CEU, L. 237, 6 OCB2d 34 (BCB 2013)

(IP) (Docket No. BCB 3091-13)

Summary of Decision*:** The Union alleged that NYCHA violated NYCCBL § 12-306(a)(1) and (4) by engaging in direct dealing by communicating to the Union's membership concerning NYCHA's response to the anticipated the across-the-board cuts of federal spending mandated by the Budget Control Act of 2011 and inviting direct communication from its employees regarding mandatory subjects of bargaining. NYCHA argued that it did not engage in direct dealing as it has the right to disseminate information to its employees and that it did not attempt to subvert the Union as its communications did not demonstrate an effort to engage its employees in direct negotiation nor contain a threat of reprisal or a promise of a benefit. The Board found that NYCHA did not engage in direct dealing. Accordingly, the petition is denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CITY EMPLOYEES UNION, LOCAL 237,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,
Respondent.

DECISION AND ORDER

On July 16, 2013, the City Employees Union, Local 237, International Brotherhood of Teamsters ("Local 237" or "Union") filed a verified improper practice petition against the New York City Housing Authority ("NYCHA") alleging that NYCHA violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") by engaging in direct dealing by communicating to the Union's membership concerning NYCHA's response to the anticipated the across-the-board cuts of

federal spending mandated by the Budget Control Act of 2011 ("sequestration") and inviting direct communication from its employees regarding mandatory subjects of bargaining. NYCHA argues that it did not engage in direct dealing as it has the right to disseminate information to its employees and that it did not attempt to subvert the Union as its communications did not demonstrate an effort to engage its employees in direct negotiation nor contain a threat of reprisal or a promise of a benefit. The Board finds that NYCHA did not engage in direct dealing and, accordingly, denies the petition.[1]

BACKGROUND

The Petitioner and the Respondent are parties to a collective bargaining agreement dated April 1, 2000, to June 30, 2002, and a series of memoranda of understanding, the most recent dated December 15, 2008, through December 2010, which remain in *status quo*. Local 237 represents approximately 8,000 NYCHA employees. NYCHA is a public benefit corporation that provides affordable housing.

NYCHA receives the majority of its funding from the United States Department of Housing and Urban Development ("HUD"). As such, it was directly impacted by the across-the-board cuts of federal spending mandated by the Budget Control Act of 2011 ("sequestration") that came into effect on March 1, 2013. By June 2013, NYCHA calculated that the combined impact of the sequestration and other federal budget cuts (collectively, the "Continuing

[1] The Union also claimed NYCHA failed to bargain over unilateral changes and the practical impact of such changes made to terms and conditions of employment by NYCHA in response to the sequestration. The Union withdrew that claim without prejudice based upon NYCHA's representation that it has not yet fully determined the actions it will take regarding furloughs and layoffs.

Resolution") would be a reduction of $205 million in federal funding, representing eleven percent of its budget.

On June 10, 2013, the *New York Post* ran an article entitled "100 million hit to Housing" ("*Post* article") that stated that the cuts in federal funding "could result in some [NYCHA] workers being furloughed." (Ans., Ex. A) NYCHA avers that it did not provide any information to the *New York Post* for the article and that the article ran without its knowledge.

NYCHA asserts it felt an obligation to address employees' concerns regarding the *Post* article and did so through three emails. NYCHA's General Manager affirmed that the emails were "an effort to be as transparent as possible and provide as much information as possible" and that "the emails included information about both those steps that had been taken and those steps that were being contemplated, but not yet finalized." (House Affirmation, ¶ 10) The first email was sent on June 10, 2013, by NYCHA's Chairman to all NYCHA employees ("June 10 email"). It was entitled "Budget Update" and reads, in pertinent part:

> As you may already know, the [sequestration] went into effect on March 1st of this year, triggering a series of across-the-board cuts to the federal budget. Because NYCHA is funded entirely by [HUD], these automatic cuts will directly affect us, along with other public housing residents and authorities across the country.
>
> We expect sequestration, coupled with the related [Continuing Resolution], will reduce NYCHA's 2013 federal subsidies by $205 million—a cut of 11%. Every part of our budget—public housing (both Operating and Capital) and Section 8—will be affected. . . . Without a new source of revenue to replace the sequestration cuts, hard decisions are simply unavoidable.
>
> We are now in the process of identifying a series of changes, both immediate and long-term. Separate communications on specific measures will come from the General Manager's office as determinations are made. The Board and I deeply appreciate the work you do every day to promote NYCHA's mission, and we thank you in advance for your resilience during this trying time. . . .

> There are tough choices to face in the weeks and months to come, but I know that with the help of your dedication and creativity, we will continue to deliver great results for the families that count on us. Thank you for all that you do.

(Pet., Ex. B)

On June 12, 2013, NYCHA's General Manager sent an email to all NYCHA employees entitled "Impact of Federal Sequester and Continuing Resolution On NYCHA" ("June 12 email") that reads, in pertinent part:

> Earlier this week, Chairman Rhea outlined a series of budget challenges facing NYCHA as a result of the [sequestration] and the extension of the Continuing Resolution under which NYCHA is funded. Based on the operational budget we adopted earlier this year, these actions by Congress will reduce funds available to NYCHA by $205 million in 2013. The NYCHA leadership team has developed a thoughtful, strategic plan to minimize the impact of these budget reductions on our employees and public housing and Section 8 families that we serve. . . . NYCHA has had to make tough and unavoidable decisions to ensure that we continue to be a valuable and thriving resource for New York City. . . .
>
> We have had no choice but to put the following measures into effect:
>
> - An across-the-board hiring freeze in all NYCHA Departments; only positions determined to be critical will be filled
> - With the [exception] of front line position[s], positions vacated will not be filled without my approval, which requires significant justification
> - Reductions in overtime across the Authority
> - Elimination of the Seasonal Caretaker program
> - Elimination of the Leadership Academy and Executive Leadership development programs
> - Implementation of various OTPS cost savings measures
> - Reduction in payment standards for Section 8 subsidies from 110% to 90% of HUD's fair market rents
> - Full conversion of resident watch to a volunteer program
> - Shutdown of NYCHA-operated community and senior center facilities effective at the end of the summer program period. With support from the City of New York, we will continue to

> offer youth and senior center summer programming and hire center staff for the 2013 Summer Day Camp program
> - We will also eliminate selected positions
> - In addition, layoff actions and exploration of furloughs will be necessary
>
> There is no question that the above measures will be painful and create additional challenges for all of us in meeting the critical needs of our diverse communities. We expect to provide more details over the next few days. If you have specific questions, please see your supervisor.
>
> We face difficult times in the months ahead but I know that the professionalism and commitment I have seen in NYCHA employees over the past ten months will carry us through. The Board and I thank you for your hard work and dedication that continues to make a positive impact in the lives of New Yorkers.

(Pet., Ex. C)

Also on June 12, 2013, NYCHA's Chairman was interviewed by *Crain's New York Business* and was quoted in a June 13, 2013 *Crain's* article stating that: "The impacts [of the sequestration] are going to be fairly painful" and that "[a]t this point, we're cutting through the bone." (Pet., Ex. D)

On June 26, 2013, NYCHA's General Manager sent an email to all NYCHA employees entitled "Budget Reduction—Update" ("June 26 email") that reads, in pertinent part:

> As you may be aware, Mayor Bloomberg and the New York City Council have announced a budget agreement that will provide $58 million dollars for NYCHA in the City's fiscal year 2014 that runs from July 1, 2013[,] through June 30, 2014. These much-needed funds will help to reduce the unfortunate impact of the Federal Continuing Resolution and [sequestration,] which cut our 2013 budget in the aggregate by $205 million. . . .
>
> As a result of this City budget allocation, participants who receive services in all 69 NYCHA-operated community centers and 37 senior centers will continue to receive those services until June 2014. . . .

> While we are pleased to be able to continue these services for our residents, NYCHA still faces a shortfall in federal funding of nearly $150 million. This means that, with the exception of items covered in the proposed City budget, NYCHA must proceed to execute the other components of our cost savings plan in order to balance our budget. We continue to need your cooperation and the cooperation of our labor union partners to manage the impact of these budget reductions on NYCHA. I will continue to keep you updated as these plans are finalized.
>
> Thank you again for your patience and flexibility during these trying and uncertain times. We have accomplished a lot together. NYCHA's Board, Executive Department, and I deeply appreciate your devotion to NYCHA's mission. Despite the challenges we face, we know that your tireless work and commitment to services will continue to pay for NYCHA's residents and communities.

(Pet., Ex. E) NYCHA's General Manager affirmed that the three June 2013 emails "did not attempt to negotiate an agreement with employees as to any of the proposed actions or seek any type of employee response." (House Affirmation, ¶ 11) NYCHA did not discuss or notify the Union of the contents of the June 2013 emails prior to their distribution. Subsequent to issuing the June 2013 emails, NYCHA and the Union met to discuss the impact of the sequestration. As of November 4, 2013, no Union members had been laid off or furloughed and NYCHA has represented that no furloughs or lay-offs are expected in 2013.

On July 16, 2013, the Union filed the instant petition. As relief, the Union asks that the Board order NYCHA to cease and desist from directly communicating with its members in a manner that subverts its position as bargaining representative and order any other relief the Board deems just and proper.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that by communicating directly with its members through the June 2013 emails and the press, NYCHA has subverted its members' representational and organizational rights and as well as its representation of its members and therefore engaged in unlawful direct dealing in violation of NYCCBL § 12-306(a)(1) and (4).[2] The emails were directed to NYCHA's entire work force; presented NYCHA's plan for cost savings as a *fait accompli*; advised the Union's members that necessary components of the plan included layoffs, a hiring freeze, and the exploration of furloughs that NYCHA characterized as "painful"; and invited the Union's members to contact their supervisors with questions. (Rep. ¶ 84) (quoting Pet, Ex. C) According to the Union, NYCHA attempted to undermine its members' faith in the Union by instilling fear. NYCHA communicated to the Union's members that it had made decisions and taken actions that alter or practically impact terms and conditions of employment without discussing or notifying the Union first, thereby conveying to the Union's members that NYCHA had already determined what it would do and that the Union would be ineffective to

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[2] NYCCBL § 12-306(a) provides, in pertinent part, that:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter;
>
> * * *
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

NYCCBL § 12-305 provides, in pertinent part, that: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

prevent or minimize the impact of NYCHA's actions and decisions. The Union argues that the communications were intended to compromise any bargaining position the Union may take. The Union argues that NYCHA's instruction to its employees to ask their supervisors, not their Union, questions about the changes NYCHA had unilaterally implemented constituted direct dealing.

NYCHA's Position

NYCHA argues it has not engaged in direct dealing. The Board has held that management has the right to disseminate information as long as it is not used to subvert the union. An employer does not engage in direct dealing when it notifies union members of impending layoffs before conferring with the union. NYCHA characterizes the reference to layoffs and furloughs in the June 12 email as "actions that had not yet been taken, but would be explored." (Ans. ¶ 57) Therefore, NYCHA argues that its communications do not demonstrate an effort to engage its employees in direct negotiation nor contain a threat of reprisal or a promise of a benefit. NYCHA simply provided its employees with the information it had available to alleviate concerns raised by a newspaper article. NYCHA's emails do not contain any attempt to subvert the Union; to the contrary, the emails are clear that NYCHA's plans have not been finalized and that the "cooperation of [its] labor union partners" will be essential. (Ans. ¶ 88) (quoting Pet., Ex. E)

DISCUSSION

The Union claims that NYCHA's communications constituted direct dealing in violation of NYCCBL § 12-306(a)(1) and (4). We find that the record does not support a claim of direct dealing. Direct dealing occurs when an employer "in its communications with employees, []

obtains or endeavors to obtain the employees' agreement to some matter affecting a term or condition of employment, whether by making either 'a threat of reprisal or promise of benefit,' or 'otherwise subvert[ing] the members' organizational and representational rights.'" *DC 37*, 5 OCB2d 1, at 15 (BCB 2012) (quoting *CIR*, 49 OCB 22, at 22 (BCB 1992)); *see also Matter of Patrolmen's Benevolent Assn. v. N.Y.C. Off. of Collective Barg.,* 2012 NY Slip Op. 50997(U), at 6-7 (Sup. Ct. N.Y. Co. May 29, 2012) (Schoenfeld, J.) (affirming Board's definition of direct dealing).

The Union argues that the June emails constituted direct dealing because they were directed to NYCHA's entire work force and invited the Union's members to contact their supervisors with questions. It is undisputed that NYCHA communicated directly with its employees. However, we find that the communications at issue do not contain a threat of reprisal or a promise of benefit. *See DC 37*, 5 OCB2d 1, at 15. Nor do we find that the June emails otherwise subvert the members' organizational and representational rights or seek to disparage the Union. *Cf. UFA*, 69 OCB 5, at 7 (BCB 2002) (direct dealing found where employer "question[ed] the Union's leadership"). To the contrary, the June 26 email explicitly refers to NYCHA's need for "the cooperation of our labor union partners to manage the impact of these budget reductions on NYCHA." (Pet, Ex. E) We find that the instruction in the June 12 email for employees to contact their supervisor with any specific questions they had regarding the June 12 email was not an effort to engage the employees in direct negotiation. Indeed, nothing in the June 2013 emails implies that the employees would be able to bargain with their supervisors. *Cf. UFT*, 4 OCB2d 4 (BCB 2011) (employer engaged in direct dealing when it issued a memorandum to employees inviting them to negotiate individually with management regarding a new breakdown in their hours worked, a mandatory subject of bargaining).

The Union further argues that the June emails should be considered direct dealing because they presented NYCHA's plan for cost savings as a *fait accompli* and advised the Union's members that necessary components of the plan included layoffs, a hiring freeze, and the exploration of furloughs. In *DC 37*, 5 OCB2d 1, we found that while the Department of Finance ("DOF") communications announcing layoffs were not direct dealing, they did constitute a repudiation of a job security clause in the parties' collective bargaining agreement.[3] In *DC 37*, DOF communicated far more than an intention to lay off employees. Prior to informing the unions about the layoffs, DOF not only communicated to its employees that there would be layoffs, it advised them of the specific positions to be eliminated, the specific number of employees to be laid off, when the layoffs would occur, and informed the employees that human resources would contact the employees affected (indicating that DOF had already chosen which employees to lay off). Thus, the communication in that case "[spoke] of the layoffs as a *fait accompli*, leaving no room for the Union to represent its members' interest." *DC 37*, 5 OCB2d 1, at 15. By contrast here, no date for the layoffs was set, no positions to be eliminated were identified, and no Union members were scheduled to be laid off prior to NYCHA discussing the matter with the Union. Thus, NYCHA's communications left substantial room for the Union to represent its members' interest. Therefore, to the extent that the Union is arguing that *fait accompli* aspect of repudiation found in *DC 37*, 5 OCB2d 1, be extended to direct dealing cases, we decline.

Accordingly, we find that direct dealing has not been established and dismiss the petition.

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[3] In *DC 37*, in response to a newspaper article reporting that there would be layoffs, DOF sent a memorandum directly to its employees announcing layoffs and the elimination of specific titles prior to notifying the Union. We found that DOF did not engage in direct dealing since the memorandum contained neither a threat of reprisal nor a promise of benefit nor demonstrated an effort to engage the employees in direct negotiation. *See DC 37*, 5 OCB2d 1, at 15.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the Improper Practice Petition filed by City Employees Union, Local 237, International Brotherhood of Teamsters, against the New York City Housing Authority, docketed as BCB-3091-13, is denied.

Dated: December 19, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER