Civil Service Bar Ass'n, 65 OCB 9 (BCB 2000) [Decision No. B-9-2000 (IP)], aff'd, City of New York v. DeCosta, Civil Service Bar Ass'n, Local 237, International Brotherhood of Teamsters, No. 403335/00 (Sup. Ct. N.Y. Co. June 7, 2001).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
	:	
-between-	:	
	:	
Civil Service Bar Association, Local 237, International Brotherhood of Teamsters,	:	
	:	
Petitioners,	:	Decision No. B-9-2000
	:	Docket No. BCB-1967-98
-and-	:	
	:	
City of New York and New York City Administration for Children's Services,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On March 26, 1998, the Civil Service Bar Association, Local 237, International Brotherhood of Teamsters ("Union") filed a verified improper practice petition. It alleged that the New York City Administration for Children's Services ("ACS") violated Sections 12-306a (1), (3) and (4) and 12-311d of the Collective Bargaining Law ("NYCCBL") by requiring bargaining unit members in the title Attorney to commit to working for ACS for a specified period of time.[1]

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[1] Section 12-306(a) of the NYCCBL provides in pertinent part:
a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public

(continued...)

The City requested and received several extensions of time, and filed an answer on May 15, 1998. The Union requested and received several extensions of time, and filed a reply on July 27, 1998.

BACKGROUND

The Union represents, it says, "all employees in the classifications of Agency Attorney and Agency Attorney Interne (collectively 'the Attorneys')" who are employed by ACS. Attorneys represent the agency in Family Court and child protective proceedings and perform other legal work for the agency. After they are hired, Attorneys are given 3 to 4 weeks of classroom training.

The Union and the City are parties to a unit collective bargaining agreement. The employees covered by that agreement are also covered by the City-wide agreement between the City and District Council 37, AFSCME. Article I, Section I of the City-wide agreement provides

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[1](...continued)

> employee organization;
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;
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> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.
>
> **§12-305 Rights of public employees and certified employee organizations.** 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 or all of such activities....

that terms and conditions for all City employees, including Attorneys, must be uniform. Article XVIII of the 1991-1994 unit agreement provides that representatives of the City and the Union will study and make recommendations about problems of recruitment and retention of qualified professional personnel.[2] One of the issues in contention between the parties is whether, at the time the petition was filed, they were negotiating successors to both contracts and were in a *status quo ante* period.[3]

Karen Dodson resigned her position as Attorney at ACS. By letter dated December 18, 1997, the Supervising Attorney of the Brooklyn Family Court Unit told Dodson:

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[2] Article XVIII ("Professional Development Committee") of the 1991-1994 unit agreement, which appears unaltered as Article XIX of the 1995-1999 unit agreement, provides:

A joint committee composed of representatives of the Office of Management and Budget, Office of Labor Relations, the Department of Citywide Administrative Services and the Union shall meet to study problems related to the recruitment and retention of qualified professional personnel and where deemed necessary make recommendations to the appropriate City officials. The Professional Development Committee shall meet regularly so that it may be able to consider these matters in an expeditious fashion.

[3] Section 12-311 of the NYCCBL provides, in relevant part:

d. Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement ... the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

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> by summarily resigning from employment at ACS effective November 21, 1997, you have broken your two-year commitment to work at the agency. While you did not make a formal request to waive the commitment, the reasons you provided for your decision to resign would likely not have constituted a basis upon which a waiver would have been granted.
>
> Consequently, a copy of this letter will be placed in your central personnel file, and any requests for a legal or employment reference will result in a response indicating your employment dates and the fact that you left in contravention of your commitment.

According to the Union, ACS has since told other Attorneys that it will take similar action if the Attorneys breach what ACS considers to be a commitment to work for a specific period of time. The Union says that it was informed for the first time on February 17, 1998, that ACS requires all applicants for the Attorney position to make a commitment to work for two or three years.

According to the City, many of the ACS attorneys prefer to leave the agency's employ and go into private practice, representing respondents in Family Court proceedings. The City says that ACS "determined that as a means for encouraging professional responsibility and commitment to the development of professional skills, attorneys would be asked prior to hiring to make a commitment to remain with the agency for two (and later, three) years from the date of hire. During the interview and hiring process, it is explained to applicants that if a position were offered to them, they would be expected to make a commitment to remain with the agency for a set period of time ... This commitment is specifically stated in the offer letter," it says, and has been since 1996.

The City adds that it gives permission to resign if an Attorney leaves to take another public interest job. When an Attorney resigns without the agency's permission, the City says, it may put a letter such as the one it wrote to Dodson into the Attorney's personnel file, but will

only release that letter to a prospective employer if the former employee signed an authorization form specifically allowing ACS to release it. Otherwise, ACS's response is generally limited to verification of dates of employment.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that Article XVIII of the Unit Agreement[4] provides that a joint committee of representatives of the City and Union will meet to study problems relating to the recruitment and retention of qualified professional personnel. This committee, it said, never reached an agreement that the Agency can require Attorneys to work for a specific period of time.

The Union argues, in its reply, that it has raised issues that are within the Board's jurisdiction and do not merely state a contractual violation, and that its petition was filed within four months of its first notice of the disputed actions and is timely. It cites *District Council 37, AFSCME and New York City Housing Authority*, Decision No. B-1-90, for the proposition that a union need not file an improper practice claim until a previously-adopted management policy has had an immediate impact on bargaining unit members. It cites the same case for the proposition that a union that was not directly informed by management of a newly-adopted policy has not had constructive notice.

The Union contends that ACS has attempted unilaterally to require its Attorneys to commit to work for a fixed period of time, in violation of the NYCCBL. Although the work

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[4] *See*, fn. 2, *supra*.

performed by ACS Attorneys is important, it says, it is not substantively different from the work performed by attorneys at other City agencies; therefore, the City's argument that the importance of their work justifies requiring such a commitment from ACS Attorneys alone has no merit and the City discriminates against ACS Attorneys by requiring it. In addition, the Union claims, ACS has canceled vacations and threatened Attorneys with negative employment references for leaving before the end of what the agency characterizes as their commitments.

It is the Union's contention that ACS has not required all Attorney applicants to make such a commitment before they are hired, but after. It cites Decision No. B-38-86 at 14-15 for the proposition that imposing such a requirement upon current employees is a mandatory subject of bargaining that must be negotiated with the Union. Furthermore, even if the City and ACS have a right to refuse to bargain over the commitment, the Union says, they have waived that right.

The Union maintains that, during negotiations for the successor agreement, ACS never presented the Union with a formal demand requiring Attorneys to commit to work for the agency for a specified period of time. By unilaterally making a change in a working condition during negotiations, it claims, ACS violated § 12-311(d) of the NYCCBL.[5]

The Union argues that the commitment is not a qualification as contemplated by the NYCCBL because requiring Attorneys to work for ACS for a fixed period of time is not an effective means of encouraging Attorneys to remain with the agency or making Attorneys understand that the position is in a crucial area of public service law. Therefore, it contends,

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[5] *See* fn. 3, *supra.*

ACS has committed an improper practice by unilaterally imposing this requirement.[6] The Union maintains that, by disguising a commitment as a qualification, ACS avoids negotiating longevity pay or other incentives for retaining Attorneys.

The Union says that ACS has threatened Attorneys with retaliation if they resign without permission before the end of what ACS says is the commitment period. Placing negative letters in a personnel file is discipline, the Union contends, and directly affects the Attorney's condition of employment. The Union notes that the agency's argument that its statements and actions do not prevent an Attorney from leaving ACS, and allowing some Attorneys to leave before the end of the commitment period, are inconsistent with the agency's argument that the commitment is essential for development of Attorneys' skills and is a means of encouraging professional responsibility. Allowing some Attorneys to leave and retaliating against others, it argues, creates a situation in which ACS can discipline them without justification, in an arbitrary and discriminatory fashion.

The Union contends that the City's description of the Attorneys' job specifications are couched in such a way as to suggest that Attorneys are morally obligated to work for ACS for a fixed period of time and that ACS, therefore, has license to ignore the requirement of the statute.

City's Position

The City contends that this Board does not have jurisdiction over the Union's improper

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[6] The Union cites *Uniformed Fire Officers Ass'n and City of New York*, Decision No. B-7-87, *annulled*, 531 N.Y.S.2d 703 (Sup.Ct. N.Y. County, 1988), *aff'd*, 567 N.Y.S.2d 435 (1st Dept 1991), *aff'd in part, rev'd in part*, 79 N.Y.2d 120, 580 N.Y.S.2d 917 (1992).

practice claim because the Union alleges a violation of Article XVIII of the collective bargaining agreement,[7] a claim which is more appropriately addressed in a grievance proceeding. Furthermore, according to the City, the purpose of establishing a committee pursuant to Article XVIII was only to address issues of recruitment and retention as they arise under the civil service law; the committee's authority, circumscribed by the contract, is solely to study and make recommendations about a limited number of issues. Therefore, the City argues, the committee's work does not limit, modify or waive its right to adopt standards of qualifications for Attorneys.

The City claims that the petition is untimely because the disputed policy has been in effect since February 1996, when ACS was developed. In its Answer, the City states, "[a]ll attorneys hired by ACS since its development were hired in part because they satisfied this qualification and standard for the position." Therefore, the City argues that the Union's four-month statutory limitations period began to run when the policy was first effected and that it "is not plausible that Petitioner was unaware of this requirement until almost two years later." Thus, the City believes that the petition is untimely and must be dismissed.

The City also argues that the Union has not made a satisfactory initial showing of a violation of § 12-306a(3) of the NYCCBL under the standard adopted by the Board as the *Salamanca* test.[8] The City contends that the Union has not shown that Attorneys who accepted positions with time commitments were engaged in protected union activity before, during or after

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[7] *See*, fn. 2, *supra*.

[8] According to the *Salamanca* test, a union must first show that the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's protected activity and that the employee's union activity was a motivating factor in the employer's decision.

hiring. Furthermore, the Union has neither alleged nor even suggested that union activity motivated the agency's decision to commit the act complained of. In addition, the City asserts that the Union has not shown facts that would constitute a violation of the *status quo ante* provision of the NYCCBL or that the subject of the alleged violation is a mandatory subject of bargaining.

The City maintains that the scope of bargaining must be restricted so that it does not intrude into areas that involve a basic goal or mission of the employer. Citing Decision No. B-1-90, it argues that for a policy to be a mandatory subject of bargaining, it must be plainly germane to the working environment and not a managerial decision at the core of entrepreneurial control. The City contends that the goals and mission of ACS are an improved professional service in the child welfare system. It says that the Attorneys at ACS address serious issues of life and death and, because of the nature of these cases, ACS Attorneys must be intensively trained and supervised and must demonstrate a professional commitment to public service.

According to the City, requiring Attorneys to work for a specified period of time is an appropriate standard for determining whether an applicant fits the position and the agency. By acknowledging this standard, it says, Attorneys tell the agency they are interested in public service and are prepared to perform their duties in a professional manner. Applying such a standard, the City contends, is a management right that is specifically excluded from bargaining under § 12-307b of the NYCCBL [9] because it allows ACS to maintain the greatest flexibility in

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[9] Section 12-307(b) of the NYCCBL provides:
b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies;
(continued...)

selecting employees. The City maintains that this commitment, as a standard for selection, is a qualification for appointment. Therefore, it claims, this subject is non-mandatory and not within the scope of bargaining,[10] and the Union has not alleged a violation of § 12-306a(4) of the NYCCBL.[11]

The City argues that the commitment is only required of prospective employees or to future promotion of current employees. The City emphasizes that "[t]he determination would be

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[9](...continued)
determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

[10] The City cites *Patrolmen's Benevolent Ass'n and New York City Police Dep't*, Decision No. B-24-87 and *United Probation Officers Ass'n and Dep't of Probation*, Decision No. B-69-88.

[11] Section 12-306(a)(4) of the NYCCBL provides:
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;
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otherwise if the policy was to apply to current employees."[12]

DISCUSSION

The City contends that the instant petition is untimely. We have previously found that a union need not file an improper practice claim until a previously-adopted management policy has had an immediate impact on bargaining unit members and, unless the union has been informed directly of a newly-adopted policy, until it has had constructive notice of that policy.[13] Here, ACS has not shown that it affirmatively gave the Union notice of its policy change or that the Union learned of the impact of the policy on a bargaining unit member until Dodson received the letter submitted into the record, which was by letter dated December 18, 1997. Since the Union filed its petition within four months of the date of that letter, we will not find the petition to be untimely.

The City also contends that we do not have jurisdiction over the Union's claim because it is a contractual dispute that must be resolved through the grievance procedure. The contract provision cited by the City is Article XVIII of the 1991-1994 unit agreement,[14] provides that the parties will "meet to study problems related to the recruitment and retention of qualified

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[12] The City cites Decision B-1-90 in which the Board reviewed the decisions on the issue of residency requirements and stated that "although a residency requirement for initial employment is a managerial prerogative, such a requirement may not be imposed on current employees who were hired before the requirement took effect." The City argues that the residency requirement is similar to the commitment requirement and that consistent with that case, ACS did not impose the commitment requirement upon current employees.

[13] *See, e.g., L. 620, SEIU and New York City Fire Dep't,* Decision No. B-30-91; *L. 768, Dist. Council 37, AFSCME and New York City Housing Authority*, Decision No. B-1-90

[14] *See,* fn. 2, *supra.*

professional personnel and, where deemed necessary, make recommendations to the appropriate City officials." The City also argues, in the alternative, that there is no nexus between the instant claim and the cited provision. The cited provision neither deals with the specific question of a required commitment nor suggests a limitation on management's right to act in matters of recruitment and retention in general. We find that this Board is not divested of jurisdiction, since the cited provision is not "a reasonably arguable source of right" with respect to the subject matter of the improper practice charge.[15]

However, finding that the Union's claim is not essentially a contractual grievance does not dispose of it. The Union also claims that the agency violated §12-306(a)(4) of the NYCCBL by refusing to bargain in good faith on a mandatory subject of bargaining. The City maintains that a requirement to work for a specific period of time is a qualification of employment. Under the NYCCBL, management has the right to "maintain the greatest flexibility in selecting persons to fill vacancies"[16] and to select employees based upon their qualifications.[17]

In Decision No. B-24-87, we found that setting qualifications for initial employment[18] is not a mandatory subject of bargaining,[19] and that deciding whether some types of experience are

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[15] *Nassau Chapter, CSEA, L. 1000 (County of Nassau)*, 25 PERB ¶ 3071 (1992). *See, Roma v. Ruffo*, 683 N.Y.S.2d 145 (C.A., 1998).

[16] *City of New York and Dist. Council 37, AFSCME*, Decision No. B-4-74.

[17] *Patrolmen's Benevolent Ass'n and New York City Police Dep't*, Decision No. B-24-87.

[18] *See also, Rochester Sch. Dist*., 4 PERB 4509, *aff'd* 4 PERB 3058 (1971).

[19] *See also, Rensselaer City Sch. Dist.*, 13 PERB 3051 (1980), *aff'd* 15 PERB 7003,
(continued...)

more valuable than others in preparing employees for particular assignments or promotion is the type of judgment reserved to the City by Section 12-307(b).[20] We do not agree with the City, however, that the disputed requirement is a qualification for employment as an Attorney at the agency. As we said in *Committee of Interns and Residents and Health and Hospitals Corp*., "qualifications have been defined as 'preconditions, not conditions of employment. They define a level of achievement or a special status deemed necessary for optimum on-the-job performance.'"[21] Therefore, we find that the alleged commitment is not a non-mandatory subject of bargaining by virtue of being a job qualification.

We next consider whether requiring employees to make a commitment to work for a specified period of time is a mandatory subject of bargaining. There are cases in which the decision to institute a policy has been found to be related to the basic mission of the public agency and, therefore, not a subject for bargaining. Citing Decision No. B-1-90, the City argues that for a policy to be a mandatory subject of bargaining, it must be plainly germane to the working environment and not a managerial decision at the core of entrepreneurial control.[22] In

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[19](...continued)
App. Div., 488 N.Y.S. 2d 883 (1982); *Fairview Professional Firefighters Assn*, 13 PERB 3083 (1979); *West Irondequoit Board of Education*, 4 PERB 4511, *aff'd* 4 PERB 3070 (1971).

[20] Decision No. B-38-86.

[21] *Id*. at 13, quoting *West Irondequoit Bd. of Educ., supra*, n. 11. *See also, Uniformed Fire Officers Ass'n, et al. and City of New York,* Decision No. B-7-87, *affirmed in part, Levitt v. Board of Collective Bargaining,* 580 N.Y.S.2d 917 (1992) (requiring applicants for hire or promotion to repay debts is not a qualification for employment, but affects a condition of employment and is a mandatory subject of bargaining).

[22] Our law contains a management rights clause. However, that provision, § 12-
(continued...)

Decision No. B-1-90, we found that the unilateral imposition of what we characterized as a residency requirement on employees after their hire was not a mandatory subject of bargaining. We said that the Housing Authority's policy of barring employees from membership in tenant committees was "plainly germane to the working environment" because the possibility that employees could be terminated had an impact on a working condition. However, we also found that the employer's requirement implicated, not a term or condition of employment, but a policy that was fundamental to the basic direction of the employer's mission and thus within the core of entrepreneurial control.[23]

The standard cited by the City was used in *Ford Motor Co. v. NLRB*,[24] where the company refused to bargain over changing prices provided by a vendor in its in-plant cafeteria. Holding that the company was required to bargain, the Court found that the terms and conditions under which food was available at the plant were plainly germane to the working environment.[25] It found further that, because the company was not in the business of selling food, establishing

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[22](...continued)
307(b), does not expressly deal with the subject at issue here. In similar situations, we have sometimes used the test set forth in *Ford Motor Co.* v. *NLRB,* 441 U.S. 448 (1990), as a means for determining whether a subject is a management prerogative or a mandatory subject of bargaining.

[23] *L. 768, Dist. Council 37, AFSCME and New York City Housing Authority*, Decision No. B-1-90 at 17 (the employer's requirement implicated a policy that was fundamental to the basic direction of the employer's mission because it was reasonably designed to counteract a perception of a conflict of interest, and thus was within the core of entrepreneurial control).

[24] 441 U.S. 448 (1990).

[25] *Id*. at 498, citing *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) at 222-23 (Stewart).

food prices was not among those "managerial decisions, which lie at the core of entrepreneurial control."[26]

The Court cited Justice Stewart's concurring opinion in *Fibreboard Paper Products*, in which the company was required to bargain about subcontracting work. Stewart wrote:

> nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning . . . the basic scope of the enterprise are not in themselves primarily about conditions of employment. . . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.[27]

He defined "the larger entrepreneurial questions" as, among others, "what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be" and contrasted them with bargainable issues such as discharge and work assignment and "underlying questions of work scheduling and remuneration."[28]

In the instant case, despite the City's arguments to the contrary, no public policy is implicated, nor is the decision to require a work commitment fundamental to the agency's basic direction or mission. Although ACS argues that it requires more of a commitment from its Attorneys because they deal with "matters of life or death," dealing with important legal matters is hardly unusual, nor does it constitute, in itself, a matter which is at the core of the agency's

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[26] *Id*.

[27] *Id*.

[28] *Id*. at 2.

entrepreneurial control; attorneys in many other city agencies deal with critical matters.[29]

PERB has reached a similar conclusion in a case involving the consequences of early cessation of employment. In *City of Mount Vernon v. City of Mount Vernon Police Benevolent Ass'n*,[30] a union demanded bargaining over the employer's adoption and implementation of a requirement that employees enter into individual training contracts by which they would be obligated to reimburse the employer for the cost of training if they left employment within three years of permanent appointment. The employer argued that the training program would deter individuals from accepting employment only to receive valuable training which would then qualify them for different employment. The employer also argued that training would instill dedication and commitment in its employees. The ALJ found, and the PERB Board affirmed, that, "by use of the training agreement, the employer-employee relationship is fixed for a period of at least three years, unless the employee purchases his release earlier at a price determined by the City." Fixing the period of employment, it held, was neither related to the employee's ability to perform the job nor helpful to the accomplishment of any mission. In fact, it said, "the restrictions imposed by the training agreement on an employee's freedom to change positions or careers is but another factor ... in finding it to be mandatorily negotiable."[31] We find, as

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[29] *Cf., CSEA v. Buffalo Sewer Auth.*, 29 PERB ¶ 4638 (1996) ("[S]aving money is not a compelling management prerogative when the underlying issue involves a mandatory subject of bargaining ... Policies and procedures which establish the means by which to accomplish such a managerial goal are generally mandatory").

[30] *City of Mount Vernon v. City of Mount Vernon Police Benevolent Ass'n,*17 PERB ¶ 4591(1984), *affirmed*, 18 PERB ¶ 3020 (1985).

[31] *Id*. at 4685.

did PERB, that fixing the minimum period of employment places a restriction on a condition of employment and, thus, is a mandatory subject of bargaining.[32] Furthermore, we agree with PERB that:

> [t]he City is rightly concerned about maintaining the employment of staff in which it has invested time and money. Efforts to retain staff, however, whether by positive inducements such as increased compensation or negative inducements such as reimbursements to the employer, cannot be imposed unilaterally when, as here, they involve terms and conditions of employment.[33]

The decision stated, further, that:

> [p]re-hire agreements between a public employer and a prospective employee do not negate a public employer's [statutory] duty to negotiate the terms and conditions of employment of that prospective employee once he has attained employee status. Otherwise, a public employer could evade that duty if it could persuade prospective employees to waive their rights under [the statute]. It is therefore improper for a public employer to condition an offer to hire a prospective public employee upon that prospective employee's waiver of the [statutory] right to be represented in negotiations covering the allocation of training costs.[34]

An employer violates its bargaining obligation when it establishes a uniform policy concerning a mandatory subject of bargaining where none existed before,[35] and we have found

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[32] We are aware that parties who appear before PERB are not subject to a statutory management rights clause, as are parties who appear before this Board. Nevertheless, on the facts of the case before us, we find the PERB analysis to be equally applicable.

[33] *Id.* at 3042.

[34] *Id.*

[35] *See, e.g., Averill Park Central School District*, 27 PERB ¶ 4605 (1994) at 4836 (although the "broad management rights clause" permits the employer to "retain exclusive right and authority to manage the school district and to direct the work force, including but not limited to the right to plan, direct and control all operations ... [and] the right to establish changes or introduce new and improved methods," the employer must still bargain on a mandatory subject;

(continued...)

that the agency's decision to require a work commitment from Attorneys is a mandatory subject of bargaining. If ACS wishes to apply the contested policy to its employees, it must first bargain about that decision and its implementation and consequences.[36]

Having so found, it is unnecessary for us to reach the question of whether, as the Union claims, the City's actions violated §§ 12-306a(1) and (3) of the NYCCBL. Similarly, since we have found the decision to require a commitment of a specific number of years to be a mandatory subject of bargaining, it is not necessary to reach the Union's allegations that ACS violated the *status quo* provision of the statute.

We direct ACS to notify its present employees in the titles Agency Attorney and Agency Attorney Interne, in writing, that there is no policy requiring a commitment to work for a specific term of years. ACS will also remove from the personnel files of any affected former employees such erroneous negative information and inform those individuals, in writing, that it has taken this action. Finally, we direct the agency to post the attached notice for no less than thirty days at all locations used by the Union for written communications with unit employees. The Agency is directed to complete these measures no later than 120 days after the date this decision was issued.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York

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[35](...continued)
Onondoga-Madison BOCES, 13 PERB ¶ 3015 (1980) at 3023 (an employer may not unilaterally reserve to itself the right to change policies which involve mandatory subjects of negotiation).

[36] *Levitt v. Board of Collective Bargaining, supra,* n. 13 (City must bargain about imposing on both current and prospective employees a requirement to repay debts).

City Collective Bargaining Law, it is hereby,

ORDERED, that the improper practice petition docketed as BCB-1967-98 be, and the same hereby is, granted; and it is further,

DIRECTED, that the parties bargain about any decision of the Administration for Children's Services to require a specific commitment of time for employment of employees in the titles Agency Attorney and Agency Attorney Interne; and it is further,

DIRECTED, that the Administration for Children's Services notify its present employees in the titles Agency Attorney and Agency Attorney Interne, in writing, that there is no existing policy requiring them to work for a specific period of time in that title; and it is further,

DIRECTED, that the Administration for Children's Services remove from the personnel files of any affected former employees the erroneous negative information concerning alleged breaches of contracts of employment by affected individuals, and inform them in writing that it has taken that action, and it is further,

DIRECTED, 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; and it is further,

DIRECTED, that the Agency will complete these measures no later than 120 days from the date this decision is issued.

Dated: June 27, 2000
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CHARLES G. MOERDLER
MEMBER

I dissent.* RICHARD A. WILSKER
MEMBER

I dissent.* EUGENE MITTELMAN
MEMBER

* See attached opinion.

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 employees in the titles AGENCY ATTORNEY AND AGENCY ATTORNEY INTERNE that the Administration for Children's Services committed an improper practice by requiring a commitment to work for a specific term of years without bargaining with the public employee organization representing those employees.

THEREFORE, IT IS:

DIRECTED, that the Union and the Administration for Children's Services bargain about any decision to require a specific commitment of time for employment of employees in the titles Agency Attorney and Agency Attorney Interne; and it is further,

DIRECTED, that the Administration for Children's Services notify its present employees in the titles Agency Attorney and Agency Attorney Interne, in writing, that there is no existing policy requiring them to work for a specific period of time in that title; and it is further,

DIRECTED, that the Administration for Children's Services remove from the personnel files of any affected former employees the erroneous negative information concerning alleged breaches of contracts of employment by affected individuals, and inform them in writing that it has taken that action; and it is further,

DIRECTED, that the Administration for Children's Services will complete these measures no later than 120 days after the date this decision is issued.

Dated: New York, New York
June 27, 2000

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BCB-1967-98

DISSENT

For the reasons set forth below, Board Member Richard Wilsker and Eugene M. Helman respectfully dissents.

The Administration for Children's Services ["ACS"] employs several hundred attorneys. They primarily represent ACS in various Family Court proceedings as well as a number of other administrative and judicial settings across the city, including child abuse and neglect cases; removal of children from their parents; and termination of parental rights, frequently as a consequence of abuse or neglect.

ACS was developed to improve services for children and families at risk. ACS' goals and mission centered on improved professional service in the child welfare and protection systems. Such improvement could be achieved through a committed and competent staff who would continue employment with the agency even after they had "learned the ropes." For the ACS legal staff to achieve a sufficient level of competency, they needed on-the-job training, experience and knowledge attained over one or two years of employment. ACS determined that for it to achieve its goal for improvement, it needed to employ attorneys who were committed to achieving this level of competency. By asking applicants if they were willing to make a commitment to serve for a minimal period, ACS was better able to determine whether an applicant was committed to public service and had a professional interest in this area of law. By agreeing to commit to a public service position for a minimal period, an applicant conveyed to ACS that he or she met the criteria for selection and therefore satisfied the qualifications for employment by ACS.

The qualifications established by ACS recognize that the job of ACS attorney is not for everyone. ACS attempts to address this by seeking applicants willing to commit to a minimum period of public service. When people receive a written offer of the

position, they are reminded that the job requires a commitment to serve for the minimum period. When an applicant accepts an offer to work for ACS, they know they were selected based upon that criteria, as well as others.

Management has the right to determine the criteria it will use to select employees from a pool of applicants. The majority recognized this by citing 13 PERB 3051,[1] which states "[T]he employer is free to establish new criteria for future incumbents of new or vacant positions to which employees may be promoted." In that case, PERB determined that use of a residency preference in selecting applicants for appointment was a managerial prerogative beyond the scope of mandatory negotiation, provided it was only applicable to prospective employees or to future promotion of current employees. Consistent with that case, ACS established the commitment as criteria for selection for employment but did not imposed it upon current employees.

In an earlier case also noted by the majority where residency was recognized as a qualification, a PERB Hearing Officer stated the principle adopted by PERB in several subsequent cases:

> [M]atters distantly or tangentially related to or affecting the employment condition should not clutter the negotiating table without the parties' consent. Moreover, management's right to make fundamental policy decisions regarding the operation and goals of the mission is, if anything, more compelling in the public sector where the employer, charged with the management and direction of government enterprise, has the added responsibility of fulfilling a public trust.
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> In applying these criteria to the instant case it is readily apparent that the *decision* to impose a residency requirement is not a mandatory subject of negotiations. A residency requirement is not a condition of, but a qualification for employment. Like other employment qualifications, it defines a level of achievement or a special status deemed necessary for optimum on-the-job performance. Traditionally, qualifications have been

[1] The majority also cited 13 PERB 3083 in this context, but that case as reported is not relevant to this issue.

> matters of managerial prerogative, and no cogent reason appears to justify a departure from this rule.

See 4 PERB 4509, referenced along with 13 PERB 3051 in Board Decision B-24-87 for the rule that setting of qualifications for initial employment or for promotion is not a mandatory subject of bargaining.

PERB restated this concept in a case that considered whether the setting of qualifications for promotion into a bargaining unit was a managerial function or right. PERB found:

> Employment qualifications, however, are preconditions, not conditions of employment. They define a level of achievement or a special status deemed necessary for optimum on-the-job performance. As such, they are a fundamental policy right of management. See 4 PERB 4512.

Like a residency preference or requirement, a commitment requirement defines a level of achievement or special status ACS deems necessary for optimum on-the-job performance. A commitment requirement, like the residency requirement or preference for appointment, is clearly a qualification for employment when imposed prior to the start of the employment relationship. Like residency, a commitment defines a special status, i.e. a personal interest in public service in this field of law. ACS determined that a commitment was essential to achieving its goals of improved efficiency, effectiveness and professionalism in its services. Committed professional staff at ACS was more likely to achieve optimum on-the-job performance.

ACS recognized that by employing attorneys with a commitment to public service and this work, the professionalism of people in this title was likely to improve. ACS knew that committed attorneys would be more likely to perform well under intense situations in comparison to attorneys who simply wanted any job until something better came along. The commitment requirement is one of the very few objective means available for determining whether an applicant is truly committed to public service in this field.

The Board considered whether the establishment of an objective means for selecting personnel for promotion (as well as assignment) fell within the statutory management rights provision of the NYCCBL. In Board Decision B-24-87, the Board reviewed an objective point system by which a numerical value was assigned to various types of job assignments, educational attainment, evaluation ratings, departmental recognition, and other standards. Promotions (as well as assignments) were made based upon the number of points achieved by the applicant for promotion (The same system was used in assessing an applicant's qualification for certain assignments). In finding that this point system merely set qualifications for promotions and assignments, Board Decision B-25-87 stated that:

> It is well settled PERB law that a term or condition of employment is a mandatory subject of bargaining, but that the setting of qualifications for initial employment or promotion is not a mandatory subject of bargaining. [The Board has] agreed that the establishment of qualifications for advancement or promotion fall well within the realm of those powers reserved to the City by Section 1173-4.3 (b) [now NYCCBL 12 – 307 (b)]. Thus, we find in the instant case, that the judgement that some types of experience are more valuable that others in preparing employees for particular assignments or promotions is the type of judgment reserved to the City by Section 1173-4.3 (b) [now NYCCBL 12 – 307 (b)]. [2]

Board Decision B-24-87 was consistent with the Board's determination long ago that the management's right clause of the NYCCBL reserves the right for management to "maintain the greatest flexibility in selecting persons to fill vacancies." See Board Decision B-4-74. Yet, flexibility in selection of employees is precisely what is at issue here. ACS exercised this flexibility by determining that attorney applicants must at least commit to public service for a minimal period. This requirement was intended to discourage acceptance of a position with this agency if there was no real interest in

doing this work. ACS management, like most employers, wanted to identify applicants with an interest in and commitment to achieving a level of competency in this field.

It is curious that the majority relies upon all of the above case, as we did, to demonstrate what a qualification is and that setting of qualifications is a management prerogative when established as a precondition of employment. The majority, after relying upon all of these same cases, simply concludes without analysis that a commitment requirement is "not a non-mandatory subject of bargaining." Although the cases discussed above conclude that setting qualifications is a managerial prerogative, the majority failed to analyze the present case in that context. Instead, it simply dismissed the City's argument out of hand.

The majority relied upon Board Decision B-38-86 as a source for the definition of "qualification," which was originally stated in 4 PERB 4509. That often-quoted definition was also stated as:

> Employment qualifications, however, are preconditions, not conditions of employment. They define a level of achievement or a special status deemed necessary for optimum on-the-job performance. As such, they are a fundamental policy right of management.

See 4 PERB 4511. Also see 4 PERB 4509, discussed and cited more fully above.

The majority, in relying upon Board Decision B-38-86, stopped its reading of that decision too soon. Had they read on, it would have been clear that at the time of that decision, this Board was considering the definition of "qualifications" in the context of whether HHC could require Chief Residents to have a New York State license. HHC adopted the license requirement as a qualification for that position, but in doing so, like ACS, HHC limited the application of that requirement to "future" Chief Residents. The Board held that "the application of the requirement with respect to appointments to Chief Resident made subsequent to adoption of the resolution is not a mandatory subject of

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[2] B-24-87 was cited in footnote 15 of the majority opinion as B-38-86.

bargaining." The Board then went on to explain the distinction between a "precondition" and a "condition" of employment by noting that:

> However, what is a qualification in some situations may become a condition of employment in other circumstances. Even where the employer is not required to negotiate qualifications for initial employment or for promotions, PERB has ruled that the employer does not violate the duty to bargain in good faith when it unilaterally imposes a geographical residency requirement upon employees who were not hired subject to such a requirement. The rationale is that, with respect to such employees, the residency requirement becomes a condition of continuing employment rather than a precondition or qualification for employment...
>
> However, as Paragraph 6 of the waiver procedure provides that the licensing requirement is not applicable to current Chief Residents, the obligation to bargain over the decision to institute the requirement does not arise under the circumstances of the instant case. Therefore, as the City does not seek to apply the requirement to current Chief Residents, and as it is not required to bargain concerning the application of the requirement to those who are not currently Chief Residents, we will grant the City's motion to dismiss the allegation that the City violated the NYCCBL by refusing to bargain over its decision to institute the licensing requirement. See Board Decision B-38-86.

This more complete reading of Board Decision B-38-86 reveals that the term "precondition of employment" recognizes the employer's right to exercise the greatest flexibility in determining what criteria it will apply to the selection of an applicant who qualifies for appointment to a particular position within a public agency.

When considered altogether, the cases discussed above from PERB and this Board establish without question that the public employer has a managerial right to determine what standards it will use to select qualified employees. Since this remains a managerial right, there is absolutely no obligation under the NYCCBL to bargain over the implementation of any new qualification, standard or criteria used for selection of new employees.

Board Decision B-38-86 also clarifies beyond question that those very same criteria, standards and qualifications, whether we are talking about residency

requirements, commitment requirements or licensing requirements, all become conditions, not preconditions, of employment when and only when they are applied to current employees. Since the record before this Board now clearly limits the application of the commitment requirement to new hires only, this Board has no rational basis for concluding that ACS committed an improper practice when it imposed a commitment requirement. There is no difference between the action taken by ACS as to new hires and the action taken by HHC as to new hires in Board Decision B-38-86.

In holding otherwise in the present case, the majority devotes a portion of its decision to the City's reliance upon Board Decision B-1-90. The City offered this case as further support of its argument that it is a managerial prerogative to establish the qualifications for new hires. The strength of the City's position, however, is found in the cases reviewed above. Since it has already been determined that a commitment is a qualification as long as it is only required of new hires or current employees up for promotion, it was not necessary to undergo yet another analysis to determine that this remains a managerial prerogative. It must be noted however, that it is impossible to agree with the majority's conclusion that ACS' efforts at improving the efficiency, quality and professionalism of the staff charged with preventing injury and death of children does not raise public policy implications.

The analysis of this case should end at this point based upon the Board and PERB cases relied upon by the majority. Unfortunately, it is necessary to undergo further analysis because many of the cases relied upon by the majority have no relationship to the issue now before this Board.

The majority quoted 29 PERB 4639 in a footnote for the proposition that "[S]aving money is not a compelling management prerogative when the underlying issue involves a mandatory subject of bargaining... Policies and procedures which establish the means by which to accomplish such a managerial goal are generally mandatory." Immediately

before that quotation, PERB stated that "this case is simply about substituting one method of staffing for another without a sufficient countervailing interest which would insulate the charge from negotiations."

A reading of this entire case reveals it is arose from a new procedure for the assignment of overtime that was imposed upon the employees without bargaining. Generally, it is recognized that procedures are a mandatory subject of bargaining, while the establishment of criteria or qualifications are not. The decision to implement a new standard or qualification for selection of employees has no relationship to changes in a procedure for the assignment of overtime. Additionally, and even more significantly, neither party argued that ACS imposed this requirement upon applicants to save money.

The majority inappropriately relied upon another case that turned on the economic impact of a management action. In 17 PERB 4591, the employer imposed a requirement upon its new hires that they sign a "training agreement." That training agreement required that if the new employees left the agency before a set period of time, they would be required to pay to the agency the cost of the training they received. The employer argued that the agreement would instill "dedication and commitment." PERB found, however, that the agreement required employees to reimburse the employer for the value of training received even though it was "an admittedly unknown amount, established unilaterally by the City." A full reading of the case makes it very clear that the financial implications of management's action is what cause the disputed action to become a mandatory subject of bargaining.

The commitment requirement imposed by ACS had no financial implications. There was no requirement that employees pay back the employer if they leave the agency before the end of the commitment period. In fact, there is no penalty for leaving early. The employee pays nothing and loses nothing that they earned. The only action

the agency would take was to send them a letter stating that they broke a commitment to remain with the agency and that letter would be copied to their personnel file.

It must be emphasized that this is as far as such a letter could legally go. The only exception is if the employee chooses to consent to the release of the letter to a prospective employer. The employee, therefore, controls whether or not anyone outside of ACS ever sees that letter. It must be noted, however, that even if a prospective employer does see it, it is unlikely such a letter would influence an employer who has already determined that the individual was qualified under the criteria they utilize for selection.

The majority sought support for its position by citing to another case addressing the economic implications of an employer action. In 27 PERB 4605, PERB reviewed an employer's unilateral change in the scheduling of coffee breaks at several locations. This caused some locations to experience a reduction in the number of coffee breaks they received. PERB found "it is well settled that paid time off is a mandatory subject of negotiations. Coffee breaks specifically have been determined to be a mandatorily negotiable term and condition of employment." This decision, which effected current employees, has no relationship to the issue of a commitment made before hiring.

Finally, the majority was persuaded by a Board decision that was ultimately reviewed by the Court of Appeals. The case evolved from a decision to require perspective employees to complete an extensive personal financial information questionnaire prior to employment. The questionnaire was found to be quite invasive. Despite this, the Board concluded that the employer could properly ask prospective employees to provide this information and that as a condition of initial appointment, it was not a mandatory subject of negotiation. See Board Decision B-7-87. This part of the decision was not raised on appeal. The appeal raised concerns regarding the employer's requirement that employees pay back the City for any outstanding debts to the City of

New York. The Board concluded that the compulsory execution of a repayment agreement with respect to the questionnaire was an improper practice. Id. Obviously, this decision turned on the economic effect of such an agreement. There is no such economic effect as a consequence of ACS imposition of the commitment qualification.

It is necessary to make one final point. The majority seems to miss the point made in this record about the training provided by ACS. The training is one means by which ACS attorneys develop competency and proficiency on the job. The unusual extent of the training is apparent when consideration is given to the breath of the materials received and the amount of time spent in the classroom. The training program was emphasized to help put the ACS attorneys' position into perspective. Furthermore, ACS does not ask that any employee pay for that training under any circumstance and it is inappropriate for the majority to now use that program as an economic sword to turn a qualification into a mandatory subject of bargaining.

For all of the above reasons, the requirement that applicants commit to a minimal period of service is a qualification for employment. Establishing this qualification for selection is a managerial prerogative, reserved by the NYCCBL. Public employers fulfill the public trust in part by exercising the greatest flexibility possible in setting qualifications for appointment of new employees. Since ACS did not violate the NYCCBL by requiring new hires to commit to public service for a minimal period, this petition should be dismissed in its entirety.

Dated: October 26, 1999
New York, New York

Richard Wilsker
Member

June 27,2000
New York, New York

Eugene M. Helms