12-99	affirmed	Savage v. DeCosta, 120860 N.Y. Co. S.Ct., 1/13/99.	77

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-12-1999
	:	Docket No. BCB-2027-98
And	:	
	:	
City of New York and New York City Police Department,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On November 20, 1998, the Patrolman's Benevolent Association ("Union") filed a verified improper practice petition alleging a practical impact on the safety of its members and a petition seeking permission to request injunctive relief from the New York State Supreme Court.[1] The Union claimed that the New York City Police Department ("Department") was required to bargain over its order that Police Academy trainees perform traffic control duty during the holiday season. The Department filed an answer to the petition for injunctive relief on November 24, 1998 and the Union filed a reply on November 25, 1998. On December 1, 1998, the Board of Collective Bargaining denied the Union permission to seek injunctive relief in the

[1] The Union made its request pursuant to Civil Service Law § 209-a, which provides, in relevant part:
5. [Eff. Until June 30, 1999.] Injunctive relief before the New York city board of collective bargaining. (a) A party filing an improper practice charge under section 12-306 of the administrative code of the city of New York may petition the board of collective bargaining to obtain injunctive relief before the supreme court, New York county, pending a decision on the merits by the board of collective bargaining, on a showing that: (i) there is reasonable cause to believe an improper practice has occurred, and (ii) where it appears that immediate and irreparable injury, loss or damage will result and thereby rendering a resulting judgment on the merits ineffectual necessitating the maintenance of, or return to, the status quo to provide meaningful relief.

supreme court.[2]

The City filed an answer to the improper practice petition on December 9, 1998 and the Union filed its reply on December 14, 1998. A hearing was held on December 17, 1998, and testimony was taken from Sgt. Edward Leap, Training Coordinator, Traffic Control Division; James O'Keefe, Director of Training for the Department; P.O. John Flynn, Union trustee; Michael Markman, Chief of Personnel for the Department; P.O. Bruce Robertson, Second Vice President of the Union; P.O. Alan Such, Instructor, Traffic Control Division Training Unit; and P.O. Michael Wilson, Instructor at the Police Academy. The parties filed post-hearing briefs on December 29, 1998.

BACKGROUND

Police Department recruits are sworn police officers who are in training at the Police Academy. On November 11, 1998, the Department issued a Departmental Order directing recruits to participate in three tours of what the Department called traffic control training between November 21, 1998 and December 31, 1998. The training consisted of performing traffic enforcement duty, including making traffic stops. The recruits were not issued firearms while undergoing traffic control training and were not scheduled to receive firearms training until December 6, 1998. According to §105-03 of the Patrol Guide, police officers performing patrol duty in uniform are required to carry or wear an approved firearm.

The Recruit Orientation Guide tells recruits that they are to "refrain from taking action in the street which may place you in a position beyond your current capabilities," and tells them to behave like a "concerned, conscientious private citizen" and call an officer if they become aware of any situation requiring police attention. This directive is repeated many times while recruits are training at the Academy, and they were reminded of it each day they went out to perform traffic control duty.

Such and Robertson testified that, before beginning traffic control duty, the recruits were given two hours of training in traffic control and were shown a video on "Courtesy, Professionalism and Respect." Robertson said he saw approximately 95% of the recruits on traffic control duty standing alone in the intersection, unaccompanied by a trained officer, instructor or supervisor.

Such said the recruits were not assigned to direct traffic under the observation of an instructor, but were assigned to a Sergeant in groups of eight and taken to assigned intersections. Recruits were assigned to their traffic posts alone, without another Department member present. Leap said that, under appropriate circumstances, a recruit might have to actively direct traffic from within an intersection. The Sergeant in charge of each group of 8 recruits supervised other Police Officers at the same time. The Sergeant and three instructors from the Traffic Control Training Unit drove around the area where the recruits were assigned, to observe their performance and give further instruction. The recruits were issued walkie-talkies so that they could communicate with the supervising sergeant. Recruits were given two parking summonses per

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[2]The Union's appeal of the Board's decision to deny injunctive relief was denied. *See*, *Savage v. DeCosta*, N.Y. Co. Sup. Ct. (Gangel-Jacob, J.), entered 1/15/99.

tour but were told not to write them until a supervisor was present. Such testified that this system was unique, and was not the method ordinarily used to train Police Officers assigned to the Traffic Control Division.

According to Robertson, Level Two Traffic Enforcement Agents who perform intersection control receive nine weeks of training at the Academy and must observe a trained Level Two Traffic Enforcement Agent five times before being assigned to direct traffic at an intersection. Leap and Such said that Police Officers assigned to the Traffic Control Division are trained at the Academy for two days and then spend half a day at an intersection with an instructor before assuming traffic control duty. Such testified that different kinds of intersections require different traffic control approaches.

The City introduced into evidence photographs of four uniforms, front and back. These uniforms are worn by Police Officers, Level Two Traffic Enforcement Agents, recruits and Auxiliary Police Officers. All four uniforms are dark blue. The Police Officer and the Auxiliary Police Officer wear similar blue visor caps. The Traffic Enforcement Agent wears a white and blue visor cap. The police recruit wears a peaked cap. All four wear vests. The Police Officer and Auxiliary Police Officer wear blue vests that say, respectively, "Police" and "Auxiliary Police." The Traffic Enforcement Agent and the police recruit both wear orange vests that say, "Traffic." The Department issues bulletproof vests to Police Officers and recruits, but not to Traffic Enforcement Agents or Auxiliary Police Officers.

Wilson said that each recruit assigned to traffic duty under the disputed order was issued a bulletproof vest and, if one could not be found that fit, was not sent out. However, he said, the recruits were not told how to wear the orange "Traffic" vest when wearing their standard-issue raincoat which says "Police" on the back.

Markman testified that the Patrol Guide is only a guide and can be overridden by "superior authority." There are times, he said, when Officers have discretion in not adhering to the provisions of the Patrol Guide. He said that the recruits are being assigned to the "least critical" traffic control posts and that the Department is issuing bulletproof vests to them to get them accustomed to wearing them, although they are not issued vests each time they are sent out on an assignment in the field.

There was testimony about other field assignments given to recruits in the past. Flynn was at the 1996 Thanksgiving Day Parade and saw unarmed recruits assigned one-on-one to armed police officers to work inside barriers along the parade route in areas closed to vehicular traffic. During the Pope's visit to New York City in 1995, he said, unarmed recruits were assigned to work with armed officers to escort citizens living in secured areas to their homes. Wilson said that recruits attended a 1996 line-of-duty funeral but were not assigned to any police functions. At the Yankee Victory Day parade in 1996, he said, groups of five recruits were each assigned to an instructor or armed Police Officer on the parade route, under constant supervision and observation. During the snow emergency in 1996, recruits were assigned to police headquarters to answer phone calls and perform administrative work, but were not assigned to duty in the street.

On November 25, 1998, a recruit was struck by the sideview mirror of an automobile while he was directing traffic. On the same day, while she was directing traffic, another recruit

called for assistance when she witnessed an altercation in which a knife was displayed.

POSITIONS OF THE PARTIES

Union's Position

The Union claims that the Department's order creates a practical impact on the safety and health of Academy cadets and is, therefore, a mandatory subject of bargaining. The impact on safety is evident, the Union contends, from the Department's decision to put recruits on traffic duty without adequate training and without weapons. The incidents of November 25, 1998, it says, are proof of this contention. The Union also maintains that the uniforms the recruits must wear while directing traffic may lead uninformed citizens to believe that the recruits are armed police officers. Thus, the Union claims, the Department has placed unarmed and inadequately trained recruits at busy intersections, exposing them to attack by armed civilians who may think they are armed police officers.

Because the Department has refused to bargain over this subject, the Union argues, it has violated §§ 12-306a.(1) and (4) and 12-307b. of the New York City Collective Bargaining Law.[3] The Union says the Board has never required that an employee be injured before finding an impact on safety; rather, it has held that the existence of a threat to safety may create a duty to

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[3] **§12-306 Improper practices; good faith bargaining.**

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.

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§12-307 Scope of collective bargaining; management rights

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b. 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 action; 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 terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

bargain.[4]

According to the Union, recruits have an obligation to take police action if they see crimes committed. It maintains that officers have been dismissed for failure to do so, even while off-duty.[5] Since the Department has directed recruits not to take action if they see crimes committed while on traffic duty, the Union argues, it will force them either to violate the Patrol Guide or risk arrest.

City's Position

The City maintains that it is unlikely that a recruit could be mistaken for an armed Police Officer; they are performing the same traffic duties as unarmed Traffic Enforcement Agents and Auxiliary Officers and their uniforms are not similar enough to the uniforms of other officers to be mistaken for them.

The City contends that the Union has failed to meet its heavy burden of proof or show a clear threat to safety[6] because there is no practical impact on safety from assigning unarmed recruits to traffic control duty. Although the Union alleges that recruits may be mistaken for armed police officers and thus placed in danger, the City maintains, the Union has offered no proof that such a danger exists and its allegations are conclusory and must be dismissed.

As for the Union's argument about the recruits' uniforms, the City says, their uniforms do not resemble those of fully trained Police Officers. The uniform that most closely resembles that of Police Officers, it says, is the uniform worn by an unarmed Auxiliary Police Officer. Further, the City asserts, a recruit wears a different vest and hat than an armed Police Officer. The City says that the recruits not only wear their uniforms while performing traffic duty, but also wear them going to and from the Academy each day. It also contends that the Union has not proven that there is a practical impact on the safety of recruits that results from the fact that it has not issued firearms before sending them out to do traffic control duty.

The City argues that the Union's claim that recruits' safety was compromised by inadequate training was raised for the first time in the Union's reply and, thus, must be dismissed.[7] If we consider the argument, however, the City maintains that the recruits' training was

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[4]The Union cites *United Probation Officers Ass'n and New York City Dep't of Probation*, Decision No. B-37-87; *New York City and L. 621, SEIU*, Decision No. B-34-93; *Uniformed Firefighters Ass'n and City of New York,* Decision No. B-6-91.

[5]The Union cites *Sadler v. Bratton*, 219 A.D.2d 517, 631 N.Y.S.2d 664 (1st Dept 1995) (an off-duty police officer on sick report was dismissed for failing to prevent a sexual assault committed in his presence).

[6]The City cites *Uniformed Firefighters Ass'n and City of New York; Uniformed Fire Officers Ass'n and City of New York*, Decision No. B-39-92.

[7]The Union cites *Dep't of Correction and Correction Officers Benevolent Ass'n*, Decision
(continued...)

adequate and they received close supervision while they were performing traffic control duty.

DISCUSSION

Section 12-307b. of the NYCCBL reserves to the City exclusive control and sole discretion to act unilaterally in certain enumerated areas that are outside the scope of collective bargaining, such as assigning and directing its employees, determining their duties during working hours, and allocating duties among its employees, unless the parties themselves limit that right in bargaining.[8] However, where we find a clear threat to employee safety, the statute imposes a duty to bargain over alleviation of the impact on members of the bargaining unit.[9] It is not necessary for the action to have already taken place, or for an employee to have been harmed, for the Board to find that there is a practical impact on the safety of employees.[10]

In the instant case, the Union argues that the Department's order has a practical impact on the safety of recruits because they were unarmed and could be assaulted by civilians and because they were inadequately trained and prepared for the assignment of traffic control. The testimony and evidence show that recruits were ordered not to get involved if they saw crimes being committed, just to seek assistance from Police Officers. They were issued radios for that purpose and, unless the recruits disobeyed orders, they were unlikely to become involved directly in the kind of police work for which they had not yet been trained or would need firearms. We also find that there is not enough similarity between the uniforms of Police Officers and recruits to have the effect argued by the Union: that ordinary citizens would mistake recruits for Officers.

The City asks us not to consider the Union's argument concerning the safety impact of the training and supervision provided to Academy recruits on traffic control duty. Although the City is correct when it states that the Union raised this argument for the first time in its reply, we will entertain it because it involves a question of safety impact and because the City had the opportunity to address the issue in a hearing. In this regard, as a matter of policy, we find that it would be unwarranted to require that an additional safety impact claim, arising out of the same challenged management action, be precluded from consideration unless re-filed in a separate petition. In addition, the OCB Rules provide that it shall be the duty of a Trial Examiner "to see that a full inquiry is made into all the facts in issue and to obtain a complete record of all facts

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[7](...continued)
No. B-28-97; *Health and Hospitals Corp. and New York State Nurses Ass'n*, Decision No. B-2-95.

[8] *See, e.g.*, *City of New York and L. 221, SEIU,* Decision No. B-34-93.

[9] *See, e.g.*, *Correction Officers Benevolent Ass'n and Dep't of Correction*, Decision No. B-40-92.

[10] *United Probation Officers Ass'n and Dept; of Probation*, Decision No. B-37-87.

necessary for a fair determination of the issues."[11]

The record shows that the Department did not give recruits as much training in traffic control as it gives Police Officers or Traffic Enforcement Agents who undertake the same duty. The Department gave the recruits two hours of classroom training and no field training. Police Officers assigned to traffic control duty have three days of training, with one day in the field. Traffic Enforcement Agents have several weeks of training, and are not allowed to work intersections alone until they have observed a trained Agent in an intersection five times. There is also testimony that recruits were assigned to work alone in intersections, with only intermittent supervision by sergeants who were also supervising seven other recruits at different locations, in addition to other officers.

All of this, however, does not prove that there has been a practical impact on the safety of Academy recruits performing traffic control duty. The Union has not shown that a lesser amount of training and supervision has made the work of the recruits unsafe, or that a greater amount of training would have prevented the one traffic-related injury it introduced into the record. Less training does not necessarily equate to an unsafe condition.

The amount of training provided to employees ordinarily is a matter of management prerogative.[12] Since it is a management prerogative, there is no duty to bargain unless it is proven that some level of training is necessary in order for the job to be performed safely. Here, the Union has not presented objective evidence of the connection between the level of training and employee safety. Without such evidence, its claim remains conclusory. Accordingly, the petition is denied.

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 petition docketed as BCB-2027-98 be, and the same hereby is, dismissed.

Dated: New York, New York
April 5, 1999

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

[11]Title 61, Rules of the City of New York, §1-10(c). *Cf., Cerra and Human Resources Administration,* Decision No. B-27-81.

[12]*Patrolmen's Benevolent Ass'n and New York City Police Dep't*, Decision No. B-5-80 (determining adequacy of training program is a management right).

THOMAS J. GIBLIN
MEMBER

ROBERT H. BOGUCKI
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER