Patrolmen's Benevolent Ass'n, 21 OCB 10 (BCB 1978) [Decision No. B-10-78 (Arb)], aff'd, Patrolmen's Benevolent Ass'n v. Anderson, N.Y.L.J., Feb. 22, 1979, at 6 (Sup. Ct. N.Y. Co. Aug. 7, 1979).

BOARD OF COLLECTIVE BARGAINING
OFFICE OF COLLECTIVE BARGAINING

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In the Matter of

CITY OF NEW YORK,
Petitioner

-and-

PATROLMEN's BENEVOLENT ASSOCIATION,

Respondent

---------------------------------x

DECISION NO. B-10-78

DOCKET NO. BCB-294-78

APPEARANCES:

Elaine P. Mills, Esq.
for the City of New York

Matthew King, Esq.
for the PBA

DECISION AND ORDER

This case arises from a motion filed by the City of New York on July 18, 1978, to reopen and reconsider our prior Decision No. B-9-78 in this case, issued July 5, 1978.

The City's motion asserted that Decision No. B-9-78 was "affected by mistake of law and fact and should be reconsidered."

The Board heard oral argument on September 20, 1978.

Discussion

Board Decision No. B-9-78 found arbitrable a PBA grievance relating to the Court Alert System which alleged contract violations detrimental to Police Officers arising out of the administration of the System. The remedy requested in arbitration was "overtime under rescheduling

provision of the contract." The City had opposed arbitration on the ground that the grievance was barred by res judicata and by laches.

The Board found that the grievance was not barred by res judicata for the reason that the prior arbitration award cited by the City had not dealt with the Court Alert System nor with the same allegations of contract violation raised by the PBA in the pending request for arbitration. In the instant proceeding for reopening and reconsideration, the City has not revived its claim of res judicata, and no further discussion of this issue is necessary herein.

The Board further found in Decision No. B-9-78, that the defense of laches would not bar the arbitration. The decision stated:

> ... the PBA has not demanded that the (Court Alert] System be dismantled; PBA is requesting arbitration of a dispute which arises out of implementation of the System. Of course, an arbitrator would have no jurisdiction to order a change in court procedures."

The Board further found that:

> "In this case, PBA is claiming, in essence, that the continuing and expanding use of the Court Alert System has led to new problems of which PBA has only gradually become aware. It is not clear when PBA first became aware, or should have become aware, that the expansion of Court Alert was placing an allegedly onerous burden on police officers. The City has not shown at what time PBA should have become aware of its claim. Thus, a requirement

> of the defense of laches, that the claimant has unduly rested on a claim for an unreasonably lengthy period of time, is not present in the instant case. Therefore, the City has not met the burden of proving a laches defense."

In support of its motion and prior to the oral argument, the City submitted the affidavit of Samuel S. Herrup, Director of the Appearance Control Unit of the Police Department, which described in great detail the operation of the Court Alert System since its introduction in 1970. In substance, the affidavit showed that the System and its component parts had remained essentially unchanged as to procedures since its inception in 1970, although it had been expanded from borough to borough over the years. Exhibits were attached to the affidavit in support of this contention. The Herrup affidavit refuted in material respect many allegations in the PBA request for arbitration. The PBA had alleged that changes in the operation of the Court Alert System had gradually occurred and that the System became more and more onerous to individual police officers as time off between their tours was shortened in violation of the contract. In specific support of this general claim, PBA had also alleged that named individuals had been harmed, assertedly in violation of the contract, and that the System was being operated as a subterfuge to avoid the payment of overtime.

The Herrup affidavit showed that the Court Alert System had had substantially the same effect on the schedules of police officers since its inception and throughout its operation. The affidavit set forth in great detail the figures relating to the percentages, on a yearly basis from 1970 to 1978, of police officers placed on Court Alert who were actually required to appear in court; these figures show that the percentages have not varied significantly since 1970. In addition, the Herrup affidavit refuted the PBA's contentions relating to alleged changes in scheduling on a police officer's regular day off. The City further offered detailed evidence to show that the Court Alert System has operated more favorably since 1975 with respect to officers scheduled for late tours so that these officers may avoid being scheduled in such a way as to have only 8 hours between tours. Similarly, the City alleged in its papers submitted before oral argument, that rescheduling of officers who regularly work a 4 to 12 tour is done in such a way that "any reduction in hours t)ff between the last regular tour and the rescheduled tour will be balanced out by additional hours off between the rescheduled tour and the next regular tour," and that there has been no recent change in this practice.

The effect of the lengthy and detailed allegations now submitted by the City is substantially to refute the PBA allegations that new and recent changes gradually introduced

have adversely affected police officers and have violated contract provisions.

Of greatest significance to our consideration of the instant motion for reconsideration is the fact that the main body of specific evidence supporting the PBA's position, i.e., the claims of actual harm to six named Police Officers, evidence upon which the Board relied in Decision No. B-9-78, has been substantially overcome by documentary evidence submitted by the City in support of its motion. In this connection, the City's affidavit shows that the six officers have been part of the Court Alert System in Manhattan for varying periods of time amounting to anywhere from 5 to 8 years. Based upon the individual officers' Arrest Report Folders, it appears that the six officers have made numerous arrests and court appearances since their assignment to Manhattan's 32nd Precinct.

Thus, the City has shown that, if there is any merit to the PBA's claim, the PBA should have been aware of its claim at the beginning of this decade and certainly not later than 1975, the date of the last change in the Court Alert System, itself a change benefitting officers assigned to late tours.

Although the PBA was served with a copy of the City's affidavit one week prior to the oral argument held on September 20, 1978, the PBA offered no affidavits or other

evidence to refute any of the allegations made by the City despite the fact that such a submission was affirmatively solicited by the Board. Nor did Counsel for PBA dispute the City's factual allegations at the oral argument.

The PBA's position at the oral argument departed significantly from its position before the Board prior to the issuance of Decision No. B-9-78.

Counsel for the PBA stated at oral argument that the PBA was challenging the implementation of the Court Alert System due to its allegedly disadvantageous effect on police officers. Counsel stated:

> "And we in the Union believe that that is a complete and utter disregard of the rights of the Union members, that they should be used in a system to the advantage of every other agency in the City, to the advantage of prisoners, District Attorneys, Court Clerks, Judges, defense counsel, and that their lives, their normal routine which they should be able to expect, because of their working charts, would be disrupted to the convenience of these other agencies."

Aside from the asserted inconvenience to Police Officers, the PBA perceives that officers are unnecessarily placed on Alert. The PBA cites the City's figures concerning the low percentage of officers on Alert who actually make a court appearance on any given day as proof that the Court Alert System is not functioning properly and should either be revised or abolished. The PBA contends that Court Alert should

have been improved along the years and that the percentage of officers on Alert who were actually called to court should have increased steadily. In response to a question from the Board, Counsel stated that the remedy sought by PBA was:

> "either ... a tightening up of the procedures of the Court Alert System ... or else do away with the System altogether as ineffectual as regards ... Police Officers."

In response to another Board question, the parties informed the Board that the PBA had not demanded collective bargaining negotiations on the subject nf the Court Alert System during the recent negotiations for a contract term beginning July 1, 1978 and ending June 30, 1980.

In this matter, the Board is presented with a case which is unusual in two respects. First, although the City has now effectively made out a defense of laches to the PBA demand for arbitration, the City has not shown why the relevant information was not provided to the Board prior to the issuance of Decision 3-9-78. The Board will generally not reopen and reconsider a case based on the mere failure of a party to present evidence and argument which was available to it upon the initial litigation of the matter. However, in this case we reach a different result because of the presence of a second unusual circumstance; that is, the fact that the Union has

essentially reversed the position it took prior to the issuance of Decision B-9-78. We deem this change in the Union's position to be of such magnitude and significance as to amount to a reopening of the original case by PBA itself. The PBA now demands arbitration in order that the Court Alert System may be either substantially changed or abolished altogether. Our opinion in Decision B-9-78 expressly relied on the failure of PBA to demand "that the System be dismantled" and on the fact that PBA was only demanding payment of overtime. We held that "an arbitrator would have no jurisdiction to order a change in court procedures." Now, the PBA has changed its demand and is seeking exactly that remedy which we earlier had found prohibited. Instead of seeking an arbitral decision concerning an alleged contract violation, PBA now seeks major management changes by the City and the judiciary system. These changes may not be brought about through grievance arbitration; rather, they should have been raised in negotiations for discussion between the parties to the extent, if any, that they concerned subjects of bargaining between the PBA and the City.

Significantly, neither before nor during the oral argument did PBA dispute the factual allegations on which the City's claim of laches is based. Thus, the requirement set forth in our earlier decision has been met; the City has "shown at what time PBA should have become aware of

its claim." we find that by 1975, the date of the last procedural change in the Court Alert System, PBA was or should have been aware of any contract violations that existed with respect to the Court Alert System. In this connection we note that the six named police officers who were asserted to have been harmed by the System have worked under Court Alert for at least five years. We therefore hold that the City's defense of laches is valid in that the Union has failed since 1975 to make known its claim to the City.

For the reasons set forth above, we shall grant the City's motion to reopen Decision No. B-9-78 and, upon reconsideration, we shall deny the request for arbitration.

O R D E R

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 motion of the City of New York to reopen and reconsider Decision No. B-9-78 be, and the same hereby is, granted; and it is further

ORDERED, that upon reopening and reconsideration, the request for arbitration of the PBA be, and the same hereby is, denied.

DATED: New York, N.Y.
October 20, 1978

ARVID ANDERSON
CHAIRMAN

EDWARD SILVER
MEMBER

EDWARD GRAY
MEMBER

THOMAS J. HERLIHY
MEMBER