Lieutenant's Benevolent Ass. v. City & NYPD, 49 OCB 14 (BCB 1992) [Decision No. B-14-92 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
-------------------------------------x
In the Matter of the Improper
Practice Proceeding

-between-

LIEUTENANTS BENEVOLENT ASSOCIATION, DECISION NO. B-14-92

Petitioner, DOCKET NO. BCB-1421-91

-and-

CITY OF NEW YORK and
NEW YORK CITY POLICE DEPARTMENT,

Respondents.
-------------------------------------x

DECISION AND ORDER

On September 30, 1991, the Lieutenants Benevolent Association ("the LBA") filed a verified improper practice petition against the City of New York and the New York City Police Department ("the Department"). The petition charges that the Department committed an improper practice when it announced its intention to implement solo supervisory patrols, and then refused to bargain over anticipated productivity gains that
allegedly would result, in violation of Section 12-306a.(1) and (4)
of the New York City Collective Bargaining Law ("NYCCBL").[1] The

---

[1] NYCCBL §12-306a. provides as follows:
Improper practices; good faith bargaining.
a. 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 12-305] 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.

City, appearing by its Office of Labor Relations, filed a verified answer and a supporting affidavit on October 16, 1991. The Union filed a verified reply and supporting affidavit on October 25, 1991.

BACKGROUND

This case is one in a series of actions brought by the LBA and another union, the Sergeant's Benevolent Association ("SBA"), in an attempt to prevent or forestall the Police Department from instituting solo supervisory patrols for its lieutenants and sergeants. The issue of solo patrols for supervisors has historical roots tracing back thirteen years.

In April of 1979, the Department issued an order that would have caused sergeants and lieutenants in specified precincts under certain "triggering" conditions to operate patrol vehicles by themselves.[2] As soon as the order was issued, the SBA filed an improper practice petition alleging that the plan would have a practical impact upon the safety of police sergeants. The LBA intervened on behalf of lieutenants, making the same claim.

Following an evidentiary hearing, this Board, in Decision No. B-6-79, held that the implementation of solo patrols for sergeants and lieutenants would have a practical impact upon their safety because of three specific deficiencies in the provisions of the order. The decision ordered the parties to attempt to alleviate these three areas of safety impact through prompt negotiations.

The negotiations did not produce an agreement, and a three-member impasse panel was appointed to take evidence and to issue a report and make recommendations for alleviating the safety impact. The panel issued its Report and Recommendations on October 3, 1980. On November 13, 1980, the SBA filed a new petition requesting clarification of certain of the panel's recommendations. The parties held settlement discussions during the next

---

[2] Operations Order Number 40, dated April 6, 1979.

several months while the new petition was pending.

On April 15, 1981, by memorandum of agreement, the SBA and the City agreed to modify several of the panel's recommendations.[3] On May 6, 1981, the LBA also signed the Sergeants' Memorandum of Agreement, thereby accepting it and agreeing to be bound by its terms.

There is no evidence that Operations Order No. 40, as modified by the Sergeants' Memorandum of Agreement, was implemented during the ensuing decade. By letter dated November 7, 1990, however, the Department informed the SBA that it intended to implement solo supervisory patrols beginning in April of 1991. Both the LBA and the SBA met with the City on several occasions in this regard during November and December of 1990, but the discussions produced no results, other than agreement by the City to provide certain requested information.

On December 18, 1990, the SBA filed a scope of bargaining petition against the City, alleging that the City had refused to negotiate over the safety impact of the Department's announced plan to implement solo supervisory patrols. The LBA filed a similar petition against the City on January 11, 1991. The petitions contend that the circumstances concerning policing in New York City have changed since the parties adopted the Sergeants' Memorandum of Agreement in 1981. As a result, the Unions claim that the plan has become unsafe. The Unions also claim that they are entitled to share the cost savings that the plan allegedly would generate.

In Decision No. B-9-91, a consolidated interim decision and order issued on February 21, 1991, this Board ordered the scope of bargaining petitions held in abeyance pending consideration of the solo supervisory patrol program by the parties' Labor-Management Safety Committees. As directed, the parties

---

[3] "Memorandum of Agreement, On the Subject of Radio Motor Patrol, Between the Sergeants' Benevolent Association and the City of New York" [referred to hereinafter as "the Sergeants' Memorandum of Agreement."]

held various joint safety committee meetings between February and September 1991. On September 11, 1991, however, the City informed the LBA and the SBA that the Department intended to implement solo supervisory patrols for the day shift, effective November 4, 1991, in fourteen of the precincts listed in Operations Order Number 40.

By letters dated September 25, 1991, the LBA and the SBA advised the Office of Collective Bargaining that the Labor-Management Safety Committees did not resolve the safety impact issues and that the City was about to implement the solo supervisory patrols unilaterally. The LBA's letter also charged that the City had not bargained over productivity or gainsharing. Both Unions asked that their scope of bargaining petitions be reactivated. Those cases have been assigned to a Trial Examiner and await an evidentiary hearing.

POSITIONS OF THE PARTIES

Union's Position

The LBA claims that the City has refused to bargain in good faith over the productivity gains that the Union says will be realized from the implementation of the solo supervisory patrol program. It contends that although the parties have reopened negotiations for a new contract to replace the Agreement that expired on October 31, 1990, the City allegedly refuses to discuss gainsharing with the Union.

According to the LBA, on September 11, 1991, the City's chief negotiator said that he would be unavailable to meet until the City concluded an impasse hearing involving the Patrolmen's Benevolent Association. Even then, he allegedly indicated that the City would not bargain over productivity or gainsharing before November 4, 1991, when the solo supervisory patrol program would begin. According to the LBA, this conduct by the City constitutes regressive and bad faith bargaining. In the Union president's view, the unilateral implementation of the program was "in retaliation for the lack of

progress in the LBA-SBA-City Labor Management Safety Committee meetings that were held from February through June, 1991."

Responding to the defenses raised by the City in its answer, the LBA stipulates that "[a]ny reference to Section 12-306a.(1) of the [NYCCBL] is a typographical error and should be changed to Section 12-306a.(4)."

The LBA then argues that the changed circumstances concerning policing in New York City defeat the City's defenses of res judicata and collateral estoppel.

Next, the LBA denies the City's claim that Decision No. B-9-91 imposed no duty on management to bargain before the Department could implement the solo supervisory patrol program. In the LBA's view, the decision did not address the issue of whether the Union had the right to an agreement before the Department could implement the program.

Finally, the Union asserts that a practical impact finding by this Board is not a condition precedent to a decision on whether the exercise of a management prerogative gives rise to a bargaining obligation.

In summary, the central theory of the LBA's claim is that the Department's unilateral decision to implement solo supervisory patrols without first negotiating to impasse with the Union is an improper practice within the meaning of Section 12-306a.(4) of the NYCCBL.

City's Position

The City maintains that it is under no duty to bargain over the implementation of the solo supervisory patrol program because it has the managerial right, under Section 12-307b. of the NYCCBL,[4] to determine the job

---

[4] NYCCBL §12-307b., the statutory management rights clause, provides, in pertinent part, as follows:

> It is the right of the city [to] . . . direct its employees; . . . determine the methods,

(continued...)

assignments of its employees. It notes that in Decision No. B-6-79, this Board specifically found that the solo supervisory patrol program was a proper exercise of the City's reserved managerial powers. In view of this decision, according to the City, the doctrines of res judicata and collateral estoppel should prevent any further consideration on the issue of whether the Department's unilateral implementation of the program constitutes bad faith bargaining.

In the event that the Union's claim is not precluded, the City asserts that it is premature because there has been no determination that practical impact will result or has resulted from the assignment of lieutenants to solo patrols. According to the City, in a practical impact case, before there can be a refusal to bargain finding, practical impact must first have been found to exist and must remain unalleviated. Here, the City points out, both the LBA's and the SBA's scope of bargaining petitions currently are pending in another proceeding. Therefore, this Board has not yet evaluated and determined the merits of the Unions' practical impact allegations.

The City next denies that the implementation of the solo supervisory patrol program violated NYCCBL §12-306a.(1). It argues that the LBA did not state a prima facie case in this respect because it neither showed how it was discriminated against, nor showed that the employer's action discouraged police lieutenants from exercising the rights granted to them by the NYCCBL.

Finally, while the City reiterates its belief that it has no bargaining duty on the issue of solo supervisory patrols, it stresses that it has never refused to negotiate with the LBA over productivity gains realizable from the program. It maintains that its chief negotiator confirmed the City's

---

[4] (...continued)
> 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. . . .

willingness to bargain on this issue on September 11, 1991, although he indicated that his calendar would not permit a bargaining session to be scheduled before October 4, 1991. The City insists, however, that the discussions take place in context of the general wage package, and not as an isolated issue. The City also points out that, thus far, it has not received any specific demands on productivity or gainsharing from the LBA.

DISCUSSION

To the extent that the LBA's petition seeks practical impact bargaining, we note that this is identical to its claim in Docket No. BCB-1356-91, a case that is pending presently before this Board. Therefore, we will not consider practical impact as a dimension of this case, for doing so would serve no purpose and would only result in duplicative litigation. This exclusion, together with the LBA's stipulation that it had no intention of pursuing a NYCCBL §12-306a.(1) charge, leaves to us only the question of whether the City unlawfully has refused to negotiate on a subject that is mandatorily bargainable.

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 classified as mandatory subjects of bargaining. This does not mean, however, that every decision of a public employer that may affect a term and condition of employment automatically becomes a mandatory subject of negotiation. Although the parties also remain free to bargain over non-mandatory subjects, generally there is no requirement that they do so.[5]

It is well settled that management has the unilateral right to decide,

---

[5] Decision Nos. B-5-90; B-1-90; B-31-89; B-70-88; and B-7-77.

within a general job description of a title, the job assignments that are appropriate for employees in that title. Similarly, management has the right to assign work in a way it deems necessary to maintain the efficiency of governmental operations.[6] As long as the tasks assigned are an aspect of the essential duties and functions of the position, there is no mandatory obligation to negotiate when they are altered.[7] Thus, the critical issue for our consideration in this case is whether the announced assignment of certain police lieutenants to solo supervisory patrols involves a change in their wages, hours or working conditions, triggering a mandatory obligation to bargain under NYCCBL Section 12-307a.(4).

Based upon the record before us, we cannot conclude that the implementation of the Department's plan necessarily will involve changes in terms and conditions of employment, since it is not apparent how, if at all, the announced assignment of lieutenants to solo patrols has changed or will change an aspect of the essential duties and functions of their position. In the absence of such a demonstrable change, there can be no mandatory bargaining obligation on the City's part. If there is no mandatory duty to bargain, the City could not have committed an improper practice when it announced its intention to detail certain lieutenants to solo supervisory patrols without first bargaining to impasse over gainsharing or any other aspect of the redeployment.

With respect to projected productivity gains, we reiterate that productivity gains realized by the implementation of the solo supervisory patrol program is mandatorily bargainable, within a more general negotiation of wages and wage comparability. We find no evidence that the City has been unwilling to bargain in this context, however. The statement of the

---

[6] NYCCBL §12-307b.; Decision Nos. B-61-91; B-56-88; B-37-82; B-35-82; and B-5-80.

[7] Decision Nos. B-61-91 and B-56-88.

Commissioner of Labor, on September 11, 1991, that he could not attend a bargaining session before October 4, 1991 because of a scheduling conflict is not unreasonable and does not constitute a refusal to bargain. The City's unrefuted allegation that the Unions thus far have not submitted specific demands on productivity or gainsharing further argues against our sustaining a refusal to bargain charge. The City cannot be expected to negotiate over a demand that has not yet been formulated and duly presented.

For all of these reasons, we find that the LBA has not sustained its improper practice claim, and we shall dismiss the petition herein in its entirety.

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 Lieutenants Benevolent Association and docketed as BCB-1421-91 be, and the same hereby is, dismissed.

Dated: New York, New York
April 30, 1992

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

STEVEN H. WRIGHT
MEMBER