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

CORRECTION OFFICERS BENEVOLENT ASSOCIATION,

DECISION NO. B-21-81

Petitioner,

DOCKET NO. BCB-402-80

-and-

CITY OF NEW YORK DEPARTMENT OF CORRECTION,

Respondent.
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DECISION AND ORDER

This proceeding was commenced by the filing, on February 7, 1980, of an improper practice petition by the Correction Officers Benevolent Association (hereinafter COBA or the Union). The petition alleges that:

> Since early January 1980 the officers employed at the House of Detention for Men and C-95 have been required to walk a half-mile for 20 minutes through institutional corridors, in uniform, from the Locker Room to the Roll Call Assembly Point without pay at the beginning of their tours and back again another 20 minutes after their tours.

The City of New York, through its office of Municipal Labor Relations (hereinafter the City or OMLR), sought and received an extension of time in which to file an answer. The answer was filed on May 8, 1980, claiming, inter alia, that the Union had failed to allege any facts which, if true, would establish an improper practice. The City asserted that the

change in the location of the roll-call assembly point was within its management rights as defined in the New York City Collective Bargaining Law (hereinafter NYCCBL) and thus was beyond the scope of collective bargaining.

After receiving an extension of time in which to respond to the City's answer, the Union filed, on May 28, 1980, a verified reply.

PROCEDURAL BACKGROUND

After receiving all of the pleadings in this case, the Office of Collective Bargaining (hereinafter OCB) deferred action on this matter as it appeared that the issue might be resolved in the course of ongoing unit negotiations between COBA and the City. When no resolution of the matter was forthcoming, however, the Trial Examiner scheduled an informal conference and a hearing for October 22 and 24, 1980, respectively. These proceedings were adjourned at the request of the Union and were eventually rescheduled for January 19 and 23, 1981. The hearing was adjourned at the request of the City, but the scheduled conference was held on January 19, 1981.

At the informal conference, the City explained that the command structure at the House of Detention for Men (hereinafter HDM) and the Anna M. Kross Center (hereinafter

AMKC), which had been consolidated, giving rise to the alleged increase in time required for correction officers to walk from the locker room to the roll-call assembly point, has been separated as of January 5, 1981. The two former roll-call points, one for HDM and one for AMKC, each in close proximity to the locker rooms for the respective facilities, have been restored.

After some discussion, it became clear that the dispute could not be settled either within the context of ongoing contract negotiations or informally between the parties. Therefore, hearings were scheduled and were held before the OCB Trial Examiner on April 24, 1981 and May 12, 1981. Post-hearing briefs were filed by both parties on May 28, 1981.

At the commencement of the hearing, the City moved to dismiss the Union's petition. The motion was denied at that time. After the Union completed its case, the City renewed its motion. This motion is now before the Board.

FACTUAL BACKGROUND

Effective December 31, 1979, the House of Detention for Men and the Anna M. Kross Center were combined to form a single command structure on Rikers Island. The consolidation was effected in order "to distribute the resources, personnel and services to the complex in a more efficient

manner."[1] Pursuant to the unification of the command structure, the Department of Corrections (hereinafter the Department) combined several roll-call assembly points into one point. As a result of this change, the union alleges, it took fifteen to twenty minutes to walk from the locker room, where the officers change into their uniforms, to the roll-call point, instead of the two to three minutes it had taken before the consolidation.[2] As of January 5, 1981, however, the command structure was separated again and the former roll-call points were reinstated.[3] For this reason, COBA withdrew its request for injunctive relief[4] and seeks only compensation for the time spent by officers walking from the locker room to roll call under the consolidated command.

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[1] Memorandum dated December 28, 1979, to Heads of Correctional Facilities and Divisions from Jacqueline McMickins, Chief of Operations, on the subject of transfers (City Exhibit #1).

[2] The precise distance and the amount of time required to walk that distance are disputed. Union witnesses testified that, after the consolidation, the distance from the locker room of the HDM complex to the roll-call point was about half a mile (Tr. 15) and the walk took fifteen to twenty minutes (Tr. 52, 64). City witnesses testified that the walking time required under the consolidated command was four to five minutes from one locker room and seven to ten minutes from the other (Tr. 132, 157).

[3] This information was provided by the City's counsel at the informal conference held on January 19, 1981 at OCB.

[4] In its petition, the Union asked for the following relief:

> Pay the officers for time spent walking from the Locker Room to the Roll Call or restore the Roll Call to its former proximity to the Locker Room.

POSITIONS OF THE PARTIES

Union's Position

COBA asserts that the City's unilateral elongation of the distance between the locker room and the roll-call assembly point pursuant to the consolidation of the command structures of two facilities, resulting in an additional twenty-minute walk at the beginning and end of each tour of duty, constitutes an improper public employer practice as defined in section 1173-4.2a(4) of the NYCCBL.[5] The Union cites NYCCBL section 1173-4.3a to the effect that hours (including overtime rules) and working conditions are matters within the scope of collective bargaining. COBA also cites section 1173-4.3a(4) which states that:

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[5] NYCCBL Section 1173-4.2a provides as follows:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 of this chapter;

(2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

> All matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, shall be negotiated with the certified employee organizations representing the employees involved.

In its brief, the Union also relies upon NYCCBL §1173-4.3b to the effect that questions concerning the practical impact of managerial decisions are within the scope of bargaining.[6]

COBA emphasizes that it does not challenge the City's right to consolidate the prison facilities in this case. Rather, it objects to the unilateral change in hours and working conditions imposed upon its members without bargaining.

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[6] Section 1173-4.3b of the NYCCBL provides as follows:

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, notwithstanding 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.

The Union seeks compensation as a remedy for correction officers who were required to walk the increased distance during the period of the consolidated command.

City's Position

The City contends that the unification of the command structure of the HDM and AMKC facilities was a valid exercise of its management rights as defined in NYCCBL section 1173-4.3b and that the consolidation of various roll-call assembly points into one point pursuant to the unification of command was also a valid exercise of these rights. OMLR notes that the new roll-call point was approximately in the middle of the consolidated institution and that, as always, officers were required to report to roll call in uniform at the beginning of a tour of duty. OMLR argues that there was no change in the time that a correction officer's tour of duty commenced or in the length of the tour.

The City admits that, as a result of the consolidation, the distance between the locker rooms and the roll-call point was greater than before, but the City asserts that the consolidation was entirely proper in that it was done in an effort to achieve management's legitimate goals in unifying the two facilities. These goals were to alleviate problems of excessive overtime, to distribute the more stressful regular and overtime assignments at the HDM complex over

a broader base of employees, and to comply with federally mandated standards for reducing the prison population.

The City notes that the Union concedes that the unification of the command structure was proper. The consolidation of the roll-call points pursuant to a decision as to which management concededly had no duty to bargain was therefore also protected by section 1173-4.3b of the collective bargaining law, according to OMLR. The City adds that its statutory obligation to bargain in good faith on wages, hours and working conditions (NYCCBL section 1173-4.3a) is specifically limited by section 1173-4.3b. The mere allegation that the City made a unilateral change in a term or condition of employment is not sufficient, according to OMLR, when that change was in an area of statutorily protected management prerogative.

The City maintains further that there is no basis for a finding of practical impact in this case. In Board Decision B-41-80,[7] according to 0MLR, the Board found that the Health and Hospitals Corporation had no obligation to bargain on the impact of its decision to decentralize an operating unit because the union failed to prove that the managerial decision created an "unreasonably excessive or unduly burdensome workload as a regular condition of employment." Further, the

[7] Civil Service Technical Guild, Local 375 v. New York City Health and Hospitals Corp.

City notes, even if the Board were to find a practical impact in this case, it would, in keeping with prior decisions, first afford the employer an opportunity to alleviate the impact. Only after the Board finds that the employer has not expeditiously relieved the impact is there a duty to bargain over alleviation of impact, according to the City.

OMLR also stresses the fact that COBA made no demands on the City to bargain over the issue of the consolidated roll-call point even though contract negotiations began shortly after the consolidation took place; nor did the Union attempt to grieve management's decision as an alleged contract violation. In fact, says the City, when correction officers' complaints concerning the new roll-call point were brought to the warden's attention, he engaged in discussions with the Union and even suggested a solution to the problem, which solution COBA rejected.

For all of the above-stated reasons, and for the further reason that the command structure was separated in January, 1981 and the roll-call points that existed before the consolidation were restored, OMLR urges that the Union's improper practice petition be dismissed.

DISCUSSION

The issue presented in the instant case is whether the consolidation of the roll-call assembly points for the City's

prison facilities on Rikers Island constitutes a mandatory subject of collective bargaining, because it affects the hours or working conditions of employees, or whether the consolidation is a management prerogative under NYCCBL section 1173-4.3b, as to which the City may take unilateral action.

The issue as framed above is one which the Board has often been called upon to resolve. In City of New York v. Patrolmen's Benevolent Association,[8] for example, cited by COBA, the City of New York filed a petition seeking a determination as to whether two matters - the manning of precinct radio motor patrol cars and the scheduling of patrolmen's work - were within the scope of bargaining as defined in the NYCCBL. The Board held that the City was required to bargain over changes it sought to make in duty charts of police officers to the extent that the changes would affect hours of work but that the matter of manning was not a mandatory subject of bargaining since it related to management's authority unilaterally to establish standards of service to be offered to the public and to determine the methods, means and personnel to be utilized in doing so.

In the instant case, the Union concedes that the consolidation of the prison facilities was within management's rights as defined by NYCCBL section 1173-4.3b. However, COBA contends that the City had an obligation to bargain

[8] Board Decision B-5-75.

over the increase in hours of correction officers occasioned by the change in the location of the roll-call point and, that since the consolidation is no longer in effect, the City should compensate the officers for the time spent walking from the locker rooms to roll call during the period of the consolidation.

For the reasons stated below, we do not find any violation of the duty to bargain in good faith. COBA never submitted a demand to the City to bargain concerning the consolidation and/or its effect on the hours of correction officers although negotiations for the 1980-1982 collective bargaining agreement were in progress while the Union's improper practice petition was pending. We note that the Union did demand bargaining on 272 other items. Further, COBA declined to raise this issue during mediation sessions held under the auspices of the Office of Collective Bargaining.[9]

It is clear that COBA had every opportunity to request the City to negotiate concerning the effect of the consolidation on the hours and working conditions of correction

[9] At the hearing in this case, Mr. James Hanley, Assistant Director of the Office of Municipal Labor ' Relations, testified that there were approximately thirteen formal collective bargaining sessions between COBA and the City, some informal bargaining sessions, and mediation sessions. At no time during any of these sessions, did the Union request, formally or informally, that the City bargain over the consolidated roll-call point (Tr. 162-163).

officers. A successor agreement to the 1978-1980 contract between the City and COBA has yet to be concluded, and an impasse panel is still meeting to resolve the disputed issues. Under these circumstances, the Board is unwilling to allow the filing of an improper practice petition to substitute for a demand for bargaining.

In a recent case before the New York State Public Employment Relations Board (PERB), the Board reached a result similar to the one we have reached here. In City of White Plains v. Professional Firefighters Association,[10] the Association filed an unfair labor practice charge alleging that the City violated its duty to bargain in good faith over the implementation of a rule requiring firefighters to report outside employment. The City raised as an affirmative defense the Association's failure to request bargaining on this matter during negotiations for a successor agreement even though it had been notified of the City's intention to require the report. The PERB hearing officer and Board agreed with the City's position and held that the Association must be deemed to have waived its right to negotiate on the matter.

In another recent case, PERB held that a school district did not violate its duty to bargain in good faith concerning the impact of its assignment of a retiring unit employee's

[10] 13 PERB ¶3059 (1980).

job duties to a non-unit employee. In Elwood Union Free School District v. Elwood Teachers Alliance,[11] PERB noted that the district had met with the union to discuss this question. In dismissing the unfair labor practice charge, PERB found that the record did not show a refusal by the district to meet and confer with the union after the first discussion. Rather, the record showed that no further discussions were held because the union did not seek them.

At the hearings in the case at bar, testimony was offered by a Union witness, Mr. Frank Ayala, that shortly after the consolidation, he, as a union delegate, communicated the Union's concerns to the warden at monthly labor-management committee meetings. However, the solutions proposed at those meetings did not involve compensating the officers for the extra time (Tr. 20-21), and the Union was not satisfied. We do not consider a complaint by a union delegate made to a warden in the context of regularly scheduled labor-management committee meetings to be a demand for bargaining. As the warden in question here testified, he has no authority to negotiate on behalf of the City (Tr. 148). We deem the two decisions of PERB, cited above, to be relevant to the instant matter, COBA had an affirmative obligation to demand negotiation regarding the roll-call problem. The City at no time refused to discuss the matter and, in fact, in the context of labor-management meetings, indicated a willingness to do so.

[11] 14 PERB ¶3007 (1981).

Union witness Ayala also testified that, during the period of the consolidation, incidents often arose which required a correction officer on his way to roll call to respond to a request for assistance by a superior officer (Tr. 17). This occurred because the officers had to walk through inmate housing areas to get from the locker room to the roll-call point. When officers were so detained, they were unable to be at roll call on time and, in some cases, late reports were filed against them (Tr. 18). This witness also testified, however, that a grievance could be filed if a late report was incurred (Tr. 34). Additionally, a City witness, Mr. Harvey Pierce, a correction officer with the rank of Captain, who is in charge of keeping records and making schedules for Department personnel, testified that there were several occasions when an officer who was delayed by such an incident submitted a claim for overtime compensation and was paid for this time (Tr. 151-152). Thus, it does not appear that individual correction officers were in any way disciplined as a result of the change in the location of the roll-call point.

In addition to the considerations outlined above, the Board bases its decision to dismiss COBA's improper practice petition on the fact that the pre-consolidation roll-call points have been restored and the issue of a unilateral increase in hours is now moot. We shall not order the City

to bargain about a subject, including matters of practical impact, concerning which the Union declined to demand bargaining when it had every opportunity to do so.

For all of the above-stated reasons, we shall not entertain a demand for compensation in this case, and we shall dismiss the Union's improper practice petition in all respects.

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 improper practice petition filed by the Correction officers Benevolent Association be, and the same hereby is, dismissed.

DATED: New York, N.Y.
September 9, 1981

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