COBA v. DOC, 63 OCB 26 (BCB 1999) [Decision No. B-26-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	
CORRECTION OFFICERS' BENEVOLENT ASSOCIATION, President, Norman Seabrook,	:	
Petitioner,	:	DECISION NO. B-26-1999 DOCKET NO. BCB-2053-99
-and-	:	
NEW YORK CITY DEPARTMENT OF CORRECTION,	:	
Respondent.	:	

DECISION AND ORDER

On April 2, 1999, the Correction Officers' Benevolent Association ("COBA" or "Union") filed the instant verified improper practice petition alleging that the New York City Department of Correction ("City" or "Department") failed to bargain in good faith over its decision to institute training for Correction Officers during a midnight tour of duty at the Correction Academy ("Academy"). On April 15, 1999, the Union filed an amended verified improper practice petition. On April 29, 1999, the City filed an answer to the amended petition. The Union filed a reply on May 7, 1999.

Background

The Correction Academy ("Academy") trains Correction Officers in the use of, *inter alia*, batons, use of force and alternatives, cardiopulmonary resuscitation methods, infectious disease

control, and equal employment opportunity matters. Correction Officers are assigned to work at the Academy as instructors and support staff. According to the City, forty-three Correction Officers are assigned as instructors and support staff; the Union asserts 41 are assigned there. At the time the instant petition was filed, more than 600 Correction Officers were in training at the Academy. Among them were some 400 new recruits.

Traditionally, the only tours of duty for Correction Officers assigned to the Academy were a day tour, 7x3, and an evening tour, 3x11. The tours are eight hours and fifteen minutes long. Typically, assignments at the Academy have not required overtime. Further, unlike staffing in the jails, training at the Academy heretofore was never conducted during a midnight tour.

On March 25, 1999, Nicholas Santangelo ("Santangelo"), the Department's Director of Labor Relations, telephoned the COBA offices to speak with its president, Norman Seabrook. Seabrook was unavailable but, later that day, Joseph Bracco ("Bracco"), COBA's Second Vice President, returned the call. Bracco and Santangelo discussed the Department's plan to accommodate an unusually large number of Correction Officers who would be in training at the Academy during April and May. The large number was occasioned by the fact that three groups of Correction Officers would be taking classes at the same time. One class of new recruits had started training in February, 1999. A second class of new recruits was scheduled to report the first week of April, 1999. In addition, about 200 Correction Officers who were already "in-service" were undergoing routine re-training as required by various federal, state, and city mandates.

Santangelo told Bracco that the training of all three groups would overlap for about two months. To accommodate them during that time period, he said, the Academy would be adding a midnight tour. Officers would be asked first to volunteer to work the extra assignment, earning overtime at the contractual rate, but the Department might mandate overtime if not enough Officers volunteered. At Bracco's request, Santangelo put the Department's plan in writing in a letter dated March 30, 1999. The letter also said the Department anticipated that the opportunity for extra compensation would be welcomed by Union members who work at the Academy, obviating mandatory overtime.

On March 31, 1999, Assistant Commissioner Deborah J. Kurtz ("Kurtz") met with her support staff and instructors from the Academy, to inform them about the plan for a "temporary" midnight tour. By Teletype Order No. 1443-0, dated April 1, 1999, Gary M. Lanigan ("Lanigan"), First Deputy Commissioner of the Department, informed Commanding Officers in all Department facilities and divisions that the midnight training sessions for "all uniformed personnel" would in fact begin April 13, 1999.

Positions of the Parties

Union's Position

COBA asserts that it opposed implementation of the midnight tour at the Correction Academy without prior collective bargaining for several reasons. In its amended petition, the Union argues that Academy "instructors will no longer work the usual and customary eight hour and fifteen minute tour of duty," and that "their hours of work will be extended on a regular and

continuing basis in order to ensure coverage for the midnight tour." The Union asserts that the work day could be as long as sixteen hours, at least until May 22, 1999. This, the Union asserts, renders the staffing decision mandatorily bargainable.

The Union acknowledges management's right under the New York City Collective Law ("NYCCBL") to make staffing and scheduling decisions, but the Union asserts that right is limited by what the Union says is a decades-long practice of not requiring midnight tours at the Academy. The Union contends that this practice of not requiring Correction Officers to staff a midnight tour "gives rise to an agreed upon term and condition of employment" requiring bargaining. For support, the Union cites *Matter of Aeneas McDonald Police Benevolent Association v. City of Geneva*,[1] for the proposition that an employer must bargain over a change in a past practice if it involves a mandatory subject of bargaining.

The Union also contends that "suddenly" putting Academy instructors on a midnight tour has a "direct and adverse effect on working conditions" by disrupting the Officers' daily schedules, affecting eating and sleep patterns as well as their interaction with others in their personal lives. This, the Union contends, also renders the Department's decision mandatorily bargainable.

The Union also argues, in its reply, that, to determine the bargainability of the City's decision to institute a midnight tour at the Academy, the Board of Collective Bargaining ("Board") should apply the test set forth by the Supreme Court of the United States in *Ford*

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[1] 92 NY2d 326, 680 NYS2d 887 (1998) (Article 78 challenge of public employer's reduction in level of health insurance benefits provided to retired union members).

Motor Company v. N.L.R.B.,[2] which this Board applied in *District Council 37, AFSCME, AFL-CIO, et al. v. New York City Housing Authority*.[3] Citing the first prong of the *Ford* test, the Union asserts that implementation of the midnight tour is germane to the working environment. Citing the second prong of the *Ford* test, the Union contends that the managerial decision at issue here does not lie at the core of entrepreneurial control, assertedly because "DOC's own description of this plan as temporary confirms that its decision is not 'fundamental to the basic direction of the enterprise,'" the Union concludes.

The Union argues as well that this Board has never held that management has the right to "abuse overtime, as in this case, by systematically and regularly extending hours of work, where the need for more hours was anticipated well in advance." Pointing to NYCCBL § 12-307(a) as mandating bargaining on overtime as a component of "hours," and disputing the City's argument that the assignment of overtime is a management right, the Union argues that the management rights clause in 12-307(b) does not contain the word "overtime."

According to the Union, the Department has failed to bargain in good faith over its unilateral decision to staff a midnight tour of duty at the Correction Academy. In response to the City's assertion that no demand was made for bargaining, the Union contends that no demand is necessary because the City's refusal was assertedly "inherent" in its decision to act unilaterally, the Union argues, and "need not be preceded or followed by a request to bargain."[4]

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[2] 441 U.S. 488, 101 LRRM 2222 (1979).

[3] Decision No. B-1-90.

[4] For the proposition that a unilateral change in a term or condition of employment constitutes a refusal to bargain in good faith, thus, an improper practice, the Union cites *District*

As for relief, the Union seeks bargaining over the decision to implement the midnight tour and a cease-and-desist order from this Board enjoining the Department from implementation of a midnight tour of duty at the Correction Academy "until impasse proceedings or an earlier mutual resolution."

City's Position

The City that the assignment of Correction Officers to work overtime in the instant case is a legitimate exercise of its managerial prerogative to deploy its work force and to determine the methods, means and personnel by which government operations will be carried out. The City, therefore, denies it acted improperly by making the assignments at issue here.

In their March 25, 1999, phone discussion, Santangelo told Bracco that "a midnight tour was planned to be used to deal with the situation [of a two-month overlap of a new class of recruits with the then-current class]." In his affidavit in support of the City's answer, Santangelo also said he told Bracco that a sign-up list would be posted for volunteers to work, "in addition to their regular tour, an extra four hours (or more if they wished) on the midnight tour, for which they would be compensated at the overtime rate." He also said, "[I]t might be necessary for the Department to order overtime in the event that not enough volunteers signed up."

Council 37, AFSCME, AFL-CIO and Its Affiliated Locals 2507 and 3621 v. New York City Emergency Medical Service of the New York City Health and Hospitals Corporation, Decision No. B-16-96; *District Council 37, AFSCME, AFL-CIO , v. New York City Health and Hospitals Corporation, Emergency Medical Service*, Decision No. B-26-89; and *United Probation Officers Association v. Department of Probation*, Decision No. B-44-86.

The City asserts, at one point in its answer,[5] that "it was necessary to add a midnight tour at the Academy for approximately two months (April 13 through May 22)." At another point in its answer,[6] it states that the Department "has not created a new tour of duty," but that it merely expanded its hours of operation to be consistent with operating hours throughout the Department. The City contends that the expansion is a temporary schedule adjustment to permit all Correction Officers who must undergo training during April and May, 1999, to do so in the heavily used facilities of the Academy, where space is at a premium during those months. According to the affidavit of Deputy Commissioner Kurtz, submitted with the City's answer, the Department intended that only Correction Officers already in-service would report for re-training at midnight and that new recruits would continue to be trained during the daytime and evening hours.

The City argues that it was under no obligation to negotiate over the discontinuation of any past practice conducting training during day and evening tours. Disputing the Union's argument to the contrary, the City relies on this Board's case law for the proposition that no duty to negotiate arises from the revocation of a rule or regulation pertaining to a non-mandatory subject of bargaining.[7] The City distinguishes the PERB case law cited by the Union on this point,[8] arguing that the Union misreads the holding of that case. The City also asserts that a

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[5] Paragraph 35, p. 6.

[6] Paragraph 51, p. 11.

[7] The City cites *Patrolmen's Benevolent Association of the City of New York v. Police Department of the City of New York*, Decision No. B-42-88.

[8] *See* n. 1, above.

subject's status is fixed by law and is unaffected by the parties' actions or intentions.[9]

Moreover, the City claims that the Union never demanded bargaining over the plan to utilize the midnight tour at the Academy but that, even if it had demanded bargaining, the City would have been under no obligation to negotiate, because the ordering of overtime assertedly is a managerial prerogative,[10] and arguably nothing in the parties' collective bargaining agreement limits that prerogative.[11]

The City also disputes the Union's assertion that the overtime assignments constitute a "significant" change in terms and conditions of employment requiring bargaining. The City adds that no plans are contemplated which would change or deny unit members overtime pay to which they are entitled under the contract.

For these reasons, the City argues that the Union has failed to make out a *prima facie* case of failure to bargain in good faith.

Discussion

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[9] The City cites *City of New York and L. 621, SEIU*, Decision No. B-34-93 at 15, and *City of New York v. Uniformed Firefighters' Association of Greater New York*, Decision No. B-4-89.

[10] The City cites *United Probation Officers Association v. New York City Department of Probation*, Decision No. B-29-87.

[11] The City cites *Uniformed Sanitationmen's Association, Local 831, IBT, AFL-CIO v. City of New York*, Decision No. B-68-90; *Sergeants' Benevolent Association v. City of New York, Office of Municipal Labor Relations and New York City Police Department*, Decision No. B-56-88 at 12-13, and *United Probation Officers Association v. James Payne, Commissioner, New York City Department of Probation*, Decision No. B-37-87 at 4-5; and *City of New York v. Patrolmen's Benevolent Association*, Decision No. B-35-86.

Section 12-307(a) of the NYCCBL requires public employers and employee organizations to bargain in good faith on all matters concerning wages, hours and terms and conditions of employment.[12] With respect to "hours," the duty to bargain includes, *inter alia*, the total number of hours in a work day and the total number of hours in a work week.[13] The duty to bargain also includes overtime where the issue concerns, *inter alia*, the rate of compensation.[14] PERB has also held that the Taylor Law requires negotiations over "terms and conditions of employment," defining that phrase to mean, *inter alia*, hours and stating that the number of hours in the work day and work week is a mandatory subject of bargaining.[15]

Section 12-307(b) of the NYCCBL, however, 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

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[12] The duty to negotiate a mandatory subject includes the duty to negotiate until agreement is reached or the impasse procedures are exhausted, and to submit to the impasse procedures set forth in the statute; the City may not unilaterally implement a change in a mandatory subject of bargaining before bargaining on the subject has been exhausted. *See, e.g., Uniformed Firefighters Association v. Fire Department*, Decision No. B- 63-91.

[13] *See, e.g.*, *Patrolmen's Benevolent Association v. City of New York and City of New York Police Department*, Decision No. B-04-1999, at 9, citing *Patrolmen's Benevolent Association v. City of New York*, Decision No. B-8-80.

[14] See *City of New York v. Uniformed Firefighters Association of Greater New York*, Decision No. B-4-89, citing Civil Service Employees Association, Inc., Niagara Chapter and Town of Niagara, 14 PERB 3049 (1981), wherein PERB held that the Union's proposal concerning rate of overtime pay for police officers was mandatorily negotiable.

[15] *See, e.g., Local 294, International Brotherhood of Teamsters and City of Amsterdam*, 10 PERB 3007 (1977).

limit that right in bargaining.[16] In prior decisions we have held that scheduling is a management right pursuant to § 12-307(b) and, therefore, not a mandatory subject of bargaining.[17]

In the case before us, the City makes conflicting assertions about whether or not the Department instituted a midnight tour of duty which was "new" at the Correction Academy, but there is no dispute that Correction Officers were asked to work overtime to help cover training sessions which began at midnight. Nor is there any dispute that, heretofore, training sessions did not start at midnight.

The heart of the Union's complaint is that the overtime worked by Correction Officers beginning at midnight assertedly represents a unilateral change in the hours of work of Correction Officers who are Academy instructors and staff. The Union asserts this implicates a mandatory subject of bargaining. The Union concludes that the Department was required to negotiate over its decision "no longer" to require the unit members at issue to work what the

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[16] *See, e.g., Patrolmen's Benevolent Association v. City of New York and New York Police Department*, Decision No. B-12-1999, citing *City of New York and L. 621, SEIU*, Decision No. B-34-93.

[17] *See, e.g., City of New York v. Uniformed Firefighters Association of Greater New York*, Decision No. B-4-89 and, generally, *Uniformed Firefighters' Association of Greater New York v. City of New York*, Decision No. B-21-87. See also, *City of New York, v. Patrolmen's Benevolent Association of the City of New York*, Decision No. B-24-75 (starting and finishing times of tours of duty, number of different charts, number of tours on each chart), *aff'd sub nom. Patrolmen's Benevolent Association v. Board of Collective Bargaining*, N.Y. Co. Sup. Ct. (N.Y. *Law Journal*, Jan. 2, 1976, at p. 6); *Lieutenants' Benevolent Association v. City of New York*, Decision No. B-10-75 (starting and finishing times); *City of New York v. Patrolmen's Benevolent Association*, Decision No. B-5-75 (changes on duty charts); *City Employees' Union, Local 237, IBT, v. New York City Housing Authority* and *New York City Housing Authority v. City Employees' Union, Local 237, IBT*, Decision No. B-6-74 (right to schedule work on holidays and weekends); and *City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-4-69 (establishment of shift hours).

Union calls "the usual and customary eight hour and fifteen minute tour of duty." By failing to negotiate, the Union continues, the Department has engaged in an improper practice.

The City argues that the Department's decision was a proper exercise of its managerial prerogative to assign overtime pursuant to its right under § 12-307(b) to "determine the standard of services to be offered" and to "determine the methods, means and personnel by which government operations are to be conducted. . . ."

In a recent case wherein the Department of Sanitation determined that it was necessary to require that Sanitation Enforcement Agents ("SEAs") work a six-day week for less than three months in order to clean up the most problematic districts in the City, this Board held that the unilateral determination of the standards of service to be offered by that Department, as well as the methods, means and personnel by which governmental operations were to be conducted, were reserved to the agency and outside of the scope of the agency's obligation to bargain.[18] That included work charts and overtime. Nor was there any dispute that the SEAs received the proper compensation under the applicable collective bargaining agreement or that the standard work charts were unchanged, apart from the addition of overtime.[19]

So, too, in the instant case, there is no dispute that the standard work charts have been unchanged, apart from the addition of overtime. There is neither any contention that the Department threatened to withhold payment for overtime at the previously negotiated and agreed-upon rate nor that the Correction Officers who actually worked the overtime did not

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[18] *Id.* at 6.

[19] *Id.* at 7.

receive the pay to which they were entitled. We find, therefore, that the Union has failed to sustain its claim that the assignment of overtime under the circumstances herein concerned a mandatory subject of bargaining or was improper under our statute.[20]

We find equally unpersuasive the Union's argument that the longstanding practice of not requiring unit members to work a midnight tour of duty at the Academy creates a duty to bargain when such a tour is instituted. Under the NYCCBL, the bargaining status of a subject matter is fixed by law and is unaffected by the parties' actions or intentions.[21] In an earlier case, this Board rejected a union's unrebutted contention that, because the City for several years had scheduled Licensed Practical Nurses to be off-duty every other weekend, it was required to bargain on the subject.[22]

So, too, in the instant case, no duty to bargain arises from any past practice of not scheduling a midnight tour of duty, absent a finding by this Board of a practical impact.[23]

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[20] Even if the Union had been successful in this regard, its assertion that Correction Officers would be assigned sixteen hour tours on a regular and continuing basis appears to be conjectural. The Union has not pointed to any factual instance wherein that actually occurred. Santangelo's affidavit asserts, and the Union does not deny, that a sign-up list would be posted for volunteers to work "an extra *four* hours (or more if they *wished*) on the midnight tour. . . ." (Emphasis added.)

[21] *Id.* at 38, citing *City of New York v. Uniformed Firefighters Association of Greater New York*, Decision No. B-4-89 at 30-31; *Uniformed Firefighters' Association of Greater New York*, Decision No. B-21-87; and *City of New York v. Social Service Employees Union*, Decision No. B-11-68.

[22] *City of New York v. Licensed Practical Nurses and Technicians of New York, Inc., Local 721, Service Employees International Union, AFL-CIO*, Decision No. B-59-89 at 38.

[23] The Union urges the use of the test we adopted in *District Council 37, AFSCME, AFL-CIO, et al. v. New York City Housing Authority*, Decision No. B-1-90, citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 101 LRRM 2222 (1979). The so-called "*Ford*" test is inappropriate in

In this regard, the Union's claims that implementation of the midnight tour at the Academy disrupts the eating and sleep patterns of unit members as well as their interaction with others in their daily lives. To be sure, this Board has recognized that § 12-307b of the NYCCBL provides that, notwithstanding the managerial prerogatives set forth in that section, unilateral, managerial action which has an impact on terms and conditions of employment including, but not limited to, questions of workload, staffing,[24] and employee safety are within the scope of collective bargaining. However, here, the Union neither asserts a claim of practical impact nor provides factual assertions which could arguably support a contention that the unilateral managerial decision has had a practical impact on unit members.

As we find no duty to bargain over the Department's unilateral decision to schedule overtime for the Correction Officers at issue here, we therefore find no breach of that duty and no improper practice under the circumstances as alleged by the Union in the instant petition. For all the reasons above, we deny the instant petition.

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determining the bargainability of the Department's scheduling decision here, because, as we have already determined, the matter concerns scheduling, a managerial prerogative.

[24] We have determined, above, that "staffing" in this instance relates to scheduling, which is a managerial prerogative.

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 filed by the Correction Officers Benevolent Association in the matter docketed as BCB-2053-99 be, and the same hereby is, denied in its entirety.

Dated: July 13, 1999
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER

SAUL G. KRAMER
MEMBER