

United Prob. Officers Ass. v. City & DOP, 55 OCB 27 (BCB 1995) [Decision No. B-27-95 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the

UNITED PROBATION OFFICERS
ASSOCIATION,

DECISION NO. B-27-95

DOCKET NO. BCB-1777-95

Petitioner,

-and-

CITY OF NEW YORK and the NEW YORK
CITY DEPARTMENT OF PROBATION,

Respondents.

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DECISION AND ORDER

On August 16, 1995, the United Probation Officers Association ("Union" or "UPOA") filed a petition against the City of New York ("City") and against the New York City Department of Probation. The petition asserts that, in light of changed circumstances, the current city-wide bargaining representation and coverage is no longer appropriate for the approximately 90 bargaining unit members who are required to carry weapons, and it seeks a determination enabling the UPOA to bargain separately at the unit level over all terms and conditions of employment for these armed officers. The City, appearing by its Office of Labor Relations, filed an answer to the petition on September 18, 1995. The UPOA filed a reply on October 4, 1995. The City filed a sur-reply on October 5, 1995, to which the Union filed an objection on October 24, 1995.

BACKGROUND

The United Probation Officers Association is the certified representative of Probation Officer Trainees, Probation Officers, Senior Probation Officers, Supervising Probation Officers, and Probation Assistants employed by the New York City Department of Probation. However, pursuant to Section 12-307a. of the New York City Collective Bargaining Law ("NYCCBL"),¹ District Council 37, as the current certified employee organization for city-wide matters, negotiates all matters that must be uniform for employees who are subject to the city-wide Career and Salary Plan and Standard Leave Regulations, including members of the UPOA's bargaining unit. According to the UPOA, it should have the right to bargain at the unit level for its 90 armed bargaining unit members "both with respect to the 'concessions'

¹ NYCCBL §12-307a.(2) reads as follows:

[Public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages, hours and working conditions, except that:]

(2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved.

* * *

(4) all matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, shall be negotiated with the certified employee organization representing the employees involved.

bargaining"² and in the current collective bargaining for a new agreement to be effective January 1, 1995.

POSITIONS OF THE PARTIES

UPOA's Position

The UPOA acknowledges that in 1989, this Board rejected its level of bargaining petition based upon a change in job specifications that affected 34 armed unit members and firearms instructors out of a bargaining unit in excess of 900 members (Decision No. B-48-89). It contends, however, that circumstances have changed since then, both in terms of the total number of armed probation officers and of their job responsibilities. According to the Union, unit members who carry weapons or give firearms instruction perform the functional equivalent of the uniformed police and correction services. Therefore, because of these special and unique duties, the UPOA assertedly should be entitled to bargain over these members' terms and conditions of employment, either by virtue of subsection (2) or subsection (4) of NYCCBL § 13-307a.

The Union points to several particular factors in support of its position. It notes that in 1988, there were 34 officers who were required to carry weapons in connection with their work of enforcing warrants and making house arrests, and in serving as firearms instructors. This number constituted less than four percent of the more typical work performed by the other officers in the Probation Department. Today, according to UPOA figures, approximately 90 out of 1,000 probation officers carry weapons. The Union asserts that these officers regularly engage in work that is identical with that of police officers and correction officers, and that they are the functional equivalent of the uniformed police and correction services.

² The "concessions" bargaining to which the Union refers concerns the tentative agreement reached between the City and the municipal unions on June 30, 1995, on \$440 million in labor concessions for the current fiscal year.

Moreover, according to the Union, armed probation officers have had to assume a range of new duties since 1989. They now monitor probationers wearing electronic bracelets under house arrest, and they serve as backups to police officers when they request assistance executing felony warrants. Similarly, police officers serve as their backups when probation officers rearrest probationers who have violated the terms of their release.

Disputing a comparison of probation officers with other types of peace officers in City employment, the Union contends that special officers who work for the Health and Hospitals Corporation carry weapons only while on duty, and do not arrest absconders or monitor house arrests. Detective investigators allegedly investigate crimes, but do not make arrests, pick up absconders, or monitor house arrests. Deputy sheriffs execute civil judgments, but, like detective investigators, allegedly do not make arrests, pick up absconders, or monitor house arrests. The Union concludes that these factors justify excluding the armed probation officers from city-wide bargaining coverage.

City's Position

The City maintains that the Union has not shown how probation officers' work differs from other similar Career and Salary plan employees, such as special officers, detective investigators, or deputy sheriffs; it has only reiterated the same arguments that it made in 1988, i.e., that some probation officers perform duties that are functionally equivalent to police officers. The only change, the City contends, is the number. In 1988, 34 officers out of 900 were armed. Today, approximately 90 out of 1,000 officers are armed, which is still less than ten percent of the total bargaining unit membership.

According to the City, what the Union implicitly seems to be saying is that a community of interest no longer exists between unit members who carry guns and those who are unarmed. While fragmentation of the unit would counter the Board of Certification's long-standing policy favoring consolidation of bargaining units, this type of issue assertedly should be decided in a

representation proceeding before that Board, and not through a scope of bargaining petition before the Board of Collective Bargaining.

DISCUSSION

We preface our discussion with a comment on the issue of sur-replies. The OCB Rules (Title 61, § 1-07, of the Rules of the City of New York) do not provide for the filing of sur-replies. It is the Board's policy not to encourage the filing of subsequent pleadings, and it will not consider such submissions unless special circumstances warrant inclusion of the material in question.³ There is a very practical reason for this policy: sur-replies invite a response, which can then invite a further response. This can lead to a protracted exchange of pleadings on purely tangential or peripheral matters. Under the circumstances of this case, the new information that the City would have us accept in its sur-reply does not rebut a substantive new fact or legal theory raised for the first time by the Union in its reply. Therefore, we will not allow the City's sur-reply to become part of the record.

With respect to the merits of the UPOA's petition, as we said in 1989 in Decision No. B-48-89, under the existing structure of the New York City Collective Bargaining Law there are only two avenues open to an employee organization that desires to bargain directly in its own behalf over uniform matters subject to the Career and Salary Plan: it may bargain independently if it qualifies as a representative of the uniformed police, fire, sanitation or correction services;⁴ or it may bargain for a variation or a particular application of a city-wide policy, or for a particular term of the city-wide agreement, if it can show that special and unique considerations exist within its department, class of employees, or collective bargaining unit concerning

³ Decision Nos. B-16-90 and B-27-80.

⁴ See, NYCCBL § 12-307a.(4), supra, note 1.

the particular application.⁵

Regarding the first approach, although the UPOA contends that some of its members perform the "functional equivalent" of police work, probation officers become neither police officers nor members of a New York City uniformed police, fire, sanitation or correction service when they carry firearms. The New York State Criminal Procedure Law defines "police officer" as, inter alia, a sworn officer of the division of state police or of an authorized county, city, town or village police district; an investigator employed in the office of a district attorney; a fire marshal in New York City fire department bureau of fire investigation; and a special investigator employed in the statewide organized crime task force.⁶ This section clearly does not include probation officers within the statutory definition of police officer. Additionally, according to the Classification and Compensation Schedules of the Classified Service of the City of New York, there are no circumstances under which probation officers are members of the New York City Police Service, the Correction Service, the Fire Service, or the Sanitation Service.

Thus, even if probation officers were accorded statutory police officer status through legislative enactment, they still would not qualify for independent bargaining over uniform matters subject to the Career and Salary Plan under the NYCCBL, because they do not meet the Section 12-307a.(4) classification criterion. We therefore conclude, once again, that even if, arguendo, certain bargaining unit members are doing work that is "functionally similar" to work done by police officers, this does not bring them within the ambit of the § 12-307a.(4) exception.

To bring a matter within the scope of bargaining under the "special and unique considerations" provision of Section 12-307a.(2), there are two

⁵ Decision Nos. B-48-89; B-2-73 and B-11-68.

⁶ Criminal Procedure Law Section 1.20.34.(a)-(q).

conditions that must be met: employees subject to the Career and Salary Plan must show a special and unique consideration with regard to a particular term of the city-wide agreement or policy; and the term itself must be a mandatory subject of bargaining.⁷

The only special and unique consideration that the UPOA has raised in this case is that approximately 90 employees out of a total unit membership of 1,000 employees are armed, and that some of them may be involved in monitoring probationers under house arrest wearing electronic bracelets. We find that the latter contention indicates a change in technology rather than a change in responsibility. Electronic home monitoring may signify an important technological advancement in the way in which probationers are supervised, but it does not amount to a significant change in the nature of probation work itself.

The contention that being armed and performing quasi-police functions qualifies probation officers for special and unique consideration is a dubious proposition, given that special officers, detective investigators, and deputy sheriffs may carry firearms but are not considered unique from other employees in the Career and Salary Plan. More importantly, probation duties involving the carrying of firearms still represents a very small fraction of the work performed by the other ninety percent of the UPOA bargaining unit members who are unarmed.

Even if the Union could demonstrate that special and unique considerations exist with respect to the work of the minority of bargaining unit members who carry firearms, this fact would not furnish a sufficient basis to prove that special and unique considerations for the entire unit exist, nor would it justify an order to bargain at the unit level over all terms and conditions of employment for these 90 employees, as requested by the Union. Whether a given demand proposed by the Union at the unit level was in response to "concessions" bargaining or otherwise is beside the point.

⁷ Decision No. B-48-89.

In conclusion, we find that the UPOA lacks standing to bargain independently over city-wide Career and Salary Plan issues under Section 12-307a.(4) of the NYCCBL because it is not a member of one of the four specified services, and we find that it may not demand to bargain at the unit level over wages, hours and working conditions for its 90 armed members because the Union has not sufficiently shown the existence of a special and unique consideration with respect to these members.

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 level of bargaining petition filed by the United Probation Officers Association, be, and the same hereby is, dismissed.

Dated: New York, New York
December 19, 1995

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

THOMAS J. GIBLIN
MEMBER

JEROME E. JOSEPH
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

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