

PBA, et. al v. McGuire (Comm. of NYPD), City, NYPD, 23 OCB 21 (BCB 1979) [Decision No. B-21-79 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

-----x

The Patrolmen's Benevolent Association
of the City of N.Y. in behalf of
LAWRENCE DIMAGGIO, as delegate of
the Patrolmen's Benevolent Association
of the City of New York, Inc.,
ROBERT REGA, as a delegate of the
Patrolmen's Benevolent Association of
the City of New York, Inc.,

DECISION NO. B-21-79

DOCKET NO. BCB-307-78

Petitioners,

-and-

ROBERT J. MCGUIRE, as Police Commis-
sioner of the City of New York, the
New York City Police Department, and
the City of New York,

Respondent.

-----x

The Patrolmen's Benevolent Association,
Inc., in behalf of HARVARD ALFANT, as
Delegate of the Patrolmen's Benevolent
Association of the City of New York,
Inc., ALBERT TALLANT as a Delegate of
the Patrolmen's Benevolent Association
of the City of New York, Inc., and all
other delegates of the Patrolmen's
Benevolent Association of the City
of New York similarly situated,

DOCKET NO. BCB-308-78

Petitioners,

-and-

ROBERT J. MCGUIRE, as Police Commis-
sioner of the City of New York, The
New York City Police Department, and
The City of New York,

Respondents.

-----x

DECISION AND ORDER

The improper practice petition in Docket No. BCB-307-78, filed on December 27, 1978, alleges that certain Police Officers were:

"transferred and reassigned to a 'peddler detail' through 11/29/78. Petitioners are elected union delegates. Approximately 1,000 other police officers possessed similar training but were not so assigned. The transfer of elected union officials from those units electing them in the absence of a compelling need has the result of producing a chilling effect upon the union activities of delegates and constitutes unwarranted interference and coercion of union officials by the employer."

The relief requested by Petitioners is that the Board:

"enjoin the temporary transfer of union delegates in the absence of evidentiary showing to the union of a compelling and substantial need by the employer before said temporary transfers are undertaken."

The improper practice petition in Docket No. BCB-308-78, filed on December 27, 1978, alleges that:

"Petitioner delegates and all other PBA delegates similarly situated were permanently transferred effective 11/14/78 to Communications Section, One Police Plaza. Petitioner delegates were transferred before other similarly trained non delegate police officers. Defendants refused to convene a mandatory Labor-Management meeting to discuss transfers with the union.

Said permanent transfers have a chilling effect upon all union delegate activity. Said permanent transfers deprive and disenfranchise union members of union representation and protection at the whim of the employer destroying the infrastructure of the union."

The relief requested by Petitioners is that the Board issue an order:

"Enjoining respondents from continuing the transfer of elected PBA delegates from their respective units or commands."

Because similar issues of law are presented in the two cases, we have consolidated them for purposes of decision.

Following the filing of the above described petitions, the parties engaged in lengthy settlement discussions during which the filing of answers by the City was adjourned. The settlement discussions having failed to produce mutual agreement, the City filed its answers on July 23, 1979, and following a series of further adjournments requested by the parties, the Union served a consolidated reply on November 15, 1979.¹ On December 5, 1979, the City filed its sur-reply.

¹ Although it is not necessary to set forth the facts in detail, we note that the Union had filed suit in Supreme Court, New York County for certain relief related to the cases herein and that we granted a City Motion to hold the improper practice cases in abeyance until the union withdrew the civil proceedings. In DiMaggio and Rega v. McGuire, Justice Klein denied a preliminary injunction against the transfers in an opinion, dated December 15, 1978, which held that the Police Department "did not in any manner discriminate against these two PBA delegates in an arbitrary or capricious manner" and that the allegations of the plaintiffs flare totally unsupported by the proofs submitted." (Index No.21444-78, N.Y. Cty.) In Alfant v. McGuire, Justice Hughes denied a preliminary injunction on January 11, 1979, stating "Plaintiffs have neither shown a likelihood of prevailing on the merits, ... nor that they are favored by a balance of the equities." (Index No.2182/78, N.Y. Cty.)

Evidentiary Hearing

By letter of November 7, 1979, the Board informed the parties as follows:

"... if either party wishes formally to request a hearing, the written request must be received by the Board on or before November 14, 1979, and it must include a detailed description of the facts to be adduced at a hearing and show why the case may not be decided without a hearing."

The parties made no response to this direction of the Board. Because we believe a hearing is not required in this case, and in the absence of any response to the request of November 7, 1979, we shall decide this case on the pleadings and other submissions before us.

Background

In Docket No. BCB-307-78 Police officers DiMaggio and Rega, both PBA delegates, were transferred to the Peddler Detail on December 6, 1978, along with 18 other non-delegate Police Officers. The assignment lasted until December 29, 1978, and at the end of this period, the officers were returned to their original commands. The purpose of the transfers was to deal with street peddling problems during the period of heavy shopping ,in December, 1978.

In Docket No. BCB-308-78, Police officers Alfant and Tallant, both PBA delegates, were transferred along with 82 other Officers to the "911" Detail. The assignment began on December 18 and lasted approximately two months until sufficient

civilian replacements had been trained.

The PBA filed related grievances protesting the transfer of Union delegates. These contract violation cases progressed as far as the third step denial of the grievances by the Police Department. By letter of March 26, 1979, and in informal settlement discussions with the PBA and members of the OCB staff, the City raised the question whether the improper practice cases should be deferred to arbitration under the collective bargaining agreement. In response to the City's suggestion concerning deferral to contractual procedures, the PBA by letter of June 5, 1979, informed the City and the OCB that it had formally withdrawn the grievances and any pending requests for arbitration and that it wished to proceed with the improper practice cases.

Positions of the Parties

From all the formal papers and letters submitted by the Union it appears that its basic position is that the Police Department commits an improper practice under the NYCCBL any time it transfers a Police officer who is a Union delegate unless there are no non-delegate Officers available with similar qualifications who may be transferred instead. The Union takes the position that all delegate transfers not accomplished under the conditions set forth above are inherently coercive and have the effect of interfering with and restraining union activity.

The brief submitted together with both improper practice petitions herein asserts that delegate transfers violate the collective bargaining agreement between the parties. Citing Article 18 of the agreement, the Union argues that the contract evinces an intent that PBA delegates shall not be transferred out of their units. Further, the Union states that "the absence of a particular paragraph overtly barring permanent transfers signifies neither 1) that the employer may engage in a new practice of permanently transferring delegates at its discretion nor that 2) the union waives opposition to such transfers." (emphasis in-original)

Article 18, "Union Activity" provides in its entirety:

Section 1.

Time spent by Union officials and representatives in the conduct of labor relations shall be governed by the provisions of Mayor's Executive Order No. 75, dated March 22, 1973, or any other applicable Executive Order or local law, or as otherwise provided in this Agreements. No employee shall otherwise engage in Union activities during the time the employee is assigned to the employee's regular duties.

Section 2.

PBA Trustees and delegates shall be recognized as representatives of the PBA within their respective territories and commands. For the purpose of attending the regularly scheduled monthly delegate meeting, PBA delegates shall be assigned to the second platoon and excused from duty for that day. In the event the delegate so assigned to the second platoon is unable to attend said monthly delegate meeting because of illness which requires remaining at home or hospitalization, or

absence from the New York metropolitan area on leave or by assignment, or required court appearance, then and only then will a designated alternate delegate be excused from duty as spelled out in this section. The Union will provide the City with a list of those attending each such meeting, which shall be the basis for their payment.

Section 3.

The parties shall explore a further clarification of departmental rules and procedures to enable PBA delegates and officers to represent properly the interests of employees. An appropriate departmental order in this regard shall be issued."

The PBA brief alleges that "never in the history of employer/union relations had a delegate been transferred other than for disciplinary reasons." Even during the 1975 fiscal crisis when "5,000 police officers" were laid off, "the Police Department of the City of New York did not transfer any elected union delegates during the midst of what can only be perceived as a massive personnel deployment for the purpose of maintaining adequate police coverage." (emphasis in original) In response to the City's answer which asserts that "in fact, delegates have been transferred in the past particularly in 1975 at the height of the fiscal crisis", the PBA reply concedes that delegates were transferred in 1975, but the reply contends that "every delegate so transferred was returned to his original command after a vigorous protest by PBA, and the Police Department promised at that time that no future transfers of delegates" would take place.

The PBA asserts that during the negotiations for the 1978-80 contract, it demanded "the inclusion of a provision which would preclude the employer from transferring elected union delegates from the situs of their respective territories and commands." However, the union contends, it withdrew the demand after being assured by "representatives for the employer" that delegates had never been transferred and would never be transferred. Further, the PBA states, these representatives assured the Union "that existing contract language ... sufficiently expressed the intent of the employer not to transfer delegates other than for disciplinary reasons." (emphasis in original)

In addition to its claim that delegate transfers violate the collective bargaining agreement, the PBA also asserts that the transfers constitute an improper practice pursuant to the NYCCBL. In support of this position the PBA cites Section 700 of the New York State Labor Law, and cases decided thereunder. PBA next cites the Policy of the Taylor Law (Article XIV of the Civil Service Law), to prevent employer interference and coercion with respect to employee rights to participate in employee organization activities. The PBA urges that "past practice" which is "incorporated by reference into the existing contract" holds that "union delegates stand in a different light than that of other police officers" and that therefore the Department must "exhaust all other avenues of similarly trained police

officers before proceeding to transfer an elected union delegate."

The Union argues that in addition to the 87 Officers actually transferred to the 911 communication unit, there were 8 Officers available on restricted duty and that these should have been transferred instead of the two delegates. The PBA argues that the transfer of union delegates "in the absence of a dire emergency enables the employer to 'punish' an 'active' union delegate under the guise of his ministerial prerogative."

The PBA asserts that the Department's ability to transfer delegates permanently has a "chilling effect on union activities." The Union fears that "in the future, elected union officials taking issue ... with Superiors in furtherance of union affairs, may be ministerially transferred."

In support of this position the Union cites cases arising under the private sector State Labor Relations Board² and a case arising under the Taylor Law.³ Further, the Union cites certain NLRB cases.⁴

² For example NYS Labor Relations Board v. Interborough News Co., 10 NYS 2d 396(1939).

³ Wayland v. PERB, 403 NYS 2d 790(1978).

⁴ For example, Union Carbide, 95 LRRM 1068 and Chrysler Corp., 95 LRRM 1071.

The position of the City is that PBA has not stated a claim under the NYCCBL and that the petitions herein should be dismissed. The City contends that the Police Commissioner lawfully exercised his power to transfer members of the Department and that there is no limitation placed on this power by contract, by law or by Department Rules and Regulations. The City argues that all the Officers including PBA delegates, selected for the special details were chosen on the basis of a judgment that their temporary absence from their normal commands would cause the least disruption to the normal operation of the Department and its various divisions.

The City asserts that PBA demanded a non-transfer superseniority provision for delegates during the negotiations for the 1978-80 contract but that the demand was withdrawn in the early stages of the negotiations. The City contends that at that time, the PBA was informed that the policy was "not to transfer delegates unnecessarily." Further, the City states:

"Assuming arguendo that off-the-record assurances were given to the PBA, the PBA ... cannot rely upon such assurances to limit the Police Commissioner's statutory powers and rights."

The City points out that the PBA constitution as well as the collective bargaining agreement "recognize that delegates may not always be available and provide for alternates insuring representation."

Based on the fact that the petitions herein do not allege any improper motive on the part of the City as to the specific transfers in question, and based on the fact that the transferred delegates have been returned to their commands, the City urges that the petitions be dismissed.

Discussion

Under the NYCCBL, both public employers and public employee organizations are prohibited from interfering with the rights of public employees under §1173-4.1 to "join or assist" unions and to "refrain" from union activity. Section 1173-4.2a(3) prohibits a public employer from discriminating "for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization." Section 1173-4.2b(1) makes it an improper practice for a union "to cause, or attempt to cause, a public employer" to interfere, restrain or coerce public employees in their rights. Read together, these subsections prohibit any actions by management or labor which discriminate in such a way as to encourage participation in the affairs of a public employee organization, including the granting of benefits to employees in return for their activities on behalf of the union. It is clear that a provision, such as is sought by PBA herein, which would have the effect of insulating elected PBA delegates from transfer to temporary details might be viewed by many Police Officers as an

encouragement of active participation in internal PBA activities. This is not mere speculation as to a subject matter heretofore unexamined. In the private sector, the NLRB and the Courts have sanctioned limited types of benefits for union delegates whose presence is necessary to the functioning of labor management relations under the collective bargaining contract. See, e.g. Aeronautical Lodge v. Campbell, 24 LRRM(1949), where the Supreme Court sanctioned "top seniority for union chairmen for purpose of layoffs" even though veterans protected by the Selective Training and Service Act might be laid off as a result.

In Dairyalea Cooperative, Inc., 89 LRRM 1737(1975), the NLRB set forth its rule that

"steward super seniority limited to lay off and recall is proper even though it too, can be described as tying to some extent an on-the-job benefit to union status."

The Board's decision was enforced by the Second Circuit in NLRB v Teamsters, Local 338, 91 LRRM 2929(1976).

Many cases could be cited, including those mentioned by PBA herein, to support the proposition that certain benefits may legally be granted to union delegates in order to insure their presence on the job so that grievances may be presented properly under the contract. However, all of these cases would contain a vital element which is missing from the instant case -- a contract pro-

vision, mutually agreed to by the parties, setting forth the rights and obligations of the parties with respect to the non-transfer of delegates. It may or may not be that rights such as the union claims here might properly be sought and obtained in contract negotiations. The fact is that they were not. The PBA has not directed our attention to any case, nor has our own research disclosed any, where it has been held to be an improper practice⁵ to refuse to grant such rights as are at issue here to union officials in the absence of a contractual provision setting forth those rights.

There are sound policy reasons for the requirement that an agreement set forth the particular rights to be granted to elected union officials. First, as has been shown above, the area of privilege that may be accorded to union delegates is narrow. Unless the privilege can be shown to be necessary and directly related to the performance of delegate duties, it would amount to an impermissible encouragement of union activity and thus violate NYCCBL §1173-4.2(a) and (b). For this reason a precise delineation of privileges granted to union delegates is desirable. Second, questions concerning the rights of union officials go to the heart of the smooth functioning of the collective

⁵ Or an unfair labor practice under the National Act.

bargaining relationship and they are therefore too important to be left to an ad hoc determination such as the one being attempted here. Finally, any restriction on management's right to assign and reassign employees must involve considerations of the efficiency of the public service and of the special requirements of the Police Department. These considerations can best be dealt with by negotiations and mutual agreement.⁶

We turn next to the PBA's contention that the contract between the parties does in fact prohibit delegate transfers. A reading of the language of Article 18 shows that this is not the case. Indeed, the Union admits that there is an "absence of a particular paragraph overtly barring permanent transfers."⁷ We find that there is no intent expressed in Article 18 that delegates shall not be transferred. The only intent in the contract is that contained in Article 18, §3, to the effect that:

"The parties shall explore a further clarification of department rules and procedures...."

⁶ The instant cases illustrate some of the details that are best left to the parties such as whether temporary transfers of delegates should be permitted in special circumstances.

⁷ It is not clear why the Union refers in this sentence to "permanent" transfers.

Clearly, the contract recognizes that further discussions are necessary to formulate further understandings concerning union activity.

Both parties have given the Board their own versions of the bargaining history relating to delegate transfers. We need not examine these allegations at any length because we are not here faced with ambiguous contract language the intent of which must be illuminated by resort to the bargaining history. Instead, it is clear that there is no writing between these parties relating to delegate transfers.

Finally, we note that the PBA has not alleged any anti-union animus on the part of the Police Department. Although it has asserted to the Board that the ability to transfer delegates "enables" the Police Department to punish an active union delegate and will have a "chilling effect" on delegates because "in the future . . . [active delegates] may be ministerially transferred," the PBA has not alleged that any delegates have in fact been subject to reprisals for their union activity. We do not think it proper to speculate or to assume that Police Department officials will engage in illegal activity where there has been absolutely no showing of any fact in support of the speculation. The facts herein show that the transfers complained of were quite limited in time and as to numbers of delegates affected: two delegates out of a total of twenty

officers were transferred for three weeks and two delegates out of a total of 84 officers were transferred for two months We note also that PBA has not alleged that the transfers resulted in a lack of representation at any particular time or place.

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 petitions in Cases No. BCB-307-78 and BCB-308-78 be, and the same hereby are, dismissed.

DATED: New York, N.Y.
December 17, 1979

ARVID ANDERSON
CHAIRMAN

ERIC J. SCHMERTZ
MEMBER

WALTER L. EISENBERG
MEMBER

MARIA T. JONES
MEMBER

FRANKLIN J. HAVELICK
MEMBER

CAROLYN GENTILE
MEMBER

MARK J. CHERNOFF
MEMBER