***Patrolmen's Benevolent Ass'n*, 41 OCB 64 (BCB 1988) [Decision No. B-64-88], *aff'd*,*Caruso v. Board of Collective Bargaining*, 161 A.D.2d 444, 555 N.Y.S.2d 133 (1st Dep't), *leave denied*, 76 N.Y.2d 706, 560 N.Y.S.2d 988 (1990).**

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, Inc.,

Petitioner,

-and-

THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondent.
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DECISION NO. B-64-88

DOCKET NO. BCB-937-87

DECISION AND ORDER

The Patrolmen's Benevolent Association (hereinafter "PBA" or "the Union") filed a scope of bargaining petition on February 20, 1987 requesting that the Board of Collective Bargaining determine whether a directive issued by Police Commissioner Benjamin Ward on February 17, 1987 concerns a matter within the scope of collective bargaining. The City of New York, appearing through its Office of Municipal Labor Relations (hereinafter "the City") filed its answer on March 27, 1987. The PBA submitted a reply on April 23, 1987.

In an interim ruling (Decision No. B-18-87) rendered on May 21, 1987, this Board found that the Union's petition raised an issue of practical impact, and directed that a hearing be held in order to permit the resolution of

factual questions relating to that issue. Accordingly, after several postponements at the request of the parties, a hearing was held on September 18, 1987 before a Trial Examiner designated by the Office of Collective Bargaining. Following the granting of several extensions of time requested by both parties, post-hearing briefs were submitted by the PBA and the City.

FACTS

On February 17, 1987, the Police Commissioner issued the following directive to all Police Department personnel:

> To: ALL COMMANDS
>
> SUBJECT: RESTRAINT OF PERSONS IN POLICE CUSTODY
>
> 1. EFFECTIVE IMMEDIATELY PERSONS IN POLICE CUSTODY WILL NOT BE RESTRAINED BY CONNECTING OR TYING REAR CUFFED HANDS TO CUFFED OR SHACKLED ANKLES OR LEGS.
> 2. IF EXTRAORDINARY RESTRAINT IS REQUIRED, THE EMERGENCY SERVICE UNIT WILL BE NOTIFIED TO RESPOND.
> 3. ANY PROVISIONS OF THE DEPARTMENT MANUAL OR OTHER DEPARTMENT DIRECTIVES IN CONFLICT WITH THIS MESSAGE ARE SUSPENDED.

The issue addressed by this directive is the use of a method of restraint known as "hog-tying" or full body immobilizing restraint.

The parties dispute whether this directive reflects existing Police Department policy, or constitutes a unilateral change in policy. The City contends that "hog-tying" is not and never has been an approved method of restraint in the Police Department. In contrast, the PBA asserts that the use of the full body immobilizing restraint is "essential" to Police Officers' safety in "appropriate circumstances" and that this form of restraint has been practiced, although in rare instances, and has been observed by superior officers without objection.

The Union's Evidence

In support of its position, the Union adduced the testimony of a single witness, Police Officer John Young. Officer Young testified on the basis of over 15 years of patrol duty prior to his appointment, in 1980, to the position of the PBA's Bronx Financial Secretary. He explained that the full body immobilizing restraint consists of handcuffing a subject's hands behind his back, cuffing or otherwise linking the subject's feet together, and then cuffing or tying the secured hands and feet together in the rear of the subject. Officer Young

testified concerning an incident in which he and his partner used the full body immobililzing restraint to secure a violent, emotionally disturbed person until the individual could be transported by ambulance to the hospital. The witness described how the subject had jumped on the Officers, struggled with them, and continued to kick at them even after being handcuffed. The enhanced restraint was then applied, according to the witness, in order to prevent injury to the Officers and the subject. Officer Young further stated that his patrol supervisor, either a Sgt. McIver or a Sgt. Lynch, responded to the scene of the incident, that he "assumed" that his supervisor observed the manner in which the subject was restrained, and that the supervisor did not reproach the Officers or otherwise indicate that the manner of restraint was improper.

Officer Young testified further that he remembered one other incident in which he observed a "hog-tied" prisoner inside of a patrol car. He did not testify as to the circumstances which led to that prisoner being so restrained. He said that he "assumed" that superior officers responded to the scene of this incident.

In response to cross-examination, Officer Young was not able to specify the dates of these incidents of "hog-tying". He conceded that he had not observed any "hog-tying" incidents since at least 1980.

Officer Young also identified several documents offered by the PBA's counsel. Union exhibits 1 through 4 are various safety and training memoranda which were issued by the Police Department. Exhibit 1 concerns the proper way to handcuff prisoners. Exhibit 2 advises how to deal with mentally disturbed persons, including methods of restraint. Exhibit 3 discusses, inter alia, the care to be used in subduing psychotic persons. Exhibit 4 also deals with the handling of mentally ill persons and describes various means of restraint which may be used. None of the memoranda identified by Officer Young and admitted into evidence contains any reference to "hog-tying" or any similar form of full body immobilizing restraint.

Finally, Officer Young identified a flier (Union Exhibit 5) which he said accompanied a piece of Departmental restraining equipment known as a "flex-cuf." The "flex-cuf" is a form of plastic handcuff which is designed for use in situations of mass arrests. An illustration

on the flier depicts the "hog-tying" of a prisoner using the "flex-cuf." The witness testified that the "flex-cufs" were purchased and stored by the Police Department, but noted that the flier was supplied by the manufacturer, not the Department.

The City's Evidence

The City called two witnesses to testify in support of its position. The first witness, Inspector Kevin Farrell, is assigned as the executive officer of the Police Academy. In that capacity, he oversees the training of all Police Academy recruits as well as the in-service training of all members of the Police Department. He testified that neither probationary Officers in the Academy nor members of the patrol force who receive in-service training are taught the use of "hog-tying". Inspector Farrell identified three training manuals concerning dealing with emotionally disturbed persons and physically restraining prisoners (City Exhibits 1 through 3). He stated that these manuals, which pre-date the issuance of the Police Commissioner's directive at issue herein, are distributed to probationary Police Officers who enter the Police Academy. He noted that there is no mention of "hog-tying" in any of the

documents.

In response to cross-examination, Inspector Farrell testified that in extraordinary circumstances, when Police Officers on the scene believe that some sort of enhanced restraint is required, they are to request assistance from the Department's Emergency Services Division. Members of that unit have available special equipment which can be used to immobilize a person. However, according to the witness, Emergency Services Division members also are prohibited from using "hog-tying".

The City's second witness, Chief John B. McCabe, is the chief of patrol for the New York City Police Department. He is a veteran of 41 years of service in the Department and is responsible for managing all of the uniformed patrol forces of the Department to insure the efficient and proper performance of police duty. Chief McCabe described an incident which served as the basis for the issuance of the directive which is at issue herein. He stated that an emotionally disturbed person was reported to have died while in custody after having been "hog-tied" by Officers of the Transit Authority Police. He further testified that prior to the report of that incident, the New York City Police Department

had not heard of the use of "hog-tying", but in response to that incident, decided that,

> "...just in case, we will put this order out to prevent our officers from doing that."

He stated that he had never seen "hog-tying" used and was not aware that it ever had been used by members of the Police Department.

Chief McCabe was asked why the statement,

> "Any provisions of the Department Manual or other Department directives in conflict with this message are suspended,"

was included in the Police Commissioner's directive on "hog-tying", if there had been no procedure in the past on that subject. He responded,

> "That paragraph is tacked onto every order that we put out. It's a normal thing that they have just in case something else is in conflict with it."

Positions of the Parties

Union's Position

The PBA argues that the Police Commissioner's issuance of the directive concerning "hog-tying" constitutes both a change in Departmental policy and a change in terms and conditions of employment for Police Officers. It

asserts that this change has a direct and negative impact upon the safety of members of the bargaining unit. Moreover, the Union contends that there existed a past practice of unit members using enhanced restraints in rare but significant cases involving violent, emotionally disturbed persons; and that such practice was known, or ought to have been known, by superior officers in the Department. The PBA submits that the Police Commissioner's unilateral action in prohibiting conduct which was the subject of a past practice has rendered Police Officers less able to protect themselves in situations in which their safety is threatened by violent and/or emotionally disturbed persons who must be taken into custody.

City's Position

The City submits that in issuing the directive at issue herein, it was exercising its managerial rights under Section 12-307(b) of the New York City Collective Bargaining Law (hereinafter "NYCCBL"). Specifically, the City alleges that the subject of the directive is within the scope of the City's right to determine the methods and means by which a part of the Police Department's operations is to be conducted. Moreover, the

City asserts that the directive does not constitute a change in policy, but reflects and reinforces existing Departmental policy. Furthermore, the City contends that the Union has failed to produce any evidence establishing a practical impact on safety resulting from the issuance of the Police Commissioner's "hog-tying" directive. For these reasons, the City requests that the PBA's petition be dismissed.

Discussion

In Decision No. B-18-87, we directed that a hearing be held on the sole question of whether the directive issued by Police Commissioner Ward on February 17, 1987 constitutes a change in policy which has created a practical impact upon the safety of members of the PBA. However, the Union's pleadings appear to raise one other issue, which we will address and determine initially.

The PBA alleges that the issuance of the directive in question constitutes a unilateral change in terms or conditions of employment for Police Officers, and thus is mandatorily bargainable. We reject this contention. We agree with the City that the issuance of a directive concerning the permissibility of the use of a particular

method of restraining persons taken into Police custody is within the scope of the City's express statutory prerogative to

> "... direct its employees; ... determine the methods, means and personnel by which government operations are to be conducted; ... and exercise complete control and discretion over its organization and the technology of performing its work..."[1]

In the face of this clear grant of managerial authority, the PBA's assertion that a decision apparently made within the scope of that authority involves terms and conditions of employment which are bargainable, is vague and conclusory. Accordingly, we hold that the managerial decision challenged herein is not, itself, within the scope of bargaining.

However, the law recognizes that a decision made by an employer in the exercise of its managerial prerogative, and, thus, outside the scope of bargaining, may give rise to issues within the scope of bargaining concerning the practical impact such decision has on matters of employment, including matters of employee safety.[2]

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[1] NYCCBL §12-307(b).

[2] NYCCBL §12-307(b) further provides that (continued...)

It was for this reason that we directed a hearing on the Union's claim of a practical impact on safety.

In Decision No. B-18-87, after noting the factual dispute between the parties concerning whether the Police Commissioner's directive constituted a change in Departmental policy, we stated:

> "Clearly, the City has no duty to bargain over a directive that merely reiterates existing policy since such an action could not, by its very nature, create a practical impact upon employees. If the evidence reveals that the directive does involve a change in policy, the Board will then determine whether such directive presents a practical impact, as the PBA alleges."[3]

(Footnote 2/ continued)

> "Decisions of the city or any other public employer on [matters of management right) 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."

[3] We note that a practical impact may arise even in the absence of a change in managerial policy or other affirmative management act, where it is established that management has failed to act on the face of changed circumstances, Decision Nos. B-31-88; B-43-86. However, the PBA has not alleged the existence of changed circumstances in the present case.

Thus, the burden was on the PBA to demonstrate (1) that the directive constituted a change in policy, and (2) that the change resulted in a practical impact upon employees. Having carefully considered the record of the hearing as well as all of the pleadings, exhibits, and memoranda of law submitted herein, we find that the Union has failed to establish either of the elements of its claim as set forth above.

The record shows that both experienced Police Officers and new recruits receive training in how to handle and restrain persons taken into custody, including specifically emotionally disturbed persons. There is no evidence that the Department's detailed training materials, or its instructors, ever referred to, authorized, or condoned the use of a full body immobilizing restraint or "hog-tying". The materials in evidence do provide direction in the safe and proper way to handcuff an individual. Such directions do not include the use of "hog-tying". The City's witness, Inspector Farrell, testified persuasively that the training of Police Officers at the Police Academy and in-service thereafter, was consistent with the training manuals and did not include the use of "hog-tying".

We also find credible the testimony of the City's other witness, Chief McCabe. We give great weight to his testimony that in 41 years of service on the Police force, he never saw "hog-tying" used and was not aware that it ever had been used by members of the Department. We note particularly Chief McCabe's current responsibility as supervisor of the Department's entire patrol force. In this capacity, it seems likely that any policy or practice of permitting the use of "hog-tying" would have come to his attention. His denial of the existence of such a policy was persuasive.

In contrast, the Union's attempt to prove the existence of a policy of the Department condoning the use of "hog-tying" in appropriate cases was supported only by the testimony of its witness, Police Officer Young, concerning two isolated incidents which occurred at some unspecified time prior to 1980. While we believe Officer Young's account of those incidents in which "enhanced restraint" or "hog-tying" was used to be truthful, we do not find that such evidence is sufficient to demonstrate the existence of a Departmental policy approving the use of such forms of restraint. We are not convinced that superior officers of the Department necessarily were

aware of the incidents as to which Officer Young testified; we note that the witness merely "assumed" that superior officers observed the "hog-tied" prisoners. In any event, we hold that evidence of two isolated incidents occurring more than seven years before the date of the Police Commissioner's directive is insufficient to rebut the City's testimony, supported by documentary evidence, that "hog-tying" was not an approved form of restraint.

Our conclusion, in this regard, is not altered by consideration of Union Exhibit 5, a flier containing an illustration of a "hog-tied" person, which was enclosed with supplies of plastic handcuffs ("flex-cufs") which were purchased by the Police Department. It is undisputed that the flier was printed and enclosed by the manufacturer, not the Department. The Union has not established any basis for us to find that the Department authorized or approved the contents of the flier or its inclusion with the "flex-cufs". Therefore, we do not attribute the "hog-tying" illustration to the Department or find it to constitute any evidence of Department policy.

For the reasons stated above, we find that Commissioner Ward's directive of February 17, 1987 did not constitute a change in existing Department policy. Consequently,

a practical impact could not have resulted from the issuance of that directive.

However, assuming, arguendo, that there was a change in policy, we would find that the PBA failed to demonstrate any practical impact resulting from the change. The Union's evidence showed only that Police Officers are at risk and have a difficult job when they confront emotionally disturbed persons. However, the record fails to establish that that inherent risk is made greater because Police Officers are prohibited from "hog-tying" such individuals. In the incident participated in by the Union's witness, Officer Young, the Officers were attacked by the emotionally disturbed person before they "hog-tied" that individual. Having disarmed and subdued that person, and having placed handcuffs on his wrists and ankles, it is not apparent why the further binding together behind his back of his cuffed hands and feet was essential to the safety of two armed Police Officers who were required to restrain him until an ambulance arrived. Moreover, the Department's witness, Inspector Farrell, testified that in extra-ordinary circumstances, when Officers on the scene believe that some sort of enhanced restraint is required, they are to request assistance from the Department's specially

trained and equipped Emergency Services Division. Accordingly, we believe that existing Department policy provides alternatives to "hog-tying" which are designed to enhance the safety of Police Officers as well as subjects in custody. Therefore, we find that the prohibition of the use of "hog-tying" does not have a practical impact on Police Officer safety.

Based upon the above, we will issue an order determining that the issuance of the directive in question does not raise issues within the scope of collective bargaining.

O R D E R

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

DETERMINED, that the directive issued by Police Commissioner Benjamin Ward on February 17, 1987 does not raise any issues within the scope of collective bargaining; and it is further

ORDERED, that the scope of bargaining petition filed by the Patrolmen's Benevolent Association herein be, and the same hereby is, dismissed.

DATED: New York, N.Y.
December 20,1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

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MEMBER

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