Civil Service Technical Guild, L. 375, **79 OCB 41 (BCB 2007)**
[Decision No. B-41-2007] (IP) (Docket No. BCB-2567-06).

Summary of Decision: The Union alleges that the City violated NYCCBL § 12-306(a)(4) by refusing to bargain in good faith prior to implementing the CityTime timekeeping system utilizing biometric hand-geometry at the Department of Design and Construction. The Board found that the Union had failed to establish that the City had failed or refused to bargain the issue with the certified bargaining representative at the Citywide level, or that considerations special and unique to the bargaining unit represented by Local 375 created an obligation to bargain with Local 375. Accordingly, the Board dismissed the charge in its entirety. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

CIVIL SERVICE TECHNICAL GUILD, LOCAL 375,

Petitioner,

-and-

THE CITY OF NEW YORK and DEPARTMENT OF DESIGN AND CONSTRUCTION,

Respondents.

DECISION AND ORDER

On August 14, 2006, the Civil Service Technical Guild, Local 375 (the "Local") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Design and Construction ("DDC") alleging that the City violated NYCCBL § 12-306(a)(4) and, derivatively, (1), by refusing to bargain with the Local in good faith prior to implementing the CityTime timekeeping system and biometric hand-geometry scanners ("Scanners")

used in conjunction with CityTime for certain employees. The City in response has argued that the City had in a series of discussions raised the implementation of CityTime with the Citywide bargaining representative, that no objections were raised to the implementation, that timekeeping procedures are not a mandatory subject of bargaining, that any changes were *de minimis*, and that no practical impact upon the Union's membership was established. After a hearing, the Board finds that the Local has failed to carry its burden of proving that the City failed or refused to bargain the implementation of CityTime with the Citywide bargaining representative, or, alternatively, that special and unique circumstances specific to the employees comprising the bargaining unit represented by the Local were present, giving rise to an obligation on the part of the City to bargain with it. Accordingly, we dismiss the petition in its entirety.

BACKGROUND

After a full hearing in this matter, the Trial Examiner found that the totality of the record established the relevant facts to be as follows.

The Local represents employees in engineering and scientific titles who work at, among other agencies, the DDC, including, but not limited to Architects, Engineers, and Construction Managers. District Council 37 ("DC 37") is the parent body of the Local. Other unions represent employees in different titles at the DDC.

CityTime is an automated timekeeping system that records the daily attendance and leave requests and usage of City employees, replacing paper timesheets and other non-automated methods of recording time, through the use of data collection devices such as the Scanners and desktop PCs. Information is transmitted through the data collection devices to authorized managerial, supervisory

and timekeeping personnel for approval; upon approval the information time data is routed to the City's Payroll Management System.

CityTime has been programmed to facilitate the enforcement of collective bargaining agreements, as well as the applicable provisions of the federal Fair Labor Standards Act ("FLSA").[1] Thus, CityTime incorporates information regarding flexible time, compressed schedules and grace periods. The Citywide Agreement negotiated between the City and DC 37, admitted into evidence as a joint exhibit, provides that

> Employees who are not covered by FLSA whose annual gross salary including overtime, all differentials and premium pay is in excess of the cap shall be required to submit periodic time reports at intervals ... but shall not be required to follow daily time clock or sign-in procedures. Employees covered by the overtime procedures of FLSA shall be required to follow daily time clock or sign-in procedures.

Id., Art. IV § 7 (c).

Thus, employees who are "above the cap" and whose job titles are not covered by the FLSA, are required to record their time on a weekly basis, and, as CityTime has been applied at the DDC, enter their time on CityTime on their PCs, or may use the Scanners if they choose to do so. Employees who are below the cap, by contrast, are required to submit their time on a daily basis, using the Scanners, which employ hand-geometry and employee-specific PIN numbers, confirming the identity of the employee on each occasion that employee "signs" in or out.

At the time the petition was filed, the DDC was one of ten agencies employing CityTime. In its Answer, the City alleged that it had "met with [DC 37] on numerous occasions over the course of two to three years, to discuss the production and implementation of CityTime at city agencies."

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[1] 29 U.S.C. §§ 201-219.

(Ans. ¶ 34.) The City alleged that "DC 37 did not raise objections to the implementation of the CityTime system at city agencies" at these meetings. (Ans. ¶ 36.) The Local, denying the relevance of any position taken by DC 37 as to its members' claims, admitted "upon information and belief" that such meetings "may have been held." (Reply ¶ 11.) The Local denied knowledge and information sufficient to form a belief as to the veracity of the allegations that DC 37 raised no objection to implementation of CityTime, but then asserted that the City "admit[s] in Paragraph 34 of its Answer that it had met with DC 37 'on numerous occasions,' which suggests that the parties were engaged in 'bargaining,' and that the subject of those sessions were 'production and implementation of CityTime at city agencies' notwithstanding [the City's] position that implementation is not a mandatory subject of bargaining." *Id.*

The City and the Local first met regarding CityTime on June 29, 2006, and the Local stated to the City that it had not previously been notified as to the implementation of CityTime. The City, however, had met with representatives of DC 37 six times between May 2003 and September 2005 to discuss CityTime. The City and the Local next met on July 20, 2006, during which, the Union avers, DDC Commissioner David Burney implied that if the decision was his, Scanners would not be used at the DDC. On July 21, 2006, the Local's President, Claude Fort, requested that the City defer the implementation of CityTime until the parties had an opportunity to bargain over it. The City responded on July 27, 2006, informing Fort that implementation would proceed as scheduled and, at an August 1, 2006, meeting, informed the Local that CityTime was to be implemented at the DDC on or about August 7, 2006. The Scanners were installed between June 5 and July 31, 2006, and activated on September 26, 2006.

At the hearing, the Local did not call any witnesses or submit documentary evidence

controverting the allegation that the City met with DC 37 on the subject of CityTime. Nor did it call any witnesses or submit any documentary evidence rebutting the allegation that, at these meetings, DC 37 did not raise objections to the implementation of CityTime.

Testimony from the City's witnesses established that the basic CityTime program was designed so that it could be configured to agency requirements, and thus varied in its configuration from agency to agency. Michael Secker, employed by the City's vendor for implementation of CityTime, Spherion Consultants, stated that the testing "is done on a Citywide basis except on occasions where there is an agency specific requirement." (Tr. 237-238.) He explained

> CityTime has a lot of configurations available because agencies operate in different ways. So we have requirements that CityTime should be able to operate in a different way depending on what the agency needs.

(Tr. 238.)

Secker went on to testify to specific areas of variation in CityTime, customizing schedules to comply with an agency's practices ("flex bands" or other flex time arrangements, meal times), and the agency's timesheet approval process. Secker described the "current methods of capturing time" by CityTime, as "entering it directly onto the time sheets on [the employee's] Web browser or using the biometric hand scanners." (Tr. 243.)[2]

The Local called testimony tending to establish its claims regarding several forms of harm stemming from the implementation of CityTime. Union witnesses testified that:

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[2]We decline the Local's request to include its allegations concerning the subsequent WebClock methodology of recording time in this matter because WebClock is the subject of separate, subsequently filed, improper practice petitions brought both by the Local and by DC 37, the Citywide bargaining representative, which are ongoing at this writing. No evidence concerning WebClock was proffered at the hearing, or contained within the pleadings herein.

• The use of biometric Scanners is more intrusive than the previously used sign-in sheets;

• The Scanners require greater physical participation and more frequent timekeeping activity;

• Scanners are unsanitary and/or unpleasant to use;

• Scanners may be overcrowded or nonfunctional, resulting in false lateness results;

• CityTime changes the prior flexibility with respect to "making up" *de minimis* lateness;

• CityTime rounds employees' time to the quarter hour, increasing lateness in the record;

• CityTime processing time requires employees to stay later than their "log out" times; and

• CityTime complicates timekeeping for employees in the field.[3]

On July 31, 2007, the last day of hearings, the Trial Examiner brought to the attention of the parties the Court of Appeals's decision on June 12, 2007 in *Mayor of the City of New York v. Council of the City of New York*, 9 N.Y.3d 23 (2007), and gave them the opportunity to submit letter briefs as to that decision's impact on the questions of which bargaining agent, if any, would have the right to bargain the implementation of CityTime under NYCCBL § 12-307, and what effect that finding would have on Local 375's raising the alleged improper practice before the Board. (Tr. 636-638.) The parties were offered an opportunity to present further factual testimony in support of their answers to these questions, but only if they requested to do so, and accompanied their request with an offer of proof.

The Local, in its response, stated that it "does not believe that additional evidence is needed to determine whether, as a matter of law, Respondents were obliged to bargain with Local 375

[3]Because of the nature of our ruling, which does not involve a factual finding on these issues, and the pendency of an improper practice proceeding filed by DC 37, docketed as BCB No. 2662-07, which raises related issues, we do not recount the testimony and exhibits submitted by the Local on these questions, in the interest of avoiding prejudice to the parties in that matter.

regarding implementation of CityTime and the biometric hand-geometry scanners at DDC." (Local August 2, 2007 Letter at 1). The Local relied upon the facts in the record, and on the website of the Office of Payroll Administration ("OPA"), to establish its claims. Thus, the Local asserts, the OPA website states that "CityTime is being implemented on an agency by agency basis ... Your agency will select the method that you use, based on location and business requirements. Depending on your agency selection, this method might be one or a combination of several methods."[4] *Id*.

The City, by contrast, expressed a desire to adduce the testimony of its chief negotiator of the Citywide Collective Bargaining Agreement to "resolve the factual issue of what has been the past practice between the City and the municipal unions representing employees subject to the career and salary plan with regard to negotiating overtime and time and leave rules." (City August 2, 2007 Letter at 1). The City then stated that it

> is the City's position that the language of New York City Collective Bargaining Law § 12-307(a)(2) and the plain language of the Citywide Agreement clearly establish that only the bargaining representative certified by the Board of Certification to negotiate overtime and time and leave rules (District Council 37) may negotiate such issues as they apply to CityTime ...

(City Letter at 3).

Based on these representations, the Trial Examiner, by letter dated August 9, 2007, denied the City's request for further hearings and closed the record:

> the parties agree that the questions raised turns upon the language of §12-307(a)(2) as related to the evidentiary record raised in this case.

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[4]Notably, the language cited by the Local is different than, although consistent with, the text of the website annexed to the Petition as Exibit "A". The text as cited by the Local in the letter was viewed on November 14, 2007, at http://www.nyc.gov/html/opa/html/about/city_time.shtml. We grant the Local's request that we take administrative notice of the updated version of the website. *See Correction Officers Benevolent Ass'n*, Deciison B-17-2005 at 3.

> Interpretation of the NYCCBL is classically a question of law, determined within the expertise of the Board, and, in the absence of any ambiguity in the law or in the contract, evidence of past practice in conformity with the text of the statute and Citywide Agreement is not necessary, but rather would at best be cumulative. *See, e.g., Aeneas McDonald Police Benevolent Ass'n v. City of Geneva*, 92 N.Y.2d 326, 333 (1998). The City has not claimed any ambiguity in the NYCCBL section at issue, and therefore has not established any need to adduce testimony consistent with the language or plain meaning of either. Moreover, Local 375's concern with incurring any further delay is well taken. Thus, in the absence of any clear purpose to be served by the testimony, as distinct from the legal arguments stemming from the NYCCBL and the Citywide, no further hearings will be held, and the factual record is hereby deemed closed.

Id. at 2.

POSITIONS OF THE PARTIES

Union's Position

The Local contends that the City's actions have resulted in several improper practices. First, the City unilaterally implemented CityTime at the DDC and activated Scanners without affording the Local a good faith opportunity to bargain. CityTime changed time, leave and attendance policies, as well as the units of measure for time and attendance. Under the old system, time was calculated to the minute, while under CityTime it is automatically rounded. A 9:08 a.m arrival time is rounded up to 9:15 a.m., while a 5:07 p.m. departure time is rounded down to 5:00 p.m. An employee, therefore, could lose up to 14 minutes per day, and could thus appear to have missed fifteen minutes of work, with possible disciplinary ramifications, when, in fact, he only missed one. Prior to CityTime, supervisors and employees had flexibility with respect to timekeeping. A nine-to-five employee who arrived 15 minutes late could arrange with his supervisor to work, at regular time, to 5:15 p.m. The sign-in sheets would accurately record the arrival time as 9:15 a.m. and departure

time as 5:15 p.m., while the timesheets may state 9:00 a.m. and 5:00 p.m. With CityTime, no such discretion exists; the employee's arrival would be recorded as late (9:15 a.m.), the employee would have to request overtime, and have it formally approved, in order to work to 5:15 p.m.

Pre-implementation bargaining was required because the new system constituted a "material change in the degree of employee participation" and is "more intrusive" than the prior time keeping system. (Pet. at ¶ 7.) CityTime is more complex and more time consuming than the use of timesheets. Article IV, § 16(b), of the Citywide Agreement provides a five minute grace period, but that period is intended to cover occasional and unanticipated delays in arrival, not timekeeping functions. The Scanners require greater employee participation as well, specifically, the creation of a biometric template of the employee's palm. The Scanners are more intrusive than sign-in sheets because they require the insertion of a body part into a machine.

Second, the City has refused to bargain over the practical effects of implementing CityTime and the Scanners, which include the lengthening of the work day by the additional time required to use CityTime, forcing employees to arrive early to avoid being perceived as late, and/or modifying the grace period, in violation of NYCCBL § 307(b).

Moreover, the Local argues, the "City has clearly treated the implementation of CityTime and the data collective devices as an agency (department)-level matter, and that variables from agency to agency would in any event preclude Citywide bargaining." (Local August 2, 2007 Letter at 1.)

City's Position

First, the Local's claims should be deferred to arbitration as they require an interpretation of the Article IV, §§ 7(c) & 16(b), of the CityWide Agreement. Second, Respondents do not have a duty to bargain regarding CityTime as it is a management prerogative to install timekeeping

equipment, and such installation becomes bargainable only if it impacts the terms and conditions of employment. CityTime merely entails changing the timekeeping procedure from a manual/paper procedure to a mechanical/automated procedure, requires no greater employee participation, and is no more intrusive.

The City further denies that CityTime changes time, leave or attendance policies. No informal agreements between employees and their supervisors regarding time and attendance were condoned by the agencies, are not part of the agreement between the parties, and the variation from such cannot, therefore, be a mandatory subject of bargaining.

Third, the implementation of CityTime has had no practical impact; there have been no complaints of employees losing time due to it. The proper forum for a practical impact claim is a scope of bargaining petition, which Petitioner has not initiated, nor the Board resolved, and until there is a determination of any claim of practical impact, any claim of refusal to bargain over such is premature. Fourth, there has been no interference with union members or their rights, nor has Petitioner put forth any evidence of anti-union animus or improper motive.

The City then argues that the language of NYCCBL § 12-307(a)(2) and the plain language of the Citywide Agreement clearly establish that only the bargaining representative certified by the Board of Certification to negotiate overtime and time and leave rules may negotiate such issues as they apply to CityTime. The City claims that if the Board must negotiate over the implementation of CityTime at the DDC, which implementation effects employees in the career and salary plan represented by a variety of bargaining units at the DDC, and directly impacts on overtime, and time and leave provisions in the Citywide Agreement, such negotiations must be conducted with the duly authorized Citywide bargaining representative, DC 37. Thus, even in the event that the Board finds

that the Local has proven a unilateral change took place that constitutes a breach of the duty to bargain, no bargaining order should issue with respect to the Local.

Finally, the City argues that to the extent time and leave requirements for the FLSA covered employees are mandated by the FLSA, they constitute a prohibited subject of bargaining.

DISCUSSION

As a threshold matter, we find that this Board has jurisdiction over the Local's claims, and that the City's argument that we should defer to arbitration is ill-founded. NYCCBL § 12-309(a)(4) vests in this Board exclusive jurisdiction "to prevent and remedy improper public employer ... practices as such practices are listed in section 12-306;" among such improper employer practices is "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining..." NYCCBL § 12-306(a)(4). On the face of the pleadings, the Local's claim that the City has refused to bargain with respect to the implementation of CityTime sounds not in the terms of the collective bargaining agreement, nor yet even in the Citywide Agreement, but rather raises claims over which this Board has jurisdiction. *See Social Serv. Union L. 371*, Decision No. B-31-2007 at 10-11; *District Council 37, Local 1508*, Decision B-23-2006 at 11.

As we have previously noted, this Board, like the Public Employment Relations Board ("PERB"), must comply with Section 205.5(d) of the Civil Service Law, which provides in pertinent part:

> ... the board shall not have the authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

District Council 37, Decision B-23-2006 at 10-11.

This Board has thus declined to exercise jurisdiction over improper practice claims "when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement or mutually agreed-upon policies." *Id., quoting Civil Serv. Bar Ass'n, Local 237, Int'l Bhd. of Teamsters*, Decision No. B-24-2003 at 10-11; *citing District Council 37, Local 3621*, Decision No. B-6-2006; *District Council 37*, Decision No. B-36-2001. Thus, we have stated that when "a claim under § 12-306(a)(4) that a public employer changed a policy on a mandatory subject without bargaining also involves a matter that is arguably covered by a negotiated agreement and the claim under the NYCCBL could be resolved in the arbitral process, this Board will defer to arbitration." *Id.; citing Civil Serv. Bar Ass'n, Local 237*, Decision No. B-24-2003 at 11.

However, in this case, no provision of the collective bargaining agreement has been raised by either the Local in support of its claim, nor by the City, as a potential source of the claimed right involved. *See Uniformed Sanitationmen's Ass'n*, Decision B-68-90 at 18-19; *District Council 37*, Decision B-23-2006 at 13. Nor does the City's mere citation to the Citywide Agreement address the merits of the claim, but rather forms part of its *statutory* argument that the Local is not entitled to bargain this issue with the City. *Id; see generally Civil Serv. Bar Ass'n*, Decision B-9-2000 (mere reference to collective bargaining agreement does not preclude analysis of elements of improper practice claim); *Uniformed Firefighters' Ass'n*, Decision B-39-2006 at 14-15 (same). Accordingly, this claim is properly before us.

To establish a claim that an employer has imposed a unilateral change and thus violated the duty to bargain in good faith, a petitioner must establish that (1) the employer has refused or failed to bargain to either fruition or impasse; (2) with the appropriate certified bargaining representative;

(3) with respect to a mandatory subject of bargaining; and (4) has unilaterally changed the terms and conditions of employment in a legally cognizable manner. *Uniform Fire Officers Ass'n*, Decision B-17-2001 at 6-7; *District Council 37, L. 376*, Decision No. B-20-2007 at 9-11 (citing, inter alia, *Town of Stony Point (PBA)*, 26 PERB ¶ 4650 (1993)); *see also, District Council 37*, Decision No. B-13-98 at 16-17.

In the instant case, the Local has not established, at a minimum, the first two elements. Therefore we need not opine as to the applicability of the remaining elements, especially in view of pending improper practice cases raising similar issues.

The Local, and not the City, has the burden of proving that the City had an obligation to bargain with it as to the issues implicated in this matter. *District Council 37, L. 376*, Decision No. B-20-2007 at 11. The Local's claim must be resolved with reference to Section 12-307a(2) of the NYCCBL, which states that:

> ...[P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages ..., hours (including but not limited to overtime and time and leave benefits) [and] working conditions ... except that ...:
>
> (2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employees organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved.

We have routinely held, and the State's highest court has recently reaffirmed, that any issue

that "involves a matter of time and leave [] is among the subjects that ordinarily must be mandatorily bargained at the citywide level" pursuant to section 12-307(a)(2). *United Federation of Teachers*, Decision No. B-28-2001 at 7; *Social Services Employees Union, L. 371*, Decision B-18-81 at 12; *see also Mayor of the City of New York v. Council of the City of New York*, 9 N.Y.3d 23, 30 (2007)("Thus, city-wide collective bargaining is the general, though not invariable, rule as to matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules.")(editing marks omitted).

However, we have recognized, as have the courts, that where the representative of a bargaining unit can show "special and unique circumstances" applicable to the unit, then the certified bargaining representative for that unit may in fact seek to bargain with respect to issues normally relegated to the Citywide level of bargaining. *United Probation Officers Ass'n*, Decision B-55-88 at 9;*United Federation of Teachers*, Decision B-28-2001 at 7-8; *see also, Mayor of the City of New York v. Council of the City of New York*, 6 Misc.3d 1022A, 800 N.Y.S.2d 349 at *2 (Sup. Ct. N.Y. Co. 2005) , *aff'd*, 38 A.D.2d 89 (1st Dep't 2006), *aff'd*, 9 N.Y.3d 23 (2007)("However, certain issues, such as overtime and time-and-leave matters may not be raised at the unit level of negotiations unless there are considerations special and unique to the unit").

In this case, the Local has argued that the mere fact that CityTime is being "rolled out" on an agency-by-agency basis and the resultant agency-specific permutations on the CityTime software suffice to establish "special and unique considerations" justifying recourse to the unit level of bargaining. However, this claim is unpersuasive.

First, the Local has admitted that it does not represent all of the employees at the DDC, and has presented no evidence tending to show that its members, as opposed to other employees at the

DDC subject to CityTime, were uniquely affected by the agency-wide implementation of CityTime. *See United Probation Officers Ass'n*, Decision B-27-95 at 7-8; *compare, United Probation Officers Ass'n*, Decision B-44-86 at 15-16 (special and unique circumstances established where application of mandatory subject is "neither universally nor automatically provided" but rather "are informed by a large measure of discretion ...with respect to standards and criteria ... reflecting unique attributes of the particular trade, occupation or profession of the bargaining unit involved."); *United Federation of Teachers*, B-28-2001 at 7-8 (School Security Supervisors who were functionally transferred from Board of Education to the City presented unique and special circumstances as their prior contractual rights to holidays were thereby invalidated, and the application of Citywide provisions would result in their working on days when the schools were closed). Indeed, the Local submitted no evidence tending to distinguish unit members at the DDC from non-bargaining unit members at either the DDC or at other agencies.[5]

Moreover, we reject the contention that the alleged differences in permutations in CityTime at the DDC mandate bargaining at the unit level. None of the features of CityTime alleged to have established a cognizable unilateral change – the use of the Scanners, the loss of flexibility in making up minor lateness, the rounding effect, and the "false positive" readings of lateness for congestion at the Scanners or booting up time of the individual PC – has been uniquely related to the implementation of any particular configuration of CityTime, nor has it been tied only to the

[5]In its petition and supporting affidavits in *Civil Service Technical Guild, Local 375 v. City of New York*, Index No. 109626/07, of which the Local requested the Board to take administrative notice of portions in its August 2, 2007 Letter, the Local, far from relying on "unique and special circumstances" to its members sought a City-wide injunction against the implementation of CityTime "at any new agencies" throughout the City. *See,* Order to Show Cause; Affirmation of Rachel J. Minter, sworn to July 13, 2007, at ¶ 29.

bargaining unit involved here. Rather, as Seckel's unrebutted testifimony established, the various permutations in CityTime chosen for the rollout at the DDC were geared to customize it to the prior practice of the agency in question. These changes thus "represent a change in technology rather than a change in [function]," and do not in and of themselves constitute a "unique and special consideration." *United Probation Officers Ass'n*, Decision B-27-95 at 7. We accordingly find that the Local has failed to establish that special or unique circumstances exist in this matter such that bargaining at the unit level was appropriate.

We likewise reject the notion that the Local is entitled to a bargaining order in favor of DC 37 as Citywide bargaining representative. No evidence or argument has been adduced to suggest that the Local has standing to assert the rights of its parent in such a manner, and we decline to create on this record an exception to our well-established rule that a local union does not have standing to assert a failure to bargain claim as to a subject of Citywide bargaining, or indeed the rights of employees it does not represent in general. *See, e.g., United Probation Officers Ass'n*, Decision No. B-27-95 at 7-8 (local lacks standing absent "special and unique circumstances"); *Social Services Employees Union*, Decision B-18-81 at 13-14 (same); *Uniformed Firefighters Ass'n*, Decision B-33-97 at 16-17 (standing generally).

Moreover, and independently, we find that the Local failed to establish that bargaining did not take place with the Citywide representative. Notably, the City has alleged that it engaged in a series of discussions with DC 37, the Local's parent union, regarding the implementation of CityTime, and that, in these discussions, DC 37 raised no objection to its implementation. These allegations, if credited, could form the basis of a claim that bargaining had reached fruition, thus satisfying the employer's obligation to bargain over this topic. As we have recently reaffirmed:

> the employer violates (the law) if during the contract term [the employer] refuses to bargain, or takes unilateral action with respect to the particular subject, unless 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.

Uniformed Firefighters' Ass'n, Decision B-39-2006 at 13-14 (*quoting United Probation Officers Ass'n*, Decision No. B-38-89 at 19); *see also District Council 37, AFSCME*, Decision No. B-23-2002 at 13-14, *aff'd*, *District Council 37 v. City of New York,* No. 112450/03 (Sup. Ct. N.Y. Co. Mar. 15, 2004, *aff'd* 22 A.D.3d 279 (1st Dep't 2005).

We do not, in this case, hold that such bargaining to fruition took place; the Local by denying knowledge and information sufficient to form a belief as to what occurred at the series of meetings did not admit that the City's characterization was accurate; in fact, under CPLR 3018, the effect of such a response to an allegation is treated as tantamount to a denial. But the Local did admit the fact of a series of meetings between the City and DC 37, and did not adduce any evidence to sustain its burden of proof that the City failed or refused to bargain to fruition or to impasse. Accordingly, even if we were to find that the Local had standing to bring a claim that the City had failed to bargain with DC 37, we would be obliged to find that the Local failed to carry its proof as such a claim.

Accordingly, the petition is dismissed.

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-2567-06, filed by the Civil Service Technical Guild, Local 375 be, and the same hereby is dismissed in its entirety.

Dated: New York, New York
December 4, 2007

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER