PBA v. McGuire (Comm. of NYPD), City, 27 OCB 23 (BCB 1981) [Decision No. B-23-81 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE PATROLMEN'S BENEVOLENT ASSOCIATION,

DECISION NO. B-23-81

Petitioners,

DOCKET NOS. BCB-493-81
BCB-494-81
BCB-495-81

-and-

ROBERT J. McGUIRE, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Respondents.

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DECISION AND ORDER

Procedural Background

The Patrolmen's Benevolent Association (hereinafter "PBA") filed improper practice petitions in cases BCB-493-81, BCB-494-81, and BCB-495-81 on May 19, 1981. All of these petitions alleged the replacement of PBA unit employees by civilians in the 120 Precinct and Central Booking division of the Police Department (hereinafter "the Department"). The Department's actions in implementing such replacements are alleged to constitute improper practices, in violation of Section 1173-4.2(a), subdivision (2), (3), and (4), of the New York City Collective Bargaining Law (hereinafter

"NYCCBL").[1]

With the PBA's consent, the City requested and was granted an extension of time until June 12, 1981 to answer the above petitions.[2] Similarly, the PBA twice requested and, with the City's consent, was granted extensions of time to file a reply to the City's answer. A further extension of time was given upon the expiration of the second due date for the reply. However, despite these repeated extensions of time in which to file, the PBA failed to submit a reply to the City's answer.

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[1] Section 1173-4.2(a) of the NYCCBL reads as follows:

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 of this chapter;
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> (2) to dominate or interfere with the formation or administration of any public employee organization;
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> (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;
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> (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.

[2] The City filed a single answer to all three petitions.

The three above-captioned cases contain common questions of law and the factual allegations in each are essentially the same. Therefore, in order to avoid unnecessary delay and to best effectuate the policies of the NYCCBL, cases BCB-493-81, BCB-494-81 and BCB-495-81 are hereby consolidated for the purposes of decision.

Positions of the Parties

The PBA's petitions allege that police personnel in the 120 Precinct, i.e. Cell Attendants and the Roll Call Officer, have been replaced by non-bargaining unit civilian personnel; the same is alleged to have occurred with regard to Male Attendants responsible for fingerprinting and searching of prisoners in the Central Booking Division.

The PBA challenges the use of civilians in duties formerly performed by police officers, alleging:

> "Replacement of a union unit employee with non-police employees constitutes a deprivation and loss of an employee unit to the detriment of the union. The union is composed of individual units which are represented in the union organizational structure and for which the union bargains during contract negotiations. A replacement of an employee's unit by another employee's unit not affiliated with the recognized employee union (P.B.A.),

> constitutes an improper practice pursuant to Section 1173-4.2(2)(3)(4) of the Rules of the Office of Collective Bargaining. Said policy of replacing a union unit (sic) with a non-union unit (sic) constitutes dis crimination against the covered employee organization."[3]

The remedy requested by the PBA is an order of this Board directing the City:

> "To halt and desist from replacing employees of the recognized bargaining organization with other employees."[4]

The City, in its answer, denies the allegations contained in the petition's statement of the nature of the controversy except that it admits that "certain responsibilities pertaining to roll call in the 120 Precinct have been assigned to another employee of the Department who is not represented by Petitioner."[5] The City affirmatively states that there has been no civilianization of Cell Attendants in the 120 Precinct. Furthermore, the City claims that there is no such position as "Male Attendant" in the Department. Rather, the City contends that the title of Attendant (Male) is certified to an organization other than the PBA and that no employees in that title have been replaced.

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[3] The quoted language appears in all of the improper practice petitions filed herein.

[4] The quoted language appears in all of the improper practice petitions filed herein.

[5] City Answer, paragraph 5.

The City also asserts that the petitions fail to allege facts which, if true, would establish that the City committed an improper employer practice within the meaning of the statute, and that the PBA has not alleged any improper motivation on the part of the City. Thus, the City alleges that the petitions fail to state a claim upon which relief can be granted.

The City further contends that through the ongoing civilianization program, the Department:

> "...is attempting to deploy its total work force in a fashion most conducive to effective, efficient and safe delivery of police functions. Specif-ically, civilianization allows more Police Officers to be assigned to duties more directly related to law enforce-0 ment."[6]

In this regard, the City alleges that:

> "Coupled with the reassignment of Police Officers to operations within the ambit of traditional police duty, the Depart-ment has assigned non-uniformed civilian personnel represented by an organiza-tion other than Petitioner, to perform functions related to the operation of the Department as distinguished from delivery of police services."[7]

The City argues that the civiliani4zation program is a valid exercise of its statutory management right to determine the "methods, means and personnel" by which the Department's

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[6] Id., paragraph 9.

[7] Id., paragraph 10.

functions are to be conducted and may not form the basis of an improper practice.[8] The City cites a number of prior Board of Collective Bargaining (hereinafter "the Board") decisions in support of the aforementioned argument, i.e., Decision Nos. B-8-80, B-14-80, B-26-80 and B-27-80.

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[8] The statutory management rights provision is set forth in Section 1173-4.3(b) of the NYCCBL, which states as follows:

> §1173-4.3 Scope of collective bargaining; management rights
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> b. 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 City goes on to state that allegations concerning the replacement of employees not certified to the PBA who were not in fact replaced are "so bizarre and vague" that they should be dismissed for failing to state a claim upon which relief can be granted.

In addition, the City argues that the validity of the Department's civilianization program has already been litigated and decided in its favor both by the Board and the Courts.[9] It states that it has prevailed on the roll call officer classification issue in a previous decision,[10] and maintains, on this basis, that the instant claims of petitioner should be dismissed as res judicata.

The City also asserts that the filing of the instant petitions represents such an "egregious abuse" of NYCCBL procedures and "utter disregard" of Board precedent as to mandate censure. It requests that we permanently enjoin the PBA from litigating the validity of the civilianization program and that the Board assess costs and disbursements against the PBA.

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[9] The City's Answer, at paragraph 14, speaks of review in the Appellate Division. Although several of our decisions on civilianization have been appealed at Special Term, none has been reviewed by the Appellate Division.

[10] Although the City fails to give a case citation to support this contention, it is presumably referring to the holding in Patrolmen's Benevolent Association v. Robert J. McGuire and City of New York, B-26-60, aff'd, Sup. Ct., N.Y. Cty., Spec. Term, Pt. 1, Index No.16971 (7/26/81).

Discussion

At the outset, we note that the issue of civilianization in the police department is one which has been dealt with at length in prior Board decisions.[11] These decisions have carefully and specifically enumerated the necessary elements to be pleaded and proven if a prima facie cause of action on this issue is to lie. The instant petitions evidence no resort to these guidelines and consist, in large part, of the same kinds of conclusory allegations - in many instances couched in identical language - as those set forth in the earlier cases.

Initially, we note that, as in BCB-370-79, Decision No. B-14-80, supra, the petitions herein fail to indicate the dates on which the alleged replacements of police personnel occurred and the names or number of employees affected thereby. In view of the City's denial of the allegations in the petitions, it was incumbent upon the PBA to allege facts with sufficient particularity to enable this Board to determine whether a factual dispute exists which might warrant the holding of a hearing. Furthermore, the lack of dates makes it impossible for us to ascertain whether the

[11] In addition to those cases cited above by the City, see Decision Nos. B-5-80 and B-33-80.

petitions herein were timely filed so as to give us jurisdiction to determine these matters.[12]

Secondly, even if we were to accept the PBA's limited factual allegations as true, these facts alone would not constitute an improper practice under the law. The PBA claims that the City's actions constitute improper practices prohibited by NYCCBL Section 1173-4.2(a), subdivisions (2), (3) and (4). We quote our discussion in Decision No. B-26-80 pertaining to these same allegations:

> "With respect to subdivision (2), the union has failed to indicate how the transfer of duties from uniformed to civilian personnel ... constitutes domination or interference with the formation or administration of the PBA. The Union has not alleged any facts which would suggest that the PBA has been or will be prevented, hindered or in any way affected in representing present and future members of the bargaining unit.
>
> The union's allegations of a:

[12] Section 7.4 of the Revised Consolidated Rules provides:

> Improper Practices. A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 1173-4.2 of the statute may be filed with the Board within four (4) months thereof by one (1) or more public employees or any public employee organization acting in their behalf or by a public employer together with a request to the Board for a final determination of the matter and for an appropriate remedial order.

> '... deprivation and loss of an employee unit (sic) to the detriment of the union....',

is incomprehensible to us. The bargaining unit for which the PBA has been certified as the collective bargaining representative, has not been changed or reduced in any manner. The PBA ... certification is not altered by the City's civilianization program. Moreover, it is not alleged that any police officer has been laid off or otherwise terminated as a consequence of the transfer of some duties to civilians. Thus, we fail to see how the PBA has been deprived of any part of its bargaining unit. Accordingly, we will dismiss that part of the PBA's complaint alleging illegal interference with or domination of the union by the City.

With respect to subdivision (3), the PBA alleges that the claimed:

> '... policy of replacing a union unit (sic) with a non-union unit (sic) constitutes discrimination against the covered employee organization.'

However, the PBA has not alleged any facts which would tend to show that the City discriminated against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, either the PBA or the union which represents the civilian employees. In this regard, it is significant that the PBA has not alleged nor submitted evidence to prove that the City is motivated by anti-union animus in implementing the civilianization program. Nor has the union attempted to refute the City's statement of the rationale underlying this program. Therefore, in the absence of factual allegations to support its

assertion of discrimination, we will dismiss that part of the PBA's complaint alleging a violation of §1173-4.2(a), subdivision (3).

The PBA's claim under subdivision (4) is upon the City's statutory duty to bargain in good faith on matters within the scope of collective bargaining. The PBA contends that the City's implementation of the civilianization program constitutes a mandatory subject of bargaining, and that the City's failure to bargain constitutes an improper practice.

The City denies that the civilianization program is a mandatory subject of bargaining, and asserts that the decisions to reassign police officers to assignments within the ambit of "traditional police duty" and to replace them with civilians in assignments relating to the "operation" of the Department, are within the City's statutory right to:

> '... determine the methods, means and personnel by which government operations are to be conducted....'

The City, points out that, pursuant to the statute,

> 'Decisions of the City or other public employer on those matters are not within the scope of collective bargaining ....'

We find that the City's decision ... to reassign ... police officers ... to duties "within the ambit of traditional police duty" and "more directly related to law enforcement", is within the City's right, under NYCCBL section 1173-4.3(b), to determine the "methods, means and personnel by which governmental operations are to be conducted." We also are persuaded by the

> City's allegation that through the civilianization program, the City is,
>
> > '... attempting to deploy its total work force in a fashion most conducive to effective, efficient and safe delivery of police functions.'
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> This rationale offered by the City falls within the City's further statutory right to:
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> > '... maintain the efficiency of governmental operations...'
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> Therefore, we hold that the implementation of the civilianization program is a management prerogative, and we are compelled to find that it is not within the scope of collective bargaining...."[13]

The PBA has failed to allege any facts which might persuade us to reconsider our prior reasoning and holdings. The record does not speak to any clear and explicit waiver by management of any statutory right which might curtail its powers, so we must assume that there has been no such relinquishment. Furthermore, no case law has been cited by the PBA that would indicate that the courts are not in agreement with our previous holdings on the instant subject. In fact, we take administrative notice of the decisions of the Court affirming our findings in Decision Nos. B-8-80, B-26-80, B-27-80 and B-33-80.[14]

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[13] Decision No. B-26-80 at pp.12-17, footnotes deleted.

[14] See Patrolman's Benevolent Association v. Robert J. McGuire and City of New York, B-8-80, aff'd, Sup. Ct., N.Y. Cty., Spec. Term, Pt. 1, NYLJ (4/21/81) at 7; Patrolmen's Benevolent Association v. Robert J. McGuire and City of New York, B-26-80, supra; Patrolmen's Benevolent Association v. Robert J. McGuire and City of New York, B-27-80, aff'd, Sup. Ct., N.Y. Cty., Spec. Term, Pt. 1, Index No.16972 (7/26/81); and Patrolmen's Benevolent Association v. Robert J. McGuire and City of New York, B-33-80, aff'd, Sup. Ct., N.Y. Cty., Spec. Term, Pt. 1, NYLJ (1/30/81) at 6.

The City argues that civilianization of the roll call officer classification is a matter which has already been litigated. Decision No. B-26-80, supra, does deal with the roll call position. No evidence was submitted by the PBA after the City made this contention which would distinguish the prior situation from the present one. We therefore find that the matter as it specifically pertains to roll call officers to be res judicata.

The City would have us censure the PBA for filing the instant petitions dnd assess costs and disbursements against the PBA. We decline to do so. The NYCCBL mandates remedial powers and authority; it is not a statute which seeks to impose punitive sanctions against a losing party. However, we urge that the instant decision as well as existing case law be carefully read and the directions contained therein be adhered to before any party to a proceeding concerning civilianization involves all concerned in future litigation.

For the reasons set forth above, we will dismiss the PBA's petitions herein.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the Nev., York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petitions filed herein by the Patrolmen's Benevolent Association of the City of New York, Inc., in the cases docketed as BCB-493-81, BCB-494-81 and BCB-495-81 be, and the same hereby are, dismissed.

DATED: New York, N.Y.
October 7, 1981

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD J. CLEARY
MEMBER

CAROLYN GENTILE
MEMBER