PBA v. City & NYPD, 63 OCB 4 (BCB 1999) [Decision No. B-4-99 (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-4-99
Petitioner,	:	Docket No. BCB-1992-98
	:	
-and-	:	
	:	
The CITY OF NEW YORK and the CITY OF NEW YORK POLICE DEPARTMENT,	:	
	:	
Respondents.	:	

DECISION AND ORDER

On June 10, 1998, the Patrolmen's Benevolent Association ("Union" or "Petitioner"), filed a verified improper practice petition against the City of New York Police Department ("NYPD," "City" or "Respondent"). The petition alleges that the NYPD violated §12-306(a)(1) and (4) of the New York City Collective Bargaining Law ("NYCCBL")[1] when it refused to engage in collective bargaining concerning the plan announced by respondents under which approximately 2,000 police

[1] 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.

officers will be designated as being on "Special Assignment," for which they will be paid a bonus of approximately $1,400 for a period of one year. The respondent filed its answer on July 6, 1998. The petitioner filed its reply on July 23, 1998. On August 7, 1998, the respondent submitted a sur-reply, alleging that new facts and legal theories were raised for the first time in the reply.

BACKGROUND

The "Special Assignment Differential" ("SAD") within the NYPD dates back to before 1972. In Labor Relations Order 73/6, it is stated at paragraph 10, page 4, that

> The differential of $389 per annum heretofore paid to Patrolmen (detailed on Special Assignment) shall be continued. Patrolmen (detailed on Special Assignment) assigned to the Aviation Unit, as a pilot who flies, shall receive in lieu of the Special Assignment Differential of $389 a differential equal to that paid Patrolmen under Section II, A - Police Department 20 - Squad Chart Schedule (this order). This differential shall not prevent a Patrolmen from receiving night shift differential for work performed during those hours and under the same conditions as spelled out in the night shift differential section.

The document does not provide a definition of a SAD. In Labor Relations Order No. 82/2 ("LRO 82/2"), dated, July 17, 1981, the amount of the SAD was increased to $1400 pursuant to bargaining with the PBA. Since 1972 and continuing to the present collective bargaining agreement, Labor Relations Orders referencing the continuation of the SAD have been issued.[2] The content of the LRO's regarding SAD's remained substantially similar through the years, with the exception of the rate paid. However, LRO Nos. 95/10 and 98/13 dropped the specific mention of Aviators and added a "Special Dog Care Rate" for those officers engaged in "special dog care work."

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[2] *See* LRO No. 73/6; LRO No. 74/24; LRO No. 75/54; LRO No. 79/15; LRO No. 80/7; LRO No. 81/12; LRO No. 88/13; LRO No. 95/10; and LRO No. 98/13.

On or about June 1, 1998, Lou Matarazzo, as president of the petitioner PBA, wrote a letter to respondent's Commissioner of Labor Relations James F. Hanley, regarding the NYPD's announcement that approximately 2000 Police Officers will be designated as being on "Special Assignment," for which they will be paid a bonus of approximately $1400 for a period of one year. He stated, "It has been repeatedly held by PERB that any change in public employee's salary structure by which employees receive special merit or premium pay is subject to mandatory collective bargaining with the certified bargaining agent." The letter cites several PERB decisions, then states that the PBA is the appropriate bargaining unit, and asks for a meeting to begin negotiations. It concludes by stating that, if Matarazzo does not hear from Hanley within five business days, "appropriate further steps will be taken to protect the rights of the union and it's members."

On June 4, 1998, Police Commissioner Howard Safir sent letters to various officers. The complete text of the letter is as follows:

> As you know, the New York City Police Department has received considerable praise and wide notoriety for its efforts in reducing crime and enhancing the quality of life in our City.
>
> In recognition of this success, local commanders were conferred with and requested to select individuals within their respective patrol, housing, and transit units who have contributed the most to this noteworthy achievement and merit monetary recognition via designation as police officer special assignment.
>
> The initial phase of this program has resulted in the identification of 2,000 police officers, including yourself, who are performing in an outstanding manner. It is the Department's desire to expand this program in the near future in order to include additional members of the service.
>
> In response to your commanding officer's selection, I am pleased to designate you police officer special assignment. This rank designation carries an immediate raise of $1,400 which is pensionable. This salary increase will be reflected in the June 11th paycheck.
>
> Congratulations!

On June 10, 1998, the PBA filed the instant improper practice petition, alleging that petitioner has refused to collectively bargain regarding an issue which is mandatorily negotiable. The petition requests that the respondent be ordered to cease and desist from implementing the plan described in Commissioner Safir's June 4, 1998 letter.

On January 7, 1999, the Trial Examiner wrote a letter to the parties requesting a list of those assignments or details which, prior to the June 4, 1998 letter from Commissioner Safir, were paid the Special Assignment Differential. The Union responded on January 14, 1999: the City responded on January 15, 1999 and supplemented its response on January 19, 1999.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that it has been repeatedly held by PERB that any change in public employees' salary structure by which employees receive special merit or premium pay is subject to mandatory collective bargaining with the certified bargaining agent. The PBA argues that both *City of Rochester v. Rochester Locust Police Club, Inc.*, 12 PERB ¶ 3010 and *Village of Spring Valley Policeman's Benevolent Association v. Village of Spring Valley*, 14 PERB ¶ 3010 specifically hold that the issue of premium pay for police officers is subject to mandatory collective bargaining with the certified bargaining unit. The PBA cites several other PERB decisions which they claim relates to premium pay for teachers and firefighters, again holding that premium pay is a mandatory subject of collective bargaining.[3] The Union also cites Lefkowitz, *Public Sector Labor and Employment*

[3] The PBA cites *Orange County Community College Faculty Association v. County of Orange*, 10 PERB ¶ 3080 (teachers) and *Local 589, International Association of Firefighters, AFL-CIO v. City of Newburgh*, 16 PERB ¶ 4516 (firefighters).

Law, page 311: "Basic rates of pay, whether hourly wage, annual salary, or incentive/merit, are mandatory bargaining subjects. So, too, are overtime and premium rates of pay. . ." [emphasis supplied].

In its reply, in response to the City's contention that the SAD is not new, the petitioner calls the Board's attention to the fact that the SAD referred to in LRO 73/6, was paid exclusively to police officers on some sort of special assignment, *i.e.*, who performed some kind of duty other than ordinary patrol, such as to a police officer assigned to the Aviation Unit as "a pilot who flies." It contends that the SAD was not paid to a police officer based merely upon a police officer's status as a pilot to the Aviation Unit; he or she had to be a "pilot who flies," clearly demonstrating that the SAD was paid only to those police officers who actually performed some sort of special duty other than ordinary patrol duty.

The petitioner states that the SAD was paid to approximately 115 police officers as recently as March 1998. It argues that the 115 police officers were all engaged in duties other than ordinary patrol, and were assigned to the Aviation Unit and other specialized units. The petitioner contends that under the new program, the respondents intend to designate 2,000 police officers, whose duty assignments were and will continue to be ordinary patrol, as being on Special Assignment, as a way of disguising the fact that respondents are simply giving bonuses to 2,000 selected police officers without engaging in collective bargaining with petitioner as required by law.

The petitioner argues that the SAD was never previously used, as the respondents currently propose to use it, as a form of bonus pay to a select group of police officers who perform the same ordinary patrol duties as thousands of other ordinary police officers. The petitioner refers to the

letter that Safir sent to the 2,000 police officers, which states that the current use which the respondent intends to make of the SAD is simply as a form of "recognition" of "select individuals within their respective patrol, housing and transit units who have contributed the most to this noteworthy achievement [reducing crime] and merit monetary recognition via designation as police officer special assignment." It contends that the respondent is currently attempting to use the name of a program previously agreed to in 1970 for an entirely new and different program and that, where the new and different program, consisting of bonus pay for "selected" police officers is proposed, § 12-306(a)(1) and (4) of the NYCCBL requires that respondents engage in collective bargaining prior to implementing said program, which is mandatorily negotiable.

Finally, the petitioner contends that annexed to LRO 82/2 is a copy of a Resolution of the New York State Financial Control Board which appears to be an approval by the said Board of a 1980-1982 collective bargaining agreement between the City and the "Police Benevolent Association of the District Attorney's Offices, City of New York."[4] Petitioner contends that any agreement made in 1980-1982 between the City of New York and the "Police Benevolent Association of the District Attorney's Offices, City of New York" does not constitute prior agreement between the petitioner, the Patrolmen's Benevolent Association of the City of New York and the City of New York with respect to any salary differential which may have been agreed to by the "Police Benevolent

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[4] Annexed to LRO 82/2, which, in the main text, raises the differential to $1400, is a document entitled, "New York State Financial Control Board Resolution." Its first paragraph reads:

WHEREAS, the City has submitted for Control Board review and approval a collective bargaining agreement for the period July 1, 1980, through June 30, 1982, (the "Agreement") between the City of New York and the Police Benevolent Association of the District Attorney's Offices, City of New York. . .

Section IV of the Agreement continues a $500 prorated annual differential for Electrical Inspectors or Senior Electrical Inspectors duly assigned as Area Supervisors.

Association of the District Attorney's Offices, City of New York."

City's Position

The City argues that the instant petition must be dismissed because there has been no unilateral change in a term or condition of employment. It claims that petitioner's argument that the decision to extend the SAD to 2000 police officers was something new and had never been done before is not supported by the facts. It argues that the differential for police officers designated for special assignment has been in effect since at least 1972, and the language in Labor Relations Order No. 70/1R, suggests that it was in place before that date. The City argues that, while establishing the level of pay is a mandatory subject, the parties have previously agreed in bargaining to the level of pay herein, and that petitioner has acquiesced to the Police Commissioner's ability to select police officers for special assignment, as well as to the differential received for such assignment by never having filed a grievance or an improper practice in relation to the SAD.

The City argues that the petitioner would have the Board believe that simply based on the fact that there has been an increase in the number of police officers that have been designated as police officer special assignment, it somehow results in a unilateral change in a term or condition of employment.[5]

Second, the City contends that petitioner has failed to state facts sufficient to maintain a charge that respondents have refused to bargain in good faith on a matter within the scope of

[5] The City argues that the Board has even held that the Police Commissioner has always had the right to determine who would receive the SAD as well as the right to determine how many police officers would receive it. *See*, Decision No. B-2-81.

collective bargaining. It argues that the Board has consistently construed § 12-307(b)[6] of the NYCCBL to guarantee the City the unilateral right to determine the methods, means, and personnel by which governmental operations are to be conducted, unless this right has been limited by he parties in their collective bargaining agreement.[7] It contends that the petition contains no allegation that any limitation exists in the agreement between the parties which curtails the Police Commissioner's right to make assignments.

The City asserts that the Board has also held that job assignments are proper management tools when undertaken for legitimate business reasons.[8] It argues that the assignments at issue were consistent with the long history of designating police officers for special assignment and granting them a SAD. They conclude the argument in their answer by stating that it was a proper exercise of management's rights for the Police Commissioner to designate 2000 police officers for special assignment. It states that the assignment has carried with it a $1400 differential since 1981, and before that time there was always an amount certain attached to the differential. Accordingly, the respondent argues, the petition should be dismissed.

In its sur-reply, the respondent contends that new facts and legal theories were raised for the

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[6] Section 12-307(b) of the NYCCBL grants the employer the right:
. . . to determine the standards of service to be offered by its agencies; determine the standards of selection for employment; direct its employees; . . . 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.

[7] The City cites Decision Nos. B-37-87 and B-23-87.

[8] The City cites Decision Nos. B-26-93 and B-50-90.

first time in the reply, and that consistent with Board precedent, a sur-reply should be allowed.[9] It contends that the improper practice petition merely stated that police officers would be receiving a bonus for being on Special Assignment. The respondent contends that in response to the City's answer that police officers have always received this differential, they claim for the first time that police officers have received the differential in the past but only for an assignment besides patrol duty.

The respondent also claims that the petitioner is mistaken in claiming that the SAD was not confined to other than patrol duty, and that their only support for the claim is the Aviation Duty differential. Petitioner states in their reply that the SAD was paid to a police officer who performed some kind of duty other than ordinary patrol, such as a pilot who flies in the Aviation Unit. However, the City argues that the LRO's state just the opposite, that the SAD has always been separate from a differential provided to a pilot who flies and that nowhere does it state that the SAD will only be paid to patrolmen performing duties other than ordinary patrol.

DISCUSSION

As a preliminary issue, we discuss the contention by the City in its sur-reply that the Union raised new claims in its reply. The Union's argument that the plan was a thinly veiled attempt at merit/incentive pay appears to have been a response to the City's arguments in its answer that the SAD previously existed and an extension of arguments previously advanced.[10] Accordingly, we

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[9] The City cites Decision No. B-14-83.

[10] In *Richard McAllan, Barbara Taylor and George Engstrom v. Emergency Medical Services, Division of New York City Health and Hospitals Corporation and Local 2507,*

shall consider the arguments that were advanced in the reply.

Public employers and employee organizations have a statutory duty, under § 12-307(a) of the NYCCBL, to bargain on all matters concerning wages, hours and working conditions, *i.e.*, mandatory subjects of bargaining. Section 12-306(a)(4) of the NYCCBL makes it an improper practice for a public employer to refuse to bargain in good faith on such matters. A similar prohibition against an employer's refusal to bargain with the certified bargaining representative can be found in §209-a.1(d) of the Taylor Law. It has been held, under both statutes, that a unilateral change in terms and conditions of employment constitutes a refusal to bargain in good faith, and, therefore, an improper practice under the applicable statute.[11]

It is well settled that issues regarding basic rates of pay, whether incentive/merit or premium are mandatory subjects of bargaining.[12] Therefore, our analysis turns on whether the SAD in

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District Council 37, AFSCME, AFL-CIO, Decision No. B-14-83, we stated,

> In the present case, we do not believe that the submission of sur-replies was warranted, except to the extent that they responded to the allegations concerning the actual implementation of broadbanding, which were raised for the first time in the petitioner's replies. The remainder of the respondents' sur-replies consist substantially of elaboration or extension of arguments previously advanced. . .

[11] *Patrolmen's Benevolent Association v. City of New* York, Decision No. B-8-80. *See also: Village of Rockville Center*, 18 PERB ¶3082 (1985); *City of Batavia*, 16 PERB ¶3092 (1983); and *Board of Education, City of Buffalo*, 6 PERB ¶3051 (1973).

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*, *Uniformed Firefighters Association v. Fire Department*, Decision No. B-63-91.

[12] *United Probation Officers Association v. Department of Probation*, Decision No. B-44-86 at 13 (merit increases are subject of mandatory collective bargaining); *See also*, Lefkowitz, *Public Sector Labor and Employment Law*, First Ed., p. 311("Basic rates of pay, whether hourly/wage, annual salary, or incentive/merit are mandatory bargaining subjects.")

question is, in fact, an extension of the longstanding SAD, or an attempt at giving selected police officers merit pay. Since neither of the parties provided the Board with any document defining or outlining the SAD in their pleadings, we must construct a meaning from the documents provided, mainly the LRO's. Although the Union is incorrect in relying on the Aviator differentials described in the LRO's to define a SAD, we nonetheless agree with their description of the nature of the term SAD. The term itself implies that the officer who receives the differential will perform a duty that is different from the "ordinary" police officer. Further support for that particular construction of the term can be found in the more recent LRO's which, under Section 9 of the agreement, titled "Assignment Differentials" provide for a "Special Dog Care Rate" for those officers engaged in "special dog care work." The general SAD provision is also found under that section and it states that the differential should be continued to be paid to Patrolmen "[detailed on Special Assignment]." Both of these provisions imply that the officer is engaged in work other than that of the customary duties of a police officer. Additionally, the parties' responses to the Trial Examiner's request for a listing of all the assignments which, in the past, have received the SAD support the conclusion that such assignments have been used for specialized duty that is different from the general police duty performed by most police officers. Therefore, it appears that the approximately 115 positions subject to the SAD, prior to the issuance of the June 4, 1998 letter from Police Commissioner Safir, differed

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(citations omitted); *Bolk v. Carle Place Teachers' Association,* 6 PERB ¶ 7510 (incentive/merit: "That the Plan represents a salary, wage or other term and condition of employment is clearly indicated by the language employed by plaintiff . . . when it said: 'Since provision should be made to give additional financial remuneration to those teachers whose services have been consistently superior, the Board of Education has adopted an Incentive Compensation Plan . . .'[emphasis supplied]"); *Town of Haverstraw,* 11 PERB ¶ 3087 (premium); *Village of Spring Valley Policemen's Benevolent Association v. Village of Spring Valley*, 14 PERB ¶ 3010 (premium, specific to police).

both quantitatively and quantitatively from the 2,000 additional positions identified in the Safir letter.

In support of its position that the program is merely an extension of the SAD, the City produces a voluminous amount of LRO's to show that the SAD has existed for some time and has been bargained over in the past. If those documents existed alone, the Union might not be able to prove that the program was different from what the City claimed it was - an extension of the SAD. However, the letter by the Police Commissioner to the selected recipients of the "differential," dated June 4, 1998, supports the Union's characterization of the true intent behind the program.

In the letter's first paragraph, we find a reference to the "considerable praise" and "wide notoriety" for the NYPD in its efforts to reduce crime in the City. The letter continues by stating, "in recognition of this success," local commanders were consulted and "requested to select individuals within their respective units "who have contributed the most to this noteworthy achievement and merit monetary recognition via designation as police officer special assignment." It further continues by stating that 2,000 police officers, "who are performing in an outstanding manner," had been identified (emphasis added). The clear import of this letter is that the police officers are to receive merit pay for a good job, not that the officers were performing work other than the "ordinary" police officer. Accordingly, the conclusion is inescapable that the program implemented June 4, 1998 by the NYPD was intended as a means to award certain officers merit pay.

The City argues that granting the SAD of June 4, 1998 is within its managerial rights, as prescribed by § 12-307(b) of the NYCCBL. In one of the cases the City cited to support this proposition, *City Employees Union Local 237, IBT v. New York City Housing Authority*, Decision

No. B-23-87, the Board stated that § 12-307(b) of the NYCCBL[13] "reserves to the employer exclusive control and sole discretion to act unilaterally in certain enumerated areas that are outside the scope of collective bargaining. (emphasis added)." This decision went on to find that the City was within its management rights to assign its employees, which is indeed outside the scope of collective bargaining. However, when the employer acts unilaterally with regard to an action that is within the scope of bargaining, such as determining the basis for merit/incentive pay increases, the result must be different. Merely disguising the incentive/merit pay increase as an assignment does not suffice. Accordingly, we hold that the respondent violated § 12-306(b) of the NYCCBL when it refused to engage in collective bargaining concerning the program implemented on June 4, 1998.

[13] Section § 12-307(b) of the NYCCBL was known, at the time of this decision, as § 1173-4.3(b).

ORDER

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

DETERMINED, that the unilateral implementation of the Special Assignment Differential in the manner described herein constitutes an improper public employer practice, in violation of §§ 12-306(a)(1) and (4) of the NYCCBL; and it is therefore

ORDERED, that the improper practice petition filed herein be, and the same hereby is, granted; and it is further

DIRECTED, that the respondent shall cease and desist from unilaterally implementing the Special Assignment Differential in the manner described herein (*i.e.*, merit pay) without negotiating concerning criteria and procedures with the petitioner's bargaining unit.

DATED: February 4, 1999
New York, New York

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER