UPOA v. City, DOP, 41 OCB 70 (BCB 1988) [Decision No. B-70-88 (Scope)]

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

UNITED PROBATION OFFICERS ASSOCIATION,

Petitioners,

-and-

CITY OF NEW YORK, DEPARTMENT OF PROBATION,

Respondent.
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DECISION NO. B-70-88

DOCKET NO. BCB-1107-88

INTERIM DETERMINATION AND ORDER

On November 2, 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 impact on the health and safety of Probation Officers who have been given new job specifications and have been assigned to the Field Services Unit. The Department, appearing by the Office of Municipal Labor Relations, filed its answer to the petition on November 21, 1988. The Petitioner filed a reply on December 9, 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, the Officers are required to make home visits to persons under investigation or supervision, and they must also make field visits to probationers in order to provide services relating to such matters 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]

On September 28, 1988, the New York City Department of Personnel notified the Petitioner by letter that it planned to revise the job specification for the title of Probation Officer. The letter reads as follows:

> Based on a request from the Department of Probation and after careful study, we have determined that it is appropriate to revise the class specification for subject title. Attached is a copy of our proposed revision.
>
> Please be advised that the City Personnel Director plans to adopt this revised class specification five (5) days from now.

[1]New York City Department of Personnel job specification R 7.5.78, for the title of Probation Officer.

Attached to the letter was a revised job specification for the title of "Probation Officer." Among the revisions was a newly-added section containing the following provision:

> When assigned to the Field Services Unit, may be required to perform violation of probation warrant investigations; make collateral field visits; enforce violation of probation warrants; execute warrants; perform "failure to report" investigations and requisite field visits; detain or take into custody probationers wanted by law enforcement agencies; assist the Office of General Counsel in the preparation of cases for the Violation of Probation process; and execute search orders.

The Petitioner, by its Counsel, set forth its objections to the proposed revised class specification, in a letter addressed to the City Personnel Director, as well as to the Office of Municipal Labor Relations, and the Commissioner of the Department of Probation, and dated October 3, 1988, which reads, in pertinent part, as follows:

> A review of the proposed revised class specifications indicates that the major revision therein appears to pertain to the insertion of "Typical Tasks" to be performed by Probation Officers assigned to the Field Services Unit and the physical and psychological examinations required for assignments to Field Services.
>
> * * *
>
> [At the present time, Probation Officers in the Field Services Unit] are required to carry weapons, wear bullet proof vests and work side by side with law enforcement officers from the New York City Police Department. The danger to the health and safety of Probation officers serving in the

> Field Services Unit are inherently greater than those faced by Probation Officers serving in traditional functions of supervision, investigation or CLO in the Supreme, Criminal or Family Courts.
>
> * * *
>
> [The Union asks the Department] to refrain from formalizing the "Typical Tasks" of Probation Officers in the Field Service Unit until such time as [the Department] meets with [the Union] to bargain over the health and safety dangers facing Probation Officers in the Field Services Unit....

The Office of Municipal Labor Relations, in behalf of the Respondent, replied by letter dated October 12, 1988, which reads, in pertinent part, as follows:

> The subject matter of your missive is the job specification for Probation Officer. Determination of the content of a job specification is a managerial prerogative.
>
> * * *
>
> In accordance with the [New York City Collective Bargaining Law], the City will not negotiate over the content of job classification for Probation Officer or any other job title.

POSITIONS OF THE PARTIES

Petitioner's Position

The Petitioner complains that despite a request not to do so, the Department has unilaterally changed the traditional job functions of Probation Officers assigned to the Field Services Unit, thereby making their work much more dangerous, while

refusing to bargain over such change. The Petitioner requests that this Board find that the change in the Probation Officer job specification is within the scope of collective bargaining, and it asks that a hearing an the impact on the Officers' health and safety be ordered.

The Petitioner supports its contention by noting that Probation Officers assigned to the Field Services Unit are required to carry weapons, wear bullet proof vests, and work side by side with law enforcement officers from the New York City Police Department. Because Field Service Unit Officers must detain or take into custody wanted probationers, their job is allegedly much more dangerous than the more typical and routine probation work of supervision, investigation and court liaison.

The Petitioner asserts that these facts alone demonstrate that "the practical impact is self-evident." It further supports its safety impact claim, however, through the submission of sworn statements of two Field Service Unit Officers who allegedly were exposed to unusually dangerous situations.

In her affidavit, Officer Camille Piccininni detailed an incident that occurred in August of 1988, when she and two other Field Service Unit Officers went to a Brooklyn address to execute a warrant: "We knocked on the door and heard a commotion including breaking glass. We went outside with guns drawn. A probationer who happened to be out on the street told us the

place was a crack den and they have Uzi submachine guns. We went back and got into the apartment. Inside were Uzis and shotguns, some in plain sight and some in closets, and a quantity of crack. We found one person inside and took her to central booking: the rest had gotten away out the windows."

Officer Piccininni also described the equipment issued to her by the Department, which includes a handgun, chemical Mace, handcuffs and a bulletproof vest. She said that each month she gets about 40 violation of probation warrants to execute. In order to do so, she must go to the location and search for an individual. Once found, the person is arrested, handcuffed, and taken "to the Police or to the pens at the appropriate court." She claimed that between July and October of 1987, she took part in a pilot program at the 78th Precinct Warrant Squad where she teamed up with a police officer as her partner. She stated that although they served primarily probation warrants, they sometime served other warrants as well.

Field Services Unit Officer Kenrick Mead asserted that he carries the same Department-issued equipment as Officer Piccininni, and that he, too, often works side by side with the police: "Sometimes I must call for police assistance, e.g., to break down a door to apprehend a probationer."

Officer Mead described his first case in the Field Service Unit: "[W]e went to a neighborhood of abandoned buildings in East

New York to try to locate a drug dealer. I drew my weapon and kept it at the ready, while I waited at the back door of the basement where we thought the man could be found. He had a child hostage. The police were called in. Eventually he was subdued." Officer Mead went on to describe a second account of a recent case when he attempted to apprehend a probationer: "I went to a basement apartment to locate [a probationer]. His girlfriend said she thought he had a gun. I drew my weapon at that point. We called for police reinforcement (emergency services). The police broke down the door. A hostage negotiations team arrived. We finally located [the subject] and took him into custody."

The Petitioner contends that, although generally the content of a job specification may be a non-mandatory subject of bargaining and a management prerogative, the Department's rights are not entirely unfettered. It cites a PERB case in support of its position that new duties which are beyond the traditional functions of Probation Officers are mandatorily bargainable.[2] According to the Petitioner, the inclusion of Field Service Unit

[2]In Village of Waverly, 21 PERB ¶4560 (1988), the PERB held that work rules setting forth duties of police dispatchers were not mandatorily negotiable to the extent that such duties were inherent in function of dispatcher. However, the Board went on to hold that a rule requiring dispatchers "to maintain police-station office in neat and clean condition" was mandatorily negotiable because that function was not inherent in the function of a police dispatcher.

work in the Probation Officer job specification adds police functions ("execute warrants", "detain or take into custody probationers wanted by law enforcement") to "what essentially has been a social work position," and thus has a practical impact upon unit members.

Respondent's Position

The Respondent agrees that Probation Officers assigned to the Field Service Unit are involved in the apprehension of probationers, and that, in the performance of this task, they are armed and wear bullet proof vests. It argues, however, that as peace officers, Probation Officers are authorized to use physical force and deadly physical force in making an arrest.[3]

The Respondent then cites several Board decisions[4] in support of its contention that management has the right, under §12-307b. (the statutory management rights clause) of the New

[3]The Respondent cites New York Criminal Procedure Law §2.10(24), which confers peace officer status on Probation Officers, and §2.20.1(b), which authorizes all peace officers to use deadly physical force in making an arrest or preventing an escape of certain felons.

[4]Decision Nos. B-4-74; B-16-74; B-5-75; and B-21-87.

York City Collective Bargaining Law ("NYCCBL")[5] to determine the standards of service to be offered, and the methods, means and personnel by which governmental operations are to be conducted.

In the Respondent's view, the gravamen of the Union's petition is that the use of certain equipment in the work of some Probation Officers makes their job a matter which must be bargained over. The Respondent contends, however, that this Board, in Decision No. B-43-86, has held that management has the prerogative to determine the content of job classifications. It

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[5]NYCCBL §12-307b. reads 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. 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.

further argues that the PERB has held that qualifications for appointment and employment are a management prerogative and are not mandatory subjects of bargaining.[6] The Respondent concludes that the Department is, therefore, not required to bargain over the revised job classification, and that portion of the Union's petition should be dismissed.

Finally, the Respondent asserts that the Petitioner has failed to demonstrate that the Department's action has resulted in a practical impact within the meaning of NYCCBL §12-307b., as the Board has previously required,[7] and that it has failed to allege facts sufficient to warrant a determination that there is a prima facie practical impact on safety, as the Board has previously required in Decision No. B-37-87.

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[6]The Respondent cites P.B.A. of Hempstead, 11 PERB ¶3072 (1978) wherein the Board held that establishing qualifications for employment is a management prerogative and is not a mandatory subject of negotiation, and Onondaga Community College Federation of Teachers, 11 PERB ¶3045 (1978), wherein the Board held that a bargaining demand concerning the selection process for department chairperson is not a mandatory subject of bargaining because it relates to the method or procedure for selection of employees for promotion.

[7]The Respondent contends that the Board has previously held, in Decision Nos. B-38-85, B-23-85, B-34-82, and B-27-80, that as "a precondition of the Board's consideration of an impact claim, the petitioner must specify the details thereof, the allegations of mere conclusions is insufficient."

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.[8]

The exception to this rule arises under NYCCBL 12-307b. (the statutory management rights clause), which provides that the effects of a decision made by an employer in the exercise of its management prerogatives, may, under certain prescribed circumstances, fall within the scope of bargaining. If the effects of a management decision reach the level specified, they constitute a "practical impact" in the words of the statute, and may give rise to mandatory bargaining for the purpose of

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

establishing means or methods for alleviating the impact.

Content of Job Classification as a Mandatory Subject of Bargaining

Section 12-307b. of the New York City Collective Bargaining Law gives management the express right to determine the content of a job classification.[9]

As the Union points out, the PERB has held that, under certain circumstances, job content of current employees may be a mandatory subject of bargaining.[10] However, the cases before the PERB did not involve a statutory management rights provision such as is applicable in the instant matter. The existence of the management rights provisions of NYCCBL §12-307b. is the critical distinguishing factor that renders the PERB rulings inapposite to a case arising under the New York City Collective Bargaining Law.

In the instant case, the Petitioner has put forth no evidence which could demonstrate that the parties voluntarily agreed, in any way, to limit the Department's right unilaterally

[9] See Decision Nos. B-3-69; B-7-69; B-24-72; and B-43-86.

[10] See: Village of Waverly, 21 PERB ¶4560, supra. Also See: Scarsdale P.B.A. v. Village of Scarsdale, 9 PERB ¶3075 (1975), wherein the Board held that job content of current employees is a mandatory subject of negotiations provided that "the negotiations demand would not narrow the inherent nature of the employment involved."

to change the content of the job classification for Probation officers, or otherwise limit the exercise of management's rights under NYCCBL §12-307b. We find, therefore, that the Respondent has no statutory or contractual duty to bargain over the revision in the class specification for the title of Probation Officer.

Duty to Negotiate Over Impact of the Revised Job Classification

The final sentence of NYCCBL §12-307b. qualifies the reservation of managerial prerogatives to the City 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 alleviating the adverse effects upon employees arising out of a decision made by the employer in the exercise of its statutory management prerogatives.[11] The duty to bargain arises, however, only after an employer takes action, in the exercise of its managerial prerogative, that creates a practical impact on its employees. In other words, although the Union has no right initially to demand bargaining over a subject that is non-mandatory, it does have the right to seek alleviation through bargaining of a practical impact resulting from a management decision.

[11]See Decision No. B-18-75.

We originally addressed the question of what constitutes practical impact in Decision No. B-9-68, where we found that the term "practical impact" refers to "unreasonably excessive or unduly burdensome workload as a regular condition of employment." In 1975, we expanded upon the concept of practical impact when we said that any exercise by management of its prerogative to lay off employees is deemed to have impact per se, and that the City is obligated to bargain over impact of the layoff decision immediately, even before the layoffs actually take place.[12] Shortly thereafter, we further expanded the scope of per se impact when we found that where a "proposed change is challenged as a threat to safety, it must, if there is a dispute as to bargainability, be submitted to this Board which, on the basis of the relevant evidence, will determine whether or not the proposed plan in fact involves a threat to safety."[13]

With these principles in mind, we turn to the question of practical impact in the present case.

We are persuaded that the Petitioner has made a sufficient showing to warrant a hearing on its safety impact claim. The affidavits of Officers Piccininni and Mead describe extremely

[12]Decision No. B-3-75.

[13]Decision No. B-5-75.

dangerous situations. More fundamentally, we agree that the fact that the Department of Probation, which has a staunch policy against on-duty possession of handguns, has seen fit to equip Field Services Unit Officers with firearms, chemical Mace, and body armor, is a self-evident indication of the level of danger it attaches to this work. The Respondent's argument that Probation Officers are peace officers, and are, therefore, authorized to use deadly physical force, is in no way dispositive of the danger.

For all of the aforementioned reasons, we find that a substantial issue regarding the safety of Probation Officers assigned to the Field Services Unit has been raised, and we shall direct that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining in order that we may consider evidence of the practical impact on safety as it may affect Probation Officers assigned to this Unit.

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 issue of a practical impact on the safety of Probation Officers assigned to the Field Services Unit be referred to a Trial Examiner designated by the Office of Collective Bargaining for the purpose of conducting a hearing and establishing a record upon which this Board may determine whether any practical impact exists.

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

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