Patrolmen's Benevolent Association,79 OCB 43 (BCB 2007)

[Decision No. B-43-2007] (IP)(Docket No. BCB-2632-07)

Summary of Decision: The Union alleged that in violation of NYCCBL § 12-306(a)(1), (4), and (5) the City unilaterally altered a procedure allowing police officers who are United States Armed Forces veterans to take special leave to commemorate Veteran's Day, Memorial Day, and Independence Day by changing the non-discretionary entitlement to special leave to a discretionary benefit granted at the will of supervisory officers. The Board found that the alteration involved the type of discretion that falls within an employer's right to monitor employee leave and dismissed the petition in its entirety. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Petitioner,

- and -

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On July 10, 2007, the Patrolmen's Benevolent Association ("PBA" or "Union") filed a verified improper practice petition against the City of New York and the Office of Labor Relations ("City"). Petitioner alleges that, in violation of § 12-306(a)(1), (4), and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), the City unilaterally altered a procedure allowing police officers who are United

States Armed Forces veterans to take special leave to commemorate Veteran's Day, Memorial Day, and Independence Day by changing the non-discretionary entitlement to special leave to a discretionary benefit granted at the will of supervisory officers. The City contends that it did not violate the NYCCBL because the change it made was to a paperwork and supervisory review procedure that did not affect the substantive rights of police officers. This Board finds that the alteration involved the type of discretion that falls within an employer's right to monitor employee leave and dismiss the petition in its entirety.

BACKGROUND

New York City Police Department ("NYPD") promulgated Patrol Guide Procedure ("PGP") No. 205-24 on January 1, 2000. PGP 205-24 is titled "Special Leave for Former Members of the Armed Forces" and outlines the procedure for officers "seeking to establish eligibility for Veterans Day, Memorial Day and/or Independence Day leave of absence." The procedure mandated that an officer:

> 1. Submit to commanding officer/supervisory head, copy of:
>
> > a. Honorable Discharge and/or Separation Certificate (DD 214) with any other document(s) which substantiates eligibility for Veterans Day and Memorial Day leave of absence.
> > b. Honorable discharge and/or Military Order indicating separation was under honorable conditions from National Guard, Naval Militia or Reserve forces of the United States, together with any other documentation indicating entitlement to Independence Day leave of absence.

Step 2 of the procedure then mandates that the commanding officer ("CO") or supervisory head to "[f]orward all documentation to [Commanding Officer] Military and Extended Leave Desk." ("COMELD"). Then, COMELD was required to:

3. Review all documentation submitted to determine if member is entitled to leave.

4. Prepare appropriate "color coded" Special Leave for Former Members of the Armed Forces Certificate (Misc. 899N) indicating leave to which member is entitled, as follows:

a. Blue certificate – Independence Day
b. Pink certificate – Memorial and Veterans Days
c. Yellow certificate – Memorial, Independence and Veterans Days.

5. Forward certificate and all submitted documents to commanding officer/supervisory head concerned.

6. Cause color-coded certificate and supporting documentation to be placed in member's Personal Folder.

On March 9, 2007, NYPD promulgated Interim Order ("IO") 12. IO 12 revised PG 205-24 "to clarify the procedure for when uniformed members of service seek to establish eligibility for military holiday entitlements." The procedure now mandates that an officer:

1. Submit to [C.O.]/supervisory head, a written request and original copy of:

a. Honorable Discharge and/or Separation Certificate (DD 214) with any other document(s) which substantiates eligibility for Veterans Day and Memorial Day leave of absence.
b. Honorable discharge and/or Military Order indicating separation was under honorable conditions from National Guard, Naval Militia or Reserve forces of the United States, together with any other documentation indicating entitlement to Independence Day leave of absence.

(Changes are underlined.)

The language of Step 2 of IO 12 was modified to read that the CO or supervisory head is next required to "[f]orward [CO]'s endorsement recommending approval/disapproval and all copies of documentation submitted, to [COMELD]." Then, COMELD is required to:

3. Review all documentation submitted to determine if member is entitled to leave.

4. Prepare endorsement indicating leave to which member is entitled to and forward all submitted documents to [C.O.]/supervisory head concerned.

5. Have endorsement and supporting documentation placed in member's Personal Folder.

(Changes are underlined.)

The language regarding the requirement that the paperwork be color-coded was removed.

The Union claims that these changes constitute an improper practice. As a remedy, the Union asks that the Board order the City to (i) rescind any provision of IO 12 that modifies holiday leave benefits; (ii) make whole any Union member aggrieved by the improper practice by compensating the member at the overtime rate for every leave day improperly denied, as well as grant the member an additional day of leave to be used at the member's convenience; and (iii) post the violation in a location within all precincts and commands that is accessible to all police officers and commonly used to post messages to police officers.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that prior to the recent unilateral change, it was the practice of NYPD to, upon request from an eligible veteran/officer, grant special leave on Veteran's Day, Memorial Day and Independence Day. It contends that, pursuant to the new policy, the veteran/officer's CO as well as COMELD are now allowed to exercise their own discretion in determining whether the member is entitled to special leave. Since procedures and criteria for granting leave are mandatory subjects of bargaining, NYPD's modification of the special leave procedure, which essentially changed the entitlement to special leave from a non-discretionary to discretionary benefit, constitutes a unilateral change in terms and conditions of employment and a failure to bargain in good faith.

Prior to IO 12's issuance, PG 205-24 merely required the CO to forward the officer's evidence of honorable discharge to COMELD, who was in turn charged with reviewing the documents to determine whether the veteran/officer was honorably discharged and therefore eligible for special leave. The Union argues that the only prior limitation on special leave was an objective, non-discretionary requirement that no more than 40% of officers entitled to special leave would be eligible per command. IO 12 significantly alters the procedure by giving the CO discretion to refuse the request and granting COMELD the authority to deny the request for reasons other than failure to meet the military service and honorable discharge criteria.

The City relies on the inaccurate premise that any unilateral change in terms and conditions must be substantial in order to violate the NYCCBL. The City's argument that the changes are minor or are merely changes in administrative procedure and are therefore not changes at all not only relies on misstatements of applicable law, but is plainly contradicted by the language of IO 12. IO 12 grants the CO unprecedented authority to make a written recommendation to COMELD, and this recommendation then becomes an additional and subjective basis for COMELD's decision on whether to grant a veteran/officer's request for leave. Since the level of discretion given to the CO and COMELD in the plain language of IO 12 directly affects each veteran/officer's entitlement to special leave, this modification constitutes a unilateral change in a term or condition of employment in violation of NYCCBL § 12-306(a)(1), (4), and (5).[1]

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[1] 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

City's Position

The City argues that the Union failed to establish that NYPD changed terms and conditions of employment for police officers. PGP 205-24 and IO 12 share identical eligibility parameters, application procedures, and supporting documentation requirements. In addition, both directives share identical limitations on special leave. IO 12 nominally modifies PGP 205-24 in two ways. First, IO 12 eliminates the color-coded record-keeping system outlined in PGP 205-24, which is a record-keeping change that does not affect terms and conditions of employment. Second, the requirement that COs review supporting documentation and merely make a recommendation to COMELD as to whether special leave should be granted is not a change in terms and conditions of employment.

The City contends that this dispute is not related to whether special leave is within the scope of collective bargaining. Rather, the Union incorrectly contends that NYPD changed terms and conditions of employment for police officers by allowing COs the authority to approve or disapprove special leave requests. This preliminary and internal administrative review neither changes eligibility nor supporting documentation requirements for special leave nor limits COMELD's authority to approve or disapprove special leave requests based on whether a member of the service provided the requisite information. Furthermore, NYPD retains the prerogative to modify record keeping and internal administrative procedures. Thus, the Union has not shown that the City violated NYCCBL § 12-306(a)(4).

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employees;
(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

The City also contends that it did not violate NYCCBL § 12-306(a)(5). NYPD did not change a mandatory subject of bargaining nor did it alter any terms and conditions of employment included in the parties' collective bargaining agreement.

Since the Union cannot establish a violation of NYCCBL § 12-306(a)(4) or (5), it cannot establish a derivative violation of § 12-306(a)(1), nor does the Union allege any facts to support an independent claim under that provision of the NYCCBL.

DISCUSSION

The instant matter poses the question of whether a change in the way the City monitors eligibility for the use of special leave, by requiring a preliminary recommendation by a supervisor, constitutes a mandatory subject of bargaining. NYCCBL § 12-306(a)(4) makes it an improper practice for a public employer "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated employee representatives. . . ." This Board has held that mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment. *Local 376, District Council 37, AFSCME*, Decision No. B-20-2007 at 9; *Correction Officers Benevolent Ass'n*, Decision No. B-26-2002 at 7. When a petitioner asserts that a unilateral change has occurred in a term and condition of employment which is determined to be a mandatory subject, then the petitioner must demonstrate the existence of such a change from existing policy. *Local 376, District Council 37, AFSCME*, Decision No. B-12-2004 at 17. *See also Local 371, Social Service Employees Union,* Decision No. B-10-2002; *Town of Stony Point* (PBA), 26 PERB ¶ 4650 (1993).

A majority of the cases in which the Board addressed the issue of monitoring leave took place

in the context of sick leave; these cases are instructive because they clarify the status of leave in general as a subject of bargaining, with resultant similarity as to bargaining rights and obligations. In *MEBA, District No. 1, Pacific Coast District*, Decision No. B-3-75 at 17, this Board found that the City's requirement that an employee, absent for more than two days, provide a written statement from a doctor, constituted a bargainable, procedural requirement. *Id.* However, in *Correction Officers Benevolent Ass'n*, Decision No. B-26-2002, we restated the Board's long standing distinction between demands relating to the amount of sick leave and procedures for its authorized use, which are mandatorily bargainable, and those relating to management's actions to monitor the use of sick leave, which is a non-mandatory subject. *Id*. at 7; *Correction Officers Benevolent Ass'n*, Decision No. B-16-81 at 97-102.

In the instant matter, it is evident from the language of the original order, PGP 205-24, that a supervisor, in the form of COMELD, already had the discretion to determine whether an officer was eligible for special leave in the first instance, using the criteria specified in the order. Contrary to the Union's assertion, the prior NYPD procedure, on its face, did not provide merely for a "rubber stamp," or non-discretionary action, as the original PGP 205-24 states that COMELD was to "[r]eview all documentation submitted to determine if member is entitled to leave." This language implies the exercise of a certain amount of discretion on NYPD's part to determine if an officer was, in fact, eligible. Now, under IO 12, a CO must make an initial recommendation, but the final determination, as outlined in IO 12, still rests with COMELD, using exactly the same criteria as before. NYPD has not changed the total amount of leave for which these officers are eligible, nor the criteria for eligibility for such leave. The Union does not allege that the procedures that the officer requesting leave must follow have changed. The City is ensuring that only eligible officers

are granted this special leave, as it did before. Moreover, the type of discretion involved here falls squarely within an employer's right to monitor the use of leave.

The Union states its concerns regarding the possibility of an abuse of a supervisor's discretion – that NYPD will ignore its longstanding criteria and arbitrarily reject an officer's request. In addressing this concern, we note PERB's holding in *Town of Carmel*, 31 PERB ¶ 3023 (1998), in which the union also raised concerns about potential abuse of a new directive regarding a supervisor's mandatory verification telephone calls to officers on sick leave. PERB stated,

> The reasonableness of an action or proposal, whether employer or union, simply has no bearing on the negotiability of the subject matter at issue under a charge. The potential unreasonableness of the Town's directives as applied by its supervisors in some future, unknown context no more makes this part of [the directive] mandatorily negotiable than would the arguable unreasonableness of a PBA bargaining demand render that demand a nonmandatory subject of negotiation.

Id. at 3051-3052. (Citations omitted.)

We also note that if the Union believes an officer has been improperly denied special leave, it may be able to grieve the improper denial under the parties' collective bargaining agreement.[2]

For the reasons stated above, we find that no duty to bargain is implicated in the facts as presented by the Union. Therefore, there has been no violation of either NYCCBL § 12-306(a)(4) or (5). Additionally, since the Union has not shown that the City violated § 12-306(a)(4) or (5), there can be no derivative violation of § 12-306(a)(1). *Local 237, City Employees Union,* Decision No. B-24-2006. Accordingly, we dismiss the Petitioners' petition in its entirety.

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[2] Article XXI of the parties' collective bargaining agreement is titled "Grievance and Arbitration Procedure." Section 1(a)(2) defines the term grievance as "a claimed violation, misinterpretation or misapplication of the written rules, regulations or procedures of the Police Department affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1a, the term 'grievance' shall not include disciplinary matters; . . ."

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-2632-07, be and the same hereby is, dismissed in its entirety.

Dated: December 4, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER