PBA v. City, NYPD, 37 OCB 42 (BCB 1986) [Decision No. B-42-86(IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the
Improper Practice Proceeding

-between-

DECISION NO. B-42-86

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK,

DOCKET NO. BCB-850-86

Petitioner,

-and-

THE CITY OF NEW YORK and THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.

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DECISION AND ORDER

On February 12, 1986, the Patrolmen's Benevolent Association (""BA") filed a verified improper practice petition charging that the New York City Police Department ("Department") violated Sections 1173-4.2(a)(4)[1] and

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[1] Section 1173-4.2(a)(4) of the NYCCBL provides:

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

1173-7.0(d)[2] of the New York City Collective Bargaining Law ("NYCCBL") by revoking a Department rule precluding information concerning unsubstantiated civilian complaints against police officers from being revealed to superior officers and by issuing an order that specifically provides for receipt by a commanding officer of all civilian complaints filed against a member of his command.

The City of New York ("City"), appearing by its Office of Municipal Labor Relations ("OMLR"), submitted a verified answer to the petition on June 13, 1986 and the

[2] Section 1173-7.0(d) of the NYCCBL provides:

> d. Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending sixty days thereafter or thirty days after the panel submits its report, whichever is sooner, provided, however, that upon motion of the panel, and for good cause shown, the board of collective bargaining may allow a maximum of two sixty-day extensions of time for the completion of impasse panel proceedings, provided further, that additional extensions of time for the completion of impasse panel proceedings may be granted by the panel upon the joint request of the parties, and during the pendency of any appeal to the board of collective bargaining pursuant to subdivision c

(Continued ...)

PBA submitted a verified reply on July 11, 1986. 3

Thereafter, by letter dated August 1, 1986, Counsel for the PBA informed the Chairman of this Board that, during the prior month, members of the Department had been intimidated and harassed in that they were threatened with transfers, changes of assignment or changes of duty tours based upon unsubstantiated civilian complaints filed against them. In light of these recent developments, the PBA's attorney requested that the Board expedite its decision in the instant matter or, alternatively, schedule a prompt hearing to resolve any issues of fact.

(2 Continued)

> of this section, the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

3 The statutory time limits for the filing of the answer and reply herein were extended upon mutual consent of the parties.

On August 6, 1986, the Trial Examiner designated by the Office of Collective Bargaining ("OCB") wrote to counsel for the PBA advising him, in pertinent part, as follows;

> At this time, it does not appear that there are any disputed issues of material fact that would warrant our holding a hearing in the case. Nor does your letter of August 1st, in and of itself, provide the basis for a hearing. However, should you wish to provide us with additional facts which might establish the need for further proceedings, you may do so by serving and filing a supplementary statement within ten days of the date of this letter.

As no response to the above-quoted letter has been received, we now render our decision on the basis of the record before us.

Background

On or about May 17, 1972, Chief of Personnel Memorandum No. 48, concerning the "Confidential Nature of Unsubstantiated Complaints Investigated by the Civilian Complaint Review Board Investigating Unit," was issued to all commands in the Department. It provided, inter alia, that:

> [t]he Civilian Complaint Review Board ["CCRB"] will not supply information to superior officers concerning unsubstantiated complaints investigated by the Civilian Complaint Review Board Investigating Unit. 4

4 Chief of Personnel Memo No. 48 §3 (1972). Interim Order No. 53 (1974) defined a civilian complaint as "unsubstantiated" when "the investigation provides insufficient evidence to clearly prove or disprove the allegations made."

On April 12, 1979, Operations Order No. 36 was published, purporting to revoke Memorandum No. 48. Thereafter, a dispute arose as to whether the Operations order, which stated that certain of the directives revoked thereby, including Memorandum No. 48, had been "incorporated into the Department Manual or published in another type of department directive" was effective in revoking the Memorandum.

In a grievance filed pursuant to its 1982-1984 collective bargaining agreement with the City, the PBA argued that the language in operations order No. 36 to the effect that Memorandum No. 48 was incorporated elsewhere in the Department Manual rendered the order ineffective insofar as it purported to revoke the substance of the Memorandum. The PBA asserted that the City's action in reporting civilian complaints to superior officers violated the Memorandum and, accordingly, constituted a grievance within the meaning of collective bargaining agreement. In dismissing a petition challenging arbitrability filed by OMLR, we reasoned that:

> while the City correctly states that management has the right unilaterally to revise or, ... to revoke, a rule or regulation, and is under no obligation to arbitrate concerning this decision, the focus of the instant dispute lies elsewhere. ... As we are persuaded that the language of the Operations Order itself provides an arguable basis for the PBA's claim that the Order incorporates by reference, and asserts the continuing effectiveness of, the sub-

> stance of Memorandum No. 48, we find that the Union has satisfied its burden of demonstrating a prima facie relationship between the management action complained of and the source of the alleged right. 5

We directed that the matter of the ambiguity in the Operations Order be resolved in arbitration together with the underlying grievance.6

In the wake of our determination on the question of arbitrability and related issues, the Department sent the following telegraphed message, dated December 16, 1985, to all commands:

> Operations Order #36 1979 revoked Chief of Personnel Memo No. 48, series 1972. To clarify any possible misunderstanding, Chief of Personnel Memo No. 48 is revoked.

Thereafter, on February 11, 1986, the Department issued Interim order No. 9, the source of the instant controversy. Distributed to all commands, this directive of the Police Commissioner provides, in part, as follows:

> Subject: CIVILIAN COMPLAINT REVIEW BOARD COMPLAINT NOTIFICATION AND ASSESSMENT PROCEDURES
>
> 1. Effective immediately, additional civilian complaint notification and assessment procedures are adopted to emphasize

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5 Matter of City of New York and Patrolmen's Benevolent Association, Decision No. B-22-85 (July 29, 1985), motion for reconsideration denied, Decision No. B-22A-85 (Nov. 19, 1985).

6 Decision No. B-22A-85. The dispute was submitted to Arbitrator Maurice Benewitz and ultimately was settled. Matter of City of New York and Patrolmen's Benevolent Association, Docket No. A-1940-84 (June 30, 1986).

> command accountability, improve the department's ability to analyze the causes for civilian complaints, and assist commanding officers in training their personnel. Commanding officers will review the complaint history of individual officers, conduct complaint notification conferences, review Civilian Complaint Review Board complaint statistics on a monthly basis and conduct an annual civilian complaint assessment of the command. The effectiveness of each

command's complaint assessment program will be evaluated periodically by the Inspections Division.

2. On a monthly basis, the commanding officer will receive a copy of each CIVILIAN COMPLAINT REPORT (PD313-154) filed against a member of his command. A copy of each identified member's previous Civilian Com plaint Review Board complaint history will be attached. This information is provided solely for the knowledge of the commanding officer, and will be treated and safeguarded with the utmost confidentiality.

3. The commanding officer will conduct a civilian complaint notification conference with each identified member .... The conference will inform the member of the complaint, advise him of civilian complaint procedures, cause a review of the member's service record, and will, in addition, provide training or counseling in professional conduct, as appropriate. The member shall be advised that the conference is for notification and training purposes only, and that questioning about the incident will be conducted at a future date by the assigned investigator ....

* * *

In the instant matter, the PBA asserts that the City has committed improper practices within the meaning of the NYCCBL in that it unilaterally (a) revoked Chief of Personnel Memorandum No. 48 and (b) promulgated Interim Order No. 9, thereby changing "a condition of the contract of employment between the Petitioner and Respondents." As a remedy for the alleged improper practices, the PBA seeks an order directing the City to cease and desist from transmitting information to commanding officers concerning unsubstantiated complaints investigated by the CCRB Investigating Unit; rescind the offending departmental order; and bargain collectively in good faith with the PBA concerning any such changes in department rules.

Positions of the Parties

PBA's Position

The PBA maintains that the subject of Interim order No. 9 - complaint notification and assessment - and the supplying of information concerning unsubstantiated civilian complaints against police officers to their commanding officers incident to the Order, fall within the area of discipline which, the PBA contends, is a mandatory subject of bargaining. The PBA explains that promotions and assignments are based

upon the evaluation of police officers by their commanding officers and notes that a poor evaluation can stand in the way of a promotion, despite a qualifying score on a promotional examination. It is alleged that such evaluation also can adversely affect officers in their access to special assignments that are deemed significant for advancement; in their assignment to motor patrol as opposed to foot patrol; and in assignment of days off and overtime. Thus, the PBA argues, the complaint notification and assessment procedure is inextricably intertwined with the disciplinary function. The PBA asserts that, unlike a mere investigatory procedure, the notification and assessment procedure goes beyond fact gathering and provides for the "stockpiling" of unsubstantiated complaints for future use against an officer.

The PBA rejects the City's contention that the promulgation of Interim Order No. 9 is within its management prerogative to "maintain the efficient operation of government." Rather, the PBA insists, the procedure prescribed in the order constitutes a unilateral change in terms and conditions of employment, in violation of sections 1173-4.2(a)(4) and 1173-7.0(d) of the NYCCBL.

Finally, the PBA asserts that the notification and assessment procedure has a "direct impact" upon the wages, hours and working conditions of police officers because evaluations will occur as a direct result of this procedure.

City's Position

The City denies that it committed any improper practice when it revoked it promulgated the complaint notification an assessment procedures contained in Interim Order No. 9 without negotiating with the PBA. Both of these actions, OMLR asserts, were within its management prerogative under section 1173-4.3(b) of the NYCCBL, inter alia, to maintain the efficient operation of government.7 According to the City, the procedures at issue herein are a proper management tool through which the department may enhance its efficiency by providing better training to individual officers and by assuring proper accountability in its commands.

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7 Section 1173-4.3(b) of the NYCCBL provides:

> 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.

OMLR argues that the procedures challenged herein are not disciplinary in nature but are merely investigatory. In support of this contention, the City points to:

(a) the enabling legislation section 440 of the City Charter which limits the scope of authority of the CCRB to investigating and recommending action upon civilian

complaints;

(b) the Charter's grant to the Police Commissioner of control over departmental disciplinary matters (N.Y. City Charter §434);

(c) the 1966 decision of the New York Supreme Court in Cassese v. Lindsay, 55 Misc. 2d 59, 272 N.Y.S. 2d 324, allegedly holding that no disciplinary authority was delegated to the CCRB; and

(d) two decisions of the New York Court of Appeals which allegedly hold that the power to convict and punish members of the police force is vested solely in the Police Commissioner and may not be delegated.

The City argues further that investigatory procedures, such as those at issue herein, are not subject to mandatory collective bargaining. Directing our attention to Lieutenants Benevolent Association v. City of New York (Decision No. B-10-75), the City contends that we previously have held that a demand relating to pre-disciplinary investigations is not within the scope of bargaining. Further, the City points to

a decision of a hearing officer of the New York Public Employment Relations Board ("PERB") (New Paltz United Teachers, 16 PERB §4552 (1983)) which purportedly held that the investigation of complaints concerning individual employees is a management prerogative.

With respect to the alleged violation of NYCCBL section 1173-7.0(d), OMLR asserts that the CCRB notification and assessment procedures do not constitute terms or conditions of employment, have not been incorporated into a collective bargaining agreement between the parties or made a subject of negotiations between them. Therefore, according to the City, unilateral action in this area of management prerogative does not violate the status quo provision of our statute.

Finally, the City submits that, assuming arguendo, the notification and assessment procedures are part of the Department's disciplinary function, they are at best a permissive subject of bargaining because, as this Board has held, the decision to take disciplinary action (and, by extension, a procedure that may lead to taking disciplinary action) is a permissive subject of bargaining.8

Discussion

Created in 1966, pursuant to section 440 of the New York City Charter, and by General Order No. 14 of

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8 The City of New York v. District Council 37, AFSCME, Decision No. B-3-73.

the Commissioner, the CCRB is an investigative arm of the Police Department empowered "to receive, to investigate, to hear and to recommend action upon civilian complaints against members of the... department...." 9 The CCRE forwards its recommendations to the Police Commissioner, in whom is vested:

> cognizance and control of the government, administration, disposition and discipline of the department ... (N.Y. City Charter §434).

Shortly after the issuance of the Order creating the CCRB, certain members of the Department sought to enjoin its implementation, alleging that the Order was illegal because it invaded the powers granted to the Police Commissioner by the Charter and Administrative Code to control the conduct and discipline of members of the Department. The New York Supreme Court, in Cassese v. Lindsay, rejected this argument, however, finding that "[t]he investigative machinery offered under General Order No. 14 relates only to a preliminary procedure quite apart from the process by which the Commis-

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9 Section 440(c) of the City Charter provides, in relevant part:

> The commissioner shall have the power to and may establish within the police department a review board, to consist of one or more persons, who shall serve at his pleasure, which board may have the power to receive, to investigate, to hear and to recommend action upon civilian complaints against members of the police department, or any one or more of such powers, ...

sioner takes [disciplinary] action within the purview of Section 434a-14.0."10 The court distinguished the role of the CCRB in receiving, investigating, hearing and recommending action on civilian complaints from that of the Police Commissioner who is required by law to make an independent decision whether to discipline a member and whose decision may or may not be consistent with the recommendation of the CCRB.

The provisions of the City Charter and Administrative Code, and the court's analysis in Cassese, make clear that, while certain investigatory powers are vested in the CCRB, the authority to take disciplinary action against a member of the Department remains with the Police Commissioner. Nevertheless, in an earlier case (Docket No. BCB-757-85), as in the present one, the PBA alleged that rules of procedure promulgated by the Commissioner for use in CCRB operations were disciplinary

10 51 Misc. 2d 59, 272 N.Y.S. 2d 324, 335 (1966). Section 434a-14.0 of the Administrative Code provides in relevant part:

> Discipline of members. - a. The Commissioner shall have the power, in his discretion, on conviction by him, ... to punish the offending party ....
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> b. Members of the force ... shall be fined, reprimanded, removed, suspended or dismissed from the force only upon written charges made or preferred against them, after such charges have been examined, heard and investigated by the commissioner, or one of his deputies ....

procedures that could not be implemented without bargaining

In Patrolmen's Benevolent Association v. City of New York, the PBA challenged the unilateral implementation of procedural rules that provided for informal ("Face to Face") hearings in certain types of cases under investigation by the CCRB. In our decision in that case, we noted that the taking of disciplinary action is a management right and therefore not a mandatory subject of bargaining, but that unions generally have a right to bargain over procedures for review of disciplinary actions. We also noted that procedures used to investigate law enforcement personnel have been held to be non-mandatory subjects of bargaining.11 Finding that the Face to Face hearings were used to determine whether there was misconduct by an officer and thereby to assist the Commissioner to determine whether any discipline was appropriate, and noting that, in any event, the CCRB can do no more than make a recommendation to the Commissioner based upon its investigation, we held that the Face to Face hearings were investigative rather than disciplinary in nature. We concluded therefore that the City could not be compelled to negotiate over these procedures and dismissed the PBA's petition.

We have carefully reviewed the complaint notification and assessment procedures that are the subject of the Order

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11 Decision No. B-37-86, at pp. 8-9 and cases cited therein.

challenged by the PBA in the present case. Interim Order No. 9 provides, inter alia, that a commanding officer shall receive a copy of each civilian complaint report filed against a member of his command prior to, and without regard to the disposition of, the complaint. Under the provisions of the order, therefore, a commanding officer is privy to complaints that ultimately may not be able to be substantiated or that ultimately may be determined to be unfounded, as well as to complaints that will be deemed to require action of a disciplinary nature.

Interim Order No. 9 also directs commanding officers to confer with members who are the subject of a civilian complaint in order to:

(a) inform them of the complaint (the form utilized for this purpose indicates that the notification is "not an investigation");

(b) advise them of department procedures regarding civilian complaints; and

(c) provide training or counseling in professional conduct, as appropriate.

Subsequent to the receipt by a commanding officer of a complaint against a member, an investigation is conducted by the CCRB or by another investigatory agency, as appropri-

ate.12 When a complaint is investigated by the Department, the officer is afforded certain procedural safeguards (as prescribed by section 118-9 of the Department's Patrol Guide) because:

> "substantiated findings of a Civilian Complaint Review Board investigation may form the basis for disciplinary action ...."

Our reading of Interim Order No. 9 indicates that it is not a purpose of the Order to confer upon commanding officers the power or duty to take disciplinary action of any kind based upon civilian complaints or even to share in the investigatory functions of the CCRB with regard to such matters. The purpose of the order is to inform the commanding officer regarding civilian complaints and to authorize him or her to relay such information to affected employees and to provide appropriate training or counseling. Thus, contrary to the PBA's claim, the commanding officer is neither directed nor authorized by the Order to take disciplinary action. Based upon these findings, we conclude that the unilateral promulgation of the complaint notification and assessment procedures constituted a proper exercise of the City's manage-

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12 Where circumstances warrant, e.g.,where a complaint includes criminal allegations, an investigation will be conducted by the Internal Affairs Division, Field Internal Affairs Unit, a District Attorney's office or the Special Prosecutor's Office.

ment rights, pursuant to section 1173-4.3(b) of the NYCCBL, including its right to "maintain the efficiency of governmental operations," and was not subject to a prior duty to negotiate.

We acknowledge, and have carefully considered, the PBA's allegation that, as a result of these procedures, unsubstantiated civilian complaints may be used inappropriately and unfairly in the evaluation of police officer performance and for determining based on such evaluations eligibility for promotion or special assignment, or for determining tours of duty and overtime. It is well-settled, however, that the evaluation of employees, the assignment of tasks, of duty tours and of overtime are management functions concerning which there is no obligation to bargain. Moreover, an otherwise proper order of the Police Commissioner cannot be held to constitute an improper practice on the basis of speculation as to the various ways that subordinate officials of the Department might misuse the information provided to them under the Order. If, as is alleged, the complaint notification and assessment procedures are being applied in an unauthorized manner, with the result that unjustified disciplinary action is taken against police officers, such action may be redressed either through the negotiation of a provision in the parties' collective bargaining agreement

expressly forbidding the use by commanding officers of unsubstantiated civilian complaints as a basis for adverse personnel action, or through the negotiation of procedures for the review of disciplinary action improperly founded upon the use of information gathered pursuant to Interim Order No. 9. Of course, nothing stated in this decision is intended to preclude the PBA from grieving as a violation, misinterpretation or misapplication of the Interim Order specific instances where a commanding officer may have used information concerning unsubstantiated civilian complaints for purposes not authorized therein. No such claim has been made here, however.

For the aforementioned reasons, we conclude that practice has been committed.

The PBA also contends that the City violated the NYCCBL when it unilaterally revoked Chief of Personnel Memorandum No. 48, in which supplying of information concerning unsubstantiated civilian complaints was proscribed. With respect to this allegation, we also find that the City has committed no improper practice, for there is no duty to negotiate over the revocation of a rule or regulation dealing with a non-mandatory subject of bargaining.13 In the present case, we have determined that the supplying of

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13 Decision No. B-22A-85.

information to commanding officers relating to unsubstantiated civilian complaints is not a mandatory subject of bargaining.

We also reject the PBA's claim that the revocation of Memorandum No. 48 and the promulgation of Interim Order No. 9 contravene the provisions of NYCCBL section 1173-7.0(d). -section 1173-7.0(d) requires that, during the "period of negotiations," the public employer must refrain from making unilateral changes in wages, hours or working conditions. As we hold that the supplying of information concerning unsubstantiated civilian complaints to commanding officers is not a mandatory subject of bargaining, and since the prior contract between the PBA and the City was silent on this issue, nothing in section 1173-7.0(d) prevents the City from unilaterally implementing such a change even during the status quo period.

Finally, we emphasize that the PBA's assertion that the supplying of unsubstantiated civilian complaints to commanding officers pursuant to Interim Order No. 9 has a "direct impact" on the wages, hours and working conditions of its members, and the amplification of this allegation in PBA counsel's letter of August 1st to the Chairman, fail

to state an actionable claim under the improper practice provisions of our statute. As stated above, it is not the fact that information is supplied to commanding officers, but rather the action that may be taken by such officers, without authorization, and in response to the information received, that the PBA alleges has an impact on terms and conditions of police officer employment. As such action does not necessarily and automatically flow from the implementation of the Interim Order, but is collateral to its implementation, we cannot find that any practical impact results from the promulgation of the Order which would require alleviation or bargaining under the NYCCBL.14 We reiterate however that, if disciplinary action is being taken against police officers because of unsubstantiated civilian com
plaints that have been filed against them, there are other means of redress which the PBA may pursue.

For all of the aforementioned reasons, we shall dismiss the instant petition in its entirety.

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14 Section 1173-4.3(b) of the NYCCBL, quoted in full at note 7 supra, provides that questions concerning the practical impact that management's decisions may have on its employees are within the scope of collective bargaining.

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 Patrolmen's Benevolent Association be, and the same hereby is dismissed.

DATED: New York, N.Y.
September 25, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

JOHN D. FEERICK
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER