DC 37 v. City, FDNY & DOF, 61 OCB 13 (BCB 1998) [Decision No. B-13-98 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice between District Council 37, AFSCME, AFL-CIO, Petitioner, and The City of New York, New York City Fire Department and Department of Finance, Respondents.	Decision No.	B-13-98
	Docket No.	BCB-1846-96

DECISION AND ORDER

On July 15, 1996, District Council 37 ("DC 37" or "Union") filed an improper practice petition against the New York City Fire Department ("FDNY"), the Department of Finance ("DOF") and the City of New York (hereinafter collectively known as "City"). The petition alleges that the City violated New York City Collective Bargaining Law ("NYCCBL") §12-306(a)(1) & (4)[1] when it: (1) violated its obligation to negotiate only with DC 37 by unilaterally negotiating individual agreements with employees; (2) unilaterally instituted a new condition of

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[1] NYCCBL §12-306(a)(1) & (4) provides, in relevant part:

> **Improper practices; good faith bargaining.** a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> (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.

employment by requiring all nonresident employees hired after January 1, 1973, to pay to the City, an amount equal to what a City resident would pay in personal income tax (hereinafter "City resident tax"); and (3) wrongfully deducted that tax, thereby reducing the wages and salaries of the affected employees.

On October 11, 1996, the City filed an answer. On January 9, 1997, the Union filed a reply, and on January 29, 1997, the City filed a sur-reply. The Union filed a response to the sur-reply on February 25, 1997, seeking oral argument.

BACKGROUND

On or about October 19, 1995, the Union received an outline of proposals from the City addressing a possible functional transfer of employees from the Emergency Medical Service ("EMS") of the Health and Hospitals Corporation ("HHC") to the New York City Fire Department ("FDNY"). The EMS workers to be transferred were members of the Hospital Technicians' bargaining unit, a joint employer- joint union bargaining unit between the HHC and New York City, and Teamsters Local 237, Service Employees International Union, Local 144 and DC 37, all of which are covered by the Citywide collective bargaining agreement ("Citywide agreement") between the HHC, the City and DC 37. The outline stated that the transfer would assume a payroll date of November 12, 1995, and that, since the employees would then be City employees, those nonresident employees hired after 1973 will pay an amount equal to the City resident tax, pursuant to the New York City Charter ("Charter") §1127."[2] Prior to this,

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[2] §1127 of the City Charter states, in pertinent part:

a. Notwithstanding the provisions of any local law, rule or regulation to the

(continued...)

nonresident employees of the EMS at the HHC who were hired before October 1, 1982, paid the nonresident City income tax, which is a lesser amount. The Union voiced its objections and opposition to the outline at that time, and purportedly expressed a desire to negotiate a Memorandum of Agreement with the City and the HHC over the terms of the proposed transfer.

On December 18, 1995, the Union received a draft version of a book of FDNY/EMS practices, procedures and policies. Contained therein was a sample pay-stub, which included a "City Waiver" box, representing the City resident tax that would be deducted from the pay of transferred, nonresident EMS workers.

On February 9, 1996, the Union was notified by Ms. Jane Roeder, then Assistant Commissioner of the Office of Labor Relations, that all nonresident employees hired after 1973 would be covered by Charter §1127. Accompanying this notification was a "Fact Sheet" stating that the transfer assumed a payroll date of March 17, 1996, which reiterated the message that, "[T]hose nonresident employees hired after 1973 will pay full City nonresident tax ("Section 1127"). Notification of nonresident tax will be sent to all employees at their last known

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[2](...continued)

> contrary, every person seeking employment with the city of New York or any of its agencies regardless of civil service classification or status shall sign an agreement as a condition precedent to such employment to the effect that if such person is or becomes a nonresident individual as that term is defined in section 11-1706 of the administrative code of the city of New York or any similar provision of such code, during employment by the city, such person will pay to the city an amount by which a city personal income tax on residents computed and determined as if such person were a resident individual, as defined in such section, during such employment, exceeds the amount of any city earning tax and city personal income tax imposed on such person for the same taxable period.

address."[3] The Union responded by informing the City that it believed it was unlikely that Charter §1127 could be legally extended to cover all HHC employees without the Union's consent. In any event, the Union asked for and received a list of the names of all Union represented EMS employees that were hired between 1973 and October 1, 1982.

On February 21, 1996, the Union was informed by Dan Connelly, Counsel for the Mayor's Criminal Justice Coordinator, Katie Lapp, that the City resident tax is mandated by Charter §1127 and therefore beyond the scope of negotiation. The Union claims that, at this time, it openly maintained its position that Charter §1127 not be applied to previously exempt employees without the consent of the Union.

Between February 27, and March 1, 1996, the Union members were mailed what was purported to be a proposed agreement, informing the transferred EMS workers of their obligation to pay the City resident tax: the City considered that acceptance of employment constituted acceptance of an agreement to abide by Charter §1127 and to pay the higher City resident tax. The Union responded by engaging in a campaign aimed at convincing those employees not to sign any agreement to pay the additional tax, arguing that it was being imposed without the consent or participation of the Union.

On March 13, 1966, Union representatives received a fact sheet from the City which stated that all affected employees should have received notification regarding implementation of the additional payments due under Charter §1127, and that the payroll transfer date for the EMS

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[3] It should be noted that the "Fact Sheet" refers to the additional payments due under Charter §1127 as the "full City nonresident tax."

workers would be March 17, 1996. On that day, the EMS workers were transferred from the HHC to the FDNY.

Coincidental with the filing of the instant improper practice petition, Petitioner commenced an Article 78 proceeding in State Supreme Court, New York County, Matter of Hill v. City of New York, ("Hill") Index No. 112578/96, alleging that, (i) the City acted arbitrarily, capriciously and in contravention of law, by enforcing Charter §1127 in violation of CSL §70(2)[4] and Charter §1143;[5] and, (ii) the City's action is an unconstitutional impairment of contract and deprivation of property in violation of the due process clauses of the New York State and United States Constitutions. The Union sought an order, (i) directing reimbursement of all moneys deducted via enforcement of Charter §1127; and (ii) directing the City to cease any further deductions thereunder.

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[4] **CSL §70. Transfers**

> (2) Transfer of personnel upon transfer of functions. Upon the transfer of a function (a) from one department or agency of the state to another department or agency of the state, or (b) from one department or agency of a civil division of the state to another department or agency of such civil division, or (c) from one civil division of the state to another civil division of the state, or (d) from a civil division of the state to the state, or vice versa, provision shall be made for the transfer of necessary officers and employees who are substantially engaged in the performance of the function to be transferred. .... Officers and employees so transferred shall be transferred without further examination or qualification, and shall retain their respective civil service classification and status. .... Officers and employees transferred to another governmental jurisdiction pursuant to the provisions of this subdivision shall be entitled to full seniority credit for all purposes for services rendered prior to such transfer in the governmental jurisdiction from which transfer is made.

[5] New York City Charter §1143. **Transfer of records and employees in case of transfer of functions.** Wherever by any provision of this charter functions, powers or duties are assigned to any agency or officer which have been heretofore exercised by any other agency or officer, all officers and employees in the classified municipal civil service who at the time when such charter provisions shall take effect are engaged in the performance of such functions, powers or duties are assigned by this charter, without examination and without affecting existing compensation or pension or retirement rights, privileges or obligations of such officers and employees.

Supreme Court Justice Lehner entered judgment in favor of the Union, finding that enforcement of Charter §1127 against the EMS petitioners and other similarly situated employees was in violation of Civil Service Law ("CSL") §70(2).[6] The Court held that, in applying the provisions of Charter §1127 to the affected transferees, the City disregarded their seniority benefits. The Court stated that the EMS workers' exemption from Charter §1127, as a protected benefit, was supported by the legislature's intention in adopting CSL §70(2) to protect employee rights upon transfer.

POSITIONS OF THE PARTIES

Union's Position

In its Petition, the Union claims that it was bypassed as a result of the City's dealing directly with individual union members. The Union asserts that the City, without authorization, unilaterally established a new condition of employment: the withholding of the higher City resident tax from nonresident EMS workers transferred from the HHC to the FDNY, allegedly as a condition of employment with the City. As a "unilateral establishment of a continuing condition of employment," the Union claims that the City has "wrongfully deducted the equivalent of the difference between the taxes paid by them [transferred EMS workers] as nonresidents and the City resident tax from EMS employees hired before November 1, 1982." Hence, the Union regards the additional payments as a new condition of continuing employment with the City, thereby reducing the wages of those employees, in violation of NYCCBL §12-306(a)(1) & (4).

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[6] Matter of Hill v. City of New York, NYLJ, April 8, 1997, p. 25, c.6.

The Union states the City engaged in direct dealings with employees when, between February 27 and March 1, 1996, it initiated a mailing which contained a proposed agreement for affected transferees to sign, seeking to secure their obligation to pay the City resident tax. The Union claims that it was given no advanced warning of these mailings, and had no knowledge of their contents. Therefore, the Union maintains that any alleged agreement between the City and an individual is not an agreement between the City and the Union to pay the additional tax pursuant to Charter §1127.

The Union claims that the exemption from Charter §1127 by the HHC employees hired prior to October 1, 1982 is an aspect of their seniority, protected by CSL §70. Between 1973, when the predecessor to Charter §1127 was enacted, and 1982, HHC denied the application of its provisions to HHC's nonresident employees. When, in 1982, HHC reversed itself, HHC nonresident employees were exempted from its provisions by virtue of their seniority. As such, the exemption is seen as a condition of employment and cannot be unilaterally eliminated without the Union's consent. In the alternative, the Union argues that these employees should be exempt from the application of Charter §1127 as a continuing condition of employment, subject to collective bargaining. The Union states,

> The facts and circumstances surrounding the functional transfer of the HHC employees to the FDNY clearly demonstrate that the application of the non-residency tax to the transferred employees was not expressly mandated by the language of §1127 and therefore was not "beyond the power of the parties to alter or modify the statutory provision by collective bargaining . . . "

It continues by stating that the transferred EMS workers are not to be treated as "newly hired" employees, and that to do so would go beyond the scope of Charter §1127; the application of Charter §1127 to the HHC employees who were functionally transferred to the FDNY constitutes a continuing condition of employment, which is a mandatory subject of bargaining. Moreover, the Union states that there is no "plain and clear statutory mandate" within Charter §1127 which provides for a disciplinary procedure, nor is there a public policy which calls for the circumvention of the collective bargaining agreement in this matter. Rather, this matter is seen as within the ambit of the collective bargaining agreement, and should be resolved in that arena.

The Union states that the City is engaging in "arbitrary, selective enforcement of the Charter §1127 obligation" by its decision to extend coverage only to those EMS workers hired after 1973, continuing to exempt those hired prior to 1973. The Union argues that, insofar as Charter §1127 requires all new hires to sign a pre-employment agreement as a condition of employment, the City's policy in this regard exhibits its inconsistent application of that obligation.

Lastly, the Union affirmatively states that the instant Petition was filed within the requisite 120 days, as measured from the implementation date of Charter §1127 by the City, March 17, 1996. It is further asserted that matters which occurred prior to that date are admissible as background data as long as the effective date of the conduct which forms the basis of the Union's charge occurred within the four-month period. Moreover, the Union contends that its opposition to the implementation of the tax with respect to the affected transferees was raised continuously since it was first discovered that the City planned it; failure to raise specific

objections to every piece of correspondence issued by the City in this matter does not amount to a waiver with regard to alleged violation.

City's Position

The City argues that the allegations raised in this Petition should be dismissed because they are untimely. It states that the Union received notification as early as October 19, 1995, which stated that the transferred EMS workers would be subject to an increase in the amount of taxes taken from their pay pursuant to Charter §1127. The City continues by pointing out that on February 9 & 21, 1996, the Union was sent fact sheets advising it that the tax would be imposed on all nonresident employees hired after 1973, and that the tax is a nonnegotiable subject as it is mandated by Charter §1127. Moreover, it is claimed that between February 27, 1996 and March 1, 1996, all EMS employees were notified by mail that they would be required to pay the residency tax pursuant to Charter §1127. The City maintains that knowledge of the impending tax increase may be further imputed to the Union because, on or before March 11, 1996, the Union was engaged in a campaign against the tax by directing Union members not to sign consent forms allowing the additional deductions. Furthermore, all Union representatives received a fact sheet on March 13, 1996, informing the Union that all affected transferees should have been informed of the additional tax in early March. Because the aforementioned events all took place more than four months prior to the filing of Petitioner's Petition, the City submits that the Petition is untimely and should be dismissed.

The City asserts that, "There has been no unilateral implementation of a 'new condition of continuing employment,' as the City's compliance with Charter §1127 is a nonmandatory subject

of bargaining, and was required by operation of law." The City maintains that it did not arbitrarily "decide" that coverage of Charter §1127 would be extended to EMS workers hired by the HHC prior to October 1, 1982, but that Charter §1127 mandates the applicability of the provisions contained therein to all EMS workers that were hired subsequent to its enactment in 1973. The City states that, where there exists an imperative statutory provision with regard to certain aspects of the parties' rights under the collective bargaining agreement, the statutory provision will prevail, and those aspects shall be deemed non-mandatory issues of bargaining.[7] Therefore, the City claims that Charter §1127 imposes an imperative on the parties in that the full City Residence tax must be deducted from all City employees who have been transferred from the HHC to the FDNY.

The City further argues that it did not negotiate directly with individual employees, and therefore could not have circumvented, or bypassed, the Union in its role as exclusive bargaining agent. The City states that those employees were sent a form which dealt with the anticipated transfer and the imposition of the residency tax, and that such actions do not rise to the level of "negotiating." The City claims that they have kept the Union apprised of all planned and

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[7] The City cites: Matter of Town of Mamaroneck PBA v. New York State Pub. Employment Relations Bd., 66 N.Y.2d 722, 496 N.Y.S.2d 995 (Ct. App. 1985) (longevity credit provided by statute not subject to collective bargaining); Union Free School District No.2 of Town of Cheektowaga v. Nyquist, 38 N.Y.2d 137, 379 N.Y.S.2d 137 (Ct. app. 1975); In Re Application of the New York City Department of Probation, et al. v. Malcolm McDonald, et al., 613 N.Y.S.2d 378 (1st Dept. 1994) (applicability of §1127 does not involve a provision of the contract and is not for an arbitrator to decide); City of New York v. Malcolm D. McDonald, 607 N.Y.S.2d 24 (1st Dept. 1994) Leave to Appeal Denied, 83 N.Y.2d 759, 615 N.Y.S.2d 876 (1994)(disciplinary procedure afforded by law is not mandatorily negotiable); Webster Central High School District v. PERB, 555 N.Y.S.2d 245 (????); City of Newburgh v. Michael Potter, et al., 24 PERB ¶7550 (statutory provisions cannot be altered by collective bargaining); Garden City Police Benevolent Association, 21 PERB 3027 (1988); Westbury Union Free School District, 9 PERB 7018 (1976); City of Troy, 4 PERB 8016 (1971).

anticipated transfers of employees, and any accompanying personal income tax consequences, by providing a "Fact Sheet," a copy of the FDNY Handbook and other correspondence, pertaining to the transfer.

The City maintains that, unlike the National Labor Relations Act (NLRA), §8(c),[8] there is no provision in the NYCCBL or the Taylor Law which prohibits "direct dealing" by an employer with employees. Direct dealing with an employee rises to the level of a violation only if there is the "Threat of reprisal or the promise of benefit, and that the direct dealing does not always interfere with employees' organizational rights."[9] The City claims that no direct dealing has occurred because there has been no threat of reprisal or force or promise of benefit to the transferred EMS workers, nor has there been any interference with organizational rights between those workers and the Union.

DISCUSSION

As a preliminary matter, we address the City's timeliness argument. Section 1-07(d) of the Rules of the City of New York (RCNY) provides:

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[8] NLRA §8(c) states:

> 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 Act, if such expression contains no threat of reprisal or force or promise or benefit.

We note, however, that "direct dealing" has been found to be a violation of NLRA §8(a). *See,* Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404, 102 S.Ct. 720, 70 L.Ed.2d 656 (1982); NLRB v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed. 230 (1962).

[9] B-17-92, citing North Colonie Central School District, 18 PERB ¶4600 (1985); See also, Brentwood Clerical Association, 14 PERB ¶4630 (1981); Rochester Fire Fighters, 9 PERB ¶4542 (1976).

> Improper Practices. A petition alleging that a public employer or its agents . . . has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf . . .

We have previously held that a "party may also await performance of an action and file an improper practice charge within four months after the intended action is actually implemented and the charging party is injured thereby."[10] Since the effective date of the City resident tax deduction was March 17, 1996, we find the instant petition, filed on July 15, 1996, to be within the time constraints established by RCNY 1-07(d).

It is true that when a petition alleges a continuing course of conduct commenced more than four months prior to the date of filing, the allegation may not be time-barred in its entirety. In such cases, a specific claim for relief is time-barred to the extent a petitioner seeks a remedy for wrongful acts which occurred more than four months before the petition was filed, but evidence of the wrongful acts may be admissible for purposes of background information when offered to establish an ongoing and continuous course of violative conduct.[11] Therefore, those matters cited in the instant petition which allegedly occurred before March 15, 1996, are considered only as background information. We next turn to the merits of the Union's position.

The Union claims that the City imposed a condition of employment on the affected transferees: an increase in the amount of City income tax to be taken from their pay as a

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[10] Decision No. B-30-91 at 10, citing Barry v. United University Profession, 23 PERB ¶3024 (1990), citing Werner v. Middle County Teachers Association, 21 PERB ¶3012 (1988).

[11] Decision Nos. B-21-93 and B-37-92.

condition to accepting employment with the FDNY. This was done, it was asserted, in violation of CSL §70(2), because exemption from Charter §1127 is a benefit derived from having a certain amount of seniority as an EMS worker. The issue that deduction of the additional tax, pursuant to Charter §1127, was violative of CSL §70(2), was also advanced in a similar matter, decided in New York State Supreme Court: Ganley v. Giuliani.[12] In Ganley, the Court upheld the City's right to impose the City resident income tax, pursuant to Charter §1127, on transferees from the Housing Authority Police Department and Transit Authority Police Department, when those departments were merged with the New York City Police Department (NYPD). The Court held that,

(1) the employment condition contained in Charter §1127 is not an unlawful tax on nonresident City employees because the payment is founded upon contract, unlike a tax, which is levied by the government;

(2) the transferees from the Housing Authority Police Department and Transit Authority Police Department were persons "seeking employment with the City," thereby being subject to the employment condition;

(3) the imposition of the employment condition contained in Charter §1127 did not run afoul of CSL 70(2) because the nonresident tax is "neither a 'further examination nor qualification,' or a change in 'civil service classification and status'" This protection is not extended to encompass rights and privileges.

(4) since the affected transferees were sent notices stating that acceptance of employment with the NYPD was an acceptance of the employment condition contained in Charter §1127. "By reporting for duty as members of the NYPD after having received the notices, they confirmed their agreement to abide by the provisions of Charter §1127."

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[12] NYLJ, January 16, 1997, p.29, c.2.

The unions in Ganley also advanced a similar claim to that posited by the Union in the instant matter in that the City's implementation of Charter §1127 was "arbitrary and capricious and that the petitioners are being denied their property without due process of law because they have not consented or authorized the paycheck deduction . . . [and that] . . . CSL §70(2) prohibits the City's action." The Court in Ganley held that the individuals were on notice and that acceptance of the job with the NYPD was acceptance of the terms of Charter §1127. Moreover, the Court did not find any protected rights guaranteed under CSL §70(2) because the tax was neither a further examination nor qualification or change in civil service classification and status.

However, in Hill, the court distinguished the EMS workers therein from the police officers in the Ganley case in that the EMS workers had acquired seniority benefits as a result of the exempt status that had been granted to them from the HHC, vis-a-vis the application of Charter §1127. The Court stated:

> Petitioners' exemption from section 1127, as a protected benefit, is supported by the legislature's intention in adopting CSL §70(2) to protect employee rights upon transfer. The guarantee in section 70(2) of "full seniority credit for all purposes for service rendered prior to such transfer" includes all financial benefits resulting from years of service. Exemption from section 1127 is one of such benefits even though here it only flows to nonresidents of the City. It is a pecuniary benefit enjoyed for years by petitioners of which they should not be deprived merely because of an administrative transfer of functions.
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> * * *
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> Contrasted with the police officers in Matter of Ganley v. Giuliani, here the original employer agency had specifically granted the

> relevant employees an exemption from the imposition of section 1127 based on their period of service. It was not, therefore, just a case (as with the police officers) of an inapplicable statute, but rather it was a benefit bestowed as a consequence of being declared exempt by their employer due to seniority. The respondents' actions were accordingly in conflict with law as well as arbitrary and capricious as the application of section 1127 to these particular employees is in violation of protections provided by CSL §70(2).[13]

Here, as in Hill, we find that the seniority rights conferred on the EMS workers were indeed protected interests outside the application of Charter §1127, by virtue of CSL §70(2).

Moreover, independent of the Court's holding in Hill, we find Board precedent which establishes that the imposition of the City resident tax on those employees previously exempted by the HHC is violative of the NYCCBL. In Decision No. B-25-85, the Committee of Interns and Residents (CIR) filed an improper practice petition "alleging that the unilateral imposition by HHC of a tax on the earnings of nonresident employees, purportedly in compliance with Section [1127] of the New York city Charter, constituted a refusal to bargain in good faith and a violation of Section [12-306(a)(1) & (4)] of the [ ]NYCCBL."[14] In that case, we held that,

> The facts in the present case establish, we believe, an improper practice as it is defined in Section [12-306(a)(4)]. Because of HHC's 10-year refusal to acquiesce in the Corporation Counsel's construction of Section [1127], there was no need or occasion, prior to July 1983, for CIR to make a demand upon HHC to bargain on the effect of the application of Section [1127] to this bargaining unit. Thus, while broader legal questions have been raised by the parties in their pleadings, we find that in the unique circumstances of this matter — where HHC for 10 years denied the applicability of Section [1127] and then suddenly and unilaterally

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[13] Hill, NYLJ, April 8, 1997, at 25.

[14] Decision No. B-25-85 at 1.

> reversed itself and established Section [1127] as a condition of employment, CIR has a right to bargain over the effect of such change.[15]
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> * * *
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> We further find that where, as in the instant proceeding, there has been a refusal to confer with the certified employee representative regarding a change affecting terms and conditions of employment, there is, in our judgment, interference with the effectiveness of the employee representative and, consequently, the rights of the employees which it represents, in violation of Section [12-306(a)(1)] of the NYCCBL. [Footnote omitted.][16]

Furthermore, this Board has never found that management has the "unfettered right" to transfer or assign employees as they see fit. Rather, the Board has recognized that an action which on its face falls within an area of management prerogative may conflict with the rights granted to an employee pursuant to the NYCCBL. In these cases, the right to manage is not a delegation of unlimited power, nor does it insulate the City from an examination of actions claimed to have been taken within its limits.[17]

The NYCCBL expressly reserves to management the authority to determine the standards of services to be offered by city agencies, and the methods, means and personnel by which

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[15] In 1973, the Corporation Counsel issued an opinion stating that all city agencies, including the HHC, were subject to this provision. The HHC did not consider itself a City agency, and declined to adhere to that opinion. It was not until 1982, that HHC acquiesced to being considered a city agency and imposed this tax on all of its members. We ruled that, after ten years, the HHC could not unilaterally impose this tax, as that would be a failure "to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." Hence, the HHC issued a letter which made the tax effective for all new hires, hired after October 1, 1982.

[16] *Id.* at 9-10.

[17] Decision No. B-4-87.

governmental operations are to be conducted. Such managerial rights are not without limitations, however. Unilateral management action may not be used to denigrate existing employee rights in matters of wages, hours and/or working conditions.[18] Public employers and employee organizations have a statutory duty, pursuant to the NYCCBL, to bargain on all matters in this regard; the NYCCBL makes it an improper practice for an employer to institute a unilateral change or to refuse to bargain in good faith or on matters within that framework.[19] As the City's unilateral imposition of the City resident tax on nonresident EMS workers hired before 1982 negates a benefit previously conferred upon those affected EMS workers by their public employer, thereby resulting in a reduction in pay, we find a direct impact on the "wages, terms and conditions of employment."

We also find that, as this act by the City bears directly on the issue of seniority rights enjoyed by those affected EMS workers, the City must bargain as to any reduction in benefits

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[18] Decision No. B-36-93.

[19] B-16-96. *See also,* B-37-93 (unilateral implementation of adjucted work schedule constitutes mandatory subject of bargaining); B-38-92 (OTB's change in meal period of Branch Managers constituted a unilateral change in a mandatory subject of bargaining); B-63-91 (FDNY's unilateral imposition of reimbursement procedure constituted impermissible change in mandatorily bargainable term or condition or employment); B-21-87 (without denying management rights were involved, Board found *prima facie* claim of improper practice as petition argued issue of waiver as to why it was a violation of NYCCBL §12-306(a)(4) for the City to refuse to execute written agreement including work chart from predecessor contract and for it prospectively to make unilateral changes in work chart without negotiating with UFA);
B-7-87 (compulsory execution of an agreement to repay debts owed to City, as a condition of appointment or promotion, involves a mandatory subject of bargaining; agreement imposed continuing condition of employment, provided for deductions from wages, and established non-payment as predicate for disciplinary action).

earned from that seniority. Seniority is a mandatory subject of bargaining to the extent that a demand concerning seniority does not interfere with Civil Service Law or management rights.[20] We therefore find that, to the extent that this demand implicates existing seniority benefits, it cannot be challenged unilaterally.[21]

. **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 City expunge from the personnel files of those EMS workers hired before October 1, 1982 individual agreements between them and the City regarding Charter §1127; and it is further

ORDERED, that the City cease and desist from violating the NYCCBL in the manner described herein; and it is further

ORDERED, that the City repay all monies, with interest, deducted pursuant to Charter §1127, from those EMS workers hired before October 1, 1982; and it is further

ORDERED, that the City post the attached notice for no less than thirty days, at all locations used by the Union for written communications with unit employees.

Dated: April 16, 1998
New York, N.Y.

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[20] Decision Nos. B-3-75; B-3-73.

[21] *See*, *e.g.,* Decision No. B-23-85.

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

See attached dissenting opinion of City Members Saul Kramer and Richard Wilsker.

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE

BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY
COLLECTIVE BARGAINING LAW

We hereby notify:

All employees that the City of New York committed an improper practice by withholding the City resident tax from transferred nonresident EMS workers hired before October 1, 1982.

It is hereby:

ORDERED, that the City expunge from the personnel files of those EMS workers hired before October 1, 1982 individual agreements between them and the City regarding Charter §1127; and it is further

ORDERED, that the City cease and desist from violating the NYCCBL in the manner described herein; and it is further

ORDERED, that the City repay all monies, with interest, deducted pursuant to Charter §1127, from those affected EMS workers.

City of New York

Dated: _____

(Posted By) (Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

DISSENT

For the reasons set forth below, Board Members Richard Wilsker and Saul G. Kramer respectfully dissent.

The issues in this matter are currently being litigated in the Appellate Division of the New York Courts. Coincidental with the filing of the instant improper practice petition, Petitioner commenced an Article 78 proceeding regarding this matter. The Supreme Court issued a decision and the City appealed this case to the Appellate Division. The parties are awaiting a decision by the Appellate Division. The outcome of the court's decision will materially affect the result of the Board's decision. The court decision will determine the issue of withholding tax, the same issue that the Board ruled on in this case. Should the Appellate Division reverse the lower court it would be illegal to implement the results of the Board's decision. Thus the Board should await the decision of the Appellate Division before deciding the legal merits of this matter.

Dated: May 12, 1998
New York, New York

SAUL KRAMER
MEMBER

RICHARD WILSKER
MEMBER