PBA v. NYPD, 51 OCB 39 (BCB 1993) [Decision No. B-39-93]

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

--between--

DECISION NO. B-39-93
DOCKET NO. BCB-1574-93

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, Petitioner,

--and--

THE POLICE DEPARTMENT OF THE CITY
OF NEW YORK,
Respondent.
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DECISION AND ORDER

On May 4, 1993, the Patrolmen's Benevolent Association ("the PBA" and "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 its Applicant Processing Division ("the Division") is within the scope of mandatory bargaining, as provided under the New York City Collective Bargaining Law ("the NYCCBL").[1] On June 7, 1993, after a request

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

> **Scope of collective bargaining.**
> 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 . . . .
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> b. . . .[Q]uestions concerning the practical impact that decisions [of the city] . . . have on employees, such as

for an extension of time, the Department, appearing by the Office of Labor Relations ("OLR") filed an Answer to the Petition. On July 14, 1993, after requesting an extension of time, the Union filed a Reply to the Answer. On July 27, 1993, after requesting permission of the OCB and on notice to the Union, the Department filed a Sur-reply.

BACKGROUND

In 1971, the Department instituted an Investigative Career Path Program to select police officers for assignment to the Detective Bureau. The program was expanded in 1976 to make career choices available to police officers in other branches of the department. In 1986, by Interim Order No. 60, the program was expanded again and renamed "Career Program for Police Officers." Interim Order No. 60 stated that the goal of the program was:

> to provide a comprehensive personnel management system that:
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> a. Allows the department to place and promote qualified, experienced officers [and]
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> b. Permits police personnel, on their own initiative, to become qualified for their own assignment and career preference . . . .

Under the program, a police officer assigned to an investigative unit earns qualifying credits towards eligibility for appointment to the detective bureau. No promotion or particular assignment

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> questions of workload or manning, are within the scope of collective bargaining.

is guaranteed by Interim Order No. 60. In fact, the language states:

> It must be clearly understood by all that there are HO AUTOMATIC OR BUILT-IN GUARANTEES IN THIS PROGRAM . . . This Career Program does not limit or change the department's rights or managerial prerogatives to assign and promote personnel . . . . [Emphasis in original.]

In 1990, Section 14-103(b)(2) of the Administrative Code of the City of New York, was amended,[2] effective January 18, 1991, to require the Police Commissioner permanently to appoint as detectives those officers who had been temporarily assigned to the detective bureau upon their completion of eighteen months in that assignment. To fulfill the requirements of the amended section of the Code, Interim Order No. 60 was amended in February, 1992, by Interim Order No. 60-3. The amended Order provides, inter alia, that police officers assigned to investigative duties in specified commands for specified periods of time "shall" be designated as third grade detectives. In addition, persons holding the title of Detective Investigator in several commands, including the Applicant Processing Division, were to be redesignated as Detective Specialist.

Notwithstanding these changes, Interim Order No. 60-3 states that police officers who entered the affected commands before February 1, 1992, can be assured that their expectations

[2] Session Laws of 1990, Ch.755.

for promotion to detective third grade after the required length of satisfactory service will be realized. The Department stated its intention not to deprive any police officer already in the track of the benefits that officer expected to receive before the amendments were made.

On July 17, 1992, the Department promulgated Bulletin No. 28, announcing vacancies in the civilian title of Investigator Trainee in the Division. The title is part of the Department's "Safe Streets, Safe City" Civilianization Program, created to move uniformed officers into positions more directly related to law enforcement by using civilian personnel in positions that relate to the operational functioning of the Police Department. As a result, uniformed personnel currently employed in the Division would be reassigned to more traditional law enforcement duties.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that, under Bulletin No. 28, the Department would replace police officers currently assigned to the Applicant Processing Division. This, it argues, constitutes a unilateral change in the terms and conditions of employment. Moreover, the Union claims that Bulletin No. 28 has an impact on the safety, workload and careers of its members. The Union

alleges a threat to the "security of the Department" and asserts that the personnel who will replace police officers in the Division are not receiving proper professional screening to qualify them to recommend who should or should not serve as police officers. The Union states that Department Bulletin No. 28 increases the workload of police officers assigned to the Applicant Processing Division. It also states that civilianization of the Division has an impact on the careers of Union members.

The Union further alleges that the Department has disregarded constitutional property interests of the Union's members, interests which it says were established by Interim Order No. 60. The *Union also* alleges a claim for breach of contract by way of the Department's unilateral implementation of Bulletin No. 28.

Department's Position

The City states that the Union has failed to allege in what manner the implementation of Department Bulletin No. 28 will affect the career interests or workload of Petitioner's membership or the security of the Police Department. In addition, the City states that, although the Union asserts that some field investigations result in the summary arrest of individuals, there has been no evidence set forth in the Petition

that field investigations will be included in the job duties of the civilian 'Investigator Trainee.' The City also states that the job specification for the civilian' 'Investigator Trainee' position does not include field investigation and that field investigations will continue to be performed by police officers.

The Department denies that all police officers assigned to the Applicant Processing Division will be replaced by civilians as a result of the promulgation of Bulletin No. 28. It maintains that the bulletin "delineat(es] a position vacancy for the newly created title of 'Investigator Trainee"' and that officers currently assigned the duties of Investigator Trainee will be reassigned to more traditional law enforcement duties. It further maintains that officers will continue to perform any necessary law enforcement functions within the Division.

The City claims that civilianization of the position of "Investigator Trainee" is a management right under Section 12-307 of the NYCCBL,[3] and notes that the Union has not alleged a

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

Scope of collective bargaining; management rights.

*** * ***

b. It is the right of the city, or any other public employer, acting through its agencies, to . . . direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which governmental operations are to be conducted: determine the content of job classification: . . . and exercise complete control and discretion over its organization and

bargained-for limitation on the City's managerial right to assign work and direct its employees. Further, the City states that civilianization of positions within the Police Department has been upheld numerous times as a proper exercise of the City's managerial right under the NYCCBL. Only where the Board makes a finding that the exercise of that managerial right results in a practical impact is there a duty to bargain for the alleviation of that impact.

Because the Union has offered no factual allegation or evidence of any impact on safety, workload or career interests of its members, the City asks us to dismiss the petition. As to the Union's claim that the City has disregarded constitutional property interests allegedly established by Interim Order No. 60 and the Union's claim that the collective bargaining agreement with the Department has been breached by implementation of Bulletin No. 28, the City answers that the Union has failed to state a claim subject to the jurisdiction of the Board of Collective Bargaining.

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the technology of performing its work."

DISCUSSION

Pursuant to Section 12-309a(2) of the NYCCBL and Section 1-07(c) of the Rules of the Office of Collective Bargaining, a public employer or public employee organization may submit a petition for determination as to whether a matter is within the scope of collective bargaining under Section 12-307 of the NYCCBL.[4] 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.[5]

Where a decision reserved to management under Section 12-307 of the NYCCBL has a practical impact on employees, the statute

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[4] Section 1-07 of the OCB Rules, codified as Title 61, 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 a collective bargaining agreement may petition the board for a final determination thereof.

[5] Section 12-307 of the NYCCBL provides, in relevant part:

> **a. Scope of collective bargaining.** [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages . . ., hours . . ., [and] working conditions. . . .

expressly provides that measures for the alleviation of such impact will be within the scope of collective bargaining.[6]

We have repeatedly stated, however, that the duty to bargain over the alleviation of a practical impact does not arise until we have first determined, on the basis of factual evidence, that a practical impact has resulted from an act that is within the City's managerial prerogative.[7] We will not declare that a practical impact exists, nor direct a hearing to consider the matter, solely on the basis of conclusory or speculative allegations.[8]

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.[9] The refusal of a public employer or employee

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[6] Decision Nos. B-25-93, B-34-88, B-61-79 and B-5-75.

[7] Decision Nos. B-25-93, B-36-90, B-47-88 and B-46-88.

[8] Decision Nos. B-25-93, B-36-90, B-34-88 and B-38-86.

[9] 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 12306 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

organization 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. However, 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 would be no duty to bargain.

The Instant Proceeding

In the instant scope of bargaining proceeding, the Union has asked us to find that the Department's announced plan to hire civilians for the position of Investigator Trainee in the Applicant Processing Division concerns a unilateral change in the terms and conditions of employment of its members. The Union alleges that the Department failed to negotiate over the change before it promulgated notice of the civilianization program. It also alleges that the Department's action has resulted in a practical impact which requires bargaining to alleviate the impact.

Concerning its failure to negotiate charge, the Union fails to specify what "term and condition of employment" has been or is being changed by the Department. However, we may infer from the pleadings that the Union is referring to the reassignment of duties which heretofore have been performed by some of its

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> a final determination of the matter and for an appropriate remedial order . . . .

members and which heretofore permitted an Officer to qualify for credit toward eventual assignment to detective positions. Arguably, the matter of such service is related to issues of advancement and promotion. In this regard, we have long held that the establishment of qualifications for advancement and promotion falls within the powers reserved to the City by Section 12-307(b).[10] In Decision No. B-74-89, where this Union sought to arbitrate the Department's decision not to appoint officers to detective detail upon their fulfillment of qualifications for promotion set forth in Interim Order No. 60, we held that the Department was not required to bargain over the decision not to appoint the officers. Although parties to a collective bargaining agreement may agree voluntarily to limit an area of management prerogative,[11] a non-mandatory subject of bargaining remains within the City's statutory management right if it is not limited by the parties in their agreement.[12] In the instant case, we find that the Union has presented no evidence to show that the Department's prerogative to set eligibility requirements for detective appointments, and to determine the type and number of positions which qualify for credit toward consideration for

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[10] Decision Nos. B-24-87, aff'd, Caruso v. Anderson, Index No. 12123/87 (1st Dept., Dec. 22, 1988), B-74-89, B-38-86 and B 64-89.

[11] Decision Nos. B-74-89, B-67-88, B-53-88 and B-31-87.

[12] Decision Nos. B-74-89, B-64-89, B-4-89 and B-62-88.

detective appointments, has been limited. In fact, the Department expressly reserved its statutory management rights in Interim Order No. 60. Thus, the Department's action with respect to Interim Order No. 60 does not concern a term and condition of employment and does not fall within the mandatory scope of bargaining. Were we to infer an improper practice claim in the instant proceeding, e.g., failure to negotiate concerning a mandatory subject of bargaining, we would dismiss it for insufficiency.

As to the Union's claim of practical impact, the Union alleges that the Department's hiring of civilians for the Division's Investigator Trainee position, announced in Department Bulletin No. 28, results in a practical impact on safety, workload, and promotional opportunities, creating a duty to bargain over alleviation of the impact. The Union's allegation about a safety impact contains no statement of facts from which we may discern the nature of the complaint,[13] nor does the allegation concerning impact on workload.[14] Beyond these statements, the Union fails to specify the impact which it

[13] "Respondents are threatening the security of the Police Department to the detriment of citizen and police officer alike"; and "[T]he replacement of police officers with civilians in the Applicant Processing Division is a threat to employee safety."

[14] "Department Bulletin No. 28 decidedly increases the workload of police officers assigned to the Applicant Processing Division . . . .": and "[Bulletin No. 28] has a very practical impact on the workload of police officers in the Applicant Processing Division."

alleges civilianization of the Investigator Trainee position would have on safety or workload.

As to impact on promotional opportunities, the *Union* alleges that Bulletin No. 28 has a "definite and negative substantial career impact" on its members. From this, we may infer an allegation that the Department's plan to hire civilians in the Applicant Processing Division could limit the chances of some Union members for appointment to detective duties. A review of the case law on the subject of practical impact reveals only one case in which managerial prerogative was alleged to have had an impact on promotional opportunities.[15] There, an employee organization claimed that the public employer's unilateral action had resulted in a practical impact on some of its members by foreclosing opportunities for professional advancement. The Health and Hospitals Corporation required medical school graduates to obtain a New York State medical license as a condition of appointment to the position of third-year chief resident. The requirement was imposed on doctors then seeking appointment as the third-year chief resident. We held that if management's action excluded foreign medical students and certain other medical graduates from qualifying for promotion to a position for which they were eligible to compete when they entered the residency program, then we could find a practical

[15] Decision No. B-38-86.

impact.

The instant case is distinguishable from the doctors' case. In the doctors' case, it was the addition of an eligibility requirement which would have resulted in the disqualification from promotion of the affected employees then in line to become third-year chief residents. By contrast, in the instant case, Department Bulletin No. 28 mandates no additional requirements over those set forth in Interim Orders No. 60 and 60-3 for eligibility for appointment to detective service. Moreover, unlike the additional medical license requirement which would have eliminated certain medical students from the thirdyear chief resident track, Bulletin No. 28 does not disqualify those officers currently in the detective track. Because Bulletin No. 28 does not create additional eligibility requirements and because it does not disqualify public employees from becoming eligible for consideration for appointment to detective detail, we find that the Union has failed to state a claim for practical impact on promotional opportunities of its members.

In addition, 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.[16] We have held this to be so in a variety of contexts.[17] In an earlier civilianization case,[18] where the Department reassigned officers at Central Booking, we found that:

> [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.[19]

Similarly, in the instant case, the Department intends to assign police personnel to more traditional law enforcement activities. However, the Union has failed to demonstrate, for example, precisely what impact the civilianization of the Investigator Trainee in the Applicant Processing Division has or will have on the safety of its members. The Union has not shown

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[16] Decision No. B-18-93.

[17] Decision No. B-18-93 (evidence and property clerk): B-35-82 and B-23-81 (booking suspects); B-26-80 (clerical, record keeping, time-keeping, roll call, payroll, communications, statistical, analytical, and mechanical repair functions); B-33-80 (directing traffic); and B-34-82 (operating vehicles).

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

[19] Decision No. B-18-93, quoting B-26-80.

how their workload has or will be changed adversely, how the bargaining unit has or will be depleted, 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 nature. Without facts, we are unable to find cause to look further for a practical impact which could create a duty to bargain.

In its Petition, the Union alleges a breach of the collective bargaining agreement. Under Section 205.5 of the Taylor Law, we may not enforce the terms of a collective bargaining agreement unless the alleged violation would otherwise constitute an improper practice.[20] The Union also alleges violation of constitutional property interests which it maintains are granted under Interim Order No. 60. The NYCCBL does not create any employment-related property right such as that claimed by the Union herein, and constitutional property claims fall outside our jurisdiction, which extends to administering and enforcing procedures designed to safeguard the employee rights contemplated by the NYCCBL.[21] We are not empowered to consider or remedy every perceived wrong or inequity which may arise out of the employment relationship.[22]

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[20] Decisions No. B-15-93, B-46-92, B-60-88 and B-59-88.

[21] Decision No. B-59-88.

[22] Id.

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. 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.[23] For all the foregoing reasons, we shall dismiss the Union's petition in its entirety.

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[23] 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.

O R D E R

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 by the Patrolmen's Benevolent Association be, and the same hereby is, dismissed.

Dated: New York, N.Y.
September 22, 1993

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS GIBLIN
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