***Uniformed Fire Officers Ass'n*, 39 OCB 7 (BCB 1987) [Decision No. B-7-87 (IP)], aff'd and modified in part,*Levitt v. Board of Collective Bargaining*, 140 Misc.2d 727, 531 N.Y.S.2d 703 (Sup. Ct. N.Y. Co. 1988), *aff'd*, 171 A.D.2d 545, 567 N.Y.S.2d 435 (1st Dep't 1991), *aff'd in part, modified in part*, 79 N.Y.2d 120, 580 N.Y.S.2d 917 (1992).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

- x

In the Matter of the Improper Practice

-between-

UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854, IAFF, AFL-CIO,

Petitioner,

DECISION NO. B-7-87

DOCKET NO. BCB-875-86

-and-

CITY OF NEW YORK,

Petitioner.

- x

In the Matter of the Improper Practice

-between-

DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Petitioner,

DOCKET NO. BCB-881-86

-and-

CITY OF NEW YORK,

Respondent.

- x

In the Matter of the Improper Practice

-between-

NICHOLAS MANCUSO, AS PRESIDENT OF THE UNIFORMED FIREFIGHTERS ASSOCIATION,

Petitioner,

DOCKET NO. BCB-887-86

-and-

CITY OF NEW YORK,

Respondent.

- x

DECISION AND ORDER

A verified improper practice petition in docket number BCB-875-86 was filed by petitioner Uniformed Fire officers Association, Local 854, International Association of Firefighters, AFL-CIO (hereinafter referred to as "UFOA") on May 23, 1986. The City of New York submitted an answer to this petition on June 23, 1986. The City further submitted an amended answer on July 2, 1986. The UFOA filed a reply and memorandum of law on July 24, 1986. The City submitted a sur- on August 8, 1986. The UFOA objected to consideration of the City's sur-reply in a letter received on August 15, 1986. The Trial Examiner wrote to the parties on August 18, 1986, advising them that the Board would rule on the admissibility of the sur-reply in its decision on the merits, but offering the UFOA the opportunity to submit a response to the sur-reply in the event that the Board decided to consider that document. The UFOA submitted a response thereto, which was received on August 26, 1986.

A verified improper practice petition in docket number BCB-881-86 was filed by petitioner District Council 37, American Federation of State, County and Municipal

Employees, AFL-CIO (hereinafter referred to as "D.C. 37") on July 1, 1986. The City of New York submitted an answer to this petition on July 14, 1986. D.C. 37 filed a reply and memorandum of law on July 28, 1986. The City submitted a sur-reply and exhibits on September 5, 1986. A letter containing an objection to consideration of the sur-reply, and a response to the merits thereof, was filed by D.C. 37 on September 22, 1986.

A verified improper practice petition in docket number BCB-887-86 was filed by petitioner Nicholas Mancuso as President of and on behalf of the Uniformed Firefighters Association {herein referred to as "UFA") on July 18, 1986. The City of New York submitted an answer to this petition on August 4, 1986. The UFA filed a reply on August 21, 1986. The City submitted a sur- and exhibits on September 3, 1986. The UFA filed a response to the sur-reply on September 16, 1986.

Background

On April 23, 1986, the City Personnel Director promulgated Personnel Policy and Procedure Bulletin No. 401-86 (hereinafter referred to as "P.P.P. 401-86"), entitled "Debt Collection From City Employees of Debts

Owed to the City through Payroll Deduction". This document mandates that:

> "Effective February 3, 1986, as a requirement for appointment or promotion, newly-hired or promoted employees must disclose all existing debts to the City of New York and must consent to the payment of these debts through a lump sum or payroll deductions.
>
> If an employee selected for appointment or promotion on or after February 3, 1986 refuses to comply with the following procedures, then such person shall not be appointed or promoted, or if appointed or promoted, shall be dismissed or demoted."

The P.P.P. goes on to require that all individuals selected for appointment, promotion, or reinstatement after a break in service, complete and execute a prescribed form, designated as Form DP-2379A - "Questionnaire and Agreement Form". (A copy of Form DP-2379A is attached to this Decision as Appendix A.)

The information requested on Form DP-2379A includes, inter alia, the following: previous home addresses for the last 10 years; motorist I.D. number; vehicle make, type, license number, and state of registration; any past license plate numbers, the states in which registered, and the make, type, and color of any vehicle so registered; whether a State of New York/City of New

York Income Tax return was filed for each of the last five years; whether any money is owed to the City of New York or any agency or department thereof for (A) unpaid parking violations (B) unpaid fines, penalties, or judgments in favor of the City, or (C) any other reason; and whether there has been received any over-payment of public assistance, and, if so, whether it has been repaid. Additionally, Form DP-2379A includes a release, addressed to the Commissioner of the State Department of Taxation and Finance, authorizing the release to the City Department of Investigation of information verifying the timely filing of State and City Income Tax returns for the last five years. Pursuant to a declaration printed on the Form, all statements set forth by an applicant on the Form and its attachments are affirmed to be true, under the penalties of perjury. Furthermore, the applicant is informed by a warning on the Form that:

> "A false statement or omission willfully or fraudulently made will result in your disqualification and the termination of your employment."

Finally, Form DP-2379A includes a repayment agreement which provides the following:

> "As a qualification for appointment and continued employment with the City, I agree to repay any amounts which I owe to the City or any agency or department thereof, either by lump sum payment or, if I am able to demonstrate hardship, by deductions from my paycheck not to exceed 10% of the net income indicated on my paycheck. I further agree to cooperate with officials of the City and any agency or department thereof in determining the amounts which I may owe to the City. Failure to repay any amounts which I owe the City or any agency or department thereof may be grounds for disciplinary action."

The three petitioner Unions object to the City's actions in requiring the completion and execution of the "Questionnaire and Agreement Form" described above as a qualification for appointment or promotion. This objection forms the basis of the improper practice petitions filed herein.

Positions of the Parties

Union's Positions

For the most part, the UFOA, D.C. 37, and the UFA are in agreement concerning the bases for their challenges to the City's imposition of the requirement that individuals selected for appointment or promotion complete and execute the prescribed debt "Questionnaire and Agreement", Form DP-2379A. It would be unnecessarily duplicative and

would add nothing to an understanding of the issues if the three Unions' individual positions were described separately herein. Accordingly, the positions advanced by the Unions will be summarized jointly, with recognition of the fact that a particular Union may have placed greater emphasis on one argument, while another may have given greater emphasis to a different one.

All of the Unions reject the City's contention that the policy at issue herein involves a "qualification" for appointment or promotion. While recognizing that the establishment of qualifications for appointment and/or promotion is a managerial prerogative, and thus a non-mandatory subject of bargaining, the Unions argue that a true qualification is a pre-condition for employment or promotion which defines a level of achievement or special status deemed necessary for optimum on-the-performance. The qualification must have a bona fide relationship to on-the-job performance. The Unions assert that the policy underlying P.P.P. 401-86 and Form DP-2379A is the compulsory payment of debts claimed to be owed to the City, under the threat of discipline and dismissal from employment. They submit that P.P.P. 401-86 and Form DP2379A have no relevancy to a prospective

employee's good character or on-the-job performance. They argue that the City's contention that these documents create a "qualification" is merely a subterfuge created after the fact to avoid the City's obligation to bargain over terms and conditions of employment.

The Unions allege that the City's argument that a propensity to pay one's debts is indicative of good character, a valid qualification for employment, is a pretext for the City's efforts toward an administratively easy and convenient method of collecting alleged debt. The Unions assert that this involves an economic measure, not a matter of "qualifications". They observe that neither P.P.P. 401-86 nor an earlier Memorandum issued by Mayor Koch[1] contains any reference to a "good character" qualification. While P.P.P. 401-86 was issued on April 23, 1986, the "good character" justification was raised for the first time in the City's answers filed with this Board in July of 1986.

The Unions submit that the policy implemented through Form DP-2379A is not a valid "qualification" inasmuch as it does not set any criteria or standards for appoint-

[1]Memorandum to All City Employees, dated February 7, 1986.

ment or promotion which measure any level of achievement or determine any necessary status. The policy does not set a standard of permissible debt, by amount or type, nor does it qualify or disqualify anyone. It does not discriminate among applicants in terms of character or reputation. It operates without distinction between an individual with nominal or no debt, and one who is a tax evader or scofflaw. Under the City's policy, no matter what debt exists, an individual remains "qualified" for appointment or promotion as long as he or she signs an agreement to repay any claimed debt either in a lump sum or through payroll deductions. An employee who agrees to and does repay his or her indebtedness to the City, no matter how large or delinquent, is permitted to continue in employment. The Unions conclude that this policy represents only an economic measure to collect monies from City employees and bears absolutely no relationship to the determination of an applicant's "character and reputation" as a pre-condition to appointment or promotion.

The Unions argue that the policy and procedures embodied in P.P.P. 401-86 and Form DP-2379A constitute the unilateral establishment of continuing conditions

of employment which are mandatory subjects of bargaining. Under these documents, the obligation "to cooperate ... In determining amounts owing" continues indefinitely, as does the liability for disciplinary action for unpaid debt. Similarly, the terms of the agreement to repay through payroll deductions continue after appointment or promotion as a condition of continuing employment. The Unions allege that since they represent promotional candidates for numerous titles, ultimately every member of their bargaining units would become subject to the conditions set forth in the challenged documents.

It is asserted by the Unions that the City's policy affects wages as well as discipline, both of which are mandatory subjects of bargaining. Payroll deductions to satisfy the City's claims of debts owing from City employees is purely an economic, wage issue. Similarly, the Unions contend, the predicate for discipline and the penalty to be imposed against public employees are mandatory subjects of bargaining. According to the Unions, the City's unilateral establishment of non-payment of City debt as a predicate for discipline (without reference to the amount, age or circumstance of the debt, or the procedures by which the employee may

contest the debt) involves a subject which is mandatorily negotiable. The Unions submit that the City cannot require employees as a "condition of appointment or promotion" to agree to waive the right to union representation in negotiations over the repayment of monies claimed to be owed, the allocation of wage deductions to repay such claims, and discipline or dismissal for failure to repay monies claimed to be owed.

Finally, the Unions submit that the interests of the City in requiring the completion of the questionnaire, providing information which the City contends "is already accessible to the City", cannot outweigh the intrusiveness of the questionnaire on unit employees. The Unions assert that disclosure of certain personal and financial matters, such as disputes over public assistance or the amount of City taxes, should not be required unilaterally in the absence of vital and compelling public interest. The Unions suggest that the course taken by the City in this matter,

> "... demonstrates only the failure of the City bureaucracy to collect public debt in normal course and the sensitivity of political leaders on this issue in the current political climate."

The Unions conclude that the City's policy serves only the purpose of administrative ease in debt collection and is hardly a vital or compelling public interest. Accordingly, the Unions request that the Board direct that the City rescind P.P.P. 401-86; destroy all executed copies of Form DP-2379A in its possession; cease and desist from changing any terms or conditions of employment without first notifying and negotiating with the Unions; and provide a copy of the Board's decision herein to all affected employees.

City's Position

The City alleges that the purpose of the procedures implemented through P.P.P. 401-86 and Form DP-2379A is:

> "to both ensure that the City recovers the monies owed to it and that the recovery is accomplished in an expeditious manner."

The City furthers notes that the questionnaire seeks to elicit information that already is accessible to the City. Therefore, it does not require that an employee disclose any information of which the City does not already have knowledge.

The City submits that Form DP-2379A is one of the qualifications which is considered by the City in both the selection of new employees and in the promotion process. It is well established, contends the City that the establishment of qualifications or criteria for employment or promotion are non-mandatory subjects of bargaining. Such qualifications are not terms or conditions of employment.

The City asserts that the Department of Personnel's General Examination Procedures govern every competitive examination administered by the City. Pursuant to these Procedures, it is a minimum requirement and qualification for appointment or promotion, that each applicant possess satisfactory character and reputation. Examination notices routinely inform applicants of the need for proof of good character. The City argues that the policy expressed in P.P.P. 401-86 and through Form DP-2379A is a means of determining whether applicants possess the requisite good character. As such, the "Questionnaire and Agreement Form" is a qualification for appointment or promotion, and is not a mandatory subject of negotiation.

In its sur-reply, the City urges that an important public policy is embodied in P.P.P. 401-86. The City

observes that many of its employees are responsible for the enforcement of the civil and criminal laws, and for holding the general public to strict compliance with the rules of law. It submits that it must hold its own employees to the highest standard of conduct in order to maintain credibility with the public. It is the City's contention that P.P.P. 401-86 is an important and necessary tool which will give the City the ability to ensure that both its new employees and those seeking promotion possess the qualities which will guarantee the public trust and confidence. With respect to promotional applicants, the City also alleges that if a superior officer and/or supervisory employee lacks good character, he or she will not be able to command respect from subordinate employees, thereby affecting his or her ability to do the job.

The City argues that the questions contained in Form DP-2379A are relevant to the issue of possible employee debt. A person's address is an important reference in determining such information as the payment of taxes or rent to the Housing Authority or the existence of an obligation to the Human Resources Administration. Similarly, license plate information is the

key to determining whether one has any outstanding traffic fines. The City asserts that City employees should not and cannot be scofflaws. The City submits that the failure to pay one's debts, no matter what the amount, is a direct violation of the rules of law and a flouting of the compact of Society. Those who contravene the law in such a manner clearly are exhibiting a lack of good character. The Questionnaire contained in Form DP-2379A identifies those applicants who possess a flaw in their character.

In response to the Union's argument that P.P.P. 401-86 deals with wage issues, the City alleges that pursuant to those procedures, a deduction, not a salary reduction, is made from an employee's paycheck only where authorized by the employee. The applicant has an option with regard to how he or she will repay any debt it may be paid in a lump sum or in installments through payroll deductions. This does not affect an employee's wages, according to the City, but merely recognizes and provides a mechanism to extinguish an outstanding debt. The City further contends that P.P.P. 401-86 does not create a continuing condition of employment, since an applicant may choose to repay any debt in a lump sum, thereby eliminating

any possible continuing effect of the policy.

Finally, in response to the Union's claim that P.P.P. 401-86 may have disciplinary repercussions, the City alleges that, assuming this to be the case, this aspect of the City's policy might require bargaining only if the Unions establish a practical impact.

For the above reasons, the City requests that the Board uphold the validity of P.P.P. 401-86 and the "Questionnaire and Agreement Form", Form DP-2379A. Alternatively, the City requests that if the Board finds that any portion of the policy is objectionable, the offending portion should be severed and the remainder of the policy be upheld.

Discussion

Inasmuch as the petitions in BCB-875-86, BCB-881-86, and BCB-887-86 all represent challenges to the City's utilization of the "Questionnaire and Agreement Form" described above, and involve common questions of law, these three proceedings hereby are consolidated for determination. We note that the petition in BCB-881-86 expressly contests both P.P.P. 401-86 and Form DP-2379A, while the petitions in BCB-875-86 and BCB-887-86 challenge

only Form DP-2379A. However, this distinction is of no significance, since in subsequent pleadings, all parties, including the City, have argued their positions based upon the premise that Form DP-2379A is the prescribed mechanism for implementing the policy expressed in P.P.P. 401-86 and that consideration of the contents of the Form necessarily requires consideration of the policy underlying the P.P.P. Accordingly, we deem all three proceedings consolidated herein to constitute challenges to the application of P.P.P. 401-86 as well as the "Questionnaire and Agreement Form".[2]

This case requires consideration of several competing rights and interests. First, there is the City's interest, which we recognize as a public interest, in obtaining the repayment of debt owed to the City and in determining the character of applicants for employment or promotion. Second, there is the judicially-recognized right of public employees to the enjoyment of privacy.[3] Third, there is the right of certified collective bar-

[2]We also note initially that we have considered the City's sur-replies and the Union's responses thereto. While a sur-reply ordinarily is permitted only in response to new facts pleaded in a reply, which is not the case herein, in the exercise of our discretion we have accepted the sur-replies and responses in the interests of determining a matter of great importance on as full a record as possible.

[3]Rapp v. Carey, 44 N.Y. 2d 157, 404 N.Y.S. 2d 565 (1978).

gaining representatives, such as the petitioners herein, to negotiate with the public employer, the City regarding terms and conditions of employment of unit employees. In determining whether the City's conduct involved mandatory subjects of negotiation, we must, of necessity, balance these three factors.[4]

The parties have argued, and we agree, that this case turns largely on the question of whether, and to what extent, the disputed policy involves a qualification for appointment or promotion rather than a condition of employment. With respect to qualifications, Section 1173-4.3b of the New York City Collective Bargaining Law (hereinafter "NYCCBL") gives management great flexibility in selecting applicants for employment or promotion.[5] Similarly, PERB has recognized that, under the Taylor Law,[6] the establishment of qualifications is a fundamental right of management.[7]

[4]Virtually the same analysis was employed by the State Public Employment Relations Board ("PERB") in a case involving a related public employer's imposition of a requirement that certain classes of employees complete a financial disclosure and background questionnaire. Matter of Board of Education, City School District, City of New York, 19 PERB ¶3015, at 3033 (1986).

[5]see, Decision No. B-4-74.

[6]Civil Service Law, Article 14.

[7]Matter of West Irondequoit, 4 PERB ¶4511, aff'd 4 PERB 13070 (1971).

The City contends that the disputed policy is intended to assist in the determination of whether applicants possess good character and reputation, and that these matters constitute legitimate qualifications for appointment or promotion, in accordance with the Personnel Director's rules. In response, the Unions point out that under the PERB standard, qualifications must:

> "... define a level of achievement or a special status deemed necessary for optimum on-the-job performance."[8]

They submit that completion of the "Questionnaire and Agreement Form", as utilized by the City herein, does not establish any "qualification" which is related to any level of achievement or special status necessary for optimum on-the-job performance. In essence, the Unions argue that the way in which the City uses the "Questionnaire and Agreement Form" bears no relationship to an applicant's character or fitness to perform the job, and, therefore, is not a valid qualification for appointment or promotion.

We agree. Certainly, "good character and reputation", determined by some objective standard, may be an appropriate

[8]Matter of West Irondequoit, supra, 4 PERB at 4610. See Matter of City of White Plains, 18 PERB ¶4555 (1985): "A qualification for employment must have a bona fide relationship to the employees' ability to perform the job."

qualification for promotion or employment. However, we are not convinced that P.P.P. 401-86 and the "Questionnaire and Agreement Form" are intended or used by the City for the purpose of determining character and reputation in any way relevant to an applicant's ability to perform a job. The City argues that a propensity to pay one's debts is indicative of good character. Yet, under the City's policy, an applicant owing a debt, no matter how large or how long delinquent, remains "qualified" for appointment or promotion as long as he or she signs an agreement to repay the debt either in a lump sum or in installments deducted from his or her pay checks. On its face, the policy does not discriminate between an individual with a nominal debt, perhaps one unpaid or disputed parking ticket, and one who is a tax evader or scofflaw. No standard of permissible debt, by amount or type, is prescribed, nor is anyone disqualified provided that they sign the repayment agreement. Moreover, no inquiry is made concerning debts owed to creditors other than the City and its agencies. No explanation is offered as to why such private debt would have any lesser bearing on character or reputation.

The record tends to support the Union's contention that P.P.P. 401-86 was intended as an economic measure to collect monies from City employees and not as a test of character and reputation. We note that neither Mayor Koch's February 7 Memorandum nor P.P.P. 401-86 contains any reference to a "good character" qualification. The City, in its answers to the petitions herein, concedes that it is the "purpose" of the procedures under P.P.P. 401-86,

> "... to both ensure that the City recovers the monies owed to it and that the recovery is accomplished in an expeditious manner."

Under all of these circumstances, we conclude that P.P.P. 401-86 and Form DP-2379A do not constitute legitimate qualifications for appointment or promotion. Accordingly, we must examine next whether the promulgation of these documents falls within the scope of the exercise of any other managerial prerogative, or whether it constitutes the unilateral imposition of terms and conditions of employment which must be negotiated.

At this point, we will address the repayment agreement contained on Form DP-2379A apart from the remaining contents of that form. The repayment agreement clearly creates a continuing condition of employment, not just

one which must be satisfied at the time of appointment or promotion. The agreement states, "As a qualification for appointment and continued employment with the City, I agree...." (Emphasis added). It provides for payroll deductions in an amount up to 10% of an employee's net salary. It requires continuing cooperation in "... determining the amounts which I may owe. . . . "

This agreement deals with deductions from wages which surely affects a mandatory subject of bargaining. The fact that payroll deductions are provided as an alernative to a lump sum payment of the claimed debt does not alter this conclusion, since, depending upon the financial resources of the applicant, the choice of method of payment may be illusory. If the applicant cannot afford to pay in a lump sum, the agreement to payroll deductions is the only alternative. This affects the employee's compensation and cannot be imposed unilaterally as a condition of continued employment.

Additionally, the agreement provides that failure to repay any amounts claimed to be owed to the City " ... may be grounds for disciplinary action." To this extent, the agreement purports to dictate that an alleged failure to repay constitutes the predicate for discipli-

nary action. However, it is well established that the existence of the predicate for taking disciplinary action, and the proper penalty to be imposed if that predicate exists, are terms and conditions of employment which are within the scope of bargaining under the Taylor Law.[9] Therefore, to the extent that the City's policy imposes the non-payment of City debt as an on-going predicate for disciplinary action, it is a term or condition of employment which must be bargained.

We do not suggest that the City was improperly motivated in seeking to recoup claimed debts through the repayment agreement challenged herein. To the contrary, we recognize a substantial public interest in the prompt and efficient collection of debt owed to the government. This is a laudable goal which the City can pursue through bargaining. However, the public interest in this area does not justify the unilateral imposition of conditions of employment which affect mandatory subjects of negotiation within the meaning of the NYCCBL and the Taylor Law. Accordingly, we hold that the compulsory execution

[9]Binghamton Civil Service Form v. City of Binghamton, 44 N.Y. 23, 403 N.Y.S. 2d 482 (1978); See Matter of Poughkeepsie City School District, 19 PERB ¶4519 (1986). However, we must bear in mind that the right to take disciplinary action is a management prerogative under NYCCBL §1173-4.3b. The interplay between these two competing interests must be considered on a case by case basis.

of the repayment agreement contained in Form DP-2379A constitutes a unilateral change in terms and conditions of employment and thus a refusal to bargain over mandatory subjects of negotiation.

We now direct our attention to the questionnaire portion of Form DP-2379A. We recognize that a broad financial disclosure questionnaire was invalidated, for the most part, in a recent decision by PERB.[10] In that case, PERB found that except for a limited class of questions relating to a statutory provision not relevant herein,[11] the public employer violated its duty to bargain over terms and conditions of employment by imposing broad reporting requirements regarding the financial interests of incumbent unit employees and their spouses. However, it also should be noted that the important public interest in obtaining financial disclosures from government employees in order to deter official corruption has been recognized by the Courts.[12] PERB understood that the fact that

[10]Matter of Board of Education City School District, City of New York, 19 PERB ¶3015 (1986).

[11]Education Law §2590-g.13.

[12]Hunter v. City of New York, 44 N.Y. 2d 708, 405 N.Y.S. 2d 455 (1978); Evans v. Carey, 40 N.Y. 2d 1008, 391 N.Y.S. 2d 393 (1976).

a particular disclosure has been upheld as a matter of constitutional law does not determine the question of whether the unilateral imposition of such disclosure is violative of the requirements of the Taylor Law. We approach this question with a similar understanding. As PERB recognized, the determination of this question requires the balancing of competing interests.[13] We believe that the balance struck on the facts of the present case compels a result substantially similar to that reached by PERB on the facts of the earlier case.

We recognize that the questionnaire at issue herein differs from that considered by PERB in many respects. In the case before PERB, the questionnaire elicited information about virtually all financial interests of affected employees. In contrast, in the present case, the City's questionnaire is more narrowly drafted, and seeks to elicit specific information which will disclose the existence of debts owed to the City or its agencies. Both residential addresses and vehicle license numbers, past and present, are used by the City to search available records for evidence of debt. Similarly, questions concerning the filing (not the content) of City and State income tax

[13]19 PERB ¶3015 at 3033.

returns assist the City in the identification of individuals who may owe taxes to the City. Furthermore, questions inquiring as to admitted debts, whether on account of unpaid parking violations, fines, penalties, or judgments, are alleged to be relevant to the City's interest in collecting those debts. Finally, questions relating to the receipt of overpayments of public assistance are alleged to be relevant to the City's interest in avoiding welfare fraud and in recouping any such overpayments made. While the City's questionnaire is, perhaps, more directly related to matters of legitimate management concern than the questionnaire considered by PERB, we find that it is sufficiently detailed to constitute a potential intrusion into an individual's privacy, depending upon that individual's legitimate expectation of privacy.

Initially, we find that insofar as it is applied to applicants for initial employment, the questionnaire portion of Form DP-2379A requires a one-time, pre-employment action by applicants which, unlike the repayment agreement discussed supra, does not affect terms and conditions of employment subsequent to hire. In the absence of any such continuing effect, the compulsory completion of the questionnaire must be viewed as relating to persons who are non-employees, and therefore, who are not covered by the provisions of the NYCCBL. Moreover, even assuming coverage, we would find

that the City's interest in the information elicited on Form DP-2379A is not an unreasonable one, insofar as it relates to persons who are not yet its employees. We do not recognize any legitimate interest on the part of mere applicants for initial employment in barring the disclosure to the City of debts owed to the City. It appears that this information involves largely matters of public record which are otherwise accessible to the City, although not necessarily in forms which would facilitate collection of debts owed to the City. We believe that the expectation of privacy in such information of an applicant for initial employment is minimal. Therefore, we find the limited burden placed on applicants for initial employment by the required completion of the questionnaire portion of Form DP-2379A is justified by the greater public interest which supports the City's actions. Accordingly, we find that the City's actions with respect to applicants for employment are legally permissible.

We note, however, that while the questionnaire requires applicants to answer, "yes" or "no", the question whether they:

> "...presently owe the City of New York or any agency or department of the City any money for:"

unpaid parking violations, fines, penalties or judgments in favor of the City, the questionnaire does not provide any way

for applicants to dispute any indebtedness claimed by the City but not conceded by the applicant. Certainly, a legitimate question may arise concerning whether a debt claimed by the City is actually owed. Due process would seem to preclude the City from requiring an applicant to waive the right to challenge a claimed indebtedness as a condition of obtaining employment or a promotion. In any event, we do not understand the City to intend such a waiver, Accordingly, our sanction of the questionnaire in this case with respect to applicants for employment is with the understanding that an applicant's acknowledgement of a disputed claim on the questionnaire shall not be considered a legally binding admission of the validity of such claim, and that applicants retain the right to contest any indebtedness claimed by the City.

We emphasize that since the City may not act unilaterally to recover any debts disclosed by the questionnaire, except as otherwise permitted by law, there is no foreseeable adverse impact on terms and conditions of employment of applicants once they are hired. The City may seek to bargain concerning repayment of disclosed debts, or it may pursue its legal collection remedies outside the employer-employee relationship. Under all of these

circumstances, we conclude that the required completion of the employee debt questionnaire as a condition of initial appointment is not a mandatory subject of negotiation.[14]

However, as to employees who are or may become applicants for promotion, we find that the required completion of the debt questionnaire imposes an intrusion into employee privacy affecting a term or condition of employment. As we have discussed, at pages 18-21 supra, we are not persuaded that P.P.P. 401-86 and Form DP-2379A represent legitimate qualifications for appointment or promotion, since it has not been shown that they:

> "... define a level of achievement or a special status deemed necessary for optimum on-the-job performance."[15]

We find that as to employees seeking promotions, a balancing of the competing interests[16] leads to the

[14]An employer's request that employees complete a personal questionnaire has been held to be permissible provided that the answers to the questions will not affect conditions of employment. Matter of County of Tompkins, 10 PERB ¶3066 (1977), citing NLRB v. Laney & Duke Co., 369 F.2d 859, 63 LRRM 2552 (5th Cir. 1966).

[15]Matter of West Irondequoit, 4 PERB ¶4511, aff'd 4 PERB ¶3070 (1971).

[16]See Matter of Board of Education, 19 PERB ¶3015, at 3033 (1986), and the discussion herein at pp. 17-18, supra.

conclusion that the required completion of Form DP-2379A as a pre-condition to promotion constitutes a unilateral change in terms and conditions of their employment and not the exercise of a management prerogative. Our conclusion in this regard is supported by a similar finding by PERB in the questionnaire case referred to at pages 24-25, supra.[17] Accordingly, if the City wishes to pursue this matter, it must first negotiate in the same manner as we have prescribed with respect to the repayment agreements.

We have held above that, with respect to all employees, the repayment agreement portion of Form DP-2379A, as well as the questionnaire portion of that Form, may not be imposed unilaterally by the City. However, as we have stated supra, the City is free to pursue its goal of prompt and efficient debt collection through collective bargaining. We see no reason why the City's legitimate public interest arguments would not form the basis for productive collective negotiations on these matters. We take notice of the fact that the current collective bargaining agreements of two of the petitioners herein contain examples of the results of past bargaining concerning the permissible

[17]Matter of Board of Education, 19 PERB ¶3015 (1986).

scope of management's inquiry into its employees' off-duty activities.[18]

For the reasons stated above, we hold that the City has committed an improper practice within the meaning of NYCCBL §1173-4.2a.(4) with respect to the compulsory execution of the repayment agreement portion of Form DP-2379A, and with respect to the questionnaire portion of that Form as it applies to employees. With respect to the questionnaire portion of Form DP-2379A, as it applies to applicants for initial employment,, the improper practice charges shall be dismissed. To the extent that P.P.P. 401-86 provides for the compulsory completion and execution of Form DP-2379A as a condition of appointment or promotion, that document, also, is violative of §1173-4.2a.(4) and may not be implemented unilaterally. Accordingly, we will direct that in the event the City wishes to pursue these matters, the parties shall negotiate in good faith. P.P.P. 401-86, which purports to authorize the required use of Form DP-2379A, is, by its own terms, applicable to all City agencies. Therefore, it is appropriate that bargaining on these matters take place at the City-

[18]Contract between the City and UFA at Article XIX, section 6.; Contract between the City and UFOA at Article XVIII, section 6.

wide level between the City and the City-wide representative, D.C. 37, in accordance with the provisions of NYCCBL §1173-4.3a.(2).[19] We note that the City-wide agreement for the 1984-1987 period has been concluded only recently. Nevertheless, negotiations for a successor City-wide agreement may commence within the next few months, inasmuch as the current agreement expires on June 30. The City, if it chooses, may raise the debt disclosure and repayment procedures as an issue in such negotiations. Additionally, to the extent that the City may seek immediate negotiations which might be considered mid-term bargaining, we observe that NYCCBL S1173-7.0a.(3) is not an impediment to bargaining at this time, since (a) this subject was not specifically covered by the current unit agreements and there is no allegation that it was raised as an issue during the negotiations out of which the current unit agreement

[19]While D.C. 37, the recognized employee representative in City-wide negotiations, is authorized to negotiate on behalf of all employees subject to the Career and Salary Plan, we note that the uniformed forces, including the UFA and UFOA, are not subject to the City-wide agreement, pursuant to NYCCBL §1173-4.3a.(4).

arose; and (b) there has arisen a significant change in circumstances specifically, the widespread publicity given evidence of corruption by City officers and employees, including evidence of City employees who are scofflaws or who are otherwise delinquent in the payment of debts owed to the City - which could not reasonably have been anticipated by the parties at the time their agreements were executed. For these reasons, we find that bargaining at this time would not be inappropriate.

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 unilateral imposition of the compulsory execution of the repayment agreement contained on Form DP-2379A as a condition of appointment or promotion, constitutes an improper public employer practice, in violation of Section 1173-4.2a.(4) of the NYCCBL; and it is further

DETERMINED, that the unilateral imposition of the compulsory execution of the questionnaire portion of Form DP-2379A, except as to applicants for initial employment, constitues an improper public employer

practice, in violation of Section 1173-4.2a.(4) of the NYCCBL; and it is therefore

ORDERED, that the improper practice petitions herein be, and the same hereby are, granted, to the extent that they challenge the repayment agreement portion of Form DP-2379A and P.P.P. 401-86, and the questionnaire portions of those documents as applied to employees (but not applicants for initial employment); and it is further

DIRECTED, that the City shall cease and desist from requiring applicants for appointment or promotion to execute a repayment agreement, as contained in Form DP-2379A, and it is further

DIRECTED, that the City shall cease and desist from requiring employees who are or may become applicants for promotion, to complete and execute the questionnaire portion of Form DP-2379A as a pre-condition for promotion; and it is further

DIRECTED, that the City refrain from any attempt to enforce any repayment agreement heretofor executed by any applicant for appointment or promotion; and from taking any adverse action with respect to any applicant

for appointment or promotion on account of the applicant's refusal or failure to execute the repayment agreement; and from taking any adverse action with respect to any employee who is or may become an applicant for promotion on account of the applicant's refusal or failure to complete and execute the questionnaire; and it is further

DIRECTED, that the City make whole any employee who was denied a promotion solely because of his or her failure to complete and execute the questionnaire; and it is further

DIRECTED, that at the option of the City, all parties shall negotiate in good faith concerning the disclosure and repayment of debts owed to the City; and it is further

ORDERED, that the improper practice petitions herein be, and the same hereby are, denied in all other respects.

DATED: New York, N.Y.
March 25, 1987

ARVID ANDERSON
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

WILBUR DANIELS
MEMBER

CAROLYN GENTILE
MEMBER