SBA v. City & NYPD, 49 OCB 15 (BCB 1992) [Decision No. B-15-92 (IP)]

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

-between-

SERGEANT'S BENEVOLENT ASSOCIATION, DECISION NO. B-15-92

Petitioner, DOCKET NO. BCB-1431-91

-and-

CITY OF NEW YORK and
NEW YORK CITY POLICE DEPARTMENT,
:
Respondents.
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DECISION AND ORDER

On October 21, 1991, the Sergeant's Benevolent Association ("the SBA") 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 the safety impact and the 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 City, appearing by its Office of Labor

[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.

Relations, filed a verified answer on October 30, 1991. The Union filed a verified reply on February 3, 1992.

BACKGROUND

This case is one in a series of actions brought by the SBA and another union, the Lieutenants Benevolent Association ("LBA"), in an attempt to prevent or forestall the Police Department from instituting solo supervisory patrols for its sergeants and lieutenants. 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 several months while the new petition was pending.

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

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.

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 SBA and the LBA 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 held various joint safety committee meetings between February and September 1991. On September 11, 1991, however, the City informed the SBA and the LBA

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[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."]

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 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 SBA claims that the City has refused to bargain in good faith on safety impact, and 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 the matters of safety and gainsharing. In the SBA's view, the City's alleged intransigence undermines the Union's status as bargaining representative in the eyes of the sergeants assigned to the solo patrols.

The SBA notes that this Board, on February 21, 1991, in Decision No. B-9-91, ordered the parties' Labor-Management Safety Committees to consider and recommend changes in the solo supervisory patrol program. According to the Union, on April 10, 1991, the Department proposed experimental solo patrols in seven precincts. A joint Safety Committee reportedly met "on numerous occasions" after the proposal was made, but it could not reach an agreement for recommending changes. Yet, on September 11, 1991, the City's chief negotiator announced that the Department would be implementing solo supervisory patrols in fourteen precincts on November 4, 1991.

The SBA maintains that, in past proceedings, it clearly has established that solo supervisory patrol is inherently dangerous. According to the Union, the Department's unilateral action, without conducting appropriate negotiations on the issue of safety, constitutes a failure to comply with the clear mandate of Decision No. B-9-91. It argues that the decision directed the parties to negotiate in good faith in the joint Safety Committee, and, in the event that they could not agree, to bring the matter back to this Board for a decision on the merits. The Union insists that the decision did not give the City or the Department permission to implement the solo supervisory patrol program unilaterally.

In addition, the SBA notes that Decision No. B-9-91 held that projected productivity gains realized from the implementation of the solo supervisory patrol program would be mandatorily bargainable if sought within a more general negotiation of wages and wage comparability. It also notes that, 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, a delay of nearly one month. The Union maintains that this delay, coupled with the fact that the Department's initial proposal of a seven precinct program grew to fourteen, and was imposed unilaterally without bargaining over productivity or gainsharing, constitutes bad faith bargaining.

Responding to the defenses raised by the City in its answer, the SBA first contends that the City's assertions of res judicata and collateral estoppel do not apply because the City has mischaracterized the Union's petition. The SBA stresses that the essence of its claim is that management, in instituting the solo supervisory patrol program, disregarded the procedure outlined by this Board in Decision No. B-9-91. This disregard, according to the Union, turns the dispute into a brand new case, with issues completely different from those resolved in previous controversies between the parties. For this same reason, the SBA argues that its claim cannot possibly be

premature.

Next, the SBA claims that the City violated Section 12-306a.(1) of the NYCCBL by making "a calculated attempt" to demean the Union and to undermine the leadership's authority. In the Union's view, safety always is a term and condition of employment. It argues that the Department, by implementing the solo supervisory patrol program unilaterally without allowing the Labor-Management Safety Committees the opportunity to complete their work, made the SBA leadership appear unable to defend its members' interests.

Finally, the SBA denies the City's claim that management was under no duty to bargain before implementing the solo supervisory patrol program. To the contrary, it alleges that the Department's failure to negotiate in good faith during the meetings of the joint Safety Committee delayed the implementation of a safe solo patrol program unjustifiably. This, in turn, assertedly had an impact on gainsharing, because it delayed the consideration of resulting savings that could have benefited the Union's membership.

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 assignments of its employees. It

[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, 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. . . .

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 sergeants 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 SBA's and the LBA'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 SBA 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 sergeants from exercising the rights granted to them by the NYCCBL. While the City recognizes that a violation of NYCCBL §12-306a.(1) can occur where an employer refuses to bargain over a change affecting a term and condition of employment, it stresses that this Board already has determined that the implementation of solo patrols is a nonmandatory subject of bargaining.[5] Therefore, according to the City, since the employer has no obligation to bargain on this issue, its refusal to bargain cannot be an improper practice. With respect to potential productivity savings stemming from solo supervisory patrols, the City contends that nothing in the NYCCBL entitles the SBA to a gainsharing agreement prior to implementation of the program.

Further, according to the City, a violation of NYCCBL Section 12-306a.(1) cannot be found unless a union shows that the employer had knowledge of union activity, and that the union activity was a motivating factor behind the employer's alleged discriminatory action. The City contends that, in this case, the SBA has failed to allege the Department took any discriminatory action or engaged in anti-union animus.

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 SBA over productivity gains realizable from the program. It maintains that its chief negotiator confirmed the City's 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 SBA.

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[5] Citing Decision Nos. B-6-79 and B-5-75.

DISCUSSION

The SBA's pleadings in this case focus upon three basic issues: First, the Union contends that Decision No. B-9-91 ordered the parties to negotiate in good faith in their joint safety committees; by implementing the solo supervisory patrol program unilaterally, the City assertedly violated that order. Second, the Union contends that the unilateral implementation of the program undermines its organizational and representational stature. Third, the Union contends that the implementation will have a practical impact on employees' safety.

Dealing with the practical impact bargaining question first, we note that this claim is no different from the SBA's claim in Docket No. BCB-1351-91, a case that is pending presently before this Board. In Decision No. B-9-91, we ordered the SBA's scope of bargaining petition held in abeyance until the parties' Labor-Management Safety Committee could have a chance to consider and recommend changes in the program. The Committee members had adequate time to study the solo patrol program that the Department proposed from April to September of 1991. Apparently, the Safety Committee could not reach a consensus and, on September 25, 1991, the Unions reactivated their scope of bargaining claims that had been held in abeyance by Decision No. B-9-91. These safety impact cases currently are active and await imminent commencement of an evidentiary hearing. 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 leaves to us only the question of whether the City unlawfully has refused to negotiate on a subject that is mandatorily bargainable, and, if so, whether the refusal has undermined the SBA's representational status and ability.

Contrary to the SBA's assertion, we never "directed the parties to negotiate in good faith in the joint safety committees." Decision No. B-9-91 merely ordered the safety committees to "consider and recommend changes in the

program." We issued that order under the belief that the parties' joint safety committees abide by the precept followed by most labor-management committees in the United States: groups dedicated to improving employer-employee relations in the workplace outside the negotiated relationship. The function of labor-management committees is not generally perceived to be the conduct of ordinary collective bargaining. As an adjunct to collective bargaining in a traditionally advisory setting, the labor-management committee is intended to seek areas in which cooperative and voluntary courses of joint labor-management action can be fashioned. The duty to bargain, which drives ordinary collective bargaining, has no part in the functioning of these committees. It follows that there can be no question of failure of the duty to bargain -- i.e., refusal to bargain -- attached to the proceedings and actions of labor management committees.

We next examine whether there may have been an independent right to bargain over the Department's unilateral implementation of the solo supervisory patrol program outside the joint safety committee context.

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.[6]

It is well settled that management has the unilateral right to decide, within a general job description of a title, the job assignments that are appropriate for employees in that title. Similarly, management has the right

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

to assign work in a way it deems necessary to maintain the efficiency of governmental operations.[7] 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.[8] Thus, the critical issue for our consideration in this case is whether the announced assignment of certain police sergeants 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 sergeants 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 sergeants to solo supervisory patrols without first bargaining to impasse over gainsharing or any other aspect of the redeployment.

With respect to the SBA's representational stature, the fact that an otherwise proper and legal action of the employer may incidentally have a detrimental effect upon the Union does not necessarily mean that the action constitutes an improper practice. Only where it also could show that management's action was intended to harm the Union would we find that the element of improper motivation essential to a finding of improper practice had

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

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

been established.[9] Thus, even if we accept the SBA's claim that the unilateral imposition of the solo patrol program undermined its stature, to establish improper motivation, the Union must show also that the City knew that its action would adversely affect sergeants' representational rights, and that the negative impact was a motivating factor behind the City's decision to make the revisions.[10] These allegations of improper motive must be based upon statements of probative facts rather than upon recitals of conjecture, speculation and surmise.[11] Since the SBA has not alleged, let alone proven, that the City intended to deprive unit members of any of the rights guaranteed to public employees by Section 12-305 of the NYCCBL, there is insufficient support for the Union's claim that the City has undermined its organizational rights.

Finally, with respect to projected productivity gains, we reiterate that the subject of 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 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 SBA has not sustained its

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[9] Decision No. B-47-89.

[10] Decision Nos. B-47-89; B-8-89; B-7-89; B-2-86; B-3-84; and B-43-82.

[11] Decision Nos. B-47-89 and B-55-87.

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 Sergeant's Benevolent Association and docketed as BCB-1431-91 be, and the same hereby is, dismissed.

Dated: New York, New York
April 30, 1992

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

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MEMBER

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MEMBER

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