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OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Scope of
Bargaining Proceeding

--between--

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, INC.,

Petitioners,

--and--

THE POLICE DEPARTMENT OF THE CITY
OF NEW YORK,

Respondents.
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Decision No. B-18-93

DOCKET NO. BCB-1533-92

DECISION AND ORDER

On October 19, 1992, the Patrolmen's Benevolent Association ("the PBA" or "the Union") filed a scope of bargaining petition seeking a determination on whether the announced intention of the Police Department of the City of New York ("the Department") to hire civilian personnel to staff a vacant position in the Department's Evidence and Property Clerk's Office is within the scope of mandatory bargaining, as provided under the New York City Collective Bargaining Law ("the NYCCBL").[1] On November 12, 1992, the Department, appearing by

[1]Section 12-307 of the NYCCBL provides, in pertinent part, as follows:

> **Scope of collective bargaining; management rights.** a. Subject to the provisions of subdivision b of this section . . . public employers and certified or designated public employee organizations shall have the duty to bargain in good faith on wages . . . , hours . . . , [and] working conditions

(continued...)

the Office of Labor Relations, filed an answer to the petition. The Union filed a reply on December 23, 1992.

BACKGROUND

On October 9, 1992, Departmental Bulletin No. 39 was transmitted to all commands of the Department, announcing a proposal to hire civilian personnel for a vacant position in the Department's Office of Evidence and Property Control. In addition, a memorandum to Property Clerk Division Personnel from the Commanding Officer in the Property Clerk Division, also dated October 9, 1992, advised that resumes would be accepted at the Employee Management Division, 1 Police Plaza, Room 1014. The memorandum was signed by Deputy Inspector Bruce J. Major.

The position at issue is newly created as part of the Mayor's "Safe Streets/Safe City" Civilianization Program. The program was created to enable uniformed officers to perform duties more directly related to law enforcement by using civilian personnel in positions that relate to the operational functioning of the Police Department. Under the program, uniformed personnel currently employed in the Department's Property Clerk's Office

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(...continued)
b. . . . [Q)uestions concerning the practical impact that decisions (of the city) . . . have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

would be reassigned to more traditional law enforcement duties of patrol and investigation.

POSITIONS OF THE PARTIES

Union's Position

The Union's petition alleges that, by promulgating Bulletin No. 39 which announced a position in the Departmental property clerk's office to be filled by civilian personnel, the Department's proposed action would have a "substantial and definable impact upon the parameters of the contract of employment and the economic welfare of the membership." The Union says that "a new position within the Police Department ... is contrary to the best economic interest of Police Officers," adding that "the transfer of jobs assigned to uniformed membership to civilians is a serious economic threat to the membership" and that the "economic interest of its membership" compels the Union to initiate this proceeding. Specifically, the Union states that the "substantial economic impact" which it alleges "is a unilateral change of a term and condition of employment, and is an issue within the scope of collective bargaining between the Petitioner and the Respondent[.]"

The Union's petition also alleges a violation of Section 12-307a(4) of the NYCCBL.[2] The Union says no collective bargaining took place between it and the Department on the subject of civilianization of the property clerk's office. Moreover, the Union says the bulletin is "deemed contrary to the purported good faith of the City in its contractual agreements between the Petitioner and the City."

In its reply, the Union argues that civilianization of the Property Clerk's Office has a practical impact on the Union itself and on working conditions of its membership.[3] The Union

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[2] Section 12-307a provides, in pertinent part, as follows:

> **Scope of collective bargaining; management rights.**
> a. Subject to the provisions of subdivision b of this section . . . public employers and certified or designated public employee organizations shall have the duty to bargain in good faith on wages . . . . hours . . . . [and] working conditions except that:
>
> (4) all matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police . . . services, shall be negotiated with the certified employee organization[] representing the employees involved . . . .

[3] Petitioner's Reply provides, in pertinent part, as follows:

> 14. With the replacement of police officers in the Office of the Property Clerk by civilians, it is quite clear that the reduction of police officer assignments in the Office of the Property Clerk, city wide, not just at One Police Plaza, Manhattan, has a practical employment impact on the Petitioner and the employment agreement between the Petitioner and the City of New York.

(continued...)

(... continued)

> 15. It is obvious that such a breach of employment agreement decimates the ranks of employment by the membership in the Petitioner PBA which clearly has a practical and economic impact ...
>
> 18. It is respectfully submitted that to remove police officers from their security duties without negotiating with

states that, if management prerogative permits the City to civilianize the Property Clerk's Office, then the City has a duty to bargain over the matter.[4]

The Union's reply also alleges that "petitioners have a decided property interest in their careers." The Union's reply states:

> The respondents appear to disregard the property interests of petitioners. In this regard, the (Board] is referred to Drogan v. Ward, 674 F.Supp. 832 (1987), a case which discussed property interests of police officers . . . While that case involved promotional examinations, the importance of property interest rights in police careers courses through the court's decision. The court is referred to Regents v. Roth, 408 U.S. 564 . . . which emphasizes the constitutionally protected property interests of police officers in their careers and employment.

> the PBA has a chilling effect on all collective bargaining negotiations and has a practical impact on the wages, hours, terms and conditions of employment by the membership in the Petitioner PBA.
>
> 19. Accordingly, it is firmly alleged that Police Department Bulletin No.39 has a practical impact on the Petitioner ....

[4] Paragraph 17 of the Union's reply provides as follows:

> If, as the Respondents allege that the replacement of police officers in the Office of the Property Clerk is a managerial prerogative, it has a duty to negotiate the issues thereof collectively with the Petitioner PBA.

Department's Position

The Department, in its answer, acknowledges the creation of a new civilian position entitled "Evidence and Property Control Officer." The Department states that the uniformed personnel currently performing the function under that title will be reassigned to more traditional law enforcement duties. The Department further states its rationale for the redeployment of uniformed officers as being conducive to the effective, efficient and safe delivery of police functions.

In its answer, the Department cites Section 12-307b of the NYCCBL for the proposition that it may rightfully exercise its sole discretion over the conduct of governmental operations, determinations of the content of job classifications, and performance of its work. The Department also cites decisions by this Board which construe this section of the NYCCBL as guaranteeing the City's unilateral right to assign and direct employees and to determine and allocate duties of members of collective bargaining units, provided that parties to the contract have not limited that right by their own agreement.[5] The Department says the Union has alleged no limitation on that managerial right. The Department calls for dismissal of the

[5] Decisions No. B-68-90, B-56-88, B-37-87, B-23-87, B-15-87, B-6-87, B-4-83, B-16-81, and B-26-80.

Union's petition, saying it makes no prima facie case for practical impact which otherwise would necessitate bargaining on matters over which the Department could ordinarily exercise its discretion.

DISCUSSION

Jurisdiction

Under the Rules of the City of New York, a public employer or public employee organization may submit a petition for the determination as to whether a matter is within the scope of collective bargaining under Section 12-307 of the NYCCBL.[6] In a scope of bargaining proceeding, if we determine that a matter concerns public employee wages, hours or working conditions, it will be found to be mandatorily bargainable.[7] As to matters

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[6] Section 1-07 of the Rules of the City of New York provides, in pertinent part, as follows:

> (c) **Scope of collective bargaining and grievance arbitration.** A public employer or certified or designated public employee organization which is party to a disagreement as to whether a matter is within the scope of collective bargaining under Section 12-307 of the statute, or whether a matter is a proper subject for the grievance and arbitration procedure established pursuant to Section 12-312 of the statute or under an applicable executive order, or pursuant to collective bargaining agreement may petition the board for a final determination thereof.

[7] Section 12-307 of the NYCCBL provides, in pertinent part:

a. Scope of collective bargaining.

(continued...)

other than wages, hours and working conditions, mandatory bargaining is required only if the public employer's actions within its area of managerial prerogative are found to have a practical impact on such matters as, for example, workload, manning or safety of its employees.[8]

In practical impact cases, no duty to bargain arises before we find the existence of such an impact either from facts alleged in the employee organization's scope of bargaining petition or from evidence on the record after a hearing to consider matters not self-evident from the pleadings.[9] The determination of the existence of a practical impact is a condition precedent to determining whether any bargainable issues

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7 (... continued)
[P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages .... hours ..., (and] working conditions ....

[8] Section 12-307 of the NYCCBL provides, in pertinent part:

b. **Management rights**.

It is the right of the city ... acting through its agencies, to ... determine the methods, means and personnel by which government operations are to be conducted ... and exercise complete control and discretion over its organization ... Decisions of the city ... are not within the scope of collective bargaining, but 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.

[9] Decision No. B-25-91 at 26.

arise from the practical impact.[10] If we find a practical impact, generally the employer is given a reasonable opportunity to alleviate it by unilateral action. We are not empowered to enjoin the employer from exercising its management prerogative but rather are empowered to require the parties to bargain to alleviate the impact which is alleged to be objectionable. If management has failed to alleviate the impact after a reasonable period of time, then the parties will be required to negotiate a resolution, and finally, if necessary, will be permitted to submit the matter to impasse resolution.[11]

We will require the parties to bargain immediately rather than await unilateral action by management if the matter concerns safety, or if, by its nature, it implicitly impinges upon employees in such matters as, for example, workload or manning.[12] If we find from the face of the pleadings that the matter will have an impact per se, then the parties will be ordered to bargain immediately to alleviate the impact.

In a non-per se safety matter, if we find that the Union has stated sufficient facts in its pleadings to warrant further inquiry, a hearing will be ordered to receive evidence as to whether the employer's proposed action will indeed have an

[10] Id.

[11] Id., quoting B-9-68 at 7-8.

[12] Decision No. B-25-91 at 27.

impact on the safety of employees.[13] If a safety impact is found from evidence presented at the hearing, we will order bargaining before the objectionable proposal is implemented.

Apart from determining matters concerning scope of bargaining, a petitioner may also seek a determination as to whether a public employer or employee organization is or has engaged in an improper practice as defined by Section 12-306 of the NYCCBL.[14] A finding that a public employer or employee organization had refused to negotiate in good faith on a matter described by statute or case law as being within the scope of bargaining would constitute an improper practice, and an order for the parties to bargain in good faith could be issued to resolve the dispute. It should be noted that a refusal to bargain concerning a claimed practical impact would not constitute an improper practice since, prior to our finding that a practical impact exists, there is no duty to bargain.

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[13] Id. at 3 2.

[14] Section 1-07 of the Rules of the City of New York provides, in pertinent part, as follows:

> (d) **Improper practices**. A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed with the board . . . by one (1) or more public employees or any public employee organization acting in their behalf or by a public employer together with a request to the board for a final determination of the matter and for an appropriate remedial order . . . .

The Instant Proceeding

In the instant scope of bargaining matter, the PBA has asked us to hold that the Police Department's announced plan to hire civilians for the position of Evidence and Property Clerk concerns a mandatory subject of bargaining. The petition and reply also state that the Department failed to negotiate before it promulgated notice of the civilianization program. Although the Union's pleadings speak in terms of impact, which are appropriate in a scope of bargaining proceeding, they also allege failure to negotiate over the change, an appropriate allegation in an improper practice proceeding. Therefore, while we may infer an improper practice claim from the petition and reply, we nevertheless analyze the instant matter in terms of scope of bargaining, because the Union has filed a petition seeking a determination as to a matter within the scope of bargaining.

Subsections (4) and (5) of Section 12-307a of the NYCCBL, upon which the Union in part bases its petition, concern, not scope of bargaining, but level of bargaining.[15] These sections come into play when a dispute arises as to whether a particular organization is the proper agent to represent employees in a collective bargaining matter.[16]

[15] Decisions No. B-11-68, B-4-69, and B-12-75.

[16] Id.

As to the claim that the Department's unilateral action has resulted in an economic impact on the Union's membership, the Union argues that such economic impact is a practical impact giving rise to a duty to bargain. While Section 12-307b addresses the bargainability of managerial decisions which result in a practical impact, we have not recognized practical impact of a purely economic nature. Economic matters are considered wages, which are mandatorily bargainable. The term "wages" has been held to include, for example, salaries and pay differentials,[17] specialization pay,[18] productivity gains,[19] reimbursement of travel employment-related travel expenses,[20] supper allowance,[21] and wage increases in lieu of Increased Take Home Pay.[22] A claim concerning refusal to bargain over wages must be brought as an improper practice proceeding. We shall not consider it in this proceeding to determine scope of bargaining.

Moreover, the record reflects that no Police Officers will be laid off as a consequence of the use of civilians and that the Police Officers to be replaced will be reassigned to

[17] Decision No. B-19-79.

[18] Decision No. B-4-89.

[19] Decision No. B-15-92.

[20] Decision No. B-63-91.

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

[22] Decision No. B-1-74.

more traditional law enforcement duties. In the absence of any loss of employment by unit employees, it is not apparent that there is any economic loss over which to bargain. Accordingly, even if we were to view this as an improper practice claim, we would dismiss it for failure to state a cause of action.

The PBA's reliance, in a scope of bargaining proceeding, upon Fibreboard Paper Products Corporation v. National Labor Relations Board, et al., relating to "contracting out" or "subcontracting," is misplaced.[23] Fibreboard concerned a private sector labor dispute, not a public sector matter as is currently before this Board. The disagreement in Fibreboard concerned an allegation of an unfair labor practice as defined under the National Labor Relations Act. In Fibreboard, bargaining unit members had been terminated because independent contractors had been hired to perform the same work under similar conditions. By contrast, in the instant proceeding, no Union members have been terminated nor has the Police Department indicated that the civilianization of the Property Clerk's Office will result in the termination of any members of the bargaining unit.

[23] 379 U.S. 203, 85 Sup.Ct. 398 (1964). In Fibreboard, a private sector employer was required to bargain with the maintenance employees' union representative concerning the employer's proposal to hire an independent contractor to do maintenance work which had been performed by members of bargaining unit. Contracting out there entailed the termination of the employment of members of the entire bargaining unit.

Notwithstanding the fact that Fibreboard can be distinguished from the case at hand, were we to apply Fibreboard's definition of terms and conditions of employment to the case before us, nevertheless we must note the narrowness of the holding in Fibreboard. There, the Court stated:

> We are ... not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case -- the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment -- is a statutory subject of collective bargaining ....[24]

Three Justices concurred:

> The question posed is whether the particular decision sought to be made unilaterally by the employer in this case is a subject of mandatory collective bargaining within the statutory phrase "terms and conditions of employment." That is all the Court decides. The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that this employer's decision to subcontract this work, involving "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment," is subject to the duty to bargain collectively.[25]

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[24] Id. at 215; 85 Sup.Ct. 398, 405.

[25] Id. at 218; 85 Sup.Ct. 398, 407.

Similarly, the concurring Justices emphasized the narrowness of the Court's holding, stating:

> While employment security has ... been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.
>
> ... Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment ....[26]

The present case is unlike Fibreboard in yet another respect. Here, the record is devoid of evidence that employees represented by the PBA will suffer loss of employment or benefits as a consequence of their replacement by civilians. The affected Police officers are to be reassigned to law enforcement duties

[26] Id. at 223, 85 Sup.Ct. 398, 409.

commensurate with their existing job specifications. In addition, this is not a case of subcontracting or contracting out. Rather, it is a case of the public employer's exercising its managerial prerogative under Section 12-307b of the NYCCBL, to determine which of its employees will perform which governmental operations. Because Fibreboard is inapplicable to the facts of this case, we find that it creates no duty to bargain here.

Further, we note that the issue of civilianization of certain functions within the Police Department of the City of New York, is not one of first impression. It is well settled that civilianization programs are a proper exercise of management rights grounded in Section 12-307b of the NYCCBL and that implementation of such programs will not give rise to a duty to bargain under Section 12-307a unless we find that the employer's exercise of these rights results in a practical impact. We have held this to be so in a variety of contexts: booking suspects,[27] clerical, record-keeping, time-keeping, roll call, payroll, communications, statistical, analytical, and mechanical repair functions,[28] directing traffic,[29] and operating vehicles.[30]

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[27] Decisions No. B-35-82 and B-23-81.

[28] Decision No. B-26-80.

[29] Decision No. B-33-80.

[30] Decision No. B-34-82.

In the instant case, the Department's avowed intent to reassign police personnel to more traditional law enforcement activities is indistinguishable from the City's reassignment of police officers at Central Booking, in an earlier civilianization case. There, we found:

> [T]he City's decision ... to reassign ... police officers ... to duties "within the ambit of traditional police duty" and "more directly related to law enforcement" is within the City's right, under NYCCBL, Section (12-307b) to determine the "methods, means and personnel by which governmental operations are to be conducted." ... Therefore, we hold that the implementation of the civilianization program is a management prerogative, and we are compelled to find that it is not within the scope of collective bargaining.[31]

Here, the Union has failed to specify, for example, how the civilianization of the Evidence and Property Clerk's Office has endangered the safety of its members, how their workload has been changed to their detriment, how their bargaining unit has been depleted, specifically how the Department's expressed intent to hire civilians will affect members of the Union, or how the civilianization program would bring about an impact of any other nature. These matters must be pleaded in more detail than the Union has done here before we may find any cause to look further for a practical impact which could create a duty to bargain.

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[31] Decision No. B-26-80.

In short, the Union's pleadings are facially devoid of facts alleging either evidence of the existence of a practical impact, or of some violation of the NYCCBL. In addition, the Union has cited no case law which would indicate that the courts are not in agreement with our previous holdings on civilianization. In fact, we take administrative notice of the Court's affirmation of our findings in earlier cases.[32] As for the allegations in the Union's reply regarding breach of contract and property rights, they lie beyond this Board's jurisdiction. For all of the foregoing reasons, we shall dismiss the PBA's petition in its entirety.

[32] Patrolman's Benevolent Association v. Robert J. McGuire and City of New York, B-8-80, aff'd, Sup. Ct. N.Y.Cty., Spec. Term, Pt.1, NYLJ (4/21/81) at 7; Patrolman's Benevolent Association v. Robert J.McGuire and City of New York, B-26-80, aff'd, Sup.Ct., N.Y. Cty., Spec. Term, Pt.1, Index No. 16971/80 (7/26/81); and Patrolman's Benevolent Association v. Robert J. McGuire and City of New York, B-27-80, aff'd, Sup.Ct., N.Y.Cty. Spec. Term, Pt.1, Index No. 16972/80 (7/26/81); and Patrolman's Benevolent Association v. Robert J. McGuire and City of New York, B-33-80, aff'd, Sup.Ct., N.Y. Cty., Spec. Term, Pt.1, NYLJ (1/30/81) at 6.
See, also, Decision No. B-23-81.

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 scope of bargaining petition filed herein by the Patrolman's Benevolent Association be, and the same hereby is, dismissed.

Dated: New York, N.Y.
April 28, 1993

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

STEVEN H. WRIGHT
MEMBER

CAROLYN GENTILE
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MEMBER