

UPOA v. City, DOP, 41 OCB 69 (BCB 1988) [Decision No. B-69-88
(Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

UNITED PROBATION OFFICERS
ASSOCIATION,

Petitioners,

DECISION NO. B-69-88

DOCKET NO. BCB-1082-88

-and-

CITY OF NEW YORK, DEPARTMENT
OF PROBATION,

Respondent.

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INTERIM DETERMINATION AND ORDER

On August 26, 1988, the United Probation Officers Association ("Petitioner" or "Union") filed a scope of bargaining petition against the New York City Department of Probation ("Department" or "Respondent"), alleging that the respondent has refused to negotiate over the right of Probation Officers to carry firearms while on duty. The Department, appearing by the Office of Municipal Labor Relations, filed its answer to the petition on September 2, 1988. The Petitioner filed a reply on September 13, 1988.

BACKGROUND

Probation officers are responsible for the investigation and supervision of persons who have come under the jurisdiction of the courts. As part of their job duties, Probation Officers are required to make home visits to persons under investigation or supervision, and they are required to make initial and supervising investigations of cases involving family problems, such as neglect, child abuse, adoption, and non-support. They also must make field visits to probationers in order to provide services for such things as narcotic addiction, psychiatric disorders, unemployment, and marital problems. In addition, Probation Officers are called upon to enforce the payment of fines, restitutions, and reparations ordered by the court.¹

The Department maintains a special Field Services Unit comprised of approximately twenty-five Probation Officers, whose job it is to enforce violation of probation warrants and apprehend probationers who have violated the terms of their probation. Members of the Field Services Unit are the only Probation Officers currently authorized to carry firearms while they are working.

¹ New York City Department of Personnel job specification for the title of Probation Officer.

By letter dated July 12, 1988, the Commissioner of the Department of Probation informed the Petitioner that the Department would continue to adhere to its firearms policy as stated in its Code of Conduct. The letter reads, in pertinent part, as follows:

[A] member of the Department shall not carry or have in his possession any weapon while on duty except when specifically authorized by the agency head. At this time, only Field Services Unit personnel have my authorization to carry firearms while on duty.

According to the Petitioner, this letter furnishes the basis for its claim that the Department has refused to bargain over a change in the firearms policy.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner complains that, despite a request to do so, the Department refuses to bargain with the Union over the right of Probation Officers to carry firearms while on duty. This refusal is alleged to have a practical impact on Probation Officers' workload, health and safety. It requests that this Board order a hearing on the issue of practical impact, "in order that all of the facts can be fully developed."

In support of its position, the Petitioner claims that a large percentage of the Probation Officers' field visits to probationers must be made in Harlem, Bedford Styvesant, East New

York, and other areas of the city "proven statistically to have a high incidence of all types of crime." Therefore, according to the Petitioner, there has been an "uncontroverted" increase in the dangers to the officers' health and safety. It asserts that it is "common knowledge" that the spread of crack has "made some bad areas worse, and some marginal areas bad," and it asks for a hearing "on the issue of practical impact where all the facts can be fully developed."

The Petitioner also contends that, because Probation Officers are peace officers, they are authorized by law to carry a weapon at all times. In this regard, it notes that many Officers have been trained by the Department and are qualified to carry firearms. Nevertheless, the Petitioner complains, the Department refuses to grant permission to Probation Officers to carry firearms so that they may "protect themselves from attack or assault, and preserve their health and safety."

Furthermore, the Petitioner asserts, the Department's firearms policy has been inconsistent. It refers to Executive Policy and Procedure No. 10-8-85, which provides that Probation Officers may request permission to receive firearms training and establishes the position of Department Armorer, and it argues that this new policy is tantamount to a managerial change in policy which has a practical impact upon unit members.

Respondent's Position

The Respondent argues that this Board, in Decision No. B-23-85, has already held that the issuance of weapons to Probation Officers is a non-mandatory subject of bargaining. It further notes that, in Decision No. B-16-81, this Board has stated that a demand which seeks possession of weapons to aid in the performance of job duties is an infringement on management's prerogatives to determine the mission of the agency and the equipment necessary to accomplish that purpose.

The Respondent further asserts that the only limitation on management's prerogative under Section 12-307 b. of the New York City Collective Bargaining Law ("NYCCBL") is conditioned upon the establishment of practical impact as a result of management's action. According to the Respondent, the Petitioner has failed to allege any specific facts which support the existence of practical impact, "other than the conclusory statement that field visits somehow create a health and safety impact."

DISCUSSION

The New York City Collective Bargaining Law imposes a duty upon the employer, as well as upon the employees' representative, to bargain in good faith on matters that are within the scope of collective bargaining. These matters, which include wages, hours and working conditions, are regarded as mandatory subjects of

bargaining. This does not mean, however, that every decision of a public employer which may affect a term and condition of employment automatically becomes a mandatory subject of negotiation, and, although the parties also remain free to bargain over non-mandatory subjects, there is generally no requirement that they do so.²

The exception to this rule arises under NYCCBL 12-307 b. (the statutory management rights clause), which provides that a decision made by an employer in the exercise of its management prerogatives, and, thus, outside the scope of collective bargaining, may give rise to issues within the scope of bargaining concerning the practical impact such decision has on matters of employment, such as questions of workload, manning or safety.

Firearms Possession as a Mandatory Subject of Bargaining

In 1981, and again in 1985, we ruled on the issue of the mandatory or non-mandatory nature of bargaining demands concerning the on-duty possession of firearms by certain City employees. In both of these cases, we found that the demands were non-mandatory.

Decision No. B-16-81 determined a challenge by the City to the bargainability of a number of demands proposed by the

² See City School District of the City of New Rochelle, 4 PERB 3060 (1971). Also see Decision No. B-7-77.

Correction Officers Benevolent Association, one of which included "the right to retain weapons for premises use only" for certain unit members. We said that "[c]learly, if this demand seeks [on-duty] possession of weapons to aid in the performance of job duties, it is an infringement on management's prerogatives to determine the mission of the agency and the equipment necessary to accomplish that purpose." We found that the demand was not a term and condition of employment, and we held that it was not, therefore, a mandatory subject of bargaining.

Decision No. B-23-85 was issued in response to the City's request for a determination on whether a number of bargaining demands proposed by the Petitioner in this case, one of which included the right for "[h]andguns to be carried by all PO's or supervisors - wishing to do so," were mandatory subjects of bargaining. We said that a "demand which seeks possession of weapons to aid in performance of job duties is an infringement on management's prerogatives to determine the mission of the agency and the equipment necessary to accomplish that purpose," and we held the demand to be non-mandatory.

In the instant case, the Petitioner has put forth no new argument or theory that would persuade us to reverse our earlier decisions. Although the New York Criminal Procedure Law confers peace officer status upon Probation Officers, and, although Section 265.20 a.1(a) of New York's Penal Law exempts peace officers from the licensing requirements in connection with their

possession of firearms, the law does not give peace officers the absolute right to carry a firearm. The conduct of New York City Probation Officers as peace officers is governed by the rules and regulations of the Department of Probation, and its officers must yield to the conditions of their employment.³

Possession of firearms by on-duty Probation Officers raises questions concerning the performance of official duties. As such, it relates to the mission of the Probation Department and it is not a mandatory subject of bargaining.

Duty to Negotiate over Impact of Firearms Possession

The final sentence of NYCCBL 12-307 b. qualifies the City's exercise of its managerial authority by providing that questions concerning the practical impact that managerial decisions have on employees are within the scope of bargaining. The concept behind the practical impact provision is to provide a means of cushioning or reducing, to the extent possible, the adverse effects upon employees arising out of a decision made by the employer in the exercise of its statutory management prerogatives.⁴ The duty to bargain arises, however, only after an employer takes action or fails to take action in the face of changed circumstances in the exercise of its managerial

³ See Anemone v. Kross (as commissioner of Correction of the City of New York), 23 Misc. 2d 186, 200 N.Y.S.2d 761 (1960).

⁴ See Decision No. B-18-75.

prerogative, that creates a practical impact on its employees.⁵ In other words, although the Union has no right initially to demand bargaining over a subject that is non-mandatory, it still has the right to seek alleviation through bargaining of a practical impact resulting from a management decision.

The key distinction between mandatory bargaining and impact bargaining is that, under impact bargaining, it is management, not the Union, that holds the initiative. The Union's right with regard to impact bargaining comes into existence only after this Board makes a finding that management, pursuant to its authority under NYCCBL 12-307 b., has acted unilaterally in such a way as to create a condition through which practical impact occurs, and it has failed to alleviate such impact. The Union thereupon is entitled to seek alleviation through negotiation with the employer.

In this case, contrary to the Union's assertion, the promulgation of Executive Policy and Procedure No. 10-8-85, does not give rise to a requirement that the Department must bargain over the practical impact of its on-duty firearms policy. Policy No. 10-8-85, although untitled, is clearly concerned with off-duty possession of firearms, and reads in pertinent part as follows:

⁵ See Decision No. B-43-86.

Subject: To request permission to receive firearm certification training and to regulate the off-duty possession of firearms by members of the Department.

Therefore, even if the provisions of Policy No. 10-8-85 do, in fact, reflect a change in departmental policy, the change is immaterial to the issue raised herein concerning possession of firearms while on duty.

Having found no showing that the Department has taken an affirmative action to create a duty to bargain over the impact of its firearms policy, we turn to the Union's allegation that, because the Department has failed to respond to a change in societal conditions throughout the City, a duty to bargain has been created through its omission to act.

In Decision No. B-43-86, we said that, in order to avail itself of the practical impact procedures of the law, it is incumbent upon the Union to demonstrate that the alleged safety impact results either from a management decision or action, or from management's inaction in the face of changed circumstances. It is an allegation of inaction by the Department, in the face of changed circumstances involving an issue of safety that is presented here.

Ordinarily, it must be determined by this Board that an alleged practical impact actually exists before the duty to bargain over practical impact arises. Thus, our determination that practical impact exists is normally a condition precedent to

the resolution of the question of whether there are any bargainable issues arising from the impact. While this is an issue of fact which may require a hearing, we will not direct a hearing merely on the basis of unsupported allegations or a conclusion that impact has occurred or will occur.⁶

In unusual situations, however, we have recognized that the potential consequences of the exercise of a management right are so serious as to give rise to an obligation to bargain before actual impact has occurred. In such cases, we have said that the existence of a clear threat to employee safety constitutes a per se impact, which warrants the imposition of a duty to bargain over the impact of a management decision prior to the time that the decision is implemented.⁷ This does not mean, however, that a union need only claim a practical impact on safety in order to require the employer to bargain. The question whether there is a clear threat to employee safety, if disputed by the employer, is a matter to be determined by this Board before the obligation to bargain arises. The fact that a threat to safety may constitute a per se impact justifying the imposition of a duty to bargain does not relieve the union of the responsibility of first proving the existence of such threat to safety.⁸

⁶ Decision Nos. B-31-88; B-38-86; and B-23-85.

⁷ See Decision No. B-34-88; B-31-88; B-6-79; B-5-75; and B-3-75.

⁸ Decision Nos. B-31-88; B-37-82; and B-5-75.

In the instant case, the Petitioner contends that the failure of the Department to act in response to the widespread abuse of the drug "crack" endangers the safety and security of Probation Officers. According to the Petitioner, the way to ameliorate this danger is to allow Probation Officers to arm themselves with firearms while on duty.

On the record before us, we are unable to determine whether the Department's inaction has resulted in a practical impact on employee safety. However, we are persuaded that, in the circumstances of this case, the Petitioner's showing has raised a substantial issue of safety impact which is sufficient to warrant a hearing.

We note that Probation Officers are required to supervise convicted criminals and are required to visit such individuals in high crime areas of the City. The Union asserts that the spread of the drug "crack" has increased the danger to Probation Officers making field visits. These circumstances lend support to the Petitioner's claim that management's failure to act has created a practical impact upon employee safety. Accordingly, we will direct that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining, in order to allow the parties the opportunity to present evidence and arguments for the purpose of establishing a record upon which we may ascertain whether there exists any practical impact on the safety of the employees involved.

However, as we have stated above, the question of whether to permit the on-duty possession of firearms by employees is a matter solely within management's discretion and is not a mandatory subject of bargaining. This fact is not changed by the existence of any practical impact resulting from the exercise of management's discretion in this case. Thus, we emphasize, any duty to bargain that might arise in this case would concern the alleviation of practical impact resulting from management's firearms policy, and would not concern the firearms policy itself.

In any bargaining which might be mandated as a result of a finding of practical impact in this matter, the Union would consequently acquire no entitlement to bargain on the subject of the right of Probation Officers to carry firearms while on duty. Moreover, in the event that bargaining on alleviation of practical impact reached impasse, an impasse panel would not have the authority either to direct that Probation Officers be permitted to carry firearms or otherwise to disturb the City's decision in the exercise of its management prerogative to prohibit the carrying of firearms.

ORDER

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 Department of Probation acted in the proper exercise of its reserved management rights, as defined in Section 12-307 b. of the New York City Collective Bargaining Law, when it refused to modify its existing firearms policy regarding the carrying of firearms by Probation Officers while on-duty; and it is hereby

ORDERED, that the request by the United Probation Officers Association for an order declaring that a change in the existing firearms policy is a matter within the scope of collective bargaining between the parties be, and the same hereby is, denied; and it is further

ORDERED, that the issue of practical impact on the safety of employees represented by the United Probation Officers Association due to the refusal of the Department of Probation to alter its policy concerning the on-duty possession of firearms, is to be referred to a Trial Examiner designated by the Office of Collective Bargaining for the purpose of conducting a hearing and

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establishing a record upon which this Board may determine whether any practical impact exists.

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

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER
