

CITY OF BOSTON AND HOUSE OFFICERS ASSOCIATION, A0-11 (12/19/89).
ADVISORY OPINION

52.36 impact of one unit's contract on another unit
67.14 management rights
67.5 negotiability of items
92.47 motion to dismiss
96. Advisory Opinion

Commissioners participating:

Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

Cynthia S. Denton, Esq.	- Representing the City of Boston
Emily K. Novick, Esq.	- Representing the House Officers Association

ADVISORY OPINION

Background

Pursuant to 456 CMR 16.06, the City of Boston (City) filed a petition for an advisory opinion with the Labor Relations Commission (Commission) on June 28, 1989. By its petition, the City seeks an advisory opinion from the Commission regarding its bargaining obligation over a proposal submitted by the House Officers Association (Association) in the course of collective bargaining negotiations concerning medical support services (ancillary services) which relate to the medical services offered by residents and interns (house officers) represented by the Association.

Pursuant to Commission Rule 16.06, the Association filed a response to the City's petition on July 14, 1989. Thereafter, on August 25, 1989, the Association filed a Motion to Dismiss the petition with a supporting memorandum. On September 18, 1989, the Commission issued a letter to the City requesting that it show cause why the Association's Motion should not be granted. Subsequently, on October 16, 1989, the City filed a Memorandum in Opposition to the Union's Motion to Dismiss.

The Association is the exclusive representative for the purposes of collective bargaining of all interns and residents employed by the City's Department of Health and Hospitals. The Association and the City are currently engaged in negotiations for a collective bargaining agreement to succeed the agreement which expired on June 30, 1989.

The most recently expired collective bargaining agreement contained the following provision concerning ancillary services:



City of Boston and House Officers Association, 16 MLC 1437

ARTICLE IX. ANCILLARY SERVICES

The City recognizes that House Officers are physicians who have professional responsibilities for the care and treatment of patients and that such responsibilities are carried on under the immediate direction of the individual service chiefs and department heads. House Officers shall be expected to work throughout the Department in accordance with the assignment of the service chiefs. House Officers in both Inpatient and Outpatient Services shall not regularly or recurrently be assigned or expected to perform the duties appropriate to other positions such as laboratory technicians, clerks, messengers, aides, I.V. and blood drawing technicians, or transportation workers; nor shall they be expected to perform tasks such as the taking of routine vital signs and weight. The City shall not be deemed to be in violation of the "regularly or recurrently" provisions of the Section so long as the City continues to staff and maintain "current levels of support services" and fulfills all other terms contained in the letter from the Commissioner as referenced below. For purposes of this Section, the meaning of "current levels of support services" shall be limited to the terms of the letter from the Commissioner to the House Officers' Association, dated July 1, 1987, which is incorporated by reference herein, provided that the City may change "current levels of support services" as a result of (a) changes in the methods of providing support services, or (b) changes in the number of beds from the numbers as of July 1, 1985; or (c) changes in the census over a period of time, but the City agrees to discuss such changes in levels of support services with the House Officers' Association, and to demonstrate that the duties of House Officers with respect to support services shall not be expanded or increased.

The City and the House Officers' Association recognize that the quality of the support services is vital to both the Association and the Department and, to that end, agree to meet on a regular basis to discuss any problems or consider any suggestions that might impact upon the quality of these services. For this purpose, there shall continue to be a joint House Officers' Association/Department of Health and Hospitals committee to be called the Ancillary Services Committee.

The House Officers' Association will be notified in writing in a timely manner of meetings of the Boston City Hospital Laboratory Committee and Medical Records Committee.

As referenced in paragraph one of Article IX, levels of support or ancillary services are defined by the terms of a side letter from the City to the Association which was incorporated into the 1987-1989 agreement.

An ancillary services provision and side letter similar to those contained in the most recently expired agreement are being proposed in the negotiations for a successor agreement. The City's petition for an advisory opinion concerns only the



City of Boston and House Officers Association, 16 MLC 1437

ancillary services side letter proposed by the Association. The Association's proposal would require the City to agree to the following side letter:¹

July 1, 1989

House Officers' Association
House Officers' Building
Mezzanine Floor
Boston City Hospital

Dear Co-President,

It is the intention of the Department of Health and Hospitals to provide support services and staffing at the level determined by the following. The City shall continue to provide sufficient staff such that:

CLINICAL LOGISTICAL SERVICE

Transportation: Routine:

Transport services will be available in approximately twenty (20) minutes from a request to the CLS dispatcher. A transporter shall be assigned to Radiology from 3-11 p.m. seven days a week.

STAT:

Transport services will be available in approximately fifteen (15) minutes from a request to the CLS dispatcher.

Messenger:

[It is not the role of House Officers to routinely carry clerical messages, including but not limited to patient transfer forms. EKG and X-ray requisitions.]

Routine:

Messenger services will make hourly rounds to all ward areas during the hours of 7:00 a.m. and [5:00] p.m. weekdays. Service shall be provided to the Finland building for specimens which must be delivered.

¹ The underlined portions of the proposed side letter represent new or altered language as compared with the language of the July 1, 1987 side letter. The text also indicates where language in the earlier side letter would be deleted from the proposed side letter.



STAT:

Messenger services will be available in approximately twelve (12) minutes from a request to the CLS dispatcher.

BLOOD DRAWING1. Ward Areas: Routine:

Daily blood drawing rounds in all areas will be provided in the morning hours, seven (7) days a week and will be completed by 9 a.m., for all properly completed requests received in Central Hematology thirty (30) minutes prior to the rounds.

STAT:

Daily blood drawing rounds in all ward areas will be provided at 3:30 in the afternoon, Monday through Friday, for all requests received in Central Hematology fifteen (15) minutes prior to the rounds.

All tests which cannot be obtained by the initial phlebotomist shall be reattempted (DELETION) by a following phlebotomist within 2 hours of the initial attempt.

All unsatisfactory or lost specimens obtained by the laboratory phlebotomist will be re-drawn by the laboratory phlebotomist.

There shall be a phlebotomist trained in pediatric blood drawing techniques available to the pediatric wards.

There will be two phlebotomists trained and available for blood culture draws.

Phlebotomy services will be provided in all intensive care units by 6:30 a.m. and for all patients in isolation.

2. Pediatric Emergency Room: Ten (10) hours of blood drawing coverage during peak hours shall be provided in the Pediatric Emergency Room, seven (7) days a week. The blood drawer shall be trained in pediatric blood drawing techniques. At times when the pediatric blood drawer is not present in the PediER, a blood drawer trained in pediatric blood drawing techniques will be provided on-call to the PediER. All pediatric clinics may use this on-call blood drawing service.

3. Nursery: A qualified blood drawer shall be assigned permanently to the nursery for one (1) full shift on week days. In addition, a morning blood drawing round shall be performed on week-ends and holidays by a blood drawer qualified in neonatal blood drawing techniques.



City of Boston and House Officers Association, 16 MLC 1437

4. Outpatient: Blood drawing services will be provided in the Ambulatory Care Center during all regularly scheduled clinic hours. Blood will be drawn in approximately fifteen minutes from presentation of a completed request to the ACC blood drawing person.

[5. House officers shall not be responsible for notifying the laboratory of patient transfers at night.]

6. If staffing is inadequate to provide the above services, the department will provide emergency coverage. If such coverage is not secured, the laboratory will provide HOA with documentation of its efforts to do so.

LABORATORY REPORTS

[The City will provide computer terminals to patient care areas in order to provide diagnostic and therapeutic test results if, in the opinion of the systems manager, the addition of such terminals does not compromise the performance of the central processing units.]

Routine biochemistry and hematology test results for specimens arriving in the laboratory prior to 10:00 a.m. will be reported to ward areas on the same day on weekdays and by the end of the first day following weekends and holidays.

For specimens arriving in the laboratory after 10:00 a.m., test results will be reported to ward or outpatient areas prior to noon on the following day or weekends and by the end of the first day following weekends or holidays.

STAT biochemistry and hematology test results will be reported to ward areas in approximately ninety (90) minutes from the receipt of specimen in the laboratory except for testing not provided at Boston City Hospital.

Written laboratory results shall be incorporated into the patient's chart within twenty-four hours after the results are available.

EKG SERVICE

EKGs requested by 8 a.m. shall be incorporated into the patient's chart by 2 p.m. the same day. EKGs requested by 1 p.m. shall be incorporated into the patient's chart by 7 p.m. the same day.

EKG services will be available in the Ambulatory Care Center during all regularly scheduled clinic hours.

(DELETION)



I.V. NURSES

There shall be twelve (12) equivalent I.V. nurses. The I.V. team shall attempt to service all inpatient areas, including pediatrics, providing coverage twenty-four hours a day, seven days a week, to the extent the staffing of 12 full-time equivalent I.V. nurses permits. All I.V. nurses shall receive training necessary to adequately perform their specialized functions, in particular pediatric I.V. techniques.

PRIMARY CARE

[Provisions will be made for the taking of vital signs and weights in the primary care unit by non-House Officers.]

MEDICAL RECORDS RUNNERS

The Department will provide for transportation of medical records for admissions and emergency floor visits. The medical records department is responsible for delivering the medical record for each patient admission and for each emergency floor visit for which a request for the record is made, seven (7) days a week, twenty-four (24) hours a day. If the medical record does not arrive on the emergency floor before an admitted patient is transported to the inpatient ward, the medical record department will deliver the record to the ward within a reasonable period of time, not to exceed one (1) hour.

WARD CLERKS

The Department will make very effort to provide one (1) full-time day shift and one (1) full-time evening shift per ward Monday through Friday in the Medical, Surgical, Pediatric, and Ob/Gyn wards, the nurseries, and the Medical and Dowling I.C.U.s.

Weekend coverage shall include one (1) eight hour shift each weekend day in the above units. Maternity 4 - Labor and Delivery - will have twenty-four (24) hour coverage.

[It shall not be the House Officer's responsibility to complete requisitions and make arrangements for routine diagnostic tests, including radiology, laboratory and EKGs.] Sufficient clerical coverage shall be provided for this work. [House Officers will note 'H0 to draw' when necessary on blood orders.]

INTERPRETER SERVICES

There shall be an adequate interpreter service for all areas of the hospital and out-patient departments, twenty-four (24) hours a day, seven (7) days a week. Interpreters shall be knowledgeable in medical terminology.



The level of services indicated above is a declaration of the intention of the Department of Health and Hospitals to staff and maintain Ancillary Services. Should these services fall below the levels indicated above, the Department will make every good faith effort to immediately fill vacant positions up to those levels. [Reports on staffing levels shall be given to the Association upon demand by the Association.]²

Sincerely yours,
/Judith Kurland
Commissioner,
Department of Health and Hospitals

It is commonly understood that house officers, as physicians, have a professional and legal obligation to provide medical services in accordance with certain prescribed standards of care. Substandard performance of this obligation can affect a house officer's license to practice medicine as determined by the appropriate licensing authority and/or individual liability for medical malpractice. The Association claims that the provision of ancillary services plays an integral role in the ability of house officers to meet these professional and legal obligations.

The City challenges the ancillary services proposal for several reasons. The City argues that the proposal infringes on its managerial prerogative to determine levels of services and minimum manning provided by nonbargaining unit personnel. The City further challenges the proposal on the grounds that it mandates hours of work and shifts for nonbargaining unit personnel, mandates performance standards for nonbargaining unit personnel and mandates training and minimum qualifications for nonbargaining unit personnel.

The Association asserts that the provision of the ancillary services outlined in its proposed side letter concerns mandatory subjects of bargaining because the provision of ancillary services clearly impacts upon unit employees' hours of work, workload and pace of work, and job duties. In this regard, the Association asserts that the provision of adequate ancillary services is essential to permit unit employees to perform their jobs. When ancillary services are not provided by the City, unit employees must perform the work. The Association further asserts that the provision of ancillary services is a mandatory subject of bargaining because the amount or level of ancillary services provided impacts upon any may diminish the level of care unit employees are able to provide to their patients and diminished care may be inconsistent with their professional and legal obligations.³

2

The City seeks an advisory opinion concerning its bargaining obligation over all aspects of the proposed ancillary services side letter, except for that language contained in brackets.

3 (see page 1444)



City of Boston and House Officers Association, 16 MLC 1437

Discussion

In determining whether an issue raised in collective bargaining concerns a mandatory subject of bargaining, the Commission strikes a balance between the interests of the employees in bargaining over the issue and the interests of the public employer in maintaining managerial prerogatives. In striking that balance, the Commission considers such factors as the degree to which the issue has a direct impact on terms and conditions of employment, whether the issue involves a core governmental decision or whether the issue concerns a nonmandatory subject of bargaining. Town of Danvers, 3 MLC 1559, 1577 (1977). The Commission recognizes that a public employer must have the flexibility to manage its enterprise and, therefore, will not compel public employers to submit to the negotiation process those core governmental decisions which have only a marginal impact on terms and conditions of employment. Id. at 1571.

In striking the Danvers balance in this case, we are of the opinion that the issues raised in the Association's ancillary services proposal constitute mandatory subjects of bargaining. Due to the unique circumstances presented by the house officers' professional and legal obligations to provide medical services in accordance with certain standards of care, and the inextricable role the provision of ancillary services plays in the ability of house officers to meet those obligations, we believe that the issues raised in the proposal have a direct impact on unit employees' terms and conditions of employment.

3 (From page 1443)

Also before the Commission is a motion to dismiss the City's petition for an advisory opinion filed by the Association. The Association asserts that in order to resolve whether the ancillary services proposal concerns any mandatory subject of bargaining, the Commission needs to consider and make findings concerning facts which extend beyond the proposals themselves. Citing Westfield School Committee, Case No. A0-7 (January 7, 1983), the Association argues that an advisory opinion is inappropriate because the Commission cannot merely review the disputed proposal on its face to resolve the bargaining obligation. We disagree.

In Westfield, we determined that an advisory opinion was inappropriate not because there was a need to consider facts external to the proposal itself but because there was a need to conduct an evidentiary hearing to find those facts. We are not constrained from considering facts outside of the proposal in rendering an advisory opinion. Indeed, our Rules contemplate the submission of factual stipulations. 456 CMR 16.06 (4)(a). Based on the representations of fact (which were not substantially in dispute) and arguments made by both parties in memoranda that were submitted in support of and in opposition to the Motion, we do not believe an evidentiary hearing is necessary. Although we do not dissect the proposed side letter to determine the negotiability of each potential individual issue, we can offer general guidance to the parties based upon our review of the letter as a whole and based upon the submissions of the parties. Accordingly, the Association's motion is denied.



The City asserts that the proposal for the required provision of certain ancillary services is not a mandatory subject because the proposal infringes upon the City's inherent managerial prerogative to determine what services will be provided by nonbargaining unit personnel. Generally an employer's decision concerning the performance of nonbargaining unit work is not a subject which must be bargained with the bargaining unit. Such a decision has relatively little direct impact on a bargaining unit and therefore the balance is struck against requiring the employer to bargain with the unit. The indirect impact of ancillary services on the working conditions of the bargaining unit generally can be bargained with the employer without negotiating directly about the provision of ancillary services. See e.g., Danvers, 3 MLC at 1574; see also Town of Dennis, 12 MLC 1027, 1029 (1985).

In the instant case, however, the employer's decision to provide ancillary services may affect the professional or legal liability of the bargaining unit employee. The house officer, unlike most other bargaining unit employees, may not be free to refrain from performing nonbargaining unit work because the house officer, as a physician, may be legally liable and professionally responsible for work that is assigned by the City to nonbargaining unit employees. Thus the provision of ancillary services is inextricably intertwined with the ability of house officers to provide medical care consistent with the standards established by their profession and the law. Issues of legal and professional liability unique to this workplace mandate that we recognize that the house officers have a legitimate interest in negotiating about subjects that generally are beyond the scope of mandatory bargaining in other non-medical contexts.

The City further argues that it is not obligated to bargain over the issues raised by the Association's proposal because they concern terms and conditions of employment of nonbargaining unit employees.⁴ As we have discussed, the Association's proposal concerns subjects which directly affect the terms and conditions of the house officers' employment. Certain proposals, however, also may have an indirect impact on the working conditions of nonunit personnel, and the City is under no obligation to bargain with the Association concerning the working conditions of nonunit personnel. Nonetheless, to the extent that the ancillary services side letter proposes that certain support equipment or ancillary services be provided by the City in order to improve the working conditions of the house officers, the City has an obligation to negotiate about the subjects that directly affect the working conditions of the house officers. For example, the side letter proposes that messenger services will make hourly rounds to all ward areas between 7 a.m.

4

In support of its argument the City relies on our advisory opinion in Saugus School Committee, 7 MLC 1849 (1981). Our decision in Saugus, however, recognized that a proposal from one union that impacted upon employees represented by another union could result in conflicting obligations for a public employer. The decision noted that those potential conflicts could not be avoided by narrowing the scope of bargaining. Rather, the Commission suggested that such conflicts be resolved through negotiations.



and 5 p.m. weekdays: "Service shall be provided to the Finland building for specimens which must be delivered. Messenger services will be available in approximately twelve (12) minutes from a request to the CLS dispatcher." The house officers have the right to bargain about messenger services which directly affect their working conditions. Thus, the house officers may insist upon bargaining about a guarantee that they not be required to perform messenger services, or about those aspects of messenger services that directly affect their working conditions. Such subjects could include the following: how quickly messages will be transported, to what areas messages will be transported, what material or messages will be transported, and during what hours messages will be transported.⁵ How the City chooses to provide a messenger service that meets the negotiated standards, however, is not a mandatory subject of bargaining. Thus, the Association has no right to insist upon bargaining about the hours of work of nonunit personnel. Should the City agree to provide messenger service weekdays between 7 a.m. and 5 p.m., for example, the City has no further obligation to negotiate with the Association about the hours of work of nonunit messengers or the number of messengers to be employed.

As the messenger service proposal illustrates, aspects of most of the proposals contained in the side letter are mandatory subjects of bargaining. Because the precise nature of the impact of certain ancillary services on mandatory subjects is not fully apparent from the submissions of the parties, we decline to evaluate each proposal contained in the side letter to determine whether individual proposals could or could not directly affect house officers' working conditions. Suffice it to say that the proposed side letter includes subjects which directly affect the working conditions of the house officers. The Association may insist upon bargaining about aspects of ancillary services that directly affect the working conditions of house officers. The Association may not insist upon bargaining about aspects of ancillary services that have no direct impact on the working conditions of the house officers, including: hours of work of nonunit employees; job duties to be assigned to nonunit employees; training and qualifications of nonunit employees, except to the extent that such training or qualifications has a direct impact on a working condition of the house officers (e.g. professional liability); or minimum shift staffing complements of nonunit employees.⁶

5

In noting the subjects that could be included in the scope of mandatory bargaining we assume, without deciding, that the speed and frequency with which messages are transported, the time during which message service is available and the material which may be transported all directly affect the ability of the house officers to perform their work in accordance with professional and legal obligations.

6

Note that the Association may demand to bargain about workload, safety and professional and legal liability issues, for example, which indirectly may affect the nonunit staffing requirements of the City. Thus, the Association may demand
(continued)



City of Boston and House Officers Association, 16 MLC 1437

Thus we advise that the City cannot decline to bargain over the Association's ancillary services proposal as that proposal concerns mandatory subjects of bargaining.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, COMMISSIONER

ELIZABETH K. BOYER, COMMISSIONER

6 (continued)

bargaining about the speed with which laboratory results are returned, or about the quality of the laboratory results, since both issues may affect the professional and legal liability of the house officers. But the Association may not demand to bargain about the number of laboratory technicians, their hours or their qualifications. Once the City has bargained about the level of ancillary services to be provided to the house officers, the City has no obligation to bargain with the Association about the means by which it will secure that level of ancillary services from nonbargaining unit personnel.

