Lieutenants’ Benevolent Ass. & SBA v. City, NYPD, OLR, 51 OCB 45 (BCB 1993) [Decision No. B-45-93]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Scope of Bargaining Proceeding

-between-

LIEUTENANTS' BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY OFFICE OF LABOR RELATIONS,

Respondents.

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DECISION NO. B-45-93

DOCKET NO. BCB-1356-91

In the Matter of the Scope of Bargaining Proceeding

-between-

SERGEANTS' BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY OFFICE OF LABOR RELATIONS,

Respondents.

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DOCKET NO. BCB-1351-90

DECISION AND ORDER

On December 18, 1990, the Sergeants' Benevolent Association ("SBA") filed a verified scope of bargaining petition alleging that the New York City Police Department ("Police Department")

had refused to negotiate regarding the impact of its announced plan to reinstitute solo supervisory patrols in certain precincts. On January 11, 1991, the Lieutenants' Benevolent Association ("LBA") filed a verified scope of bargaining petition raising similar charges with respect to its members. The New York City Office of Labor Relations ("City") filed motions on behalf of the Police Department to dismiss the scope of bargaining petitions arguing, inter alia, that the issues raised by the Unions are barred by the doctrine of res judicata, in view of the Board's previous determination in Decision No. B-6-79.

In a consolidated determination in Interim Decision No. B-9-91, the Board of Collective Bargaining denied the City's motions, finding that the Unions had raised allegations of factual circumstances that were different from those considered in 1979. The Board concluded that the parties should first attempt to resolve the issues through the Labor-Management Safety Committee established after the 1979 scope of bargaining and impasse panel proceedings. When the LBA and SBA notified the Office of Collective Bargaining that the parties had been unable to reach agreement after several meetings, the Board directed the parties to commence the instant scope of bargaining proceeding.

Thereupon, with the consent of the parties, the SBA and LBA matters were consolidated for hearings. The parties presented evidence before a hearing officer at hearings held on June 10, 12, 15, 16, 17, 19, 23, 25, 29, 1992; August 25, 26, 1992; September 8, 18, 22, 1992; and October 16, 1992. The parties submitted their memoranda of law on March 8, 1993.

By notice dated August 3, 1993, the parties were informed that the Board was considering the consolidation of these matters for the purpose of rendering a single decision that would address and determine the issues raise in each of the two cases. They were given the opportunity to submit written comment upon the proposed action. In a letter dated August 18, 1993, counsel for the LBA opposed consolidation. The SBA and the City did not submit any comment regarding this issue.

Background

The record underlying this matter is copious and protracted. In 1979, the Police Department issued Operations Order Number 40 ("O/O 40") for the purpose of instituting solo supervisory patrol for sergeants and lieutenants in forty-three precincts. The SBA and LBA filed improper practice petitions alleging that O/O 40 would have a practical impact upon the safety of the officers involved and that the City was required to bargain over the alleviation of the practical impact.

After an evidentiary hearing, the Board determined in Decision No. B-6-79 that the implementation of O/O 40 would create a practical impact upon safety within the meaning of Section 1173-4.3b of the New York City Collective Bargaining Law since it failed to set standards regarding (1) the number of Radio Motor Patrol ("RMP") cars required to be in operation in a given tour before solo supervisory cars could be assigned, commonly referred to as the "trigger number", and (2) the

circumstances in which a sergeant or lieutenant unfamiliar with the precinct or covering more than one precinct could be assigned to solo supervisory patrol. The Board thereupon directed the parties to commence good faith bargaining for the purpose of reaching an agreement on the terms for alleviating the practical impact.

When the negotiations failed, the Board directed the parties to submit the unresolved issues to an impasse panel. Following a lengthy hearing, the impasse panel issued its Report and Recommendations. After the SBA filed a petition requesting clarification of certain of the recommendations, the parties began settlement discussions. By May 1981, all of the parties had agreed to be bound by a set of modified panel provisions which included certain safeguards for the implementation of solo supervisory patrol. The SBA and the City thereafter incorporated the agreement on the modified panel provisions into their collective bargaining agreement. The collective bargaining agreement between the LBA and the City, however, did not include the modified panel provisions.

On June 15, 1981, the Police Department issued Operations Order Number 49 which embodied the agreed-upon provisions. The Department, however, never implemented the order; whether such action was the result of a police officer being killed while on solo patrol in 1980 or because the Department was unable to reach the required trigger numbers remains unclear.

Thus, solo supervisory patrol became a dormant issue until the Department informed the Unions in late 1990 that it intended to reinstitute the program. The joint Labor-Management Safety Committee, which had not convened in the intervening decade, met unsuccessfully on several occasions to discuss the program. Shortly thereafter, the Unions filed scope of bargaining petitions contending that because of changed circumstances since the parties adopted the modified panel provisions, the Department's plan would have a practical impact on the safety of the officers involved.

On October 31, 1991, the Department issued Operations Order Number 118 ("O/O 118"), which again provided for solo supervisory patrol. With respect to lieutenants, O/O 118 became effective November 4, 1991. Citing the modified panel provisions incorporated into its collective bargaining agreement, the SBA, however, received a preliminary injunction in New York State Supreme Court against the implementation of the order with respect to its members pending completion of the grievance arbitration process. See Decision No. B-23-92, in which we found the grievance filed by the SBA to be arbitrable.[1]

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[1] As of the completion of the hearings, the arbitrator had not yet issued his Opinion and Award on the SBA's grievance. The City, however, attached a copy of the opinion to its memorandum of law in the instant matter. The LBA, joined by the SBA, objects to our consideration of the opinion since the issues involved are distinct and the City should have first requested a ruling on the admissibility of new evidence. We overrule the LBA's objection. As the City concedes, the opinion is not evidence and we have not considered it as such. Rather, the City

Positions of the Parties

The LBA's Position

1. Lieutenants' Increased Duties and Responsibilities

The LBA argues that lieutenants have faced significant changes in circumstances and conditions affecting their safety on solo patrol since the issuance of the October 1980 impasse panel recommendations. Specifically, the LBA first contends that the duties and responsibilities of the lieutenants currently operating on solo patrol are much more extensive than those performed by lieutenants in 1980. Lieutenants in 1980 primarily functioned as "desk officers" in the precinct station house performing administrative duties. As the impasse panel noted, only 24 of 349 lieutenants assigned to patrol precincts actually engaged in supervisory patrol, reflecting certain policies requiring lieutenants normally to remain at precinct headquarters. In 1989, the Police Department began replacing the desk officer concept with that of the "Platoon Commander". As Platoon Commanders, lieutenants are responsible (1) for supervising other officers in the precinct, (2) maintaining a daily memo book, (3) responding to and directing police activities at serious crimes and emergencies, (4) identifying priority conditions to be addressed by officers in the platoon,

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included it for its purported persuasive value much as any Board decision or other authority might be. In any case, we find that the opinion bears little relation to the matter before us in view of the dissimilarity of the issues involved, and we have given it no weight in our determination.

and (5) performing certain administrative duties. Thus, a lieutenant now spends on average four to six hours of each tour on patrol duty. According to the LBA, a lieutenant performing these duties on solo patrol is placed in an unsafe situation because he is attempting simultaneously to drive the patrol vehicle, make entries in his memo book, monitor the radio, and observe outside conditions.

In addition, the LBA notes the changes since 1980 in the Department's policies with respect to Emotionally Disturbed Person ("EDP") calls. Since the mid-1980's, lieutenants have been required to respond as back-up to all EDP calls and to maintain certain EDP equipment in the RMP car, such as a taser, restraining stretcher, shield, shepherd's crook, and nova. A specially trained Emergency Services Unit ("ESU") is designated to act as the first responder in EDP situations. According to the LBA, however, the solo supervisor is placed in a dangerous situation since ESU is not always promptly on the scene.

The LBA further produced witnesses[2] who testified that under the current New York City Police Department Patrol Guide ("Patrol Guide"), lieutenants must respond to thirty-eight different types of calls, many of which cannot be responded to safely while on solo patrol. The LBA argues that, even though the Department does not intend the lieutenant to be the first responder at these

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[2] The LBA's motion to correct the transcript, as modified by its letter of March 17, 1993, has been granted.

calls, a lieutenant may in fact be the first officer on the scene. Furthermore, according to the Union, a solo lieutenant on patrol faced with back-logged calls or with a request by a citizen to respond to a crime in progress would have to take action under his sworn oath of duty, thereby compromising his safety.

The dangerous impact of these situations upon the solo supervisor is magnified by radios which allegedly "black-out" in certain areas such as tunnels, fail to operate efficiently when too many officers are communicating on the same frequency, or otherwise malfunction. The call-boxes, which provided another means of communication for officers in 1980, have allegedly fallen into disrepair and are no longer used.

2. Statistics

The LBA cites the 1980 impasse panel for its statement that the statistical evidence demonstrates "substantial swings and changes in the levels of crime and police activity in the individual precincts". Yet, the Police Department assertedly took no action between 1980 and 1991 to monitor the statistics before unilaterally implementing solo supervisory patrol in fourteen precincts, thereby impacting upon the safety of lieutenants.

The Union further notes that the precincts deemed appropriate for solo supervisory patrol in 1980 were not "high risk" insofar as the level of crimes being committed therein. In

the mid-1980's, however, the Police Department eliminated the designation of precincts as "high risk", "medium risk", or "low risk".

Another factor allegedly impacting upon the precincts selected for solo supervisory patrol is the change in precinct boundaries, which were re-drawn in the mid-1980's in order to be co-terminus with community boards. Thus, some of the original forty-three precincts selected for solo patrol may no longer be the lower risk precincts, in the Union's view.

In addition, the LBA asserts that there has been a dramatic increase in crime since 1980, both City-wide and in the forty-three precincts, particularly with respect to gun-related violence and crack cocaine and other drug-related crimes. The number of radio runs and arrests allegedly have increased, while the total number of police officers assigned to precincts increased only slightly. Furthermore, according to the Union, the City has changed demographically since 1980 due to an influx of various minority groups, with a concomitant rise in drug-related and other crime.

The LBA points to the testimony of Lieutenant David Brosnan, who said that since his police academy cadet days, he had been trained and oriented to perform as part of a two-member team when entering buildings, making car stops, or working on patrol. Thus, restricting the training for solo supervisor patrol to use

of the shotgun after a ten-year hiatus allegedly creates an impact upon the safety of lieutenants.

3. Stress

The LBA contends that the implementation of solo supervisory patrol has had an impact on the safety of lieutenants due to the heightened stress it creates, particularly in view of the increased duties of lieutenants and other changed circumstances since 1980. In support of this contention, the LBA offered the expert testimony of Dr. Harvey Schlossberg, a psychologist and former Director of Psychological Services for the New York City Police Department. Defining stress as "the incidents and calamities that happen in a person's life to which the person has to adjust...and which cause anxiety or tension", Dr. Schlossberg concluded that solo supervisory patrol is stressful. In his opinion, this additional stress factor impacts upon the supervisor's safety because it may affect his psychological perceptions and response in a situation that is hazardous.

The SBA's Position

1. Statistics

Using reports gathered annually by the Police Department, the SBA has proffered the following statistical calculations to establish that crime has increased since 1980:

> a) For 1980, 1981, and 1982, perpetrators involved in incidents with police officers were armed with a weapon in 80%, 83%, and 74% of the cases, respectively; for 1989, 1990, and 1991, the statistics increased to 96%, 95%, and 97%, respectively.

b) In 1981, 21 semi-automatic pistols were used by perpetrators in incidents involving police officers; in 1991, this figure had risen to 77.

c) For the period 1981-1987, the use of high energy handguns, i.e., a .357 Magnum, 10 millimeter, .44 caliber, .44 Magnum, or a .45 caliber weapon, in incidents involving police officers averaged between 11 and 18; for the period 1988-1991, the average use of high-energy handguns was almost 26 per year.

d) In 1981, there were 1,015 assaults on police officers in 43 precincts designated for solo patrol; in 1989 and 1990, there were 1,835 and 1,656, respectively.

e) In 1981, there were 2,061 felony and misdemeanor weapons possession arrests in the 43 designated precincts; by 1990, this figure had risen to 3,354.

f) In 1980, the number of handguns vouchered to the property clerk was 9,214; in 1991, the number was 13,769.

g) In 1989, for the first time, semi-automatic pistols were vouchered in greater numbers than revolvers. In 1980, 2,451 semi-automatic weapons were vouchered, compared with 8,043 in 1991.

h) There have been significant increases between 1980 and 1991 in City-wide arrests for felonies which pose a high level of danger to police officers: murder and non-negligent manslaughter have increased by 19.6 %; robbery by 39.4%; felonious assault by 59.8%; grand larceny vehicle by 37.7%; and felony arrests for dangerous weapons by 85.5%.

The SBA emphasizes that in 1980, the perpetrator's weapon of choice was a low-energy revolver; by 1991, it was the medium to high-energy semi-automatic pistol, thereby allegedly creating a more dangerous environment in the City. Sergeant David Schultheis, an ESU supervisor, testified that a police officer in 1980 facing an armed perpetrator would generally encounter a "Saturday Night Special", i.e., a .22 or .25 caliber, five or six shot revolver; today, high capacity nine millimeter weapons, or

even fully automatic weapons, are the "norm rather than the exception".[3]

Furthermore, the SBA dismisses the shotgun as a significant countervailing factor to the increased firepower of perpetrators. According to the SBA, the shotgun is cumbersome and requires two hands to operate, rendering it an inadequate weapon for a police officer already burdened with a heavy-duty flashlight, a nightstick, and a radio. In addition, the shotgun racks in the patrol vehicles utilize allegedly unreliable locking mechanisms. The SBA also contends that the shotgun is a less appropriate weapon than it was in 1980, since the police force is now comprised of a greater number of females, who will find the weapon difficult to use.

2. Precinct Changes

The SBA argues that the Police Department has failed to re-evaluate the precincts selected for solo patrol, despite allegedly significant changes in precinct boundaries, including the addition of precincts in 1984 which did not exist in 1979.

3. Increased Responsibilities

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[3] Attached to the SBA's memorandum of law and cited therein is an article from the February 14, 1993 edition of *The New York Times Magazine*. This article was offered as evidence relating to the availability and cost of various types of weapons. Because it was offered after the close of the hearing and without any opportunity for cross-examination, we have not considered the article in rendering our decision or included it as part of the evidentiary record.

In the SBA's view, the role of a supervisor, i.e., a sergeant or lieutenant, is more demanding today than it was in 1981 since the number of duties they are expected to perform has increased. Many of these duties, according to the SBA, require the presence of a second police officer.

The City's Position

1. Burden of Proof

The City argues that the Unions have failed to meet their burden of proving the existence of a practical impact on the safety of supervisors assigned to solo patrol. This burden of proof, in the City's view, is not satisfied by simply alleging speculative possibilities. Rather, the City notes that neither Union has identified a single incident where the safety of an officer has been brought into question while performing solo patrol under the current program that has been in effect for almost one year.

Moreover, the City points out that the parties herein have an agreement, which is still in existence and which was designed to alleviate the previous practical impact that the Board had found in Decision No. B-6-79. Citing Section 12-311a(3) of the New York City Collective Bargaining Law ("NYCCBL"), the City thus argues that the Board, before it may order the parties to bargain over any practical impact, must first determine that the changes rendered by the current implementation of the solo supervisory patrol were significant and unforeseen.

2. Unions' Failure to Allege Changed Circumstances That Create a Practical Impact on Safety

The City submits that the current solo supervisory patrol program is a reflection of the prior program which conformed to the parties' agreement on the modified panel provisions. The only differences are that the current program is limited to fourteen precincts[4] and contains higher trigger numbers for two-person RMP vehicles in particular precincts. Thus, absent further allegations, any impact which may exist is presumably alleviated by the incorporation of the previously agreed-upon terms into O/O 118. In the City's view, the Union's allegations of changed circumstances, considered seriatim, simply do not rise to the level of a clear threat to safety.

a. Increase in Crime

In the first instance, the City challenges the Union's reliance on statistical evidence allegedly showing an increase in crime. The City argues that the parties agreed to form the joint Labor-Management Safety Committee after the 1980 impasse proceedings because they recognized the inevitability of fluctuations in crime levels in the various precincts. Thus, the parties' 1981 agreement provides a mechanism for reviewing the solo patrol program, including reviewing the trigger numbers, in order to alleviate any

[4] Although O/O 118 is currently limited to fourteen precincts, the City acknowledges that it may eventually expand the program to the forty-three precincts designated in O/O 49.

practical impact on the safety of officers due to crime fluctuations.

In the City's view, any increase in crime levels has already been alleviated by the Department's decision to increase the trigger numbers, which it may do unilaterally under the terms of the 1981 agreement. Even assuming, however, that this increase did not sufficiently alleviate any safety impact, the City urges that the Unions should not benefit from their refusal to submit their recommendations on trigger numbers to the Safety Committee, which was established for precisely such circumstances.

In any event, the City challenges the significance of the statistical evidence, which does not take into account the number of additional officers who have been added to the police force in any particular precinct. According to the testimony of Chief Markman, the number of arrests is a function of both manpower and the crimes that are being targeted by a precinct commander or the Police Commissioner.

Furthermore, the City disputes the persuasive value of the statistical evidence since it does not reflect the environment in which a solo supervisor is working. Although O/O 118 limits solo supervisory patrol to the day tour, the Union's crime table exhibits have not been so limited and encompass all tours in a twenty-four hour period. Moreover, the City points to its own evidence allegedly showing that

New York City has seen a reduction in every crime over the last several years and a 6.5% decrease in major felony crimes since 1980.

Finally, the City challenges the relevance of the statistical evidence since supervisory officers neither generally perform an enforcement function, nor serve as first responders or as back-ups unless an emergency exists. Rather, the supervisor's role is to supervise the force and ensure that the work is accomplished according to proper procedures.

b. Alleged Increase of Semi-Automatic Weapons

Similarly, the City disputes the relevance of the Union's evidence allegedly showing an increase in the use of semi-automatic weapons, since it neither corresponds with the tours and precincts selected for solo supervisory patrol nor relates to the primary job function of sergeants and lieutenants. The evidence, rather, includes incidents affecting officers of all ranks, thereby allegedly creating a distorted picture since the majority of firearms incidents involve police officers and not supervisors.

Furthermore, the City argues that the semi-automatic weapons used by the perpetrators are of poor quality and that, despite the increased prevalence of these weapons, neither the number of officers being shot nor the number of shots being fired has increased.

c. Alleged Decrease in Average Age of Perpetrators

The City disputes the testimony of Union witnesses who perceived an increase in the number of young persons committing serious crimes. The City points to statistical evidence allegedly showing that there actually has been a decrease in the percentage of total felony arrests of persons aged nineteen or younger in the City from 1980 to present.

Again, the City questions the relevance of the Union's argument, since even assuming perpetrators had become younger, there is no evidence to establish how this impacts on safety or how it relates to the supervisory job function of sergeants and lieutenants.

d. Disrepair of Call Boxes

The City submits that the Unions have failed to establish that the lack of call boxes has had any negative impact on solo supervisors on patrol or even that call boxes were in general use in 1980. Citing the testimony of Lieutenants Grossane and Pica, the City asserts that call boxes are obsolete and have been replaced by the portable radio each officer carries.

e. Changes in Precinct Boundaries

The Unions, according to the City, have failed to demonstrate through statistical data that any precinct

boundary change since 1980 has resulted in a concomitant rise in crime in that precinct.

f. Demographic Changes

The City asserts that the Unions have not established a nexus between the risk to an officer on solo patrol and the increased minority population of any precinct.

g. EDP Equipment

The requirement that certain supervisors carry EDP equipment in their patrol vehicle allegedly has no impact on safety since many officers, including the Emergency Services Unit, are designated to respond to an EDP situation. Therefore, it is unlikely that a solo patrol supervisor would be placed in the situation of confronting an emotionally disturbed person and handling the EDP equipment, since the supervisor could simply order another officer on the scene to handle the equipment. In this regard, the City notes that the supervisor, consistent with O/O 118, would wait for back-up before responding to the incident.

Furthermore, the City argues that EDP equipment was not available in 1980 and, in fact, is designed to make the apprehension of an EDP safer for the officers.

h. Portable Radios

The City contends, contrary to the Union's assertion, that the portable radios in use today are viable means of communication which the Department continually monitors.

Any difficulties in transmission, according to the City, actually occur less frequently than in the past.

i. Shotguns

The City disputes the contention that the availability of a shotgun to solo supervisors on patrol creates an impact on their safety. The City points out that, in fact, there is no change in circumstances in this regard since the Department provided shotguns and shotgun training to supervisors as a result of the prior impasse proceedings as a means of alleviating any safety risk.

3. Union's Failure to Establish that Changed Circumstances Have Created a Practical Impact on Workload

The City contends that it is the Union's burden to prove that the exercise of a managerial prerogative has resulted in an unreasonably excessive and unduly burdensome workload as a regular condition of employment. The Unions here have failed to meet this burden, according to the City, since the evidence does not establish that the changes in duties since 1980 have increased the supervisor's workload to such an extent as to meet this standard.

In any event, as an issue apart from workload impact, the City notes that it is willing to bargain with the Unions in the context of an overall collective bargaining agreement with respect to the productivity gains deriving from the implementation of solo supervisory patrol.

Discussion

Preliminarily, we address the issue of our consolidating these two scope of bargaining/practical impact proceedings for determination. The question of whether to consolidate ordinarily arises in connection with the holding of hearings. The purpose of consolidation in such cases is to save the time of the parties and the Trial Examiner where there are common questions of fact and law, through the avoidance of duplicative testimony. In apparent agreement that the present cases were appropriate ones for consolidation, the parties herein consented to the scheduling of consolidated hearings in these matters and participated fully therein.

The question of whether to consolidate similar cases for decision (as distinguished from hearing) usually rests solely within the discretion of the decision-making body, whether an administrative agency or a court. However, in the present case, since we were informed that one party had expressed opposition to the rendering of a consolidated decision, and since our rule regarding consolidation[5] provides for notice to the parties, we provided such notice and invited the submission of written comments. Only the LBA made a submission on this question, in which it opposed consolidation on the ground that the factual evidence adduced regarding Lieutenants differs from that adduced regarding Sergeants. The LBA implies that unless the members of

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[5] RCNY §1-13(l).

this Board each review the entire record and the parties' briefs and exhibits, the Board will be unable to distinguish between the merits of each union's arguments and evidence in a consolidated decision.

We disagree. It should be noted that our previous interim decision in these matters[6] was a consolidated decision affecting both cases, and that the parties agreed that these matters be heard together in consolidated hearings. Clearly, there are issues of fact and law that are common to both cases. Specifically, both cases involve the implementation by the Police Department of solo supervisory patrols, by Sergeants (BCB-1351-90) and Lieutenants (BCB-1356-91), pursuant to the provisions of O/O 118. In both cases, the respective unions assert that the implementation of solo supervisory patrols will have a practical impact on the safety of the affected officers. The petitions filed in the two cases are virtually identical. Both cases involve a long and common background, dating back to our ruling, in a 1979 consolidated decision on safety impact claims,[7] and a 1981 impasse panel Report and Recommendation involving both unions.[8] Both cases include allegations that changed circumstances render the safeguards prescribed by the impasse panel in 1980 inadequate to protect the safety of officers today.

[6] Decision No. B-9-91.

[7] Decision No. B-6-79.

[8] Impasse case no. I-145-79.

We are mindful of the fact that each of the two unions produced different evidence at the hearings and that the specifics of their claims of changed circumstances differ. We are fully capable of separately considering the evidence and arguments presented by the SBA and the LBA, and addressing them in a single decision. No useful purpose would be served by rendering separate decisions in these cases. Accordingly, we will determine these two proceedings in a single consolidated decision.

An essential starting point for our consideration is the Board's decision in B-6-79 involving the initial challenge by the SBA and the LBA to the City's implementation of solo supervisory patrol under O/O 40. In that proceeding, we analyzed the scope of management's rights under Section 1173-4.3b, which provides 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 actions; 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." [Emphasis added]

The Board held that the unilateral determination of levels of manning such as those set forth in O/O 40 constituted a proper exercise of the City's reserved powers under Section 1173-4.3b. We determined, however, that O/O 40 had a practical impact on the safety of supervisors insofar as it:

> "fails to define or set standards as to the point at which the reduced numbers of Radio Motor Patrol cars in operation in a given precinct or a given tour, with due consideration to the varying levels of police activity, would render the use of solo supervisory patrol cars unsafe, and fails to provide for supervisory patrols by Sergeants or Lieutenants unfamiliar with the precinct or covering more than one precinct, including a precinct where no solo RMP vehicles are permitted at any time."

We further concluded that the Unions' allegations concerning age, training, precinct surveys, and the additional driving duties of supervisors did not rise to the level of practical impact. We directed the parties to bargain to alleviate the practical impact resulting from the failure of O/O 40 to provide for (1) trigger numbers, (2) patrol of an unfamiliar precinct, and (3) patrol covering more than one precinct.

As previously noted, the issues were submitted to an impasse panel when the parties' negotiations failed. With certain modifications of the impasse panel plan, the parties reached an agreement in 1981 for the implementation of solo supervisory patrol, which provided in pertinent part as follows:

1. solo supervisory patrols shall not be assigned unless the "trigger point" of two-man RMPs for the precinct and tour have been met;

2. supervisors on solo patrols shall be equipped with operational portable radios and with shotguns, for which training must be provided;

3. all solo supervisory patrols shall first be filled on a voluntary basis;

4. solo patrol supervisors shall not be dispatched or respond as primary response units, and shall not be dispatched or respond as back-up units except in emergencies when no other back-up RMP is available;

5. a supervisor shall not be assigned to solo patrol unless he has served at least three months in the precinct involved and has engaged in at least thirty tours of supervisory patrol in the twelve preceding months in the precinct involved;

6. a supervisor assigned to patrol more than one precinct shall be provided with an operator;

7. the Commanding Officer shall have the authority to assign an operator to a supervisor in the event of an unusual condition, and if solo patrol is suspended due to such a condition for police officers, it shall automatically be suspended for supervisors;

8. a joint Labor-Management Committee on Safety consisting of equal members from the City, the LBA and the SBA shall be established to recommend changes as necessary, and the Department shall provide to the Unions relevant reports and statistics compiled on the subject of solo RMP;

9. supervisors shall not be penalized, deemed to have assumed the risk, or denied retirement or other benefits because of their having volunteered for or been assigned to solo supervisory patrol; and

10. the agreed-upon terms shall be incorporated into an Operations Order, subject to review by the Unions prior to its issuance.

The Department never implemented O/O 49, which incorporated the terms of the above agreement. On October 31, 1991, however, the Department issued O/O 118, which provides, in relevant part, as follows:

1. solo supervisory patrol will be presently limited to the second platoon in the following precincts: 7, 10, 19, 23, 47, 50, 60, 76, 84, 94, 100, 104, 122, 123;

2. no solo supervisory patrol shall be assigned unless the trigger number of two police officer RMPs has been met;[9]

3. no supervisor shall be assigned to solo supervisory patrol unless that supervisor is equipped with a working portable radio and has received adequate training in solo car tactics and the use and care of the shotgun, which shall be available to supervisors on solo patrol;

4. solo supervisory patrols shall be filled first on a voluntary basis;

5. solo patrol supervisors shall not be dispatched nor respond as primary response units, and shall not be dispatched as back-up units except in emergencies when no other back-up RMP unit is available;

6. in emergencies when no other back-up RMP unit is available, other RMP units on low priority jobs shall be dispatched before a solo supervisor is dispatched, and RMP units on meal or otherwise temporarily out-of-service shall be dispatched, if they can be called back into service expeditiously;

7. no supervisor shall be assigned to solo supervisory patrol unless that supervisor has been assigned to the precinct for a minimum of three months and has performed a minimum of thirty tours of supervisory patrol in an RMP car in the precinct during the preceding twelve months;

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[9] The appendix to O/O 118 provides for higher trigger numbers than the text itself; depending on the precinct, the trigger number is between four and six for the fourteen designated precincts.

8. no sergeant or lieutenant shall be assigned solo supervisory patrol when assigned to patrol more than one precinct; and

9. in the event of an unusual condition, a commanding officer may suspend the provisions of this order and assign a police officer as operator of the supervisor's vehicle on a given tour.

Thus, O/O 118 closely mirrors the modified impasse panel plan agreed to by the parties in 1981. Moreover, O/O 118 encompasses the areas in which we found an impact on safety in 1979 by providing trigger numbers, along with guidelines for familiarity with the precinct prior to an assignment of solo patrol and by prohibiting patrol of more than one precinct while on solo patrol.

We reiterate that our decision in B-6-79 permitted the implementation of solo supervisory patrol, except insofar as it impacted on safety in three particular regards, none of which exist in the current implementation of O/O 118. Thus, the issue herein is whether the Unions have presented substantial evidence to show such a change in circumstances that our previous determination of the areas of safety impact, and the parties' agreed-upon means of alleviating such impact, are no longer sufficient to neutralize the risks to a solo supervisor on patrol.

We find that the Unions have failed to present such evidence. To the extent that changes have occurred over the last decade in New York City and in policing, we are unable to

conclude that they rise to the level of an impact on safety or that they render meaningless the previous proceedings and the agreement deriving therefrom.

We note that the Unions' arguments herein are largely repetitive of those raised previously. As examples, the Unions claimed before the Board or the impasse panel that (1) solo patrol would result in significantly greater stress on supervisors, (2) the risks of solo patrol were augmented by the rising level of crime, (3) the solo supervisor's safety during a "pick-up" job was threatened by the lack of a partner, (4) the portable radios were often defective and had no reception in certain places, (5) solo supervisors, under their sworn oath of duty, could not simply stand by waiting for a back-up patrol vehicle, and (6) the supervisor's risks were increased by the additional responsibility of driving the patrol vehicle on solo patrol. These contentions did not persuade the impasse panel that solo patrol could never be safely implemented. Rather, the impasse panel found that the risks of solo patrol would be reduced to a tolerable level by the inclusion of certain safeguards, which were ultimately adopted in the parties' agreement and which are now included in O/O 118.

Perhaps the Unions' most persuasive argument on its face is that changes in crime levels and precinct boundaries may make the precincts originally selected for solo patrol no longer the most appropriate. Yet, even this concern was anticipated in the prior proceedings. Recognizing that there are substantial fluctuations in the level of crime and police activity in the individual precincts, the impasse panel recommended the establishment of an ongoing consultative mechanism to monitor implementation of solo patrol, later embodied in the parties' agreement as the joint Labor-Management Safety Committee. The Unions, however, apparently chose not to recommend different precincts for inclusion in the solo patrol program after the Department issued O/O 118, preferring instead to return to the Board with its initial position that solo patrol is unsafe. We see no reason to depart from our earlier determination that the implementation of solo patrol, provided certain safeguards are in place, is a management prerogative. These safeguards are in place in O/O 118.

The other changed circumstances advanced by the Unions either are not persuasive or do not rise to the level of rendering the solo patrol program unsafe. The statistical evidence allegedly showing an increase in various types of crime, for instance, does not persuade us that solo patrol is now unsafe since the evidence is not derived exclusively from experience with day tours and/or with precincts in which O/O 118 would

provide for solo patrols. Moreover, even if the Unions had proven a safety impact based on an increase in crime, we note that the City has raised the trigger numbers for the solo program patrol, thereby alleviating any additional risk associated with the alleged increase in crime.

Nor are we persuaded by the LBA's evidence that lieutenants currently perform between four and six hours of patrol duties on each tour, compared with 1980 when lieutenants primarily performed desk duties. This factor alone does not undermine the safety of solo patrol. The safeguards in place are sufficient to alleviate the safety impact, whether it is a lieutenant or a sergeant who is performing solo supervisory patrol.

Likewise, we find that solo supervisors face no additional risk in responding as back-ups in EDP cases by virtue of the current requirement that they carry specialized equipment. Despite the new terminology, there is no evidence to suggest that situations involving emotionally disturbed persons are now more prevalent; rather, the evidence shows that the EDP equipment now available actually decreases the risk to an officer by providing additional means for controlling these situations.

We do not assign great weight to the evidence concerning the lack of call boxes in the City. In fact, the evidence indicates that the portable radios in existence today are a more effective means of communication than call boxes and that, overall, they perform adequately.

Nor do we find a safety impact because a supervisor may in fact be the first to arrive on a crime scene. This argument was raised, and rejected, in the prior proceedings on the basis that the risk could be reduced to a tolerable level by a requirement, such as currently exists in O/O 118, that solo supervisors be dispatched only as back-up units in emergencies when no other back-up unit is available, thereby reducing the likelihood of the supervisor arriving first on the scene. The same reasoning still applies.

We find no merit in the SBA's argument that the shotgun is inadequate and obsolete. The parties' 1981 agreement granted solo supervisors the right to be trained and equipped with shotguns as a means of offsetting the risks of solo patrol. In fact, when asked whether the Department should no longer make shotguns available, it was the SBA's position that it wished to retain the option to have shotguns available.

As for the City's changing demographics, we find no nexus between an alleged increased risk to solo patrol supervisors and an increase in the number of certain minority groups. The LBA relies on 1980 and 1990 census data showing that the racial composition of the five boroughs has changed in certain respects, as well as the testimony of Inspector Paul Donnelly who noted large increases in the Dominican population in the Bronx and the Asian population in Little Italy, Flushing, and Queens. Not surprisingly, however, the Unions have offered no evidence to

establish that the presence of any group creates a safety risk because its members are more likely to engage in criminal activity. The LBA's argument requires a presumption of criminal activity among certain groups that we are surely unable to make.

Furthermore, we are not persuaded that changes in lieutenants' job duties since 1980 have produced such additional stress as to create an impact on the safety of solo supervisory patrol. While we recognize that lieutenants now devote significantly more time to work outside the precinct house than in 1980, we do not believe that this circumstance rises to the level of a safety impact, particularly in view of the safeguards present in O/O 118.

With respect to the City's argument that the LBA and SBA have failed to establish a practical impact on workload, we agree that the evidence does not establish any such claim. The Union's burden in such cases is to prove that the exercise of a managerial prerogative has resulted in an unreasonably excessive and unduly burdensome workload as a regular condition of employment. See, e.g., BCB Decision Nos. B-59-89; B-70-89; B-6-90. The proof herein does not demonstrate that O/O 118 has created such a condition. It appears, in any case, that the Unions are simply requesting bargaining on productivity within the context of wage negotiations for their collective bargaining agreement. Since the City has acknowledged a willingness to bargain on this issue, we see no need to make any further ruling.

Finally, we decline to restructure or abolish the joint Labor-Management Safety Committee, as the LBA urges. The committee, because of the ten-year hiatus of solo patrol, has not

had reason to meet regularly, and therefore it is premature to pronounce it ineffective. Rather, we hope the parties, in view of our decision herein, will accept the concept of solo supervisory patrol and will work within the Committee to address their concerns as they arise.

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 verified scope of bargaining petition filed by the Sergeants' Benevolent Association, and docketed as BCB-1351-90, be, and the same hereby is denied; and it is further

ORDERED, that the verified scope of bargaining petition filed by the Lieutenant's Benevolent Association, and docketed as BCB-1356-91, be, and the same hereby is denied.

DATED: New York, N.Y.
October 19, 1993

Malcolm D. MacDonald
Chairman

George Nicolau
Member

Thomas J. Giblin
Member

Steven H. Wright
Member