NYSNA, 8 OCB2d 17 (BCB 2015)

(IP) (Docket No. BCB-4090-14)

Summary of Decision: The Union alleged that HHC violated NYCCBL § 12-306(a)(1), (a)(4), and (c)(4) by refusing to comply with an information request and by transferring out unit work. HHC argued that the petition was untimely and that the information requested by the Union is not relevant to, nor reasonably necessary for, the administration of the parties' collective bargaining agreement because it concerns titles not represented by the Union. The Board found that the petition was timely. The Board further found that the information request aids the Union in its duty to respond to its membership and assists the Union in carrying out its statutory responsibilities. Accordingly, the petition was granted as to the information request claim. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

NEW YORK STATE NURSES ASSOCIATION,

Petitioner,

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

INTERIM DECISION AND ORDER

On December 19, 2014, the New York State Nurses Association ("NYSNA") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC"). The Union alleges that HHC violated § 12-306(a)(1), (a)(4), and (c)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by refusing to comply with an information request and by unilaterally transferring unit work that had been exclusively performed by its members. This Interim Decision and Order

addresses only the Union's claim relating to its October 15, 2014 request for information.[1] HHC argues that the petition was untimely and that the information requested by the Union is not relevant to, nor reasonably necessary for, the administration of the parties' collective bargaining agreement because it concerns titles not represented by the Union. The Board finds the petition timely. The Board further finds that the October 15, 2014 request for information aids NYSNA in its duty to respond to its membership and assists the Union in carrying out its statutory responsibilities. Accordingly, the petition is granted as to the information request claim.

BACKGROUND

NYSNA, the City of New York, and HHC are parties to a collective bargaining agreement and a Memorandum of Agreement. NYSNA is the sole and exclusive collective bargaining representative for registered nurses serving in, among other titles, Staff Nurse, Head Nurse, and Nurse Practitioner.

It is undisputed that NYSNA bargaining unit members perform nursing education work at HHC facilities, including conducting nursing orientations, nursing classes, and working one-on-one with individual nurses. NYSNA avers, and HHC denies, that HHC has transferred out nursing education work performed exclusively by titles it represents to employees in titles that it does not represent, such as the Assistant Director of Nursing ("ADN") title, without giving notice to or bargaining with NYSNA. Specifically, NYSNA avers, and HHC denies, that at Bellevue Hospital Center ("Bellevue") and Harlem Hospital Center ("Harlem Hospital"), HHC has failed to fill multiple vacancies arising from the departure of NYSNA bargaining unit

[1] We address the alleged transfer of unit work only to the extent needed to understand the information request claim.

members who were working as educators and has unilaterally re-assigned this NYSNA bargaining unit work to ADNs.

HHC denies that nursing education work was exclusively performed by NYSNA members or that it re-assigned NYSNA bargaining unit work, avers that it has historically assigned nursing education duties to ADNs, and admits doing so at both Bellevue and Harlem Hospital. At Harlem Hospital, HHC hired three ADNs to perform nursing education duties in 2014; one each in July, September, and December.

NYSNA avers that, on or about December 9, 2014, during a nursing practice committee meeting at Harlem Hospital, it raised the issue of NYSNA educator bargaining unit work being re-assigned to ADNs. According to NYSNA, Harlem Hospital's Chief Nursing Officer admitted to a NYSNA representative that Harlem Hospital had decided that when NYSNA bargaining unit educators left their positions, those positions would be eliminated, and that the NYSNA educator work would then be re-assigned to newly-created ADN positions. HHC denies these allegations but admits that Harlem Hospital informed NYSNA that it intends to hire employees in the ADN title to work in its Nursing Education Department at some undetermined point in the future.

April 2014 Information Request

On or about April 1, 2014, HHC's Assistant Vice President of Labor Relations received a letter from NYSNA's Associate Director ("April 2014 Information Request") expressing NYSNA's concerns that:

> HHC is currently engaged in promoting certain members of [NYSNA] from the Head Nurse, Supervisor of Nurses or other titles in our bargaining unit to the title of [ADN]. It is further our understanding and concern that these promotions of bargaining unit members are being made without posting such promotional opportunities or otherwise providing a fair and open opportunity for potential applicants to be informed of the vacancies and to apply for these positions in accordance with applicable law,

> regulation and/or policy. We are also concerned that these promotions might be circumventing bargaining unit pay rates and/or entail an inappropriate use of non-bargaining unit personnel to do bargaining unit work.

(Ans., Ex. E) Accordingly, NYSNA requested pursuant to the NYCCBL that HHC:

1. Provide copies of any and all job postings or notices of vacancies for Assistant Director of Nursing and Associate Director of Nursing positions (or any equivalent title) throughout HHC, sorted by facility, program or site, and including the date of the posting or notice, for the period from January 1, 2013 to February 28, 2014;

2. Provide copies of any and all job postings or notices of vacancies for the bargaining unit titles of Head Nurse and Supervisor of Nurses throughout HHC, sorted by facility, program or site, and including the date of the posting or notice, for the period from January 1, 2013 to February 28, 2014;

3. Provide the names and titles of each person hired, promoted or otherwise selected to assume the position or title of Assistant Director of Nursing, Associate Director of Nursing, or any equivalent title throughout HHC, sorted by facility, and including the date of hire, promotion or selection to assume such position, for the period from January 1, 2013 to February 28, 2014; for each such person specify whether they were hired, promoted or selected from within HHC or from outside HHC, and if from within HHC, state that person's title or position immediately preceding their hire, promotion or selection to assume the new title;

4. For each person identified in paragraph 3 above, provide a copy of the job description, job duties and functional job duties for their position.

(Ans., Ex. E)

In its request, NYSNA stated that it needed the information "[i]n order for us to determine the extent of these practices and whether they violate our collective bargaining agreement, the City-wide agreement, and or HHC or city personnel rules and regulations."

(Ans., Ex. E) NYSNA further explained that the "intent of the above information request is to provide NYSNA, as the legal representative of the registered nurses at HHC, with a clear understanding of the facts and circumstances surrounding the promotion of our members, compliance with contractual pay scales, and preventing the evasion of our contractual rights relating to bargaining unit work and job duties." (Ans., Ex. E)

In or around April 17, 2014, HHC responded to NYSNA's April 2014 Information Request by providing the information requested in item (2) and refusing to provide the rest of the requested information, stating that: "As [NYSNA] is not the collective bargaining representative for either the Assistant or Associate Director of Nursing titles, we do not believe there is an obligation under the NYCCBL to provide the information you requested in items (1), (3) and (4)." (Ans., Ex. F)

October 2014 Information Request

On October 15, 2014, NYSNA's Associate Director sent another letter to HHC's Assistant Vice President of Labor Relations ("October 2014 Information Request") stating that it was writing "to reiterate" NYSNA's request for the information requested in its April 2014 Information Request but not provided by HHC (*i.e.*, information requested in items (1), (3), and (4)). (Pet., Ex. 2) Further, the October 2014 Information Request sought information for an additional eight-and-a-half months. Whereas the April 2014 Information Request sought information for the period January 1, 2013, to February 28, 2014; the October 2014 Information Request extended the period to October 15, 2014.

HHC denies having received the October 2014 Information Request. The Union's verified petition asserts that the October 2014 Information Request was sent to HHC's Assistant Vice President of Labor Relations from the Union's Area Director. Notably, the October 2014

Information Request has the same address and facsimile number as the April 2014 Information Request, the receipt of which HHC does not dispute. The only distinction between the address used on the October 2014 Information Request and address on the letterhead of HHC's Assistant Vice President of Labor Relations is that the information request includes the floor number in addition to the room number. (*Compare* Pet., Ex. 2 *with* Ans., Ex F) In response to HHC's denial of receipt of the October 2014 Information Request, the Union provided the Trial Examiner and HHC with copies of the facsimile documents. (*See* March 6, 2014 Union email and attachment) The facsimile cover sheet is addressed to HHC's Assistant Vice President of Labor Relations, has typed on it "Re: ADNs," and handwritten on it the facsimile number that appears upon the letterhead of HHC's Assistant Vice President of Labor Relations. While the typed date on the facsimile cover sheet is October 8, 2014, the transmittal information printed on the cover sheet states that the facsimile was actually transmitted on October 15, 2014, at 11:46 a.m., to the facsimile number that appears upon the letterhead of HHC's Assistant Vice President of Labor Relations.

After the Union provided a copy of these documents to HHC, HHC reiterated that it had no record of having received the October 2014 Information Request. (*See* March 13, 2015 HHC email) HHC represented that if it had received the October 2014 Information Request, its response would have been identical to its response to the April 2014 Information Request.

POSITIONS OF THE PARTIES

Union's Position

On December 19, 2014, the Union filed the instant petition, requesting that the Board order HHC to provide the information requested in the October 2014 Information Request and

arguing that HHC's failure to provide the information requested in its October 2014 Information Request violates NYCCBL § 12-306(a)(1), (4) and (c)(4).[2] The Union has not alleged any violation related to the April 2014 Information Request. The Union notes that the Board has held that an employer's decision to transfer out work that had previously been exclusively performed by members of the bargaining unit "is inextricably bound to the other mandatory terms and conditions of employment." (Pet. ¶ 28) (quoting *DC 37,* 2 OCB2d 1 (BCB 2009)). The information the Union requested, it argues, relates to HHC's decision to transfer out work performed by its members and, accordingly, HHC is required under NYCCBL §12-306(c)(4) to provide the information.

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[2] NYCCBL § 12-306(a) provides in pertinent part that:

> It shall be an improper practice for a public employer . . .
>
> (1) to interfere with, restrain or coerce public employees in the exercise of rights granted in section 12-305 of this chapter, or to cause, or attempt to cause, a public employer to do so;
>
> * * *
>
> (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."

NYCCBL §12-305 provides in pertinent part that: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . ."

NYCCBL §12-306(c)(4) provides in pertinent part that:

> The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation: . . .
>
> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

HHC's Position

HHC argues that the petition must be dismissed as untimely because an improper practice must be filed within four months of when a petitioner knew or should have known of the acts that were alleged to constitute an improper practice. Since HHC responded to the April 2014 Information Request on April 17, 2014, and the petition was filed in December 2014, HHC argues that the petition is untimely as it was filed eight months after NYSNA knew or should have known HHC's position. HHC does not address the October 2014 Information Request other than to claim that it did not receive it and stating that, had it received it, its "response would have been identical to the response we provided to the April [2014 Information Request]." (HHC March 13, 2015 Email)

Further, HHC argues that the instant Petition must be denied since the information requested by the Union is not relevant to, nor is it reasonably necessary for, the administration of the parties' collective bargaining agreement because the Union does not represent employees in the title of ADN or Associate Director of Nursing. The duty to provide information, HHC argues, is not absolute but circumscribed by the necessity for and the relevancy of the information sought and the reasonableness of the request. HHC argues that it has no obligation to provide irrelevant information and that since it is undisputed that NYSNA is not the collective bargaining representative for HHC employees in the title of ADN or Associate Director of Nursing, the information requested by NYSNA is not relevant to its administration of the parties' collective bargaining agreement.

DISCUSSION

The issue before us concerns the Union's claim that HHC has failed to provide information relevant to the Union's duty to respond to its membership and carrying out its statutory responsibilities, specifically its claim that HHC assigned exclusive bargaining unit work to non-bargaining unit members. The only information request addressed by the Union in its petition was the October 2014 Information Request. We find that the record establishes that HHC received the October 2014 Information Request and that the petition is timely. We further find that the information requested was proper under the NYCCBL as it aids the Union in its duty to respond to its membership and assists the Union in carrying out its statutory responsibilities.

Receipt of the October 2014 Information Request

On the record before us, we find that the Union has established that it faxed HHC a copy of the October 2014 Information Request. The transmittal information on the facsimile cover sheet establishes that on October 15, 2014, the October 2014 Information Request was transmitted to the facsimile number printed on the letterhead of HHC's Vice-President of Labor Relations. The facsimile cover sheet is addressed to HHC's Vice-President of Labor Relations and references "ADNs."[3] Thus, the documentation provided by the Union establishes to our satisfaction that the October 2014 Information Request was faxed to HHC on October 15, 2014. It is well-established that proof that a document was sent creates the rebuttable presumption that the document was received and that the "mere denial of receipt is not enough to rebut this presumption." *Kihl v. Pfeffer*, 94 N.Y.2d 118, 122 (1999). Here, HHC has provided nothing but

[3] We recognize, but accord no weight to, the fact that the typed date on the facsimile cover sheet is October 8, 2014, in light of the fact that the transmittal date printed by the facsimile machine is October 15, 2014.

a mere denial and, thus, has not rebutted the presumption of receipt. Accordingly, we find that HHC received the October 2014 Information Request prior to the filing of the petition.

Timeliness

NYCCBL § 12-306(e) and Office of Collective Bargaining Rule § 1-07(d) set the statute of limitations at four months. Accordingly, "it is well established that an improper practice charge 'must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence.'" *Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *affd.*, *Matter of Mahinda v. City of New York*, Index No. 117487/09 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), 91 A.D.3d 564 (1st Dept. 2012) (quoting *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd.*, *Matter of Raby v. N.Y. Off. of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003) (Beeler, J.)). In addition, "[t]imeliness is an affirmative defense which must be pleaded and proved by the responding party." *Griffiths*, 63 OCB 3, at 11 (BCB 1999); *see also DC 37, L. 420*, 5 OCB2d 19, at 8 (BCB 2012); *UPOA*, 37 OCB 44, at 12 (BCB 1986) ("There is no requirement that the petitioner establish . . . that its claim is timely").

The disputed action in this petition is HHC's failure to provide information in response to the October 2014 Information Request. However, HHC did not raise any timeliness defense regarding the October 2014 Information Request.[4] The petition was filed on December 19, 2014, less than four months after the October 2014 Information Request. Accordingly, it is timely.

Further, the Union's petition does not contain any claims relating to the April 2014 Information Request. Therefore, HHC's assertion that the petition should have been filed within

[4] HHC's only defenses related to the October 2014 Information Request are that it was not received and that the information requested was not relevant. Both of these defenses are addressed in the other section of this decision.

four months of its response to the April 2014 Information Request is not responsive to the claims in the petition. Moreover, HHC did not base its timeliness argument on the assertion that some of the information sought in the October 2014 Information Request was repetitive of information previously sought by NYSNA in its April 2014 Information Request. As that argument is not before us, we have not addressed it here.

Merits

This Board has long held that a public employer's duty to bargain in good faith pursuant to NYCCBL § 12-306(c)(4) includes the obligation "to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." *DC 37, L. 376*, 1 OCB2d 37, at 4 (BCB 2008); *see also COBA*, 63 OCB 9, at 12 (BCB 1999). A "violation of NYCCBL § 12-306(c)(4) necessarily constitutes a violation of the duty to bargain in good faith pursuant to NYCCBL § 12-306(a)(4)." *OSA*, 1 OCB2d 45, at 16 (BCB 2008). Further, "[s]ince the denial of information to which the [u]nion is entitled renders the [u]nion less able effectively to represent the interests of the employees in the unit, the employer's failure to supply the information also interferes with the statutory right of employees to be represented, in violation of NYCCBL § 12-306(a)(1)." *NYSNA*, 3 OCB2d 36, at 17, n. 7 (BCB 2010).

The NYCCBL's duty to provide information "extends to information which is relevant to and reasonably necessary for purposes of collective negotiations or contract administration." *NYSNA*, 3 OCB2d 36, at 13 (quoting *DC 37, L. 2507*, 73 OCB 7, at 21 (BCB 2004)) (quotation marks omitted). Accordingly, "information relevant to and reasonably necessary for consideration of a potential grievance, or to determine if an improper practice occurred, fall

within the ambit of contract administration, and such information must be produced upon request." *NYSNA*, 4 OCB2d 42, at 11-12 (BCB 2011).

While the initial burden is upon the union, it "is not an exceptionally heavy one, requiring only a showing of probability that the desired information is relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NYSNA*, 3 OCB2d 36, at 13 (quoting *Comar, Inc.*, 349 NLRB 342, 354 (2007)) (quotation marks and other citations omitted). However, "the duty to disclose such documentation does not attach when the party's request involves a non-mandatory subject of bargaining or cannot be used in contract administration." *NYSNA*, 3 OCB2d 36, at 13-14. Thus, the obligation to provide information "is not absolute and is circumscribed by the necessity for and relevancy of the information sought and the reasonableness of the request, including the burden on the employer and the availability of the information elsewhere." *Id.* (quoting *County of Ulster*, 43 PERB ¶ 4502 (2010)) (quotation and editing marks omitted).

HHC's argument is that it was not obligated to provide the information requested by the Union because that information "is not relevant to, nor is it reasonably necessary for the administration of the parties' collective bargaining agreement because the Union does not represent employees in the title of Assistant or Associate Director of Nursing." Ans. ¶ 57. We find HHC's argument unavailing. Nothing in the NYCCBL or our caselaw restricts the information a union can request to that concerning titles it currently represents. The pertinent inquiry is whether the information requested can aid a union in fulfilling its statutory obligations to its members. *See NYSNA*, 3 OCB2d 36, at 13 (citing *Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 42 PERB ¶ 4570, at 4773 (2009)).

We find that a union may request information regarding titles it does not represent when such information is relevant to a union's statutory obligations regarding the titles it does represent or is reasonably necessary for the administration of a collective bargaining agreement to which the union is a party. *See NYSNA*, 3 OCB2d 36, at 17. In the instant matter, the Union has met its burden to demonstrate that the information concerning non-bargaining unit employees is relevant to its allegation of transfer of bargaining unit work in violation of the NYCCBL. In *NYSNA*, we found documentation related "to outsourcing and subcontracting of work typically performed by [union members] . . . reasonably necessary to the administration of the Agreement, as the responsive documentation will aid the Union in determining how best to protect its membership from further actions by HHC that could involve the loss of future work from NYSNA's membership." *Id. See also OSA*, 1 OCB2d 45, at 16 (HHC's failure to provide current position description for former union members found unreasonable when it was aware that the union was investigating whether the changes in those employees civil service titles were appropriate). We find here that NYSNA's October 2014 Information Request seeks documentation "that is relevant to the instant matter, . . . aids NYSNA in its duty to respond to its membership, and assists the Union in carrying out its statutory responsibilities." *NYSNA*, 3 OCB2d 36, at 17 (citing *COBA*, 75 OCB 17, at 7 (BCB 2005)).

Accordingly, we find that HHC violated NYCCBL § 12-306(a)(1) and (4) with respect to HHC's failure to disclose information responsive to NYSNA's October 2014 Information Request. *See NYSNA*, 3 OCB2d 36, at 17 & n. 7 (citations omitted).

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 verified improper practice petition filed by the New York State Nurses Association against the New York City Health and Hospitals Corporation, docketed as BCB-4090-14, hereby is granted to the extent that the New York City Health and Hospitals Corporation failed to respond to the New York State Nurses Association's October 15, 2014 information request; and it is further

ORDERED, that the New York City Health and Hospitals Corporation produce, within thirty (30) days of the date of this Order, the information requested in the October 15, 2014 information request.

Dated: May 28, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
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