

Patrolmen's Benevolent Ass'n, 25 OCB 8 (BCB 1980) [Decision No. B-8-80 (IP)],  
aff'd, Patrolmen's Benevolent Ass'n v. McGuire, No. 8238/80 (Sup. Ct. N.Y.  
Co. Apr. 13, 1981).

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING  
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In the Matter of

THE PATROLMEN'S BENEVOLENT  
ASSOCIATION, INC.,

DECISION NO. B-8-80

Petitioner,

DOCKET NO. BCB-369-79

-and-

ROBERT J. McGUIRE, as Police  
Commissioner of the CITY OF NEW  
YORK, the NEW YORK CITY POLICE  
DEPARTMENT, and THE CITY OF  
NEW YORK,

Respondents.  
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**DECISION AND ORDER**

On November 7, 1979, the Patrolmen's Benevolent Association (hereinafter  
"PEA" or "the Union") filed an improper practice petition alleging that:

Petitioner(s) and all other police officers simi-  
larly situated comprised the Parking Enforcement  
Squad ('PES') of the New York City Police Depart-  
ment. Said police officers issue summonses and  
perform other functions related to the enforce-  
ment of motor vehicle operations as well as  
operate tow trucks when necessary. Commencing  
January 1, 1980, the functions heretofore carried  
out by said police officers will be transferred  
to the Department of Traffic with consequent  
elimination of the 'PES' function. The transfer  
will be accomplished by assigning 'PES' functions  
to the Department of Traffic. Said functions to  
be carried out by CETA workers who will drive  
tow trucks and will be given the power to issue  
summonses - said power hereto fore exclusively  
reserved to police officers. Said program con-  
stitutes a calculated procedure to replace police  
officers with untrained civilian personnel and  
clothe said civilians with powers traditionally  
exercised by police officers. Implementation of  
this program constitutes an attempt by the  
employer to dominate, interfere with and destroy  
the Public Employee Organization.

As relief, the PBA requests that the Board of Collective Bargaining ("BCB"):

enjoin Respondents from implementing the transfer of 'PES' to the Department of Traffic and clothing civilian employees with summonses or other powers traditionally employed by police officers.

In a letter dated November 19, 1979, the PBA amended its petition to allege a violation of section 1173-4.2a(4) of the New York City Collective Bargaining Law ("NYCCBL").

On November 29, 1979, Respondents, the Police Commissioner the Police Department and the City of New York, appearing by the Office of Municipal Labor Relations (hereinafter "OMLR" or "the City") filed an answer to the petition and requested that the Board dismiss the PBA charge. A reply was filed by the PBA on December 19, 1979; a letter in sur-reply was filed by the City on December 28, 1979; to which the PBA responded by letter on January 2, 1980.

#### POSITIONS OF THE PARTIES

##### Union Position

The PBA argues that the City has a duty to bargain over the transfer of the functions of the Parking Enforcement Squad (hereinafter "PES") from the Police Department to the Department of Transportation and that the unilateral implementation of the transfer of functions constitutes an improper practice.

The Union claims that under the 1978-1980 contract between the parties, it is the sole and exclusive representative of

police employees in the Police Department, including employees working in the PES unit. The PBA maintains, "The normal expectation for the Union would be that said Police Officers would continue to be represented by the PBA in [the PES) unit and perform the regularly assigned duties of said unit." The Union also contends that the job specification for police officers and "past practice," "existed and was negotiated by the parties to the last contract." The Union claims:

The employer may not, under the guise of managerial prerogative use the existence of other non-uniformed civilians as a rational to evade negotiations with the recognized bargaining agent prior to the complete replacement of a Unit with non-Union civilian employees.

The PBA concludes:

The Union is entitled to rely upon the continued existence of a unit that was negotiated for at the time of the contract, until the parties either agree to a change prior to the Collective Bargaining Process or the Collective Bargaining Process results in a change. Managerial rights are not unfettered [sic] and customarily are subordinated to the provisions of a Collective Bargaining agreement where the employees are represented by a unit.

The Union also argues that despite the absence of a contractual prohibition against subcontracting police work to civilians, the City does not have "a license to sub-contract" when the result is "the avoidance or negation of a contract in whole or in part."

In addition, the PBA contends that the use of "non-unit civilian personnel in the place of police officers" will affect

the working conditions of police officers and pose "a chilling effect upon the Union" by precluding expansion of the Union.

The Union states, "A representative organization cannot continue to exist when the employer unilaterally removes units from said organization without first negotiating same with the Union for the purpose of preserving job titles and employee positions."

In support of its position, the Union cites an arbitration award in The Port Authority of New York and New Jersey and The Port Authority Policemen's Benevolent Association,<sup>1</sup> wherein, the PEA claims, the arbitrator held "the Port Authority could not utilize civilian personnel to perform jobs traditionally performed by the [P.A. PBA] which had not been negotiated away in either a Collective Bargaining agreement or in some other fashion between the Union and employer." (Emphasis supplied by Union).

### **City Position**

The City does not dispute that it intends to transfer the PES functions of the Police Department to the Department of Transportation. OMLR argues that the Union has not alleged any facts which, if true, would establish that the City and the Police Department have attempted to dominate a public employee organization in violation of NYCCBL section 1173-4.2(a). The City also maintains that there are no allegations of improper

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<sup>1</sup> American Arbitration Association Case No. 1130 0124/79. (Cohen, N. Arbitrator).

motivation by Respondents and, thus, the City argues, the Union has failed to state a claim under NYCCBL section 1173-4.2(a).

With regard to the bargainability of the transfer of function, the City argues that the decision is within its statutory management rights to "determine the methods, means and personnel by which governmental operations are to be conducted" which are set forth in NYCCBL section 1173-4.3(b). The City contends that a valid exercise of a management right, as in the instant matter, may not form the basis of an improper practice.

The City maintains that the PES functions have been performed under the direction of the Police Department since 1967 and that "a substantial portion of the physical removal operation has been performed by a private contractor since 1976." OMLR claims that a majority of the employees assigned to PES "are non-uniformed civilians represented by an organization other than Petitioner." The City also contends that a number of non-police employees working in several City agencies are empowered to issue summonses; in particular, the City maintains that for over a decade the Department of Transportation has employed Traffic Enforcement Agents "whose job duties entail precisely the sort of issuance of summonses complained of in the Petition." The City argues that the PBA should not be permitted, "at this late date, to complain of the use of non-police officers in the performance of summons and traffic duties.

The City concludes that the proposed integration of the "tow-away" program with other traffic enforcement duties performed in the Department of Transportation is the result of "managerial audits and studies," with the purpose of promoting "economic and efficient delivery of governmental services," and is within the scope of managerial prerogatives stated in the NYCCBL.

### **Sur-Replies**

In a letter dated December 28, 1979, submitted after the filing of the PBA reply herein, the City maintains that no employee presently represented by the PBA will be removed from the bargaining unit. OMLR also argues that formulation of job specifications is a management right, that the job specification for police officers "does not specifically encompass the duties involved herein," and that the job specification does not constitute a "jurisdictional grant" to the PBA. The City further asserts that the transfer of PES functions to the Department of Transportation is not a "sub-contracting to civilians," as claimed by the PBA, because there is no "limiting contractual provision." The City also cites Board Decision No. B-21-79 in support of its position that the transfer of the PES functions is a proper exercise of a management right under the NYCCBL. OMLR maintains that the arbitration award cited by the Union concerns a dispute arising under a statute in another jurisdiction and is entitled to no weight herein.

The PBA, in a letter dated January 2, 1980, objects to any consideration of the City's December 28th letter on the grounds that the OCB Rules do not provide for any pleadings after submission of a Petitioner's reply in a dispute before the BCB and that, in any event, "the format chosen by the Office of Municipal Labor Relations does not comport with the 'Service of Motions' engaged in by the parties before the Office of Collective Bargaining." The Union goes on to argue that Board Decision No. B-21-79 "does not collaterally stop the present improper practice." The PBA claims that the City is not terminating the PES functions because they are no longer necessary, but that the City seeks "to shift union functions to those employees of another union or to other non-union personnel, to the obvious detriment to the organization then representing said union," a practice, the Union argues, is expressly barred in the Port Authority arbitration award.

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**DISCUSSION**

In its papers, the PBA alleges the City has committed the following practices prohibited by NYCCBL sections 1173-4.2a(2) and (4):

[T]o dominate or interfere with the function or administration of any public employee organization;

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[T]o refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

The Union does not in any way indicate how the proposed transfer of PES functions from the Police Department to the Department of Transportation constitutes domination or interference with the formation or administration of the PBA. The Union claims that the transfer of the PES unit "precludes the expansion" of the PBA, but it offers nothing by way of facts or arguments to show that this will be the result of the transfer of PES functions. The Union does not point out anything in the City's proposal to transfer PES functions which in any way suggests that the PBA will be prevented, hindered or at all affected in representing present and future members of the police force. The PBA ignores the statutory bar<sup>2</sup> placed on expansion of the Union which limits a certified representative of police to only representation of members of the police force of the Police Department. In addition, there is no suggestion in any of the papers filed that the City is motivated by anti-union animus in proposing the transfer of functions. Thus, we dismiss that part of the Union's complaint alleging illegal interference with or domination of the Union by the City.

Determination of the second part of the Union's charge, an alleged illegal refusal to bargain over the proposed transfer of PES functions, rests on interpretation of the City's statutory duty to bargain in good faith on wages, hours and working con

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<sup>2</sup> NYCCBL §1173-10.0b.



ditions,<sup>3</sup> subject to the provision of NYCCBL section 1173-4.3b, which states:

It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, not with standing the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

It appears that the decision on the "methods, means and personnel by which the [PES functions] are to be conducted" is within the City's management prerogative. The Union offers no persuasive evidence or argument which demonstrates that limits exist on the City's freedom to act unilaterally in this area. The Union appears to rest on its statutory<sup>4</sup> and contractual

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<sup>3</sup> NYCCBL §1173-4.3a.

<sup>4</sup> NYCCBL §1173-4.1.

status<sup>5</sup> as the exclusive bargaining representative of Patrolmen and Policewomen (except those detailed as First, Second or Third Grade Detective) to support its claim of rights with regard to work performed. However, both the statute and contract provision cited concern the Union's exclusive right to represent employees and neither relates to any rights regarding performance of certain work. There is nothing in the PBA unit contract which details the work performed by employees represented by the Union or provides jurisdiction over unit work. The job duties of a police officer, which are not stated or incorporated in the contract but can be found in the Department of Personnel Notice of Examination for the title,<sup>6</sup> also do not offer any basis to support a claim of rights to the work the City proposes to transfer. The stated job duties and responsibilities of a Patrolman Policewoman are:

To perform general police duties in the various branches of the department; to perform all additional functions for the rank prescribed by relevant laws, the

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<sup>5</sup> Article I, "Union Recognition and Unit Designation," section 1 of the PBA contract states:

The City recognizes the Union as the sole and exclusive collective bargaining representative for the unit consisting of the employees of the New York City Police Department in the titles of Patrolman and Policewoman, except those detailed as First, Second and Third Grade Detectives, and Patrolman/Policewoman (CETA).

<sup>6</sup> Second Amended Notice of Examination No. 8155, "Police officer Series," dated May 23, 1979.

Department Manual, orders or directives  
of the New York City Police Department;  
and to perform special duties or assign-  
ments as directed by competent authority.

There is no dispute that all employees represented by the PBA have and will continue to perform the quoted duties.

The Union claim that past and existing practice between the parties suggest a unit jurisdiction over the work performed in the PES squad is diluted by the City's assertions, not contradicted by the PBA, that civilian employees and others who are not police officers have performed, both within and outside of the PES squad, certain of the contested job duties. It is not disputed that Traffic Enforcement Agents, employed by the Department of Transportation, have performed, for over ten years, some of the traffic and summons duties the PBA now claims is bargaining unit work. In addition, it is not controverted that City civilian employees and private contractors, who are not City employees, have performed some of the towing functions of the PES squad. There is no indication in the pleadings before the Board that the PBA protested or objected in the past to the use of civilians, Traffic Enforcement Agents, and private contractors to perform a number of the functions of the PES squad. Thus, there appear to be no grounds to support a claim of practice of exclusive assignment of PES functions to employees represented by the PBA which would limit the City's freedom to determine how and by whom the PES functions are to be performed.

The PBA recognizes that there is nothing in its contract to bar the City from subcontracting the work of police officers, but the Union argues that the City is not free to subcontract when the result is "avoidance or negation" of a contract. The Union does not identify, nor can we find, any provision of its contract which would be avoided or negated by reason of the transfer of PES functions. Further, the City's proposed action, in our opinion, does not constitute a subcontracting of unit work -- the proposal is in the nature of a transfer of functions from one department to another, not a contracting with another party to perform the job, and, as discussed above, it has been found that the PES functions are not exclusive bargaining unit work. We also point out that there is no suggestion that any police officers will be laid off as a result of the proposed transfer.<sup>7</sup>

The Port Authority arbitration award cited by the PBA involved an arbitrator's interpretation of rights derived from a collective bargaining agreement between a government entity and an employee organization who are not parties to the matter before the Board and who are not subject to the jurisdiction of the NYCCBL. In our opinion the arbitration award is of little relevance to determination of the allegations herein of violations of law except to point out that unit work can be pro-

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<sup>7</sup> The City, in its papers, states that one of the purposes of transferring the PES functions is to free "Police Department personnel for duties more directly related to law enforcement."

tected in a collective bargaining agreement and that such protection can be enforced in the arbitral forum.

Therefore, for the reasons stated, we dismiss the improper practice petition filed by the PBA.

**ORDER**

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 petition filed herein by the Patrolmen's Benevolent Association of the City of New York, Inc., be, and the same hereby is, dismissed.

DATED:           New York, N.Y.  
                  March 20, 1980

ARVID ANDERSON  
CHAIRMAN

WALTER L. EISENBERG  
MEMBER

VIRGIL B. DAY  
MEMBER

EDWARD SILVER  
MEMBER

EDWARD F. GRAY  
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