NYSNA v. City & NYPD, 71 OCB 23 (BCB 2003) [Decision No. B-23-2003 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

NEW YORK STATE NURSES ASSOCIATION,

Petitioner,

Decision No. B-23-2003
Docket No. BCB-2311-02

-and-

CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT,

Respondents.

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DECISION AND ORDER

On November 15, 2002, the New York State Nurses Association ("NYSNA" or "Union"), filed a verified improper practice petition (and on December 23, 2002, filed an amended improper practice petition) against the City of New York and the New York City Police Department ("City"or "NYPD"). The Union alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), NYPD has unilaterally assigned several police officers ("P.O.s"), who are not unit members of NYSNA, to perform the functions and duties of Case Management Nurses ("CMNs"), a title represented by NYSNA, in the NYPD's Medical Division in Queens. By this unilateral action, the Union asserts, NYPD has caused several CMNs to be reassigned, thus eroding the NYSNA bargaining unit and creating a practical impact on workload, over which NYPD has refused to bargain.

The City maintains that assignments and transfers are a management prerogative and that NYSNA has presented insufficient allegations of fact to state a *prima facie* case of workload impact. Furthermore, NYPD has assigned police officers to various positions in the Medical Division in Queens in a manner consistent with years of prior practice.

NYSNA does not explicitly seek the remedy of bargaining over the reassignment decision itself. As to the workload issue, this Board finds that the Union has not presented sufficient allegations of fact to state a *prima facie* case that the assignment of several P.O.s to the NYPD Medical Division and the transfer of several CMNs have created a practical impact that requires bargaining. Therefore, this Board dismisses the petition.

BACKGROUND

CMNs, Level I, in the Medical Division of the NYPD work in five locations. Two of these locations, in Lefrak and Jamaica, Queens, are the subject of this petition. The Medical Division is staffed by 18 CMNs, one staff nurse, and a number of P.O.s. NYSNA was certified in 1994 as the exclusive bargaining representative of the CMNs in NYPD. *New York State Nurses Ass'n*, Decision No. 2-94. P.O.s in the Medical Division generally are registered nurses or have medical backgrounds, though having such background is not a requirement. The job description of CMNs in NYPD indicates that under the supervision of a physician, CMNs typically implement a case management system; consult with private physicians of NYPD employees; screen employees by examining vision, hearing, and blood pressure, and by administering EKGs; keep records; and counsel sick employees in an effort to reduce

absenteeism.

The Medical Division has various units at some of its locations, including five units at issue here. First, the Candidate Testing Unit in Queens is currently staffed by one CMN, one staff nurse, and five P.O.s. According to the City, NYPD assigned one P.O. in 1999, three in 2000, and one in 2001. The Union denies knowledge and information sufficient to form a belief as to the accuracy of these dates. CMNs and P.O.s in this unit gather medical history, take hair and urine samples, and administer examinations, such as noted above, to applicants to the NYPD, including P.O.s, Traffic Enforcement Officers, and School Safety Officers.

The Pregnancy Medical District ("PMD") has one P.O., assigned in November 2001, and no CMN. The City alleges upon information and belief that only one CMN was ever assigned to PMD for a short time prior to 2001, but the Union denies knowledge or information regarding the accuracy of that assertion. The P.O. at PMD telephones employees on maternity leave, gathers medical information, and ascertains when the employee might return to work.

The Article II/Disability Unit ("Article II") is staffed by four CMNs and three P.O.s. One P.O. was assigned on July 21, 2002, one was assigned on August 19, 2002, and one was assigned on either July 30 or August 19, 2002. The Union denies knowledge of the first two dates. The CMNs and P.O.s in this unit assemble medical charts and folders, review lab work and doctors' notes, and determine whether relevant tests are completed for employees who claim disability before the NYPD disability board.

Five CMNs but no P.O.s currently staff the Occupational Health Nursing Unit ("OHNU"). Among other duties, CMNs perform blood work, assess exposure to Hepatitis B,

and administer Hepatitis B vaccines and pulmonary function tests.

Two CMNs are assigned to the Queens Health Care Unit ("QHCU"), but the pleadings do not indicate that any P.O.s are assigned to this unit. In QHCU, CMNs work with six surgeons covering six districts, monitor sick police officers, determine when the officers should be seen at the clinic, perform tests and blood work, and draft reports, including a hospital log. This unit services about 2000 to 3000 officers.

According to the Union, early in 2002, CMNs in Candidate Testing and OHNU heard that the NYPD intended to assign P.O.s to work in their units. NYSNA and NYPD held a series of labor-management meetings during which the parties discussed NYPD's assigning P.O.s to perform duties of CMNs. The City denies NYSNA's accounts of the meetings but does not offer its own version. The Union alleges that at the first such meeting, on April 9, 2002, Nursing Representative Sonia Echeverria complained that one P.O. was performing CMN collective bargaining unit work in the Lefrak Article II unit. She stated that such non-bargaining unit employees should not be used to replace CMNs, for the NYPD would erode NYSNA's bargaining unit. John Beirne, representing NYPD, responded by saying that the Union "could not tell the NYPD how to assign police officers," that the parties' collective bargaining agreement ("CBA") had no "reverse out-of-title" clause, and that the police officer in question was a licensed registered nurse ("RN"). However, he added that because NYPD needed more nurses, NYPD would investigate the situation.

The Union alleges that on April 26, 2002, NYPD assigned P.O. Diana Francis to OHNU. Francis is also an RN. In addition to performing normal duties, the CMNs at OHNU were

assigned to train P.O. Francis to carry out all required functions at the clinic.

At a labor-management meeting on May 14, 2002, Echeverria sought clarification concerning the qualification and credentials of the P.O.s/RNs who were performing CMN duties. The new Chief Officer of the Medical Division said he would investigate. On May 17, 2002, according to the Union, Sergeant Irene Piccione phoned Echeverria to say that P.O. Francis was reassigned to Candidate Testing, where she would not perform CMN duties but only clerical functions.

In July and August 2002, Francis, and two other P.O.s were reassigned to Article II. The Union asserts, but the City denies, that previously, only CMNs performed Article II duties that involve access to confidential information concerning disability applications.

On September 16, 2002, one CMN of the three who worked at QHCU was transferred to Article II. The Union asserts, but the City denies, that, as a result, the two CMNs left at QHCU were forced to perform the work of three nurses.

In a letter dated September 20, 2002, to NYPD Captain Kevin Holloran, Echeverria stated that although she had been told that P.O.s would not perform the duties that should be exclusively performed by RNs in the NYSNA bargaining unit, NYPD continued to assign P.O.s to various units. She pointed out that Article I of the parties' CBA states that the Union is the "sole and exclusive" representative for titles that include all staff nurses and CMNs. She requested that the NYPD cease and desist from the improper assignments. In addition, Echeverria opined that P.O.s with access to folders of other members of NYPD could raise problems of conflict of interest and confidentiality. In a response on October 3, 2002, Holloran

repeated NYPD's position that management reserved the right to assign personnel in a way that best serves the needs of NYPD.

According to the Union, at a labor-management meeting on October 17, 2002, Echeverria reiterated NYSNA's position. While Holloran agreed that NYPD could use more CMN positions, he stated again that management could assign P.O.s wherever they were needed.

On November 5, 2002, NYPD posted a Department Bulletin listing vacancies for lieutenants, sergeants, and P.O.s in the Medical Division. Members with medical background or experience would be preferred.

During the summer and fall of 2002, the parties were involved in collective bargaining for a successor agreement to the contract that had expired in September 2000. At a March 26, 2001, bargaining session, NYSNA presented two proposals at issue here. One, entitled "Bargaining Unit Work," read: "There shall be no bargaining unit work performed by non-bargaining unit members." A second, entitled "'No Replacement' Language," read: "Any and all current bargaining unit positions, filled or vacant, shall not be replaced with non-bargaining unit persons." The record is silent as to whether bargaining occurred although no agreement was reached on either proposal. When NYSNA filed a Request for a Declaration of Impasse on July 19, 2002, the "Bargaining Unit Work" proposal was not included on the list of unresolved bargaining demands. The "'No Replacement' Language" proposal was on the list but was not made part of the Memorandum of Agreement ultimately executed by the parties.

As a remedy, the Union seeks (1) bargaining over the workload impact resulting from NYSNA nurses' being assigned to train P.O.s to perform CMN duties and from NYSNA nurses'

being unilaterally transferred to various units, (2) immediate restoration to CMNs of those duties that they previously performed, (3) reinstatement of any CMN who was transferred or terminated as a result of NYPD's removal of those duties which the CMNs previously performed exclusively, and (4) restoration of lost wages, benefits, and conditions of employment, if any, caused by the reassignments.[1]

POSITIONS OF THE PARTIES

Union's Position

NYSNA asserts that the City violated NYCCBL § 12-306(a)(1) and (4) by failing to bargain over the practical impact caused by replacing certain CMN positions with P.O.s and transferring CMNs to various units.[2] According to the Union, when P.O. Francis was assigned to OHNU, the CMNs were directed to perform their usual duties as well as to train Francis in, for example, taking blood, obtaining data from members regarding Hepatitis B exposures, and

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[1] Although in its petition and reply the Union seeks reinstatement for any CMN terminated as a result of the assignment of CMN duties to P.O.s, the Union states in its reply that "Petitioner does not allege that CMNs have been terminated." (Reply ¶ 98.)

[2] NYCCBL § 12-306(a) provides in pertinent part:
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;
* * *
(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. . . .

§ 12-305 provides in relevant part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing . . . .

administering vaccines. Concerning transfers of CMNs, the Union asserts that after a transfer of one CMN from QHCU, the other two CMNs remaining in the clinic had a 50 percent rise in workload. Instead of handling two districts with two surgeons, each CMN has to handle three. The workload – including monitoring sick employees (determining whether they are sick, calling hospitals, and overseeing medications); administering shots; coordinating information with private physicians and police surgeons; and preparing reports – has become so excessive that daily working conditions are affected. Yet despite a request, NYPD has failed to bargain over the workload impact.

According to NYSNA, prior to the recent assignments of P.O.s, CMNs exclusively performed the work in the Medical Division. NYSNA attaches the job specifications for these CMNs. NYPD's unilateral action of assigning P.O.s to perform duties that only CMNs had performed, the Union contends, has eroded the bargaining unit and has diminished the rights of employees to organize and of NYSNA to represent its bargaining unit members. NYSNA addressed this subject with NYPD at several labor-management meetings and in its September 20, 2002, letter demanded that NYPD cease and desist from assigning P.O.s to carry out CMN functions.

In response to the City's argument, the Union argues that its petition is timely. At a minimum, allegations concerning P.O.s who were assigned to CMN duties within four months of the filing of the petition are timely. In addition, this Board should not dismiss on timeliness grounds any practical impact claim concerning CMNs.

Finally, NYSNA asserts that the petition should not be dismissed because the Union did

not insist on reaching an agreement on its "Bargaining Unit Work" and "'No Replacement' Language" proposals.

City's Position

The City claims that the petition is untimely because many of the assignments of P.O.s to NYPD's Medical Division occurred more than four months prior to the filing of the petition. At a minimum, every allegation concerning assignments except for officers assigned in August 2002 should be dismissed as untimely.

A claim of practical impact, the City argues, is not established merely by showing an increase in the employees' duties; rather the Union is required to demonstrate an "unreasonably excessive or unduly burdensome" workload. NYSNA's allegations concerning one individual's replacement or transfer do not support a finding of practical impact. Furthermore, there is no showing that the assignments of P.O.s to the Medical Division caused any transfer.

According to the City, NYSNA has failed to state a *prima facie* case that NYPD committed an improper practice by refusing to bargain over the assignments of P.O.s to the Medical Division. The assignment of employees to positions within the agency is not a mandatory subject of bargaining but a management right under the NYCCBL. Moreover, NYPD assigned P.O.s in a manner consistent with years of prior practice. The City claims, upon information and belief, that assignment of uniformed members to the Medical Division has been going on since the Division's inception.

The City also contends that there is neither a statutory nor contractual basis for the Union's assertion that CMN duties are exclusively the jurisdiction of NYSNA. The Union's

petition is an attempt to achieve in a different forum what the Union failed to secure at the bargaining table. Since NYSNA did not insist on bargaining to the point of agreement over the "Bargaining Unit Work" and "'No Replacement' Language" proposals, the Union should not now be given another opportunity to bargain over these issues.

Finally, the City argues, the claim that NYPD's actions have eroded the NYSNA bargaining unit is based on speculation and must therefore be dismissed.

DISCUSSION

Addressing the issue of timeliness, this Board may not consider any claimed violation of the NYCCBL if that violation occurred more than four months prior to the filing of an improper practice petition. NYCCBL § 12-306(e); § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1); *see Social Services Employees Union, Local 371*, Decision No. B-19-2002 at 6. Here, the petition was initially filed on November 15, 2002. The City states that several P.O.s were assigned to the Medical Division after July 15, 2002, four months prior to the filing. Therefore, we deem the petition timely as to these actions. The Board will consider allegations regarding prior events as background. *Id.; Autorino*, Decision No. B-30-91 at 9-10.

Under NYCCBL § 12-307(a), public employers and public employee organizations shall have the duty to bargain in good faith over wages, hours, and working conditions.[3] It is an

[3] NYCCBL § 12-307(a) states in pertinent part:
Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage

improper practice under § 12-306(a)(4) for a public employer to refuse to bargain in good faith on matters within the scope of collective bargaining. *See District Council 37, Local 1549*, Decision No. B-37-2002. However, § 12-307(b) of the NYCCBL reserves to the public employer discretion to act unilaterally in certain areas outside the scope of mandatory bargaining, such as the right to assign or reassign its employees, to determine what duties employees will perform during working hours, and to allocate duties among its employees, unless the parties themselves limited that right in their collective bargaining agreement. *Local 621, S.E.I.U.*, Decision No. B-34-93 at 9; *see District Council 37, Locals 2507 and 3621*, Decision No. B-34-99 at 17; *Licensed Practical Nurses and Technicians of New York, Local 721*, Decision No. B-59-89 at 22. When, however, the employer exercises a management right in a manner that has an adverse effect on terms or conditions of employment and thus results in a practical impact, the duty to bargain may arise over the alleviation of that impact.[4] *Sergeants Benevolent Ass'n*, Decision No. B-56-88.

> rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) [and] working conditions . . . .

[4] NYCCBL § 12-307(b) provides in pertinent part:
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 . . . ; 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. . . ; and exercise complete control and discretion over its organization . . . . 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.

In *Sergeants Benevolent Ass'n*, Decision No. B-56-88 at 15-16, this Board explained

> the distinction between a duty to bargain which arises when a public employer wishes to make changes in the wages, hours or working conditions of its employees and a duty to bargain concerning the means for alleviation of a practical impact, which cannot arise until this Board has determined (a) that a practical impact exists and (b) that the employer has failed to alleviate the impact. A refusal to bargain charge is brought to the Board by means of an improper practice petition asserting a violation of section 12-306(a)(4), while a practical impact claim should be initiated by a scope of bargaining petition in which specific allegations of impact are set forth. The determination of the existence of a practical impact – a question of fact which may necessitate a hearing – is a condition precedent to a determination whether there are any bargainable issues arising from the impact. [Citations omitted.]

In *Sergeants Benevolent Ass'n*, in which petitioner raised an improper practice claim, the Board had not determined that the management action complained of had created a practical impact. Although the assertion of practical impact was considered premature, the Board did not dismiss the petition simply because of its technical defects and considered the allegations. *See Local 300, Service Employees International Union*, Decision No. B-36-90 at 6.

For the Board to find a practical impact on workload, a petitioner must allege sufficient facts to show that the managerial decision created an unreasonably excessive or unduly burdensome workload as a regular condition of employment. *See District Council 37, Local 1549*, Decision No. B-37-2002 at 9; *District Council 37, Locals 983 and 1062*, Decision No. B-6-90 at 36; *Uniformed Sanitationmen's Ass'n, Local 831*, Decision No. B-6-87 at 13-14. A petitioner does not demonstrate a practical impact by enumerating additional duties assigned to employees or by noting a new assignment of duties covered in the job specifications. *See*

Sergeants Benevolent Ass'n, Decision No. B-56-88 at 17. An assertion that, for example, employees are required to work more time than scheduled must include specific details, not bare surmise of increased workload. *Id.*

Here, since this Board has not yet determined whether practical impact exists, a claim of failure to bargain is premature, but we will consider the Union's impact allegations. According to NYSNA, the assignment of P.O. Francis to OHNU required CMNs there to take on the extra duties of training her to perform the necessary functions of that unit. In addition, as a result of the transfer of a colleague from QHCU to another work location in the Medical Division, the remaining CMNs at QHCU have experienced an increase in workload. The number of doctors and NYPD employees with whom these CMNs must interact has risen by 50 percent. Yet despite the assertion of excessive daily workload at OHNU and QHCU, NYSNA has not alleged facts sufficient to show that the duties as noted are unreasonably excessive or unduly burdensome. *Compare United Probation Officers Ass'n*, Decision No. B-23A-85 (pleadings raise issues, such as overtime, physical and emotional health, and loss of professionalism, sufficient to warrant a hearing on workload impact), *with Probation and Parole Officers Ass'n, Local 599, S.E.I.U.*, Decision No. B-2-76 (no workload impact found since, among other factors, employees were not forced to work overtime or penalized for being unable to finish their work). Also, the Union has not provided facts to demonstrate that any transfers were the direct result of the assignment of P.O.s to the Medical Division or that the transfers would not otherwise have occurred. Moreover, since NYSNA specifically does not allege that any CMNs were terminated as a result of P.O. assignments, the impact over layoffs is not at issue. Without a showing of a

workload impact which needs to be alleviated, this Board will not require bargaining.

While NYSNA states that the functions and duties in the Medical Division have been exclusive to CMNs and that the assignment of P.O.s to CMN positions is eroding the NYSNA bargaining unit, the Union has not specifically made a claim in its pleadings that the decision to assign P.O.s to perform the duties of CMNs is a mandatory subject over which the City is required to bargain under NYCCBL § 12-307(a) and § 12-306(a)(4). Neither does NYSNA request, as part of the remedy it seeks, that this Board order bargaining other than the bargaining over workload impact. Moreover, the Union fails to cite any legal authority to support a charge of refusal to bargain on a mandatory subject.

Although the Union notes that Article I, Section 1, of its CBA recognizes NYSNA as the exclusive bargaining agent for CMNs, the Union provides no other contract provision, including a reverse out-of-title provision, to indicate that the parties contemplated that all duties in the Medical Division would be the exclusive province of CMNs. This Board has stated that union recognition clauses, such as that in Article I, Section 1, here, cannot be construed as grants of exclusive work jurisdiction. *United Probation Officers Ass'n*, Decision No. B-10-92 at 11.

Finally, the Union fails to indicate how the assignment of P.O.s has eroded the NYSNA bargaining unit. As noted, the Union does not allege, for example, that any CMN has been terminated or will be laid off as a result of the reassignments. *See Communications Workers of America, Local 1180*, Decision No. B-19-99 (layoffs, while not a mandatory subject of bargaining, create a *per se* practical impact over which the employer must bargain).

Thus, we do not find that NYSNA, simply by mentioning "exclusivity" and "erosion" of

the bargaining unit, states a claim that the City is required to bargain over these subjects. *See Local 426, S.E.I.U.*, Decision No. B-41-92. Any allegation that the City violated NYCCBL § 12-306(a)(1) as a derivative claim to § 12-306(a)(4) must also fail.

Since we dismiss the Union's workload impact charge and find that the Union failed to state a claim for bargaining over a mandatory subject, we need not reach the other issues presented. Accordingly, the petition is dismissed.

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, BCB-2311-02, filed by the New York State Nurses Association, be, and the same hereby is, dismissed.

Dated: July 29, 2003
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER