PBA v. City & NYPD, 63 OCB 2 (BCB 1999) [Decision No. B-2-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
	:	
-between-	:	
	:	
PATROLMEN'S BENEVOLENT ASSOCIATION,	:	
	:	
	:	Decision No. B-2-1999
Petitioner,	:	Docket No. BCB-1966-98
	:	
-and-	:	
	:	
The CITY OF NEW YORK and the CITY OF NEW YORK POLICE DEPARTMENT,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On April 29, 1998, the Patrolmen's Benevolent Association ("Union" or "Petitioner"), filed a petition for injunctive relief and a verified improper practice petition against the City of New York Police Department ("NYPD," "City" or "Respondent").[1] The petition alleges that the NYPD violated §12-306(a)(1) and (4) of the New York City Collective Bargaining Law ("NYCCBL")[2]

[1] The petition for injunctive relief was denied by the Board of Collective Bargaining ("Board") on April 16, 1998.

[2] Section 12-306 of the NYCCBL provides, in relevant part:

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 § 12-305 of this chapter;

* * *

(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.

when it unilaterally changed its performance evaluation process without bargaining over the proposed changes. The respondent filed its answer to the improper practice petition on April 8, 1998. The petitioner filed its reply on April 29, 1998.

BACKGROUND

On March 6, 1997, John P. Beirne, Deputy Chief and Commanding Officer of the Office of Labor Relations ("OLR"), wrote a letter to Louis Matarazzo, President of the Patrolmen's Benevolent Association ("PBA") regarding a proposed interim order. The letter stated that it was the department's intent to implement this order in the near future. The attached proposed interim order, titled "Implementation of Performance Banding System and Personnel Records Check During Annual Performance Evaluation Process," promulgated two changes. In the first, each officer would be placed in one of three "performance percentage bands" comprised of his or her "squad peers." The proposed interim order mandates that regardless of the objective performance rating given to the individual police officer,

> Individuals with the highest performance rating among their squad peers would be identified and placed by their immediate supervisor in the 'top 25 percent band' of performers; those identified next in performance would be placed in the 'middle 50 percent band' and, following these performers, are the individuals with placement in the 'lower 25 percent band.' This three-band designation . . . for each uniform member of the service below the rank of captain, excluding detectives, must be communicated by the Rater to the individual during the annual post-appraisal interview and typed into the 'Overall Rater's Comments' caption on the front of the evaluation form.

The proposed interim order provided detailed instructions as to how a "Rater" would compute the number of officers in each band.

The second change required raters to sign a form verifying that they have taken into account

in their evaluations a number of performance criteria. It reads, in pertinent part:

> [A]ll Raters and Reviewers *in all Bureaus* must now examine the Ratee's *CPI Record, Department Recognition, Sick Record, Commendatory Letters, possible inclusion in one of the Performance Monitoring Systems, precinct or community acknowledgments, CCRB Record for entries pertaining to the immediate rating period, and any other record of performance documentation (e.g. Command Discipline Log, Minor Violations Log, etc.)*.

It continues by stating:

> This performance related information must be considered when assessing and determining an individual's "Overall Evaluation" standing (*i.e.* Competent, Highly Competent, etc.) for the rating period. This new procedure will entail the completion of a "Performance Verification" . . . that must be signed by both the Rater and Reviewer, attesting to this personnel record review of the Ratee. This statement must be attached . . .to the original performance evaluation form which will be forwarded to the Employee Management Division.

Matarazzo sent a letter to Beirne on March 16, 1998, stating that it had been repeatedly held by PERB that annual evaluation procedures are a "term and condition of employment" and consequently, subject to mandatory collective bargaining with the certified bargaining agent. The letter then cites several PERB decisions apparently relating to evaluation procedures. Matarazzo states that the PBA is the appropriate bargaining agent with regard to the annual evaluation of Police Officers. Matarazzo then requests that Beirne schedule a meeting with him to begin negotiations regarding the said proposed interim order at Beirne's earliest convenience. On March 18, 1998, Interim Order Number 12 ("IO 12") was issued. The title and text was identical to the proposed interim order described above.

The petition states that, by refusing to collectively bargain regarding an issue which is mandatorily negotiable after petitioner requested collective bargaining on this issue, the respondent

has violated § 12-306 (a)(1) and (4) of the NYCCBL. The petition requests that the Board find the respondents guilty of committing an improper practice and the Board order the respondents cease and desist from implementing IO 12 of March 18, 1998.

POSITIONS OF THE PARTIES

Petitioner's Position

The petitioner contends that prior to the implementation of IO 12, Police Officers were rated by their supervisors on a five level objective scale: "Very Low," "Low," "Competent," "Highly Competent" or "Extremely Competent." A rater in command of five Police Officers could thus objectively evaluate them, and, in a good unit, might well have two officers rated "Highly Competent" and three officers rated "Extremely Competent." It contends that implementation of the said Interim Order will result in the subjective evaluation of 25% of officers as being in the "lower 25%" of the squad to which they were assigned, regardless of the fact that they may have been objectively rated as "Highly Competent" merely because other officers in their squads are rated as "Extremely Competent." It argues that this will change the procedure by ranking officers against other members of his/her squad instead of against an objective set of standards.

In its reply, the petitioner contends that it does not concede that respondents are correct in their interpretation of prior law regarding the distinction the respondent attempts to make between an "evaluation procedure," which the respondents concede is a mandatory subject of bargaining, and "standards or criteria" used to evaluate employees, which the respondent contends is a nonmandatory subject of collective bargaining. The Union argues that regardless of whether the said distinction is correct, it is obvious that the implementation of IO 12 will effect a drastic change in the procedure

used to evaluate Police Officers, and does not merely change the "standards or criteria" used in the evaluation process, as alleged by respondent. The Union argues that this is regardless of whether IO 12 is intended to replace the prior evaluation system or merely to augment it.

Respondent's Position

The respondent argues that IO 12 sets out specific requirements for the raters and reviewers, but does not in any way modify, remove or effect the procedures associated with the established evaluation form. It contends that the performance evaluation used before issuance of IO 12 was designed to provide a quantitative measure of the specific performance and behavioral dimensions and that IO 12 leaves the entire performance review process and form intact except to add only the "Banding" rating which is determined by the quantitative results of the performance evaluation. According to the respondent, IO 12 merely takes one measure, *i.e.*, the numerical measures that result from the performance evaluation and places individuals into "bands." It contends that it was promulgated merely to augment the accuracy of data reported on the performance evaluation and requires raters to "fine tune" their individual performance assessments during the performance evaluation process.

The respondent argues that prior to issuing IO 12, the performance evaluation process anticipated that a reviewer would conduct an appropriate review and that such a review could include consideration of each of the following when formulating the evaluation rating of the individual: individual CPI Record, Department Recognition Record, CCRB record, Performance Monitoring Record (if applicable) and all other records of performance for events in the immediate rating period. It contends that IO 12 does not change the material that is subject to consideration; that it merely

requires that the rater and the reviewer now sign a "Performance Verification" that states that as part of the evaluation process they reviewed and considered the above-mentioned factors. It states that the requirement that raters and reviewers sign a verification is not part of the performance evaluation, that it does not change the performance standards, it has no effect on procedures and it will not appear in the employee's personnel file. It argues that it is merely a management tool designed to remind the rater and reviewer to consider all applicable personnel material when preparing a performance evaluation.

The respondent maintains that they met with petitioners on April 7, 1998 and discussed the purpose and intent of IO 12 and that such a meeting was not mandatory in this case. It also maintains that IO 12 addresses only a management prerogative and/or a nonmandatory subject of bargaining. It states that IO 12 has not yet been implemented and will not be implemented until direction is received from the Board. It contends that respondents advised petitioners on May 7, 1998 that IO 12 will not be implemented while the Board's decision is pending in this matter.

The respondent argues that the Board has found that § 12-306 (a)(1) may be independently violated by conduct such as threatening an employee for union activity[3] and that in the present case, there are no facts alleged to support any claim as to any individual employee or group of employees as to § 12-306 (a)(1) alone.

The respondent argues that petitioner has failed to allege any facts that support a violation of § 12-306 (a)(4). It contends that IO 12 incorporates the evaluation procedures that have been in existence for several years and that there has been no unilateral change in the evaluation procedures.

---

[3] The respondent cites Decision No. B-47-89.

The respondent argues that the requirement that the rater and reviewer sign a verification that they conducted a review of specific records does not modify the criteria and standards of the performance evaluation; it merely established an accountability measure to assure that the rater and reviewer are considering all the appropriate personnel material during a performance evaluation. Even if such an accountability measure could be perceived as a change to the criteria and standards, the respondent argues, the change is to a nonmandatory subject of bargaining and it falls within management's prerogative.

The respondent states that PERB has found no improper practice when the employer expands, deletes from or modifies an evaluation form and that PERB has found that the criteria or standard included in a performance evaluation are nonmandatory subjects of bargaining.[4] It contends that in *Elwood Union Free School District,* 10 PERB ¶ 3107 (1977), PERB found no improper practice when a school district modified an evaluation form by changing certain "quality categories" to include new qualities and delete others. It quotes the decision as stating, "[t]he change in the evaluation form . . . is not one of procedure, but of standards. The new form changes some of the criteria against which teachers are to be evaluated and simplified the measurement standards. The criteria and standards for teacher evaluation are a management prerogative."

Respondent also refers to *Genesee Educational Association*, 29 PERB ¶ 4594 (1996). It contends that in this decision, PERB has also found that a change in an evaluation process that provided new skills categories to be rated on a new rating scale that included new, as well as old, objectives and goals was a change in the criteria upon which employees were to be evaluated.

---

[4] The respondent cites *Genesee Educational Association*, 29 PERB ¶ 4594 (1996) and *Elwood Union Free School District*, 10 PERB ¶ 3107 (1977).

Respondent contends that it was found that those changes were nonmandatory subjects of bargaining and that the employer had no duty to bargain over the revised criteria or the changes in the evaluation form. In *Genesee*, the Administrative Law Judge noted that the PERB Board has long held that "while evaluation procedures are mandatory subjects of bargaining, the standards or criteria used to evaluate employees are nonmandatory subjects of bargaining." The Administrative Law Judge also stated that, "[T]he College might have expanded the criteria upon which employees were to be evaluated. However, a change in the criteria upon which employees are to be evaluated is a nonmandatory subject, and the College had no duty to negotiate the revised criteria or its internal evaluation form." Based on those decisions, respondent argues, the issuance and implementation of IO 12 would not constitute an improper practice.

The respondent also argues that in its communications related to this issue, petitioner erroneously relies upon three cases and Jerome Lefkowitz' *Public Sector Labor and Employment Law* as support for its position. The first case petitioner relies on, the respondent argues, *Board of Education of the Newburgh Enlarged City School District v. PERB*, 22 PERB ¶ 7009 (1989), and Lefkowitz' book, pertain only to evaluation procedures, which the respondent concedes are mandatory subjects of bargaining. However, respondent maintains that what IO 12 implements are criteria and standards, or nonmandatory subject of bargaining. The respondent argues that petitioner erroneously relied on *Board of Education, Bellmore Merrick Central High School Dist., Nassau County v. Bellmore Merrick United Secondary Teachers Association*, 39 N.Y.2d 167, 383 N.Y.S.2d 53 (Ct. App. 1976) because the case involved an arbitrability question. Respondent also argues that petitioner relied erroneously upon *Cohoes City School District v. Cohoes Teachers Association*, 40

N.Y.2d 774, 390 N.Y.S.2d 53(Ct. App. 1976) because the court found that the employer had a right to refuse tenure to a probationary employee without giving a reason. It was found, allegedly, that this obligation can not be waived through the bargaining process.

The respondent argues that when petitioner complains that IO 12 is a "subjective" measure, this amounts to an admission that IO 12 applies only to the criteria and standards considered by the rater or reviewer. Such subjectivity, it argues, naturally comes into play to some degree when applying standards and criteria in any performance evaluation, is separate from the procedures followed during the evaluation process. It argues that IO 12 does not effect any part of the performance evaluation procedures applicable to the person evaluated. Respondent argues that in the instant matter, the Department is merely expanding the evaluation form to include the standard criteria of "banding" and IO 12 does not effect any part of the performance evaluation procedures applicable to the person evaluated.

The only other "change" required by IO 12 is one related to the accountability of the rater and the reviewer in that they will now sign a verification that they considered all relevant materials when they prepared the performance evaluation, the respondent argues. It argues that the requirement is not part of the performance evaluations, does not change the standards, in no way effects the procedures and will not appear in the employee's personnel file. It is merely a management tool designed to remind the rater and the reviewer to consider all applicable personnel material. Therefore, respondent argues, it did not act unilaterally with regards to a mandatory subject of bargaining as their actions in issuing IO 12 were limited to an exercise of management prerogative relative to a nonmandatory subject of bargaining.

The respondent argues that the Board has held that where management acts within the realm of its statutory prerogative, it does not commit an improper practice when it announces its intention to exercise that prerogative in a certain way.[5] It contends that when the Police Department advised petitioner of its intention to issue IO 12, it was merely announcing an exercise of its prerogative with regard to a nonmandatory subject of bargaining. Accordingly, the respondents did not fail or refuse to bargain in good faith and no violation of § 12-306 (a)(1) and (4) can be found.

Finally, the respondent argues that the petition fails to state a claim in that the decision to issue IO 12, at best, may be considered a modification of the standards and criteria upon which employees are to be evaluated and a decision to effect such a modification is a right reserved to management by § 12-307 of the NYCCBL.[6] It argues that petitioner seeks to overturn a management decision that would expand the standards and criteria within the performance evaluation form. The respondent argues that IO 12 merely augments the accuracy of performance data reported by supervisors when they conduct performance evaluations and IO 12 has no impact or effect on the procedures for conducting a performance evaluation. The rater and reviewer verifications will not be part of the performance evaluation that will appear in the employee's personnel file. It argues that in the instant matter, petitioner has not alleged any limitation in the collective bargaining agreement

---

[5] The respondent cites Decision Nos. B-14-92 and B-15-92.

[6] Section 12-307(b) of the NYCCBL reads, in pertinent part:

It is the right of the city, or any other public employer, acting through its agencies, to . . . determine the standards of service 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 other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . and exercise complete discretion over its organization and the technology of performing its work.

which curtails the City's managerial right, under § 12-307 of the NYCCBL, to issue and implement IO 12. It reminds the Board that PERB, in *Elwood Union Free School Dist.*, found that the criteria and standards for teacher evaluation are a management prerogative, and a change in the evaluation form constituted a change in standards. It contends that the two modifications are similar in that IO 12 merely modifies the form used for the performance evaluation. Accordingly, the respondent argues, the petition should be dismissed.

DISCUSSION

As a preliminary issue, we shall discuss the issue of ripeness, an issue that has arisen traditionally in the scope of bargaining context, because the respondent states in its answer that IO 12 has not yet been implemented and will not be implemented until direction is received by the Board. We have held that the policy carried out by the statutory structure of the NYCCBL permits a finding by this Board on the bargainability of a particular subject without requiring the parties to come before us in a procedural posture where one already may have committed an improper practice.[7] In this case, there is no question that a controversy exists between the parties on the bargainability of the instant matter. If the Union can sustain its claim, we may appropriately issue a bargaining order even though the plan has not yet been implemented. Accordingly, we find that the Union's petition is not premature.

Turning to the merits of this dispute, the City acknowledges that procedures related to the evaluations are a mandatory subject of collective bargaining. However, the City contends that IO12 changes the criteria or standards by which an officer is rated, and is therefore a nonmandatory subject

---

[7] *City of New York v. Patrolmen's Benevolent Association*, Decision No. B-5-75.

of bargaining. The question that remains is whether the changes effected by IO 12 may be classified as substantive, *i.e.*, changes in standards and criteria, or procedural.

We find the distinction clearly outlined in *Genesee Educational Association NEA/NY v. Genesee Community College*, 29 PERB ¶ 4594. In that case, Genesee Education Association filed an improper practice charge alleging that the college unilaterally implemented a new professional evaluation form for all non-teaching personnel. The prior evaluations had been completed by a previous supervisor on a two page narrative form, using criteria which had been agreed to by the employee and her supervisor at the time of her last performance evaluation, and the quantitative goals which were developed at the time that the annual plan was developed. In preparation for her first two evaluations, the employee had gathered specific data for the evaluator relating to achievement of her goals.

In preparation for her first evaluation under a new supervisor, the supervisor requested that the employee gather different data for her evaluation. The new supervisor also sent the employee a newly developed evaluation form. The form listed several "skill" categories, with a rating scale for a series of related "behaviors." Several of the objectives corresponded to skills she had previously been evaluated on, including functional/technical work, organization and thoroughness. Several others were new to the evaluation, including initiative, integrity and oral communication, as were a number of specific "behaviors."

The Administrative Law Judge noted the PERB Board's distinction between evaluation procedures and standards and criteria. In holding that the modifications were changes in criteria and standards rather than procedure, the Administrative Law Judge noted that the employee was still

required to meet with her supervisor and discuss her performance and to provide any material which would be relevant to her performance review. It held that the fact that she was required to provide different documents to her new supervisor than she had to her prior supervisor or that she chose to fill out the new evaluation form prior to her conference was not tantamount to a change in procedure. The Administrative Law Judge stressed that the process of meeting with her supervisor to review her performance and any data she had gathered remained unchanged. It distinguished this case from *Sufffolk County BOCES II*,[8] where the employees were required to participate in an additional pre-observation conference and thus deemed a change in evaluation procedure. In *Genesee*, the Administrative Law Judge then stated,

> In adopting the new form, the College might have expanded the criteria upon which the employees were to be evaluated. However, a change in the criteria upon which employees are to be evaluated is a nonmandatory subject, and the College had no duty to negotiate the revised criteria or its internal evaluation form.

We find further guidance in *Elwood Union Free School District v. Elwood Teachers Alliance*, 10 PERB ¶ 3107. In dismissing an improper practice charge, the Board held that a change in a teacher evaluation form was not one of procedure, but one of criteria and standards which is management prerogative and thus a nonmandatory subject of bargaining. The evaluation form in controversy reduced some evaluation categories and substituted others in the areas of general

---

[8] *Suffolk County Board of Cooperative Educational Services, Second Supervisory District v. BOCES II Teachers Association*, 17 PERB ¶ 3043.

quality,[9] professional quality[10] and instructional quality.[11] In denying that the changes were procedural, the Board held that the new form changes some of the criteria against which teachers are to be evaluated and simplifies the measurement standards. The Board held that the criteria and standards for teacher evaluation are a management prerogative and thus a nonmandatory subject of bargaining.

In the instant matter, we hold that IO 12 implements a new standard and criteria, not a procedure. The City asserts that the three band designation will merely be an addition to the existing performance evaluation. If so, the addition of a three band designation in which the rater is to place the officer is analogous to the change of the evaluation form in *Elwood Union Free School District*. In *Elwood Union Free School District*, PERB found it within the employer's right to change the criteria by which an employee is judged. Here, the City is also changing the criteria on which an officer is judged by adding a section that asks the rater to place the officer in a certain performance band. This scenario is analogous to placing the employee in a category rating his or her performance as "Satisfactory" or "Needs Improvement." The only difference between the two is that the process that the *reviewer* uses to place an *employee* in a certain category in the instant matter is mandated, where the process by which the reviewer arrived at a rating in *Elwood Union Free School District*

---

[9] Four categories ("Highly Satisfactory" through "Unsatisfactory" were reduced to two ("Satisfactory" and "Needs Improvement").

[10] "Attitude" was deleted and "Performance of School Duties," and "Class or Departmental Responsibilities" were added. "Response to Criticism" was changed to "Response to Suggestions for Improvement."

[11] "Preparation" was deleted and "Sets Realistic Standards" and "Uses Fair and Valid Evaluation Techniques" were added. "Rapport with Students" was deleted and "Respects Worth and Dignity of Individual Child" was added.

was left to the individual rater's discretion. However, that distinction is not sufficient to place performance banding in the realm of an evaluation procedure.

Though IO 12 mandates a certain way of calculating a rating for the rater and mandates that the rater and reviewer sign a document confirming their consideration of several factors, the calculations and confirmation signature are designed to aid the rater in arriving at a level of performance. The performance level in which the rater is required to place the officer may only be described as a standard and criteria. It appears that the employee is not required to do anything procedurally different from before. The employees will not be required to appear at an additional conference, as in *Suffolk County BOCES II.* The officers are not even required to supply additional or different documentation. As there is no evidence that the process of performance reviews for the officers will change if the City chooses to implement IO 12, and the standards and criteria by which an employee is reviewed are nonmandatory subjects of bargaining, we hereby dismiss the instant improper practice petition in its entirety.

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-1966-98 be, and the same hereby is, dismissed in its entirety.

DATED: February 4, 1999
New York, N. Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER