UPOA v. City, 41 OCB 66 (BCB 1988) [Decision No. B-66-88 (IP)]

Office of Collective Bargaining
Board of Collective Bargaining
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In the Matter of

UNITED PROBATION OFFICERS ASSOCIATION,
Petitioner,

-and-

THE CITY OF NEW YORK,
Respondent.

DECISION NO. B-66-88
DOCKET NO. BCB-1074-88
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In the Matter of

UNITED PROBATION OFFICERS ASSOCIATION,
Petitioner,

-and-

THE CITY OF NEW YORK,
Respondent.

DOCKET NO. BCB-1089-88
--------------------------------X

DECISION AND ORDER

On August 9, 1988, the United Probation Officers Association ("UPOA" or "petitioner") filed an improper practice petition, Docket No. BCB-1074-88, against the City of New York ("City" or "respondent") alleging a failure and refusal to bargain with respect to unforeseen savings generated by the hiring of approximately 180 Probation Officers ("POs") and Probation Officer Trainees ("POTs"). Claiming that the recently executed 1987-90 collective bargaining agreement was premised on savings realized from the hiring of 49 POTs over the life of the

agreement as well as from freezing the minimum salary rates of POs, the UPOA maintains that the savings generated by the additional hirings should also be made available to the bargaining unit. The City filed its answer on September 2, 1988. The Union filed a reply on September 13, 1988.

On September 16, 1988, the UPOA filed a scope of bargaining petition, Docket No. BCB-1089-88, which in addition to restating each allegation of the aforementioned proceeding, claims that the hiring of 125-150 POTs instead of POs has a practical impact on the workload, health and safety of the remaining Pos and Supervising POs. Consequently, the UPOA seeks a determination by the Board of Collective Bargaining ("Board") that its demand to bargain over the aforementioned hiring, by virtue of a resultant practical impact, is within the scope of bargaining. The City filed its answer on October 3, 1988. The Union filed a reply on October 10, 1988.

The above-described improper practice and scope of bargaining proceedings have been consolidated for decision herein as they involve the same parties, events and underlying factual circumstances.

Background

Between April and October of 1987, UPOA and the City engaged in collective bargaining which resulted in the execution of the

1987-90 Economic Agreement ("Agreement"), intended to be incorporated into the agreement successor to the one terminating on June 30, 1987 ("Separate Unit Agreement"), covering employees of the Department of Probation ("Department") represented by the UPOA.[1]

On or about April 29, 1987, the Union proposed to the City that savings achieved by the hiring of POTs instead of POs be used to fund an increased economic package for the bargaining unit. It is undisputed that the City initially responded that it would consider this proposal. At a bargaining session on May 26, 1987, the City expressed reservations as to whether the UPOA's proposal for the use of savings from POTs should be considered as a source for funding part of a wage increase. The parties agree that on June 23, 1987, the City unequivocally stated that the Union's proposal was unacceptable. The UPOA contends that the reasons given by the City for rejecting their proposal were twofold:

1) Commissioner Payne [who had favored the proposal] was no longer in charge, and

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[1] UPOA is the certified and designated bargaining representative of employees in the following titles:

Probation Officer Trainee
Probation Officer
Senior Probation Officer
Supervising Probation Officer

2) the Department could not function with more than 49 POTs.[2]

The parties agree that on or about July 21, 1987, the UPOA proposed instead that the economic package offered by the City, in the form of a straight wage increase for all Pos, be restructured to fund incremental increases for incumbent employees only. Subsequently, on or about October 1, 1987, UPOA and the City executed the Agreement which provides for a 5% general wage increase for incumbent UPOA bargaining unit members in each year of the contract. The Agreement also provides that the new hire minimums for POs in the first year of the contract shall only be increased by $500 rather than by 5%. It is undisputed that the savings derived from this partial freeze of the minimum for new hires was used to fund a service increment of $700 in addition to the 5% increase for employees with more than three years of service in the Department.

The Union asserts that in reliance upon certain misrepresentations made by the City during negotiations, it changed its bargaining position to the detriment of its members. The UPOA contends that it would not have agreed to execute the Agreement had the actual facts concerning the number of POTs to be hired been made known to petitioner. The UPOA alleges, upon

[2] Presumably this number is significantly less than the number proposed by UPOA in their April 29, 1987 wage proposal.

information and belief, that the Department now functions with about 150 POTs.

On May 18, 1988, the UPOA wrote to Mr. Harry Karetzky, the former 1st Deputy Director, Office of Municipal Labor Relations, in pertinent part, as follows:

> UPOA understands that approximately 180 new [POs] are about to be hired. As you remember, the recently negotiated agreement froze salaries for new hires. The projection of savings under the new contract did not take into account the new hiring. The Union believes that the new hiring constitutes "a significant change in circumstances which could not reasonably have been anticipated by both parties" under NYCCBL 12-311 a.(3). UPOA asks that the unforeseen savings be used to fund increases for its members.

Mr. Karetzky's written reply to this bargaining demand, dated July 8, 1988, stated that the City was "unable to reopen Contract proceedings for Probation Officers."

On August 9, 1988, the UPOA filed the instant improper practice petition alleging a violation of Section 12-306 a.(l) and (4) of the New York City Collective Bargaining Law ("NYCCBL"),[3] seeking an order from the Board directing the City

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[3] NYCCBL Section 12-306 a.(l) and (4) provide:

> 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; [and]
> >
> > (4) to refuse to bargain collectively in good faith on matters within the scope of

(continued...)

to

> bargain in good faith with respect to the allocation of savings generated by the hiring of approximately 150 Pos/POTs above the agreed upon number [and] to cease and desist from further violation of the NYCCBL.

After issue was joined in the above-mentioned proceeding, on September 16, 1988 the UPOA filed the instant scope of bargaining petition pursuant to Section 12-307 b. of the NYCCBL[4] and Rule 7.3 of the Revised Consolidated Rules of the Office of Collective

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(... continued)
> collective bargaining with certified or designated representatives of its public employees.

[4] NYCCBL Section 12-307 b. provides:

> It is the right of the city, or any 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. <u>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</u>. (emphasis added)

Bargaining (110CB Rules"),[5] seeking, in addition, bargaining over the practical impact of hiring POTs instead of POS.

Positions of the Parties

Petitioner's position

The UPOA bases its bargaining demand, in part, on Section 12-311 a.(3) of the NYCCBL, which provides:

> Nothing herein shall authorize or require collective bargaining between parties to a collective bargaining agreement during the term thereof, except that such parties may engage in collective bargaining during such term on a matter within the scope of collective bargaining where (a) the matter was not specifically covered by the agreement or raised as an issue during the negotiations out of which such agreement arose and (b) there shall have arisen a significant change in circumstances with respect to such matter, which could not reasonably have been anticipated by both parties at the time of the execution of such agreement.

The Union claims that the additional hiring of POs and POTs constitutes a significant change in the circumstances of affected employees which could not have been anticipated at the time the Agreement was executed. Therefore, the UPOA contends that it is entitled to reopen negotiations pursuant to 12-311 a.(3).

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[5] OCB Rule 7.3 provides, in pertinent part:

> **Scope of Collective Bargaining and Grievance Arbitration.** A public employer or certified or designated public employee organization which is a party to a disagreement as to whether a matter is within the scope of collective bargaining under Section 12-307 of the statute ... may petition the Board for a final determination thereof.

The petitioner also asserts that it dropped a wage proposal which allocated savings derived from hiring POTs in reliance upon the City's representation that they would not hire more than 49 POTs. Contending that certain misrepresentations made by the City induced UPOA to sign the Agreement at a substantially lower increase in wages, the Union argues that the City should be estopped from asserting that it bargained in good faith or that it fully complied with the strictures of Section 12-306 c. of the NYCCBL.[6] The Union also denies that its demand seeks to reopen a fully executed collective bargaining agreement in violation of

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[6] NYCCBL Section 12-306 c. 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:

(1) to approach the negotiations with a sincere resolve to reach an agreement;
(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
(4) to furnish to the other party, upon request, data normally maintained in the regular course of business, available and necessary for full and proper understanding and negotiation of subjects reasonably discussion within the scope of collective bargaining;
(5) if an agreement is reached, upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

Section 3 of the Agreement. Section 3 provides:

Prohibition of Further Economic Demands

> No party to this Economic Agreement shall make additional economic demands during the term of this Economic Agreement or during the negotiations for or the term of the Separate Unit Agreement. Any disputes hereunder shall be promptly submitted and resolved.

The UPOA argues that the "understanding reached [on or about October 1, 1987] was simply an economic agreement, not an overall collective bargaining agreement, with many unit demands remaining to be negotiated." Contrary to the City's contention that the improper practice petition violates Section 3 of the Agreement, the petitioner asserts that it is not making additional economic demands but rather "seek[ing] bargaining over unforeseen savings" at no additional cost to the City.

In response to the City's contention that the Union should be estopped from filing a scope of bargaining petition because it has already raised the matter in an earlier improper practice petition, the UPOA argues that the City "cite[s] no authority for this proposition nor any reason why the two cannot be pursued simultaneously."

In the scope of bargaining petition, the UPOA attempts to refute the City's contention that it is under no duty to bargain over managerial decisions involving the staffing and manning of its operations. According to the petitioner, the hiring of large

numbers of POTs rather than POs is subject to impact bargaining pursuant to Section 12-307 b. of the NYCCBL. Because POTs "are generally not assigned a full caseload" and "cannot handle, without supervision and training (which is virtually non-existent), as many cases," the UPOA contends that the resultant increase in workload on POs and Supervising Pos has a deleterious effect on the health and safety of these employees. Contrary to the City's assertion that the dispute concerns an "unfettered" management right, the Union contends that it has demonstrated that the management action complained of has created a practical impact on the working conditions of its members and, therefore, is a subject within the scope of bargaining.

Respondent's Position

The City maintains that the petitioner's filing of an improper practice petition, seeking to reopen negotiations of a fully executed collective bargaining agreement, is precluded inasmuch as section 12-311 a.(3) of the NYCCBL constitutes a bar to mid-contract bargaining on non-impact matters and on any matters that have already been fully negotiated, regardless of whether or not they are included in the contract.[7] Furthermore, the City points out that the parties themselves agreed that there

[7] The City cites Decision No. B-21-75.

would be no further economic or cost related demands. Referring to Section 3 of the Agreement,[8] the City contends that the Union's bargaining demand of May 18, 1988 is prohibited in that it constitutes an additional demand for an economic benefit at additional cost to the City.

The City contends that the parties have executed an agreement which clearly sets forth the wages to be paid to members of the UPOA bargaining unit which does not contemplate utilization of savings that result from the hiring of POTs. The City maintains that it has bargained in good faith and has fully complied with all of its bargaining obligations as set forth in Section 12-306 c. of the NYCCBL. In support of this position, the City notes that the Agreement was the end result of a mediated settlement between the parties.[9]

In response to the UPOA's contention that the City's hiring of 125-150 POTs instead of POs is subject to impact bargaining, the respondent argues that the Union has failed to allege facts which demonstrate that a practical impact attaches to the exercise of its management prerogative. Therefore, the City maintains that the hiring of POTs remains a nonmandatory subject.

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[8] Supra at page 9.

[9] Mr. Alan R. Viani, Deputy Chairman of the Office of Collective Bargaining, acted as a mediator for the parties at the July 21, 1987 bargaining session.

Finally, the City asserts that the UPOA should be estopped from its attempts to reopen negotiations through the use of the instant scope of bargaining petition inasmuch as the petition is merely duplicative of the improper practice petition "under the guise of a practical impact petition."

Discussion

As a preliminary matter, we will address the City's challenge as to the preclusive effect, if any, that the pendency of the Union's improper practice petition has on our consideration of a subsequently filed scope of bargaining petition involving the same underlying facts. The UPOA contends that the City cites no authority for its position.

Indeed, we held in Decision No. B-12-75 that

> [t]he pendency of an improper practice proceeding before the PERB alleging a refusal to bargain on a particular subject is no bar to consideration by this Board of the bargainability of the same subject.[10]

However, we have also determined that where a scope of bargaining petition asserts the same facts and claims as had previously been asserted <u>and</u> <u>denied</u> in the form of an improper practice charge,

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[10] It should be noted that between March 1973 and June 1978 the Public Employees Relations Board ("PERB") had exclusive jurisdiction over improper practice proceedings until the New York State Legislature amended the Taylor Law [Section 205(5)(d)] to restore to OCB jurisdiction to decide and remedy improper practices allegedly committed by public employers and/or public employee organizations subject to the NYCCBL.

we will decline to reconsider our prior holding.[11]

In the instant matter, inasmuch as no final determination as to the merits of the improper practice petition has been made, preclusion of the scope of bargaining petition is unwarranted. Furthermore, a refusal to bargain charge arising from an unforeseen change in circumstances, as compared with a request that this Board determine that a practical impact has resulted from the exercise of managerial prerogative, presents clearly distinguishable issues for our consideration.

Turning to the substantive issues raised by the parties herein, the UPOA alleges that because in its view, the recently negotiated Agreement contemplated savings generated by the hiring of only 49 POTs, the City's failure and refusal to bargain with respect to the additional and unforeseen savings that resulted from the hiring of more than 49 POTs constitutes an improper practice. The Union seeks to reopen negotiations on the subject of wages based upon "a significant change in circumstances," citing Section 12-311 a.(3) of the NYCCBL as authority for its bargaining demand. The City argues that there is no basis for raising the question of the use of savings from POTs wages in an improper practice petition, contending that Section 12-311 a.(3) precludes mid-contract bargaining on matters that have already

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[11] See, Decision No. B-35-82.

been fully negotiated.

One of the conditions precedent to the reopening of negotiations pursuant to Section 12-311 a.(3) is that the matter be within the scope of bargaining. Therefore, our initial inquiry focuses on whether the savings generated from hiring additional POTs constitutes a matter within the scope of bargaining. Failing that, the instant improper practice petition must be dismissed for failure to state a cause of action.

Pursuant to Section 12-307 b. of the NYCCBL, it is the City's management prerogative to determine the standards of services to be offered by its agencies and to determine the methods, means and personnel by which government operations are to be conducted, limited by the constraints that a resultant practical impact might impose. We have held that the hiring and deployment of personnel relates to matters of managerial prerogative over which the City has no obligation to bargain.[12] Clearly, the determination of the level of staff to be hired is a matter of management prerogative.[13] These matters are, at best, permissive subjects of bargaining; the City is free to consider and/or reject proposals relating to such subjects. Moreover, its participation in bargaining on a permissive subject does not

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

[13] See, Decision No. B-10-81.

"alter the nature of the subject if, as a matter of law, it is an exercise of management prerogative."[14] Therefore, the City is not estopped from maintaining that the hiring of additional POTs is outside the scope of bargaining.

As distinguished from mandatory subjects, neither party may insist on bargaining on permissive subjects of negotiation.[15] The statutory obligation or duty to bargain applies only to mandatory subjects of bargaining.[16] We have held that the duty to bargain does not compel agreement, even as to a mandatory subject. It only requires negotiation in good faith; that is negotiation with a sincere resolve to overcome obstacles and to reach an agreement.[17]

Having determined that the essence of UPOA's demand concerns a matter within the City's statutory management rights and that the rejection of an economic proposal linked to such a subject does not constitute a breach of the duty to bargain in good faith, we find that the refusal by the City to bargain over the use of savings derived from the hiring of POTs cannot form the basis of an improper practice claim.

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[14] See, Decision No. B-7-72. Cf. B-38-88; B-16-74; B-11-68.

[15] Decision No. B-11-68.

[16] Decision Nos. B-23-75; B-11-68.

[17] See, Decision No. B-11-68.

Accordingly, without passing on the question of whether the unanticipated increase in hiring of Pos and POTs constitutes a "significant change" within the meaning of Section 12-311 a.(3) of the NYCCBL, we find that the UPOA's demand does not concern a mandatory subject of bargaining and, thus, we dismiss the improper practice petition, Docket No. BCB-1074-88. We also find it unnecessary to reach the merits of the City's affirmative statement that Section 3 of the Agreement would preclude bargaining on any subject which would result in additional cost to the City.

Directing our attention to the allegations of practical impact resulting from the hiring of POTs instead of POs, we recognize that the instant scope of bargaining petition is an alternative attempt by the UPOA to bring its demand of May 18, 1988 within the scope of bargaining. Claiming that the allegedly realized savings over which it seeks bargaining is the product of a management action which also has caused a practical impact on the workload, health and safety of its members, the UPOA contends that the City is obligated to bargain over such savings. The City argues that UPOA has failed to demonstrate that a practical impact has resulted from the exercise of its management prerogative.

Clearly, Section 12-307 b. of the NYCCBL contemplates that the exercise of a managerial prerogative having an adverse

practical impact on the workload, health and safety of affected employees carries with it a duty on the part of the City to alleviate such impact. However, this duty will not arise until this Board has determined that a practical impact exists.[18] When a claim of practical impact specifically on workload is alleged, the union has the burden to come forward with details of the nature and extent of the practical impact in order to sufficiently establish that "an unreasonably excessive or unduly burdensome workload" has resulted.[19] Similarly, when an impact on health and safety is alleged, the union must set forth evidence sufficient to demonstrate the existence of such threat to safety.[20]

In the instant matter, the UPOA's allegation of practical impact on workload consists of a statement which, by implication, suggests that because Trainees cannot carry a full caseload, hiring POTs instead of POs will increase the caseload of the remaining POs. However, the UPOA offers no proof thereof and the record is devoid of any probative evidence which would support a claim of increased caseload or workload. Moreover, the hiring of additional employees in a bargaining unit ordinarily would be

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[18] Decision Nos. B-56-88; B-37-82; B-41-80; B-2-76; B-18-75; B-9-68.

[19] Decision Nos. B-56-88; B-37-82.

[20] Decision Nos. B-27-82; B-5-75.

expected to have the effect of decreasing the workload of incumbent employees, even though the newly-hired employees initially are less productive than incumbents. The UPOA has not explained how the distribution of unit work over a greater number of employees has increased, rather than decreased, the workload of incumbent POs.

The UPOA also alleges that the increased workload on Pos, as a matter of course, impacts on the health and safety of these employees. As evidence to support this contention, the UPOA states "[o]bviously large-scale hiring of Trainees increases the workload of [POs ... and this] increased workload endangers the health and safety of [POs]." Again, the Union presents no factual evidence to support their theory but relies solely upon this conclusory statement.

We are unpersuaded that the petitioner has sufficiently demonstrated that the hiring of POTs instead of POs has resulted in either an increased workload or a threat to safety so as to constitute a practical impact. We have held that a practical impact on the workload of employees does not automatically result even in cases where personnel reductions are involved.[21] In Decision No. B-2-76, a case in which Probation Officers sought a bargaining order over the impact of layoffs upon remaining

[21] Decision Nos. B-2-76; B-18-75.

employees, we found that while there had been some increase in workload, it did not rise to the level of "an unreasonably excessive or unduly burdensome workload as a regular condition of employment." As compared to the instant matter, the UPOA has not demonstrated that the hiring of POTs has resulted in any increase in workload of Pos, or that their terms and conditions of employment have been affected in any manner which we might deem to constitute a practical impact on workload. As we have long held, practical impact is a factual question, and the existence of such impact cannot be determined when insufficient facts are provided by the union.[22]

Similarly, because the UPOA has not brought any facts to bear which raise a substantial issue as to whether a safety impact has resulted sufficient to warrant a hearing in this regard, we must conclude that there is no basis for a finding that a practical impact on safety and health attaches to the management action at issue.

Accordingly, we also dismiss the instant scope of bargaining petition, Docket No. BCB-1089-88.

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

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 be, and the same hereby is dismissed, and it is further

ORDERED, that the scope of bargaining petition filed by the United Probation Officers Association be, and the same hereby is, dismissed.

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

MALCOLM D. MacDONALD
CHAIRMAN

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