DC 37, 5 OCB2d 23 (BCB 2012)

(IP) (Docket No. BCB-2990-11)

Summary of Decision: The Union alleged that HHC violated NYCCBL § 12-306(a)(1) and (4) by refusing to bargain over disciplinary procedures for provisional employees. The Union further alleged that HHC's refusal to bargain constitutes interference with its members' rights under NYCCBL § 12-305. HHC argued that it is prohibited from bargaining over this subject because to do so would require a contravention of the law and violate public policy, and that prior decisional law and Board precedent on the subject has been preempted by statute. The Board found that HHC had no duty to bargain over disciplinary procedures for its provisional employees, and dismissed the petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION,

Respondent.

DECISION AND ORDER

On October 25, 2011, District Council 37, AFSCME, AFL-CIO ("Union"), filed a Verified Improper Practice Petition alleging that the New York City Health and Hospitals Corporation ("HHC") violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by refusing to negotiate over disciplinary procedures for provisional

employees. The Union further alleges that, by unilaterally refusing to bargain, HHC has unlawfully interfered with Union members' rights to collectively bargain pursuant to NYCCBL § 12-305. HHC argued that it is prohibited from bargaining over this subject because to do so would require a contravention of the law and violate public policy, and that, at most, recent revisions to the New York Civil Service Law ("CSL") have rendered the matter permissive. The Board finds that HHC has no duty to bargain over due process rights for its provisional employees, and thus did not violate the duty to bargain in good faith over mandatory subjects of bargaining, and, accordingly, denies the Petition.

BACKGROUND

The Union represents public employees at various agencies, authorities, boards, and corporations throughout the City of New York ("City"), including HHC. The Union, HHC, and the City are parties to the 1995-2001 Citywide Collective Bargaining Agreement ("Citywide Agreement"), which remains in *status quo* with the exception of Article XVI, discussed below. As the certified "citywide" bargaining representative, the Union negotiates the terms and conditions of employment that must be uniform among the City's "Career and Salary" employees. *See* NYCCBL § 12-307(a)(2).[1] These terms are memorialized in the Citywide Agreement and are applicable to HHC employees in

[1] NYCCBL § 12-307(a)(2) provides, in relevant part, that:

> . . . matters which must be uniform for all employees subject to the career and salary plan . . . shall be negotiated only with a certified employee organization . . . designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty percent of all such employees . . . .

career and salary positions. The Union is also the certified "citywide" bargaining representative for employees covered by certain "unit" agreements, including the Clerical, Blue Collar, Institutional Services, Social Services, and Accounting/EDP agreements.

New York law provides that "[n]o provisional appointment shall continue for a period in excess of nine months." CSL §65(2). Notwithstanding this statutory declaration, the City and other municipalities had in the past routinely employed provisional employees beyond the statute's nine-month proscription.

In the 1980s, in the absence of statutory due process mechanisms for provisional employees, the parties amended the Citywide Agreement to include a due process procedure for provisional employees who had served for two years in the same or similar title or related occupational group in the same agency. The amendment was memorialized in Article XVI of the Citywide Agreement, which addresses disciplinary procedures for the referenced provisional employees.[2] The provision continued in effect for approximately 20 years.

On May 1, 2007, the Court of Appeals issued its decision in *Matter of City of Long Beach v. Civil Service Employees Association, Inc. - Long Beach Unit*, 8 N.Y.3d 465 (2007). In *City of Long Beach*, the Court of Appeals held that "[t]he Civil Service Law, however, clearly sets a time limitation on provisional appointments and that period is nine months," and thus the employer "cannot agree to provide superior rights to provisional employees holding positions beyond that statutory time period." *Id.* at 471. Accordingly, the Court found that such provisions in a collective bargaining agreement

[2] Most of the unit agreements contain similar due process language for provisional employees.

were void as contrary to public policy. *Id.* at 471-72. The Court explained that this result was compelled to vindicate the policy embodied in the CSL:

> Allowing parties to enter into agreements that give tenure rights to provisional employees who have served beyond the statutory time limit would only perpetuate this harm. The failure to administer timely examinations prevents the identification and hiring of qualified candidates from eligible lists, as required by the Civil Service Law, and misleads provisional appointees into having expectations of continued employment beyond that permitted by law.

Id. at 472. The Court's holding therefore nullified the due process provisions for provisional employees in the Citywide Agreements, as well as unit agreements with similar provisions.

In January 2008, in response to *City of Long Beach*, the Legislature amended CSL § 65 to add a new subsection (5) entitled "Plan for addressing excess provisional appointments." CSL § 65(5). According to the accompanying statement of legislative findings and intent, the amendment sought to implement the public policy discerned by the Court by "establishing an orderly and expeditious means for achieving substantial compliance with the time periods generally permitted by law with respect to such provisional appointments." L. 2008, c. 5 § 1. Recognizing that this process "will take a reasonable period," the Legislature also stated that "in the interim, in order to maintain continuity in the provision of public services and harmonious labor relations, it is in the public interest to authorize limited negotiated disciplinary procedures for provisional employees of the city of New York" and certain affiliated entities, defined as "DCAS employers." *Id.*

The amendment defines "DCAS employers" as:

> (i) the city of New York; and (ii) any other entities whose civil service and examinations are administered by the New York city department of citywide administrative services ("DCAS"), and who opt to participate in this section by written notice to the state commission within thirty days of the effective date of this subdivision.

CSL § 65(5)(a). The amendment required "DCAS employers" to submit a five-year plan to bring the City into compliance with the State law's restrictions on provisional appointments. CSL § 65(5)(b). Section 65(5)(g), which specifically addresses agreements governing disciplinary procedures, provides, in pertinent part:

> [A]ny DCAS employer and an employee organization . . . may enter into agreements to provide disciplinary procedures applicable to provisional appointees or categories thereof who have served for a period of twenty-four months or more in a position which is covered by such an agreement. No such provisional employee shall be deemed to be permanently appointed under such circumstances, nor may such disciplinary procedures be deemed to preclude removal of an employee as a result of the establishment of and appointments from an appropriate eligible list or in accordance with any other provision of law.

CSL § 65(5)(g). In short, the amendment permits "DCAS employers" and unions to negotiate limited due process rights for provisional employees pursuant to the criteria set forth therein.

Following the passage of the amendment, the City and the Union engaged in negotiations over a new disciplinary procedure for provisional City employees within the parameters of CSL § 65(5). The parties subsequently reached an agreement, which the

Union's Executive Director and the City's Commissioner executed on August 30, 2011. HHC was not a party to the negotiations or the agreement.[3]

In a September 6, 2011 letter to the City and HHC, the Union requested bargaining over due process rights for provisional employees at HHC, with the stated goal of executing an agreement similar to that reached with the City. Neither HHC nor the City responded to the bargaining request.

In the wake of the *City of Long Beach* decision, the City and HHC had informally agreed to hold in abeyance the Union's requests for arbitration of grievances challenging disciplinary action against provisional employees with two or more years of service. On October 21, 2011, for the first time since the parties agreed to hold such matters in abeyance, HHC filed a related petition, docketed as BCB-2988-11, also decided today in *DC 37*, 5 OCB2d 24 (BCB 2012), challenging the arbitrability of a grievance seeking redress for the discipline of an HHC provisional employee with over two years of service.

POSITIONS OF THE PARTIES

Union's Position

The Union makes two arguments in support of its claims that HHC refused to bargain over disciplinary rights for provisional employees and interfered with Union members' collective bargaining rights, in violation of NYCCBL § 12-306(a)(1) and (4).[4]

[3] In an October 6, 2011 letter to the Union, the Commissioner confirmed that the August 30, 2011 agreement "specifically excludes the New York City Health and Hospitals Corporation ('HHC') even though HHC is a signatory to the Citywide Agreement." (Ans., Ex. A)

[4] NYCCBL § 12-306(a) provides, in pertinent part:

First, the Union contends that disciplinary procedures are a mandatory subject of bargaining. Second, it asserts that bargaining over due process for provisional employees would not violate public policy.

Citing decisions by the Board and the New York Public Employee Relations Board ("PERB"), the Union contends that both administrative bodies have held the subject of discipline to be a mandatory subject of bargaining. While acknowledging that the *City of Long Beach* decision rendered the provisional due process provisions in the Citywide Agreement null and void, the Union asserts that the State Legislature subsequently amended CSL § 65 to permit the negotiation of provisional due process agreements. Therefore, it reasons, HHC's refusal to bargain over the matter constitutes a violation of NYCCBL § 12-306(a)(4). The Union contends that, by unilaterally refusing to bargain over disciplinary procedures, HHC has also unlawfully interfered with and restrained the Union in the exercise of its right to collectively bargain, pursuant to NYCCBL §§ 12-305 and 12-306(a)(1).

> 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 12-305 of this chapter . . .
>
> (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;

NYCCBL § 12-305 provides, in pertinent part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any of all of such activities.

Next, the Union argues that bargaining over due process for provisional employees would not violate public policy. It contends that the CSL § 65(5) amendment is dispositive in that it provides "clear and unequivocal legislative approval" for negotiated provisional due process agreements. (Pet. Memo of Law, at 9) Citing State court and PERB decisions, the Union asserts that it has "long been recognized" that alternative disciplinary procedures must be viewed as advancing the public good, and that prior determinations that discipline is a mandatory bargaining subject should not be disturbed unless a statute clearly prohibits negotiation over the subject. (*Id.*) In the instant matter, the Union contends that "it can hardly be said that there is a statute that clearly and plainly prohibits negotiations regarding due process rights of provisionals. Indeed, the opposite is true." (*Id.*)

Finally, the City's Office of Labor Relations, HHC's collective bargaining agent, executed a provisional due process agreement with the Union that "mirrors the due process rights" that provisional employees had long held prior to *City of Long Beach*. (Pet. Memo of Law, at 8-9) While HHC is not a party to that agreement, it is subject to the provisions of the Citywide Agreement. As such, despite the desirability and intent of providing consistent terms and conditions of employment to Career and Salary employees, provisional employees currently employed by HHC and City agencies have "drastically different" due process rights. (*Id.* at 9)

HHC's Position

HHC argues that it is prohibited from bargaining over disciplinary procedures for provisional employees on three grounds, all of which derive from the *City of Long Beach* decision and its implications. First, bargaining over the subject would require a

contravention of the law. Second, it would violate public policy. Third, the "bargainability" of the subject has been preempted by law.

On the first ground, HHC argues that *City of Long Beach* rendered disciplinary rights and procedures for provisional employees a prohibited subject of bargaining. Accordingly, HHC cannot bargain with the Union over the subject without contravening law and public policy, as articulated in the decision. HHC contends that CSL § 65(5)(g) did not vacate or overturn *City of Long Beach*. Rather, it carves out a limited circumstance in which the prohibition on bargaining enunciated in the decision does not apply. Unless an employer meets the criteria set forth in CSL § 65(5), the subject of discipline for provisional employees remains a prohibited subject of bargaining.

HHC argues that it does not meet the criteria set forth in the statute. Specifically, it is not a "DCAS employer," as defined in CSL § 65(5)(a). First, HHC is not a City agency. It administers its own civil service independent of DCAS, has its own classification system, and maintains its own personnel rules and regulations. Second, while DCAS does administer HHC's examinations, HHC maintains that it never opted in writing to participate in DCAS' statutorily mandated "five year plan" to reduce the number of provisional employees, or any "alternative agreement." (Ans. ¶¶ 69, 72) Consequently, it contends that it remains subject to the prohibition on bargaining over disciplinary procedures for provisional employees.

On the second ground, HHC contends that engaging in bargaining over disciplinary procedures for provisional employees would violate public policy. It emphasizes that the Court of Appeals and the State Legislature recognized that the negotiation of disciplinary procedures for provisional employees is prohibited as violative

of public policy unless a public employer meets the criteria for designation as a "DCAS employer," which HHC asserts that it does not meet. If HHC were to engage in bargaining over the subject, it would thus violate the "clear public policy" articulated in *City of Long Beach*.[5] (Ans. ¶ 79)

On the third ground, HHC argues that it is prohibited from bargaining over disciplinary procedures for provisional appointees because the Board's prior decisional law has been rendered inapplicable by *City of Long Beach* and that CSL § 65(5)(g) does not act to make the subject mandatory. HHC argues that the word "may" in CSL § 65(5)(g) clarifies that the amendment does not obligate employers within its scope to bargain over disciplinary procedures for provisional employees and transforms an otherwise prohibited subject into no more than a permissive bargaining subject.

Finally, HHC contends that the Board lacks jurisdiction to determine the applicability of CSL § 65(5) to HHC. It further contends that there is no independent or derivative violation of NYCCBL § 12-306(a)(1).

DISCUSSION

It is an improper practice under NYCCBL § 12-306(a)(4) for a public employer or its agents "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public

[5] HHC rejects the Union's arguments that HHC should be compelled to bargain because it is subject to the Citywide Agreement, arguing that the Union "signed off" on the October 6, 2011 side letter with the knowledge that HHC was specifically excluded from the agreement negotiated by the City and the Union. (Ans. ¶ 82) It further contends that the cases cited by the Union in support of its public policy argument are distinguishable from the instant matter.

employees."[6] *Id.*; *see also DC 37*, 4 OCB2d 34, at 10 (BCB 2011). Thus, we have often held that a "public employer may not unilaterally implement a change in a mandatory subject before bargaining on the subject has been exhausted." *DC 37*, 4 OCB2d 34, at 11. In the instant case, the Board is presented with a topic that had been authoritatively deemed by the Court of Appeals to be a prohibited subject of bargaining, and which has been the subject of a legislative amendment, deeming it to be non-mandatory but permissible under certain limited circumstances.

The factual underpinnings of this matter are undisputed. In 2007, the Court of Appeals, in *City of Long Beach*, held that a "provisional employee cannot be entitled to any right of continued employment" under the terms of a collective bargaining agreement. *See City of Long Beach*, 8 N.Y.3d at 472. The decision effectively nullified Article XVI of the Citywide Agreement, which sets forth a procedure for providing due process rights to provisional employees, as well as similar provisions in unit agreements. It also rendered the subject of due process disciplinary rights for provisional employees a prohibited subject of bargaining. Recently, the Appellate Division, First Department, clarified the Court of Appeals' intent, holding that the grievance procedures in the Citywide Agreement "predate and were abrogated by *City of Long Beach*," and that there is "no specific language in the [Citywide Agreement] that would indicate that the parties intended to enter an agreement to revive those procedures pursuant to [CSL] § 65(5)(g)." *Matter of Mahinda v. Bd. of Collective Bargaining*, 91 A.D.3d 564, 566 (1st Dept. 2012).

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[6] Because the Board has "has exclusive non-delegable jurisdiction to hear improper labor practice claims over which Supreme Court lacks original subject matter jurisdiction," we reject HHC's claim that its affirmative defense that the amendment to CSL § 65(5) has the effect of divesting us of jurisdiction over the instant improper practice claim. *Matter of Patrolmen's Benevolent Assn. v. City of New York*, 293 A.D.2d 253, 253 (1st Dept. 1990) (citing (CSL § 205(5)(d)).

In response to *City of Long Beach*, the State Legislature amended CSL § 65 to add a new section entitled "Plan for addressing excess provisional appointments." *See* CSL § 65(5). The Legislature's stated intent in amending the statute was to further the "constitutional mandate of making appointments and promotions 'according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive.'" CSL § 65 (Stmt. of legislative findings and intent). The Legislature authorized a five-year plan as the mechanism for establishing an "orderly and expeditious means for achieving substantial compliance with the time periods generally permitted by law with respect to . . . provisional appointments." *Id.*

In the interim, in order to "maintain continuity in the provision of public services and harmonious labor relations," the Legislature authorized "limited negotiated disciplinary procedures" which are "intended only to facilitate the orderly implementation of the plan." *Id*. Accordingly, CSL § 65(5)(g) provides that "DCAS employers" and the Union "may enter into agreements to provide disciplinary procedures applicable to provisional employees or categories thereof who have served for a period of twenty-four months or more in a position which is covered by such an agreement." CSL § 65(5)(g).[7]

[7] As this case addresses employees employed as provisionals for over two years, we need not address the concurrence's hypothetical regarding disciplinary procedures for employees whose grievances might be adjudicated and who could be put back to work within their nine month permissible employment period, and whether that comports with the "stop gap" nature of provisional employment as "termin[able] at any time without charges preferred, a statement of reasons given, or a hearing held." *City of Long Beach*, 8 N.Y.3d at 471 (quoting *Matter of Preddice v. Callanan*, 69 N.Y.2d 812, 814 (1987) (internal quotation marks omitted)).

On the record before us, we cannot conclude that HHC is a "DCAS employer" within the meaning of the statute. Based on the facts presented, HHC did not "opt to participate" in the DCAS plan to reduce provisional employees within the requisite time period, a requirement for being considered a "DCAS employer" under the statute. *See* CSL § 65(5)(a). Pursuant to the statute, the Union may only enter into an agreement governing disciplinary procedure for provisional employees with a "DCAS employer." *See* CSL § 65(5)(g). Because there is no evidence that HHC is a "DCAS employer," we cannot conclude that CSL § 65(5)(g) applies or requires negotiations for an agreement with the Union for a disciplinary procedure for provisional employees.[8] Nonetheless, even if we were to conclude that HHC meets the criteria for a "DCAS employer," as defined in CSL § 65(5)(a), our conclusion would not differ. CSL § 65(5)(g) did not, as HHC correctly argues, legislatively overrule *City of Long Beach*. Rather, the amendment specifically provides that, for the period in which that subsection remains in effect, DCAS employers and employee organizations "may" enter into agreements to provide disciplinary procedures for specified provisional employees. In the context of the determination by the Court of Appeals that the subject was a prohibited subject of bargaining, the Legislature's use of the word "may" makes bargaining over the subject of provisional employees' disciplinary rights a permissive matter. *See D'Elia on Behalf of Maggie M. v. Douglas B.*, 138 Misc.2d 370, 377 (Fam. Ct. Nassau Co. 1988) ("Generally, it is presumed that the use of the word "shall" when used in a statute is mandatory, while the word "may" when used in a statute is permissive only and operates to confer

[8] We note the concurrence's query as to whether HHC can be deemed to have given "*de facto*" assent to the parties' agreement was not raised by the Union nor is it supported by evidence in the record. Accordingly, a hearing on the issue is not warranted.

discretion. . . . The deliberate use of the word 'may' shows a settled legislative intent not to impose a positive duty"); *Matter of Gable Transps. v. State*, 29 A.D.3d 1125, 1126-1127 (3d Dept. 2006) (describing as "permissive language" granting administrative agency discretion the statutory term "may"). Accordingly, under these circumstances, were HHC to be deemed a "DCAS employer" within the meaning of the statute's terms, it could not be compelled to bargain under the NYCCBL.

The Union points to the disparity between the treatment of HHC and City employees in provisional positions resulting from HHC's refusal to bargain the issue. While these concerns are far from frivolous, we are constrained by the clear import of CSL § 65(5) that due process rights for provisional employees is a permissive subject over which no party can be compelled to bargain. In light of the above, we conclude that HHC did not violate NYCCBL § 12-306(a)(4) by failing or refusing to bargain over disciplinary due process rights for provisional HHC employees. We further find that there is no independent or derivative violation of NYCCBL § 12-306(a)(1), and dismiss all claims against HHC.

ORDER

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 Improper Practice Petition filed by District Council 37, AFSCME, AFL-CIO against the New York City Health and Hospitals Corporation, docketed as BCB-2990-11, is denied.

Dated: May 29, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

I concur. See my Opinion below.

CHARLES G. MOERDLER
MEMBER

I join in Member Moerdler's concurring Opinion.

PETER PEPPER
MEMBER

Concurring Opinion of Charles G. Moerdler.

I am constrained by the decisions noted below to concur in the judgment herein. I do so reluctantly because I am persuaded by the well-reasoned dissenting opinion of former Chief Judge Judith Kaye in *Matter of City of Long Beach v. Civil Serv. Empls Assn, Inc-Long Beach Unit*, 8 N.Y. 3d 465 (2007) that the construction advanced by the majority opinion herein (which, in turn, is based upon its reading of the majority holding in *Long Beach*) misconstrues the reach of *Long Beach*, as well as the operative Legislative enactment. However, *Long Beach* and the language of the recent First Department decision in *Matter of Mahinda v. Bd. Of Collective Bargaining,* 91 A.D. 3d 564 (1st Dept. 2012) seemingly require this concurrence (as contrasted with a dissent), absent hoped-for judicial clarification.

The underlying concern in this proceeding is whether provisional employees are entitled to the protection of fundamental rights during the period of their lawful employment. It is undisputed that for more than 20 years a Citywide Contract or Agreement has been in effect that provides "… a provisional employee with two or more years of service … [the right] to grieve a charge of incompetence or misconduct." (Verified Improper Practice Petition at pars. 8-12; Admitted in Verified Answer pars. 8-12). The Agreement includes a Provisional Employee Disciplinary Procedure (Id. at 12). Respondent HHC effectively admits that the Citywide Agreement's provisions apply to HHC employees. (Id at 10). Yet, HHC, while acknowledging its dependence on provisionals, seeks to deprive them of historic protections.

(1)

In 2007 the Court of Appeals rendered its *Long Beach* decision. The majority in *Long Beach* simply held that a provision in a collective bargaining agreement that purported to grant tenure to provisionals after one year of service or prohibits their termination absent compliance with stated conditions was void in light of Civil Service Law §65, especially in view of the requirement of CSL§ 65(1) that limits provisional appointments to a nine month term. *Long Beach, passim; see,* 8 N.Y. 3d at 470-473*).* Importantly, the *Long Beach* majority was silent as to what rights may attach during that nine month period (other than to note that provisionals could be terminated without cause), a point that Chief Judge Kaye noted in dissent (Id at 473) and which the majority left unanswered[9]:

> The majority takes issue with granting a worker who has been provisionally employed for more than one year what it deems to be rights superior to those granted a provisional worker who is replaced by the City within a nine-month period as per statutory mandate. *The Civil Service Law itself, however, does not prohibit the City and the CSEA from negotiating limited protections for provisional employees based on the length of time they have served the City. Any such prohibition stems from the statute's requirement that provisional appointments be terminated after nine months ….(Id at 474-475).*

In sum, Chief Judge Kaye correctly analyzed the Civil Service Law as simply proscribing the term of employment of provisionals and the majority in *Long Beach* simply holds that where a collective bargaining agreement seeks to abridge the Law's nine month proscription its provisions are void. However, the *Long Beach* court makes no mention of, and neither does CSL §65, of any bar to the negotiation of disciplinary

[9] It is the general practice of appellate courts in New York , including the Court of Appeals, to circulate to the full court panel, prior to release of court determinations, copies of decisions that either dissent from, concur in or otherwise depart from the majority opinion. One purpose of that salutary practice is to permit the majority to address in their opinion issues thus raised. The point is relevant here because the majority chose not to address Chief Judge Kaye's argument as summarized herein.

procedures *applicable to the period of lawful employment and prior to lawful termination.* By contrast, this Board and PERB have held, and their holdings have consistently been sustained, that discipline is a mandatory subject of bargaining. E.g., *Auburn Police Local 195 v. PERB,* 91 Misc. 2d 909, *affirmed*, 62 A.D. 2d 12 (1978), 46 N.Y. 2d 1034 (1974); *DC 37 v. NYPD & City*, 67 OCB 25 (BCB 2001).

Thus posited, HHC's refusal to bargain disciplinary procedure *applicable to the period of lawful employment and prior to lawful termination* is, without more, improper. The majority, relying on what I believe is a flawed reading of *Long Beach* and the Civil Service Law, erred in concluding otherwise. [10]

(2)

Following *Long Beach* the Legislature concluded that the effective operation of government could not continue if the decision were allowed to stand unchanged. L. 2008, c. 5, §1. After all, agencies like HHC were able to function only because they relied upon thousands of provisional employees. Thus, as late as December 2011, HHC still relied on some 3,633 provisionals. (Petition, par 39; undenied in HHC's Verified Answer).

Effective 2008, CLS §65 was amended to permit adoption of a five-year plan to effectively deal with the issue of provisionals. L. 2008, c 1-5; CLS §65 (5). The amendment effectively stayed implementation of the nine month tenure bar of provisionals as reinforced by *Long Beach.* And while HHC protests (perhaps a bit too shrilly) that it did not subscribe to that plan and that only the City of New York supposedly did, the fact remains that with some 3, 633 provisionals still on HHC's

[10] Recently, the Appellate Division, citing *Long Beach,* adopted that same approach, without explanation or reasoning, in a case that may be viewed as being distinguishable. *Matter of Mahinda v. Bd. Of Collective Bargaining,* 91 A.D. 3d 564 (1st Dept. 2012).

payroll more than 3 years after enactment of §65(5), such protestations ring hollow. Similarly, HHC's admits that during that period it held in abeyance disciplinary grievances filed on behalf of provisional employees and that it did so while being well aware that DC 37 "and the 'DCAS employer' the City of New York, [had] reached an agreement pursuant to §65(g) of the Civil Service Law granting contractual due process right[s] to provisional employees of the City." (HHC Verified Answer at pars. 47-48).

Putting aside the question as to whether HHC is a funded, appointed and dominated creature of the City, and thus bound by its actions, it is evident that a *prima facie* case is stated for the proposition that, whether or not HHC itself physically signed the DC 37-New York City due process rights agreement, it gave its *de facto* assent and thus benefited by being enabled to continue in service by the labors of legions of provisionals who have permitted it to operate. Call it estoppel, call it implicit assent, call it what you will, this record compels the conclusion that, at the very least, a serious factual question exists as to whether HHC assented *de facto* to the City Agreement pled by HHC in its Answer (Ibid). That question can only be answered on a full record following an evidentiary hearing. I would, at the very least, have directed such a hearing and held a final determination in abeyance pending the conclusion of that hearing.

(3)

In the interests of completeness, I take this opportunity to note that the majority misconstrues CLS §65 (5)(g) as supposedly negating the long established principle that discipline is a mandatory subject of bargaining, at least in this context. That notion is predicated upon the majority's misconstruction of the word "may" in CLS §65

(5)(g) as indicative of a legislative intention to make such bargaining permissive as contrasted with the mandatory subject of bargaining that it has long been. The term "may" is used CLS §65 (5)(g) to authorize parties "… to enter into agreements to provide disciplinary procedures applicable to provisional appointees or categories thereof *who have served for a period of twenty four months or more …"* Bearing in mind that *Long Beach* holds that appointments are limited to nine months and that anything that would seem to go beyond or extend that tenure is open to challenge, it becomes clear that this language (and the use of the word "may" in connection therewith) was intended by the Legislature simply to make clear that the legislative intent was to toll the nine month bar for this purpose. And that construction is supported by the immediately preceding language in CLS §65 (5)(g) that that grant of authority to supercede the nine month tenure bar was authorized "[n]otwithstanding any inconsistent provision of this chapter or any other law or rule to the contrary …" In sum, the word "may" and its usage in context had nothing whatsoever to do with making such bargaining permissive rather than mandatory, and, with respect, the majority's contrary construction is simply wrong.

May 24, 2012

CHARLES G. MOERDLER

Charles G. Moerdler
Member

PETER PEPPER

Peter Pepper
Member