



**OFFICE OF LABOR RELATIONS AND COLLECTIVE BARGAINING**  
51 CHAMBERS STREET, RM. 603 NEW YORK, NY 10007

**Department of  
Education**

*Dennis M. Walcott, Chancellor*

December 27, 2012

Monte Klein  
Director, Office of Public Employment Practices & Representation  
New York State Public Employment Relations Board  
80 Wolf Road, Suite 500  
Albany, New York 12205

Dear Mr. Klein:

This office serves as counsel to the New York City Department of Education for matters of Labor Relations and Collective Bargaining.

Enclosed, please find an original and four copies of an Improper Practice Charge against Respondent United Federation of Teachers. Please process the enclosed charge and have the matter scheduled for a hearing as soon as possible.

Respectfully submitted,

David Brodsky  
Director  
Office of Labor Relations and Collective Bargaining  
NYC Department of Education  
49-51 Chambers Street  
Room 603  
New York, NY 10007

cc: Adam Ross, Esq.  
UFT General Counsel  
52 Broadway  
New York, NY 10004

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

**IMPROPER PRACTICE CHARGE**

**INSTRUCTIONS:** File an original and four (4) copies of this Charge with the Director of Public Employment Practices and Representation, New York State Public Employment Relations Board, 80 Wolf Road, Suite 500, Albany, NY 12205-2656. If more space is required for any item, attach additional sheets, numbering item accordingly.

DO NOT WRITE IN THIS SPACE

Case No.

Date Received:

**1. CHARGING PARTY**

a. Name (If employee organization, give full name, including any affiliation and local name and number):

**New York City Department of Education**

b. Address (No. & Street, City and Zip Code, County):

**52 Chambers Street, New York, NY 10007**

Telephone Number: **212-374-6000**

c. Name and title of the representative filing charge:

**David Brodsky, Director, Office of Labor Relations and Collective Bargaining**

d. Name, address and telephone number of attorney or other representative, if any, to whom correspondence is to be directed: **David Brodsky, Director,**

**Office of Labor Relations and Collective Bargaining,**

**51 Chambers Street, Rm. 603**

**New York, NY 10007**

Telephone Number: **212-374-7954**

**2. PUBLIC EMPLOYER AND/OR EMPLOYEE ORGANIZATION AGAINST WHICH CHARGE IS BROUGHT**

a. Name and Address (No. & Street, City and Zip Code, County):

**United Federation of Teachers, Local 2, AFL-CIO**

**52 Broadway, New York, NY 10004**

b. Telephone Number: **212-598-9215**

3. Is the charging party filing a separate application for injunctive relief pursuant to §204.15 of the Board's Rules of Procedure?

YES

NO

**4. VIOLATIONS ALLEGED**

Pursuant to Article 14 of the Civil Service Law, as amended (Public Employees' Fair Employment Act), the charging party hereby alleges that the above-named respondent(s) has (have) engaged in or is (are) engaging in an improper practice within the meaning of the following subsections of Section 209-a of said Act (check the subsection(s) allegedly violated):

If by a public employer

- 209-a.1(a)
- 209-a.1(b)
- 209-a.1(c)
- 209-a.1(d)
- 209-a.1(e)
- 209-a.1(f)
- 209-a.1(g)

If by an employee organization

- 209-a.2(a)\*
- 209-a.2(b)
- 209-a.2(c)\*

\* If the charge alleges a violation of Sections 209-a.2(a) and/or (c) of the Act based on an employee organization's processing of or failure to process a claim that a public employer has breached its agreement with such employee organization, identify the public employer:

a. Name and Address (No. & Street, City and Zip Code, County):

b. Telephone Number:



## **RIDER TO IMPROPER PRACTICE CHARGE**

### **NATURE OF THE ACTION**

1. This action arises from Respondent's failure to negotiate in good faith in violation of §209-a(2) of the Taylor Law. Specifically, Respondent, United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (the "Respondent" or "UFT"), has (i) imposed several impermissible preconditions to bargaining; (ii) included non-mandatory subjects of bargaining in the negotiations of mandatory subjects; and (iii) refused to respond to the Petitioner's request to negotiate.

### **BACKGROUND**

2. The New York City Department of Education (the "DOE") is a public employer within the meaning of Section 201 of the Public Employees' Fair Employment Act, Civil Service Law §200 *et seq* ("the Act").

3. The United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (the "UFT") is a public employee organization within the meaning of Section 201 of the Act.

4. The UFT is, pursuant to Article 14 of the Civil Service Law, the sole and exclusive bargaining representative of all non-supervisory pedagogical employees, as well as certain other employees, of the DOE.

5. Dennis M. Walcott is the Chancellor of the DOE.

6. The DOE and UFT are parties to collective bargaining agreements for Teachers and Functional Chapters covering the period from October 13, 2007 to October 31, 2009, the terms of which remain in full force and effect pursuant to Civil Service Law §209-a.1(e).

7. In 2010, New York State passed Education Law §3012-c – regarding the annual evaluation of a teacher's professional performance. Under the new law, teachers' annual professional

performance reviews shall be comprised of multiple measures including, student growth on state assessments, locally-selected measures of student achievement; and other measures of teacher effectiveness, such as observations against a research-based, state approved, rubric. In addition, teachers' annual reviews will conclude with a single composite effectiveness score in one of the following four categories – Highly Effective, Effective, Developing, and Ineffective. This law also provides that certain teachers may appeal their annual rating. In March of 2012, Education Law §3012-c was amended with respect to New York City, to among other things, prescribe certain aspects of the appeals process. (Education Law §3012-c (5)(a))

8. With the exception of measuring student achievement as determined by state assessments, all the elements of the teacher evaluation system are mandatory subjects of collective bargaining between the school district and its local union. Since the passage of the law, not all school districts in New York State, including the DOE, have reached an agreement and implemented a teacher evaluation system in accordance with Education Law §3012-c. Earlier in 2012, at the strong urging of Governor Andrew Cuomo, New York State passed budget legislation which states that school districts must agree to a new teacher evaluation process in accordance with Education Law 3012-c – and receive approval by the New York State Education Department (“SED”)– by January 17, 2013; otherwise the district would not receive state funds that were otherwise appropriated for the district for the 2012-2013 year. (*Chapter 57 of the Laws of 2012, S6257-E/A9057-D*)

9. Accordingly, if the DOE does not have a negotiated and approved teacher evaluation agreement with the UFT by January 17, 2013 it will lose approximately \$250 million state aid. Given the need for SED approval, the practical deadline to reaching an agreement is well before January 17, 2013. Failure to receive this additional funding from the state will directly impact schools and their ability to provide services to its students. Among the possible effects of the loss of funding will

be: class sizes will likely increase; fewer teachers will likely be hired; reductions to staff that support children; cuts to professional development for staff; cuts to after-school programs.

10. As stated above, virtually all elements of the teacher evaluation system are mandatory subjects of negotiation. Accordingly, the DOE and UFT have a legal duty to bargain a teacher evaluation system, pursuant to § 204.2 of the Act.

11. By statute, twenty or twenty-five percent of a teacher's annual rating must be based on student achievement as measured by state assessments or other comparable measures. This portion of the law is not negotiable, and as such, is a prohibited subject of bargaining. However, the remaining elements of the new evaluation system are subject to negotiation. This includes, but is not limited to: a) the development of the locally-selected measures of student achievement that will comprise fifteen or twenty percent of a teacher's annual rating; b) the development of subjective measures of teacher effectiveness, including multiple observations of a teacher's classroom performance against a state-approved rubric, which will comprise the remaining sixty percent of a teacher's annual rating; c) the development of a process that allows a teacher to appeal his/her rating<sup>1</sup>; d) the creation of a Teacher Improvement Plan for teachers rated "Developing" or "Ineffective."

12. As a result of this mandate the DOE and UFT commenced negotiations regarding a teacher evaluation process on April 20, 2012. At this negotiating session, the parties discussed and outlined the aspects of Education Law §3012-c which require negotiation.

13. On June 27, 2012 the parties specifically outlined the following as issues that required negotiation, including : locally-selected measures of student learning; scoring of various sub-

---

<sup>1</sup> The framework for the Appeals process for New York City is set forth in Education Law §3012-c(5)(a) however there are a number of elements of that process that the statute leaves to be negotiated through collective bargaining.

components of the evaluation system; the components of the other measures of effectiveness; the rubric for observations of teachers; the observation process; protocols involving an independent validator; the teacher improvement plan; the appeals process; which teachers are covered by Education Law §3012-c; the timeline for the issuance of teachers' annual ratings; and strategic compensation. The parties also agreed to establish sub-committees to negotiate certain issues. The DOE committed to weekly negotiation sessions.

14. Beginning in early July the parties started to meet more frequently to negotiate teacher evaluation – sometimes multiple times in one day – both in a large-group negotiation session and in subcommittees. The parties had in excess of 25 negotiating sessions (large and small group or sub-committees) during which they discussed and exchanged several proposals on the relevant issues, including those outlined above. Although the parties did not reach agreement on these issues, both parties made progress towards reaching an agreement.

15. In November, 2012, the parties agreed that there were several issues which were significant and difficult to discuss in a large-group setting but nonetheless continued to meet and discuss various open issues in an attempt to reach agreement.

16. The parties continued to meet during November, albeit, more informally and in smaller groups which resulted in additional progress towards reaching an agreement.

17. On December 6th, 2012, in a telephone conversation, UFT Secretary and Executive Assistant to the President, Michael Mendel (“Mendel”)<sup>2</sup> informed DOE Deputy Chancellor Marc Sternberg (“Sternberg”) that the UFT would not reach an agreement with the DOE on a teacher evaluation system unless and until the DOE came to agreement with the UFT on the number of schools the DOE intends to phase-out or close commencing in the 2013-14 school year.

---

<sup>2</sup> Mendel also serves as the UFT’s lead negotiator for these teacher evaluation negotiations

18. Also, on December 6th, 2012, in a separate conversation from that referenced in paragraph 17 with Sternberg, Mendel reiterated the UFT's pre-condition to a teacher evaluation agreement in that he told DOE Deputy Chancellor David Weiner ("Weiner") that the UFT would not reach an agreement on teacher evaluation process unless and until the DOE came to agreement with the UFT on the following issues: the number of schools the DOE intends to phase-out or close commencing in the 2013-14 school year; and the reduction of paperwork for teachers.

19. Prior to the aforementioned conversations with Sternberg and Weiner, the UFT also communicated directly with the DOE's Director of Labor Relations, David Brodsky, informing him that the UFT would not agree to a teacher evaluation system unless it was agreed that the UFT receive an "economic credit" should the parties successfully come to an agreement on a teacher evaluation system, to be applied towards any potential wage increase received in a successor collective bargaining agreement.

20. On December 18, 2012, UFT President Michael Mulgrew ("Mulgrew") sent DOE Chancellor Dennis Walcott an email regarding the ongoing teacher evaluation negotiations and raised a number of issues unrelated to the teacher evaluation negotiations. (*See Mulgrew email annexed hereto as Exhibit A*).

21. Of most significance, Mulgrew informed the Chancellor that he was immediately terminating all negotiations regarding teacher evaluations as required under Education Law §3012-c. Mulgrew established a pre-condition to resuming teacher evaluation negotiations by stating that the Union will only meet with the DOE to discuss a "planning and roll-out process for the new evaluation system -- in case we ever get to such an agreement (on teacher evaluation)." Subsequent to Mulgrew's email from December 18<sup>th</sup> (*Exhibit A*), Mendel sent an email to Weiner on December 21<sup>st</sup> clarifying Mulgrew's email and in the process reiterating that the UFT will not



resume bargaining on “evaluation issues” until the parties meet to discuss “implementation and roll-out” of a new evaluation system. Mendel has also communicated this ultimatum by phone to Weiner. *(See Mendel email annexed hereto as Exhibit B)*

22. On December 18, 2012, on the same day as Mulgrew’s email to Chancellor Walcott, the UFT cancelled two meetings previously scheduled to discuss teacher evaluation. The first was scheduled for December 18, 2012 where UFT and DOE representatives were scheduled to continue discussions regarding issues related to local measures of student achievement and scoring of ratings. Additionally, a December 19, 2012 meeting scheduled to discuss details about the appeals process was cancelled by UFT General Counsel, Adam Ross (“Ross”). In his email cancelling the December 19<sup>th</sup> meeting, Ross states that “Per Michael Mulgrew’s email to the Chancellor, we need to cancel tomorrow morning’s breakfast conversation.” *(See: Ross email annexed hereto as Exhibit C).*

23. The Union’s refusal to continue negotiations and conditioning future negotiations on the parties successfully agreeing on an implementation plan for a new evaluation system is not only improper but also meaningless since the parties have not yet reached agreement on all of the details of a new teacher evaluation system.

24. Further, refusing to meet about and conditioning agreement on the outstanding evaluation issues on wholly unrelated matters that are not mandatory subjects of bargaining, such as which schools the DOE will close or phase-out in the next school year is a violation of the Taylor Law.

25. In short, the UFT has failed to negotiate in good faith the required elements of a teacher evaluation system pursuant to Education Law §3012-c by: 1) demanding agreement on non-mandatory subjects of bargaining or issues that are not required elements of reaching an agreement on a new teacher evaluation system; and 2) by refusing to bargain unless the parties reach agreement on how to implement a new evaluation system. Not only does this constitute a

violation of the Taylor Law, but should the UFT continue to refuse to resume negotiations immediately, the statutory deadline that a new teacher evaluation system be approved by SED by January 17, 2013 will not be met. As a result, approximately \$250 million in state aid will be lost which will undoubtedly have a significant detrimental impact on schools.

26. Moreover, the timing of the UFT's preconditions and refusal to bargain – on the eve of the January 17, 2013 deadline and months after the parties commenced negotiations – is a blatant and irresponsible attempt to extort an agreement on non-mandatory and unrelated subjects to the teacher evaluation that places at serious risk \$250 million of much needed state funding for the DOE.

### **ARGUMENT**

#### **THE UFT HAS FAILED TO NEGOTIATE IN GOOD FAITH REGARDING THE TEACHER EVALUATION PROCESS IN ACCORDANCE WITH EDUCATION LAW 3012-c IN VIOLATION OF §209-A(2)(b) OF THE ACT.**

##### **A. The UFT's making the possibility of reaching a deal through negotiation contingent upon a condition precedent is evidence of bad faith negotiation.**

27. It is well-settled that a teacher evaluation process is a mandatory subject of bargaining, and as such, the DOE and UFT are obligated, pursuant to §204.2 of the Act to negotiate this issue. New York City Board of Education, 8 PERB ¶4528 (1975); Avon Central School District, 20 PERB ¶ 4564. Thus, the UFT is legally obligated, pursuant to §204.2 of the Act, to negotiate a new teacher evaluation system.

28. It is equally well-settled that once negotiations on the teacher evaluation process – a mandatory subject of negotiations – commenced, the UFT was obligated to continue such negotiations in good faith until agreement is reached or impasse procedures are exhausted.

AFSCME Council 66 ex rel. AFSCME Local 930, 24 PERB ¶ 4582 (1991); City of Newburgh, 15 PERB ¶ 3116 (1982).

29. Yet the UFT has brought an abrupt halt to negotiations by refusing to discuss critical elements of the new teacher evaluation system until the DOE agrees on how it will be rolled out. By holding continued negotiations on the components of the evaluation system hostage to agreement on implementation, the UFT is not only putting the cart before the horse, but is also violating the Taylor Law. The UFT's unequivocal refusal to continue to bargain, and the circumstances surrounding its refusal, are a clear violation of its duty to collectively bargain in good faith pursuant to §209-a(2)(b) of the Act.

30. The Board has repeatedly held that bargaining may not be withheld on a condition precedent. Malone Central School District, 37 PERB ¶ 4591(2004). In Malone, the Union's refusal to negotiate until an agreement was reached on health insurance was found to violate the Act. Id.

31. Moreover, whether a party has acted in good faith depends on the totality of the circumstances. Southampton Benevolent Association, 2 PERB ¶3011 (1969). In Southampton, the Board held that a duty to negotiate in good faith means that both parties approach the negotiating table with a sincere desire to reach an agreement. Thus, essentially, good faith is a matter of intention. Whether a party approached the negotiating table with a sincere desire to reach agreement can only be determined by the party's conduct in this regard. Id.

32. Here, it is clear that the totality of the UFT's conduct - namely (i) cancelling bargaining sessions and conditioning resumption of bargaining on the parties agreeing to an implementation plan of an evaluation system yet to be agreed upon; and (ii) conditioning a teacher evaluation agreement on wholly unrelated matters such as school closings and other issues that are either non-mandatory subjects or not required elements of teacher evaluation – demonstrates that it is

not bargaining in good faith with a sincere desire to reach agreement on an evaluation system, as required by both Education Law 3012-c and the Taylor Law.

33. Moreover, the timing of the Union’s termination of negotiations and refusal to bargain –less than three weeks before the statutory deadline for having an approved teacher evaluation agreement and months after negotiations started— underscores that the UFT’s actions are nothing short of bad faith bargaining and a reckless attempt to leverage \$250 million in state funding in order to achieve a broader agenda unrelated to teacher evaluation.

34. Additionally, as per Mulgrew’s December 18, 2012 email, the UFT has unequivocally put an end to any negotiations of the required elements of a teacher evaluation system, on the basis that other issues – not required to reach an agreement on teacher evaluation - should be resolved first. As the Board points out in Malone, “all the aspects of good faith bargaining...require, first and foremost, that the parties meet. Where a party simply refuses to meet and negotiate, or predicate bargaining upon agreement to a condition precedent, a violation of the Act must be found.” Id.

**B. The UFT has failed in its obligation to negotiate in good faith by insisting on agreements concerning non-mandatory subjects or issues not required to implement Education Law §3102-c.**

35. In his telephone calls with Deputy Chancellors Weiner and Sternberg, Mendel made it clear that the UFT would not agree on a teacher evaluation system pursuant to Education Law §3012-c unless the DOE and UFT agreed to the number of schools the DOE intended to phase-out or close commencing in the 2013-14 school year. Mendel also notified Weiner that the UFT will not agree on a new evaluation system until there is an agreement on several other issues not connected or required to reach an agreement on teacher evaluation pursuant to Education Law §3012-c. Among those issues are: i) UFT receiving an economic credit for reaching an agreement on teacher

evaluation to be applied to any potential wage increase included in a successor agreement to the currently expired CBA; and ii) the DOE's agreement to a reduction in paperwork for teachers. While both are indeed mandatory subjects of bargaining in connection with negotiations of a successor collective bargaining agreement, neither are required to reach an agreement on a teacher evaluation system pursuant to Education Law §3012-c.

36. In addition to improperly conditioning collective bargaining on a condition precedent (i.e. implementation of a new evaluation system), it is well settled that conditioning negotiations of a mandatory subject (i.e. teacher evaluation process) on negotiation of a non-mandatory subject (i.e. the closing of schools) is without question a violation of the Taylor Law. In Cincinnati Education Association, the Board found that the union's carrying of non-mandatory items into fact-finding, over the employer's objection, constituted improper insistence. 13 PERB ¶4512 (1980). The union in Cincinnati was directed to "negotiate in good faith" by withdrawing the non-mandatory items from the demands. Similarly, in Yorktown Faculty Association, 7 PERB ¶ 3030 (1974), the Board determined that the union's insistence on non-mandatory subject demands constituted a refusal to negotiate in good faith.

37. Looking at the totality of the circumstances, it is obvious through the UFT's transparent and improper demands, that they have not bargained in good faith in connection with teacher evaluation pursuant to Education Law §3012-c and instead are improperly attempting to use the statutory mandate regarding teacher evaluation to advance an unrelated political and collective bargaining agenda. These strong arm tactics serve not only to frustrate the process, but make reaching an agreement on teacher evaluation impossible unless the DOE acquiesces to the UFT's improper demands. As such, a violation of the Act must be found.

38. There can be no doubt that the UFT has no real intention to reach an agreement on the subject of the teacher evaluation process, nor any intention to bargain on this issue in good faith.

39. Viewing the UFT's actions in their totality, the UFT has failed to negotiate in good faith regarding a new teacher evaluation process in violation of the Act.

**WHEREFORE** it is respectfully requested that the Public Employment Relations Board issue an order:

- a. Declaring that the UFT violated §209-a(2) of the Taylor Law;
- b. Directing the UFT to cease and desist from violating the Act;
- c. Directing the UFT to immediately bargain in good faith regarding the new teacher evaluation process; and
- d. Granting such other, further and different relief as is just and proper.



## Brodsky David

---

**From:** Brodsky David  
**Sent:** Wednesday, December 26, 2012 2:48 PM  
**To:** Brodsky David  
**Subject:** FW: Grave Concerns

David Brodsky  
Director  
Office of Labor Relations and Collective Bargaining  
New York City Department of Education  
Phone (212) 374-7954  
Fax (212) 374-0423

**From:** Michael Mulgrew [<mailto:MMulgrew@uft.org>]  
**Sent:** Tuesday, December 18, 2012 3:43 PM  
**To:** Walcott Dennis M  
**Subject:** Grave Concerns

The Department of Education's demonstrated inability to manage the school system correctly has led us to have serious concerns about getting anything constructive done with you. Two and half years ago the state decided to change this year's standardized tests to the Common Core standards and since then you have done nothing to create a curriculum based on the common core. You have now left teachers in a horrendous situation where they are scrambling to try and get material appropriate for these new tests to teach their children.

Inevitably, this will lead to a drop in standardized test scores -- which I know once again you will try to blame on the teachers because you will not take responsibility for your incompetence. Despite all of this and many other examples, the teachers in our schools have worked through Hurricane Sandy and many other challenges to serve the children in our care, even as the union has continued to try to negotiate a new evaluation system.

We were recently informed by our members in the schools that you have launched a new program, the Teacher Effectiveness Intensive Three Week Cycle, without any planning or proper training for the schools. Charlotte Danielson's rubric requires intensive training in order for it to be used correctly, but you have refused to certify or intensely train people so that they can properly use this tool. Your decision to launch this new program without a plan that would lead to its successful implementation is mind-boggling to us.



## Brodsky David

---

**From:** Brodsky David  
**Sent:** Wednesday, December 26, 2012 2:47 PM  
**To:** Brodsky David  
**Subject:** FW: Evaluation and other matters

David Brodsky  
Director  
Office of Labor Relations and Collective Bargaining  
New York City Department of Education  
Phone (212) 374-7954  
Fax (212) 374-0423

**From:** Michael Mendel [<mailto:MMendel@uft.org>]  
**Sent:** Friday, December 21, 2012 3:45 PM  
**To:** Weiner David  
**Subject:** Evaluation and other matters

As a result of our conversation yesterday, I spoke to Michael. We will be happy to meet with you per his email to the chancellor the other day. I would like to reiterate that Michael said "to discuss a planning and roll-out process for the new evaluation system...". He went on to say "We await your communication to set up such a meeting on the planning and roll-out process for the benefit of our children and our schools". I understand there might have been a misunderstanding regarding this statement in Mulgrew's letter, "at this time we will only meet with you to discuss a planning and roll-out process for the new evaluation system". He was referring to any discussions regarding evaluation issues. Thank you.

**Michael Mendel**  
**UFT Secretary/Executive Assistant to the President**

\*\*\*\*\*  
The views, opinions, and judgments expressed in this message are solely those of the author. The message contents have not been reviewed or approved by the UFT.  
\*\*\*\*\*

## Brodsky David

---

**From:** Adam Ross [ARoss@uft.org]  
**Sent:** Tuesday, December 18, 2012 4:25 PM  
**To:** Brodsky David; Solimando Karen  
**Cc:** Michael Mendel; Ellen Procida  
**Subject:** Tomorrow's Meeting

David and Karen,

Per Michael Mulgrew's email to the Chancellor, we need to cancel tomorrow morning's breakfast conversation.

Adam

Adam S. Ross, Esq.  
General Counsel  
United Federation of Teachers  
14th Floor  
52 Broadway  
New York, NY 10004  
(212) 701-9420

CONFIDENTIALITY NOTICE: This communication (including any attachments) is confidential and privileged. The information is intended for the sole use of the addressee. If you are not the intended recipient, you are advised that any disclosure, copying, distribution, use, or the taking of any action in reliance upon this communication is prohibited. If you have received this communication in error, please notify the sender by electronic mail or by telephone (212-701-9420) immediately and delete this communication (including any attachments).

\*\*\*\*\*

The views, opinions, and judgments expressed in this message are solely those of the author. The message contents have not been reviewed or approved by the UFT.

\*\*\*\*\*