Doctors Council v. HHC, 69 OCB 31 (BCB 2002) [Decision No. B-31-2002 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DOCTORS COUNCIL, S.E.I.U., AFL-CIO,

Petitioner,

Decision No. B-31-2002
Docket No. BCB-2241-01

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

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DECISION AND ORDER

Doctors Council ("Union") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC") on October 1, 2001. The Union alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), HHC revoked its Code of Ethics and unilaterally implemented the New York City Conflicts of Interest Law found in Chapter 68 of the New York City Charter ("Chapter 68"). HHC argues that Chapter 68 is a prohibited subject of bargaining because it is a matter fixed by law and the Board of Collective Bargaining (the "Board") may interpret only the NYCCBL and not other statutes. We find that we do not have jurisdiction to interpret Chapter 68 or to determine its applicability to HHC employees. We also find, however, that the Union has the right to demand bargaining over procedures for implementation of the requirements of Chapter 68. Therefore, we deny the Union's improper

practice petition, but without prejudice to the Union's right to demand bargaining over procedures for implementation of the requirements of Chapter 68 to the extent that such negotiations are not inconsistent with the statute.

BACKGROUND

On January 13, 1983, the HHC Board of Directors adopted a Code of Ethics ("HHC Code") which defined relevant terms and listed activities that constituted conflicts of interest and exceptions to these activities. The HHC Code applied to, among others, its Board of Directors, Officers, and employees. HHC Code, Section III(A).

In early 2000, the New York City Conflicts of Interest Board ("COIB"), which is responsible for enforcing Chapter 68, notified HHC that Chapter 68 applied to HHC employees. By letter dated October 6, 2000, COIB's Executive Director sent HHC's General Counsel a document entitled "Charter Section 2604 (Plain Language Version) vs. HHC Code of Ethics (Sections IV and V)." The document compares Chapter 68 with the HHC Code, and each provision is followed by COIB's "Comment" explaining how the two sources differ. On February 14, 2001, COIB's Deputy Counsel sent HHC's General Counsel a document entitled "NYC Conflicts of Interest Law (Plain Language Version)" that briefly explained the relevant provisions of the law. Representatives of HHC and COIB met several times to discuss Chapter 68. The Union was not a party to these discussions.

On or about May 31, 2001, the HHC Board of Directors passed a resolution replacing HHC's Code with Chapter 68. The minutes of the meeting state: "There had been a long controversy over whether Chapter 68 applied, as a legal matter, to HHC. The matter was looked

at very closely and it was ultimately concluded that it does apply to the employees and the Board of Directors of HHC." (Improper Practice Petition, Ex. B).

By memorandum dated July 5, 2001, HHC President Luis R. Marcos notified its employees that: "Effective immediately, and pursuant to a recent resolution of the Corporation's Board of Directors, employees of the Corporation are required to comply with the provisions of Chapter 68 of the Charter of the City of New York regarding conflicts of interest instead of the provisions of the Corporation's Code of Ethics. . . . Waivers of violations of Chapter 68 may, under appropriate circumstances, be sought from the New York City Conflicts of Interest Board." (Answer, Ex. B).

Sometime thereafter, HHC distributed to its employees a comparative document entitled "Chapter 68 (Conflicts of Interest Board) vs. HHC Code of Ethics" that was based largely upon the October 6, 2000, COIB document comparing Chapter 68 and the HHC Code ("Comparative Document"). HHC did not inform its employees that the document was written originally by the COIB, with HHC's making minor revisions.

On July 18, 2001, the Union Contract Administrator wrote to HHC Director of Labor Relations regarding the requirement that HHC employees comply with Chapter 68 instead of the HHC Code. The Union wrote that "Doctors Council believes that since these are subjects for negotiations, and they have never been discussed, it is improper and unauthorized for HHC or any of its entities to force our doctors to comply." By letter dated July 30, 2001, HHC responded: "As you will see from the Resolution and Chapter 68 of the New York City Charter, HHC employees have always been subject to the provisions of the New York City Conflicts of Interest Law. . . . This in no way implicates a mandatory subject of bargaining."

The Union requests that the Board direct HHC to restore the status quo by rescinding HHC's unilateral imposition of compliance with Chapter 68; direct HHC to bargain with the Union over the implementation of Chapter 68 to unit members; and rescind any personnel actions made on the basis of Chapter 68.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that HHC unilaterally imposed the rules of Chapter 68 on unit members in violation of §§ 12-306(a)(1) and (4) of the NYCCBL.[1] In addition, the Union argues that Chapter 68 contains new and broader prohibitions than those contained in the HHC Code, and that the actual text of the Comparative Document differs from that of Chapter 68. To that end, the Union points to significant differences between the HHC Code, Chapter 68, and HHC's Comparative Document with respect to a physician's opportunity to engage in outside employment, receive gifts, provide expert testimony, and own stock.

For example, while the HHC Code permitted outside employment, the Comparative

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[1] NYCCBL § 12-306(a) provides:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees. . . .
* * *
§ 12-305 provides in relevant part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

Document reads: "You may not have a job with anyone that you know or should know does business with the City or receives a license, permit, grant, or benefit from the City." In contrast, the actual text of § 2604(a)(1)(b) of Chapter 68 states that "no regular employee shall have an interest in a firm which such regular employee knows is engaged in business dealings with the city except if such interest is in a firm whose shares are publicly traded." According to Chapter 68, "interest" refers to either a "position with a firm" or an "ownership interest in a firm." The phrase "business dealings with the city" means "any transaction with the city involving the sale, purchase, rental, disposition or exchange of any goods, services, or property, any license, permit, grant or benefit, and any performance of or litigation with respect to any of the foregoing." Chapter 68, § 2601(8). Additionally, regular employment means "all . . . public servants whose primary employment . . . is with the city." Chapter 68, § 2601(20). It is not disputed that many unit employees are part-time physicians or dentists who may not be "regular employees."

The Union argues that the application of the outside employment provision of Chapter 68 adversely affects its members because a large number of part-time HHC physicians or dentists have a second job with employers such as New York University or Downstate Medical Center, both of which have affiliation agreements with HHC. In fact, the Union claims that approximately one-half of the HHC physicians and dentists employed at Bellevue Medical Center, an HHC facility, are also employed by New York University. Since Chapter 68 prohibits continued employment at outside institutions that do business with HHC, a considerable number of HHC employees would be forced to abandon their employment with these other institutions or risk losing their employment with HHC. Citing *Uniformed Firefighters Ass'n*, Decision No. B-43-86, and *Committee of Interns and Residents*, Decision No. B-4-75, the Union argues that

outside employment has been found to be a mandatory subject of bargaining.

The Union also points out that pursuant to HHC's Code, an employee could not "directly or indirectly, solicit any gift, or accept or receive any gift, whether in the form of money, service, loan, travel, entertainment . . . under circumstances which it could reasonably be inferred that the gift was intended to influence him or her, or could reasonably be expected to influence him or her." The Comparative Document reads: "You may not accept anything of value from anyone that you know or should know is seeking or receiving anything of value from the City." In contrast, the actual text of Chapter 68, §2604(b)(5), reads: "No public servant shall accept any valuable gift, as defined by rule of the board [$50 or more], from any person or firm which such public servant knows is or intends to become engaged in business dealings with the city, except . . . a gift which is customary on family and social occasions." The Union claims that the more restrictive prohibition outlined in Chapter 68 regarding the receipt of gifts has already caused problems for at least one employee. Following HHC's issuance of its Comparative Document, the HHC Office of Inspector General contacted an HHC physician to gather information regarding alleged gifts from a pharmaceutical company.

In regard to expert testimony, the Union states that while Chapter 68 distinguishes between regular and part-time employees, the Comparative Document does not. The latter states: "You may not receive anything from anyone to act as a lawyer or expert against the City's interests in any lawsuit brought by or against the City." However, § 2604(b)(8) of Chapter 68 states: "No public servant shall give opinion evidence as a paid expert against the interests of the city in any civil litigation brought by or against the city. For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant." A

"regular employee" is defined as one whose primary employment is with the city. Chapter 68, § 2601(20). The Union claims that, as a result of this provision, at least one HHC physician has lost an opportunity to supplement his salary by testifying. As evidence, the Union submits an affidavit from Dr. Warren Tanenbaum, who is a psychiatrist employed by HHC at Kings County Hospital, and who was offered $7,000 for his expert testimony in an action against the Fire Department of the City of New York ("FDNY") on behalf of a patient that he has been treating for approximately eight or nine years. An attorney at the HHC Legal Department told Dr. Tanenbaum that Chapter 68 prohibited him from receiving "any compensation for testifying against the City, including the FDNY, as an expert." As a result, he was forced to decline the offer. No evidence was submitted regarding Dr. Tanenbaum's employment status.

The Union claims that the new stock restrictions under Chapter 68 are unduly burdensome and must be negotiated. Previously, under the HHC Code, an employee could own up to 5% of stock of an entity that does business with the city. However, Chapter 68 permits an employee to own only up to $32,000 worth of stock in a company that is engaged in business dealings with the city. Furthermore, under Chapter 68, the interest of an employee's spouse, domestic partner, and unemancipated child is imputed to the employee. Chapter 68 § 2604(a).

The Union also claims that HHC must bargain over disciplinary action against any member who has allegedly violated Chapter 68 since the law imposes harsher penalties than does the former HHC Code. While a violation of the HHC Code would have resulted in disciplinary action "based upon the circumstances of each case," the Union states, Chapter 68, § 2606(b), provides that COIB, "after consultation with the head of the agency involved, . . . [may] impose fines of up to ten thousand dollars, and recommend to the appointing authority . . . suspension or

removal from office or employment."

Finally, the Union asserts that the application of Chapter 68, especially with respect to paid expert testimony and outside employment, has a *per se* practical impact on bargaining unit members' income and their right to pursue outside personal and professional interests.

HHC's Position

HHC argues that the Union's petition is untimely because Chapter 68 was added to the Charter on November 8, 1988, and the Union's petition was filed more than four months after that date.

HHC also argues that the Union has failed to state a *prima facie* case sufficient to prove a violation of NYCCBL §12-306(a)(1) and (4). Once COIB notified HHC that it intended to enforce Chapter 68, HHC had no alternative but to revoke the HHC Code and inform its employees of the change. Therefore, since HHC "did not impose the coverage, but instead, merely satisfied its own obligations under the Conflicts of Interest Law, by making its employees aware of its application," HHC cannot be held to have taken any unilateral action that could have materially altered a term or condition of employment.

HHC claims that the application of Chapter 68 is a prohibited subject of bargaining because it is a matter fixed by law. Since Chapter 68, § 2601(2), identifies HHC as one of the agencies covered by the law, neither HHC nor the Board has the authority to modify Chapter 68. Citing *Patrolmen's Benevolent Ass'n*, Decision No. B-41-87, *aff'd sub nom. Caruso v. Anderson,* No. 25827 (N.Y. Sup. Ct. February 19, 1988), *aff'd*, 150 A.D.2d 994, 541 N.Y.S.2d 1007 (1st Dep't 1989), HHC argues that the Board has determined that even if a matter covered by statute is not a prohibited subject, a permissible subject may still be pre-empted by statute when any

agreement resulting from permissive negotiations would be in contravention of the law, thereby making the agreement illegal and unenforceable.

HHC denies the Union's allegation that a member was questioned after receiving gifts from a pharmaceutical company and claim that to the extent that there are any negative consequences due to the application of Chapter 68, an employee may either obtain a waiver from the COIB, or have the COIB review allegations of misconduct. Additionally, HHC argues that the Union's *per se* practical impact claim must be dismissed because the Union improperly initiated the claim by filing an improper practice petition and failed to provide any factual support to prove its allegation.

DISCUSSION

As a preliminary matter, we find that the petition is timely. Section 12-306(e) of the NYCCBL and §1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1), provide that a petition alleging an improper practice in violation of § 12-306 may be filed no later than four months after the disputed action occurred. Here, HHC notified its employees of the implementation of Chapter 68 on July 5, 2001, and the Union filed its petition on October 1, 2001. Since the Union filed its charge within the four month period, it is timely.

The petition challenges HHC's unilateral imposition of Chapter 68 on the Union's members.[2] HHC argues that the application of Chapter 68 is a matter fixed by law and may not be bargained. We find that the question of the applicability of Chapter 68 to HHC employees is

[2] We address the applicability of Chapter 68, not the Comparative Document, which appears to have been advisory in nature, and is therefore not the focus of this discussion.

beyond the jurisdiction of this Board. In *Correction Officers Benevolent Ass'n*, Decision No. B-39-88 at 5-6, the Union alleged that the City misconstrued §71 of the Civil Service Law ("CSL") when it implemented certain procedures for employees who had sustained job-related injuries. The City argued that because exercise of CSL §71 rights are derived from a statute, any attempt to bargain over them was unlawful. *Id.* at 11-12. We found that the determination of the applicability of the challenged procedures involved interpretation of the CSL, a function beyond the scope of this Board's power under the NYCCBL. "The Union may not seek redress in this forum for the alleged violation of the due process rights of its members arising under statutes other than the NYCCBL." *Id*. at 17. Therefore, in the instant case, we will not resolve a dispute which requires us to interpret Chapter 68 or determine its applicability to HHC employees.

However, while our authority does not extend to the administration or interpretation of statutes other than the NYCCBL, a public employer may not insulate its actions from compliance with applicable requirements of the NYCCBL merely by demonstrating that its actions were in accord with statutory law. *Correction Officers Benevolent Ass'n*, Decision No. B-72-89 at 11; *Correction Officers Benevolent Ass'n*, Decision No. B-39-88 at 17. Even if management action is taken pursuant to another statute, certain obligations -- for example, bargaining over mandatory subjects -- may arise under our law. *Patrolmen's Benevolent Ass'n*, Decision No. B-41-87 at 6. In *Committee of Interns and Residents,* Decision No. B-25-85, although we refused to address the validity or applicability of Section 822 of the New York City Charter on HHC employees, we found that HHC had certain bargaining obligations. *See Lieutenants Benevolent Ass'n*, Decision No. B-23-99, *aff'd*, *City of New York v. Lieutenants Benevolent Ass'n*, 285

A.D.2d 329, 730 N.Y.S.2d 78 (1st Dep't 2001) (City's procedure to process refunds of excess moneys paid by non-resident union members pursuant to New York City Charter § 1127 is a mandatory subject of collective bargaining).

These cases are in line with the Court of Appeals in *Matter of City of Watertown v. State of New York Public Employment Relations Board*, 95 N.Y.2d 73, 711, N.Y.S.2d 99 (2000), which addressed a dispute arising under General Municipal Law § 207(c), and decided that while the municipality's initial determination of disability status was a non-mandatory subject of bargaining, the procedures for challenging the determinations, as they affected terms and conditions of employment, had to be negotiated. The Union was afforded the right to "negotiate the forum – and procedures associated therewith – through which disputes related to such determinations are processed." 95 N.Y.2d at 73, 76; 711 N.Y.S.2d at 99, 102 (citations omitted).

Here, while the question whether HHC employees must comply with Chapter 68 is a matter of law that is not subject to collective bargaining, we acknowledge that the Union may make demands to bargain over procedures for implementation of the requirements of Chapter 68 which do not relate to questions of interpretation or application of the law. Although the Union has not specified precisely what procedures it seeks to bargain, it has shown that the implementation of Chapter 68 directly relates to the employees' terms and conditions of employment. Therefore, the Union has the right to request bargaining over the implementation of the requirements of Chapter 68 to the extent that such negotiations are not inconsistent with the statute.

Regarding the Union's claim that HHC must bargain over disciplinary action taken against any member alleged to have violated Chapter 68, we find that since the penalties are

imposed by law, rather than by the employer, HHC is not obligated to bargain over the subject. Therefore, we deny the Union's demand to bargain over this provision of Chapter 68.[3]

We now turn to the Union's allegation under NYCCBL § 12-307(b)[4] that the implementation of Chapter 68 has resulted in a *per se* practical impact on bargaining unit members' income and their right to pursue outside personal and professional interests. A claim of *per se* practical impact is one in which "there is no question that the action proposed by the employer will result in a practical impact on the affected employees. Such a result is implicit in the action proposed by the employer" *Uniform Firefighters Ass'n*, Decision No. B-25-91 at 24 (emphasis in original). Here, since the impact relates solely to moneys potentially earned from outside employment, the Union has failed to state a *prima facie* claim of *per se* practical impact, the claim is dismissed.

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[3] We take administrative notice that the parties have already bargained over disciplinary procedures as set forth in Article VIII of their collective bargaining agreement, and the Union has not alleged that those procedures have been violated.

[4] Section 12-307(b) of the NYCCBL states that it is the right of the employer:

> to determine the standards of services to be offered by its agencies; determine the standards for employment. . . ; determine the methods, means and personnel by which government operations are to be conducted. . . . Decisions of the . . . 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 . . . are within the scope of collective bargaining.

ORDER

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

ORDERED, that the improper practice petition filed by Doctors Council, S.E.I.U., AFL-CIO be, and the same hereby is, denied with respect to the application and interpretation of Chapter 68, but without prejudice to the Union's right to demand bargaining over the procedures for implementation of the requirements of Chapter 68 to the extent that such negotiations are not inconsistent with the statute.

Dated: September 23, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
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