PBA v. NYPD, 41 OCB 42 (BCB 1988) [Decision No. B-42-88 (IP)]

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

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, DECISION NO. B-42-88
Petitioner,

DOCKET NO. BCB-977-87

-and-

THE POLICE DEPARTMENT OF THE CITY
OF NEW YORK,

Respondent.
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DECISION AND ORDER

On July 10, 1987, the Patrolmen's Benevolent Association ("PBA" or "the Union") filed a verified improper practice petition charging that the Police Department of the City of New York ("the Department" or "the City") violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL") by unilaterally suspending a provision of the Patrol Guide. The City, through its Office of Municipal Labor Relations, sought and received several extensions of time in which to file an answer. A verified answer was filed on November 13, 1987. After 'receiving two extensions of time in which to respond, the Union filed its verified reply on December 16, 1987.

Background

On or about June 11, 1987, the Department's Commanding Officer, Court Division, issued a memorandum to the Chief of the Department, which provides, in part, as follows:

Subject: IMPLEMENTATION OF SUPREME COURT SPECIAL SUMMER SESSION PROGRAM

1. The Police Commissioner has stated at a high level criminal justice meeting that the police Department would guarantee the presence of all police officers at court during the special summer session of Supreme Court which is designed to set firm trial dates for specific jail cases.

3. Acceptable reasons for non-appearance on a scheduled day off or vacation (PG 114-7) is suspended. Members of the service will be brought in on their days off. [emphasis in original] Attempts will be made to produce police officers who are on vacation. Appearance Control supervisors will use discretion when ordering personnel to court while on vacation. Documented travel plans, i.e., airline tickets, confirmed reservations, etc. will generally be acceptable reasons for not canceling vacations.

4. Appearance Control Units in each borough will treat these cases separate and distinct from normal court appearances. The designation SS will precede the Borough abbreviation and serial number to indicate it is a "Summer Session" case. Separate logs will be kept and a special overtime code will be assigned to this project.

The suspended Section of the Patrol Guide ("PG 114-7"), issued on June 20, 1980, provides, in relevant part, as follows:

PURPOSE: To prevent unnecessary appearance in court on the scheduled day off of a uniformed member of the service.

DEFINITION: Acceptable reasons for non-appearance on a scheduled day off:

(2) Vacation

ADDITIONAL DATA: A uniformed member of the service who must appear in court on a scheduled day off, for an adjourned case, will be assigned to a 0900 to 1700 hour tour or as otherwise appropriate for attendance at court. A uniformed member who must appear in court on a scheduled day off for an arraignment will be assigned to the second platoon.

It is uncontroverted that the City promulgated PG 114-7 with an intent to minimize the possibility of police officers reaping undue overtime benefits by scheduling themselves for vacation on court appearance days. However, the Union contends that this Section also "confer[s] a benefit upon petitioner's membership which cannot be taken from [them] without some sort of benefit, in the form of monetary compensation, being granted in return." Consequently, the PBA asserts that the unilateral suspension of PG 114-7 constitutes an improper practice pursuant to Section 12-306[1] of the NYCCBL and, as a remedy, seeks an order of this Board directing the City to "vacate, withdraw and annul the memorandum of June 11, 1987 and restore and place into full effect Patrol Guide 114-7."

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[1] While the petition does not cite the section(s) of NYCCBL 12-306 alleged to have been violated, we find that the language used by the petitioner, viz., "done unilaterally, without the consent of petitioner's membership and without prior consultation" afforded respondent ample notice of the nature of petitioner's claim. Implicit in such an allegation is a claim that the issue herein is alleged to be a mandatory subject of bargaining and that the Department's unilateral action thereon constitutes an improper practice within the meaning of Section 12-306 a.(1) and (4) of the NYCCBL, which provides:

> 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 1173-4.1 (12-305) of this chapter;
>
> (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.

POSITIONS OF THE PARTIES

The Union's Position

The PBA maintains that the City improperly took unilateral action affecting a mandatory subject of bargaining. The Union alleges that suspension of PG 114-7 which, they claim, provides that police officers "are not required to appear in Court when they are on vacation," deprives its members of a due benefit without their consent.

In its response to the City's first affirmative defense based upon the statutory management rights provision of the NYCCBL,[2] the Union points out that under that same provision, questions concerning the practical impact of managerial decisions are within the scope of bargaining. On this basis, the Union rejects the City's contention that

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[2] Section 12-307 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.

there is no duty to bargain over the exercise of a management prerogative. While the PBA does not challenge the City's right "to maintain the efficiency of governmental operations" and to "determine the methods, means, and personnel by which government operations are to be conducted," it does object to unilateral action taken which, the Union claims, has an impact on a matter within the scope of collective bargaining.

The Union attempts to rebut the City's contention that the Department enjoys a "long-standing past practice of ... calling in members of the Petitioner from their vacations," by questioning why the Department would need to suspend the cited section of the Patrol Guide if, in fact, the privilege it conferred was qualified and conditional in the first instance. Thus, the Union denies the existence of the past practice asserted by the City, and contends that the City, by virtue of its own action in suspending PG 114-7, has acknowledged the existence of a specific right vested in its members pursuant to that Section which may not now be revoked without bargaining.

The City's Position

The City asserts that its decision to suspend PG 114-7 was a valid exercise of its management rights as defined in NYCCBL 12-307 b., as an action taken "in response to an emergency condition." It further rejects the Union's contention that its unilateral action impacts on a mandatory subject of bargaining. Therefore, the City demands the

petition be dismissed for failure to state a prima facie claim of improper practice.

The City maintains that the section of the Patrol Guide at issue provided the petitioner's membership with merely a qualified and conditional privilege wherein "one of the acceptable reasons for non-appearance [in Court] on a scheduled day off was a member's vacation," subject to the Department's discretion. It is the City's position that such a discretionary privilege does not constitute a vested right or benefit. The City asserts that the language following the heading Additional Data in PG 114-7[3] itself demonstrates that the City "clearly anticipated the need for police to be called in from their vacations and created procedures for just that purpose."

As an additional affirmative defense, the City submits that the petition should be dismissed as untimely, pursuant to Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules").[4] In support of this position, the City argues that it has

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[3] Supra at 2.

[4] Section 7.4 of the OCB Rules, in relevant part, provides:

> Improper Practices. A petition alleging that a public employer or its agents has engaged in or is engaging in an improper practice in violation of Section 1173-4.2 [12-306] of the statute may be filed with the Board within four (4) months thereof ....

enjoyed a "long-standing past practice" of exercising its managerial prerogative to recall members of petitioner fro their vacations, "dating back to at least as early as 1975."[5] Furthermore, the City submits that "this past practice has received the imprimatur of an arbitrator,"[6] whose award upheld the City's right to recall police officers from their vacations during a papal visit in 1980. The City argues that since it took no action that departed from this consistent past practice in the four months prior to the filing of the instant petition on July 10, 1987, the action is time-barred.

Finally, the City asserts that this practice enjoys "contractual status precisely because it has been in effect for years ..., indicat[ing] an implied agreement between the parties."

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[5] The City relies upon Inspections Division Bulletin Volume 2. Number 2, dated February 1975, which contains guidelines for procedures regarding night differential, overtime and travel guarantees which are intended for use by inspectional personnel as well as members handling time and money records. Under the heading Court Appearances, the Bulletin provides:

> "[m]embers of the service can be rescheduled for court appearances."

[6] The City cites Arbitration opinion and Award No. A-970-80 between these parties which dealt with the Department's decision to call in police from their vacations to provide security for Pope John Paul II. In the award, Arbitrator Peter Seitz stated:

> "(o)ne does not find any provisions which have the effect of vesting a right, irrevocably, in an employee, or guaranteeing a vacation in the time period or periods of his choice."

For all the foregoing reasons, the City submits that any-claim that a due benefit has been suspended "is entirely specious" and requests that the improper practice petition be dismissed.

DISCUSSION

We consider, at the outset, the City's argument relating to the legal sufficiency of the PBA's petition. The City contends, inter alia, that the petition is defective in that it was not timely filed within the four-month period prescribed by Section 7.4 of the OCB Rules. The City argues that "in light of the fact that [its] policy of calling in police from their vacations is a long-standing past practice dating back to at least as early as 1975, the Petition, as filed on July 10, 1987, is untimely on its face." The Union denies the existence of a past practice and contends that the Inspections Division Bulletin ("Bulletin")[7] has "no affirmative probative value in this controversy" and "should be considered as nothing more than a generalized statement (which is) permissive in nature." The Union also argues that Arbitration Award No. A-970-80 "has no applicability to the present controversy" inasmuch as the PBA denies the existence of a "sudden emergency" in the present circumstances.

We agree with the Union that the guideline in the Bulletin relied upon by the City to demonstrate a past

[7] See footnote 4/, supra at 7.

practice is vague and also note that it is superseded in time by PG 114-7. Furthermore, if indeed the long-standing practice of the Department has been to enjoy an unrestricted right to recall police officers from their vacations, we are constrained to inquire, along with the Union, why the City needed to suspend PG 114-7 in 1987 to exercise a right allegedly established over 12 years ago. Therefore, we are unpersuaded that the Union's claim should be deemed to have accrued at any time prior to the date of the challenged order which suspended PG 114-7. In Decision No. B-44-86, we stated

> "(i]t is well settled that a union appropriately interposes itself only where an action of management has immediate impact on the employees represented by the union or necessarily entails such impact in the immediate or foreseeable future." [8]

The PBA's petition was filed well within four months of the perceived impact of the act complained of.

Accordingly, we reject the City's contention that the PBA's petition filed on July 10, 1987, seeking rescission of an order dated June 11, 1987, is untimely.

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[8] In Decision No. B-44-86, we refused to find the Union's petition seeking to negotiate criteria and procedures for the granting of merit increases untimely on the premise that the Administrative order which provided those guidelines was issued nine years before the City announced its intention to implement a merit pay plan.

The substantive issue presented in the petition is whether the City committed an improper practice by unilaterally suspending a section of the Patrol Guide which, according to the PBA, vests a benefit in its members, thereby constituting a mandatory subject of bargaining. The City, disputing the Union's claim, insists that the recall of police officers from prescheduled vacations is a management prerogative under NYCCBL Section 12-307 b., as to which the City may take unilateral action.

The PBA asserts that the Department, in promulgating PG 114-7, effectively waived its discretionary power to act unilaterally in an area which would otherwise be within the scope of statutory managerial prerogative. Therefore, the Union contends the issue of recalling its members from their vacations for court appearances is a matter subject to a duty to bargain. In contrast, the City argues that PG 114-7 "does not and never has provided members of Petitioner with an unqualified right to decline to make court appearances because of scheduled vacations" and points to the existence of an "explicit caveat" in the rule as evidence of the conditional nature of the provision. The City also relies upon an allegedly long-standing past practice to further demonstrate that the City has not waived its managerial prerogative in this area.

In Decision No. B-22A-85, we stated:

> "Unless the substance of a rule involves a mandatory subject of bargaining, so that the employer is precluded by law from taking unilateral action thereon,[9] or the promulgation, revision, modification or revocation of a rule has a practical impact on employees, as defined by the NYCCBL,[10] the employer is not required either to negotiate or to arbitrate concerning its decision [to change the rule]."[11]

For the reasons stated below, we find that the rule which the City unilaterally suspended does not involve a mandatory subject of bargaining. Accordingly, we cannot find that the City has committed an improper practice based upon a refusal to bargain, for there is no duty to negotiate over the revocation of a rule or regulation dealing with a non-mandatory subject of bargaining.[12]

In Decision No. B-38-88, we held that "changes in work schedules are management decisions not ordinarily subject to an obligation to bargain unless, in the exercise of these rights, the employer actions affect wages, hours or working condition of employees in a manner rising to the level of practical impact."[13] In that case, the Department's decision unilaterally to impose a work schedule on certain

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[9] NYCCBL Sections 12-306 a.(4) and 12-307 a.

[10] NYCCBL Section 12-307 b.

[11] See also Decision No. B-42-86.

[12] Decision Nos. B-42-86; B-22A-85.

[13] See also Decision No. B-4-83, where we acknowledged "the retained management rights of the Police Department to assign Police Officers and otherwise to deploy its forces with maximum effectiveness. (emphasis added)

members of the Captain's Endowment Association as a permissible means of fulfilling its mission "to determine the standards of services to be offered by its agencies" and to "maintain the efficiency of governmental operations" was found to be outside the scope of bargaining. There, as in the instant matter, the Union offered no persuasive evidence or argument demonstrating the existence of limits on the City's freedom to act unilaterally in this area. The Union is not claiming deprivation of any contractually negotiated benefit, i.e., overtime or vacation pay, nor does it dispute that PG 114-7 was unilaterally issued by the Department for an altogether different purpose. Furthermore, we note that when the PBA grieved the promulgation and implementation of PG 114-7 in 1979,[14] we held, in Decision No. B-9-79, that the new amendment to the Patrol Guide (PG 114-7) did not

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[14] In Decision No. B-9-79, the City's challenge to the arbitrability of the PBA's request for arbitration was denied on the basis that an arguable nexus existed between PG 114-7 and Article III l.b of the contract.

See also Arbitrator's opinion and Award No. A-844/79 and A-899/79. The following two issues were heard by the arbitrator and both grievances were denied:

1) PG 114-7 did not violate the contract inasmuch as "[Article] III l.b speaks only of tours rescheduled for court appearances which it prohibits for the purpose of preserving the intent and spirit of the section on overtime compensation. What PG 114-7 did was to deal with scheduling of court appearances on the police officers' scheduled day off, not the rescheduling of a tour of duty. Such a scheduling is not for the purpose of avoiding overtime but is, in fact, an overtime assignment." (emphasis added)

2) The assignment of police officers on their regular day off to a tour (0900 - 1700 hours) other than the second tour (0800 - 1635) was not a violation of Article III 1.b because since the section says, "may begin at 8:00 AM," the starting time is permissive, not mandatory.

arguably violate the provisions of the Department's Administrative Guide because the contract did not "limit the general right of the employer to promulgate amendments of existing rules, regulations or procedures; nor [was] it claimed that the contract imposes a duty upon the employer specifically to retain unchanged the provisions of Administrative Guide.... If [the PBA] does not have a right to the preservation of such a rule, regulation or procedure, as such, it cannot justify its request to arbitrate a claim that amendment or revocation of the regulation is a violation of the regulation."

For these reasons, we find that PG 114-7 involves a matter of management prerogative and not a mandatory subject of bargaining, and that the Union has failed to establish that either a clear and explicit management waiver or contractual limitation exists.

The remaining basis upon which the PBA's claim of improper practice is asserted is that the City's exercise of its managerial prerogative has a resultant practical impact. The NYCCBL recognizes that employer actions found by this Board to have a practical impact on terms and conditions of employment may give rise to a duty to bargain with the Union concerning that practical impact.[15]

[15] Decision No. B-5-75.

However, the Union's pleading on this issue is merely a rebuttal to the City's management rights defense, and it fails to allege any facts to substantiate a claim of practical impact. As we have previously held, practical impact is a factual question, and the existence of such impact cannot be determined when insufficient facts are provided by the Union.[16] Therefore, we need not consider this bare allegation further except to make clear that a finding by this Board of practical impact is a condition precedent to any duty to bargain to alleviate such impact and that the proper mechanism for bringing a dispute of this nature before this Board is through a scope of bargaining petition.

Accordingly, we shall dismiss the instant petition in its entirety.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

[16]Decision Nos. B-38-88; B-37-82; B-27-80; B-16-74.

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 6, 1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER