# *District Council 37, Local 924*, 77 OCB 1 (BCB 2006)

[Decision No. B-1-2006(IP)] (Docket No. BCB-2382-04)

**Summary of Decision:** District Council 37 filed an improper practice petition alleging that DEP violated NYCCBL § 12-306(a)(1), (3), and (4) when it directed the president of Local 924 and other employees to vacate duplicate lockers on DEP premises, one of which the Local president allegedly had been using for Union business. The City argues that the Union failed to prove the charges. The Board finds insufficient evidence to support any of the claims. ***(Official decision follows.)***

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**OFFICE OF COLLECTIVE BARGAINING**
**BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Improper Practice Proceeding**

***-between-***

**DISTRICT COUNCIL 37, AFSCME, LOCAL 924,**
**and KYLE SIMMONS,**

***Petitioners,***

***-and-***

**CITY OF NEW YORK and the**
**NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,**

***Respondents.***

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## DECISION AND ORDER

On January 30, 2004, District Council 37, AFSCME, Local 924 ("Union" or "Local 924"), filed a verified improper practice petition on behalf of Kyle D. Simmons against the New York City Department of Environmental Protection ("DEP" and "City"). The Union claims that DEP interfered with, restrained, and coerced employees in the exercise of rights granted in § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)

("NYCCBL") in violation of NYCCBL § 12-306(a)(1), that it retaliated and discriminated against Simmons in violation of § 12-306(a)(3), and that, in violation of NYCCBL § 12-306(a)(4), it failed to bargain over its order to vacate duplicate lockers on DEP premises. The City argues that the Union did not prove any facts showing that DEP interfered with the rights of or discriminated against any employee due to union activity. The City also argues that it has no duty to bargain over its decision to allocate its limited supply of lockers by limiting the number of lockers employees may use. After an evidentiary hearing, this Board finds insufficient evidence to support any of the claims and denies the instant improper practice petition in its entirety.[1]

## BACKGROUND

Simmons has been employed by DEP since 1996 in the title of City Laborer. In that capacity, he maintains and repairs buildings used by DEP (other than plumbing and electrical work), removes garbage from DEP sites, and delivers caustic and toxic chemicals used in the maintenance of those buildings and in the treatment of public drinking water. Simmons is assigned to the facility known as groundwater headquarters, on 164th Street and 110th Avenue in South Jamaica ("Station 6"). Approximately ten other employees work at Station 6, including Frank Mammola, Watershed Supervisor, and John Dydland, Chief of Groundwater Supply. The function of this facility is to pump water from an underground aquifer and treat it for human consumption. Supervisors meet their work crews each morning at this location to assign work. Simmons and other employees sign in and out at another facility known as Queens Repair Yard, a complex of buildings including storage tanks, booster pumps, a garage and a storeroom ("Station 24"). Employees who use an

[1] A hearing in this matter was delayed pending settlement discussions.

agency vehicle at Station 6 pick it up at Station 24, and employees who wear protective gear change from their street clothes at Station 24.

In 1997, Simmons was elected shop steward of Local 924. At that time, he asked Dydland for space in which to store Union-related material. Dydland told him that if he could find space, he could use it. Simmons found a discarded four-drawer file cabinet which had been left for garbage disposal in the area of the dumpster at Station 24. Simmons put working hinges and a bar to secure the cabinet doors, moved it to Station 6, and stored Union material in that cabinet. In addition, Simmons also retrieved and rehabilitated a discarded locker at Station 6, in 1999, which he allegedly used to store Union materials. At Station 6, he also had a personal locker where he kept personal and work-related items such as clothes, gloves, a shovel, and paintbrushes. When, on occasion, Simmons did not have time to return a work tool to a storage location, he stored it overnight in his personal locker, allegedly to prevent it from being stolen and to have it handy for completion of a task the following day. Simmons also claims he kept safety equipment in his personal locker for use, not for himself, but for Union members whom he represented. This was equipment which he claimed he obtained through his participation in labor-management committees, "extra equipment for the members just in case they didn't have any." (Tr. 24.)[2] In addition to the two lockers and the four-drawer file cabinet at Station 6, Simmons also maintained two lockers at Station 24.

In December 2001, Simmons became president of Local 924, representing Laborers at DEP. In that capacity, he has assisted members with grievances, attended labor-management meetings, and represented the Local in collective bargaining.

At all times relevant herein, DEP did not issue lockers to employees at these locations but

[2] "Tr." refers to citations to the hearing transcript.

allowed employees to find or install their own lockers on DEP property for the storage of work clothes, equipment, and personal effects. Simmons testified that "[i]f you found space, you had space. If you didn't find space, you didn't have space." (Tr. 27.)

In October 2003, Ken Koprivnik, associate project manager, and Stanley Kavanagh, supervisor in charge of the treatment department, reported to Dydland that some new employees at Station 6 did not have lockers while other employees had more than one. On October 15 and 16, 2003, Koprivnik and Kavanagh issued two memoranda asking supervisors to take a survey to determine the number of lockers at Stations 6 and 24 and to identify any lockers which new employees could use. The survey revealed that several employees, including Simmons, had more than one locker at Station 6. At that time, Simmons wrote to Koprivnik and Kavanagh asking for a labor-management meeting to discuss the matter of employee lockers. No meeting was scheduled at that time.

On October 23, 2003, Koprivnik and Kavanagh issued another memo, which stated:

> In an effort to secure a locker for each employee starting their shift at Groundwater Headquarters [Station 6], you have been directed to print your name on the locker(s) you are currently using at Groundwater Headquarters and the former Tank #6 booster house. Each employee will be allowed one locker at the location where they start & end their shifts. Any employee that has a locker(s) at the other location will remove the contents and surrender that locker(s) prior to October 31st. On Monday, November 3rd, any locker not identified will have the lock and the contents removed.

By memorandum of October 28, 2003, Koprivnik and Kavanagh wrote:

> Due to a lack of lockers at Groundwater Headquarters for all personnel that sign in and out here, a locker count was completed and most personnel have complied with memo's [*sic*]distributed last week. This is a list of DEP personnel who have (2) lockers and will have to vacate their locker at Groundwater by the 31st of October.

> Lockers that are not identified will have the locks cut off and the contents removed. . . .

The memo named ten employees who occupied two lockers at Station 6. Simmons was one of them.

Simmons asserts that after he received the memos, he labeled the locker and storage cabinet which he maintained at Station 6 with Union business cards. He emptied his personal locker at Station 6 when he learned that a specific employee did not have a locker, and placed his personal items in the other Station 6 locker which he maintained for Union business. On October 31, 2003, Simmons asked Dydland to schedule a labor-management meeting – which Dydland did, for December 2, 2003 – to discuss the locker matter.

On November 3, 2003, DEP did not remove any locks. By memo dated November 10, Koprivnik and Kavanagh set November 12 as the new deadline for vacating the lockers. They also identified seven employees, including Simmons, who still maintained two lockers at Station 6, and warned that failure to comply "may" result in charges of insubordination. Dydland testified that five of the seven employees complied but that Simmons and one other employee did not. After Dydland determined that the other employee had been absent from the facility for a few months and apparently would not be returning to DEP, he had that person's lock cut and the contents of his locker removed. Simmons was, thus, the only other employee who continued to occupy more than one locker.

Dydland testified that, on November 12, 2003, at or about 7 a.m., Simmons entered Dydland's office and told him that he would have anyone arrested who cut off the lock on his locker. Dydland told Simmons to remove any "material" that he might have in there. Dydland testified that he, Koprivnik, Kavanagh, and other supervisors, waited for about 45 minutes, while Simmons

attended a Union meeting, before proceeding to the lockers. Simmons returned but left again for about five minutes. When he returned again, Dydland first moved to cut the lock from the locker of the employee who had been absent for awhile. Simmons told Dydland that particular locker did not belong to him. Dydland responded that they were aware of that. They again asked Simmons to remove the contents of his locker before they cut the lock but Simmons refused. Dydland was asked if Simmons told him that the locker contained Union material. He testified:

> A. Yes, he did. And at that point I asked Mr. Simmons, to, you know, please open the locker and show me what you have in it. And he refused to do that.
> Q. Why did you ask Mr. Smmons that question?
> A. At that point, I didn't believe him, and my feeling was if I saw it was Union material, then I would have second thoughts about cutting the lock.

(Tr. 75-76.)

Simmons described the events as follows:

> A. I pretty much pleaded with Mr. Dydland and said, "This is a union cabinet. It should not be touched." He says, "I give you one more opportunity to remove the lock, because it looks like a personal cabinet to me."
> Q. Was the word "cabinet" used?
> A. I mean "locker." He says, "It looks like a personal locker to me." And he said, "Well, let me see what's in it." And I says, "You don't have to see what's in it. I'm telling you this is Union equipment." I said, "If you want me to move it, I will move it to another location." And at that time he said, "No, I want the cabinet." I told him it was the Union's cabinet at that time, and, "It belongs to us. And we will move it, if you would like, to another location, if you needed the area." And he said, no, he wanted the lock removed. And then he said, "Are you,"asking me again, "are you going to remove the lock?" And I refused to remove the lock.

(Tr. 35–36.)

At that point, Dydland had Koprivnik and Kavanagh cut the lock. Dydland testified that, when he opened the locker and had the contents removed, he found nothing that looked to him like Union materials. Among other things, he found items of DEP property, including a shovel and a

hydrant wrench; other items, the ownership of which was not described, including paintbrushes, a scraper, some safety vests and gloves; and finally "some file folders," which neither he nor Simmons described in detail. (Tr. 77.) Dydland testified that, if DEP ever provided any of those materials to Simmons for distribution to his members as Simmons had stated, Dydland was not aware of it. Dydland had an inventory prepared of what was found in Simmons' locker. They immediately offered the contents to Simmons but, for unexplained reasons, Simmons refused to take them. The contents remained secured under lock and key and were available to Simmons upon request. Dydland also asserted that, if Simmons had asked to remove the locker from DEP premises altogether, Dydland would have let him do so.

Simmons canceled the labor-management meeting scheduled for December 2, saying that it was "useless" since his locker had been opened and contents removed. The locker remains unused pending the outcome of this dispute. However, DEP has provided Simmons with an additional locker at Station 24, giving Simmons two lockers at Station 24 and a file cabinet at Station 6. At an unspecified later date, Simmons retrieved the contents of the locker.

The Union seeks restoration of the Union's locker facilities and contents, restoration of second lockers to DEP employees represented by the Union, and an order directing DEP to negotiate over DEP's decision to change its practice with respect to the use of the locker facilities.

## POSITIONS OF THE PARTIES

### Union's Position

The Union contends that DEP's removal of the lock from Simmons' locker at Station 6 constitutes discrimination against Simmons as president of Local 924 for the purpose of discouraging

him and his fellow Union members from participating in Union activities, in violation of § 12-306(a)(1) and (3) of the NYCCBL.[3] The Union argues that the locker from which Simmons' belongings and "union materials and documents" were removed, was found by Simmons in a refuse pile on DEP property and rehabilitated by him. For several years, DEP allowed him to use it for personal effects and/or Union business. When DEP supervisors appropriated the locker without negotiating over the change, they violated § 12-306(a)(4) of the NYCCBL. This change in DEP practice is all the more objectionable because of DEP's uncontradicted history of not issuing locker space to employees in the first place.[4]

**City's Position**

The City contends that DEP's actions were a proper exercise of managerial prerogative to

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[3] Section 12-306(a) of the NYCCBL states that it is 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 section 12-305 of this chapter;
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> * * *
>
> (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. . . .
>
> Section 12-305 of the NYCCBL provides, in pertinent part:
> 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. . . .

[4] The Union's reply also raised a health and safety impact claim, however it did not present evidence or testimony at the hearing as to this claim, and we deem it abandoned.

determine the allocation of locker space for its employees.[5] Those actions were not, as the Union asserts, motivated by anti-union animus. The agency's supervisors acted reasonably by issuing five memoranda concerning its plan to require employees with two lockers to vacate one. All employees complied except Simmons and one employee who was not in active service at that time. The memoranda were not directed at Simmons in his Union capacity.

Moreover, the Union has failed to demonstrate any duty on DEP's part to bargain over its decision to allocate locker space. Decisions regarding the management of DEP's property are reserved to DEP, and this right is not restricted by any contractual provision or consent determination. DEP's decision was motivated by its interest in ensuring that all of its employees have access to a locker for personal belongings. Even if a duty to bargain were found here, the record reflects no demand by Simmons to bargain over the locker matter.

## DISCUSSION

The issues in this case are: (i) whether DEP discriminated or retaliated against Simmons, in violation of NYCCBL § 12-306(a)(3), when Dydland ordered the lock and contents removed from Simmons' locker at Station 6; (ii) whether DEP's actions interfered with protected employee rights, in violation of NYCCBL § 12-306(a)(1); and (iii) whether DEP failed to bargain over a mandatory

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[5] NYCCBL § 12-307(b) reads, in pertinent part:

> It is the right of the city, or any other public employer, acting through its agencies, to . . . determine the standards of services to be offered by its agencies; direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining . . . .

subject, in violation of NYCCBL § 12-306(a)(4) when it ordered DEP employees to vacate duplicate lockers. This Board finds no violation of NYCCBL § 12-306(a)(1), (3), and (4) for the reasons below.

To determine whether alleged discrimination or retaliation violates § 12-306(a)(3), this Board uses the standard enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by this Board in *Bowman*, Decision No. B-51-87. *Bowman* requires that Petitioner show that:

> 1. the employer's agent responsible for the alleged discriminatory act had knowledge of the employee's protected activity; and
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> 2. The employee's protected activity was the motivating factor in the employer's decision.

If a petitioner presents convincing evidence as to both of these elements, then the employer may try to refute the evidence on one or both elements or, failing that, may attempt to establish that its actions were motivated by a legitimate business reason. *See Rivers*, Decision No. B-32-2000.

As for whether Simmons was engaged in protected activity and whether DEP knew of that activity, *Civil Service Bar Ass'n, Local 237*, Decision No. B-24-2003 at 12, we find no dispute that Simmons was formerly a shop steward and currently is president of Local 924; that since 1997, he has been involved generally in assisting members with grievances and attending labor management meetings; that since 1999 he used a locker at Station 6 purportedly for Union materials; and that DEP had knowledge of his union activity. However, the Union has not identified any specific union activity in the fall of 2003 for which it claims DEP retaliated or discriminated against Simmons.

Even if we assume that the first prong of the *Bowman* standard has been satisfied, with respect to the second prong – whether DEP's action in cutting the lock and removing the contents of the locker was intended to coerce, retaliate or discriminate against Simmons because of his Union activities – we find that the Union has failed to sustain its burden. The record demonstrates that

DEP's actions were directed toward all employees at Stations 6 and 24 and that it did not treat Simmons differently than any other employee. Moreover, the documentary evidence corroborates DEP's contention that the motivation for the restriction on the number of lockers Simmons, or any other employee, could use was DEP's desire to supply lockers for employees who did not have one. The five memos written by DEP supervisors pertain to DEP's expressed interest in providing lockers for employees who had none. The memoranda were addressed to all employees who were using more than one locker. In addition, DEP did not single out Simmons when it sought to remove locks and locker contents of employees not responsive to the memos. Another employee who was not responsive to the memos experienced the same treatment as Simmons when that employee's lock was cut and the contents of his locker were removed. Finally, we observe that it is undisputed that Simmons was permitted to continue to use a four-drawer file cabinet at Station 6 for Union business, that he kept a personal locker at Station 24, and that, subsequently, he was given a second locker at Station 24. Based upon this record, we find there is insufficient evidence to establish any causal connection between Simmons' union activity and the action taken by DEP with respect to the lockers. Accordingly, we dismiss the claimed violation of NYCCBL § 12-306(a)(3).

With respect to the claim that DEP has interfered with Simmons' right to engage in union activity in violation of § 12-306(a)(1) of the NYCCBL, we also find the Union's position unsupported by the evidence. Section12-306(a)(1) may be independently violated by improper employer conduct such as threatening employees for exercising their rights granted in §12-305. *Local 2021, District Council 37*, Decision No. B-36-93; *Local 1180, Communications Workers of America*, Decision No. B-47-89. However, consistent with our case law, we do not find that such a violation has been established here.

In *City Employees Union, Local 237, IBT, AFL-CIO*, Decision No. B-12-2002, an agent of the New York City Health and Hospitals Corporation ("HHC") ordered that the lock on a union file cabinet be cut open and the contents removed and destroyed, allegedly for renovations to take place. We found that the admitted removal and destruction of the union's documents independently violated § 12-306(a)(1) of the NYCCBL because the employer's agent knew that the contents of the file cabinet belonged to the Union and concerned its members. We stated that HHC was in no position unilaterally to identify the value of the documents or to order their destruction.

By contrast, in the instant case, the Union has failed to prove that the contents of Simmons' locker were union-related. The record shows that Simmons had and continued to maintain a separate file cabinet for Union materials. A number of items were removed from Simmons' locker; some belonged to Simmons, personally, some admittedly were DEP property, and some were "file folders" which were not further identified by either party. There is no dispute that the contents were not destroyed but rather were held in a secure location, under lock and key, and made available for Simmons to retrieve them, which he inexplicably refused to do for some period of time. Moreover, there is no dispute that DEP gave Simmons plenty of advance notice – five memos over the course of nearly one month – during which time Simmons could have moved any union-related contents to either the Union file cabinet at Station 6 or to Simmons' locker at Station 24.. There is no contention by the Union that DEP refused to let Simmons store Union materials at another location on DEP's premises. We find that the Union has failed to show that DEP's actions with respect to Simmons' locker interfered with his, or any other Union member's rights as granted in § 12-305 of the NYCCBL.

With respect to the Union's claim that DEP breached its duty to bargain regarding the subject

of employee lockers, we also find no violation of NYCCBL § 12-306(a)(4). It is an improper practice under NYCCBL § 12-306(a)(4) for a public employer or its agents "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." Mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment. *See District Council 37, AFSCME*, Decision No. B-13-2005 at 7. We have considered the bargainability of the subject of locker and storage facilities in several past cases.

In *Uniformed Firefighters Association*, Decision No. B-43-86 ("*Firefighters I*"), the City disputed the negotiability of a union demand for locker facilities for certain unit members for the cleaning and storage of equipment. This Board recognized that the City was entitled to broad managerial discretion in allocating the uses of its physical plant. *Id.* at 11. However, we held that the evidence that the bargaining unit's work necessarily resulted in employees getting wet and dirty, taken together with the fact that all members of the unit assigned to other locations already enjoyed the benefit, established that, under the circumstances, the demand related to a working condition and, thus, constituted a mandatory subject of bargaining. *Id.* at 12.

In contrast, in *Uniformed Firefighters Association*, Decision No. B-4-89 ("*Firefighters II*"), *aff'd*, *Uniformed Firefighters Ass'n v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd,* 163 A.D.2d 251, 558 N.Y.S.2d 72 (1st Dep't 1990), we determined that a union demand concerning the provision of decontamination facilities for Fire Marshals was not bargainable. We found that, in the absence of proof of circumstances such as were found to exist in the *Firefighters I* case, the demand did not concern a condition of employment but rather infringed

upon the City's right, under NYCCBL §12-307b, to manage its property, and therefore, was a nonmandatory subject of bargaining.[6]

Here, as in *Firefighters II*, the Union has failed to present evidence of circumstances warranting a conclusion that the subject of limitations on the use of lockers by DEP employees concerns a bargainable working condition. DEP's decision to allocate its limited number of lockers by restricting the number of lockers an employee may use relates directly to the City's right, under NYCCBL § 12-307, to allocate the use of its physical plant. Although the City's "discretion in this area is not absolute," *Firefighters II*, Decision No. B-43-86 at 12, the Union here has presented insufficient evidence to demonstrate that the subject of its claim – the permitted use of duplicate lockers – is a mandatory subject of bargaining. We note, in this regard, that although the Union's reply alleged that there were health and safety reasons for employees to use more than one locker, no testimony or evidence in support of that claim was presented at the hearing. In the absence of such a showing, we do not find that DEP violated its duty to bargain when it limited the number of lockers its employees can use. Therefore, we find no violation of NYCCBL § 12-306(a)(4).

Accordingly, we deny the Union's petition in its entirety.

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[6] Most recently, in *United Federation of Teachers*, Decision No. B-28-2001, we found that to the extent the union's demand for changing facilities and lockers for the storage of personal items may be subject to bargaining, it could be raised only in Citywide bargaining, not at the unit level. The issue of the appropriate level of bargaining has not been raised in the instant case.

**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, BCB-2382-04, filed by District Council 37, AFSCME, Local 924, is denied in its entirety.

Dated: January 23, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

BRUCE H. SIMON
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER