COBA v. City, DOC, 41 OCB 39 (BCB 1988) [Decision No. B-39-88 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

Correction Officers Benevolent Association,
Petitioner,

DECISION NO. B-39-88
DOCKET NO. BCB-878-86

-and-

The City of New York and The New York City Department of Correction,:
Respondent.
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DECISION AND ORDER

On June 11, 1986, the Correction Officer's Benevolent Association ("COBA" or "the Union") filed a verified improper practice petition charging that the New York City Department of Correction ("the Department" or "the City") violated Section 12-306 a.(4) [former Section 1173-4.2 a.(4)][1] of the New York City Collective Bargaining Law ("NYCCBL") by unilaterally changing the terms and conditions of employment of a particular class of employees; specifically those who have sustained job-related injuries. The City, by its Office of Municipal Labor Relations, was granted several extensions of time, from June 26, 1986 through November 20, 1987, to

[1] Section 12-306 a.(4) of the NYCCBL provides:

It shall be an improper practice for a public employer or its agents 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.

submit its answer, on the grounds that it was engaged with the Union in settlement discussions. The Union consented to these extensions. On October 28, 1987, COBA filed an amended verified improper practice petition which, in addition to reasserting each of the allegations set forth in the original petition filed on June 11, 1986, further set forth additional factual allegations. On November 20, 1987, the City filed a verified answer, in response to which the Union filed a verified reply on December 1, 1987. On June 3, 1988, the Trial Examiner requested that the parties submit supplemental responses clarifying several issues raised by, but not fully addressed in, the pleadings. These supplemental responses were submitted on July 1, 1988.

## BACKGROUND

In January, 1986, the Department notified correction Officer Hughann Dalton of its intention to place her on an unpaid leave of absence. C.O. Dalton, who had been injured on April 11, 1981 when assaulted by an inmate, was then on paid sick leave pursuant to Article X, Section 2 of the Collective Bargaining Agreement.[2] In its letter captioned: "Notice of Proposed Leave of Absence Under Section 71 of the Civil

[2] Article X, Section 2 provides:

> Sick Leave. Each Correction Officer shall be entitled to leave with pay for the full period of any incapacity due to illness, injury or mental or physical defect, whether or not service-connected in accordance with existing procedures. (emphasis added)

Service Law," the Department advised C.O. Dalton of her right to a hearing before the Office of Administrative Trials and Hearings in the event she chose to object to the proposed leave of absence. This notice also contained language advising her of her right to seek reinstatement pursuant to Section 71 of the Civil Service Law.[3]

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[3] Section 71 of the Civil Service Law provides:

Reinstatement after separation for disability. When an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law,* he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filling of such vacancy, the name of such person shall be placed upon a preferred list for his former position, and he shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his former position, his name shall be placed on the preferred eligible list for his former position or any similar position. This section shall not be deemed to modify or supersede any other provisions of law applicable to the re-employment of persons retired from the public service on account of disability.

*Renamed Workers' Compensation Law.

The Union's original improper practice petition, filed on June 11, 1986, alleged that the Department unilaterally changed the terms and conditions of employment of members who have sustained job-related injuries by imposing unpaid involuntary leaves of absences upon said members which were claimed to "adversely impact upon their pension rights, health and welfare benefits, and unlimited sick leave entitlements."

COBA's amended petition, filled on October 28, 1987 alleges further that on July 8, 1987 and October 2, 1987, Correction Officer William P. Gaukel, also on paid sick leave since January 19, 1984 as a result of job-related injuries, received two letters from the Department seeking the resolution of his employment status. Contrary to the action proposed in the case of C.O. Dalton, i.e., an involuntary unpaid leave of absence, these notices advised C.O. Gaukel that he must either return to full duty after a medical examination certifying his fitness to work, or the City would terminate his employment pursuant to Section 71 of the Civil Service Law.

The Union, in its amended petition, contends that the "implementation of medical removal proceedings, whether resulting in unpaid medical leaves or termination" constitutes a change in terms and conditions of employment and, therefore, must be bargained.

The petitioner requests that the Board make a determination that the City's actions constitute an improper practice and as a remedy order rescission of the Section 71 notices and order the City to bargain with the Union regarding pension rights, health and welfare benefits, and any changes in existing procedures.

## Positions of the Parties

### The Union's Position

The petitioner maintains:

> "Implementation of medical removal proceedings, whether resulting in unpaid medical leaves or termination, raises numerous issues concerning (but not limited to) ... disability retirement rights, health and hospitalization benefits, future seniority and pension credits, accrued vacation and compensatory time, salary, uniform allowance, longevity adjustments, death benefits, etc."

COBA rejects the City's contention that under the NYCCBL there is no requirement to bargain over the exercise of statutory rights. The Union argues that neither misplaced reliance upon Section 71 of the Civil Service Law nor the statutory management rights provision of the NYCCBL shield the City from a duty to bargain when there is a resultant practical impact on mandatory subjects of bargaining. The Union asserts, "it is well-settled that the requirement of good faith bargaining extends to matters covered by law when they relate to terms and conditions of employment," refuting

the City's contention that a matter prescribed by statute necessarily is a prohibited subject of bargaining. In support of its position, the Union asserts that "a contract provision in a collective bargaining agreement may modify, supplement or replace forms of protection afforded public employees under the Civil Service Law."

The Union argues that Article X, Section 2 (Sick Leave) operates to limit the exercise of management prerogative and enhances the safeguards provided disabled employees by Section 71 in providing for unlimited sick leave with pay for the full period of any incapacity in accordance with existing procedures. The previous existing procedure, according to the Union, was to afford a correction officer injured in the line of duty, "full due process to safeguard their right to seek disability retirement benefits." In this regard, the Union contends "that disabled employees have always been entitled to unlimited sick leave with pay for the full period of any incapacity, and to be afforded reasonable opportunity to rehabilitate and recover from said disability and thereafter, if appropriate to be evaluated for disability retirement by the New York City Employees Retirement System ("NYCERS")" in accordance with Section 507-a of the Retirement and Social

Security Law ("RSSL")[4]

Furthermore, the Union contends that the City no longer waits for a determination by NYCERS that a particular

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[4] Section 507-a of the Retirement and Social Security Law provides, in relevant part:

Disability Retirement.
a. Application for a disability retirement allowance for a member in the uniformed personnel in institutions under the jurisdiction of the department of correctional services of ... the New York City department of correction may be made by:
1. Such member, or
2. The head of the department in which such member is employed.
b. At the time of the filing of an application pursuant to this section, the member must:
1. Have at least ten years of total service credit, and
2. The application must be filed within three months from the last date the member was being paid on the payroll or within twelve months of the last date he was being paid on the payroll provided he was on leave of absence for medical reasons without pay during such twelve month period provided the member was disabled at the time he ceased being paid.
3. Provided, however, if the retirement system determines that such member was physically or mentally incapacitated for performance of gainful employment as the natural and proximate result of an accident not caused by his own willful negligence sustained in the performance of his duties in active service while actually a member of the retirement system the requirement that the member should have ten years of credited service shall be inapplicable.
C. If the retirement system determines that the member is physically or mentally incapacitated for the performance of gainful employment, and that he-was so incapacitated at the time he ceased his performance of duties and ought to be retired for disability, he shall be so retired. Each retirement system shall be entitled to adopt appropriate procedures for making the foregoing determination, including but not limited to the conducting of medical examinations, if any, for the purpose of determining initial entitlement of an applicant for disability retirement or to continued entitlement to a disability retirement allowance. Such retirement shall be effective as of a date approved by the head of the retirement system.

employee's application for disability retirement has been denied before initiating the challenged procedures. Instead, the city has, in "applying Section 71 'termination' upon members who have not had their disability applications finalized by the Board of Trustees of the retirement system," misapplied the authoritative language of the Civil Service Law by unilaterally determining whether members are physically or mentally incapacitated. Moreover, the Union argues that "the disability retirement provisions of 'the Code' and the 'RSSL' empowers (sic) ... 'NYCER' with the sole responsibility and authority to determine when a member is physically or mentally incapacitated for the performance of duty." The Union claims that misapplication of the Civil Service Law in this particular way, coupled with the rendering of ambiguous and inconsistent notices, impacts adversely upon mandatory subjects of bargaining because its members are now uncertain of their future entitlement to both contractual and statutory benefits.

The Union contends, on the one hand, that if an unpaid leave of absence is involuntarily imposed upon an employee, "such a policy will adversely impact upon [the employee's] pension rights, health and welfare benefits, and unlimited sick leave entitlement." On the other hand, the Union argues that if an employee is terminated prior to any unpaid leave of absence, there will be an adverse impact upon the employee's "entitlement to disability retirement pursuant to Section

507-a of the RSSL," based upon a restriction of that member's grace period for filing an application for a disability retirement, in addition to the other adverse consequences stated above.

Maintaining that the City previously "never placed any [of the Union's] members on an unpaid leave of absence solely because of disability," the Union argues that the City has misconstrued the legislative intent and purpose of Section 71 of the Civil Service Law in asserting authority to do so now. The Union rejects the City's application of Section 71, contending that it is a "remedial statute," promulgated by the legislature for the protection of employees who have been separated from service due to job-related injuries; and not intended to be used as a tool by management to impose unpaid leaves of absences with a view toward eventual termination of their employment.

As a collateral matter, the Union asserts that the City's refusal to bargain or to "provide the Union with a list of employees being considered for such proposed action" makes it impossible for the Union to determine whether the challenged procedures are non-discriminatory in their application. Furthermore, "by rendering ambiguous and inconsistent notices to certain individual members," it is asserted that the City's actions have impacted on the Union's ability to properly counsel and advise its membership.

The City's Position

The City argues that the utilization of the procedures challenged herein is within the proper exercise of managerial prerogative as set forth in Section 12-307 b. of the NYCCBL.[5] Contrary to the Union's contention that a duty to bargain arises from the practical impact of these actions, the City asserts that the Union "has failed to state facts sufficient to establish that there has been any change in terms and conditions of employment." The City maintains that since it has no duty to bargain, the Union's petition must be dismissed because it fails to state an improper practice.

The City argues that "Section 71 of the Civil Service Law permits the Department to place on leave of absence any employee disabled by an occupational injury or disease,"[6] and that to do so constitutes a legitimate exercise of the

[5] Section 12-307 b. of the NYCCBL provides, in relevant part:

"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; 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.... 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 decision on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining."

[6] The City cites Duncan v. New York State Development Center, 63 N.Y.2d 820, 481 N.Y.S.2d 22 (1984).

City's managerial rights. The City further maintains that the City "is empowered, pursuant to Sections 71 and 72[7] of the Civil Service Law to separate from service a 'disabled employee'." The City denies the Union's allegation that it has never before separated employees from service by reason of a disability, citing the New York State Supreme Court's decision in Clark v. New York City Department of Correction.[8] There, the Court upheld the Department's decision to terminate a correction officer who had not succeeded in securing approval of an application for disability retirement and further found that the unlimited sick leave clause of the collective bargaining agreement did not restrict the Department's statutory right to terminate the employment of those employees no longer competent to perform their duties.

As a further affirmative defense, the City asserts "there is no requirement under the NYCCBL to bargain over the

[7] We take administrative notice that Section 72 of the Civil Service Law is inapplicable to the facts of this case in that Section 72 allows initiation of medical removal proceedings for the purposes of imposing an involuntary leave of absence on "an employee [who] is unable to perform the duties of his or her position by reason of a disability, other than a disability resulting from occupational injury or disease." (emphasis added)

[8] Clark v. New York State Department of Correction, No. 3522/79 (Sup. Ct. N.Y.Co. filed May 4, 1979).

exercise of statutory rights such as Section 71," [9] and that because these rights are derived from a statute, any attempt to bargain over them is unlawful. In support of this position, the City relies upon Board Decision No. B-41-87, wherein the Board found that the City Charter preempted bargaining on the composition of the Civilian Complaint Review Board. In that case, the Board held that a subject proposed for bargaining is a prohibited subject where there exists legislation which "leaves no room for bargaining...." In the instant matter, the City maintains that since there is no legal duty to negotiate matters covered by the Civil Service Law, its alleged failure to bargain over them cannot form the basis of an improper practice.

In response to the allegation that the affected employees' due process rights have been violated, the City maintains that the statutory due process protections accruing to these employees pursuant to Section 71 of the Civil Service Law have been preserved despite the fact that the "form of the actual letters [of notification] may have recently changed." The City concedes that in order to avoid any confusion in the future, the Department will revert to using the original notices that outlined these employees' rights.

[9] The City cites In the Matter of County of Nassau (Police Department) v. Police Benevolent Association of the Police Department of the County of Nassau, Inc., 20 PERB 3040 (1987)

Finally, the City submits that, pursuant to Section 201.4 of the Civil Service Law,[10] the negotiation of pension benefits is prohibited. Therefore, assuming, arguendo, there is a practical impact on retirement benefits, the Union is nevertheless precluded from asserting a claimed breach of the duty to bargain on such matters.

## Discussion

Section 12-307 b. of the NYCCBL reserves to the City the right and sole discretion to act unilaterally through its agencies in certain enumerated areas which, therefore, are not within the scope of mandatory collective bargaining. While we have held that "this right to manage and the reservation of an area in which management is free to act unilaterally in order to manage effectively and efficiently, is not a delegation of unlimited power,"[11] any claim to limit management's exercise of its statutory rights must be based upon clear and explicit

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[10] Section 201.4 of the Civil Service Law provides:

> The term "terms and conditions of employment" means salaries, wages, hours, agency shop fee deduction and other terms and conditions of employment provided, however, that such term shall not include agency shop fee deduction for negotiating units comprised of employees of the state or any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void. (emphasis added)

[11] Decision No. B-13-85; B-27-84.

management waiver,[12] or specific statutory proscription.[13] Additionally, the NYCCBL provides f or the alleviation of practical impact upon affected employees arising out of the exercise of management prerogative.[14] Our inquiry in the instant matter requires an evaluation of the competing claims of the City, which relies upon its statutory right to act unilaterally, and the Union, which asserts the existence of a contractual and/or statutory limitation on the City's right.

Without denying that management rights are involved, the petitioner alleges that the challenged procedures impact upon terms and conditions of employment and that the City's refusal to bargain this impact provides the basis for a prima facie claim of improper practice. The Union argues that the proposed unilateral change in the existing procedure alluded to in Article X, Section 2 (which provides for the entitlement of its members to unlimited sick leave for the alleged purposes of either rehabilitation and ultimate return to duty or, in the event they are permanently disabled, preserving their right to be evaluated for a disability pension), constitutes a practical impact on terms and conditions of employment as contemplated by Section 12-307 b. of the NYCCBL. With respect to this allegation, we find that the petition

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[12] Decision Nos. B-29-85; B-4-83; B-26-80; B-10-80; B-5-80.

[13] E.g., NYCCBL Section 12-306.

[14] See footnote 5 supra at 10.

fails to state a prima facie improper practice claim and the Board's jurisdiction under Section 12-306 a.(4) may not be invoked when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement.[15] It is well settled that we have no jurisdiction over a claimed contractual violation.[16] Any such claim should be raised in the context of the grievance procedure and not in an improper practice proceeding.[17]

In this connection we take administrative notice that such an alleged violation may be grieved under Article XXI of COBA's contract with the City, which, inter alia, defines a grievance as

> 1. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement; [and]

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[15] Decision No. B-36-87.

[16] Decision Nos. B-37-87; B-36-87; B-29-87; B-24-87; B-17-86.

See also Section 205.5(d) of the Taylor Law, which is applicable to this agency and provides that:

> ... the board shall not have the 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.

[17] See Decision No. B-15-83.

> 2. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment....

We further note that there is nothing necessarily inconsistent in either Section 71 or 72 of the Civil Service Law that would compel an adverse effect upon COBA's members' contractual right to unlimited sick leave.[18] Nor do we disagree with the Union's contention that "a contract provision ... may modify, supplement or replace forms of protection afforded public employees under the Civil Service Law."[19]

We find that the City's actions fall within the scope of its management prerogatives, and that the only demonstrable limitation on its exercise of its prerogative in this area is based upon a provision of the collective bargaining agreement. Accordingly, for the reasons set forth above, we must conclude that no cause of action under Section 12-306 a.(4) has been stated.

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[18] In Pastore v. The City of Troy, 126 Misc. 2d 113, 481 N.Y.S. 2d 306 (1984), the New York Supreme Court held that while there was nothing in the contract which precluded the application of Section 72 to impose an involuntary leave of absence, it does not give the employer the right to suspend the employee's pay in contravention of his contractual right to unlimited sick leave.

[19] In City of Newburgh v. Newman, 19 PERB 7004 (1986), the Union's contract demands included a provision for continuation of contractual benefits for police officers who were on injury leave pursuant to General municipal Law Section 207-c. The Board held "the contract could contain benefits which exceed those set forth in the aforesaid statute and the Union is entitled to have them negotiated."

With regard to the Union's allegation that the City has misconstrued the Civil Service Law in asserting authority to implement the challenged procedures in these circumstances, we find that determination of the applicability of these procedures involves interpretation of the Civil Service Law and the RSSL, a function which is beyond the scope of this Board's power under the NYCCBL. The City may not insulate its actions from compliance with applicable requirements of the NYCCBL and of the Taylor Law or oust this Board of its jurisdiction in such matters by demonstrating that the measures it took were in accordance with statutory law.[20] But the Union may not seek redress in this forum for the alleged violation of the due process rights of its members arising under statutes other than the NYCCBL. Our authority does not extend to the administration of any statute other than the NYCCBL;[21] the allegation that any statute other than the NYCCBL has been violated is, therefore, not a matter appropriate for inclusion in a petition addressed to this Board.[22]

We also find that the City has not committed an improper practice in refusing to provide the Union with a list of employees who may be subject to the challenged actions. Since we have found that there are no subjects on which the City is

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[20] Decision No. B-41-87; B-25-85. See also County of Orange v. Orange County Local 836, CSEA, 15 PERB 3017 (1982).

[21] Decision No. B-1-83.

[22] Decision No. B-20-83.

required to bargain under the present circumstances, there is no statutory duty on the part of the city to furnish the information requested.[23]

As to the Union's remaining charge that the City's practice of sending ambiguous and inconsistent notices has adversely affected the Union's ability to counsel its membership, we take administrative notice that the City has relieved any impact arising from its actions inasmuch as it has stated that "the Department of Corrections will revert to using the 'old' letter which sets forth an employee's Section 71 and Section 72 rights."

For all the aforementioned reasons, we dismiss the instant petition for failure to state a prima facie improper practice claim in its entirety. However, we emphasize that nothing in this decision shall constitute prejudice to the Union's filing a request for arbitration on the contractual issues raised herein.

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[23] See Decision No. B-41-80.
See also Section 12-306 c.(3) of the NYCCBL, which provides:

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 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. (emphasis added)

**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 by the Correction Officer's Benevolent Association be, and the same hereby is, dismissed.

DATED: New York, N.Y.
September 7, 1988

MALCOLM D. MacDONALD
CHAIRMAN

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MEMBER

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MEMBER

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