CEA, Kelly (Pres. of CEA) v. City, NYPD, et. al, 41 OCB 38 (BCB 1988) [Decision No. B-38-88 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

William P. Kelly, individually, and as President of the Captain's Endowment Association; and the Captain's Endowment Association,
Petitioner,

-and-

The City of New York, the Office of Municipal Labor Relations, and the New York City Police Department,
Respondent.

DECISION NO. B-38-88
DOCKET NO. BCB-1006-87

DECISION AND ORDER

On November 10, 1987, William P. Kelly, individually and as President of the Captain's Endowment Association, and the Captain's Endowment Association (hereinafter "CEA" or "the Union"), filed a verified improper practice petition against the City of New York, the Office of Municipal Labor Relations and the New York City Police Department (hereinafter "the City" or "the Department"). The petition alleges that the City committed improper practices in violation of Sections 12-306 a., c. and

12-311 d. of the New York City Collective Bargaining Law ("NYCCBL")[1] and Section 209-a of the Civil Service

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[1] NYCCBL Section 12-306 provides, in relevant part:

> Improper Practices; good faith bargaining.
> 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 12-305 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.
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> C. Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
> (1) to approach the negotiations with a sincere resolve to reach an agreement;
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
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> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

NYCCBL Section 12-311 d. provides, in relevant part:

> Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement ... 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.

Law[2] when it unilaterally abolished "reserve duty" and concurrently implemented an "on-duty coverage schedule" for certain members of the unit, without first satisfying its duty to bargain and a violation of the status quo. The City and the Union are currently engaged in negotiations for renewal of their collective bargaining agreement which expired June 30, 1987.

The petition alleges that the City's actions have a practical impact on the wages, hours and working conditions of members in the bargaining unit, creating, in effect, a duty to bargain concerning a matter which would otherwise constitute an exercise of managerial prerogative. The Union asserts that the City, in refusing to bargain in good faith on such matters, committed an improper practice in violation of Section 12-306 a.(4) and c.(l), (2) and (4) of the NYCCBL.

The petition further alleges that the City changed a long-standing operating procedure of the Department solely in retaliation for the unit having filed a class grievance on a related issue. The Union asserts that the City's actions were improperly motivated, having a prohibited chilling effect on public employee participation in protected union activity in violation of Section 12-306 a.(I), (2) and (3) of the NYCCBL.

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[2] We take administrative notice that the relevant improper practice provisions of NYCCBL Section 12-306 are virtually identical to certain provisions of Section 209-a of the Civil Service Law, and that the status quo provision of NYCCBL Section 12-311 are analogous to the status quo provisions of Section 209 a for purposes of this decision.

Finally, the petition alleges that the City violated Section 12-311 d. of the NYCCBL by unilaterally changing the wages, hours and working conditions of members of the bargaining unit while negotiations were pending, and that the City violated the parties' contract by failing to conduct discussions with the unit prior to effecting such changes, in violation of the status quo.

The Union requests the Board make a determination that the actions of the City constitute an improper practice and issue an order directing the City to cease and desist from taking such unilateral action, to withdraw the order implementing the on-duty coverage schedule and to order bargaining on the issues involved.

The City filed a verified answer to the petition on November 30, 1987, to which the Union filed a verified reply on December 11, 1987.

BACKGROUND

On July 28, 1987, the Union filed a class grievance on behalf of Deputy Inspector Joseph Hillary and all others similarly situated, demanding overtime compensation for all hours worked in excess of 40 hours per week pursuant to Article III and IV of the collective bargaining agreement.[3] Apparently, although not specifically stated in the grievance letter, members of the bargaining unit were routinely assigned to "reserve duty" which is, de facto, an on-call system utilized by the City as a

[3] For the purposes of this discussion, it suffices to state that Article III provides for compensatory time off at the rate of time and one-half for authorized overtime and Article IV establishes the basic forty hour work-week.

means of providing city-wide coverage at times other than normal business hours. The grievance requests that Deputy Inspector Hillary and all others performing such duty be compensated at the rate of time and one-half. The record before us fails to indicate the manner in which members of the instant unit were compensated for such assignments prior to the filing of their grievance.[4] However, the Union does allege that the subject matter of the instant grievance, when grieved by other bargaining units in the Department, resulted in arbitration awards favorable to those other units.[5]

On September 29, 1987, two months after the aforementioned grievance was filed, the Department issued an order eliminating reserve duty for the following titles in the bargaining unit: Captains, Deputy Inspectors, Inspectors, and Chief Inspectors. The order also announced that effective September 30, 1987, the

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[4] We note that the assignment of reserve duty was not exclusive to this unit but rather was a widespread practice throughout the Department. Although the manner and amount of compensation for reserve duty varied from unit to unit, unless the officer assigned was actually called to the scene from home, the officer was not credited with authorized overtime at the rate of time and one-half.

[5] We take administrative notice that four separate arbitration cases between the city and the Patrolmen's Benevolent Association, the Sergeant's Benevolent Association, the Detective's Endowment Association, and the Lieutenant's Benevolent Association, were heard and that in three out of the four matters, the Arbitrator's Award did find that reserve duty was authorized overtime and ordered compensation at the rate of time and one-half. The fourth decision found that every hour on reserve was not an hour worked within the meaning of the contract and accordingly, only awarded one hour of straight time pay for each three hours of reserve duty.

Department was implementing an "on-duty coverage schedule" for Captains and Deputy Inspectors, which provides for coverage on a 24 hour a day, seven-day-a-week basis, in lieu of the assignment of reserve duty.

On October 6, 1987, the Union wrote to James F. Hanley, Deputy Director of the office of Municipal Labor Relations, claiming that the Department's unilateral actions changed the wages, hours and working conditions of those in the unit, raising a question of practical impact, and demanded that the City bargain with the Union concerning that practical impact. The letter also indicated that "the Department has in the past discussed and negotiated 'charts' with other bargaining units" and requested an immediate bargaining session on that issue as well as other CEA demands in the course of contract negotiations.

On October 15, 1987, the Department wrote to the Union, acknowledging receipt of the grievance letter of July 28th, requesting information concerning any individual claims (other than Joseph Hillary's), and advising the Union that "reserve duty has been discontinued effective September 29, 1987." The record indicates that the Union did not respond to this letter.

On October 19, 1987 the Union submitted its bargaining demands to the City, in the ordinary course of negotiations, which included, inter alia, an overtime-pay clause change seeking time and one-half for overtime performed on reserve, in cash and pensionable.

Immediately after the October 19th bargaining session, the Union alleges that the Department "let it be known that it was now ready to release [and did release] Duty Charts changing the long-standing hours of employment of members of the unit."

On November 10, 1987, the Union filed the instant improper practice petition pursuant to Section 12-306 of the NYCCBL.

Positions of the Parties

Union's Position

The Union asserts that the unilateral imposition of a duty schedule has a practical impact on the hours and working conditions of its members, contending that "[t]he City has a duty to bargain the impact, if not the action, [as] the establishment of a duty chart must impact on hours and days off." The Union claims, as the basis of this assertion, "that the City has in fact negotiated charts with other units, and the CEA desires no unilateral action be taken to the prejudice of this unit." The Union alleges prejudice in the form of unreasonable standards of service. While the Union concedes the city's managerial right to set standards of service, it also reserves the right to object to those set which are "impossible of performance" or do not consider "past practice and performance levels." The Union

further alleges that the City's actions constitute changes in the "rules, regulations and procedures [of the Department] that impact upon the working conditions of the employees involved," arguing that the general subject of work rules involves a condition of employment and as a consequence, is a subject of bargaining.

The Union further contends that the timing of the City's unilateral elimination of reserve duty clearly demonstrates improper motive. The petitioner alleges, "[h]ad the grievance not been filed, it is improbable that, after all the years of operating in one fashion, the City would have changed its operation as it did almost immediately after the filing of the 'class' grievance." In support of its position, the Union cites four arbitration cases between the City and other units of the Uniformed Services where the Unions won for their members the right to compensation at the rate of time and one-half for work performed while on reserve tours. The Union asserts that in view of the likelihood of success in their grievance on the same issue, the timing of the City's action indicates that it was motivated by a desire to discourage access to the grievance procedure and in retaliation for the bargaining unit's use of such procedure.

Finally, the Union argues that the City violated the status quo provision of the NYCCBL, by unilaterally changing "the hours and working conditions, much less ... wages, of unit employees"

during contract negotiations. The Union contends that imposition of a duty schedule for the first time in the bargaining unit's history, without benefit of the negotiating process, constitutes a prohibited change in "the long-standing hours of employment of members of the unit," a working condition within the meaning of the statute.

City's Position

In its answer to the Union's petition, the City contends that its actions constitute the proper exercise of managerial prerogative, denies specifically each and every allegation of improper practice, and denies generally the applicability of the status quo provisions of the NYCCBL to the circumstances of this case.

The City asserts the following grounds for dismissal of the petition in its entirety:

(1) The City's action constitutes the proper exercise of its management right to determine the standards of services to be offered to the public, as well as the methods, means and personnel by which governmental operations are to be conducted;

(2) The petition fails to allege facts sufficient to demonstrate that there has been any change in the terms and conditions of employment of the employees represented by

the petitioner such as to constitute an improper practice based upon a refusal to bargain within the meaning of Section 12-306 a. and c. of the NYCCBL;

(3) The petition fails to allege facts sufficient to demonstrate that the City's actions have caused a practical impact within the meaning of Section 12-311 d. of the NYCCBL;

(4) The petition fails to allege facts with sufficient specificity to satisfy the requirements of OCB Rule 7.5[6] or to establish a prima facie improper practice by demonstrating how the City's actions encourage or discourage membership in, or participation in the activities of a public employee organization, or interfere with, restrain or coerce employees in the exercise of protected rights within the meaning of Section 12-306 a. of the NYCCBL.

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[6] OCB Rule 7.5 provides, in relevant part:

Petition-Contents. A petition filed pursuant to Rule 7.2, 7.3 or 7.4 shall be verified and shall contain:

c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts. If the controversy involves contractual provisions, such provisions shall be set forth.

The City asserts that inasmuch as the implementation of an on-duty coverage schedule for Captains and Deputy Inspectors did not alter in any way the number of working hours per year, the length of tours or the number of tours per year, it is not a mandatory subject of bargaining. In support of its position, the City cites prior Board decisions in which it was held that the City has a duty to bargain only on certain aspects of duty charts.[7] The City maintains that the assignment of personnel to duty charts in a manner which merely eliminates reserve duty, without more, does not constitute a change in hours that gives rise to a duty to bargain. The City argues that absent such a duty, that part of the petition which alleges a refusal to bargain in good faith must be dismissed for failure to state a cause of action.

[7] In Board Decision No. B-5-75, we held that although "hours" are a mandatory subject of bargaining, various restrictions are imposed on the Union's right to bargain about hours, i.e., changes in scheduling of tours of duty is not a mandatory subject unless it would result in a change in the total hours worked per day or per week.

In Board Decision No. B-24-75, we held that the City must bargain over those aspects of duty charts which affect hours of work, including days of work and days off but that the City alone has the prerogative of determining the level of manning, the level of services provided and the starting and finishing times of each tour of duty.

In Board Decision No. B-21-87, we held that the configuration of a work chart is a permissive subject of bargaining and that even if agreement was previously reached on a permissive subject and included in a contract, it does not transform that matter from a voluntary to a mandatory subject of bargaining in subsequent negotiations.

Moreover, in reliance upon Section 12-307 b. of the NYCCBL,[8] the City maintains that "in discontinuing the Reserve Duty System," it properly exercised a managerial prerogative over which there is no duty to bargain unless the exercise of its right results in a "practical impact" on terms and conditions of employment.

With respect to that part of the petition which alleges a practical impact, the City asserts that the Union has failed to demonstrate that the discontinuance of reserve duty and implementation of an on-duty coverage schedule has had a practical impact within the meaning of Section 12-307 b. of the NYCCBL. The City cites Board Decision No. B-37-87 to support its contention that the Union has failed to meet its burden in establishing practical impact, where the Board held "[a]s a precondition to our consideration of an impact claim, the petitioner must specify the details thereof." Consequently, the City submits that the instant claim must be dismissed.

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[8] Section 12-307 b. of the NYCCBL, in relevant part, 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; ... direct its employees; ... 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; ... 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 and manning are within the scope of collective bargaining.

In response to allegations that it acted with improper motive, by retaliating against the Union for having filed a grievance, the City asserts that the petitioner has alleged no facts which substantiate its claim. The City argues that the Union has failed to state a cause of action as it has not established the required nexus between its alleged actions and any encouragement or discouragement of membership in or participation in the activities of the Union, or any interference with employee rights. Because OCB Rule 7.5 places the burden on the Union to allege facts sufficient to provide this nexus and that the Union offers only conclusory allegations and speculations on this point, the City contends that this aspect of the petition must also be dismissed.

Discussion

Before considering the merits of a petition which alleges improper practice, it is necessary to address the preliminary issues raised by the City concerning whether the petitioner has (a) alleged facts sufficient to satisfy the pleading requirements of OCB Rule 7.5, and (b) stated a prima facie claim of improper practice. With respect to the former, it is the Board's policy to favor a liberal construction of the Rules.[9] While OCB Rule 7.5 does not require that a petitioner set forth every detail of its claim, we will not find the rule satisfied unless the

[9] Board Decision Nos. B-44-86; B-12-85; B-8-85; B-23-82. See also OCB Rule 15.1.

petitioner sets forth the material elements of its claim with sufficient clarity to afford the respondent notice of the transactions or occurrences complained of to enable it to formulate a response thereto.[10]

a. Improper motivation.

It is in this context that we consider that part of the City's answer which seeks dismissal of the allegations of improper motive for failure to satisfy the requirements of Rule 7.5. Contrary to the City's assertion, it is clear to us that the petition alleges a course of conduct within a specific time frame which, if proven, would constitute an improper practice. We find that enough has been alleged to place the City on notice of the nature of the claim in order to enable it to formulate a meaningful response and that the OCB Rules do not require more than this.

With regard to the requirement that a prima facie case of improper practice be stated in the petition, the Union need not present irrefutable evidence that the City's actions were motivated by anti-union animus. However, the petition must set forth specific allegations of fact sufficient to demonstrate at least an arguable basis for its claim that the employer's actions were taken for the purpose of discouraging participation in union activity. In this respect we find the petition insufficient.

The City admits that a grievance concerning reserve tours and overtime was filed on July 28th and that it did issue an order eliminating reserve tours and implemented an on-duty

[10] Board Decision Nos. B-44-86; B-8-85.

schedule for certain titles in the unit on September 29th and 30th respectively. The record also indicates that the City responded to the instant grievance on October 15th, requesting additional information in order to address the matter more fully. These facts are not in dispute.

The Union asserts that the mere timing of the City's actions, immediately following the filing of a grievance that the Union was likely to win, was a response "calculated to discourage further grievance cases; thus ... stat[ing] a prima facie claim of improper practice." In this regard, it is significant to note that the CEA has not submitted any evidence to support its claim other than this conclusory allegation. on the other hand, the City responded to the July 28th grievance by its letter of October 15th, seemingly indicating a willingness to address the Union's claims in accordance with contractual requirements. Furthermore, if conclusions are to be drawn from the above set of circumstances, one could reasonably construe the manner in which the City responded to the grievance as a response lawfully calculated to mitigate its damages in the event that the Union's claim proved to be meritorious.

Finally, we note that management has the right under Section 12-307 of the NYCCBL to direct and assign its personnel to achieve maximum efficiency, absent statutory or contractual limitations on that right.

We conclude that the Union has failed to establish a prima facie improper practice case since it has alleged no facts to support its underlying claim that the City's actions were

motivated by a desire to discourage union members in the exercise of a protected right. Accordingly, we dismiss that part of the Union's complaint without further discussion.

b. Practical impact.

Section 12-307 b. of the NYCCBL provides that an employer shall have the right "to determine the standards of services" and otherwise "to determine the methods, means and personnel by which governmental operations are to be conducted" It is on this basis that we have long held that changes in work schedules are management decisions[11] not ordinarily subject to an obligation to bargain unless, in the exercise of these rights, the employer actions affect wages, hours or working conditions of employees in a manner rising to the level of practical impact. Pursuant to NYCCBL Section 12-307 b., "questions concerning the practical impact that decisions [of managerial prerogative] have on employees, such as questions of workload and manning, are within the scope of bargaining." We have held that the aforementioned provision requires bargaining over the practical impact of decisions which are not themselves mandatory subjects of bargaining when it is found by this Board that such an impact exists.[12]

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[11] Board Decision Nos. B-21-87; B-24-75; B-10-75; B-5-75.

[12] Board Decision No. B-38-86.

According to the union, the city's action in this matter was effectively a unilateral change in the "rules, procedures and regulations that impact upon ... hours and working conditions ... of unit employees." However, the Union's petition provides nothing beyond these conclusory allegations to substantiate its claim of practical impact. In its reply, the Union did nothing to correct this shortcoming, merely stating that it would "set forth the derogatory results of [the City's] unilateral action ... in the proper time." As we have long held, practical impact cannot be determined when insufficient facts are provided by the Union.[13] Mere conclusory allegations are not enough to support a claim of practical impact,[14] nor are they sufficient to warrant the holding of a hearing. As a precondition of our consideration of a claim of practical impact, the Union must specify the details thereof.[15]

Since we have made no finding of practical impact, there is no basis for the Union's claim that the City has any duty to bargain with it over the change in question here. As we stated in Decision No. B-37-87, "the City cannot be guilty of the improper impact, and no improper practice charge under section

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[13] Board Decision Nos. B-37-82; B-34-82 ;B-27-80.

[14] Board Decision Nos. B-38-85; B-23-85.

[15] Board Decision No. B-38-86.

12-306 a.(4) based upon an 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 petition."

For the foregoing reasons, we dismiss that part of the Union's complaint alleging that the City committed an improper practice in violation of Section 12-306 a. and c. without prejudice to the filing of a scope of bargaining petition containing specific factual allegations concerning practical impact.

C. Status quo.

It is the Union's contention that the City contravened the status quo provision of the NYCCBL, Section 12-311 d. by refusing to negotiate on a mandatory subject of bargaining and taking unilateral action that impacts on hours of employment despite ongoing negotiations for a successor agreement between the parties. The City summarily denies that the statutory protections of the status quo provision are applicable to these circumstances.

The meaning and purpose of the status quo provision is to maintain the respective positions of the parties and the relationship between them essentially unchanged during periods of negotiation and impasse proceedings. This end is obtained, in part, by prohibiting a unilateral change as to any mandatory

subject of bargaining or as to any term and condition of employment established by prior contract during these prescribed periods.[16] The focus of our inquiry in the instant matter concerns whether a change in scheduling practices in order to provide city-wide coverage during non-business hours, without resort to the assignment of reserve duty and potential overtime liability, constitutes a change in a term and condition of employment within the meaning of the statute.

It is undisputed that the Captain's Endowment Association has never before negotiated with the City on the issue of work schedules and seeks bargaining on it for the first time in the current course of negotiations. Nevertheless, the Union asserts that the alleged change in "hours" violates the status quo under the present circumstances because duty charts were unilaterally imposed on this unit despite the fact that the City has bargained on charts with other units in the Department.

We are unpersuaded by the Union's argument on this point. We have long held that the City may properly elect to bargain on a permissive or voluntary subject of bargaining with one union and not with another.[17] Inasmuch as the Union has failed to establish that the exercise of managerial prerogative in the instant matter changes a term or condition of employment created by prior contract between these parties, we shall dismiss the

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[16] Board Decision Nos. B-57-87; B-13-74.

[17] Board Decision Nos. B-16-74; B-7-72; B-11-68.

Union's charge with respect to this issue.

Accordingly, we dismiss the instant petition in its entirety without addressing the merits of the dispute. However, in view of the allegations of practical impact and inasmuch as the Union's petition and reply provide insufficient facts on which to base a decision, we do so without prejudice to the Union's filing of a scope of bargaining petition which sets forth specific allegations concerning practical impact for our consideration.

ORDER

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 in the instant matter against the City of New York, the office of Municipal Labor Relations and the New York City Police Department be, and the same hereby is, dismissed without prejudice to the

Union's right to file a scope of bargaining petition for the purpose of seeking a determination of the existence of a practical impact.

DATED: New York, N.Y.
July 27,1 988

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