UPOA v. City, DOP, 41 OCB 46 (BCB 1988) [Decision No. B-46-88 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

UNITED PROBATION OFFICERS ASSOCIATION,

Petitioner,

-and-

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

Respondents.

DECISION NO. B-46-88

DOCKET NO. BCB-982-87

DECISION AND ORDER

On July 24, 1987, the United Probation officers Association ("the Union" or "UPOA") filed a verified improper practice petition against the City of New York and the New York City Department of Probation ("City" or "Depart-ment"). The petition alleges that the Department committed an improper practice in violation of Section 12-306 a. of the New York

City Collective Bargaining Law ("NYCCBL")[1] when it effected involuntarily transfers of a group of Supervising Probation Officers, because it failed to bargain over the impact of the transfers, and because two of the transferees were Union officials, and their transfers were man attempt to undermine the Union's status and effectiveness." The Union asks the Board to order the Department to rescind the transfers and to cease discriminating against members of the Union's Executive Board.

The Department and the City of New York, appearing by its Office of Municipal Labor Relations ("the City") filed a verified answer to the improper practice petition on August 14, 1987. The Union filed a reply on August 26, 1987. The City filed a sur-reply on September 2, 1987.

---

[1]NYCCBL Section 12-306a. provides as follows:

> **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.

Background

In the latter part of July, 1987, the Department of Probation ("the Department") announced the transfer of a group of approximately thirteen Supervising Probation Officers from various parts of the city to various new locations. The Union maintains that this was in violation of an agreement, reflected in a Department memorandum, by Which the Department placed limits on its freedom to transfer employees. The full text of the memorandum reads as follows:

Executive Memorandum No. 49-79

Subject: Policy on Involuntary Interborough Transfer of Assignment for Sub-managerial Staff

Policy: The New York City Department of Probation has City-wide responsibility for the legislatively man dated functions of Intake, Investigation and Super vision which represent services to the Family, Criminal and Supreme (Criminal Part) Courts. There fore, all members of the Department of whatever rank or position must be cognizant of their membership in a Department of City-wide responsibility and hence are subject to the demands imposed on our agency resources.

In order to make the most effective use of the resources of the Department within any of the five boroughs which comprise the City of New York and to maintain an equitable balance in the deployment of staff, it becomes necessary on occasion for the Department to make involuntary or unrequested transfers of personnel.
(Emphasis in original.]

When it is perceived and determined that there is a need to reassign personnel on an interborough basis, the Deputy Commissioner for Management Services, after consultation with the Deputy Commissioners for Family and Adult Court Services and Assistant Commissioners, will give direction to the Assistant Commissioners to effect the necessary transfer(s).

> Assistant Commissioners have the ultimate responsibility of specific designation of persons to be transferred in instances where involuntary or unrequsted transfers are required by the Department. [Emphasis in original.]

Procedure: I. Assistant Commissioners may wish to consider among others the following factors in implementing the process of involuntary transfers: (These factors are not presented in any order of priority and do not reflect any predetermined measure of ranking.)

A - Review of existing voluntary transfer list
B - Canvass for volunteers not on transfer list
C - Seniority in job title
D - Travel distance from home to job
E - Documented health problems
F - Documented child care problems
G - Documented prior educational commitments
H - Prior History of Involuntary Transfers

II. Assistant Commissioners should observe the following guidelines in implementing the aforementioned policy:

1 - Any staff member who is under consideration for an involuntary transfer shall be given an opportunity before a final decision is made, to discuss the transfer ramifications with the Assistant Commissioner making the transfer decision.

2 - At the time when a transfer decision is made, a special performance evaluation report shall be prepared by the employee's immediate supervisor in the branch of origin. The evaluation report shall be shared with the receiving branch and also made part of the employee's personnel file.

3 - It must be emphasized that the over-riding consideration in effecting involuntary transfers is concern for the administrative needs of the Department.

4 - All transfer decisions made by the Assistant Commissioners on behalf of the Department shall be final.

POSITIONS OF THE PARTIES

City's Position

The City claims that it acted out of necessity when it made the transfers because, during the month of July, 1987, it promoted fourteen Supervising Probation officers to administrative positions, thereby leaving fourteen supervisory vacancies. It contends that, under Section 12-307 b. of the NYCCBL,[2] a department has the affirmative right, as a managerial prerogative, to reassign its employees for the purpose, among other things, of meeting operational exigencies. The City cites Board of Collective Bargaining ("Board") Decision No. B-16-87 to support its contention that this right has been held to be "unfettered," absent a statutory or contractual limitation.

Although the City acknowledges the existence of Executive Memorandum 49-79, it contends that the memorandum merely

---

[2]NYCCBL Section 12-307 b. reads, in pertinent part, as follows:

> 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.

delineates a transfer policy unilaterally instituted by the Department, and that it was not the consequence of an agreement by the parties. Moreover, according to the City, the language contained in the memorandum is completely permissive. It maintains that the Department is therefore under no obligation to consider any of the factors enumerated in the memorandum when making transfer decisions.

Finally, the City asserts that the Board is being asked to make a determination that the Department has attempted to undermine the Union premised solely upon the fact that two of the transferred Supervising Probation officers were members of the Union's Executive Board. In the City's view, this claim is based upon speculation and surmise, with no statement of fact offered to support the allegation. In asking that the petition be dismissed, the City relies upon and quotes from a recent decision wherein the Board held that:

> [T]he mere allegation of improper motive, even if accompanied by an exhaustive recitation of union activity. . . . does not state a violation where no causal connection has been demonstrat-ed. Allegations of improper motivation must be based upon statements of probative facts rather than upon recitals of conjecture, speculation and surmise. [Decision No. B-2-87 at p.13.]

Union's Position

The Union characterizes the transfers as an "arbitrary, whimsical re-shuffling [of personnel) in total disregard for the impact on the individuals." It specifies how some of the

transfers were made, as follows:

SPO	Current	Transfer
Booker	Brooklyn	Bronx
Dean	Queens	Brooklyn
Donohue	Queens	Brooklyn
Hoff	Brooklyn	Bronx
Lindholm	Bronx	Brooklyn
Nunz	Manhattan	Brooklyn
Tannenbaum	Brooklyn	Queens

The Union complains that many of the affected Supervising Probation Officers are long time employees whose daily commuting time will be significantly increased. It goes on to allege that many of the officers have health problems such as heart trouble and hypertension "which are likely to be exacerbated by the added travel and stress," and that many have family responsibilities which "they will be unable to discharge if they are transferred."

The Union also contends that two of the transferred officers "are Union Executive Board members who will be unable to service the needs of their constituents because of the transfers," concluding that "[u)nilateral mass transfers reflect adversely on the Union's ability to represent and protect the members: thus they undermine the Union." It distinguishes Decision No. B-2-87, supra, by noting that case was brought by a petitioner who was a self-styled union activist, whereas here, the Union charges, the connection between union activity and the involuntary transfers is perfectly clear.

Finally, the Union claims that the Department failed to follow its written involuntary transfer policy that allegedly sets "certain limits on its freedom to transfer."

DISCUSSION

The Union claims that two categories of improper practices were committed by the Department when it involuntarily transferred the Supervising Probation Officers. First, the transfers constitute an improper practice because they interfered with Union activity; and second, the transfers constitute an improper practice because the City imposed them unilaterally without bargaining over their impact. The City's position is founded upon the asserted management right to determine where and how employees shall work. The City maintains that it has the "unfettered" right to transfer employees as it sees fit.

At the heart of the matter, therefore, are two competing claims: the statutory right of the certified representative of a bargaining unit to negotiate the terms and conditions of employment for its members and to be secure in its union activities, against the management right reserved to the City to make a unilateral determination as to how it will deploy its personnel, under Section 12-307 b. of the NYCCBL.

This Board has never held that management has the "unfettered right" to transfer or assign employees as it sees fit. Rather, we have held on several occasions that, although the right to assign, reassign, and transfer employees falls

within the scope of management rights defined in NYCCBL 12-307 b. and reserved to management therein,[3] management may not use its prerogative as a way to encourage or discourage active participation in the internal activities of a labor organization.[4] Moreover, even though the right to assign and reassign employees, itself, is a non-mandatory subject of collective bargaining, the impact of decisions made in association with such right may be wit hin the scope of bargaining.[5]

In order for us to find that transfers were improperly motivated so as to constitute an improper employer practice under 12-306 a. of the NYCCBL (union interference, domination, discrimination, etc.), the Union must, at a minimum, demonstrate the following:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity.
>
> 2. the employee's union activity was a motivating factor in the employer's decision.[6]

If both parts of this test are satisfied, the burden will

---

[3]Decision Nos. B-8-81; B-5-84; B-10-85; B-4-87; and B-5-87.

[4]Decision No. B-21-79.

[5]Decision Nos. B-6-79 and B-23-85.

[6]See Decision Nos. B-51-87 and B-12-88.

shift to the employer to show that the same action would have taken place even in the absence of the protected conduct.

In the present case, the Union's conclusory allegations that the transfers interfered with its status and effectiveness do not support a finding of improper practice. The record indicates that the transfers were made for valid operational reasons, and that, of the 13 or 14 Supervising Probation Officers who were transferred, only two performed union-related activities. On this basis and without more, we cannot conclude that the transfers were motivated by a discriminatory intent sufficient to invalidate the otherwise legitimate exercise of managerial discretion to assign and reassign employees under Section 12-307 b. of the NYCCBL. The Union's allegations fail to show either that the employer had knowledge of the union activity of the small portion of the group of transferees, or that the employer or its agents were motivated by anti-union animus.

The second category of improper practice claim raised by the Union concerns the practical impact of the transfers, and is based upon the last sentence of Section 12-307 b. of the NYCCBL, which reads as follows:

> Decisions of the city . . . 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.

We have held repeatedly that there can be no duty to

bargain -- and therefore no improper practice by way of refusal to bargain -- arising out of practical impact until this Board has made a determination in a proper proceeding that a practical impact exists in a given case as a result of the exercise of a management prerogative pursuant to NYCCBL Section 12-307 b.[7] No such finding has been made herein since no proceeding seeking a finding of practical impact has been brought by the Union.

Moreover, on the basis of the record before us, we are unable to find the existence of any improper practice based upon the Union's conclusory, and, to some extent, speculative allegations with regard to practical impact.

Finally, with respect to the Union's claim that the Department failed to follow its written involuntary transfer policy, we note that this contention may state a contractual and arbitrable issue but, as such, may not be rectified by the Board in the exercise of its jurisdiction over improper practices. Section 205.5(d) of the Taylor Law[8] precludes

---

[7]Decision Nos. B-9-68; B-5-80; B-8-80; B-33-80; B-41-80; and B-37-82.

[8]Section 205.5.(d) of the Taylor Law, which is applicable to this agency, provides, in pertinent part, as follows:

> . . . the board shall not have authority to enforce an agreement between an em ployer 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.

this Board from exercising jurisdiction over a claimed contractual violation that does not otherwise constitute an improper practice.[9] [10]

We find, therefore, that the Union's claims that the involuntary transfers interfered with union activity, and that they created a requirement to bargain over impact, are without merit, and we dismiss the Union's improper practice petition.

---

[9]Decision Nos. B-6-87; B-29-87; B-37-87; B-55-87; and B-35-88.

[10]On or about August 7, 1987, the Union did, in fact, file a request for the arbitration of a grievance concerning these same transfers. The grievance was based, in part, upon the Department's alleged failure to follow its written involuntary transfer policy. The City challenged the Union's request for arbitration and a decision on arbitrability has been issued by this Board.
(The City of New York v. United Probation Officers Association, Decision No. B-47-88)

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 United Probation Officers Association and docketed as BCB-982-87, be, and the same hereby is, dismissed.

DATED: New York, N.Y.
September 6, 1988

MALCOLM D. MacDONALD

DANIEL G. COLLINS

GEORGE NICOLAU

DEAN L. SILVERBERG

CAROLYN GENTILE

JEROME E. JOSEPH