# *DC 37*, 9 OCB2d 30 (BCB 2016)

(IP) (Docket No. BCB-4127-15)

***Summary of Decision:*** The Union alleged that HHC violated NYCCBL §§ 12-306(a)(1), (a)(4), and (c)(4) by failing to comply with the Union's information request concerning the use of temporary employees. HHC argues that is has complied with the information request on a rolling basis and continues to do so, and that it is foreclosed from disclosing certain information due to non-disclosure agreements that it has signed. The Board found that HHC violated the NYCCBL by failing to promptly provide the information requested. Therefore, the improper practice petition was granted. ***(Official decision follows.)***

---

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

**In the Matter of the Improper Practice Petition**

***-between-***

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,**

***Petitioner,***

***-and-***

**NEW YORK CITY HEALTH + HOSPITALS,**

***Respondent.***

---

## DECISION AND ORDER

On September 11, 2015, District Council 37, AFSCME, AFL-CIO, ("Union" or "DC 37") filed an improper practice petition against New York City Health + Hospitals.[1] The Union alleges that HHC violated §§ 12-306(a)(1), (a)(4) and 12-306(c)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by

[1] We refer to New York City Health and Hospitals Corporation as "New York City Health + Hospitals" or "HHC" throughout this Decision and Order.

failing to fully comply with the Union's information request in a timely manner concerning the use of temporary employees. HHC argues that is has complied with the information request on a rolling basis and continues to do so, and that it is foreclosed from disclosing certain information due to non-disclosure agreements that it has signed. The Board finds that HHC violated the NYCCBL by failing to promptly provide the information requested. Thus, the improper practice petition is granted.

## BACKGROUND

The Union is an amalgam of 53 local unions representing approximately 120,000 public employees in various agencies, authorities, boards, and corporations throughout the City of New York. The Union and HHC are parties to a collective bargaining agreement ("Agreement").

In early 2015, the Union requested, and received, a list of temporary employees at North Central Bronx Hospital and Jacobi Medical Center. On May 11, 2015, the Union sent HHC a letter ("May 11 Letter") requesting information about the use of temporary employees who perform bargaining unit work at additional HHC facilities. In particular, the May 11 Letter requested:

> [A] list of every temporary worker at every HHC facility who performs duties that are similar to those performed by a DC 37 bargaining unit member. Include identification of what facility the temporary employee performs such duties, the type of work performed, the name of the temporary employment agency, the rate provided to the agency, and the original date of hire.

(Pet. Ex. 1).

The Union sent a second letter to HHC on May 21, 2015 ("May 21 Letter"). That letter sought:

> [A] list of every HHC employee who also performs work at an HHC facility, but through a temporary agency or an affiliate. Include the names of the employee, identification of what facility the HHC employee works at, as well as the temporary affiliate/location, the

> type of work performed, the name of the temporary/affiliate agency, the rate provided to the agency, and the original date of hire.

(Pet. Ex. 2). There is no evidence that HHC responded to these information requests prior to the filing of the instant improper practice charge.

On September 11, 2015, the Union filed the instant petition. During the next several months, this proceeding was held in abeyance by request of the parties as they attempted to reach a negotiated outcome. The proceeding was resumed on January 25, 2016, and the HHC filed its Answer on August 11, 2016. HHC requested and received several extensions of time to file an Answer, with the Union's consent, as it simultaneously asserted that it was attempting to comply with the information request.

On May 10, 2016, HHC provided the Union with a spreadsheet identifying individuals at certain HHC facilities who are currently working for a temporary agency.[2] The spreadsheet also identified the position that each individual has with a temporary agency. However, the spreadsheet did not include the rate HHC provided to temporary agencies, the date of hire, and did not identify whether the individuals were employees of HHC. Additionally, the spreadsheet did not include information about temporary workers employed at the following HHC locations: Kings County Hospital Center, Woodhull Medical and Mental Health Center, Metropolitan Hospital Center, McKinney Nursing and Rehabilitation Center, Gouverneur Healthcare Services, Seaview Hospital and Rehabilitation Center, Cumberland Diagnostic and Treatment Center, or Renaissance Health Care Network Diagnostic and Treatment Center.

On or about August 9, 2016, HHC provided the Union with an updated spreadsheet concerning temporary workers at Kings County Hospital Center. This spreadsheet also identified

[2] The employees at issue were placed in a variety of titles, including Activity Therapist, Administrative Assistant, Pharmacy Technician, Phlebotomist, Radiology Technologist, Registrar, Social Worker, and others.

whether an individual is also employed by HHC. However, the spreadsheet did not include the rate provided to the temporary employment agency, nor did it include data concerning temporary workers at the seven other facilities.

HHC maintains that it is attempting to provide additional information as it becomes available.

## POSITIONS OF THE PARTIES

### Union's Position

The Union asserts that HHC has interfered with its members' bargaining rights, in violation of NYCCBL § 12-306(a)(4) and (c)(4).[3] In particular, it contends that HHC's response to the Union's request for information has been incomplete and therefore violates the duty to bargain in good faith. It further asserts that the failure to supply information interferes with the statutory right of employees to be represented by a union and thus also constitutes a violation of NYCCBL § 12-306(a)(1).[4]

The Union argues that the pace of HHC's compliance is too slow to satisfy HHC's obligations. Additionally, in response to HHC's assertion that the requested information is protected by a nondisclosure agreement ("NDA"), the Union argues that an NDA cannot shield HHC from its obligations under the NYCCBL. It contends that the NYCCBL does not contain

[3] NYCCBL § 12-306(a)(4) establishes 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 with certified or designated representatives of its public employees[.]"

NYCCBL § 12-306(c)(4) establishes that the duty to bargain in good faith 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."

[4] NYCCBL § 12-306(a)(1) establishes that it is an improper practice for a public employer to "interfere with, restrain or coerce public employees in the exercise of their rights . . . "

any such exception to the duty to disclose. Moreover, it asserts that an NDA in HHC vendor agreements would be inapplicable to the Union because the Union is not a marketplace competitor with the temporary agency. It also argues that an NDA should not apply to the information request because it concerns how a public entity is spending public funds. Thus, the Union asserts, the NDA should not foreclose the disclosure of information because such information is necessary for the Union to carry out its statutory responsibilities.

The Union requests that the Board of Collective Bargaining ("Board") order that HHC cease and desist from refusing to provide the requested information, comply with its information request, post appropriate notices, and grant further relief as may be proper.

**HHC's Position**

HHC contends that it is unable to provide information regarding the salary or how much the temporary workers are paid through the temporary agencies.[5] That information, it explains, is contained in agreements between HHC and the temporary agencies and HHC asserts that these vendor agreements contain NDAs that foreclose it from supplying the requested information. HHC has not entered any such NDAs into the record.

To the extent the information requested is not subject to an NDA, HHC asserts that it is endeavoring to remain responsive to the Union's requests. It contends that it is working to provide responsive information as it is made available.

[5] We note that the information request does not request documents regarding how much temporary workers are paid through temporary agencies. The Union actually requested "the rate provided to the agency." (Pet. Exs. 1 & 2) We treat the HHC's position as regarding this request.

## DISCUSSION

The 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 "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." This duty extends to information that is relevant to and reasonably necessary for purposes of collective negotiations or contract administration. *See DC 37*, 6 OCB2d 8, at 9 (BCB 2013); *PBA*, 73 OCB 14, at 10-11 (BCB 2004) *affd. as modified*, *Patrolmen's Benevolent Assn. v. City of New York*, No 1113062/04 (Sup. Ct. N.Y. Co. Feb. 4, 2005), *affd*., 27 A.D.3d 381 (1st Dept. 2006). Moreover, since the denial of information to which the union is entitled renders a union less able to effectively 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). *See NYSNA*, 8 OCB2d 17, at 11 (BCB 2015).

The Union's burden "is not an exceptionally heavy one, requiring only a showing of probability that the desired information is relevant and that it would be use of use to the union in carrying out its statutory duties and responsibilities." *DC 37*, 6 OCB2d 8, at 9 (BCB 2013) (quotations omitted) (citing *NYSNA*, 3 OCB2d 36, at 13 (BCB 2010)). Assuming the information request is reasonable and necessary for this purpose, an employer that does not possess the requested information must make a good faith effort to obtain the information sought. *See DC 37*, 6 OCB2d 8, at 9 (citing *PBA*, 73 OCB 14, at 11).

HHC does not dispute that the requests for information set forth in the May 11 Letter and the May 21 Letter are relevant to or reasonably necessary for collective bargaining or contract administration purposes. Indeed, it states that it is in the process of providing the majority of the

information requested. HHC specifically objects only to providing rates that it pays temporary agencies and maintains that NDAs contained in contracts with outside vendors prevent it from supplying this information.

At the outset, the duty to disclose is a component of a party's duty to bargain in good faith and an expressly stated obligation under the NYCCBL. *See* NYCCBL § 12-306(c); *DC 37*, 6 OCB2d 8, at 9 n. 5. This duty 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." *NYSNA*, 8 OCB2d 17, at 12. Our case law does not permit a party to avoid this obligation simply by contracting with a third party not to release information. Indeed, HHC has neither provided this Board with copies of its vendor agreements and the NDAs, nor has it cited any authority to support its position that these clauses override its obligations under the NYCCBL.

To the extent that HHC's argument may be characterized as an allegation that the rate paid to temporary agencies is confidential, HHC has not met its burden to establish such a defense. In addition to failing to provide copies of the NDAs, it has not identified the scope of the NDAs and the circumstances under which they might otherwise permit disclosure. *See NYSNA*, 3 OCB2d 36, at 14 (BCB 2010) (ordering that HHC disclose information where HHC failed to demonstrate that the information sought in the request, *inter alia*, "contains confidential information that HHC cannot disclose"). Thus, we are unable to consider whether the NDAs purport to protect HHC against the disclosure of the information requested here.

Our finding here is consistent with those of the New York State Public Employment Relations Board ("PERB"), which has held that "when a party objects to an information request on confidentiality or privilege grounds, that party has the burden to explain fully and clearly the

facts and circumstances upon which the claimed exemption is based." *State of New York*, 41 PERB ¶ 3009 (2008) (finding that the public employer had a duty to disclose the contents of an employee's disciplinary investigatory file where the employer had only asserted a generalized claim confidentiality that did not, *inter alia*, identify the specific material it believed was exempt from the duty to produce).

Similarly, in *Buffalo Professional Firefighters Association*, 49 PERB ¶ 4511 (2016), an administrative law judge found that a public employer could not withhold documents relating to searches of a criminal record database, despite the employer's assertions that it was conducting an ongoing investigation and that the material in the database was confidential. In particular, the employer neither provided any evidence of an ongoing criminal investigation nor identified specifically why the confidentiality restrictions applicable to the database would prohibit disclosure of documents responsive to the union's request. Additionally, in *Hampton Bays Teachers' Association*, 41 PERB ¶ 3008 (2008), PERB held that even where a party offers a legitimate reason for failing to comply with an information request, it must "engage in a good faith effort with the requesting party aimed at accommodating the need for the requested information."[6] Accordingly, on the record before us, HHC has not established that an NDA justifies its failure to disclose information relating to the rate provided to temporary agencies. *See NYSNA*, 3 OCB2d 36, at 17.

[6] We note that confidentiality concerns do not necessarily preclude the production of relevant information, but may warrant modification of what is produced. The National Labor Relations Board ("NLRB") has similarly found that an employer must offer an accommodation that meets the needs of both parties even where the employer has raised confidentiality concerns. *See Allen Storage*, 342 N.L.R.B. No. 44, at 502 (2004); *Minnesota Mining & Mfg. Co.*, 261 N.L.R.B. 27, at 31 (1982) *enfd* 711 F.2d 348 (D.C. Cir. 1983).

We further find that here HHC's assertion that it is continuing to provide information responsive to the request is not a defense. HHC has failed to comply with the information request within a reasonable time period and has provided no explanation for its failure to do so. This Board has held that public employers must respond to information requests within a reasonable amount of time. *See DC 37*, 6 OCB2d 8 (BCB 2013); *OSA*, 1 OCB2d 45 (BCB 2008). For example, in *DC 37*, in which we found that the Department of Parks and Recreation unreasonably delayed its response to an information request, DPR only began to partially comply five months following the initial request, and after the improper practice charge had been filed. 6 OCB 2d 8, at 10-11.[7]

Similarly, here, one year after the initial request, HHC provided only partial information and not until after the initial Petition was filed. The Union submitted two separate information requests in May 2015. The improper practice petition was filed in September 2015 and HHC began to provide information in May 2016. There is no evidence that HHC even responded to the May 2015 information requests until after the improper practice petition was filed five months later. Moreover, thus far HHC's response has not been complete. In particular, it has failed to provide any information about the rate provided to the temporary employment agency and data about staffing at seven of its locations. Although it has disclosed some identifying information about employees at 18 facilities, it has not identified the rate provided to staff agencies, the date of hire, or whether the individuals were also employees of HHC.[8]

[7] The union had requested data concerning current and prior staffing for DPR facilities. DPR provided information regarding current staffing after the improper practice petition was filed.

[8] HHC has disclosed whether temporary workers employed at the Kings County Hospital Center are also employed by HHC.

In light of the above, we find that HHC's failure to provide information responsive to the May 11 Letter and May 21 Letter in a reasonably timely manner is a violation of NYCCBL §§ 12-306(a)(1), (a)(4), and (c)(4). Accordingly, this petition is granted.

**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 District Council 37, AFSCME, AFL-CIO, docketed as BCB-4127-15 against New York City Health + Hospitals, be, and the same hereby is, granted; and it is further

ORDERED, that New York City Health + Hospitals provide to District Council 37, AFSCME, AFL-CIO, within thirty (30) days of the date of service of this Decision and Order, any and all information requested in the letters of May 11 and May 21, 2015 that has not been produced as of the date of service of this Decision and Order; and it is further

ORDERED, that New York City Health + Hospitals post the attached notice for no less than 30 days at all locations it uses for written communications with employees represented by District Council 37, AFSCME, AFL-CIO.

Dated: December 6, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
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 the Board of Collective Bargaining has issued 9 OCB2d 30 (BCB 2016), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO and New York City Health + Hospitals.**

**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 District Council 37, AFSCME, AFL-CIO, docketed as BCB-4127-15 against New York City Health + Hospitals, be, and the same hereby is, granted to the extent that New York City Health + Hospitals has violated New York City Collective Bargaining Law §§ 12-306(a)(1), (a)(4), and (c)(4); and it is further**

**ORDERED, that New York City Health + Hospitals provide to District Council 37, AFSCME, AFL-CIO, within thirty (30) days of the date of service of this Decision and Order, any and all information requested in the letters of May 11 and May 21, 2015, which has not been produced as of the date of service of this Decision and Order; and it is further**

**ORDERED, that New York City Health + Hospitals post the attached notice for no less than 30 days at all locations it uses for written communications with employees represented by District Council 37, AFSCME, AFL-CIO.**

New York City Health + Hospitals
(Department)

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.*