OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

JAMES LaRIVIERE, DIRECTOR, N.Y.
INLAND AND HARBOR CONTRACTS, DISTRICT #1 - PACIFIC COAST
DISTRICT, MARINE ENGINEERS' BENEFICIAL ASSOCIATION,

DECISION NO. B-57-87

DOCKET NO. BCB-967-87

Petitioner,

-and-

HENRY F. WHITE, JR., DEPUTY COMMISSIONER, BUREAU OF TRANSIT OPERATIONS, CITY OF NEW YORK, DEPARTMENT OF TRANSPORTATION,

Respondent.
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SECOND INTERIM DECISION AND ORDER

On June 2, 1987, James LaRiviere, Director, New York Inland and Harbor Contracts, District #1 - Pacific Coast District, Marine Engineers' Beneficial Association ("MEBA" or "the Union") filed an improper practice petition alleging that the Bureau of Transit Operations of the New York City Department of Transportation ("the City") intends to make unilateral changes in certain tours of duty of Licensed Officers employed on Staten Island ferry boats, in violation of Article V of the 1984-87 collective bargaining agreement between the parties ("the Agreement")[1]

[1]By its terms, the 1984-87 agreement between the parties expired on June 30, 1987.

and section 1173-7.0d (new section 12-311d) of the New York City Collective Bargaining Law ("NYCCBL"). On August 27, 1987, the Board issued an interim decision (No. B-36-87) denying the City's motion to dismiss the petition and determining that petitioner had stated a prima facie case of improper practice. In accordance with our order therein, the City, by its Office of Municipal Labor Relations ("OMLR"), filed an answer to the petition on September 25, 1987. On October 7, 1987, MEBA filed a reply.

## Jurisdiction of the Board

In Decision No. B-36-87, we noted that the Board has a long-established practice of dealing with alleged violations of NYCCBL section 1173-7.0d,[2] the status

[2]Section 1173-7.0d of the NYCCBL provides in its entirety:

> During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending sixty days thereafter or thirty days after the panel submits its report, whichever is sooner, provided, however, that upon motion of the panel, and for good cause shown, the board of collective bargaining may allow a maximum of two sixty-day extensions of time for the completion of

(continued...)

quo provision, on a case-by-case basis, treating such claims either as a failure of full faith compliance with the provisions of the statute or as a matter to be referred to arbitration in accordance with the grievance-arbitration procedure of the expired collective bargaining agreement between the parties. This is the first case in which we have considered whether an alleged unilateral change during the status quo period constitutes an improper

(...continued)

> impasse panel proceedings, provided further, that additional extensions of time for the completion of impasse panel proceedings may be granted by the panel upon the joint request of the parties, and during the pendency of any appeal to the board of collective bargaining pursuant to subdivision c of this section, the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the right of public employers other than their right to make such unilateral changes, or the rights of and duties of public employees and employee organizations under state law. For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining

> notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.



practice under the NYCCBL. In our first interim decision, we noted that section 1173-4.2a(4)(new section 12-306a(4)) of the statute, which defines an improper public employer practice as a refusal "to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees," could be violated by an employer's unilateral action on a mandatory subject of bargaining, with the caveat, however, that the claimed violation of statute must not derive solely from the breach of a term of a collective bargaining agreement.[3] Applying these principles to the case at bar, we found that no cause of action was stated under section 1173-4.2a(4) because the sole basis for the improper practice petition was a claimed violation of Article V of the expired agreement between the parties. We held, however, that the petition did state a cause of action within the improper practice jurisdiction of this Board because section 209-a.1(e)

[3]Section 205.5(d) of the Taylor Law, which is applicable to the City of New York pursuant to section 212 of that law, expressly provides that:

> the board shall not have authority to enforce an agreement between a public 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.

of the State Taylor Law, which makes it an improper practice for a public employer "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated,"[4] applies to the City pursuant to section 212 of the state law.[5]

Issue having been joined, we now note that neither party to this matter has, at any time before or after the issuance of our interim decision, stated its position or formulated its arguments with reference to section 209-a.1(e) of the Taylor Law. In light of this fact, and having further considered the nature of the dispute in this proceeding, we have determined that the improper practice provisions of our own statute provide an adequate and appropriate framework for the resolution of the instant controversy. As we have stated previously, the duty of the public employer to bargain in good faith with the certified representative of its employees, enforced pursuant to NYCCBL section 1173-7.2a(4), encompasses the obligation to refrain from making unilateral changes in mandatory

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[4]Subdivision (e) was added to section 209-a.1 of the Taylor Law by the Laws of 1982, Ch. 868 51 (eff. July 29, 1982), as amended by Ch. 921 §1 (eff. Dec. 20, 1982).

[5]Section 212.1 of the Taylor Law provides, in relevant part:

> This article, except ... section two hundred nine-a, shall be inapplicable to any government (other than the state or a state public authority) which, acting through its legislative body, has adopted by local law, ordinance or resolution, its own provisions and procedures ... (emphasis added).

subjects of negotiation.[6] During a period of negotiations, this obligation is extended, pursuant to section 1173-7-0d of the statute, to permissive subjects of bargaining that were included in the parties' collective bargaining agreement. The rationale for such extension, we have stated, is that:

> the meaning and purpose of the status quo provision of the NYCCBL is to maintain the respective positions of the parties and the relationship between them essentially unchanged during periods of negotiation, during impasse panel proceedings and for thirty days after issuance of panel reports. This end is obtained, in part, by prohibiting the change of any condition created by a prior contract during the period prescribed by the status quo provision.[7]

In Decision No. B-1-72, we observed that this interpretation was consistent with the view of the framers of the NYCCBL that, where employees are denied the power to strike, as they are in the public sector, the resulting imbalance in the respective strengths of the parties must be redressed if a stable bargaining relationship is to be maintained. The 1966 "Statement of Public Members of Tripartite Panel to Improve Municipal Bargaining Procedures", which was approved and signed by representatives of the City and of municipal employee organizations, and which provided

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[6]Decision No. B-25-85. See, National Labor Relations Board v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).

[7]Decision No. B-1-72 at 9.

the blueprint for the New York City Collective Bargaining Law, stated, in part:

> Because the rights normally enjoyed by employees in private employment are not available by law to employees in public employment, there is the greater need to ensure that collective bargaining takes place, and that provision be made for effective procedures for the peaceful resolution of differences when bargaining results in an impasse. The procedures set forth herein are designed to meet this greater need. These procedures offer positive assurance: (a) that employees will be treated fairly; (b) that the City will be able faithfully to discharge its obligations as employer, without interruption to the public services it furnishes; and (c)that the people of the City will be protected, as they have a legal and moral right to be, in their access to essential public services.

It is apparent that unilateral changes in terms or conditions of employment created by an expired agreement during the negotiations period will have a destabilizing effect on the bargaining relationship between parties whose relative strengths are so extensively realigned as is the case in the public sector. In the absence of a correlative right on the part of public employees to resort to self-help, i.e., by striking, the employer's unilateral action during a period of negotiations frustrates the collective bargaining process and, we hold, is as much a violation of the duty to negotiate as a flat refusal

to bargain. Moreover, we agree with the State Public Employment Relations Board ("PERB") that

> because of the absence of the right to strike in the public sector, the duty to negotiate in good faith that the Act has imposed upon public employers should be more strongly applied than the similar duty in the private sector.[8]

The duty of an employer in the public sector to refrain from self help by unilaterally altering the terms of an expired agreement while a successor agreement is being negotiated likewise should have greater force and effect than the similar duty of private sector employers.

In finding that a prima facie case of improper practice has been stated under section 1173-4.2a(4) of the NYCCBL in this case, we emphasize that it is the alleged repudiation of the status quo and the resulting alteration of the bargaining relationship between the parties which we would deem to constitute a refusal to negotiate, and not the violation of a term of the expired agreement per se. The latter, we recognize, is a matter which we do not have authority to consider unless such violation "would ... otherwise constitute an improper employer ... practice."[9]

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[8]Matter of Triborough Bridge and Tunnel Authority, 5 PERB ¶4505 at 4522 (H.O. 1972), aff'd, 5 PERB ¶3037 (1972).

[9]Taylor Law §205.5(d).

Having now set forth the framework for our assertion of jurisdiction in this case, we turn to the issues raised by the responsive pleadings in this matter.

## Positions of the Parties

### City's Position

The City concedes that it intends to change the Saturday and Sunday tours of some Licensed Officers as is alleged by petitioner. However, the City asserts that such changes are a proper exercise of a management right, under section 1173-4.3b (new section 12-307b) of the NYCCBL, to assign overtime. OMLR cites Decision No. B-7-81, where we stated that:

> in the absence of a contractual or other limitation, the assignment of overtime is within the City's statutory management right to:
>
> > ... "determine the methods, means and personnel by which government operations are to be conducted...."

Here, it is alleged, petitioner has failed to point to any restriction or limitation on management's right to assign overtime. Moreover, respondent alleges that Articles V and VIII of the Agreement permit the City to

assign overtime work as it chooses.[10]

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[10]Article V of the 1984-87 agreement between the parties provides:

> ARTICLE V - WORK DAY, WORK WEEK, AND WORK YEAR
>
> Section 1.
>
> The rates prescribed in article IV of this Agreement shall constitute compensation in full for the regular work week for the operation of ferryboats as practiced in various agencies; that is, four (4) eight-hour (8) tours per week which shall be consecutive, and 206 eight-hour (8) days per annum and effective July 1, 1985 for 207 eight-hour (8) days per annum of which 198 eight-hour (8) days are work days (representing 1484 hours work at straight time pay plus 100 hours worked at overtime pay), and eight (8) eight-hour days of which [sic] are paid holidays (representing 64 hours of holiday pay at straight time). Effective July 1, 1985 nine (9) eight-hour days are paid holidays (representing 72 hours of holiday pay at straight time).
>
> Section 2.
>
> Any regular work week may include work on a Saturday and/or Sunday at no additional compensation, it being understood that the rates set forth in this Agreement includes Saturday and Sunday work.

(continued...)

Insofar as petitioner contends that the status quo provision of the NYCCBL has been violated, the City argues that that provision, in addition to directing the public employer to "refrain from unilateral changes in wages, hours, or working conditions" during the period of negotiations, states that it "shall not be construed to limit the rights of public employers other than their right to make such unilateral changes...." Since the assignment of overtime is a management prerogative and since petitioner has not alleged that any limitation has been placed on management's rights, respondent maintains that the assignment of overtime cannot be a violation of the status quo provision of the statute.

As a further defense to the improper practice charge, the City argues that petitioner has submitted the same issue as is presented herein to the State Supreme Court,[11] and that:

> it would be inequitable to demand that the City defend the identical claim at the same time in two different forums which could result in disparate and conflicting outcomes.

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(...continued)
Article VIII provides, in pertinent part:

> A Per Annum Employee who works in excess of eight (8) hours per day or four (4) consecutive days per week or one hundred ninety-eight (198) days per year or eight (8) hours on a legal holiday shall be compensated in cash at the respective rates and for the respective titles for each hour of overtime in increments of one-half (12) hour ...

[11]We take administrative notice that the New York Supreme Court granted MEBA's application for a preliminary injunction pending the outcome of a declaratory judgment action in which MEBA seeks a determination that the City's implementation of changes in the weekend working hours of Licensed Officers violates the - status quo provision of the NYCCBL. District #1 - Pacific Coast District, Marine Engineers' Beneficial Association v. White, Index No. 1617/87 (Sup. Ct Richmond Co., N.Y.L.J., 10/2/87, pp. 15-16)(Felig, J.).

The City contends that petitioner must "exhaust its remedy" in the court before seeking a decision from the Board. Therefore, respondent requests that we (a) dismiss the improper practice petition or (b) direct petitioner to choose between the OCB and the court as the sole forum for adjudication of its claim. Alternatively, the City requests that we stay proceedings on the improper practice petition pending the outcome of the court proceeding.

MEBA's Position

Petitioner does not quarrel with the City's assertion that the assignment of overtime is a management right under the NYCCBL. Rather, it objects to the City's contention that the action complained of here is merely an assignment of overtime. MEBA notes that the dictionary defines the term "overtime" as "working hours in addition to those of the regular schedule". Therefore, petitioner argues, the City's use of the word "overtime" to characterize the regular, permanent assignment of Licensed Officers to work in excess of eight hours per day is improper. Even assuming, arguendo, that the assignments complained of in the petition are overtime assignments, petitioner contends that the City may not make such assignments without negotiating with MEBA because the parties' agreement con-

stitutes a limitation on the right to expand regularly scheduled tours beyond eight hours by the assignment of overtime work.

In opposition to the City's second defense, petitioner argues that the claim presented to the Board is not the same as the claim before the court and that the relief sought in each forum is unavailable in the other. The issue before the Board, it is argued, is whether by unilaterally changing. the length of permanent daily tours of duty, respondent has committed an improper practice, while the issue before the court is whether respondent's unilateral action constitutes an unlawful interference with the status quo. MEBA asserts that it is not seeking nor could it obtain, a finding of improper practice from the court. Similarly, it argues, the relief sought before the court is not requested from, and cannot be granted by, the Board. Therefore, petitioner concludes that it should be permitted to pursue a declaratory judgment action for enforcement of the status quo provision of the NYCCBL while litigating the allegedly different improper practice issue before this Board.

## Discussion

We have carefully considered respondent's additional defenses, asserted in its answer, to the processing of the instant petition and, for the reasons set forth below,

we reject the City's request that we either dismiss the petition or require that MEBA "exhaust its remedy" in court before seeking a decision from the Board. Nor do we deem it necessary to require petitioner to select one forum to the exclusion of the other.

Pursuant to section 205.5(d) of the Taylor Law, the state PERB is granted exclusive, non-delegable jurisdiction over improper practices generally throughout the state. With respect to improper practices arising in New York City, however, section 205.5(d) specifically states that:

> the board of collective bargaining established by section eleven hundred seventy-one of the New York City charter shall establish procedures for the prevention of improper employer and employee organization practices as provided in section 1173-4.2 of the administrative code of the city of New York,....

In accordance with this provision, the courts have held that the Board of Collective Bargaining has exclusive, non-delegable jurisdiction to hear and resolve improper practices arising in New York City.[12] Thus, there can be no doubt that we have jurisdiction in this matter.

Furthermore, it is well-settled that a party seeking to enforce rights that derive from a statute which is administered by a governmental agency must exhaust its

[12]Caruso v. Ward, Index No. 4030/87 (Sup. Ct., N.Y. Co., IA Pt. 18, N.Y.L.J., 8/14/87, p. 12, col. 2) citing DeMilia v. McGuire, 101 Misc. 2d 281, 420 N.Y.S. 2d 960 (Sup. Ct., N.Y. Co. 1979).

administrative remedies before seeking relief in a judicial forum.[13] While, on occasion, and for reasons not pertinent here, we have declined to exercise our jurisdiction over improper practices where a party has chosen to litigate his or her rights in the courts,[14] there is no statutory or other legal requirement that we defer to the courts. Particularly in a case such as the present one, where we believe that the court may not have jurisdiction over the alleged violation of section 1173-7.0d of the NYCCBL, and where we have found that this Board has exclusive non-delegable jurisdiction over the same claim cast as an improper practice, we find no basis for declining to exercise our authority.[15] Finally, it should be

[13]Young Men's Christian Association v. Rochester Pure Water District, 37 N.Y. 2d 371, 375, 372 N.Y.S. 2d 633, 635, 334 N.E. 2d 586, 588 (1975); DeMilia v. McGuire, supra.

[14]See, Decision Nos. B-7-83 (petition dismissed where based upon claims which had been litigated in the courts and were outside jurisdiction of Board); B-21-83 (petition dismissed as not within the Board's jurisdiction because claims essentially involved objections to employer's implementation of various court orders); B-8-84 (petition held in abeyance where related claims were being litigated in federal court).

[15]We note that, in support of its cross-motion to dismiss the court action, the City took a position inconsistent with its position in the instant case, arguing that the court lacked jurisdiction to grant the relief requested as this Board has exclusive jurisdiction to hear disputes arising under the NYCCBL.

noted that the powers of the Board are defined by, and limited to, those enumerated in the NYCCBL or arising under the Taylor Law. Neither statute authorizes us to enjoin the union from pursuing a declaratory judgment action in court concurrently with the instant matter. In light of the foregoing, we now proceed to consider the substantive issues raised herein.

The gravamen of the dispute is whether the proposed assignment of some Licensed Officers to tours of duty which exceed eight hours in length is a proper exercise of management's right under the NYCCBL to assign overtime work, as the City contends, or a violation of an obligation to maintain a regular prescribed work schedule during the status quo period, as is alleged by petitioner. We note that Article V, Section I of the Agreement defines the "work day, work week, and work year" to consist of:

> four (4) eight-hour (8) tours per week which shall be consecutive, and 206 eight-hour (8) days per annum and effective July 1, 1985 for 207 eight-hour (8) days per annum of which 198 eight-hour (8) days are work days (representing 1484 hours work at straight time pay plus 100 hours worked at overtime pay),.... (emphasis added).

We further note that Article VIII defines the term "overtime" as work "in excess of eight (8) hours per day or four

(4) consecutive days per week or one hundred ninety-eight (198) days per year...." Where, as here, the resolution of an improper practice dispute rests on the interpretation and application of contract provisions, and where, as here, it appears that arbitration will resolve both the improper practice and the contract interpretation issues, we have held that it is appropriate and consistent with the statutory policy favoring arbitration, to defer resolution of such dispute to the grievance arbitration procedure in the parties' agreement.[16] However, it is well-settled in this jurisdiction that a dispute may not be referred to arbitration unless the grievant(s) and their union have complied with NYCCBL section 1173-8.0d (new section 12-312d) and filed a written waiver of the right to submit the underlying dispute to any other tribunal.[17] The

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[16]Decision Nos. B-10-80; B-31-85; B-45-86. We have also considered it appropriate to defer to the grievance arbitration procedure included in an expired contract where an alleged violation of the statutory status quo provision is alleged. Decision Nos. B-6-70; B-1-72; B-10-85.

[17]Section 1173-8.0d of the NYCCBL provides:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

Board has held that a union that has already commenced another proceeding seeking permanent relief on the same matter that it would submit to arbitration is incapable of satisfying the waiver requirement. This is true whether the matter in controversy involves common legal issues or common factual issues or both.[18]

In the present case, we find that the "same underlying dispute" as would be referred to arbitration has already been submitted to the State Supreme Court in the declaratory judgment action pending at Index No. 1617/87. Since petitioner therefore cannot execute a satisfactory waiver, it is clear that deferral to arbitration would be ineffectual. Accordingly, we shall decide the issues presented herein pursuant to our primary jurisdiction under section 1173-4.2a(4) of the NYCCBL and shall direct that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining in order to afford the parties an opportunity more fully to explain their positions. The issue to be considered at such hearing shall be:

> Whether the unilateral implementation during the status quo period of proposed changes in the hours of work of Licensed Officers, resulting in assignments that exceed eight hours in length, constitutes a refusal to bargain in good faith pursuant to section 1173-4.2a(4)(new section 12-306a(4)) of the NYCCBL.

[18]See Decision No. B-28-87 and cases cited therein at notes 6 and 7.

0 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

ORDERED, that the City's request that the improper practice petition be dismissed or held in abeyance while petitioner pursues an action in the State Supreme Court, or that petitioner be required to select either the court or the Board as the sole forum for adjudication of its claim be, and the same hereby is, denied; and it is further

ORDERED, that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining to consider whether the actions complained of in the petition constitute an improper practice within the meaning of section 1173-4.2a(4) (new section 12-306a(4)) of the NYCCBL.

DATED: New York, N.Y.
December 22, 1987

ARVID ANDERSON
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

PATRICK F. X. MULHEARN
MEMBER

DEAN L. SILVERBERG
MEMBER