***Affirmed, District Council 37 v. City of New York, No. 112450/03* (Sup. Ct. N.Y. Co. Mar. 15, 2004), *69 OCB 23 (BCB 2002) [Decision No. B-23-2002) aff'd*, __ A.D. 3d __ (1st Dep't 2005).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding

-between-

Decision No. B-23-2002
Docket No. BCB-2245-01

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner

-and-

THE CITY OF NEW YORK AND THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,

Respondents.
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DECISION AND ORDER

On October 25, 2001, District Council 37, AFSCME, AFL-CIO ("DC 37"), on behalf of its two locals: Local 371, Social Service Employees Union ("Local 371"), and Local 1549, Clerical Administrative Employees ("Local 1549"), filed an improper practice petition alleging that the City of New York and the New York City Human Resources Administration ("City" or "HRA") violated Sections 12-306(a)(1), (2), (3) and (4) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 13) ("NYCCBL"). The petition alleges that the City: (a) unilaterally changed the terms of its agreement with DC 37 and altered the status quo when it granted merit wage increases to employees in the Job Opportunity Specialist ("JOS") and Associate Job Opportunity Specialist ("AJOS") titles (collectively referred to as the "JOS title series"); (b) failed and refused to execute a written

agreement concerning terms of employment for employees transferring to the JOS title series; (c) dominated and interfered with the administration of DC 37; and (d) restrained and coerced employees and discouraged employee participation in union activities. The City asserts that it had no obligation to bargain with DC 37 concerning merit pay because its collective bargaining agreement with DC 37 gives it the unilateral right to implement merit increases and it has fulfilled its obligation to bargain. The City asserts, in the alternative, that it did not have a duty to bargain with DC 37 because DC 37 does not currently represent the JOS title and the City's implementation of merit pay was otherwise lawful. We find that the City's unilateral implementation of merit pay violated §12-306(a)(1) of the NYCCBL because that action was a change to the status quo for JOS and AJOS employees during the pendency of a representation proceeding. We further find that the City's implementation of merit pay breached its agreement with Petitioner to maintain the terms of the existing collective bargaining agreement in violation of §§12-306(a)(1) and (4) of the NYCCBL. As set forth fully below, we dismiss all Petitioner's other allegations.

BACKGROUND

HRA operates offices which provide income assistance and social services to eligible City residents. In Fall 2000, the City announced a proposal to change the name of its Income Support Offices to Job Centers, to create a new title series, including JOS and AJOS titles to staff those centers, and to consolidate certain existing positions into positions which would be held by

employees in the new titles.[1] By Spring 2001, HRA began recruiting employees to fill the new titles from its current employees in the following titles: Principal Administrative Associates ("PAAs"), Eligibility Specialists ("ESs"), Supervisors ("SUPs"), and Caseworkers. The JOS title was filled with ESs and Caseworkers and the AJOS title was filled with SUPs and PAAs. SUPs and Caseworkers are represented by Local 371, PAAs are represented by Local 1180, Communications Workers of America ("CWA"), and ESs are represented by Local 1549.[2] In addition, as of November 2001, approximately 200 new employees hired to fill JOS positions do not have union representation.

In February and March 2001, Local 371 and CWA filed petitions in Case Nos. RU-1239-01 and RU-1242-01, respectively, each union seeking to accrete the AJOS title to existing bargaining units. In February 2001, Local 371 and Local 1549 filed petitions in Case Nos. RU-1239-01 and RU-1240-01, respectively, each union seeking to represent the JOS title and accrete it to existing bargaining units.

Prior to implementing the JOS title series, the City held meetings with Local 371, Local 1549, and CWA and stated that during the pendency of the certification petitions, current employees moving into the JOS and AJOS titles "would continue to receive all the benefits of their respective collective bargaining agreements, *i.e*. the City would continue their salary, longevity, service increments, assignment differentials, and all other union benefits. . . ."

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[1] The purported purpose of the changes was to "take the formerly separate functions of eligibility determination, employment identification, and social services monitoring and incorporate them into a single title series," and thereby provide each client with one individual to manage all aspects – financial, employment and social service – of his or her case. (Petitioner Ex. B.)

[2] Local 371, Local 1549, and CWA are collectively referred to herein as the "Unions."

(Answer ¶ 21, 51.) In addition, the City agreed that these employees would continue to be represented by their current bargaining representatives.[3] The City began filling the JOS title series in May 2001. On September 7, 2001, the City advised the Unions that it intended to implement a "Merit Pay Plan" for the JOS title series, and three days later it announced the Merit Pay Plan to the Job Center staff. On October 15, 2001, the City advised the Unions that it intended to implement the Merit Pay Plan as soon as practicable.[4] The Plan provides that merit pay will be given in November and December 2001 and in June and December 2002. The plan describes that the November 2001 awards to JOS titleholders were to be based on "comparative statistical criteria for the months of August and September 2001 and supervisory criteria for the past 12 months." For AJOS awards issued in November 2001, only supervisory criteria for the past 12 months were to be considered. The second award for AJOS in December 2001 was to be based on comparative statistical criteria from October and November 2001 and supervisory review criteria for the past 12 months.[5] Employees may receive up to 20% of their base salary in each calendar year. The awards are pensionable, but will not be added to the base salary.

SUPs, ESs and Caseworkers are covered by the 2000 District Council 37 Memorandum of Economic Agreement ("DC 37 MCMEA"). PAAs are covered by the 2000 CWA

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[3] HRA informed the employees, "[f]or now you will be represented by your current union: Local 1549, Local 371 or Local 1180. You will also continue to pay dues or agency shop fees to your current union. We must wait for a decision by the Citywide Board of Collective Bargaining, before the new title is represented by a particular union. However, until that happens, you may contact your current union." (Answer Ex. E.)

[4] Apparently, due to the events of September 11, 2001, implementation of the Merit Pay Plan was delayed.

[5] The review period for awards issued in 2002 will be the preceding six months, and the City will consider comparative statistical criteria and supervisory review.

Memorandum of Economic Agreement ("CWA MCMEA"). In addition, Caseworkers and SUPs are covered by the 1995-2000 Social Services & Related Titles Agreement and ESs are covered by the 1995-2000 Clerical Agreement. Both the DC 37 and the CWA MCMEAs provide:

> Section 7. Performance Compensation
>
> The Union acknowledges the Employer's right to pay additional compensation for outstanding performance.
>
> The Employer agrees to notify the Union of its intent to pay such additional compensation.

Article III, Section 11, of the Social Services & Related Titles Agreement provides:

> Merit Increases
>
> The Employer agrees to notify the Union of its intent to grant merit increases.

The Clerical Agreement does not contain any provisions regarding merit pay.

POSITIONS OF THE PARTIES

Petitioner's Position

Petitioner makes six claims. First, it asserts that the City has breached its duty to bargain, in violation of §12-306 of the NYCCBL, by agreeing to maintain the salary and benefits of the employees moving into the JOS and AJOS titles but then unilaterally creating a merit pay plan for those employees.[6] Second, Petitioner asserts that the City is using merit pay as an inducement

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[6] Section 12-306 of the NYCCBL provides, in part:

> **a. Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in exercise of their rights granted in Section 12-305 of this chapter;

for employees to move voluntarily into the JOS titles, and is thereby conferring an economic benefit without bargaining. Third, Petitioner claims that it reached an agreement with the City as to certain terms regarding the implementation of the JOS titles and requested that this agreement be committed to writing and executed, but the City refused to do so. Fourth, Petitioner contends that by unilaterally implementing merit increases for JOS and AJOS during the pendency of the representation process, the City is attempting to influence those employees' choice of union representative, and therefore has been interfering with, restraining and coercing employees represented by Petitioner. Fifth, the City's actions have been an attempt to dominate and interfere with DC 37's administration. Finally, Petitioner asserts that by unilaterally granting merit wage increases, the City has discriminated against DC 37 members and discouraged participation in DC 37.

City's Position

The City asserts that Petitioner's claims are conclusionary and speculative, for Petitioner fails to describe how the City's implementation of the merit pay plan "is connected with" the

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(2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

(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;

* * *

c. Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

* * *

(5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

employees' rights to form, join, assist, or participate in union activities, or how the granting of merit pay discriminated against employees in exercise of those rights. Further, the City claims that Petitioner has failed to allege how the Merit Pay Plan interfered with the formation of DC 37 or gave assistance to its activities or how the plan was designed to dominate or interfere with DC 37.

Further, the City denies any improper motive in its granting of merit pay. That the City has no hostility toward DC 37 or any of the other unions is demonstrated by its agreement to extend existing terms and conditions of employment in the collective bargaining agreements to employees transferring to the new titles, rather than treat them as original jurisdiction employees and apply managerial pay and benefits. Further, the City avers that the purpose of the merit pay plan is to reward employees for outstanding performance, and that the award of merit pay is permitted by the terms of the collective bargaining agreement. Therefore, even assuming there was evidence of improper motive or discrimination, there is a legitimate business reason to justify the granting of merit pay. Moreover, the City claims that since it has permitted the employees to continue to pay union dues and be represented by their respective unions, a benefit they would not receive as original jurisdiction employees, Petitioner cannot establish that the City's conduct has discouraged employee participation in union activity or interfered with DC 37's ability to represent its members.

The City also asserts that it did not breach its duty to bargain by unilaterally implementing the Merit Pay Plan because the parties fully negotiated all mandatory issues relative to merit pay. While the City notes that it has the managerial right to determine whether to grant merit pay and the aggregate amount of the awards, the City concedes that it has a duty to

bargain over the criteria and procedures used when granting merit pay. However, it asserts that as a result of negotiations with Petitioner, the only criteria and/or procedure agreed upon by the parties for implementation of merit increases was the requirement that DC 37 receive notice. In other words, since the contract did not limit management's right to determine the time the merit awards would be given, or the amount, "management retained the right to initiate the program without further bargaining with Petitioner." Answer ¶55. Therefore, the grant of merit pay is consistent with the terms of the collective bargaining agreements and the parties' agreement to abide by the terms of those agreements pending the outcome of the certification process. Moreover, the City states that there is no practical impact as a result of implementation of merit pay which warrants future bargaining.

With respect to Petitioner's third claim regarding the failure to execute an agreement, the City asserts that DC 37 has no standing to assert this claim because it has not been certified as the bargaining representative for the JOS employees. Rather, it contends that the City is precluded from entering into contracts covering the employees in the JOS title series until the question concerning representation is resolved. On the other hand, the City concedes that it agreed to extend the terms of the DC 37 agreement to certain employees who elect to transfer to the JOS title pending the resolution of the representation process, and it does not specifically deny Petitioner's assertion that "issues such as probationary periods, seniority, due process and other issues were discussed, and agreement was reached on a variety of items" for employees who accepted the JOS title. In addition, the City does not deny Petitioner's allegation that "despite the Union's demand, the City has failed and refused to memorialize and execute a written agreement." (Petition ¶18.)

DISCUSSION

First, we consider Petitioner's claim that HRA violated §12-306(a)(1) of the NYCCBL by granting wage increases while a representation petition was pending. In *Assistant Deputy Wardens Ass'n*, Decision No. B-19-95, this Board adopted the principle that an employer must preserve existing terms and conditions of employment during the representation process and that granting of a benefit during that period must conform to the status quo. In that case we held:

> where there is no existing collective bargaining agreement, an employer's obligation to maintain the status quo starts on the date that it is presented with a bona fide representation question and continues until the date that a wage and benefit package is fixed by collective negotiations with the recognized or certified bargaining agent.

Id. at 36. The Board found that the employer's refusal to continue its custom of granting its employees slippage money once a representation petition was filed constituted an unlawful change to the status quo. The Board stated that the union was not required to show improper motive since the change in status quo during the representation process is a *per se* violation of the NYCCBL. *Id.* at 43.

Basically, in *Assistant Deputy Wardens* Ass'n, we adopted the New York State Public Employment Relations Board's ("PERB") doctrine concerning the preservation of the status quo during the representation process. PERB has consistently found that "[c]hanges in prevailing employment conditions after a bona fide representation question has been raised violate the Act on a per se basis." *Genesee Valley BOCES School Related Personnel Ass'n*, 29 PERB ¶ 3065, at 3151 (1996), *aff'd, Genesee-Livingston-Stueben-Wyoming BOCES v. Kinsella*, 30 PERB ¶ 7009 (1997). PERB has stated that "[s]uch changes in employment conditions inherently chill employees in their protected right to seek representation . . . influence the employees' choice of

bargaining agent and distort any collective negotiations resulting from the certification of a bargaining agent." *Id.*; *see Dorr Glover*, 34 PERB ¶ 3008, at 3014 (2001); *Catskill Regional Off-Track Betting Corp*., 13 PERB ¶ 4028, at 4031(1980).

PERB does not require evidence of improper motive to find interference with employees' protected rights. "[H]ostility and/or animus is not an essential element of a violation of §209a.1(a). . . . A party is presumed to have intended the consequences that it knows or should know will inevitably flow from its actions." *Hudson Valley Community College*, 18 PERB ¶ 3057, at 3120 (1985). However, PERB will consider whether a change in benefits is consistent with past practice or was announced prior to the filing of the petition to rebut an allegation that a change in employees' terms and conditions of employment during the representation process was unlawful interference. *United Public Service Employees Union, Local 424*, 27 PERB ¶ 4065 (1994) (distribution of gift certificates after petition filed was consistent with past practice and not unlawful); *Fort Ann Central School District*, 17 PERB ¶ 4047 (1984) (pay increases lawful because the decision to grant increases preceded the filing of the petition). In this regard, PERB's analysis is consistent with that of the National Labor Relations Board, which has held that "the granting of benefits during an election campaign is not *per se* unlawful where the employer can show that its actions were governed by factors other than the pending election." *American Sunroof Corp.,* 248 NLRB 748 (1980), *enf'd, NLRB v. American Sunroof Corp.,* 667 F.2d 20 (6th Cir. 1981).[7]

A case with facts similar to those in the instant matter came before PERB in *Genesee*

[7] The NLRB follows the Supreme Court's ruling that a change in benefits during the representation process inherently interferes with the exercise of employee free choice. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *and see B & D Plastics*, 302 NLRB 245 (1991).

Valley BOCES School Related Personnel Ass'n, 29 PERB ¶ 3065 (1996), in which two BOCES districts, each with separate bargaining units represented by different unions, were consolidated. At the time of the consolidation, the State Commissioner of Education announced that the existing collective bargaining agreements were to remain in effect and be honored until those agreements expired. Shortly thereafter, a union petitioned to represent all the non-instructional personnel of the merged facility. Those personnel had been previously represented, albeit by different unions. Before the conclusion of the representation process, BOCES unilaterally eliminated a salary increment and a paid lunch period and reduced health care benefits. PERB found that although BOCES had the right to set the initial terms and conditions of employment for employees in the merged district, once the representation petition was filed, BOCES was required to maintain those benefits for the pendency of the representation process. Therefore, the changes to the existing terms of the collective bargaining agreement made after the representation petition was filed interfered with employee protected rights. *Id*. at 3151-52.

In the case before us, consistent with its rights, the City set the initial terms and conditions of employment for JOS and AJOS employees by deciding to maintain the terms of the existing collective bargaining agreements for all employees transferring to those titles.[8] Once the representation petitions were filed, the City was precluded from modifying the terms of the pre-

[8] While the parties may have referred to the continuation of the terms of the existing collective bargaining agreements as an action based on a mutual "agreement" between the City and DC 37, the record does not indicate that there was any substantive discussion over the initial terms and conditions of employment or that the City gave DC 37 any opportunity to bargain over the initial terms for the JOS and AJOS employees. Rather, the pleadings show that the City announced its decision to extend the terms of the existing collective bargaining agreements to the employees entering the JOS title series, and that DC 37 did not object. Similarly, the City voluntarily decided to continue its recognition of DC 37 as the bargaining representative of those DC 37 represented employees transferring into the JOS and AJOS titles.

existing collective bargaining agreements for the duration of the representation process. In other words, for the employees represented by DC 37 who were transferring to JOS and AJOS titles, the City was obligated to maintain the terms of the DC 37 MCMEA, the Social Services & Related Titles Agreement and the Clerical Agreement.

As PERB found in *Genesee Valley BOCES School Related Personnel Ass'n,* we find that HRA's implementation of merit pay to the employees in the JOS title series subsequent to the filing of a representation petition is a change in the employees' existing employment conditions and therefore violated §12-306(a)(1) of the NYCCBL. Any change in a term and condition of employment made after the representation petitions were filed had to be consistent with the terms of the pre-existing collective bargaining agreements and/or a past practice. The terms of the existing collective bargaining agreements do not include the unilateral right to implement merit pay, and there was no past practice of granting merit pay. There is no evidence that merit pay had ever previously been part of the employees' regular compensation or that the decision to grant merit pay had been made or announced for the JOS title series prior to the filing of representation petitions. Rather, it is undisputed that the first announcement of the Merit Pay Plan was in early September 2001, more than six months after the representation petitions were filed.

Furthermore, despite the City's assertion that the granting of merit pay was not improperly motivated and was for legitimate business reasons, the finding of unlawful interference in this context does not require a showing of improper motivation or union animus. Rather, the statute seeks to prohibit the inherent effect of the unilateral action, and therefore an employer's motivation is not an essential element of the violation.

Nor are we persuaded by the City's claim that it had the right to implement merit pay because it had previously fulfilled its obligation to bargain with DC 37 on that subject. There is insufficient evidence to establish that the City had the unilateral right to implement merit pay without first bargaining over criteria and procedures for implementation. On its face, the language negotiated by the parties unambiguously articulates management's contractual right unilaterally to decide to grant merit-based pay, and, pursuant to this provision, management alone will decide whether to give merit pay. It is well settled that the decision to grant merit increases and the aggregate amounts thereof are within the scope of management's rights set forth in NYCCBL §12-307(b), and that the criteria and procedures for determining eligibility for merit increases are mandatory subjects of bargaining. *Civil Service Bar Ass'n*, Decision No. B-9-69 at 7, states:

> we conclude . . . , inline with the Supreme Court's decision in NLRB v. Katz, and the pertinent laws, regulations, and practices in City employment, that the procedures and criteria to be applied in determining eligibility for merit increases are within the scope of collective bargaining, but that the decisions whether or not to grant increases, and the aggregate amount thereof, are within the City's discretion, with the individual amounts to be determined by the City in accordance with the negotiated criteria and procedures.

See Patrolmen's Benevolent Ass'n, Decision No. B-4-99 (procedures to determine increases given to police officers were a mandatory subject of bargaining, despite the City's labeling the increases as "bonuses for special assignments"); *United Probation Officers Ass'n*, Decision No. B-44-86.

This Board has held that a union waives its right to bargain when ". . . it can be said from an evaluation of the prior negotiations that the matter was fully discussed or consciously explored and the union 'consciously yielded' or clearly and unmistakably waived its interest in

the matter." *United Probation Officers Ass'n*, Decision No. B-38-89 at 26 (emphasis added), *citing District Council 37, AFSCME*, Decision No. B-21-75 at 21, *aff'd, City of New York v. Board of Collective Bargaining*, No. 41993 (S.Ct. N.Y.Co. Mar. 18, 1976) (the impact of layoffs was determined to be within the scope of bargaining and, absent evidence that the subject had been fully discussed or consciously explored, the Board found no waiver of the right to bargain). Similarly, PERB has recognized a "waiver by agreement" defense when the parties' contract has clear language granting the employer the right unilaterally to determine the subject matter in issue. *AFSCME, New York Council 66, Local 2574, County of Allegheny Employees,* 33 PERB ¶ 3019 (2000); *Civil Serv. Employees Ass'n,* 26 PERB ¶ 3074 (1993).

In the instant case, there is no evidence that the Union waived its right to bargain over criteria and procedures for implementing merit pay or that the City had fulfilled its bargaining obligation on implementation of merit pay. The contract provision does not express a relinquishment of Petitioner's statutory right to bargain over criteria and procedures for implementation of merit pay. Further, no evidence was presented to show that criteria and procedures for implementation of merit pay were fully discussed or consciously explored by the parties during prior bargaining sufficient to support a conclusion that there was a waiver of Petitioner's right to bargain or exhaustion of the City's duty to bargain.[9] Accordingly, we conclude that the City's implementation of merit pay to JOS and AJOS employees during the

[9] The City's reliance on *United Probation Officers Ass'n*, Decision No. B-70-88 is misplaced. There the Board held that changing a job description was a managerial right and not within the scope of mandatory bargaining. The parties' agreement did not contain any limitation on the City's statutory right to modify job descriptions. Here, while the City argues that likewise its managerial right to grant merit increases is not limited by the parties' agreement, the agreement also does not limit DC 37's right to bargain over criteria and procedures for implementing merit pay.

pendency of the representation process violated §12-306(a)(1) of the NYCCBL.[10] In order to remedy the violation of Section 12-306(a)(1) of the NYCCBL, we order that the City immediately cease and desist from implementing the Merit Pay Plan for the JOS and AJOS employees.[11]

Petitioner also alleges that when implementing merit pay, the City violated its duty to bargain in good faith under §12-306(a)(4) of the NYCCBL by unilaterally changing the terms and conditions of employment for employees moving into the JOS title series. In response, the City asserts that it did not have a duty to bargain concerning wages or benefits for the JOS title series because Petitioner was not the recognized or certified bargaining representative. It is well settled that when a question concerning representation for a group of employees is presented and there is no existing collective bargaining agreement, an employer has no duty to bargain with a labor organization concerning the terms and conditions of employment for those employees until the representation issue has been resolved. *Assistant Deputy Wardens Ass'n*, Decision No. B-19-95 at 25-26; *Genesee Valley BOCES School Related Personnel Ass'n*, 29 PERB ¶ 3065 (1996). In addition, under the Taylor law, "an employer may not negotiate with an incumbent organization while a bona fide question concerning representation is pending." *Deer Park School Bus Drivers' Union*, 22 PERB ¶ 3014, at 3037 (1989); *Town of Brookhaven*, 19 PERB ¶

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[10] In a petition filed by CWA, Docket No. BCB-2255-01, the Board will address claims similar to those raised in this case, including whether the unilateral granting of merit pay violates the NYCCBL for those employees represented by CWA who transferred to the AJOS titles. According to the record in this case, no original jurisdiction employees were qualified for or received merit pay in November 2001. However, for all the reasons set forth above, to the extent that original jurisdiction employees qualified for and received merit pay since that date, our order herein encompasses them.

[11] Petitioner did not seek the recission of merit pay awards already granted to employees.

3004 (1986).

Petitioner correctly asserts that the City could not act as if the employees transferring to the JOS and AJOS titles had no union representation and could not unilaterally alter terms of its collective bargaining agreements with Petitioner. Initially, the City decided voluntarily to continue applying the terms of the existing collective bargaining agreements to employees moving into the JOS and AJOS titles and committed to continue its recognition of Petitioner as a bargaining representative of those employees. As a result, the City did not merely set the initial terms consistent with the pre-existing terms of employment, but in essence agreed to give Petitioner the right to administer and enforce its agreements. Thereafter, in February 2001, the first representation petition was filed, and, as of that date, any further changes to the employees' terms and conditions of employment were prohibited. As discussed above, absent the status quo required by the filing of the representation petition, the implementation of the Merit Pay Plan would have required bargaining. Therefore, we conclude that the City's unilateral implementation of merit pay breached its collective bargaining agreements with DC 37 and violated Sections 12-306(a)(1) and (4) of the NYCCBL. However, because the unilateral implementation of merit pay post-dated the filing of the representation petitions, we cannot order that the City, prior to a determination on the question concerning representation, bargain over implementation of merit pay.[12] Accordingly, our remedy for this violation is limited to ordering the City to abide by and maintain the terms of the existing DC 37 collective bargaining

[12] A hearing in the representation cases was commenced on May 22, 2002, and is on-going.

agreements.[13]

With respect to all of Petitioner's remaining claims, we find no merit. First, there is no evidence that the granting of merit increases was intended to or has had the effect of favoring the members of one union over another. The Board requested and was provided information showing which employees had been granted merit pay as of November 2001. The data showed that the recipients of the merit increases were not predominantly confined to one job title or union affiliation. Rather, the increases were generally given proportionately. For example, in the JOS title, of the 1236 employees, 927 were formerly ESs and 309 were formerly Caseworkers. In November 2001, twenty-one percent of the former ESs received merit pay, while approximately 14% of the former Caseworkers received merit pay. Having found no significant disparities in the manner in which merit pay was awarded, we dismiss the allegations that the grant of merit increases was discriminatory and violated Sections 12-306(a)(1) and (3) of the NYCCBL.

Second, we do not find that the City breached its duty to bargain in good faith by its failure and refusal to reduce its agreement with DC 37 to writing and execute those terms. Section 12-306(c)(5) of the NYCCBL provides that the duty to bargain encompasses the obligation, "if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement." The Union has not established that the City did anything more than meet with DC 37 (and the other

[13] Because we find that due to the existence of a question concerning representation, the City did not have an obligation to bargain with DC37 at the time merit pay was implemented, we dismiss Petitioner's separate claim that merit pay was conferring an economic benefit without bargaining in violation of §§12-306(a)(1) and (4) of the NYCCBL.

Unions) and announce its decision to continue the terms and conditions of the existing collective bargaining agreements. Petitioner alleged that the parties discussed such issues as "probationary periods, seniority, due process and other issues" concerning DC 37 members who were transferring to the JOS title and that "agreement was reached on a variety of items." (Petition ¶18.) However, Petitioner did not specifically allege what terms were agreed upon by the City, when these agreements were reached, or when and what it asked the City to memorialize in writing. Although the City failed specifically to deny Petitioner's assertion that there was a demand to execute, we cannot conclude that the failure to commit unspecified terms to writing and sign the writing was a violation of the statute. Moreover, even if we found that there was an "agreement" to extend the terms of the existing contracts, and there was a demand to memorialize that understanding, the City's failure to execute that understanding would be de minimus. Therefore, we dismiss the claim that the City violated §§12-306(a)(1) and (4) of the NYCCBL by its refusal to execute a written document embodying the terms of an agreement with DC 37.[14]

Finally, we do not find merit in Petitioner's claim that HRA's grant of merit pay unlawfully interfered with and dominated DC 37 in violation of §12-306(a)(2). This Board has stated:

A labor organization may be considered "dominated" within the meaning of this

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[14] We do not agree with the City's claim that DC 37 lacked standing to raise the failure to execute claim. The facts here are distinguishable from *Patrolmen's Benevolent Ass'n*, Decision No. B-27-80, in which the union lacked standing to challenge the transfer of sergeants because they were not members of its bargaining unit. Here, DC 37 has standing to assert its refusal to execute claim inasmuch as it continued to represent the employees transferring to the JOS and AJOS titles, and the alleged agreement concerned terms and conditions of employment governing those employees.

> section if the employer has interfered with its formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found where an employer tries to help a union that it favors by various kinds of conduct, such as giving the favored union improper privileges, or recognizing a favored union when another union has raised a real representation claim concerning the employees involved.

District Council 37, Decision No. B-36-93 at 18. In this instance, there is insufficient evidence that HRA's conduct rose to the level of "domination" or "interference." Petitioner asserted no specific facts to show how the grant of merit pay resulted in "domination" DC 37, and, as noted above, there is no evidence that the granting of merit pay favored members of one union over another. Therefore, we dismiss the claim that the City violated §12-306(a)(2) of the NYCCBL.

In sum, we find that the City violated Section 12-306(a)(1) by implementing merit pay for employees in the JOS and AJOS titles after representation petitions were filed and violated Sections 12-306(a)(1) and (4) by unilaterally changing the terms and conditions of employment for those employees represented by DC 37 who are transferring to the JOS and AJOS titles. We dismiss Petitioner's remaining claims alleging violations of Sections 12-306(a)(1), (2), (3), and (4) of the NYCCBL.

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 HRA immediately cease any further implementation of merit pay to JOS and AJOS employees; and

ORDERED, that HRA maintain the terms and conditions of employment existing prior to

the commencement of the representation process (the DC 37 MCMEA, 1995-2000 Social Services & Related Titles Agreement and the 1995-2000 Clerical Agreement) for employees represented by DC 37 in the JOS and AJOS titles and continue to maintain those terms until a wage and benefit package is fixed by collective negotiations with the certified bargaining agent; and

ORDERED, that Petitioner's remaining claims alleging violations of Sections 12-306(a)(1), (2), (3), and (4) of the NYCCBL be, and the same hereby are, dismissed.

Dated: July 9, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

ERNEST F. HART
MEMBER

BRUCE H. SIMON
MEMBER

GABRIELLE SEMEL
MEMBER