SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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In the Matter of the Application of
THE CITY OF NEW YORK and RUDOLPH GIULIANI,

DECISION/ORDER

-against

Index No. 403410/99

LIEUTENANTS BENEVOLENT ASSOCIATION; ANTHONY GARVEY; as President of the Lieutenants Benevolent Association; CAPTAIN'S ENDOWMENT ASSOCIATION; JOHN DRISCOLL, as President of the Captain's Endowment Association; THE BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK, and STEVEN C. DECOSTA, as Chair of the Board of Collective Bargaining,

Respondents,

For a Judgment Pursuant to Article 78

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LOUIS B. YORK, J.:

Factual and Procedural Background

This is an Article 78 proceeding seeking to nullify a determination by the New York City Board of Collective Bargaining ("BCB") that the procedure established by the petitioner City of New York to refund money withheld from the salaries of lieutenants and captains of the Police Department residing outside the City of New York, must be the subject of collective bargaining. The City has a long established policy of withholding a portion of these employees' wages equal to the New York City residents tax paid by resident city employees. Its purpose is to equalize the take home pay between those officers living outside the City of New York with those living within the City; thus preventing a disparity in income as an incentive to move outside the City. This process is

required by statute and has been upheld by the courts.

The procedure had previously required the officers to submit a detailed form setting forth the amounts of money to be returned to them from the withheld salary payments. The City recently modified this approach by requiring that such expenses be verified by documentary evidence such as receipts within 30 days or the deductions would be withheld indefinitely or forfeited. The respondent Lieutenants Benevolent Association and the Captains Endowment Association filed petitions with BCB alleging an improper labor practice. The BCB ruled that this new requirement changed the terms and conditions of employment and ordered the city to bargain over it. For the reasons that follow, I uphold the BCB's determination and deny the City's petition.

Contention

The City contends that the very terms of Section 1127 of Chapter 49 of the New York City Charter remove its decision fro the collective bargaining process as does prior decisions of the courts at the highest levels. It also argues that the new procedure is arbitrary and capricious and in violation of public policy. Finally, it asserts that the procedure is barred by the BC's own' internal four month limitations period for bringing a challenge before it.

The respondents support BCB's decision that the new time-limitation and forfeiture constitute a new condition of employment that must be bargained over. They also assert that the BCB's 4 month time limitation period never kicked in because the violation is a

continuing one.

Opinion and Decision

A change in the terms and conditions of public employment must be the subject of negotiation via the collective bargaining process. And a change in wages is such a change in the terms of employment In re West Irondeauoit Teachers Ass'n v. Helsby, 35 NY2d 46, 358 NYS2d 720 (1974). The agency charged with the determination of whether matters are subject to collective bargaining is the BCB. Because of the special expertise it has acquired in determining this issue, its determinations must be implemented by this Court unless they are without rational basis, or violate a statute or constitutional right. Levitt v. Board of Collective Barqaininq, 79 NY2d 120, 580 NYS2d 917 (1992) [Kaye, J.]; Medical Malpractice Insurance Association v. Sup't Of Insurance, 72 NY2d 753, 537 NYS2d 1 (1988) [Kaye, J.]; accord City of NY v. Plumber Union Local No. 1, 204 AD2d 183, 612 NYS2d 128 (1st Dept. 1994).

The petitioner City of New York argues that New York City Charter, chapter 49 § 1127 specifically allows it to establish the procedure from which the deductions from salary are made. § 1127 provides as follows:

§ 1127. 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 or any of its agencies regardless of civil service classification or status shall sign an agreement as a condition precedent to such employment to the effect that if such person is or becomes a nonresident individual as that term is defined in section 11-1706 of the administrative code of the City of New York or any similar provision of such code, during employment by the city, such person will pay to the city an amount by

> which a city personal income tax on residents computed and determined as if such person were a resident individual, as defined in such section, during such employment, exceeds the amount of any city earnings tax and city personal income tax imposed on such person for the same taxable period.
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> b. Whenever any provision of this charter, the administrative code of the city of New York or any rule or regulation promulgated pursuant to such charter or administrative code employs the term "salary", "compensation", or any other word or words having a similar meaning, such terms shall be deemed and construed to mean the scheduled salary or compensation of any employee of the city of New York, undiminished by any amount payable pursuant subdivision a of this section.

The Court agrees with the petitioner that this section requires that each non-resident City employee shall pay a tax equal to that of a city employee resident. Its purpose is to discourage City employees from moving out of the City as a tax saving measure.

The City relies on three Appellate cases to establish the validity of its forfeiture provision, the first of which is Leaum v. Goldin, 55 NY2d 104, 447 NYS2d 900 (1982). That case was decided under § 1127's predecessor statute, § 822 of the then existing City Charter. There, the Court took a contract approach. Since the employees had signed an agreement subjecting them to the deductions, the deductions would be upheld. But it is not the deductions per se that is being challenged here but, rather, the method by which those deductions are made and, therefore, Leaum is not controlling. The Leaum Court said nothing about the documentation of the expenses's or the time period or the forfeiture of such deductions. The next two more recent cases relied on by the petitioner

are New York City Department of Probation v. MacDonald, 205 AD2d 372 (1st Dept. 1994) and Hill v City of New York, 253 A 2d 580 (1st Dept. 1998).

In the Department of Probation case, the court held that withholding *a* portion of the employee's salary was clearly established by § 1127 and was not subject to collective bargaining. It then granted the petition to permanently enjoin arbitration. While it granted the right of the City to unilaterally impose the withholding of a portion of wages, it did not comment at all on the instant situation, that is how much time an employee had to submit corroboration of expenses before his or her rights to be reimbursed for expenses were indefinitely withheld or forfeited. To the same effect is Hill v. City of New York, supra, which added that these deductions do not affect an employee's salary basis or pay rate; at 253 AD2d 5581, 678 NYS2d 450.

Petitioner City argues that under § 1127(b), since the procedure they have set up does not diminish salary, the terms and conditions of employment are not affected. Therefore, there is no need to bargain about what the procedure has established. But this Court finds that the forfeiture of all withheld salary does indeed affect the terms and conditions of employment . There are going to be quite a number of employees who will not receive the portion of withheld salary that they would be entitled to if they fail to corroborate their expenses within the 30 day period. This will reduce their base salary because they will either indefinitely or forever be deprived of a portion of their salary. This affects the terms and conditions of their employment. Moreover, such a forfeiture is

inconsistent with the legislative intent to equalize salaries - not causing them to be less than that of resident City employees.

The right of the City to withhold a portion of wages is not subject to collective bargaining because the statute requires it and because it has been previously agreed to pursuant to the statute's requirement. But the method challenged to enforce the statute is quite another matter. It has not been provided for in the statute and can be categorized both as an administrative matter and as a term or condition of employment. In both instances, the terms and conditions of employment are affected because in both instance wages are affected. Although withholding of a portion of salary as a deduction from the wages of out of state public employees has been established by statute and case law and is not subject to collective bargaining, the method by which moneys are refunded to the non-resident captains and lieutenants is not alluded to in the statute. Thus, the method for implementing the statute comprehends both the terms and conditions of employment, a negotiable matter, and how the procedure is to be implemented, generally a nonnegotiable management prerogative. Levitt v. Board of Collective Bargaining, supra, at 79 NY2d 127. Given such a murky situation, the Court is compelled to defer to the BCB's conclusion that this matter is subject to collective bargaining. The BCB's decision was not irrational; neither was it a violation of any constitutional provision or of § 1127 of the New York City Charter.

The City also contends that the captains' and lieutenants' applications to the Board were time-barred because they were filed more than 4 months after the new practice was initiated. The City states that the procedure for requiring corroboration has been in effect since 1978. Assuming, arguendo, that that is so, the Court agrees with the

respondents that such a violation is continuing and may be challenged each time it is enforced. But that is not what happened.

What is newly implemented is the 30 day requirement to corroborate, and the indefinite period for continuing to withhold payments as well as the forfeiture provision. And that has been challenged within the BCB's internal four month limitations period.

For all of the foregoing reasons the Court will not grant the petition. Accordingly, it is

ORDERED and ADJUDGED that the petition is denied; and it is further

ORDERED and ADJUDGED that this matter is remanded to the Board of Collective Bargaining of the City of New York to take appropriate action consistent with this order and judgment.