Lieutenants Benevolent Ass'n, 63 OCB 23 (BCB 1999) [Decision No. B-23-99 (IP)], aff'd, Lieutenants Benevolent Ass'n v. City of New York, No. 403410/99 (Sup. Ct. N.Y. Co. Oct. 27, 1999), aff'd, 285 A.D.2d 329, 730 N.Y.S.2d 78 (1st Dep't 2001).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
	:	
-between-	:	
	:	
LIEUTENANTS BENEVOLENT ASSOCIATION,	:	
	:	Decision No. B-23-1999
Petitioner,	:	Docket No. BCB-2001-98
	:	
-and-	:	
	:	
THE CITY OF NEW YORK and THE NEW YORK DEPARTMENT OF FINANCE,	:	
	:	
Respondents.	:	
	:	
In the Matter of the Improper Practice Petition	:	
	:	
-between-	:	
	:	
CAPTAINS ENDOWMENT ASSOCIATION,	:	
	:	
Petitioner,	:	Docket No. BCB-2007-98
	:	
-and-	:	
	:	
THE CITY OF NEW YORK and THE NEW YORK DEPARTMENT OF FINANCE,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On July 7, 1998, the Lieutenants Benevolent Association ("LBA," "Union" or "Petitioner"),

filed a verified improper practice petition against the City of New York ("City" or "Respondent"). The petition alleges that the City violated §12-306(a)(4) of the New York City Collective Bargaining Law ("NYCCBL")[1] when it unilaterally imposed a requirement on Lieutenants employed in the New York City Police Department ("NYPD"), who live outside New York City, that in filing their § 1127 "tax" return said Lieutenants must, allegedly for the first time in 25 years, submit verification in the form of receipts for all employee expenses on Federal Schedule A. The City submitted its answer on August 3, 1998 and the LBA submitted its reply on September 8, 1998.

On July 24, 1998, the Captains Endowment Association ("CEA," "Union" or "Petitioner") submitted a substantially similar improper practice petition, alleging that the City violated § 12-306(a)(4) in the same way with respect to the CEA's members. The City submitted its answer on August 3, 1998 and the CEA submitted its reply on September 18, 1998. In letters dated August 27, 1998 and September 1, 1998, counsel for the CEA, on notice to the LBA and the City, requested that the cases be consolidated. Inasmuch as the two petitions involve the same employer, the same alleged violation of the NYCCBL, and are alleged to be part of a common scheme, the Board will grant the CEA's request for consolidation.

BACKGROUND

Section 1127 of the New York City Charter provides, in pertinent part:

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[1] Section 12-306 of the NYCCBL provides, in part:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

***

(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.

***

> **Condition precedent to employment.** a. Notwithstanding the provisions of any local law, rule or regulation to the contrary, every person seeking employment with the City of New York. . .shall sign an agreement as a condition precedent to such employment to the effect that if such person is or becomes a nonresident individual . . . 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 . . . during such employment, exceeds the amount of any city earnings tax and city personal income tax imposed on such person for the same taxable period.

If an employee is a non-resident, he/she is required to submit form NYC 1127, which includes a line for "[t]otal itemized deductions from (federal schedule A deductions)." Federal schedule A includes a line for "Unreimbursed employee expenses-job travel, union dues, job education, etc."

The City of New York Department of Finance ("DOF") sent letters, whose dates were deleted in the City's and Union's submissions, to individual Lieutenants and Captains regarding their 1997 NYC 1127 non-resident return form. The letter stated that the DOF had received the NYC 1127 return but that they were not able to process it because the employee had failed to attach federal schedule A and/or the DOF required "receipts substantiating Schedule A lines 20-23." The letter then stated, "Please provide the information requested, along with a copy of this letter. If we do not receive a reply within 30 days, your refund may be denied and/or delayed."

On June 5, 1998, Anthony Garvey, President of the Lieutenant Benevolent Association wrote a letter to James Hanley, Commissioner of the Office of Labor Relations. The letter stated:

> Recently, the New York City Department of Finance, on or about, May, 1998, commenced requiring members of this Organization to submit verification, through receipts, of all employee expenses and other expenditures claimed on their Federal Schedule A. This unilateral action, after approximately 25 years of

> applying Section 1127, and its predecessor Section 822, without requiring verification through receipts, is a mandatory subject of bargaining. . .
>
> It is our view, and that of our Labor Counsel, that such action violates the provisions of the New York City Collective Bargaining Law in that it unilaterally alters the wages, hours and terms and conditions of employment of the LBA's members without prior notice to this Organization or bargaining about same. It is also an unwarranted invasion of privacy of the LBA's affected members.
>
> For these reasons, the LBA demands that the City of New York immediately cease imposition of the enclosure on the LBA's affected members and bargain with the LBA regarding same.
>
> If you do not affirmatively respond to this letter within seven (7) business days of receipt of this letter, appropriate legal action will be taken.

The LBA's improper practice petition was filed on July 7, 1998, followed shortly thereafter by the CEA's.

POSITIONS OF THE PARTIES

Petitioners' Position

The Unions allege that since May 1998, the City of New York, through its DOF, has violated § 12-306(a)(4) of the NYCCBL by unilaterally imposing a requirement on Lieutenants and Captains employed in the NYPD, who live outside New York City, that in filing their § 1127 "tax" return said Lieutenants and Captains must, for the first time in 25 years, submit verification in the form of receipts for all employee expenses on Federal Schedule A.

The LBA argues that the unilateral imposition of such a requirement is an invasion of the privacy of the affected Lieutenants. Both Unions argue that the City's action is a unilateral change in terms and conditions and wages without notice to petitioners and without bargaining with the petitioners. They argue that the failure to comply will result in the affected employees being subjected to a denial and/or a delay in receipt of a tax refund otherwise due the said employees.

They submit that the relief sought herein should be granted in view of the decision of the Court of Appeals in *Levitt v. the Board of Collective Bargaining*, 79 N.Y.2d 120, 580 N.Y.S.2d 917 (1992), regarding intrusion of privacy. The LBA cites Decision No. B-5-90 regarding invasion of privacy and Decision No. B-25-85 stating that the unilateral imposition of § 822, the predecessor of §1127, was a refusal to bargain in good faith. The Unions ask that the City be ordered to cease and desist from requiring compliance with the verification requirement and bargain with the Unions regarding the same.

In their replies, the Unions take issue with the City's reliance on *Levitt v. Board of Collective Bargaining*, 79 N.Y.2d 120, 580 N.Y.S.2d 917 (1992) to support its contention that the recent change in requiring Captains and Lieutenants to substantiate and submit documentation is a "minimal" infringement on the employees' privacy justified by a more important interest of the City. The Unions argue that *Levitt* involved a set of facts wherein a City employee has already been demonstrated to owe a debt to the City, as opposed to the instant matter where the documents in question are not associated with a documented debt, but are merely being required as part of a newly-emerged auditing process. In this connection, the LBA argues that the City is "seeking to undertake a fishing expedition against non-resident Lieutenants, to ascertain if there is a basis for claiming indebtedness without any due process protections for the affected Lieutenants."

In its reply, the LBA states that the respondent is incorrect when it alleges that the form to be used when paying the obligation imposed by § 1127 is a "tax form," and asserts that neither the form itself nor the opinion of the Court of Appeals in *Legum v. Goldin*, 55 N.Y.2d 104, 447 N.Y.S.2d 900 (1982) support respondent's position. It also contends that the City's assertion that

their actions do not alter a term or condition of employment is contradicted in *Legum.* Moreover, the Union asserts that the City's answer fails to recognize that when the City of New York withholds or denies refunds of monies paid, which are a term or condition of employment, the issue is mandatorily bargainable.[2]

The LBA states that, assuming *arguendo* that the Department of Finance has requested verification of expenses since 1974 and used the 10% trigger rule for at least three years, the application of these requirements to the Lieutenants is a continuing violation of § 12-306(a)(4). The LBA submits the affidavit of John Andricosky in support of its contention that such verification and application of the 10% trigger rule to Lieutenants by the City did not occur before 1998.[3] The LBA states that contrary to the assertions of the City, an unincorporated business tax review of an individual, where such individual is not employed by the City, is not subject to the requirements of the NYCCBL in contrast with the application of such procedures to Lieutenants employed by the City. It also contends, that contrary to the assertions by the City, the range of information sought by the DOF runs the gamut of petitioner's members' financial dealings in their daily lives.

It states that the City contends that Lieutenants who file federal and New York State tax returns which, if fraudulent, will be subjected to civil and possible criminal penalties, are required to give the DOF more verification regarding their § 1127 returns than they are required to give to

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[2] The Union cites *Levitt v. the Board of Collective Bargaining*, Decision No. B-7-87, *aff'd in part*, 79 N.Y.2d 120, 580 N.Y.S.2d 917 (1992).

[3] In his affidavit, Andricosky asserts that he is a an accountant that prepares tax and other returns for between 300 and 400 Lieutenants who are employed by the City. He asserts that many are non-residents. He also states that his firm, Andricosky & Fedele, Inc., has performed these services for approximately 12 years.

federal and New York State tax authorities who are not their employer. The LBA contends that the City's contention that the DOF action complained of is not within the scope of the employment relationship should be rejected because the DOF is a department of the government of the City as is the NYPD: as such, the DOF is another arm of the same public employer.

The LBA again refers to Andricosky's affidavit when it attempts to refute the City's assertion that the requirements of verification of deductions claimed on the § 1127 form are not directed at petitioner's members, but rather at the public at large, similar to a verification demanded of an individual filing an unincorporated business tax form with the DOF. Andricosky states that the Schedule A information, with attached forms, contains a multitude of personal information pertaining to the expenses incurred by the Lieutenants as a term or condition of employment. He then refers to *Levitt*. The LBA states that the cases cited by the City are readily distinguishable and apply to situations involving the public at large and not to employees who have signed a specific agreement as a term and condition of employment as have the petitioner's members.

The CEA argues that any liability under § 1127 has a financial impact on Police Captains in that their net income is subject to change, and that the City may not avoid bargaining by having another of its agents, the DOF, carry out the change as if it were administering a tax process. In response to the City's claim that the duty to bargain wages, hours and working conditions is subject to its management rights, the Union alleges that "even assuming for argument's sake that the processes change is a [management right]. The question raised by the Union regarding the onerous impact of these changes are within the scope of bargaining (CBL 12-307b)[emphasis in original]."

Respondent's Position

The City asserts that pursuant to Chapter 58 of the New York City Charter, the DOF is the agency responsible to perform the function and operations of the City which relate to the administration and collection of all sums due the City, including the oversight and collection of nonresident City income taxes. It asserts that the nonresident employees submit an 1127 tax form to the DOF, and on page 2 of the form, employees list their deductions including miscellaneous deductions on Line 38. It further asserts that the category of miscellaneous deductions includes unreimbursed employee expenses, and unreimbursed employee expenses are an item that is listed on Schedule A of the federal tax form 1040. Therefore, it states, most employees who submit form 1127 to the DOF include Schedule A which lists unreimbursed employee expenses.[4] The City asserts that some non-resident employees who do not attach Schedule A to their § 1127 filing group their deductions together on the form without describing each expense. It asserts that others group their expenses together on Schedule A without describing each expense.

The City asserts that when any non-resident employee chooses to lump their employee expenses together without describing each item, the City of New York, through the DOF, requests that the employee submit a schedule of these expenses. In addition, it asserts, when a non-resident employee provides a schedule of employee expenses but the aggregate amount of such expenses is greater than 10% of their gross income, the City, through the DOF, requests that the employee

[4] The City states that examples of employee expenses that are listed by employees on Schedule A include, but are not limited to: commuting mileage, electronic communications, arrest and enforcement expenses, safety equipment, travel, mobile telephones, gym membership, spoiled meals, handguns and ammunition. It states that some of the expenses listed are not deductible and some may be reimbursed.

submit verification of these expenses. It states that the DOF does not require verification of items that are self-explanatory, such as union dues.

The City asserts that the DOF has been requesting verification of expenses from various non-resident City employees since at least 1974, and asserts that the DOF has been using the 10% rule for all non-resident City employees for at least the past three years. The City attaches an affidavit from Virginia Ching, Unit Manager of the Accounts Examinations Unit for the DOF, in support of those contentions. It further states that in enforcing § 1127, it is appropriate for the DOF to look at the calculation of the hypothetical residency tax and verify deductions that are taken by any employee of New York City. Likewise, it argues, if the DOF were reviewing an unincorporated business tax for an individual who was not an employee of the City of New York, verification could be requested regarding deductions taken by that individual for business expenses or depreciation and that the DOF routinely requests verification of expenses deducted by non-employees filing such returns.

For its first affirmative defense, the City argues that requiring employees to verify their employee expense deductions that are submitted pursuant to the statutory obligation imposed by § 1127 does not alter a term or condition of employment. It asserts that under § 12-307(a) of the NYCCBL, there is a duty to bargain over wages, hours and working conditions, but the duty to bargain is subject to § 12-307(b), the statutory managements rights clause.[5] It asserts that requiring

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[5] Section 12-307(b) of the NYCCBL provides, in relevant part:

It is the right of the City, or any other public employer, acting through its agencies, to determine the standards of service to be offered by its agencies; determine the standards of selection for employment; direct its employees; relieve its employees from duty because of lack of work or for other

(continued...)

verification is not an invasion of privacy which alters terms and conditions of employment since there are little if any privacy interests at stake. It argues that any Captain or Lieutenant who is seeking a tax refund has already provided the City with initial information regarding his/her expenses. It argues that there is obviously no invasion of privacy when the City seeks to verify information that has already been provided by an employee. Furthermore, it contends, the disclosure that is sought is so minimal in nature that even if a remote privacy interest could be established, the information sought would still not alter an term or condition of employment.

The City cites *Levitt v. Board of Collective Bargaining*, 79 N.Y.2d 120, 580 N.Y.S.2d 917 (1992), in which it argues that the Court of Appeals held that the City had the right to unilaterally require its employees fill out a questionnaire that sought various information. It argues that the Court of Appeals stated that "No rational balancing of the competing interests--the City's substantial interest in collecting outstanding debt against an employee's right to privacy--could result in a conclusion that this questionnaire alters a term or condition of employment."[6] The City argues that in the instant matter, the right to privacy is even less since the employee has already provided much of the information supplied and the City is only seeking a narrow range of information relating to verification of employee expenses. The City argues that by requiring verification the City is fulfilling a public policy of preventing fraud, and that only through verification can the City know

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[5](...continued)
legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted. . .
***

[6] 580 N.Y.S.2d at 923.

that individuals are truthfully listing deductions.

Furthermore, the City argues, the action taken by DOF is not an action within the scope of the employment relationship. It asserts that there is no effect on terms and conditions of employment or wages because in verifying employee expenses and determining tax refunds DOF is not acting as an "employer" but in its statutorily defined capacity as a regulatory agency.

As its second defense, the City asserts that since it routinely requests verification for deductions from the public at large, the requirement that Captains and Lieutenants also submit verification cannot be found to be a term and condition of employment. The City cites the enforcement measures for the unincorporated business tax as an example. It states that when an action of a government is not directed at City employees and is instead directed at the public at large, the action cannot be considered a term and condition of employment.[7]

As a third defense, the City argues that even if the City's actions do affect terms and conditions of employment, the petition must be dismissed because there has been no change in the terms and conditions of employment. The City restates that the DOF has been requesting verification of expenses from various nonresident City employees who were subject to the requirements of § 1127 since at least 1974. Furthermore, it states that for at least the past three years, the City has requested verification of expenses in accordance with the 10% trigger. Thus, it states, there has been

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[7] The City cites *State of New York v. Civil Service Employees Ass'n*, 19 PERB ¶ 3029(1986)(University requirement that all vehicles that regularly used campus had to pay a fee applied to public at large in the same manner as it applied to union employees: therefore the action was unrelated to employment status); *State of New York v. Civil Service Employees Ass'n*, 13 PERB ¶ 3099 (1980)(Unilateral imposition of application fee for open competitive exam was not mandatory because its application to state employees was not related to employment).

no change in the City's practice of requesting verification of employee expenses. The City contends that when an employer makes a unilateral decision which is consistent with an established practice of an employer, there is no change in any term or condition of employment.[8]

Finally, the City argues that the petition should be dismissed as untimely under § 1-07 of the Revised Rules of the Office of Collective Bargaining. Section 1-07(d) states that "if it is determined that . . . the alleged violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed." It argues that in this matter, the City has been verifying employee expense deductions from non-resident City employees since 1974 and consequently, any claim regarding the verification of employee expenses arose approximately 25 years ago.

DISCUSSION

Preliminarily, we shall discuss the issue of timeliness. We have held that the four-month limitation period contained in Rule 1-07(d) will bar the consideration of an untimely filed improper practice petition.[9] However, even assuming, *arguendo*, that the allegedly violative conduct commenced more than four months prior to the date of filing the petition, the petition alleges a continuing violation. According to the Unions, the members upon whose behalf the petitions were filed, received notices within the four month limitation period. The City does not dispute this. Thus, we shall not dismiss the petition on this basis.

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[8] The City cites *Ellenville Central School Dist. v. Ellenville Teacher's Ass'n*, 13 PERB ¶ 3062 (1980); *Bellmore Union Free School Dist. v. Bellmore Administ. Council*, 14 PERB ¶ 3001 (1980).

[9] *District Council 37, AFSCME, AFL-CIO v. City of New York, City Office of Labor Relations*, Decision No. B-37-92.

The Unions argue that the information sought by the City to verify their deductions would invade the privacy of the Captains and Lieutenants. The City attempts to rebut that argument by stating that there are little if any privacy interests at stake because any Captain or Lieutenant that is seeking a tax refund has already provided the City with initial information regarding his/her expenses. It states that only through verification can the City know that individuals are truthfully listing deductions.

In *Levitt v. Board of Collective Bargaining*, 79 N.Y.2d 120, 580 N.Y.S.2d 917 (1992), the Court of Appeals held that a questionnaire used by the City to assess whether an employee had any outstanding debt to the City did not invade the employees' privacy interests.[10] It used a balancing test to determine whether the employee's privacy interest was outweighed by the City's interest in collecting outstanding debt.[11] Here, we must determine whether the employees' privacy interests outweigh the City's interest in preventing fraud. We hold that they do not. The City is only seeking a narrow range of information to verify that which the employee has already put forth on its NYC 1127 form, and it appears that the request for information is not a broad fishing expedition, but a targeted request aimed at verifying those deductions. We emphasize that the employee himself is putting forth a request for this deduction; that the City has a desire to verify information that could

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[10] Among the information requested by the City was previous home addresses for the past ten years, whether a State/City of New York income tax return was filed for each of the last five years, whether any money is owed to the City for parking fines, and other fines, and whether there had been any overpayment of public assistance. Also included was a release, authorizing the City Department of Investigation to verify the timely filing of State and City income tax returns for the last five years.

[11] 580 N.Y.S.2d at 923.

have an effect on the amount of an employee's obligation under 1127 is not unreasonable.

The Union argues that *Levitt* can be distinguished because it involved a set of facts wherein a City employee has already been demonstrated to owe a debt to the City. However, the Court of Appeals stated that ". . . all applicants for employment or promotion would be required to complete a two part form."[12] It is apparent that the City's motivation in that case was a desire to discover the unpaid amounts of applicants' financial obligations, and the instant matter is not dissimilar.

We next consider the City's actions in delaying and/or denying an employee's refund if he/she does not provide verification. We find that a delay in processing an employee's refund while the City attempts to verify the claimed deductions is acceptable provided that the delay is reasonable. Inasmuch as § 1127 provides that the amount of the payment as a condition of employment is measured by the difference between two *taxes*, it is not unreasonable for the City to verify the amount of these taxes (including any deductions that are part of their computation) before it refunds the amount of a claimed overpayment under § 1127. A reasonable delay while verification takes place would have a *de minimis* impact on the employee's wages.

However, the City may not unilaterally deny a refund altogether or delay a refund for an unreasonably lengthy period of time on the ground that the employee failed to supply requested receipts within 30 days. Although the City's desire to verify the calculation of the amount an employee owes under § 1127 is understandable, it must bargain before it imposes such a time limitation on the employee's right to a refund, for the result of a denial or a lengthy delay in

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[12] 580 N.Y.S. at 918.

processing of an employee's refund is a reduction in wages.[13] The right to receive a refund of amounts withheld in excess of what is required under § 1127 may not be extinguished or delayed indefinitely by unilateral management action. This is so because the sums withheld under § 1127 are not a tax, but rather a condition of employment.[14] Accordingly, we will direct that before the City can deny or delay for a lengthy period a refund claimed under § 1127, on the ground that the employee failed to supply requested receipts within 30 days, it must bargain over what is a reasonable time frame for the verification and processing of refund requests under that Section.

We find little merit in the City's assertion that the action taken by DOF is not within the scope of the employment relationship and the assertion that verification does not affect terms and conditions of employment because verification of tax matters is requested from certain other members of the public. As to Lieutenants and Captains, distinguished from non-employee taxpayers, the obligation to pay the sum arises out of an agreement that is a condition precedent to employment. The payment of sums due under § 1127 are incidental to the employment relationship and, although imposed by the statute, also constitute a term or condition of employment. Accordingly, we dismiss the petitions in part, and grant them in part, to the extent that we order the City to cease and desist from denying Lieutenants' and Captains' deductions on this basis without bargaining over what is a reasonable time frame for the verification and processing of refund requests under § 1127.

The dissent treats our decision in this matter as though it bars the Department of Finance

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[13] In *Levitt*, the Court of Appeals affirmed our conclusion, in B-7-87, "that payroll deductions affect wages and were therefore a matter within the scope of collective bargaining."

[14] *Legum v. Goldin*, 55 N.Y.2d 104, 447 N.Y.S.2d 900 (1982).

from verifying the correct amount of a tax. It also analogizes the condition, here, to a residency requirement. However, we disagree with those contentions for several reasons. Our decision only says that the City cannot delay or deny a refund for the sole reason that verification was not submitted within the 30-day period unilaterally decreed by the City; it does not say that the City cannot collect the amounts required under § 1127, nor does it preclude the City from requiring verification of claimed deductions.

As the City members acknowledge, this is not a tax; it is alternately a condition of employment or a contractual payment. As such, the dissent's reference to the Department of Finance's taxing authority is misplaced. Also, the employer is the City of New York. If the City chooses to delegate the collection of the § 1127 monies to its Department of Finance, that Department, as the agent of the City, has no greater right with respect to the collection of money than was possessed by its principal, the employer.

The analogy to the residency requirement is inapposite. Residency was held to be a "qualification" for employment, as the courts have defined that term. It has not been argued that payment of the § 1127 monies is a "qualification" of employment - it is a "condition" of employment, which is not synonymous with the term "qualification." Stated differently, the dissent is right that a qualification is not a term or condition of employment, but payment of the § 1127 monies has not been shown to be a qualification for employment.

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 herein by the Lieutenants Benevolent Association, docketed as BCB-2001-98 be, and the same hereby is, dismissed in part and granted in part; and it is further

ORDERED, that the improper practice petition filed herein by the Captains Endowment Association, docketed as BCB-2007 be, and the same hereby is, dismissed in part and granted in part; and it is further

ORDERED, that the City of New York cease and desist from withholding, in their entirety, refunds due to Lieutenants and Captains that are attributable to the deductions at issue for the sole reason that the employee failed to supply requested receipts within 30 days, without first bargaining over what is a reasonable time frame for the verification and processing of refund requests under § 1127.

DATED: July 13, 1999
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

ROBERT H. BOGUCKI
MEMBER

CAROLYN GENTILE
MEMBER

For the reasons set forth below, Board Members Richard Wilsker and Anthony Coles respectfully dissent.

The Union's improper practice should be dismissed in its entirety. Lieutenants and Captains who live outside New York City are required under Section 1127 of the City Charter to pay an amount equal to what the city income tax liability would have been if they were residents. The Union has argued that the City has no right to unilaterally require verification of deductions when Lieutenants and Captains submit their Section 1127 "tax" return which includes a Federal Schedule A of expenses. The majority insists that when the City denies or delays a tax refund for failing to provide verification of deductions it must bargain over the time frame because the sums withheld under Section 1127 are not a tax, but rather a condition of employment. The majority also directs the City to cease withholding tax refunds due that have not been verified.

The majority is correct in noting that the amount due under Section 1127 is a condition of employment, but has clearly misunderstood the difference between a "term and condition" of employment and a "condition" of employment. Undoubtedly, an employer must bargain over a term and condition of employment. Section 201 (4) of the Taylor Law defines "terms and conditions of employment" as "wages, hours and other terms and conditions of employment".

There is no duty to bargain over a "condition" or prerequisite of employment. The majority cites Legum v. Goldin 55 N.Y. 2D 104, 447 N.Y.S. 2d 900 (1982) in support of its proposition that the City must bargain in this case. The majority has misunderstood the holding of Legum. In Legum, the Court of Appeals held that the debt owed under Section 1127 is a contractual payment because every person seeking employment with the City must sign an

agreement as a "condition" precedent to such employment that if he or she becomes a nonresident they agree to be taxed as if the employee were in fact a City resident.[15]

Likewise in Hill v. City of New York, 253 A.D. 2d 580, 678 N.Y.S. 2d 44 (1st Dep't 1998), the First Department held the City had the right to deduct a nonresident tax payment from the paychecks of Emergency Medical Service employees who formerly worked for the New York City Health and Hospitals Corporation and who were transferred to the New York City Fire Department. The First Department emphasized that, "They [EMS employees] were notified that, by becoming City employees upon the respective transfers, they were subject to City Charter Section 1127 as a prerequisite for employment." These cases make clear that Section 1127 is a "prerequisite" for employment. This prerequisite is no different than a residency requirement or a licensure requirement.

Prerequisites or "conditions" of employment are not subject to bargaining. PERB has held that a residency requirement for a person to be hired is a qualification for employment and not a term and condition of employment.[16] Using residency as a prerequisite for employment is a managerial prerogative.[17] Likewise, the payment due under Section 1127 is a qualification for employment. If someone wants to work for the City and be a nonresident, they must sign an

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[15] For some unknown reason the majority at one point states that, "The payment of sums due under §1127 are incidental to the employment relationship and, although imposed by the statute, also constitute a term or condition of employment." This is wrong. The payment of sums under §1127 are only a "condition" of employment.

[16] City of Peekskill and Peekskill Police Ass'n, 12 PERB §3100 (1979).

[17] Rensselaer City School District and Civil Service Employment Ass'n. Inc., Local 1000, 13 PERB §3051 (1980).

agreement prior to such employment that they agree to be taxed as if the employee were a City resident. This is not a bargainable issue. Therefore, denying or delaying a refund on the ground that an employee has failed to supply verification of deductions is also not a bargainable issue.

The majority bases its direction to bargain over the time frame solely on the grounds that it must be "reasonable." That justification alone cannot create a requirement for the employer to bargain. Whether or not an issue is reasonable is not grounds to find an issue bargainable. The majority has offered no precedent or authority for finding that "reasonableness" creates a requirement to bargain.

The majority has also completely ignored the fact that in the course of administering tax collection, verification of deductions are requested from various members of the public. Thus when the Department of Finance is reviewing an unincorporated business tax for an individual who is not an employee of the City of New York, verification can be requested regarding deductions taken by that individual for business expenses or depreciation. When an action of government is not directed at City employees and is instead directed at the public at large, the action cannot be considered a term and condition of employment.[18] The majority attempts to ignore this principle because Lieutenants and Captains, as distinguished from non-employee taxpayers, must pay their sums due to an agreement that is a condition precedent to employment. But that distinction has little value. The key point is that members of the public, both employees of the City of New York and non-employees, are required to verify deductions. All members of

[18] State of New York v. Civil Serv. Employees Ass'n, 19 PERB 3029 (1986); State of New York v. Civil Serv. Employees Ass'n, 13 PERB 3099 (1980).

the public are being treated similarly and therefore terms and conditions of employment are not affected.

Furthermore, it is questionable whether the majority has the legal authority to direct the Department of Finance to cease withholding tax refunds for failure to provide verification, in any event, a result that would advantage those who had refused to provide verification over those who chose to cooperate and who proffered verification which subsequently was found to be insufficient. Such direction limits the Department's taxing authority under the Charter and is not directed to the City as an employer. The relief ordered clearly oversteps the majority's remedial powers.

Dated: June 7, 1999
New York, New York

ANTHONY COLES
MEMBER

RICHARD WILSKER
MEMBER