Caruso (Pres. of PBA) v. McGuire (Comm. of NYPD), et. al, 29 OCB 38 (BCB 1982) [Decision No. B-38-82 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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PHIL CARUSO, as President of the
Patrolmen's Benevolent Association

DECISION NO. B-38-82

DOCKET NO. BCB-530-81

of the City of New York,
Petitioner,

-against-

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

Respondents.

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INTERIM DECISION AND ORDER

A verified scope of bargaining petition was filed by the Patrolmen's Benevolent Association of the City of New York (hereinafter "PBA") on September 17, 1981, seeking a determination, pursuant to Section 7.3 of the Revised Consolidated Rules of the Office of Collective Bargaining (hereinafter "OCB Rules"), that the subject of a claimed threat to the safety of Police Officers assigned to the Brooklyn Arrest Processing Unit is within the scope of collective bargaining.

The Police Department and the City of New York, by their representative, the office of Municipal Labor Relations, filed a motion to dismiss and supporting affidavit on September 28, 1981. Dismissal of the PBA's

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petition was sought on the ground that the scope of bargaining petition was "premature". The PBA submitted an affidavit in opposition to the motion on November 9, 1981. The City filed a verified pleading, denominated as a "reply", in response to the PBA's opposing affidavit, on November 19, 1981.

Background

The circumstances which give rise to the PBA's scope of bargaining petition involve the question of the safety of Police officers assigned to the Brooklyn Arrest Processing Unit. This Unit is responsible for, inter alia, the search, temporary detention, and care of prisoners being held for arraignment in the Brooklyn Criminal Court. The facts alleged by the PBA, which must be deemed to be true for purposes of a motion to dismiss, indicate that the police personnel assigned to the detention area of this Unit include a mix of full duty (non-injured) Police Officers; limited duty or restricted duty Police Officers who are recovering from injuries and are unable to perform normal patrol functions; and civilian police attendants. The number of full duty Police Officers assigned to the Unit has been on a steady decline, and the majority of Police Officers assigned are on limited duty or restricted duty.

The PBA asserts that the presence of 40 to 50 prisoners, including violent felons and other dangerous persons, in an area staffed largely by limited duty and restricted duty Police Officers and civilian attendants, who are incapable of rendering effective assistance in crisis situations, creates an increased opportunity for disturbances and serious injury to the staff of the Unit. In support of its contention, the PBA submits a memorandum written by the Commanding Officer of the Brooklyn/Staten Island Court Section, of which the Brooklyn Arrest Processing Unit is a part, to his superior. In this memorandum, the Commanding Officer, a Captain, notes that:

> "... the problem of sufficient assignments of full duty Police Officers to Brooklyn Arrest Processing Unit is of significant proportions in relation to the maintenance of a minimally safe and secure facility and should be given due recognition and attention."

The memorandum further explains, in some detail, the problems involved in operating the Unit with such a high proportion of limited duty and restricted duty Police Officers.

The PBA alleges that it brought its concerns about the above situation to management's attention, through the filing of a grievance. The grievance was rejected by the Police Department's office of Labor Policy, on the ground that the matter did not fall within the contractual

definition of a grievance. Subsequently, the instant scope of bargaining petition was filed by the PBA.

Positions of the Parties

City's Position

Initially, the City observes that Section 7.3 of the OCB Rules states:

> "A public employer or certified or designated public employee organization which is a party to a disagreement as to whether a matter is within the scope of bargaining under Section 1173-4.3 of the statute, or whether a matter is a proper subject for the grievance and arbitration procedure established pursuant to Section 1173-8.0 of the statute or under an applicable executive order, or pursuant to collective bargaining agreement may petition the Board for a final determination thereof." [Emphasis added]

The City bases its motion to dismiss on its contention that,

> "[t]his section clearly sets forth a condition precedent to the filing of a scope of bargaining petition, i.e., the right to file in conditioned on the existence of a disagreement."

The City alleges that the PBA never presented, to the office of Municipal Labor Relations, a demand to bargain over safety and security at the Brooklyn Arrest Processing Unit, and therefore, there exists no disagreement as to the negotiability of this matter. The City concludes that on this basis, the PBA's scope of bargaining petition should be dismissed as premature.

The City also argues that the PBA could have submitted this matter to the Labor-Management Committee established under Article XXIX of the collective bargaining agreement, but failed to do so. The City claims that the PBA's filing of a scope of bargaining petition without having submitted the matter to the Labor-Management Committee, constitutes a "circumvention" of the contractual labor-management structure and of "... the entire bargaining process." The City asserts that such circumvention should not be permitted.

PBA's Position

The PBA notes that it brought the instant matter to the Police Department's attention initially through the filing of a grievance. This grievance was considered and rejected by the Department's Office of Labor Policy. The PBA alleges that the same Department management representatives who operate the Office of Labor Policy also participate in the contractual Labor-Management Committee. Thus, argues the PBA, management was on notice of the PBA's concerns about the safety of Police Officers in the Brooklyn Arrest Processing Unit, and there has been no circumvention of the labor-management structure. The PBA submits that management's failure to act to "redress the situation" was

the basis of the Union's filing of the instant scope of bargaining petition.

The PBA also alleges that its Director of Labor Relations, Charles Peterson, verbally requested that there be negotiation and discussion on the question of safety and security in the Brooklyn Arrest Process Unit, but that "... such bargaining was refused by the inaction in commencing same." The PBA contends that it has made all reasonable efforts to discuss this matter "on an administrative level", without success, and it thus instituted the present scope of bargaining proceeding.

Discussion

The primary question raised by the City's motion to dismiss, i.e., whether the existence of a disagreement is a condition precedent to the filing of a sc ope of bargaining petition, was considered and determined by this Board in our decision in City of New York v. Patrolmen"s Benevolent Association, Decision No. B-5-75. Interestingly, that case involved the same parties as the present proceeding; however, in that earlier case, the parties took positions exactly opposite to the ones they advocate herein. We believe that our ruling in B-5-75 is dispositive of the City's motion in this case.

It is the purpose of the New York City Collective Bargaining Law (hereinafter "NYCCBL") to provide a wide range of procedures whereby labor disputes may be resolved expeditiously in such a manner as will minimize conflict and the need for litigation between the parties. section 1173-5.0a of the NYCCBL provides:

> "The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
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> (1) on the request of a public employer or public employee organization which is party to a disagreement concerning the interpretation or application of the provisions of this chapter, to consider such disagreement and report its conclusion to the parties and the public;
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> (2) on the request of a public employer or a certified or designated employee organization to make a final determination as to whether a matter is within the scope of collective bargaining;
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> (3) on the request of a public employer or a certified or designated employee organization which is party to a grievance, to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 1173-8.0 of this chapter;
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> (4) to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 1173-4.2 of this chapter. For such purposes, the board of collective bargaining is empowered to establish procedures, make final determinations, and issue appropriate remedial orders;

> (5) to recommend any needed changes in the provisions of this chapter or of an, executive order;
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> (6) to compel the attendance of witnesses and the production of documents;
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> (7) to adopt rules and regulations for the conduct of its business and the carrying out of its powers and duties including rules and regulations governing the procedures to be followed by mediation and impasse panels constituted pursuant to subdivisions b or c of section 1173-7.0 of this chapter.
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> (8) where either party to collective bargaining negotiations has rejected in whole or in part the recommendations of an impasse panel, to review such recommendations as provided in paragraph four of subdivision c of section 1173-7.0 of this chapter.

This Section enumerates the various determinations this Board may issue in the performance of its duties under the NYCCBL. In our decision in B-5-75, we observed that subparagraph (2) of §1173-5.0a, the provision which governs the present case, empowers the Board "to make a final determination as to whether a matter is within the scope of collective bargaining" merely upon "the request of a public employer or a certified or designated employee organization." We stated:

> "Unlike the language in subparagraphs (1), (3) and (8), which require that there be, respectively, a request by 'a party to a disagreement', a request by a 'party to a grievance', or a rejection by a 'party to collective negotiations', subparagraph (2) calls for Board action simply upon 'the request' of a public employer or public

> employee organization. It is manifest that §1173-5.0a(2) of the NYCCBL does not require a formal bargaining demand and a formal refusal to bargain nor does it require that one party have resorted to claimed unlawful unilateral action as a prerequisite to the Board's jurisdiction to make a final determination. Nowhere in the cited section does any requirement appear that a 'case or controversy' exist in the form which the PBA alleges is necessary to confer jurisdiction on the Board in the instant case."[1]

After reviewing the legislative background of amendments to §1173-5.0a(2), we found:

> "It is evident that prior to the 1972 amendments, scope of bargaining jurisdiction could be asserted only upon request of a party 'engaged in negotiations', whereas the law as it is now written permits a scope of bargaining determination, whenever a request is made. The purpose of the amendments in 1972 was to provide two proceedings for the resolution of bargainability disputes; one proceeding upon "request" and another proceeding as part of an improper practice finding.[2]

As we noted in the earlier proceeding, the policy underlying the statute is directed toward finding solutions to labor relations problems without forcing the parties into an adversary position. Thus, it is not necessary that there have been a formal demand and a refusal to bargain. We are empowered to rule on a scope of bargaining question even though no dispute has arisen in the course of collective bargaining. For this reason, we reject the City's

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[1] Decision No. B-5-75 at p.6; accord, Decision Nos. B-12-75, B-24-75.

[2] Decision No. B-5-75 at p.8.

contention that the PBA's failure to present a formal demand to negotiate over the safety of Police officers assigned to the Brooklyn Arrest Processing Unit precludes our consideration of this matter.

We find the City's argument based upon the claimed circumvention of the contractual Labor-Management Committee similarly to be without merit. Consideration by a labor-management committee empowered only to make recommendations to the Police Commissioner is not the equivalent of collective bargaining on a mandatory subject of negotiation. Accordingly, if the PBA believes that the matter raised in its scope of bargaining petition constitutes a mandatory subject of bargaining, there exists no requirement under the NYCCBL or the Taylor Law[3] that such matter first be referred for consideration by a labor-management committee.[4]

For the reasons stated above, we will order that the City's motion to dismiss be denied, and direct that the City file an answer to the scope of bargaining petition within 10 days of the service of this decision and order.

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[3] Civil Service Law, Article 14.

[4] We note that if the City believes that the collective bargaining agreement, itself, requires submission to the Labor-Management Committee, and that the PEA has breached that contractual requirement, then the City may seek recourse through arbitration under Article XXIII, §8 of the agreement.

0 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 City of New York's motion to dismiss be, and the same hereby is, denied; and it is further

ORDERED, that the City of New York serve and file its verified answer to the scope of bargaining petition herein, within 10 calendar days after service of this decision and order.

DATED: New York, N.Y.
October 21, 1982

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD CLEARY
MEMBER

EDWARD F. GRAY
MEMBER

JOHN D. FEERICK
MEMBER

PATRICK F.X. MULHEARN
MEMBER