GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO	PERB Case No. 89-U-17 Opinion No. 249
Complainants,	
v.	
District of Columbia Public Schools,	
Respondent.	

DECISION AND ORDER

On August 23, 1989, Teamsters Local Unions Nos. 639 and 730 (Teamsters) filed with the District of Columbia Public Employee Relations Board (Board) an Unfair Labor Practice Complaint alleging that by unilaterally implementing drug-testing procedures for employees in its Transportation Branch, the D.C. Public Schools (DCPS) violated D.C. Code Section 1-618.4(a)(1) and (5). The Teamsters contended that DCPS was obligated to negotiate drug-testing procedures as well as the level of discipline imposed upon employees who test positive for certain drugs. As relief, the Teamsters requested that the Board order DCPS to bargain about these items and to reinstate any employee disciplined before the conclusion of such negotiations.

DCPS, by Answer filed on September 11, 1989, denied the commission of any unfair labor practice, averring that the institution of drug testing is a reserved management right about which there is no duty to bargain. DCPS further contended that the implementation of its drug-testing policy was merely the resumption of a past practice that was suspended until the conclusion of related litigation, and did not represent a change in working conditions. Finally, according to DCPS, the Teamsters failed to assert that testing was a subject of bargaining or to submit proposals concerning the subject, even though testing was still in effect when the parties negotiated their current

collective bargaining agreement in 1987. [1]/

By Notice dated November 16, 1989, the Board referred this matter to a hearing examiner who heard the case on December 19, 1989. In the Report and Recommendation submitted to the Board on March 28, 1990 (a copy of which is appended to this Opinion), the Hearing Examiner concluded that (1) the unilateral implementation of DCPS's drug-testing program, including attendant levels of discipline, was neither solely a new practice nor past practice but rather a current exercise of reserved management authority and therefore did not constitute an unfair labor practice; (2) the refusal by DCPS to bargain with the Teamsters over the procedures for and effects of implementing a drug-testing program constituted an unfair labor practice in violation D.C. Code Sections 1-618.4(a)(1) and (5); and (3) the Teamsters' request that DCPS be ordered to rescind the discipline imposed upon employees as a result of drug testing-procedures should be denied.

On April 26, 1990, both DCPS and the Teamsters filed Exceptions to the Hearing Examiner's Report and Recommendation, which are discussed below. We adopt the Hearing Examiner's findings and conclusions to the extent consistent with this Decision and Order.

The Teamsters first take issue with the Hearing Examiner's conclusion that DCPS did not violate the CMPA by unilaterally implementing the drug-testing program, and the finding that the introduction of drug testing was both the implementation of a new practice and the reinstatement of an old practice. Contending that drug testing affects unit employees' terms and conditions of employment, the Teamsters argue that the program is therefore subject to bargaining under the CMPA. Directing attention to the Board's customary adoption of relevant National Labor Relations Board (NLRB) decisions, the Teamsters urge the Board's adoption of the NLRB's ruling in Johnson-Bateman Co., 295 NLRB No. 26 (1989). In that case, the NLRB concluded that drug/alcohol testing is a mandatory subject of bargaining under the National Labor Relations Act (NLRA). The Teamsters point to other statutory authorities that permit, at least to a degree, the negotiation of drug-testing procedures. [2]/ In addressing this

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[1]/ DCPS did not except to the Hearing Examiner's finding with respect to this last assertion or raise arguments with respect to it in its Memorandum of Law in Support of Exceptions to the Hearing Examiner's Report and Recommendation. Therefore, we do not address it herein in view of the Hearing Examiner's sound treatment of this argument in footnote 8 of his Report and Recommendation.

[2]/The Teamsters also object to the Hearing Examiner's interpretation of the Supreme Court's decisions in National Treasury Employee's Union v. Von Raab, 489 U.S. ____ (1989) and

exception, we conclude that DCPS's decision to implement its drug-testing policy is, as the Hearing Examiner noted, "plainly a management decision which impacts on the employment relationship...[.]" [3]/ Drug testing policies, to the extent they affect employees' working conditions, constitute "terms and conditions of employment" as many jurisdictions have found. See, e.g. Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co., 620 F. Supp. 163 (1985) (under Railway Labor Act); National Fed. of Federal Employees, Local 15 and Dept. of the

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Skinner v. Railway Labor Executive Ass'n, 489 U.S.__ (1989). These decisions address Fourth Amendment Constitutional issues concerning the drug testing of employees. As such, they have no significant application to the resolution of the issue herein concerning the duty to bargain over the implementation of an employee drug-testing policy. We therefore attribute no weight to these opinions in addressing the issues herein. Notwithstanding the above, we note the Hearing Examiner did not make reference to the Von Raab case in his Report and Recommendation and thus we find no basis for this portion of the Teamsters' exception.

[3]/ DCPS's misconception of this fundamental premise serves as the basis for its arguments throughout these proceedings. In its brief to the Hearing Examiner, it argued that "[t]he key to a determination that drug testing is an educational policy is the degree of impact the issue has on the well-being of employee's [sic] as opposed to its effect on the operation of the school system as a whole." DCPS cited National Education Association of Shawnee Mission v. Board of Education, 212 Kan. 741, 512 P.2d 426 (1973) for this proposition. A review of National Education Association of Shawnee Mission v. Board of Education, supra, however, reveals that the court's approach to determining whether a subject is a nonnegotiable management policy or a negotiable term and condition of employment was as follows:

> It does little good to speak to negotiability in terms of "policy" versus something which is not "policy." Salaries are a matter of policy, and so are vacation and sick leaves. Yet we cannot doubt the authority of the Board to negotiate and bind itself on these questions. The key, as we see it, is how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole.

In our assessment, it is clear that drug testing policies are terms and conditions of employment that have a direct impact on the well being of those employees tested.

Army, 30 FLRA 1046 (1988), aff'd, 838 F.2d 1102 (9th Cir., 1988) (under the Federal Services Labor-Management Relations Statute); and, as noted by the Teamsters, Johnson-Bateman Co., supra, (private sector collective bargaining under the NLRA).

Under the CMPA, as codified in Section 1-618.8(b), the right to negotiate over terms and conditions of employment extends to "[a]ll matters... except those that are proscribed by the [CMPA]" (emphasis added). Although we have described this statutory declaration as a "broad policy governing collective bargaining," we also have recognized the need "to proceed cautiously and not [as the Teamsters suggest] on the basis of generalization." See, Int'l. Assoc. of Firefighters, Local 36 and District of Columbia Fire Dep't., 34 DCR 118, Slip Op. No. 167, PERB Case No. 87-N-01 (1988); see also, University of the District of Columbia Faculty Assoc. and Univ. of the District of Columbia, 29 DCR 2975; Slip Op. No. 43, PERB Case No. 82-N-01 (1982). Despite the Teamsters' urging that the Board should adopt the NLRB holdings with respect to drug testing, there are significant differences between the statutory scheme of the NLRA and the CMPA, chief among them, the NLRA's lack of a counterpart to the management rights provisions set forth in Section 1-618.8(a) of the CMPA. Those rights specifically include the sole right to "maintain the efficiency of the...operations entrusted to them" (Section 1-618.8(a)(4)) and, "to determine the internal security practices" of the agency (Section 1-618.8 (a)(5)).

We conclude that Section 1-618.8(a) exempts from the duty to bargain DCPS's decision to implement a drug-testing program on the facts of this case, namely, the uncontested findings that DCPS is charged with the safe transport of disabled children entrusted to its care, and the evidence of past widespread drug use among employees directly responsible for the safety and welfare of these children, employees to whom the drug-testing program applied. [4]/

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[4]/ The Hearing Examiner concluded that "[b]ecause the PERB has never determined drug-testing to be a mandatory subject of bargaining, there can be no unfair labor practice proven on this record" (Report and Recommendation at p.12). We emphatically disavow this conclusion. As previously noted, D.C. Code Section 1-618.8(b) provides that "[a]ll matters shall be deemed negotiable except those that are proscribed by the CMPA." Thus, there is a statutory presumption of negotiability. To hold that the PERB would have to first declare the negotiability of the innumerable subjects that may be proposed during negotiations would clearly frustrate the express policy of the CMPA favoring collective bargaining on terms and conditions of employment. As we have observed, "[t]he CMPA does not provide a distinct list and definition of the mandatory subjects of bargaining...[the] scope of bargain[able] issues and [thereby the duty to bargain] are

We further conclude, consistent with our previous decisions, that the effects or impact of a non-bargainable management decision upon terms and conditions of employment are bargainable upon request. See, University of the District of Columbia Faculty Association/National Education Association and the Univ. of the District of Columbia, supra; Int'l. Assoc. of Firefighters, Local 36 and District of Columbia Fire Dep't supra; and American Fed. of State, County and Municipal Employees, Council 20, AFL-CIO, and District of Columbia General Hospital and Office of Labor Relations and Collective Bargaining, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989). Included within this limited scope of bargaining is the obligation to bargain over procedures for implementing that decision when it is

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resolved on a case-by-case basis including use where relevant of the traditional private sector guidelines distinguishing between mandatory and non-mandatory subjects of bargaining." Washington Teachers' Union, Local 6 AFL-CIO and District of Columbia Public Schools, Slip Op., p.3 emphasis added.

We similarly reject DCPS's contention that the only way to raise issues concerning the negotiability of a subject matter is through a negotiability appeal. Such determinations may also be made in unfair labor practice proceedings as is the case herein. See e.g., Washington Teachers' Union, Local 6 AFL-CIO and District of Columbia public Schools, supra; Local 2091, American Federation of State, County and Municipal Employees, AFL-CIO, 28 DCR 1964, Slip Op. No. 7, PERB Case No. 80-U-02 (1981); International Brotherhood of Teamsters, Locals No. 639 and 730 and District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20, Local 2093, 35 DCR 8155, Slip Op. No. 176, PERB Case Nos. 86-U-14 and 17 (1988); and American Federation of State, County and Municipal Employees, Council 20 AFL-CIO and District of Columbia General Hospital and the Office of Labor Relations and Collective Bargaining, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989). In rejecting this contention, we note that DCPS's reliance on American Federation of Government Employees, Local 2736 v. FLRA, 715 F.2d 627 (D.C. Cir., 1983), is misplaced. The Court of Appeals for the District of Columbia was not only interpreting the procedural mandate applied to unfair labor practice proceedings and negotiability appeals under a different statute, i.e., Federal Service Labor-Management Relations Statute, but was also faced with an entirely different issue. In that case, the Federal Labor Relations Authority had determined that the union's negotiability appeal should be processed as an unfair labor practice, effectively denying the union access to the more expeditious negotiability appeal process. In the case herein, the nature of this action was not determined by the Board but rather by the Teamsters pursuant to provisions available to it under the CMPA.

made. Id. [5]/ DCPS's arguments concerning the effects of past practice on its duty to bargain over its drug-testing policy are beside the point. We have previously rejected past practice as a controlling factor in determining whether or not a duty to bargain exists with respect to a particular matter. See, Washington Teacher's Union, Local 6, AFL-CIO and The District of Columbia Public Schools, _____ DCR _____, Slip OP. No. 44, PERB Case No. 85-U-28 (1986), aff'd, Public Employee Relations Board, et al. v. Washington Teachers' Union Local 6, AFT, 556 A.2d 206 (D.C. Ct. App.) (1989). Thus, DCPS's contention that the promulgation of its drug-testing policy was not a unilateral institution of a new term and condition of employment, but rather the resumption of "long-standing [past] practice" is of no avail.

We also disagree with the Hearing Examiner's conclusion that under the CMPA DCPS's obligation to bargain over the effects of its drug-testing program does not include proposals concerning the levels of discipline. Although the Hearing Examiner correctly noted that D.C. Code Section 1-618.8(a)(2) expressly reserves to management the "sole right, in accordance with applicable laws and rules and regulations... to suspend, demote, discharge or take other disciplinary action against employees for cause" that provision is silent with respect to the procedures utilized in the exercise of that authority. Furthermore, the record reflects that the parties have a history of including the procedural aspects of disciplinary matters in their collective bargaining agreement. [6]/ And while the negotiability of a given subject matter does not depend upon whether parties have previously bargained about it, we have held that "where the statutory dictate is unclear, it becomes relevant that the parties have on previous occasions either accepted or rejected negotiation overtures [over such matters]." University of the District of Columbia Faculty Assoc. and Univ. of the District of

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[5]/ Cf., Devine v. White, 897 F.2d 121, (D.C. Cir. 1983) (procedures that management officials will observe in exercising their reserved powers under Federal Service Labor-Management Relations Statute held not precluded from duty to bargain so long as those procedures would not prevent agency from acting at all) and IFPTE, AFL-CIO v. State of New Jersey, 88 N.J. 393, 113 A.2d. 187 (1982) (mere fact that certain terms and conditions of employment reserved to management authority are dealt with by existing statute or regulations does not prove that legislature intended to take those subjects out of realm of mandatory negotiations with respect to procedures for implementing that authority under New Jersey Employer-Employee Relations Act; however, portions of proposed provisions related to substantive criteria are nonnegotiable matters of managerial prerogative).

[6]/ See Union Exhibit No. 9 p.5.

Columbia, supra. [7]/ Therefore, we conclude that DCPS's

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[7]/ We also note the testimony of the Director of the District Government's Office of Labor Relations and Collective Bargaining before the City Council's Committee on Housing and Economic Development, with respect to the impact that Bill 8-346-"Employee Substance Testing Act of 1989" would have on collective bargaining with respect to employee-drug testing including disciplinary actions:

> We believe that testing can be an effective deterrent to substance abuse when administered in a manner that provides for quality assurance and a fair balance between the employer's needs, the public's needs, and employee rights. However, we question the need for legislation limiting testing of District government employees. We have been very cautious and deliberate in our use of drug testing, both as to who is tested and when they are tested. Our drug testing programs are currently limited to highly visible public safety positions, where great harm could result from substance abuse. Moreover, our programs already provide all the safeguards that would be required by this Bill and applicable court decisions. Furthermore, these programs were developed jointly with employee labor organizations. We only contemplate further extensions to specific identified positions where employees' or public health and safety can be affected. The City presently tests all applicants for police officer, firefighter, ambulance service and selected correctional positions, and currently tests on-board employees in those categories (except corrections) as part of scheduled physical examinations, and for reasonable suspicion. The test procedures for firefighters and ambulance service employees were negotiated with the unions, which strongly supported testing and follow-up procedures. Amendments to the police drug

obligation to bargain with respect to its drug-testing policy is not limited to, as the Hearing Examiner found, "matters of procedural implementation of the [program], [i.e.,] its timing; chain of custody; the mechanics involved in implementing the policy, etc." but also includes procedural matters concerning the levels of discipline prescribed thereunder. (Report and Recommendation at p.14)

Since there is a duty to bargain over the impact and effects of and procedures for implementing decisions involving the exercise of managerial prerogative, when DCPS categorically refused to bargain over those aspects of the drug-testing policy prior to implementation, it did so at its own risk. By that refusal DCPS has committed an unfair labor practice in violation

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> testing procedures are being negotiated as well...
>
> It is also significant to note that labor and management in the District government have successfully negotiated drug testing procedures. The negotiated program specify the testing, review, rehabilitation and disciplinary procedures to be used. Not only will the proposed Bill undo sound, effective testing procedures, it will undermine the spirit of labor-management relations by unilaterally imposing conditions on employees and management that have proven to be resolvable through collective bargaining. In effect, this legislation would be a step backward and would preclude the District from negotiating testing procedures in other agencies tailored to meet the specific needs of those agencies and employees. We do not believe that this Council, which has always favored a broad scope for collective bargaining, would now want to eliminate bargaining or set bargaining parameters on an issue that has been successfully negotiated.

of D.C. Code Section 1-618.4(a)(5) and (1). [8]/

We turn now to the Teamsters' request that the Board exercise its broad remedial powers under the CMPA by ordering DCPS to rescind all discipline imposed as a result of the unilaterally implemented drug-testing procedures, and to reinstate those employees removed by the imposition of discipline. The Hearing Examiner recommended denial of this request, having found that some disciplinary actions have been submitted to the parties' negotiated grievance procedure. Furthermore, the Hearing Examiner observed that "[i]t would be particularly inappropriate in this unfair labor practice proceeding, where no evidence has been provided on the factual content or the issues raised by any of these disciplinary grievances, for the PERB to grant the kind of blanket relief which the Union requests." (Report and Recommendation at p.14)

The Teamsters' exception to the Hearing Examiner's recommendation is two-fold. First, since it is conceded that the Board's statutory authority to remedy violations is broad, the Teamsters suggest that the Board follow NLRB precedent and policy to order that the status quo ante be restored including the "recision of discipline already imposed upon employees who failed drug tests based upon procedures which were unlawfully implemented"; and secondly, they argue that deferral to arbitration is inappropriate.

The Board does not believe that all relief for those who have been adversely affected by Respondent DCPS's unlawful refusal to bargain should be denied because, as the Hearing Examiner found, "no evidence [was] provided on the factual content or the issues raised by any of these various disciplining

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[8]/ In finding this violation, we reject DCPS's intimation that Article LXIII which provides: "[t]he parties agree that, by mutual consent, they will consult and negotiate on matters not covered by [their] Agreement which are proper subjects for collective bargaining" allows it to take unilateral action with respect to such subjects. We agree with the Teamsters that Article LXIII does not constitute a "clear and unmistakable" waiver of its statutory right to bargain, see, Metropolitan Edison Co. v. National Labor Relations Board, 460 U.S. 693 (1983), and provides no more than a mutual right to reopen the collective bargaining agreement mid-term to negotiate new terms by mutual consent.

The Hearing Examiner, while concluding that DCPS violated D.C. Code Section 1-618.4(a)(5), did not rule on the allegation that by the same conduct DCPS violated D.C. Code Section 1-618.4(a)(1). We hereby correct that error and find a derivative violation of D.C. Code Section 1-618.4(a)(1) for the reasons stated in AFSCME, Local 2776 v. Department of Finance and Revenue, 37 DCR 5658 Slip Op. No. 245, PERB Case No. 89-U-02 (1990).

[sic] grievances." Although discipline was imposed in the absence of the requested and required implementation and impact bargaining, it is not possible to know what impact effects bargaining might have had upon the imposed disciplinary actions. Therefore, an appropriate remedy must be carefully designed. Since the discipline heretofore administered has not been proven to be the result of the violations, (i.e., procedures which may have been ultimately negotiated or awarded through interest arbitration), we agree with the Hearing Examiner that the Union's requested status-quo-ante remedy for those disciplined is "overly broad" and thereby unwarranted. Nonetheless, the Hearing Examiner's unqualified deferral of grievances to the parties' grievance-arbitration procedures does not provide adequate redress for the violation we have found herein, and there is no statutory basis for Board deferral to an arbitrator rather than itself providing a remedy for an unfair labor practice.

Therefore, we shall order the following remedy: Final disposition of all drug-related disciplinary grievances awaiting arbitration and those currently at earlier stages of the parties' grievance procedure shall be held in abeyance pending the conclusion of negotiations over the procedures, impact, and effect of the drug testing program. [9]/ Upon the conclusion of these negotiations, including any third-party proceedings, the parties may go forward with the processing of those grievances under the provisions, if any, resulting from the negotiations. [10]/

ORDER

1. DCPS shall cease and desist from refusing to bargain, upon request, about the procedures for implementing and the impact and effects of its drug-testing program with Teamsters Local Unions No. 639 and 730 (Teamsters).

2. DCPS shall cease and desist from interfering with restraining, or coercing, in any like or related manner, employees represented by the Teamsters in the exercise of rights

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[9]/ This Decision and Order is not to be interpreted as itself reversing any action heretofore taken by DCPS with respect to affected employees. However, this Decision shall act to suspend (as of the date of this Order) any time limits in the parties' grievance procedure concerning the filing, processing and/or decision to arbitrate any such grievances until the negotiations ordered herein have concluded.

[10]/ All drug-testing related Arbitration Review Requests filed by either of these parties will be addressed in due course under D.C. Code Section 1-605.2(b) and our Rules.

guaranteed by the CMPA.

3. DCPS shall negotiate with the Teamsters, upon request, about the procedures for implementing and the impact and effects of DCPS's drug-testing program.

4. DCPS shall cease and desist from further implementing its drug testing program before fulfilling its obligation to bargain with the Teamsters, upon request, the procedures for implementing and the impact and effects of its drug-testing program.

5. Further processing of all pending drug-testing-related grievances shall be suspended until such time as DCPS has fulfilled its duty to bargain as set forth in paragraph 3 of this Order.

6. DCPS, within ten (10) days from the service of this Decision and Order, shall post the attached Notice conspicuously on all bulletin boards where notices to these bargaining unit employees are customarily posted, for thirty (30) consecutive days.

7. DCPS shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that the Notice has been posted accordingly.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

November 1, 1990

PERB Public Employee Relations Board

Government of the District of Columbia

415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE GOVERNMENT OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN OPINION NO. 249, PERB CASE NO. 89-U-17.

WE HEREBY NOTIFY our employees that the Government of the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from further implementing a drug-testing program before negotiating with Teamsters Locals 639 and 730, upon request, the procedures for implementing and the impact and effects of the drug-testing program.

WE WILL suspend further processing of all pending drug-testing-related grievances until such time as we have fulfilled our duty to negotiate the procedures for implementing and the impact and effects of the drug testing program.

WE WILL NOT refuse to bargain collectively in good faith with Teamsters Locals 639 and 730 over the procedures for implementing and the impact and effects of our drug-testing program.

WE WILL NOT in any like or related manner interfere with the rights guaranteed to Teamsters Locals 639 and 730 by the Comprehensive Merit Personnel Act as the exclusive representatives of the following bargaining-unit of employees at the D.C. Public Schools:

UNIT:

> "All employees in the Transportation and Warehouse Service Unit in the D.C. Public School System in the following job classifications: Warehouse Leader, Warehouseman, Motor Vehicle Operator, Automotive Mechanic and Bus Attendant. Excluded are wages as earned employees, management officials, supervisors confidential employees, clerical employees, and employees engaged in Personnel work other than purely clerical capacities and employees engaged in the administration of the provisions of Title XVII, of the District of

Columbia Comprehensive Merit Personnel Act of 1978."

District of Columbia
Public Schools

Date:_____ By:_____
(Superintendent)

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 415-12th Street, N.W. Room 309, Washington, D.C. 20006. Phone 727-1822