PBA v. City & NYPD, 59 OCB 36 (BCB 1997) [Decision No. B-36-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:
--between--	:
Patrolmen's Benevolent Association, Petitioner,	: Decision No. B-36-97
--and--	: Docket No. BCB-1911-97
City of New York, and The City of New York Police Department,	:
Respondents.	:

DECISION AND ORDER

On May 8, 1997, the Patrolmen's Benevolent Association of the City of New York ("PBA" or "Union") filed a verified improper practice petition, seeking a determination of whether the City of New York ("City") and the New York Police Department ("Department") violated Sec. 12-306(a)(1) and (a)(4) of the New York City Collective Bargaining Law ("NYCCBL").[1] The Union claims the City has failed to bargain in good faith over the

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[1] NYCCBL Sec. 12-306 provides, in relevant part, as follows:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 12-305 of this chapter;

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(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

creation of new tours of duty for probationary police officers. The PBA also filed a petition for injunctive relief on May 8, 1997, which it withdrew on May 12, 1997. On May 22, 1997, the City filed a verified answer to the instant improper practice petition. On June 6, 1997, the PBA filed a verified reply.

BACKGROUND

The PBA and the City are parties to a collective bargaining agreement for the term beginning on October 1, 1991, and ending on March 31, 1995, on behalf of all Department employees in the title of Police Officer, except those detailed as First, Second, or Third Grade Detectives.

From 1978 until 1983, the Department scheduled police officers to work in rotating shifts, or platoons, with each officer working a different platoon each week. The three platoons ran from midnight to 8:30 am, 7:30 am to 4:00 pm, and 3:45 pm to 12:15 am, according to Operations Order 105 issued on November 6, 1978, by the Police Commissioner to all commands. The Order also states:

> In accordance with the agreement between the P.B.A. and the City of New York, patrol personnel presently required to make 249 appearances shall under the new contract be required to make 243 appearances. Each tour shall consist of eight hours and thirty-five minutes for a total of 2,088 hours a year. Swings under a duty schedule shall consist of the appropriate number of hours but shall not be less than 64 hours nor more than 96 hours. In keeping therewith, the 22 Squad Duty Schedule shall be replaced by the 9 Squad Duty Schedule . . . Any new steady tour established shall, in the first instance be staffed with volunteers in order of seniority.

On December 30, 1983, the Police Commissioner issued Operations Order 148 to all commands, which created a pilot program at the 115th Precinct in which officers were scheduled to work a platoon on a steady, i.e., non-rotating, basis. The Union alleges this program "was established after meeting with the PBA and agreement as to the terms of the project." The "Steady Tour Duty Schedule," as it was called, was expanded pursuant to Operations Order 97-6 issued on April 16, 1990, and, by September 17, 1990, it was implemented in all precincts. All officers hired prior to March 14, 1994, are subject to this schedule. Officers hired after that date were subject to Operations Order 23, series 1994, which implemented a rotating schedule, or duty chart, called the "scooter chart," for the second and third platoon.

On March 5, 1997, the Department issued a "Finest Message" advisory to all commands, that, upon graduation from the Police Academy on or about March 1, 1997, all members of the Police Academy Class would be assigned immediately to a fourth platoon and would work from 5:30 pm to 2:05 am. This fourth platoon would be staffed only by probationary officers from the Academy's graduating class and by sergeants assigned as trainers. The three other platoons were continued with minor changes to correct any overlap or lack of coverage.

POSITIONS OF THE PARTIES

Union's Position

The Union claims that, during the 1988 round of contract negotiations, the City agreed with the PBA to bargain over the creation of new, steady tours of duty. The Union maintains that, since then, the platoons have been and are controlled by that agreement between the PBA and the City. The Union cites Operations Order 105 as evidence that the City has limited its managerial right to schedule tours and maintains that the agreement referenced therein is still in effect.

As evidence of its attempts to bargain over the creation of a fourth platoon, the Union points to multiple, unspecified phone conversations which it asserts were intended to lay the groundwork for bargaining. The Union alleges that the City's refusal to bargain over the changed schedules constitutes an improper practice under NYCCBL Sec. 12-306(a)(4) and a derivative violation of Sec. 12-306(a)(1).

City's Position

The City argues that it has not bargained away its managerial right to control the starting and finishing times by entering into any agreements with the PBA. As for the Union's assertion that the City waived its managerial prerogative in this regard during the 1988 round of contract negotiations, the City denies that the Union ever attempted to bargain with it over the new tour and argues that it, therefore, could not have failed to

bargain in good faith.

Even if it were found that bargaining took place, the City argues that it did not fail in any duty to negotiate, citing Decision No. B-21-87 for the proposition that bargaining over a permissive subject of bargaining is not a waiver of a managerial right. The City also maintains it is well within its managerial rights to control when an employee works as long as the total number of hours for the employee remain constant.

DISCUSSION

Pursuant to Sec. 12-306(a) of the NYCCBL, wages, hours, and working conditions are mandatory subjects of collective bargaining.[2] It is well settled that the number of hours worked per day, the length of the work week and the number of appearances required per week and per year are mandatory subjects of bargaining.[3] It is also well settled that, pursuant to Sec. 12-307(b) of the NYCCBL, which outlines rights reserved to a public employer, the promulgation of work schedules, including the determination of starting and finishing times, is a non-mandatory subject of bargaining.[4]

The Union argues that the City waived through negotiation, or bargained away in prior agreements referenced in Operations

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[2] Decision Nos. B-45-92, B-44-92, B-59-89.

[3] Decision Nos. B-45-92 and B-44-92.

[4] Decision Nos. B-44-92, B-59-88, B-21-87.

Order 105,[5] its managerial right to determine the starting and finishing time of employees. We do not make a ruling on the truth of this assertion; for even if true, it does not address the question with which we are concerned herein, as to whether the City waived its managerial right to assign the employees at issue for the period covered by the applicable collective bargaining agreement.[6] We have previously held that the fact that management has, in prior agreements, limited its managerial right as to a permissive subject of bargaining, does not therefore require management to either carry that agreement forward into the next collective bargaining agreement or to bargain over that permissive subject in the next round of negotiations.[7] Bargaining over a permissive subject of bargaining does not transform a subject to a mandatory subject of bargaining.[8] The Union has offered nothing from which we may conclude that the City has agreed to limit its managerial prerogative with respect to scheduling in the applicable agreement.

Moreover, allegations of improper practice must be based on

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[5] See text, supra, at 2.

[6] The terms of the applicable collective bargaining agreement, which expired on March 31, 1995, remain in effect pursuant to Sec. 12-311(d) of the NYCCBL.

[7] Decision Nos. B-21-87, B-11-68.

[8] Decision Nos. B-56-88, B-21-87.

statements of probative fact.[9] It is not sufficient for the PBA merely to allege that an agreement limiting management's rights to schedule exists without offering evidence of its existence in the instant collective bargaining agreement between the PBA and the City. Absent evidence that the City has waived its statutory managerial rights on the subject, we find that the Department was under no duty to bargain over its decision to change the starting and finishing time of some of the unit's employees at issue. Therefore, we hold that the Department breached no duty to bargain under the facts as presented by the Union. We also hold that the Union has failed to sustain any derivative claim of improper practice against the Department under NYCCBL Sec. 12-306(a)(1).

Accordingly, for the above stated reasons, the instant improper practice petition is dismissed in its entirety.

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[9] Decision No. B-28-89.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

ORDERED, that the improper practice petition docketed as BCB-1911-97 be, and the same hereby is, dismissed.

Dated: New York, New York
July 31, 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DENNISON YOUNG, Jr.
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER