District Council 37, 79 OCB 37 (BCB 2007)

[Decision No.B-37-2007] (IP) (Docket No. BCB-2515-05).

Summary of Decision*:* The Union alleges that the City violated NYCCBL 12-306(a)(1) and (4) when DPR established and implemented a mediation program as an alternative disciplinary process absent negotiation with the Union. The Union also alleges a claim of practical impact arising from DPR's actions. The Board found that the City violated its statutory bargaining obligation by establishing, without negotiation, an alternative process for the resolution of disciplinary matters. Accordingly, the petition is granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE DEPARTMENT OF PARKS AND RECREATION, and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On November 7, 2005, District Council 37, AFSCME, AFL-CIO ("Union" or "DC 37"), filed a verified improper practice petition against the City of New York ("City") and the Department of Parks and Recreation ("City" or "DPR"). In its petition, the Union alleges violations of New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (a)(4). The Union also alleges a practical impact claim arising from

DPR's actions. The City alleges that the petition must be dismissed because it fails to state facts sufficient to demonstrate a violation of NYCCBL § 12-306(a)(4) or of a claim of practical impact; and, fails to demonstrate independent or derivative violations of NYCCBL § 12-306(a)(1).

In an effort to resolve the instant charges, the parties entered into protracted settlement discussions. However, no resolution was reached. Therefore, the Board has considered the matter and finds, that in unilaterally establishing and implementing a mediation program intended as an alternative disciplinary process, DPR has violated NYCCBL § 12-306(a)(1) and (a)(4).

BACKGROUND

On or about July 6, 2005, Ricardo Granderson, DPR Equal Employment Opportunity Officer ("EEO Officer") initiated a telephone conversation with Jose Sierra, DC 37 Blue Collar Division Director ("Union Division Director"), regarding employee participation in a mediation program administered by the Mediation Center of the Office of Administrative Trials and Hearings ("OATH"). During this conversation, a September 12, 2005 meeting was scheduled to discuss the program. On July 6, 2005, the EEO Officer also sent a letter to the Union Division Director confirming their conversation and asking for possible meeting dates in early August. The letter stated, in relevant part:

> It was a pleasure speaking with you today about the Parks Department's alternative dispute resolution program. As discussed, the program is administered, managed and staffed by the *Mediation Center.* The *Mediation Center* has a successful track record of dispute resolution . . . . Their skillset is such that they are able to facilitate communication and, ultimately, resolution of the most contentious disputes.
>
> As discussed, mediation is a unique tool that benefits both management and employees simultaneously. From both perspectives, it represents an alternative to rigid discipline because both parties are empowered in mediation. The process is completely voluntary in that we cannot compel either an employee or manager to participate. It is the voluntary aspect that provides the framework for success.

> While mediation is a widely accepted part of the private sector corporate business model, many individuals are reluctant, skeptical and, sometimes, fearful to participate because of a lack of understanding. I would like an opportunity to educate you and your leadership about the *Mediation Center* as a means of, ultimately, educating and informing your members of the value and availability of this tool.

(Pet. Ex. A.) The September 12, 2005 meeting was cancelled, was not rescheduled, and no meeting was ever held to discuss DPR's implementation of the "Parks Department's alternative dispute resolution program." (Pet. Ex. A.)

The Union alleges that subsequent to the July 6, 2005 telephone conversation and letter, the EEO Officer referred employees in several DC 37-represented titles to at least one mediation session. One such employee contacted a DC 37 Council Representative to secure representation at a meeting scheduled for August 23, 2005. The Union states that when its Council Representative arrived at the Mediation Center for the scheduled meeting, the Representative encountered other DC 37-represented DPR employees in the reception area. According to the Union, the mediator began the session at which point the Council Representative requested an adjournment so that she might confer with the DPR employees present. The Union alleges that the Council Representative questioned the DPR employees regarding their understanding of the session and their presence there. The Union claims that DPR notified the employees to attend the meeting but did not explain why their attendance was necessary. The Union does not specify the method DPR employees are informed about a matter that has been referred to mediation, however, the Union alleges that "employees are not given the option of choosing to refer their own cases to mediation, nor are they given advanced [sic] notice that they may be represented during mediation." (Pet. ¶ 10.)

The City alleges that the Citywide EEO Policy encourages mayoral and non-mayoral agencies to utilize the voluntary and confidential services of the OATH Center for Mediation Services to

resolve workplace conflicts. The City explains that in furtherance of the Citywide EEO Policy and as part of its commitment to "maintaining and promoting a bias-free and collaborative workplace in order to ensure efficient governmental operations," DPR has developed an alternative dispute resolution program that offers employees the option of utilizing OATH's mediation services. (Ans. ¶ 21.) The City also alleges that on or about November 2004, DPR began discussions with the Mediation Center in order to make mediation services a component of DPR's alternative dispute resolution program. The City maintains that

> upon the agreement of those involved, the Department [of Parks and Recreation] would refer such disputes to the Center for Mediation that were considered mediable, including, but not limited to, EEO-related matters, intra-employee disputes and intra-manager disputes. Excluded from mediation are issues arising from labor issues and issues involving agency policy.

(Ans. ¶ 22.)

The City denies the Union's allegations that the EEO Officer referred any DC 37-represented employees to an August 23, 2005 mediation session at OATH. Rather, the City avers, the August 23, 2005 session was a counseling session scheduled between the Mediation Center and several DPR employees who had been involved in a workplace dispute. As to the nature of this workplace dispute, the City alleges that prior to August 23, 2005, DPR was informed of an EEO complaint that had been reported to the City's 311 hotline. In following up on the complaint, the EEO Officer spoke with the employees involved and suggested that each employee consider attending a counseling session that would be conducted by the Mediation Center in the hopes of resolving the dispute. According to the City, each employee agreed to participate in the session and provided their contact information to the EEO Officer who forwarded this information to the Mediation Center. The City further alleges that the Mediation Center contacted each employee directly to schedule the counseling session; DPR was

not involved in coordinating, and was not represented at, the session.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that DPR's establishment of a dispute resolution program as an alternative to the existing disciplinary process, and its referral of Union-represented employees to the program, in the absence of negotiations over the procedures to be followed, interferes with the rights of Union members to be represented by the collective bargaining representative of their choosing and, therefore, constitutes violation of NYCCBL § 12-306(a)(1) and (a)(4).[1] The Union further alleges that while DPR maintains that their mediation program is voluntary, "it is apparent that the manner in which employees are notified conveys the impression that their attendance is compulsory." (Pet. ¶10.)

Moreover, the Union alleges that despite the confidential nature of mediation sessions, "employees may well discuss issues . . . that could result in disciplinary charges." (Pet. ¶ 16.) Therefore, the Union concludes, the establishment of a mediation program as an alternative to the existing disciplinary process is a mandatory subject of collective bargaining. The Union alleges that

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[1] NYCCBL § 12-306(a)(1) provides that "[i]t shall be 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," which, in turn, provides in relevant part that

> [p]ublic 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." NYCCBL § 12-305.

NYCCBL § 12-306(a)(4) provides that

> [i]t shall be an improper practice 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.

since the City failed to negotiate the establishment of this program and the mediation procedures to be used, NYCCBL § 12-306(a)(4) has been violated.

In response to the City's denial that it has violated NYCCBL § 12-306(a)(4), the Union states that the EEO Officer's July 6, 2005 letter illustrates DPR's intentions insofar as the letter posits DPR's alternative dispute resolution program as an "alternative to rigid discipline." (Rep. ¶ 26 quoting Pet. Ex. A.) The Union argues that the unilateral implementation of an alternative to the negotiated grievance and disciplinary procedures constitutes a violation of NYCCBL § 12-306(a)(4). Moreover, the Union alleges that in violating NYCCBL § 12-306(a)(4), the City has derivatively violated NYCCBL § 12-306(a)(1).

Assuming *arguendo* that the establishment and implementation of a mediation program is not a mandatory subject of bargaining, the Union alleges that the City is nonetheless obligated to bargain over the impact of the program. In response to the City's allegation that the Union has failed to establish a claim of practical impact, the Union explains that the published Guidelines of OATH's Mediation Center state that participants "may bring legal or other representatives" to the mediation session. (Ans. Ex. 3.) The Union alleges that "it goes without saying that the Union would have an obligation to provide" representation to its members who participate in mediation and that such representation would be "a costly and burdensome addition to the usual grievance and disciplinary procedures." (Rep. ¶ 33.)

City's Position

The City alleges that the petition must be dismissed because the Union has failed to allege facts sufficient to demonstrate a violation of NYCCBL § 12-306(a)(4). The City alleges that it has not unilaterally changed a term or condition of employment and that DPR has not "implemented a

new rule, policy or program" but merely "sought to inform its staff and their union representatives of the availability of a voluntary mediation program administered by" OATH. (Ans. pp. 3-4.) In fact, the City argues, the option of using the services of the OATH Mediation Center has always been available to employees involved in an EEO workplace dispute and/or complaint. The City also alleges that there is no duty to bargain over the voluntary utilization by DPR employees of the voluntary mediation program that is available to all City agencies in an effort to maintain efficient governmental operations and, therefore, there can be no violation of the NYCCBL.

Further, the City alleges, the mediation program is not administered or monitored by DPR and, thus, does not constitute a term or condition of employment. In response to the Union's allegation that employees may discuss disciplinary matters that could result in disciplinary charges, the City explains that the Mediation Center is operated by an impartial, independent third party and that DPR "is not privy to any of the confidential matters discussed in sessions." (Ans. ¶ 36.) The City alleges that DPR only receives a confirmation that a scheduled mediation did, in fact, take place. Further, the City alleges, the parties to a mediation agree in writing to maintain strict confidentiality regarding the content of mediation sessions, thereby eliminating the possibility of DPR obtaining information that could be used as the basis of disciplinary charges.

The City also alleges that the Union has failed to allege any facts demonstrating that a practical impact exists. Therefore, the Union's claim of a practical impact must fail.

Additionally, the City alleges that there is no derivative or independent violation of NYCCBL § 12-306(a)(1). The City argues that the Union has not established an independent violation of NYCCBL § 12-306(a)(1) because the Union has failed to demonstrate that there was any union activity which the City claims is a necessary component of a viable § 12-306(a)(1) claim. The City

explains that DPR's "EEO Officer offered employees involved in a work-place dispute the option of participating in a voluntary confidential counseling session administered by an independent and impartial entity," the Center for Mediation. (Ans. ¶ 52.) Moreover, the City points out, the Union does not allege that DPR was improperly motivated in offering employees the option of mediation, or that any of the facts alleged by the Union demonstrate that DPR was motivated by anti-Union animus. Further, the City argues that since the Union has not demonstrated a violation of NYCCBL § 12-306(a)(4), there can be no derivative NYCCBL § 12-306(a)(1) violation.

DISCUSSION

The questions before us are whether the City violated its statutory bargaining obligation when DPR unilaterally adopted a dispute resolution program as an alternative to the negotiated disciplinary procedures and whether, in so doing, the City's actions interfered with the rights of the Union and its members granted by NYCCBL § 12-305. For the reasons set forth below, we find that the City and DPR violated the NYCCBL as alleged by the Union.

There is no dispute that Ricardo R. Granderson, DPR's EEO Officer, contacted the Union by letter dated July 6, 2005. The letter purports to confirm a telephone conversation between Granderson and a Union official during which Granderson discussed DPR's alternative dispute resolution program and invited Union participation in an already extant program, not to negotiate the establishment of, and procedures appurtenant to, the program. The letter further describes the DPR program as "an alternative to rigid discipline . . . ." (Pet. Ex. A.). The text of this uncontested letter provides a sufficient basis for us to consider whether the establishment of this program, absent prior negotiation with the Union, violates the NYCCBL. We find that other disputed factual allegations

presented in the record are not material to the resolution of this legal question. Therefore, no hearing is necessary.[2] We have repeatedly held, and the courts have affirmed, that a party must "present more than conclusory statements" supporting the elements of its claim "to warrant a hearing to present further evidence"; rather, "[a] material issue of disputed fact must exist to be resolved." *Soc. Serv. Employees Union,* Decision No. B-10-2002 at 8; *District Council 37,* Decision No. B-20-2007 at 11; *see also Uniform Firefighters Ass'n,* Decision No. B-19-2003; *see generally Patrolmen's Benevolent Ass'n v. NYC Office of Collective Bargaining,* 38 A.D.3d 482 (1st Dept. 2007).

The NYCCBL § 12-306(a)(4) Improper Practice Claim

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." Under NYCCBL § 12-307 (a), 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.[3] *See District Council 37,* Decision No. B-12-2003 at 7; *Soc. Serv. Employees Union, Local 371, AFSCME,* Decision No. B-22-2002 at 7. Moreover, as we explained in *District Council 37,* Decision No. B-20-2007 at 9,

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[2] The Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") provide that, "[a]fter issue has been joined, the Board may decide [a] dispute on the papers filed, may direct that oral argument be held before it, may direct a hearing before a trial examiner, or may make such other disposition of the matter as it deems appropriate and proper." OCB Rule § 1-07(8).

[3] NYCCBL § 12-307(a) provides, in pertinent part, as follows:
[P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including, but not limited to, wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including, but not limited to, overtime and time and leave benefits), working conditions . . . .

"if a unilateral change is found to have occurred in a term and condition of employment which is determined to be a mandatory subject, then this Board of Collective Bargaining will find the change to constitute a refusal to bargain in good faith and, therefore, an improper practice." *See also Local 1182, Communications Workers of America,* Decision No. B-26-2001 at 4; *Patrolmen's Benevolent Ass'n,* Decision No. B-4-99 at 10.

We have long held that, while it is an employer's prerogative to take disciplinary action, the procedures necessary for the administration of discipline are mandatorily negotiable. As we stated in *District Council 37,* Decision No. B-36-2000 at 9 (citing *District Council 37,* Decision No. B-3-73 at 8-11):

> NYCCBL § 12-306(b) reserves to management the right to take disciplinary action against its employees. But the management prerogative provision of the NYCCBL was not intended to cover the entire area of discipline. In our view, it is not the intent of the NYCCBL to prohibit bargaining on the methods, means and procedures which may be used in effectuating disciplinary action.

And, in *District Council 37,* Decision No. B-13-2005, we further explained that:

> [w]hile the City has the right to make and implement decisions concerning its management prerogatives without bargaining, the procedures for implementing decisions that affect terms and conditions of employment are mandatorily bargainable. For example, while it is within management's discretion to evaluate its employees' performance, impose discipline, and grant merit pay, the procedures for implementing performance evaluations, imposing and reviewing disciplinary action, and determining eligibility for merit pay are mandatory subjects of bargaining. *See, Local 371, SSEU,* Decision No. B-31-2003 (merit pay procedures); *District Council 37,* Decision No. B-25-2001 (disciplinary procedures); *District Council 37,* Decision No. B-36-2000 (disciplinary procedures); *Patrolmen's Benevolent Ass'n*, Decision No. B-2-99 (performance evaluation procedures); *United Probation Officers Ass'n,* Decision No. B-44-86 (merit pay procedures).

Notably, at issue here are DPR employees who are represented by several different DC 37-

affiliated locals and are covered by distinct unit agreements.[4] Each of these agreements, with the exception the Seasonal Agreement, contains a negotiated grievance and arbitration procedure which encompasses disciplinary review procedures.[5] Granderson's letter states that DPR's alternative dispute resolution program is intended to be used as "an alternative to rigid discipline . . . ." This Board finds that by unilaterally establishing an alternative dispute resolution program characterized by the City itself as an "alternative to rigid discipline," the City violated its bargaining obligation and in doing so committed an improper practice under NYCCBL § 12-306(a)(4). As our prior decisions make clear, procedures attendant to the administration of employee discipline are mandatorily negotiable and cannot be implemented or revised absent prior negotiation and agreement of the parties.

The City contends that it has no duty to bargain the establishment of DPR's alternative dispute resolution program because "mediation is an alternative that has always been available to employees of the City of New York involved in an EEO workplace dispute and/or complaint as is delineated in the City of New York EEO Policy." (Ans. ¶ 34.) However, Granderson's letter does not limit the DPR alternative dispute resolution program to co-worker initiated EEO disputes or complaints. Rather, Granderson's letter clearly indicates that the DPR program stands as an alternative disciplinary procedure. Accordingly, we find that the unilateral implementation of such a program

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[4] Employees represented by: Locals 508, 461 and certain titles represented by Local 983 are covered by the Seasonal Agreement; Locals 1549 and 154, the Clerical Agreement; Locals 1505, 1506, 1507, 1508 and certain titles represented by 768 and 983, the Blue Collar Agreement; Locals 1407 and 2627, the Accounting and Electronic Data Processing Agreement; Local 375, the Engineering and Scientific Agreement; and, Locals 299 and 371, the Social Services Agreement.

[5] The Seasonal Agreement contains negotiated due process procedures only for certain represented titles.

violates NYCCBL § 12-306(a)(4).

The City also argues that DPR's bargaining duty is not implicated "over the utilization of this voluntary program which has been available to all New York City Agencies for the purpose of maintaining efficient governmental operations." Ans. p.4. While Granderson's letter states that "[t]he process is completely voluntary in that we cannot compel either an employee or manager to participate," the Union has drawn into question how "voluntary" participation will be in cases in which, the Union asserts, management selects mediation, and suggests the employees' participation.

We need not resolve the question of voluntariness, however, because the City's argument turns on a false assumption that voluntary participation by individual employees in procedures relating to mandatorily negotiable subjects of bargaining somehow acts to "cure" the failure to negotiate with the certified bargaining agent. Such is, simply, not the case. *See*, *e.g.*, *United Public Service Employees Union Local 424 and County of Columbia*, 31 PERB ¶ 4550 (ALJ 1998) ("The willingness of unit employees to perform a task is irrelevant to a determination of the propriety of an employer assigning it to them."); *City of New Rochelle*, 8 PERB § 3071 (1975) (Improper practice "for an employer to consult with individual employees who are in a negotiating unit" concerning matters of bargaining.); *Orchard Park Police Benevolent Ass'n*, 26 PERB § 4632 (1993) ("To deal directly with individual employees on a matter affecting a mandatory subject of negotiation bypasses the labor organization and deprives the employees of the right to be represented by their chosen negotiating agent."); *Buffalo Police Benevolent Ass'n, Inc. and City of Buffalo Police Department,* 23 PERB ¶ 4596 (ALJ 1990) (City violated its bargaining obligation by unilaterally implementing the voluntary counseling program.)

Moreover, DPR's intentions in establishing this disciplinary procedure are not relevant to our

consideration. *See Buffalo PBA, supra* ("[T]hat the City acted in what many would consider the best interests of the officers and with a sincere desire to help them and their families through periods of personal crisis is not questioned. Its motives, however, cannot release it from its statutory [bargaining] obligations . . . .") As discussed above, the City cannot evade its bargaining obligation by allowing an agency to implement an alternative disciplinary procedure, even if the alternative procedure is wholly voluntary and well-intentioned.

For these reasons, we find that the City violated NYCCBL § 12-306(a)(4) when, with no prior negotiation with the Union, DPR established an alternative disciplinary procedure as set forth in the Granderson letter.

The Derivative NYCCBL § 12-306(a)(1) Claim

We have previously held that when an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). Specifically, we have held that:

> where there has been a refusal to confer with the certified employee representative regarding a change affecting terms and conditions of employment, there is, in our judgment, interference with the effectiveness of the employee representation and, consequently, the rights of the employees which it represents, in violation of . . . the NYCCBL.

District Council 37, Decision No. B-20-2003 at 5-6 *quoting Committee of Interns and Residents*, Decision No. B-25-85 at 10-11. *See also Captains Endowment Association,* Decision No. B-38-2006 at 9 (NYPD violated NYCCBL § 12-306(a)(4) by unilaterally changing drug testing procedures and derivatively violated § 12-306(a)(1)) and *District Council 37,* Decision No. B-34-2006 at 18 (in violating its duty to bargain in good faith by unilaterally changing procedures concerning sick leave taken pursuant to the Family and Medical Leave Act, employer derivatively violated NYCCBL § 12-306(a)(1)).

We find, therefore, that in violating NYCCBL § 12-306(a)(4), the City and DPR have derivatively violated NYCCBL § 12-306(a)(1).

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 City violated NYCCBL § 12-306(a)(1) and (a)(4) by failing to bargain in good faith over its unilateral implementation of an alternative disciplinary review procedure pursuant to the July 6, 2005 letter of the DPR Equal Employment Opportunity Officer; and it is further

DIRECTED, that the Department of Parks and Recreation cease and desist from utilizing its alternative dispute resolution program as an alternative disciplinary review procedure until such time as the parties negotiate procedures for mediation as an alternative disciplinary review procedure; and it is further

DIRECTED, that the Department of Parks and Recreation shall post the attached notice for no less than thirty days, at all locations used by the Union for written communication with unit employees; and it is further

ORDERED, that, in all other respects, the improper practice petition docketed as BCB-2515-05 be, and the same hereby is, dismissed.

Dated: New York, New York
December 4, 2007

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER

NOTICE

TO ALL EMPLOYEES PURSUANT TO THE DECISION AND ORDER OF THE BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK and in order to effectuate the policies of the NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify that in the matter of *District Council 37, AFSCME, AFL-CIO v. The Department of Parks and recreation and the City of New York,* Decision No. B-37-2007 (Docket No. BCB-2515-05):

The City of New York and the Department of Parks and Recreation committed an improper practice by failing to bargain with District Council 37, AFSCME, AFL-CIO over the Department of Parks and Recreation's unilateral implementation of a mediation program as an alternative disciplinary review procedure.

It is hereby:

DIRECTED, that the Department of Parks and Recreation cease and desist from utilizing its alternative dispute resolution program as an alternative disciplinary review procedure until such time as the parties negotiate procedures for mediation as an alternative disciplinary review procedure;

DIRECTED, that DPR shall post this Notice for no less than thirty days, at all locations used by the Union for written communication with unit employees.

Department of Parks and Recreation

Dated: _____ (Posted By) _____

_____
(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.