OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

UNITED PROBATION OFFICERS
ASSOCIATION,

Petitioner, DECISION NO. B-37-87

-and- DOCKET NO. BCB-978-87

JAMES PAYNE, COMMISSIONER,
NEW YORK CITY DEPARTMENT OF
PROBATION,

Respondent.
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DECISION AND ORDER

This proceeding was commenced on July 13, 1987 With the filing of a verified improper practice petition by the United Probation Officers Association ("UPOA" or "petitioner") against James Payne as Commissioner of the New York City Department of Probation ("City"). The City, appearing by its Office of Municipal Labor Relations, filed a verified answer on July 6, 1987. The petitioner submitted a reply on August 17, 1987.

The Petitioner's Position

The petition alleges that the City has unilaterally implemented a project requiring that probation supervisors spend all day, once or twice a week, in sentence pens areas that are overcrowded, "noisy, hot, have inadequate staff toilet facilities" and

visible inmate toilet facilities, and "present dangerous security problems." UPOA asserts that the City has, by this action ,unilaterally changed working conditions in violation of the New York City Collective Bargaining Law ("NYCCBL"),[1] and of the parties' collective bargaining agreement.

The petition states that probation officers are also required to spend extended hours in the pens areas. According to UPOA:

> Permanent and all day assignment to these holding pens is not a part of the job description for probation officers or supervisors [and has not previously been] part of the official duties of the probation staff. The pens facilities are maintained by Dept. of Corrections personnel who are trained to work among jailed inmates [and are] paid at a higher level than probation officers.

The petition also alleges that the City violated Article 5, Section 2a of the contract by failing to give notice of its action to the UPOA.[2]

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[1]NYCCBL Section 1173-4.2a(4) states that it is an improper practice for an employer "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]Article 5, Section 2a reads:

> The Union recognizes the Employer's right under the New York City Collective Bargaining Law to establish and/or revise standards for supervisory responsibility in achieving and maintaining performance levels of supervised employee for employees in supervisory positions listed

(continued...)

In its reply, the UPOA asserts that the City bas an obligation to bargain concerning the practical impact of the assignment of probation personnel to the pens.

The City's Position

The City takes the position that the assignment of personnel falls within the statutory rights granted by NYCCBL Section 2173-4.3(b), which reads, in relevant part:

> It is the right of the City ... to determine the standards of services to be offered by its agencies; ... direct its employees; ... maintain the efficiency of government operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; ... and exercise complete control and discretion over its organization and the technology of performing its work. Decisions...on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions

(...continued)

> in Article I, Section I of this Agreement. Notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees are within the scope of collective bargaining. The Employer will give the Union prior notice of the establishment and/or revision of standards for supervisory responsibility hereunder.

> 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 also asserts that there is so limitation in the contract or elsewhere on the City's statutory right with

respect to the assignment of personnel. The City maintain that even though the petitioner couches its improper practice petition in terms that allege not only a refusal to bargain, but also a health and safety violation, the deployment of personnel remains a statutory management right.

The City also states that the assignment of probation officers to sentence pens "is a long-standing practice," one that has not been previously challenged by the UPOA, and that supervisory probation officers were assigned to the pens beginning on May 4, 1987. The City asserts that although it had no duty to bargain over this matter, City officials met with UPOA officials on April 27, 1987 to inform them of the institution of the program and that there was no objection at that time.

Discussion

Section 1173-4.3(b) of the NYCCBL reserves to the employer exclusive control and sole discretion to act unilaterally in certain enumerated areas that are outside the scope of collective bargaining. This Board has repeatedly construed Section 1173-4.3(b) to guarantee the City the unilateral right to assign and direct employees, to determine what duties employees will perform during worktime, and to allocate duties among unit

and nonunit employees, unless this right has been limited by the parties themselves in their collective bargaining agreement.[3] Although the UPOA alleges that the right of assignment in the instant case is limited by the terms of Article V, Section 2, we note that the contractual provision alleged to be violated appears to affirm the employer's statutory rights, using language virtually identical to that of Section 1173-4.3(b). We conclude that the City's action herein falls within the realm reserved to it by the NYCCBL.

The petitioner alleges that the pens are unpleasant, unsanitary, and "present dangerous security problems." Thus, according to the UPOA, the City has an obligation to bargain about the practical impact upon employees of assignment to the pens. As a general rule, there can be no finding of a violation-of NYCCBL Section 1173-4.2a(4) based on alleged impact until it has been determined by this board that a practical impact actually exists, and that the employer has not expeditiously' acted unilaterally to relieve the impact.[4] We have recognized that the existence of a clear threat to employee safety constitutes a per se practical impact, which warrants imposition of the duty to bargain before

[3]Decisions No. B-23-87, B-15-87, B-6-87, B-4-83, B-16-81.

[4]Decision No. B-38-86 and cases cited therein.

actual impact has occurred.[5] This does not mean, however, that a union need only claim a practical impact on safety in order to require the employer to bargain; the union must first prove the existence of such a threat.[6] Furthermore, the Board will not, on the basis of bare allegations, direct a bearing to determine whether impact exists. As a precondition to our consideration of an impact claim, the petitioner must specify the details thereof. The allegation of mere conclusions is insufficient.[7] In the instant case, the allegation that the City's action "presents dangerous security problems" is just such a conclusion; it does not give this board sufficient information upon which to determine that a hearing is warranted.

Accordingly, we find that no violation of Section 1173-4.2a(4) of the NYCCBL has been stated.

With respect to the claimed contract violation, as we recently stated in Decision No. B-29-87, Section 205.5(d) of the Taylor Law precludes this Board from exercising jurisdiction over a claimed contractual

[5]Decisions No. B-38-86, B-37-82.

[6]Decisions No. B-37-82, B-5-75.

[7]Decisions No. B-38-86, B-23-85, B-34-82, B-27-80.

violation that does not otherwise constitute an improper practice.[8] We also note that Article XIV of the City-wide contract deals with questions of occupational safety and health. Any claims concerning those matters may be more properly addressed through the grievance procedure specifically provided for therein.[9]

For the future guidance of the parties, we wish to emphasize the fact that the City cannot be guilty of the improper practice of refusing to bargain in good faith concerning practical impact, and no improper practice charge under section 1173-4.2a(4) based upon alleged impact can be sustained, without a finding of practical impact by this board. Since a finding of practical impact is a condition precedent to a duty to bargain to alleviate such impact, the proper mechanism for bringing a dispute of this nature before this board is through a scope of bargaining proceeding.

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[8]Section 205.5(d) of the Taylor Law, which is applicable to this agency, provides that:

> ...the board shall not have authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

[9]Under these circumstances, we find it unnecessary to consider the City's notice argument, which appears to address the alleged contractual violation.

For the reasons set forth above, we dismiss the petition herein without prejudice; to the filing of a scope of bargaining petition containing specific factual allegations concerning practical impact upon safety.

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 United Probation Officers Association in Docket No. BCB-978-87 be, and the same hereby is, dismissed.

DATED: New York, N.Y.
August 27, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

EDWARD SILVER
MEMBER

CAROLYN GENTILE
MEMBER