OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
- - - - - - - - - - - - - - - - - - X
In the Matter of

COMMITTEE OF INTERNS AND RESIDENTS,

Petitioner, DECISION NO. B-25-85

-and- DOCKET NO BCB-681-83

NEW YORK CITY HEALTH AND HOSPITALS,
CORPORATION,

Respondent.
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DECISION AND ORDER

On November 14, 1983, the Committee of Interns and Residents ("CIR" or "petitioner") filed an improper practice petition against the New York City Health and Hospitals Corporation ("HHC" or "respondent"), alleging that the unilateral imposition by HHC of a tax on the earnings of non-resident employees, purportedly in compliance with Section 822 of the New York City Charter, constituted a refusal to bargain in good faith and a violation of Section 1173-4.2(l) and (4) of the New York City Collective Bargaining Law ("NYCCBL").[1] On January 13, 1984,

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[1] §1173-4.2 Improper practices; good faith bargaining.

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 of this chapter;

HHC filed its answer, to which CIR replied on February 15, 1984. On April 16, 1984, CIR filed a letter in which it outlined the efforts it had made to discuss with HHC the implementation of Section 822 at the Health and Hospitals Corporation. No submission was filed by HHC.

On February 22, 1985, respondent submitted an amended verified answer in which it included additional facts and defenses. On March 12, 1985, CIR submitted its reply to respondent's supplemental statement of facts.

Background

In a letter dated April 4, 1973, and addressed to the Corporation Counsel of the City of New York ("Cor-

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(more)

(Footnote 1/ continued)

> (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.

poration Counsel"), Deputy Personnel Director Alphonse E. D'Ambrose requested an opinion as to whether employees of certain specified entities, which included HHC, were "covered by the non-residency city tax provisions of Section 820 of the New York City Charter." Section 820,

subsequently redesignated as Section 822, was enacted by Local Law Number 2 for the year 1973, and provides, in pertinent part, as follows

> Condition precedent to employment. Notwithstanding the provisions of any local law, rule or regulation to the contrary, every person seeking employment with the city of New York or any of its agencies regardless of civil service classification or status shall, sign an agreement as a condition precedent to such employment to the effect that if he is or becomes a nonresident individual as that term is defined in section T46-6.0 of the administrative code of the city of New York or any similar provision of such code, during his employment by the city, he will pay the city an amount, by which a city personal income tax on residents computed and determined as if he were a resident individual, as defined in, such section, during such employment, exceeds the amount of any city earnings tax and city personal income tax imposed on him for the same taxable period.

In an opinion which it issued in December 1973, the Corporation Counsel found HHC to be covered by the non-resident city tax provisions of Section 822, and opined that as to those agencies to which it applied, "Section 820 provides for an agreement which must be entered into by prospective employees as a condition precedent to employment."

From December 1973 until October 1982, HHC adhered to the position that contrary to the opinion of the Corporation Counsel, HHC was not an "agency" of the City for purposes of Section 822 and that its provisions did not, therefore, apply to HHC employees. However, in a memorandum dated October 26, 1982, HHC conceded the applicability of Section 822 to its employees and declared that

> since the provisions of Section 822 are applicable to Corporate employees, effective Monday, November 1, 1982, all new employees, as a condition precedent to employment, and all current employees who move out of the City, as a condition of continued employment, will be required to sign an "Agreement under Section 822 of the New York City Charter." (HHC Form 559)

Beginning in July 1983, HHC required new and current employees to sign the "Nonresident Agreement" and until February 15, 1985, deducted from the pay checks of non-resident unit employees the amount necessary to satisfy the withholding provision of Section 822. On February 15, 1985, approximately 15 months after the instant improper practice proceeding had been commenced by CIR, HHC issued a memorandum regarding the policy which it had first announced on October 26, 1982. The memorandum provides as follows:

> Pursuant to an ongoing evaluation of the above memorandum, HHC, a this time, directs that the following changes in the Policy be made. That portion of the October 26, 1982 memo which made the 822 Agreement a condition of continued employment for incumbent Group 12 employees who were hired before November 1, 1982 is hereby deleted. Any Section 822 deductions already imposed on Group 12 incumbents hird before November 1, 1982 will be refunded.
>
> All Executive Directors and NFCC Administrators should advise the appropriate payroll person at their health care facility of the above change in policy. A directive concerning the procedures to be followed for making the necessary refunds will be issued shortly.

The effect of this memorandum, HHC explained in its amended answer, is that

> [n]o Section 822 deductions will be made from the salaries of non-managerial employees hired before November 1, 1982 (the effective date of the original October 26, 1982 Memorandum) who move outside the City subsequent to that date, and said employees are not obligated to sign a Section 822 agreement. In addition, the February 15th Memorandum provides that any Section 822 deductions already imposed on said non-managerial incumbents will be refunded to those employees ...

Positions of the Parties

HHC's Position

HHC maintains that the policy statement issued in 1982, in which it conceded the applicability of Section 822 to its employees, was

> an appropriate exercise of policy-making authority by HHC pursuant to its Enabling Act which authorized "the Corporation ... to promulgate its own rules and regulations with respect to its Group 12 employees ... (Section 7390), and to prescribe the terms and conditions of employment for its Group 12 personnel (Section 7385)

HHC further asserts several affirmative defenses to the improper practice charge, including Section 1173-4.3(b) of the NYCCBL, which establishes a reserve of management rights into which falls the right of an employer to establish, as HHC did, a condition precedent to employment or continued employment. in support of its position, HHC cites Salamanca Police Unit, 12 PERB ¶3079 (1979); and Town of Tonowanda, 16 PERB 14527 (1983), in which the Public Employment Relations Board ("PERB") determined that the imposition of a residency requirement is a management prerogative not within the scope of mandatory bargaining.

HHC also maintains that inasmuch as the requirement complained of was fixed by law - i.e., Section 822 of the New York City Charter, it is a prohibited subject of bargaining. Petitioner does not, therefore, have the right, nor does HHC have the authority, to bargain for a contrary agreement.

In response to the claim that it had violated Section 1173-4.2(a)(1) of the NYCCBL, HHC maintains that beyond the allegation that deductions had been made pursuant to Section 822, CIR has failed to allege any facts which would demonstrate that its actions were undertaken with the improper intent of discouraging or encouraging employees in the exercise of their rights under the NYCCBL.

CIR's Position

In its reply memorandum, CIR maintains that "[b]y claiming carte blanche to promulgate employment related conditions, HHC misreads its Enabling Act," ignores Section 7390(5) of that act, which provides that

> [t1he corporation, its officers and employees shall be subject to afticle fourteen of the civil service law and for all such purposes the corporation shall be deemed "public employees", provided, however, that chapter fifty-four of the New York City Charter and

> Administrative Code and Executive Order No. 52 ... shall apply in all respects to the corporation, its officers and employees ....

and disregards its clear statutory obligation to engage in collective bargaining over terms and conditions of employment.

With respect to HHCIs first affirmative defense, i.e., that it possesses a management right to effect wage deductions, CIR stresses the novelty of calling a wage deduction a non-bargainable management prerogative and, further characterizing it as a residency requirement.

CIR next maintains that, contrary to HHCIs assertion that the imposition of the wage deductions was compelled by Section 822, "the better view is that the law was not intended to apply to the HHC; and if it were intended to apply to the HHC, it would be blatantly improper and unlawful." CIR questions the basis for HHC's relatively recent position in view of respondent's refusal for almost 10 years to acquiesce to the City's construction of Section 822.

Finally, in addressing HHC's last affirmative defense, i.e., that petitioner did not demonstrate that HHC intended to interfere, restrain or coerce employees in the exercise of their protected rights, CIR maintains

that if the natural and probable effect of the action complained of is interference, restraint or coercion, intent is presumed; "[t]he standard is an objective one, not a subjective one."

Discussion

The New York City Collective Bargaining Law Section 1173-4.2(a)(4) provides that:

> It shall be an improper practice for a public employer or its agencies:
>
> > ... 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.

The facts in the present case establish, we believe, an improper practice as it is defined in Section 1173-4.2(a)(4). Because of HHC's 10-year refusal to acquiesce in the Corporation Counsel's construction of Section 822, there was no need or occasion, prior to July 1983, for CIR to make a demand upon HHC to bargain on the effect of the application of Section 822 to this bargaining unit. Thus, while broader legal questions have been raised by the parties in their pleadings, we find that in the unique circumstances of this matter -- where HHC for 10 years denied the applicability of Section 822

and then suddenly and unilaterally reversed itself and established Section 822 as a condition of employment, CIR has a right to bargain over the effect of such change. We further find that in light of the fact that actual implementation occurred in July 1983, commencement of this proceeding in November 1983 was timely.

Our findings, as set forth above, should in no way be regarded as an expression of this Board's view on the question of the applicability of Section 822 of the New York City Charter to HHC employees. We agree with HHC that "[t1his Board is without subject matter jurisdiction to rule on either the validity of Section 822 of the City Charter or the applicability of Section 822 of the City Charter to HHC." Nevertheless, we disagree with HHC that the Board must, therefore, decline jurisdiction in this matter and dismiss the improper practice charge.

For the foregoing rea son, we find that the policy unilaterally announced by HHC in its October 26, 1982 Memorandum, effectuated in July 1983, and unilaterally modified on February 15, 1985, constitutes an improper practice within the meaning of Section 1173-4.2(a)(4) of the NYCCBL.

We further find that where, as in the instant proceeding, there has been a refusal to confer with the certified employee representative regarding a change

affecting terms and conditions of employment, there is, in our judgment, interference with the effectiveness of the employee representative and, consequently, the rights of the employees which it represents, in violation of Section 1173-4.2(a)(1) of the NYCCBL [2]

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that the acts of the New York City Health and Hospitals Corporation challenged herein, constitute, under the unique circumstances of this proceeding, an improper employer practice in violation of Section 1173-4.3(a)(1) and (4) of the New York City Collective Bargaining Law; and it is therefore,

[2] PERB ha determined that a unilateral change can constitute a violation of the prohibition against such interference. In Board of Education, City of Buffalo, 6 PERB 13051 (1973), the employer attempted to change wagesunilaterally by bargaining with individual employees. The Board held that to change terms and conditions of employment unilaterally "is so inherently destructive of employees' rights that the respondent must be presumed to have that as its purpose."

ORDERED, that the improper practice petition filed herein by the Committee of Interns and Residents be, and the same hereby is, granted; and it is further

ORDERED, that the Health and Hospitals Corporation shall, upon request, bargain in good faith, with the Committee of Interns and Residents over the effect resulting from the unilateral change in HHC's policy announced on October 26, 1982.

DATED: New York, N.Y.
August 15, 1985

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

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EDWARD SILVER
MEMBER

JOHN D. FEERICK
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