SBA v. City, NYPD, Office of Mun. Labor Rel., 41 OCB 56 (BCB 1988) [Decision No. B-56-88 (IP)]

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

DECISION NO. B-56-88

-between-

DOCKET NO. BCB-995-87

SERGEANTS BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CITY OF NEW YORK, OFFICE OF MUNICIPAL LABOR RELATIONS and NEW YORK CITY POLICE DEPARTMENT,

Respondents.
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DETERMINATION AND ORDER

On August 31, 1987, the Sergeants Benevolent Association ("SBA" or "petitioner") filed an improper practice petition alleging that the City of New York ("the City" or "respondent") failed to negotiate in good faith in violation of sections 12-306a(l) and (4) [formerly sections 1173-4.2a (1) and (4)] of the New York City Collective Bargaining Law ("NYCCBL").[1] Having obtained an extension of time in

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[1] Section 12-306a of the NYCCBL provides in relevant part:

> **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 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.

which to respond, the City, by its Office of Municipal Labor Relations ("OMLR"), filed an answer to the petition on November 18, 1987. The SBA also obtained an extension of time, and filed its reply on January 12, 1988.

Background

In April 1978, the New York City Police Department ("the Department") implemented a "Neighborhood Stabilization Program" for the announced purpose of "[enhancing] its ability to prevent street crime and to alleviate community fear of victimization."[2] Under this program, the Department created Neighborhood Stabilization Units ("NSUs"), which it manned, initially, with newly rehired police officers who had been laid off during the City's fiscal crisis. According to the City, the purpose of the assignment of such officers to the NSUs was to retrain them for active duty.

In July 1985, the Department was granted an increase of 129 sergeants "to assume full responsibility for the supervision and training of NSU personnel."[3] Sometime thereafter, the Department decided to utilize the NSUs as part of a training program for probationary police officers who had completed their Police Academy training. It decided

[2] Operations Order No. 35 (Apr. 13, 1978).

[3] Chief of Patrol Memo #4 (Feb. 11, 1987).

to staff the units with some 200 sergeants who would be permanently assigned to "Trainer/ Supervisor" positions.[4] When the SBA learned that the Department was soliciting volunteers for these positions, it requested a meeting to discuss the new assignments "to ascertain whether there would be any change in the duties, responsibilities, and working conditions of the NSU sergeants." Although a meeting was held on February 24, 1987, according to petitioner, the Department was unable to provide all of the information that the SBA desired because the program was 'still being developed.

In April 1987, the Department began training sergeants for their new assignments and, in connection therewith, promulgated a Post Academy Field Trainer /Supervisor Manual ("Manual") which incorporated a proposal for the post-Academy field training of probationary police officers. On June 4,1987, SBA president Joseph V. Toal wrote a letter to OMLR Deputy Director James Hanley in which he asserted that "the Manual along with other Department memos have clearly expanded or added to the duties and working conditions of sergeants assigned to N.S.U.s...." The letter requested that the City bargain over the "expanded and added working conditions" of sergeants for the period of the 1984-87

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[4] Id.

collective bargaining agreement.

At a meeting with OMLR on June 24, 1987, the SBA outlined items which, it claimed, involved a practical impact on sergeants. Thereafter, on June 30, 1987, petitioner submitted a set of specific demands which it sought to negotiate with the City. The parties met again on August 5, 1987 but were unable to achieve a result satisfactory to the SBA. Shortly thereafter, the instant petition was filed.

Positions of the Parties

Petitioner's Position

The SBA asserts that respondents have failed "to negotiate in good faith by (1) unilaterally changing terms and conditions of employment, and (2) refusing to negotiate over the practical impact of said changes." According to the petitioner, the NSU program requires sergeants to perform "new, additional and expanded duties."

> These new additional duties involve the performance of a new training function for sergeants and the preparation of daily and bimonthly evaluations for probationary police officers with supervision of subordinates in a one to eight ratio. The new program require[s] sergeants assigned to NSU to receive instruction in a method and techniques course and to perform a longer workday daily, without compensation, to complete his/her duties. This new NSU program also requires each sergeant to spend time for scholastic and teaching preparation. Such time is not provided with pay or other compensation. No additional compensation was paid to any sergeant for these new duties.

In addition, the SBA contends that respondents have violated the NYCCBL by failing to provide information relating to the NSU program and its implementation, which was repeatedly requested as necessary for negotiations.

In response to the City's defenses, petitioner contends that it pleaded sufficient facts to give respondents notice of the proposed area of inquiry and to enable them to formulate an answer. The SBA notes that the OCB Rules do not require more than this. Petitioner asserts that the changes in terms and conditions of employment of NSU sergeants concerning which it seeks to negotiate are set forth in the Department's Chief of Patrol Memo #4 and in the Manual. It notes that a copy of the Manual was annexed to the improper practice petition.[5] The SBA emphasizes that the Manual requires "NSU/FTU" sergeants to prepare Daily Field Training Observation Worksheets for each probationary police officer and to complete bimonthly Probationary Police Officer - Field Training Evaluation Forms. It is alleged that neither the

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[5] On or about October 29, 1987, after the instant petition was filed, Chief of Department Memo No. 5 was issued, establishing and describing a "Post-Academy Field Training Program" for newly graduated probationary police officers. This memorandum appears to implement the proposal set forth in the Manual. Inter alia, it changes the designation of Neighborhood Stabilization Unit, used in the Manual, to Field Training Unit ("FTU").

worksheet nor the form was previously used or prepared by sergeants and that the time required for the performance of these tasks increases the sergeants' work time without an increase in the length of their tour of duty.

Petitioner denies that the promulgation and implementation of the Manual and of departmental memoranda was an exercise of management prerogative. The SBA cites Board Decision Nos. B-44-86 and B-20-86 for the proposition that the unilateral implementation of a policy (Decision No. B-44-86) or proposal (Decision No. B-20-86) constitutes a refusal to bargain in violation of the NYCCBL.

Petitioner also asserts that it has demonstrated that the management action complained of has a practical impact on mandatory subjects of bargaining. Accordingly, petitioner argues, "respondents have clearly violated [§12-306a(l) and (4)] of the NYCCBL by refusing to collectively bargain and also by not providing information requested by the SBA for collective bargaining. Petitioner notes that the duty to negotiate over practical impact can arise, as here, in the middle of a contract term.

The SBA denies that the essence of the instant petition is a demand for fewer appearances and longer tours of duty for NSU sergeants, or that the negotiated prohibition of further cost-related demands during the term of the 1984-87 Uniformed Coalition Economic Agreement ("UCEA") is a bar to

the adjudication of its practical impact claims.

As a remedy, the SBA requests an order directing respondents to bargain in good faith over the practical impact of the acts described in the petition. In the alternative, petitioner seeks an order directing mediation, or a finding that an impasse exists and the appointment of an impasse panel. Additionally, petitioner seeks an order directing the City to cease and desist from implementing the NSU program insofar as it involves a change in the duties, responsibilities and working conditions of sergeants, and restoration of the status quo ante.

Respondents' Position

The City asserts that the responsibilities of sergeants assigned to NSUs have remained constant since the inception of the NSU program in 1978. According to respondents, sergeants always have been responsible for ensuring that police officers assigned to NSUs "maximize their field training opportunities." The reason for the promulgation of the Post Academy Field Trainer/Supervisor Manual, respondents maintain, was simply to assist sergeants in their responsibilities in this regard.

For its first affirmative defense, the City asserts that petitioner has failed to allege sufficient facts to support the underlying theory of its case. Specifically, respondents maintain that the SBA has not established, prima facie, that

there has been any change in the terms and conditions of employment of sergeants. Accordingly, it maintains, petitioner has not stated an improper practice within the meaning of section 12-306a of the NYCCBL.

For its second affirmative defense, the City asserts that the promulgation of the Manual was an exercise of its managerial rights set forth in section 12-307b of the statute.[6] As there is no obligation to bargain over the

[6] Section 12-307b 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.

exercise of management rights, the City argues, there cannot have been a violation of section 12-306a of the law here.

For its third affirmative defense, the City asserts that petitioner has failed to allege sufficient facts to warrant our considering whether respondents' actions have resulted in a practical impact within the meaning of NYCCBL section 12-307b. Respondent notes that this Board has refused to consider a claim of practical impact unless the petitioner specifies the details thereof.[7]

For its fourth and final affirmative defense, the City contends that the essence of the SBA's charge is a demand that NSU sergeants be required to make fewer appearances per year and work longer tours of duty. However, respondents note, by the terms of a Memorandum of Understanding entered into on December 20, 1978, and by the terms of two subsequent arbitration awards, the number of appearances of NSU sergeants has been fixed at 239 per year and the length of

[7] The City cites Decision Nos. B-38-86; B-23-85; B-34-82; and B-27-80.

their tours has been fixed at 8 hours 44 minutes each.[8] Any demand for a change during the term of the 1984-87 UCEA or of the 1984-87 separate unit agreement between the parties, the City contends, is barred by section 3 of the UCEA which precludes the assertion of further cost-related demands.

For all of the foregoing reasons, respondents request that the petition be dismissed in its entirety.

Discussion

Respondents, by their first affirmative defense, assert that petitioner failed to demonstrate that the City's actions constitute an improper practice within the meaning of NYCCBL section 12-306a. They cite Decision No. B-39-85 where we

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[8] Memorandum of Understanding for Sergeants Benevolent Association, Lieutenants Benevolent Association and Captains Endowment Association, dated December 20, 1978; Matter of Sergeants Benevolent Association and the City of New York (Police Department), Case No. A-1030-80 (decided Dec. 23, 1980, supplemental award issued Mar. 22, 1982) (Arb: Wolf, B.); Matter of Sergeants Benevolent Association and Office of Municipal Labor Relations of the City of New York, Case No. A-1850-84 (decided Oct. 25, 1985) (Arb: Nicolau, G.). In the latter arbitration proceeding, Arbitrator Nicolau expressly rejected a claim that NSU sergeants "are improperly denied ample time per tour to perform their duties" and denied a requested remedy that they be placed on (fewer) tours of longer duration.

stated, in relevant part, that

> mere conclusory allegations based upon petitioner's speculation as to the effects upon its rights that it deems to be implicit in the circumstances complained of - is not enough to satisfy the requirements of Rule 7.5.[9]

Notwithstanding the reference to Rule 7.5 in the City's answer, it is clear that the petition did provide respondents with sufficient information to place them on notice of the nature of the SBA's claim and to enable them to formulate a response. The petition therefore satisfied the requirements

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[9] Section 7.5 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") requires that an improper practice petition be verified and contain:

> a. The name and address of the petitioner;
> b. The name and address of the other party (respondent);
> c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective bargaining agreement involved, and any other relevant and material documents, dates and facts. If the controversy involves contractual provisions, such provisions shall be set forth;
> d. Such additional matters as may be relevant and material.

of the rule.[10]

Respondents' essential argument is that the petition should be dismissed because it fails to state facts sufficient to establish that there has been any change in terms and conditions of employment. According to the City, the responsibilities of sergeants have remained unchanged since the inception of the NSU program in 1978. Petitioner asserts, however, that since the implementation of the Field Training Program in 1987, NSU sergeants have been given greater supervisory responsibilities, added administrative duties, and have been required to learn new skills. It alleges that these responsibilities require longer workdays and additional preparation time.

From our examination of the pleadings and various documents submitted by the parties, it opposes that post-Academy field training of police officers has been conducted in the NSU format since 1978. However, with the assignment of some 129 additional sergeants to the training of probationary police officers in 1987, the NSU program was altered and expanded. We need not determine whether there have been changes in the duties of sergeants as a result of the expansion of the NSU program for it is well-settled that

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[10] See, Decision Nos. B-44-86; B-39-85; B-8-85; B-20-83; B-1-83; B-23-82; B-22-81.

management has the right to determine what duties within a general job description of a title are appropriate for employees in that title and to assign work in a manner that it deems necessary to maintain the efficiency of governmental operations. As long as the tasks assigned are an aspect of the essential duties and functions of the position, and it has not been established that a change in duties has a practical impact on terms and conditions of employment, there is no obligation to negotiate.[11] The critical issue for our consideration is whether changes in the NSU program involved changes in the wages, hours or working conditions of sergeants concerning which bargaining is mandatory under NYCCBL section 12-307a.

Based upon the record before us, we cannot conclude that the implementation of the Post-Academy Field Training Program involved changes in terms and conditions of employment. While the SBA alleges that, under the new program, "the amount of time necessary to perform the new, additional and expanded duties ... has been substantially increased," it also concedes that there has not been an increase in the length of the tour of duty for NSU sergeants (Reply ¶37). From this, it appears that an increase in working hours, a

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[11] NYCCBL §12-307b. Decision Nos. B-37-82; B-35-82; B-5-80.

mandatory subject of bargaining, is not an issue here. Further, the obligation to undergo additional training and to acquire new skills during regular working hours at no expense to the employee is not a term or condition of employment.[12] Therefore, we find that the implementation of the field training program was within respondents' statutory prerogatives and did not require negotiations with the SBA.

Our Decision Nos. B-44-86 and B-20-86 do not, as the SBA suggests, compel a contrary result. In Decision No. B-44-86, we held that the implementation of a merit increase program was a matter of management prerogative. We directed the City to negotiate only concerning the criteria and procedures to be applied in granting such increases. In Decision No. B-20-86, we found that a _prima facie_ case of improper practice was established where the City unilaterally upgraded the employee grievants and increased their salaries in violation of a promise to consider a proposal for settlement of the grievance and to report back to the Union. The rationale for our finding was the fact that, based upon the City's promise, the Union was led to defer its contractual remedies under the grievance procedure. We did not hold as

[12] Decision Nos. B-10-81; B-2-73; B-8-68.

a general matter that the unilateral implementation of a management proposal constituted a refusal to bargain under the NYCCBL.

Next we turn to petitioner's allegation that the implementation of the post-Academy training program has had a practical impact on sergeants. At the outset, we note that petitioner ignores the distinction between a duty to bargain which arises when a public employer wishes to make changes in the wages, hours or working conditions of its employees[13] and a duty to bargain concerning the means for alleviation of a practical impact, which cannot arise until this Board has determined (a) that a practical impact exists and (b) that the employer has failed to alleviate the impact.[14] A refusal to bargain charge is brought to the Board by means of an improper practice petition asserting a violation of section 12-306a(4), while a practical impact claim should be initiated by a scope of bargaining petition in which specific allegations of impact are set forth.[15] The determination of the existence of a practical impact - a

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[13] NYCCBL §12-307a.

[14] The procedure for seeking to remedy practical impact is outlined in Decision No. B-9-68. See also, Decision Nos. B-38-86; B-41-80.

[15] See, Decision No. B-37-82; B-35-82; B-16-81; B-9-68.

question of fact which may necessitate a hearing - is a condition precedent to a determination whether there are any bargainable issues arising from the impact.[16] The determination of both issues is within the exclusive jurisdiction of this Board.[17]

Based upon the above-stated principles, it is clear that where, as here, there has been no determination whether the management action complained of has created a practical impact, the assertion that the City has improperly refused to bargain concerning demands for the alleviation of perceived impact is, at best, premature. Nevertheless, as it is our policy not to require strict adherence to the rules of pleading, we will not dismiss the present petition simply because of its technical defects.[18] Since petitioner has made certain allegations relating to its practical impact claim, we shall consider them.

The petitioner alleges that the implementation of the field training program has a practical impact because it requires sergeants to perform "new, additional, and expanded

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[16] Decision Nos. B-36-86; B-23-85; B-37-82; B-9-68.

[17] Decision No. B-13-74.

[18] OCB Rules §15.1. Decision Nos. B-23-82; B-8-77; B-9-76; B-5-74.

duties. " A practical impact is not established however merely by a showing that there has been an increase in employees' duties. As we have previously held, an obligation to bargain on measures for the alleviation of practical impact is applicable only to impacts on conditions of employment.[19] The assignment to perform any particular duties, provided they are within the duties covered by the job specification for the title in question, is not a condition of employment. Therefore, the fact that sergeants may be required to perform additional and/or different duties appropriate to their title is not the type of adverse effect, or practical impact, contemplated by NYCCBL section 12-307b.

We note, however, petitioner's assertion that, under the new program, more work time is required of sergeants during each tour of duty than previously was the case. From this, we may infer an allegation that there has been an increase in sergeant workload. We have previously held that an unreasonably excessive or unduly burdensome workload as a regular condition of employment could constitute a practical

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[19] Decision No. B-10-81.

impact within the meaning of NYCCBL section 12-307b.[20] However, on the record before us, we are unable to determine to what extent, if at all, the workload of sergeants may have increased and, therefore, we cannot determine whether any such increase rises to the level of a practical impact. Accordingly, we shall dismiss petitioner's claim of practical impact, without prejudice to the filing of a scope of bargaining petition containing sufficient factual allegations of an impact on sergeants' workload to warrant our further consideration of such a claim.

Since we do not find any subjects concerning which respondents have a duty to bargain at this point, and since NYCCBL section 12-306c(4) only requires an employer to furnish information relating to "subjects within the scope of collective bargaining," we also find that, in the circumstances of this case, respondents have no statutory duty to provide the information petitioner has requested.

Finally, we emphasize that any future attempt to litigate issues of practical impact should conform to the requirements established and. repeatedly recited in the decisions of this Board.[21]

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[20] Decision Nos. B-37-82; B-41-80; B-2-76; B-18-75; B-9-68

[21] E.g. Decision Nos. B-38-86; B-37-82; B-16-81; B-41-80 B-9-68.

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 Sergeants Benevolent Association be, and the same hereby is, dismissed.

DATED: New York, N.Y.
October 25, 1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
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