CIR v. HHC, 49 OCB 22 (BCB 1992) [Decision No. B-22-92 (IP)]

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

-between-

COMMITTEE OF INTERNS AND RESIDENTS, DECISION NO. B-22-92

Petitioner, DOCKET No. BCB-1417-91

-and-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,
Respondent.
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DECISION AND ORDER

On September 3, 1991, the Committee of Interns and Residents ("CIR" or "the Union") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC" or "the Corporation"). The petition charges that the Corporation violated Sections 12-306a.(1), (2) and (4) of the New York City Collective Bargaining Law ("NYCCBL")[1] by refusing to meet and negotiate, and by refusing to provide

[1] NYCCBL §12-306a. provides as follows:
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 (now renumbered as section 12-306) of this chapter;
(2) to dominate or interfere with the formation or administration of any public employee organization;
(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.

information to the CIR concerning tax deferred annuities and FICA deductions.

The Corporation, appearing by the New York City office of Labor Relations ("the City"), filed a verified answer to the improper practice petition on October 11, 1991. The Union filed a verified reply on December 13, 1991. In its reply, the CIR pointed out that the City made an apparent clerical error in addressing one aspect of the Union's claim. With the consent of the Union, the City filed a verified amended answer on December 19, 1991, correcting the mistake and furthering its argument. The Union filed a verified reply to the verified amended answer on January 15, 1992.[2]

Background

Prior to the enactment of section 3121(b)(7)(F) of the Internal Revenue Code, the definition of "employment" for Federal Insurance Contribution Act (FICA) tax purposes allowed certain public sector employees to be excluded from FICA coverage. The enactment of IRC §3121(b)(7)(F), however, expanded the definition of employment to include service performed as an employee for a

[2] The OCB Rules do not provide for the filing of post-reply submissions unless it can be shown that special circumstances warrant consideration of the material in question. Because the parties agree that the City's error was inadvertent, and because the Union consented to the filing of an amended answer, we will allow both the amended answer and the amended reply to the amended answer to become part of the record herein.

State, one of its political subdivisions, or any of its wholly owned instrumentalities, unless the employee is a "member of a retirement system" of such entity. FICA contributions for public employees would have to commence on July 1, 1991, unless contributions of an equal amount were made into a retirement system. New regulations that followed the enactment of IRC §3121(b)(7)(F) permitted annuity plans to fall within the definition of approved retirement systems.

Historically, the interns and residents represented by the CIR in HHC facilities had been exempt from FICA requirements, and had been free to opt not to participate in a retirement plan. Thus, the revised code, for the first time, forced these employees to choose between participating in a retirement plan, or becoming subject to FICA deductions as of July 1, 1991.

By letter dated May 17, 1991, Corporation Chief of Staff Thomas Doherty wrote to HHC employees concerning the tax code change ("the Doherty letter"). The opening paragraph of the letter reads as follows:

> In order to ensure that all state and local government employees are enrolled in a retirement program, Congress recently enacted legislation regarding participation in the Social Security System. As a result, you and other HHC employees not currently required to pay Social Security (FICA) taxes must begin to do so effective July 2, 1991 or, alternatively, contribute at least 7.5% of your total wages to the Corporation's Tax Deferred Annuity (TDA) plan, which qualifies as a retirement program pursuant to IRS regulations under the new law.

The Doherty letter went on to describe options available to employees under sections entitled, "If You Join the TDA Plan," "If You Contribute to Social Security," and "If You Join NYCERS Pension Plan." The letter advised employees that they could ask questions about "the TDA plan as an alternative to Social Security" during a special radio call-in program to be broadcast on the City's radio station on June 4. Attached to the letter was a "sample comparison" of the costs and take home pay for three hypothetical employees earning $25,000, $30,000 and $50,000 per year, of TDA versus Social Security contributions "to assist you in your decision." The analysis calculated take home pay after annuity contributions as being between 2.6% and 4.4% more than take home pay under the FICA option. In addition, the "sample comparison" contrasted other aspects of TDAs with social security, including contribution flexibility, buy-back provisions, investment options, loans, and payouts.

By letter also dated May 17, 1991, the Union notified the HHC that it believed the Corporation would be violating the NYCCBL if it distributed the Doherty letter to its members. The Union's letter demanded that the Corporation "negotiate over the TDA as an alternative to FICA." The letter reads, in pertinent part, as follows:

> We understand that the HHC is preparing to persuade its employees ... that its [annuity] plan is a viable and preferable alternative to paying the [FICA tax] ....

> While we appreciate the HHC's sharing of information about the TDA, we believe that the CIR's role here is more than the mere recipient of information. We believe that the TDA as an alternative to FICA, the factors which influence that choice, and the circumstances under which that choice is made all constitute terms and conditions of employment requiring that we meet and negotiate.
>
> Prior to such a meeting or meetings, we believe that it is premature and impermissible under the [NYCCBL] to send out a letter to our bargaining unit members describing or characterizing the choice that HHC says is before them on this matter. We insist that no such letter be sent prior to [bargaining] ....

Either before receiving the Union's letter or despite its admonition, the Corporation distributed the Doherty letter to all HHC employees.

Positions of the Parties

Union's Position

According to the Union, the Doherty letter was not "a dispassionate document giving equal weight to two employee options." Instead, allegedly the letter was a direct effort by the Corporation to persuade employees to accept the TDA plan, because the HHC would not be required to contribute to the annuity, as it would under the FICA option. Thus, in the Union's opinion, the Doherty letter amounted to a communication pertaining to wages, which assertedly should have occurred only with the CIR's full participation.

The Union notes that economic negotiations with HHC are at impasse on the ground that the Corporation lacks surplus funds, yet the Union calculates that if all its members were to select the annuity plan, the HHC could save about $500,000. The Union maintains that it had the authority to negotiate and choose one of the options for all its members, or to bargain over potential variations in employer contributions under the TDA plan. By refusing to consult and negotiate, the Corporation allegedly violated the NYCCBL in several respects.

First, according to the Union, by ignoring its duty to bargain over wages and wage changes, a mandatory subject of negotiation, the Corporation violated subdivision (4) of NYCCBL Section 12-306a. In the Union's view, the meaning of "wages" is a broad one, embracing within it any direct and immediate economic benefit that flows from the employment relationship.[3] Specifically, the Union maintains that the availability of non-FICA monies -- in effect, a wage increase -- is the direct and immediate economic benefit involved. It further contends that the Corporation recognized that the dispute involves a wage issue, because, in its answer, the City claims that the HHC "has never refused to bargain," and that "substantive discussions have taken place." Finally, the Union argues that the City cannot absolve the Corporation of a bargaining obligation merely by

[3] Citing Decision No. B-23-75, which quoted from W.W. Cross and Co. v. NLRB, 174 F.2d 875, 24 LRRM 2068 (lst Cir. 1949).

pointing to changes in the Internal Revenue Code. According to the Union, a third party's action does not shield the employer from the duty to bargain where the employer's act has a direct effect upon a term or condition of employment.[4]

The CIR's second claim is that when it circulated the Doherty letter, the Corporation violated subdivisions (1) and (2) of NYCCBL Section 12-306a., because it communicated directly with housestaff employees on a wage issue without consulting or involving the Union. In the CIR's view, such direct dealing interferes with and undermines its position as the collective bargaining representative of these employees.

Finally, the CIR claims that by refusing to provide the Union with requested information on the TDA plan, the Corporation violated subdivisions (1) and (4) of the NYCCBL. The Union contends that because the Doherty letter allegedly concerned a mandatory subject of bargaining, the Corporation had a duty to provide the Union with the information that it sought. Disputing one of the defenses raised in the Corporation's behalf, the Union insists that it was not responsible for communicating with the Internal Revenue Service to learn whether the Corporation's interpretation of the TDA plan conformed with the new tax regulations.

[4] Citing Decision No. B-26-89.

Concerning the "City of Salamanca test" defense raised by the City, the Union points out that it has not alleged anti-union animus or discrimination based on union activity in any of its causes of action. According to the Union, the Salamanca test applies only in cases where the employer's motivation is at issue. The test allegedly does not apply in this case, because the CIR is not claiming that the Corporation discriminated against the Union, or that improper employer motivation occurred. The Union emphasizes that it simply is charging the Corporation with ignoring a bargaining duty, irrespective of what its motivation may have been.

City's Position

The City maintains that the HHC previously had established an annuity plan pursuant to section 403 of the Internal Revenue Code, and that the Corporation has never refused to bargain with the CIR concerning compensation for FICA changes. To the contrary, the City claims that substantive discussions have taken place.

The City also contends that a communication informing employees about options available to them due to revisions in the Internal Revenue Code does not change a term or condition of employment, nor does it affect a union's relationship with its members. It maintains that employers are free to provide tax information to their employees, and are not required to bargain

over the contents of internal communications with employees concerning tax code changes.

The City points out that the HHC did not initiate the new FICA regulations that impacted the annuity plan. The tax code required the Corporation to comply with the changes regardless of whether it had communicated them to its employees. Since the HHC provided neither greater benefits nor placed restrictions on any benefits previously received, allegedly the content of the Doherty letter is not the type of interference, restraint, or coercion that NYCCBL Section 12-306a.(1) protects against. If the CIR did not concur with the Doherty letter, the City argues, the Union was free to express its opinion to its members directly.

Moreover, the City maintains that communications between employer and employee lie at the core of management's entrepreneurial control over its business. Thus, it contends, the contents of such messages cannot be a mandatory subject of bargaining. According to the City, if an employer had to consult with a union before it could communicate with its employees, the employer would lose control of the basic direction of its enterprise.

With regard to the CIR's denial of information claim, the City asserts that an employer is required to furnish information to a union only where a bargaining duty exists. In this case, it contends that because the Corporation had no duty to bargain, it

was not obliged to provide the Union with the details behind the Doherty letter. In addition, the City points out that the CIR could have obtained the information on its own by communicating with the IRS directly. In its view, the Union was just as capable as the Corporation of deciding whether the HHC's annuity plan conformed to the tax code requirements. According to the City, failure by an employer to provide non-vital or otherwise ascertainable information does not establish that the employer interfered with or dominated a public employee organization.[5]

Finally, the City contends that the Salamanca test is the appropriate means for determining whether a violation of NYCCBL §12-306a.(1) (interference with, restraint or coercion of public employees) or NYCCBL §12-306a.(2) (domination or interference with formation or administration of a union) has occurred. The City asserts that unless the HHC's actions were inherently destructive of important employee rights amounting to a per se violation of law, its motivation must be scrutinized for evidence of anti-union animus. In other words, according to the City, because the CIR does not allege that a per se violation occurred, it must show that discrimination or anti-union animus was the motivating factor behind the Corporation's publication of the Doherty letter. The City contends that because the Union did not make any such showing, its petition should be dismissed.

[5] Citing Decision No. B-27-83.

Discussion

The parties in this case have presented us with two basic issues: the first concerns the breadth of the term "wages" under the NYCCBL; the second questions how far a public employer may go unilaterally when advising or giving information to its employees on matters that arguably may be of concern to their union. We shall deal with these issues separately.

A. Duty to Bargain on Wage Issues

Public employers and employee organizations have a statutory duty or obligation, under Section 12-307a. of the NYCCBL, to bargain on all matters concerning wages, hours and working conditions. Section 12-306a.(4) of the NYCCBL makes it an improper practice for a public employer to refuse to bargain in good faith on matters within that framework. A similar prohibition against an employer's refusal to bargain with the certified bargaining representative can be found in §209-a.1(d) of the Public Employees' Fair Employment Act ("Taylor Law"), and in §8(a)(5) of the Labor Management Relations Act ("LMRA") covering the private sector. It has been held, under all three of these statutes, that a unilateral change in terms and conditions of employment constitutes a refusal to bargain in good faith, and, therefore, an improper practice under the applicable

statute.[6]

The focus in this case is on the meaning of the term "wages." According to the Union, "wages" encompass a broad spectrum of compensation issues, all of which are subject to mandatory bargaining; motivation for ignoring a bargaining obligation assertedly is irrelevant. The City, on the other hand, views wage issues more narrowly. It maintains that "wages" are not involved in this case because the HHC did not change the parties' contractual salary schedule -- it merely responded to a statutory revision in the federal tax code that the Corporation did not initiate.

In Decision No. B-23-77, we said that a union demand for payment of the cash equivalent of subway fare cards concerned wages and therefore was a mandatory subject of bargaining. We based this decision upon a ruling of the U.S. Court of Appeals in a case stemming from an employer's unilateral initiation of a group health and accident insurance program.[7] In that case, the First Circuit concluded that "the word 'wages,' following the

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[6] Decision Nos. B-25-85; B-6-82; and B-5-80. See also: Village of Rockville Center, 18 PERB ¶3082 (1985); City of Batavia, 16 PERB ¶3092 (1983); Board of Education, City of Buffalo, 6 PERB ¶3051 (1973); and Board of Education Union Free School District #3, 4 PERB ¶3018 (1971).
In the private sector, see: Peelle Co., 289 NLRB No. 93, 130 LRRM 1365 (1988); Constructive Sheet Metal, Inc., 283 NIRB No. 159, 125 LRRM 1106 (1987); and Rapid Fur Dressing, Inc., 278 NLRB No. 126, 121 LRRM 1300 (1986).

[7] W.W. Cross & Co. v. NLRB, 174 F.2d 875, 24 LRRM 2068 (1st Cir. 1949).

phrase 'rates of pay' in [NLRA §9(a)] must have been intended to comprehend more than the amount of remuneration per work unit of time worked or per unit of work produced." According to the Court, wages "embraces within its meaning direct and immediate economic benefits flowing from the employment relationship."[8]

While there is no counterpart to the NLRA's Section 9(a) in the Taylor Law, §204.3. of the Act requires the parties "to confer in good faith with respect to wages, hours, and other terms and conditions of employment .... Taylor Law Section 201.4. defines "terms and conditions of employment" as meaning "**salaries**, **wages**, hours, agency shop fee deduction and other terms and conditions of employment .... (Emphasis added.)

The NYCCBL contains comparable phraseology. Section 12-307a. requires the parties to bargain in good faith on "**wages (including but not limited to wage rates**, pensions, health and welfare benefits, uniform allowances and shift premiums), hours ... [and] working conditions ....” [Emphasis added.] Thus, in enacting both the Taylor Law and the NYCCBL, the framers arguably intended the term "wages" to have as broad a meaning as the First Circuit found in NLRA §9(a).

This conclusion is bolstered by a recent review of one of our decisions by the New York Court of Appeals. In Decision No. B-7-87, we said that a requirement that applicants for employment

[8] W.W. Cross at 2071.

or promotion agree to payroll deductions stemming from information gathered in a debt questionnaire promulgated by the City affects wages, and therefore involves a mandatory subject of bargaining. The Court upheld our view, stating:

> We cannot say this was an impermissible conclusion. Indeed, this Court recognized only last month, as a constitutional matter, that a 10% payroll deduction can have a substantial impact on an employee already confronted with expenses for the necessities of life.[9]

We find, therefore, that the term "wages" also embraces within its meaning the discretionary change in payroll withholding for FICA, annuity, or retirement option contributions described in the Doherty letter. This is so for two reasons: First, because the options affect payroll deductions and immediate net pay; Second, because the options also affect the post-employment financial cushion provided by the various retirement plans outlined in the letter.

External Action Affecting Wages

The existence of an external statute, over which the employer arguably may have no control, is not a complete defense against a refusal to bargain charge. In a similar dispute several years ago, these parties asked us to decide whether the Corporation committed an improper practice when it began

[9] Levitt v. Board of Collective Bargaining,___ NY2d ___ NYLJ 2/24/92 pp.26-27 (Ct. App. 1992).

deducting from the pay of non-resident unit employees an amount necessary to satisfy the withholding provisions of the New York City Charter. The HHC contended that it merely was abiding by an opinion of the Corporation Counsel, which had held that the HHC was covered by the non-resident city tax provisions of Section 822 of the Charter. Although we decided the case on other very narrow grounds, we implicitly rejected the HHC's assertion that it could cloak its actions with immunity from the governance of the NYCCBL by the simple claim that the law mandated the measures it took.[10] In a subsequent decision also involving the HHC, we elaborated upon Decision No. B-25-85, explaining that the actions of a third party do not shield the employer from the obligation to bargain when compliance has a direct effect upon a term or condition of employment:

> This conclusion is consistent with Decision No. B-25-85, where we held that the HHC must bargain with respect to requiring employees to sign an agreement authorizing the deduction of certain taxes as a condition of continued employment. Even though the action was taken to comply with the non-residency city tax provisions of Section 822 of the New York City Charter, we found this did not relieve the HHC of its burden to negotiate changes affecting terms and conditions of employment.[11]

In our subsequent decision, we held that a requirement of the City's Medical Advisory Committee did not shield the Corporation

[10] Decision No. B-25-85.

[11] Decision No. B-26-89.

from the obligation to bargain when compliance has a direct effect upon a term or condition of employment.

A similar employer's defense came before the Fifth Circuit in NLRB v. Union Mfg. Co.,[12] after the company unilaterally increased the wages of some of its employees to conform with a new statutory minimum wage rate and refused to bargain over its action. The Court found the employer's defense -- that it was required to raise wages in compliance with the Fair Labor Standards Act -- to be without merit. The decision held that although the law required such an increase, the employer's refusal even to discuss the matter with the union justified a finding of a bad faith refusal to bargain.

The Public Employment Relations Board (PERB) also has addressed the issue concerning an employer's reliance on legislative authority to fix compensation unilaterally during negotiations. In County of Orange, 15 PERB ¶3017 (1982), the employer began deducting an annual utility fee from employees who resided in County-owned housing. This surcharge was prompted by a legislative resolution, instituted without negotiations, which required employees to pay an amount in excess of what their union already had agreed upon. The Board held that while the exercise of legislative authority, by itself, cannot sustain an improper practice charge, "the manner of its exercise can, and has been

[12] 200 F.2d 656, 31 LRRM 2232 (5th Cir. 1953).

found to provide the basis for the finding that an improper practice has been committed."[13] Thus, in our view and in that of both PERB and a federal appeals court, the existence of an external statute, over which the employer arguably may have no control, is not a complete defense against a refusal to bargain charge.

Duty to Provide Information

In its letter to the Corporation dated May 17, 1991, the Union requested a copy of "any letter to the IRS requesting a ruling on the extent to which HHC's TDA, or that of the City, qualifies as an alternative retirement system under the IRS regulations." The CIR also requested copies of "any IRS response, when received," and "any legal opinion received by HHC or the City regarding the same issue." The Corporation did not respond to the request. The City contends that the Corporation had no obligation to respond because the request involved a nonmandatory subject of bargaining and because the Union could have obtained the information on its own.

The principle that "there can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of

[13] 15 PERB ¶3017 at 3027.

its duties" has been stated clearly by the U.S. Supreme Court.[14] Under the NYCCBL, the parties have a mutual duty to provide information that arises out of their basic obligation to bargain in good faith.[15] Having found that the Doherty letter concerns a wage issue, which is a mandatory subject of bargaining, it follows that the HHC was under a statutory duty to furnish information relevant to and reasonably necessary for purposes of collective negotiations or contract administration.[16]

The possibility that the information was non-vital or that it was obtainable by other means does not obviate this statutory duty. Citing one of our earlier decisions, the City claims that the Corporation was not obligated to provide information that the Union could have obtained by itself. We have never expressed such a policy in the duty to bargain context, however. Decision No. B-27-83 concerned union representation at an employee's

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[14] NLRB v. Acme Industrial Co., 385 U.S. 432, 435-436, 64 LRRM 2069 (1967).

[15] Section 12-306c.(4) of the NYCCBL provides as follows:

> **Good faith bargaining.** The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
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> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for the full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

[16] Decision No. B-8-85.

disciplinary hearing. The Union alleged, among other things, that the employer refused to divulge the hearing date to the Union's local president. We found that even if the allegation was true, the hearing date had not been withheld impermissibly because the president easily could have ascertained it from the accused employee. This aspect of Decision No. B-27-83 involved an extreme circumstance, and we decline to broaden its holding into a rule with more general application. To the contrary, we concur with private sector precedent, which holds that the duty to provide information is not altered by the fact that the information sought may be available from another source.[17]

Having found that a change in the tax code affecting net pay qualifies as a "wage" issue, thus triggering a bargaining obligation, it follows that the Union's request for related bargaining information was both reasonable and legitimate. By ignoring the request, we find that the Corporation violated the obligation to provide information required of it by Section 12-306c.(4) of the NYCCBL.

B. Direct Dealing With Unit Members

The second aspect of this case concerns the Union's contention that by distributing the Doherty letter directly to members of the CIR, the Corporation intentionally circumvented

[17] Asarco. Inc. v. NLRB, 805 F.2d 194, 123 LRRM 2985 (6th Cir. 1986).

the bargaining unit. This allegation gives rise to the question of direct dealing, an issue that we addressed recently in Decision No. B-17-92.

In the private sector, Section 8(c) of the National Labor Relations Act[18] applies in situations where the employer is charged with interfering with union activity by dealing directly with union members. A number of National Labor Relations Board decisions relate to this provision, about three-fourths of which stem from union organizing campaigns.[19] The NLRB examines the totality of the employer's conduct and uses the language of §8(c) itself as the test for deciding, on a case-by-case basis, whether the direct dealing violated the Act.

There is no counterpart to NLRA Section 8(c) in either the Taylor Law or the NYCCBL. The Public Employment Relations Board ("PERB") has not had occasion to decide a case where the employer is accused of dealing directly with members of a bargaining unit, although there are three reported decisions by PERB hearing

[18] NLRB Section 8(c) reads as follows:

> **Expression of views without threat of reprisal or force or promise of benefit.**
>
> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this sub-chapter, if such expression contains no threat of reprisal or force or promise of benefit.

[19] See LRRM Cumulative Digest and Index, §§ 50.691 to 50.761.

officers who have dealt with the subject. In Rochester Fire Fighters,[20] the City manager wrote a letter to all employees concerning pension costs, which the union regarded as a "scare tactic." In his decision, the Director held:

> [T]he City has a right to disseminate information and to express its opinions or positions to its employees so long as this expression is not intended, nor inevitably serves to impede reaching agreement with employee organizations, or subverts the employee's right of organization and representation.

This principle was reiterated in two subsequent decisions. In 1981, a PERB Hearing Officer ruled that a letter written to Association members by a school district's chief negotiator commenting on negotiations did not, on its face, violate the Rochester Fire Fighters standard.[21] Four years later, a PERB Administrative Law Judge held that a school district's distribution of a memorandum on the status of negotiations, on the afternoon of a general membership meeting, was not improper. However, because the memorandum contained new proposals that had not yet been presented to the union, the ALJ ruled that it did present an improper impediment to the negotiating process.[22] Thus, even in the absence of statutory language equivalent to

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[20] 9 PERB ¶4542 (Director's Decision 1976).

[21] Brentwood Clerical Association, 14 PERB ¶4630 (1981).

[22] North Colonie Central School District, 18 PERB ¶4600 (1985).

NLRA Section 8(c), the PERB hearing officers seem to have adopted a similar standard. Their decisions imply that an employer's direct dealing with union members may not be a violation of law, provided there is no threat of reprisal or promise of benefit, and that direct dealing does not always interfere with employees, organizational rights.

In Decision No. B-17-92, we followed the standard used by PERB and the NLRB. In that decision, we recognized that an employer's direct dealing with union members may not violate the NYCCBL, provided there is no accompanying threat of reprisal or promise of benefit. We explained that in order for the Union to prevail in a direct dealing claim, it must prove that the direct dealing contains a threat of reprisal or force, or that it otherwise subverts the members' organizational and representational rights. When measured against this standard, the action of the Corporation in the case now before us is insufficient to sustain a claim of an improper practice under Section 12-306a.(1) or (2) of the NYCCBL.

The Doherty letter is devoid of any promise of benefit or threat of reprisal. In the absence of these elements, the only issue remaining for our consideration is the Union's allegation that the letter interfered with its organizational rights by compromising its bargaining position. Noting that bargaining for a successor contract is at impasse because the Corporation says it lacks surplus funds, the CIR maintains that it has the

authority to choose one of the tax options for all its members and to negotiate the potential cost savings accruing from the selection with the Corporation. The Union calculates that if all its members were to be covered by the annuity plan, the HHC could save about $500,000.

The parties have not cited to us any section of the Internal Revenue Code,[23] the Internal Revenue Service regulations,[24] or the Internal Revenue Service Procedures[25] that expressly empowers or precludes a labor organization from choosing to bind all of its members to one of the options covered by the Doherty letter. In fact, the statutes and regulations appear not to address this issue. Accordingly, in the absence of federal policy that would limit the exercise of rights that otherwise exist under the NYCCBL, we reiterate that because the selection of an option affects wages,[26] it is a mandatory subject of bargaining.

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[23] IRC §3121 ("Insurance Contributions Act") and IRC §457(c)(2)(B)(i) ("Deferred Compensation Plans of State and Local Governments and Tax Exempt Organizations")

[24] Internal Revenue Service Final Regulations (TD 8354), on Membership in a Retirement System - State and Local Government Employees, 26 CFR Part 31, issued June 25, 1991; and Reg. §1.457-1(a))(1) ("Compensation deferred under eligible State deferred compensation plans."), CCH ¶21,532 (1991).

[25] Rev. Proc. 91-40 (Release 8: 10-18-91).

[26] See discussion at pages 11-14, supra.

In conclusion, we find that by ignoring the Union's request for relevant and reasonably necessary information concerning withholding tax options, a wage issue that is mandatorily bargainable, the HHC committed an improper practice within the meaning of Section 12-306c.(4) of the NYCCBL. We find no evidence that the Corporation has been unwilling to bargain over availability of compensation for FICA changes, however. To the contrary, the Union acknowledges that the Corporation has entertained CIR proposals at negotiations on compensation to offset FICA contributions.

Second, we find that the Corporation did not violate the NYCCBL when it distributed the Doherty letter unilaterally to unit members of the CIR, because the letter did not promise a benefit or threaten reprisal, and because the CIR did not demonstrate any subversion of the members' organizational and representational rights.

ORDER

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

DETERMINED, that in refusing a request to furnish relevant and reasonably necessary information to the Union on a mandatory subject of bargaining, the Health and Hospitals Corporation violated Section 12-306c.(4) of the NYCCBL; and it is therefore

ORDERED, that the Health and Hospitals Corporation shall provide the Union with relevant and reasonably necessary information in order for the Union to make an independent evaluation of the changes in the Internal Revenue Code and the Corporation's interpretation of these changes; and it is further

DETERMINED, that the unilateral publication and distribution of the Doherty letter by the Health and Hospitals Corporation does not constitute an improper public employer practice within the meaning of Section 12-306a. of the NYCCBL; and it is therefore further

ORDERED, that the portion of the improper practice petition herein dealing with the publication and distribution of the Doherty letter be, and the same hereby is, dismissed.

DATED: New York, N.Y.
May 19, 1992

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

THOMAS J. GIBLIN
MEMBER

GEORGE B. DANIELS
MEMBER

STEVEN H. WRIGHT
MEMBER