***Social Service Employees Union, Local 371*, 79 OCB 31 (BCB 2007)**
[Decision No. B-31-2007] (IP) (Docket No. BCB-2534-06).

Summary of Decision: The Union alleges that the City violated NYCCBL § 12-306(a)(1), when an employee's supervisors tried to coerce her into signing an agreement that would extend her probationary period beyond what is provided for in the parties' Agreement and terminated her employment when she refused to sign the extension. The Union also claimed that, through these actions, HPD failed to bargain in good faith in violation of NYCCBL § 12-306(a)(4), and, in violation of § 12-306(a)(1) and (3), it discriminated against the employee for seeking to enforce the terms of the parties' Agreement. The Board found that it had jurisdiction to hear this claim, but since the employee was not engaged in protected activity, the Union's claims must fail. Additionally, the Board found that HPD did not fail to bargain in good faith. ***(Official Decision Follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371 and STACEY JOHNSON,

Petitioners,

-and-

CITY OF NEW YORK and DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondents.

DECISION AND ORDER

On February 6, 2006, Social Services Employees Union, Local 371 ("Union"), and Stacey Johnson filed a verified improper practice petition against the City of New York ("City") and the Department of Housing Preservation and Development ("HPD") alleging that the City violated

NYCCBL § 12-306(a)(1) when Johnson's supervisors gave her an unwarranted negative evaluation in an attempt to coerce her into signing an agreement that would extend her probationary period beyond what is provided for in the parties' collective bargaining agreement ("Agreement") and then terminated her employment when she refused to sign the extension agreement. The Union also claims that, through these actions, HPD failed to bargain in good faith in violation of NYCCBL § 12-306(a)(4) because it sought to create a one year probationary period for those employees in Johnson's title when only a six month probationary period is prescribed by the Agreement. The Union also alleges that HPD violated § 12-306(a)(1) and (3) when it discriminated against Johnson in retaliation for her seeking to enforce the terms of the parties' Agreement. The City argues that petition fails to state a cause of action because this Board does not have jurisdiction to hear alleged violations of a collective bargaining agreement and that the Union has failed to allege facts sufficient to find any violation of the NYCCBL. The Board finds that it has jurisdiction to hear this claim, but since the Johnson was not engaged in protected activity, the Union's claims must fail. Additionally, the Board finds that HPD did not fail to bargain in good faith.

BACKGROUND

Following a conference, Petitioners and the City entered into an Amended Stipulation of Agreed Upon and Disputed Facts on April 9, 2007. Because the stipulated facts suffice to resolve this case, no finding was required as to those facts which are in dispute.

HPD is a City agency that serves to improve the availability, affordability, and quality of housing in New York City. On or about July 5, 2005 Johnson was hired by HPD in the non-competitive civil service title of Community Associate ("CA"). Throughout her employment,

Johnson was assigned to HPD's central office located in Manhattan, in the Section 8 Enhanced Recertification Unit, within the Division of Tenant Resources. The Division of Tenant Resources administers the Federal Section 8 voucher program that subsidizes monthly rental payments for eligible City residents. In her position as CA, Johnson was responsible for processing information received from Section 8 voucher program participants for recertification of eligibility. Johnson's employment was subject to a six month probationary period pursuant to New York State Civil Service Rule § 4.5(b), codified as NYS Civil Service Law ("CSL") Appendix § 4.5.[1] The Department of Citywide Administrative Services ("DCAS") Personnel Services Bulletin, Rule 5.2.8(a), provides that the Department may extend an employee's probationary period an additional six months with the consent of the probationer. Additionally, Article VI, § 1(f) of the Agreement addresses grievances during the probationary period and during any extension of that period.[2] At approximately the same time as Johnson was hired, six other CAs were also hired by HPD and assigned to work in the same unit.

As part of the requirements of her probationary term, Johnson's supervisors would rate her on attendance, communication with supervisors, and the ability to address client concerns, among other things. In October 2005, Johnson received her first performance evaluation, which covered

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[1] CSL Appendix § 4.5 provides:
Probationary term. Except as herein otherwise provided, every permanent appointment from an open competitive list and every original permanent appointment to the noncompetitive, exempt or labor class shall be subject to a probationary term of not less than 26 nor more than 52 weeks.

[2] Article VI, § 1(f) of the Agreement defines the term grievance as "[a] claimed wrongful disciplinary action taken against a full-time non-competitive class Employee with six (6) months service in title, except for Employees during the period of a mutually agreed upon extension of probation."

the period of July 5, 2005 through October 4, 2005. Johnson received a satisfactory rating on her first evaluation.

On December 16, 2005, Johnson received a second performance evaluation, which covered the period from October 5, 2005 through December 5, 2005. Johnson's second evaluation was unfavorable. The notations on the second evaluation criticized Johnson for the use of compensatory time which, according to the Union, had been approved by Johnson's supervisors in advance of its use.[3] However, the City alleges that Johnson had been told by her supervisors that, as a probationary employee being evaluated for retention, it would be to her advantage to limit the use of her compensatory time to limit her absences. Additionally, Johnson's supervisors rated Johnson unfavorably in the category of client and landlord concerns. The Union alleges that prior to this evaluation, Johnson had received compliments on her work from her supervisor, manager, and director. The Union further alleges that she signed the second evaluation under protest. Johnson stated in her written rebuttal to the second evaluation that "[u]ntil receipt of this evaluation, I had never been informed that there was an issue with my work or the timeliness with which I respond to client concerns. In fact, until this 2nd evaluation I have always received compliments on my work from [sic] supervisor, manager and director." (Union Ex. D.)

At the time Johnson received her second evaluation, HPD's Enhanced Recertification Chief, Johnson's second-level supervisor, requested that Johnson agree to a six month extension of her probationary period. The Union alleges that the Enhanced Recertification Chief told Johnson that all of the CAs hired with her would be asked to consent to the extension, but the City asserts that the

[3] Johnson had been told by her supervisors that as a new employee, she was not yet eligible to use annual leave, but that she could utilize compensatory time.

other CAs hired with Johnson had already completed their probationary period and, therefore, could not be asked to extend their probationary period. According to the Union, Johnson felt that the second evaluation was being used as a tool to coerce her agreement to the probation extension, and she refused to consent to the extension. Also according to the Union, the Enhanced Recertification Chief disclosed to Johnson that she had personally given her a higher rating in the client category of the evaluation, but was subsequently told by the Enhanced Recertification Chief's immediate supervisor, an Adminsitrative Manager, to lower the rating.[4]

The Union asserts that on or about December 22, 2005, the Administrative Manager asked Johnson to sign an agreement extending her probationary period for an additional six months. According to the Union, Johnson refused to sign the agreement, explained that she thought the second evaluation was inaccurate and unfair, and stated that she believed that the evaluation was being used to force her agreement to an extension of her probation. The Union alleges that the Administrative Manager replied by explaining that all of the CAs hired around the same time as Johnson was hired were being asked to sign agreements extending their probationary periods and that all of them had done so. The Union claims that the Administrative Manager then told Johnson that she was the only one who had refused to sign even though others had also thought that their evaluations were inaccurate.

According to the Union, after this conversation with the Administrative Manager, Johnson approached an employee in HPD's Human Resources ("HR") Department to speak with her regarding the proposed extension to Johnson's probationary period. The HR employee told Johnson

[4] According to the Union, the Enhanced Recertification Chief stated that she originally rated Johnson with a "three" out of five in the client category but was told by the Administrative Manager to change the rating to the less favorable grade of "two."

that HPD was working with the DCAS to extend the probationary period of the CA title to one year.

The Union alleges that during a subsequent conversation with the Administrative Manager, Johnson asked her if she could have another day to think about whether she would sign the extension and the Administrative Manager agreed. However, according to the Union, the Administrative Manager approached Johnson approximately fifteen minutes later, informed Johnson that her supervisors had determined that she could not have another day to think about it, and that Johnson had to sign that day or not at all. According to the Union, Johnson believed she was unfairly pressured to sign the agreement and told the Administrative Manager that she would not sign it.

On December 27, 2005, Johnson received a letter terminating her employment effective on that date. According to the Union, and upon information and belief, subsequent to the termination of Johnson's employment, a job announcement for approximately 18 new HPD CAs was approved by DCAS. Also upon information and belief, the announcement stated that the probationary period for the prospective new hires would be one year.[5]

The Union filed its improper practice petition on February 6, 2006. As a remedy, the Union asks that the Board order HPD to reinstate Johnson to her position with full back pay, benefits, and seniority, from December 27, 2005 to the date of her reinstatement, and order HPD to cease and desist from restraining or coercing any employee to agree to any extension of their probationary period absent a legitimate business justification for requesting such an extension.

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[5] According to the Union, on or about December 27, 2005, the Enhanced Recertification Chief told Johnson that the Administrative Manager said she was sorry that she had ever asked Johnson to sign the extension of probation agreement and had not just left things alone, but that it was too late to reverse Johnson's discharge because the decision had already been made at a higher level. The Union also alleges that the Administrative Manager told the Enhanced Recertification Chief that they were losing a good worker.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that HPD's actions interfered with, restrained, and coerced Johnson in the exercise of her right to enjoy the benefits of Article VI, § 1(f) of the Agreement, which prescribes a six month probationary period for CAs.[6] It asserts that HPD gave Johnson poor ratings on her evaluation in an attempt to coerce her into waiving the applicable six month probationary period and discharged her when she refused to consent to the waiver. The Union insists that Johnson was never advised that her work performance was unsatisfactory before the second evaluation and that she had received compliments on her work performance before the second evaluation. The Union argues that HPD used Johnson's second performance evaluation as a pretext justifying Johnson's discharge, and as leverage to compel Johnson's consent to the extension of her probationary period. Moreover, the Union asserts, HPD presented newly-hired CAs with a mandate to agree to a six month extension of their probationary period or face the termination of their employment in order to circumvent the Agreement and interfere with the employees' rights. The Union claims that HPD determined that the position of CA in the Section 8 Enhanced Recertification Unit warranted a one year probationary period, contrary to the six month probationary period mandated by the Agreement, in violation of NYCCBL § 12-306(a)(1).[7]

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[6] Article VI, § 1(f) of the parties' Agreement defines the term grievance as "[a] claimed wrongful disciplinary action taken against a full-time non-competitive class Employee with six (6) months service in title, except for Employees during the period of a mutually agreed upon extension of probation."

[7] NYCCBL § 12-306(a) provides in pertinent part:
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 section § 12-305 of this chapter. . . .

The Union also claims that HPD failed to bargain in good faith in violation of NYCCBL § 12-306(a)(4) because it unilaterally sought to extend the contractually-mandated six month probationary period to one year and that, in violation of § 12-306(a)(1) and (3), HPD discriminated against Johnson for seeking to enforce the terms of the parties' Agreement.[8]

City's Position

The City argues that because the Board does not have jurisdiction to hear contractual disputes, it does not have jurisdiction over the instant action. It argues that the Union's claim can be reduced to an allegation that HPD interfered with Johnson's contractual right to a six month probationary period under the Agreement and must be dismissed.

The City contends that the Union has failed to allege facts sufficient to find HPD in violation of the NYCCBL. New York City Personnel Rules permit HPD to request the consent of a probationary employee to extend their probationary period.[9] The City also claims that nothing in the

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NYCCBL § 12-305 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. . . .

[8] NYCCBL § 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any 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. . . .

[9] NYC Personnel Rule V, Section I, provision 5.2.8(a) provides:
[n]otwithstanding the provisions of paragraph 5.2.1, upon the written request of the agency head setting forth the reasons therefor and with the written consent of the

Agreement limits the ability of the parties to extend the length of the probationary period and that Article VI, § 1(f), expressly contemplates the possibility of such an extension. The City asserts that as a matter of law, HPD was entitled to request an extension of Johnson's probationary period and, further, HPD was entitled to terminate the employment of any probationary employee during the initial or extended probationary period.

The City argues that it did not violate the NYCCBL because the Union failed to allege any protected union activity. The City argues that, since Johnson's actions were not in furtherance of the collective welfare of the Union, her activity is not of the type protected by the NYCCBL. Additionally, the City argues that even if the Board does find that Johnson was engaged in protected union activity, Johnson's termination was not motivated by union activity, but was instead motivated by her substandard levels of attendance and professionalism, as evidenced by the poor ratings on her second performance evaluation. The City denies that all of the employees in the CA title who were hired around the time that Johnson was hired were made to sign extensions to their probationary period.

The City also asserts that it did not violate NYCCBL § 12-306(a)(4) because the Union has failed to meet its burden of proving that there has been a change in working conditions over which there was a duty to bargain.

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probationer, the commissioner of the citywide administrative services may authorize the extension of the probationary term for one or more additional periods not exceeding in the aggregate six months; provided however, that the agency head may terminate the employment of the probationer at any time during any such additional period or periods.

DISCUSSION

At the outset, we find that this Board has jurisdiction over the Union's claims. Pursuant to NYCCBL § 12-309(a), this Board has the exclusive jurisdiction to prevent and remedy violations of § 12-306. On their face, all of the Union's allegations – interference with employees' protected rights, a breach of the duty to bargain in good faith, and discrimination – raise statutory claims over which the Board has jurisdiction.

Although the City argues that the Union's entire claim sounds in contract and must be dismissed pursuant to Article 14, § 205.5(d) of the CSL (the "Taylor Law"), this Board may exercise jurisdiction over an alleged breach of a collective bargaining agreement when the acts constituting the breach also constitute an independent improper practice under the NYCCBL. *Sergeants Benevolent Ass'n*, Decision No. B-32-2005 at 8 ("Where the facts alleged to constitute a unilateral change claim are inextricably related to a claim of unlawful interference and to other statutory claims, the claim cannot be deferred to be resolved separately in arbitration.") *Id*. at 8-9; *see Connetquot Central School District*, 19 PERB ¶ 3045 (1986) (jurisdiction asserted over claim that a unilateral change in a contract term was inherently destructive of employees' protected rights.)

Here, the Union's allegations concern the attempted coercion of a Union member in the exercise of rights provided for in the parties' Agreement, and then the termination of her employment when she attempted to enforce those rights. These are statutory claims, and not simply breach of contract claims, as the allegations encompass interference with union activity, a unilateral change in a mandatory subject of bargaining, and discrimination. We find that the facts alleged to constitute the unilateral change claim are inextricably related both to the claim of unlawful interference with union activity and to the other statutory claims and, therefore, cannot be resolved

separately. *Local 1180, Communication Workers of America*, Decision No. B-28-2002 at 8-9; *Schulyer-Chemung-Tioga Board of Cooperative Educational Services*, 34 PERB ¶ 3019 (2001); *Connetquot Central School District*, *supra*. Therefore, we will not dismiss the Union's claim based upon lack of jurisdiction, nor will we defer to arbitration.

The primary issue in this case is whether HPD interfered with, restrained, and coerced Petitioner in the exercise of her rights when, according to the Union, her supervisors gave her an unwarranted negative evaluation in an attempt to coerce her into signing an agreement that would extend her probationary period beyond provided for in the parties' Agreement and terminated her employment after she refused to sign the extension. The Union alleges that these actions interfered with her right to exercise and enforce her right to the six month probationary period provided in the parties' Agreement.

NYCCBL § 12-306(a)(1) provides that it is an improper practice for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter. . . ." Those rights encompass the "right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their choosing." NYCCBL § 12-305. In evaluating whether an employer's action violates NYCCBL § 12-306(a)(1), this Board applies the analysis from *Assistant Deputy Wardens' Ass'n*, Decision No. B-19-95 at 27, adopted from *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 (1967) ("*Great Dane*"). S*ee generally Local 2627, District Council 37*, Decision B-27-2003 at 7-8.

Using this standard, the Board employs one of two tests:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business

> considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

388 U.S. at 34; Decision No. B-19-95 at 27.

Under this analysis, the employer's behavior complained of must either directly inhibit or penalize protected union activity to constitute a violation of § 12-306(a)(1) or (3). *See Committee of Interns and Residents*, Decision No. B-26-93 at 41-42, *enforced sub nom, Committee of Interns and Residents v. Dinkins*, No. 127406/93 (Sup. Ct. N.Y. Co. Nov. 29, 1993) (citations omitted) (inherently destructive behavior); *Local 2627, District Council 37*, Decision No. B- 27-2003 at 8 (discriminatory conduct targeting protected activity under § 12-306(a)(1) and (3)); *Howe*, Decision B-32-2006 (same; claims under § 12-306(a)(3)).[10]

In the case of a claim of inherently destructive behavior, where the employer's conduct occurs outside of the context of protected union activity, it cannot be taken as deterring future protected union activity. *Hennings*, Decision No. B-45-98 at 6-7. If an employer's conduct is not inherently destructive, and is not taken with the intent of retaliating for or deterring future protected activity, then no violation of the NYCCBL can be made out. *See, e.g., Local 2627, District Council 37*, Decision No. B-27-2003 at 8-10. In this case, Petitioner has not alleged facts sufficient to show that the City interfered with Johnson's rights under the NYCCBL or retaliated against her for engaging in protected union activity.

A petitioner seeking to establish a claim sounding in either interference with or retaliation

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[10] We note that PERB employs a similar analysis. *See, e.g., County of Monroe v. Newman*, 125 A.D.2d 1002, 1003 (4th Dep't 1986) (conduct inherently destructive to union constituted an improper practice); *Greenburgh # 11 Federation of Sch. Teachers*, 33 PERB ¶ 3018 (2000) (same); *City of Salamanca*, 18 PERB 3012 (1985) (conduct taken with discriminatory motivation).

for protected union activity must establish some linkage between the act complained of and union status or protected activity as defined by § 12-305 of the NYCCBL. NYCCBL § 12-306(a); *Howe*, Decision No. B-32-2006 at 19-20. We have consistently held that when "an individual employee files a grievance or complains about terms and conditions that are covered in the parties' collective bargaining agreement, then such acts are deemed to be protected." *Id.* at 21 (citing *Lamberti*, Decision No. B-21-2006 at 15-16); *Sergeants' Benevolent Ass'n*, Decision No. B-22-2005 at 22. Thus, the Union's assertion that Johnson's declination of the agreement to extend her probationary period, even if constituting a cause of complaint common to other employees as the Union asserts, cannot constitute protected activity unless the right she asserted stems from the collective bargaining agreement itself, or the text of the NYCCBL. In this case, the Union asserts that the right asserted is found in the collective bargaining agreement.

The Union claims the right to insist upon a probationary period of no more than six months' duration derives from the parties' Agreement, Article VI, § 1(f). However, this provision does not, by its express language, purport to create any such right. Rather, the cited subsection of the Agreement defines the term "grievance" and, in defining the class of employees in possession of the right to bring a grievance, simply acts to exclude employees who have the requisite six months service in their positions from bringing a grievance during "a mutually agreed upon extension of probation." This reference, absent more, does not render these extensions "covered in the parties' collective bargaining agreement"; it neither authorizes, bars, limits, nor qualifies such agreements. *State of New York-Uniformed Court System v. Dist. Council 37*, 3 A.D.3d 435 (1st Dep't 2004) (collective bargaining agreement provision of grievance rights expressly limited to permanent employees held to create no such right in probationary employees) (citing *Matter of Uniform*

Firefighters of Cohoes, Local 2562 v. City of Cohoes, 94 N.Y.2d 684, 694-695 (2000)).

Nor does any other provision in the Agreement create a right to a six-month probationary period. Rather, the duration of a probationary period is a creature of statute, as implemented by local rules. *See* CSL §§ 17, 20, 63(2); *Matter of Boyle v. Koch*, 114 A.D.2d 78, 80-81 (1st Dep't) *lv. denied*, 68 N.Y.2d 663 (1986); *Matter of County of Fulton*, 14 A.D.3d 771, 773 (3rd Dep't 2005). These rules "have the force and effect of law." *Matter of Fulton, supra,* (quoting *Matter of Albano v. Kirby*, 36 N.Y.2d 526, 529 (1975) (quoting CSL § 20)). The Personnel Rules clearly allow for the extension of such a period by agreement with the individual employee. *See* 55 R.C.N.Y. § 5.2.8(a); *Glisson v. Steisel*, 96 A.D.2d 83, (1st Dep't 1983); *see generally Matter of Garcia v. Bratton*, 90 N.Y.2d 991, 995 (1997) (Ciparik, J., dissenting); *Matter of Boyle v. Koch*, *supra.* Thus, we are constrained to reject the contention that entry into such an agreement implicates rights covered by the collective bargaining agreement.

Accordingly, we are unable to find that Petitioner was engaged in any protected activity, and, thus, the Union cannot show that HPD's actions were either inherently destructive of important employee rights, or in retaliation for such protected activity, and thus violated the NYCCBL. Therefore, we dismiss the Union's claims that HPD violated NYCCBL § 12-306(a)(3) and both the independent claim that HPD violated NYCCBL 12-306(a)(1), and the derivative §12-306(a)(1) claim that would arise should the employer violate § 12-306(a)(3).

Finally, NYCCBL § 12-306(a)(4) provides that it is an improper practice for a public employer "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining . . ." However, NYCCBL § 12-306(a)(4) is not without limitation, and this Board has held that probationary periods are non-mandatory subjects of bargaining within the City's

statutorily-mandated discretion pursuant to CSL § 63. *Law Enforcement Employees Benevolent Ass'n*, Decision No. B-18-2007 at 22 (City's refusal to bargain over the probationary period was not an improper practice). Therefore, we reject the Union's claim that HPD failed to bargain in good faith by allegedly requesting that Petitioner and all other CAs consent to an extension of their probationary period. However, we do so noting that this conclusion is without prejudice to any claim arising out of CSL or other statutes regarding the Union's disputed allegation that HPD has subverted the Personnel Rules at issue by requiring all new hires to sign agreements extending their probationary periods. While such a claim may be properly heard in another forum, absent some connection to protected union activity or union status, entirely lacking here, they do not constitute violations of the NYCCBL. Accordingly, we dismiss this claim and the other claims in the Union's petition in their entirety.

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 docketed as BCB-2534-06, be and the same hereby is, dismissed in its entirety.

Dated: New York, New York
September 25, 2007

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER

PETER PEPPER
MEMBER