***Patrolmen's Benevolent Ass'n*, 15 OCB 24 (BCB 1975) [Decision No. B-24-75 (S)], *aff'd*, *Patrolmen's Benevolent Ass'n v. Board of Collective Bargaining*, N.Y.L.J., Jan. 2, 1976, at 6 (Sup. Ct. N.Y. Co.).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
------------------------------------X
In the Matter of

THE CITY OF NEW YORK

-and

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK
------------------------------------X

DECISION NO. B-24-75

DOCKET. NO. BCB-235-75

DECISION AND DETERMINATION

On August 8, 1975, the City of New York filed its petition herein requesting that the Board determine the bargainibility of certain aspects of duty charts for patrolmen and policewomen employed by the Police Department.

The Patrolmen's Benevolent Association of the City of New York (PBA), filed a motion on August 21, 1975, requesting that the Board dismiss the City's petition as untimely and inappropriate under §1173-5.0(a) of the NYCCBL as amplified by §7.3 of the Rules, or, alternatively, that the Board stay consideration of the petition pending a final determination by the New York State Public Employment Relations Board (PERB) of an improper practices case filed with it by the PBA.

On September 2, 1975, the City replied that the submission of a motion by the PBA in lieu of an answer was improper and a delaying tactic, and the City asserted the pendency of the improper practice charge before PERB "would have no effect on the jurisdiction of the Board of Collective Bargaining to determine the bargainability of the chart and related matters before it."

On September 9, 1975, the Board informed the parties that it would consider all of the issues raised by the parties at its next meeting and that it would not hear oral argument in the case. The Board advised the parties that they "should submit any further material they may deem advisable, including the Answer of the PBA herein, at the close of business on Tuesday, September 16, 1975." Although specifically requested to do so, the PBA did not submit its Answer to the City's Petition. Instead, on September 16, 1975, it submitted a summary of the position advanced in its motion of August 21, 1975, and in its letter of August 1, 1975 (discussed below).

Background

A prior Board decision , No. B-5-75 issued on February 14, 1975, dealt with various issues including the issue of duty charts. In that decision, the Board said with respect to duty charts:

> "We confirm that the City alone has the power and duty to determine the level of manning in the Police Department. However, more is involved here than the mere 'scheduling' of tours of duty. Therefore, if withdrawal of the letter of October 3, 1972, would result in a change ir the total hours worked per day or per week by Patrolmen' and Policewomen, the question or" hours is a mandatory subject of bargaining.
>
> "Section 971 of the Unconsolidated Laws imposes certain limits on the number of hours a Patrolman may be required to work pursuant to his duty chart. It is clear that the parties may not bargain over hours in such a way as to reach an agreement contrary to the duty expressly reserved to the Police Commissioner by law. Any PBA or City demand which would require a contravention of law is therefore a prohibited subject of bargaining.
>
> "Further, the Police Department is charged with insuring the public safety. Therefore, it has the duty to determine the level of services it will provide to the public and it alone may determine the level of manpower required and the number of Patrolmen who must be on duty at a certain time.

***

> "The City must bargain over those aspects of the duty charts and 24-squad system which affect hours of work, including days of work and days off, and which are not fixed by law and which do not impinge on the City's-right to determine the level of manning required to provide police protection to the public."

After the issuance of Decision No. B-5-75, an impasse panel considered certain issues in dispute between the City and PBA but did not rule on the issue of charts as the charts had not been submitted to them by the parties. The recommendations of the panel were incorporated in a collective bargaining agreement. Subsequent to the implementation of the agreement, bargaining commenced on the issue of charts and on July 16, 1975, the Board appointed an impasse panel to aid in the resolution of the charts dispute.

The Board's letter appointing the impasse panel, said:

> "Please be advised of your designation as the Impasse Panel to resolve a dispute existing between the Patrolmen's Benevolent Association and the City of New York with respect to patrolmen's schedules. The City's demand is:

> "'The City of New York proposes that Patrolmen are to work an 8-hour tour with 261 appearances during a chart year.'
>
> "The PBA demand is:
>
> 'PBA proposed that the current 24-squad charts work system be retained except that the work day shall consist of the 8-hour tour of duty.'
>
> "The Board of Collective Bargaining approved the designation of an impasse panel with the understanding that the impasse panel, prior to undertaking formal hearings or the making of recommendations, would undertake mediation efforts pursuant to Section 1173-7.0c3(a) of the New York City Collective Bargaining Law."

On August 1, 1975, the PBA informed the Board that it had filed an improper practice charge with the PERB alleging that the City had refused to bargain on many bargainable aspects of duty charts by asserting the managerial prerogative in sessions with the impasse panel. The PBA letter requests that the Board stay impasse panel proceedings pending determination of the charge before the PERB. In support of its motion for a stay, the PEA asserts that the Board has a

practice of suspending impasse proceedings until scope questions are resolved. The letter further states that the matter was brought to the PERB because the scope of bargaining issues are intimately related to the City's general bad faith bargaining. . . ."

The charge before the PERB details various alleged refusals on the part of the City to make information available and to discuss implications of duty chart changes claimed by the City to constitute matters of management prerogative.

The City filed the instant petition requesting that the Board determine the bargainability of the elements of the PBA proposal before the impasse panel which it contends are matters of management prerogative. The issues posed by the City petition are:

"a) The starting and finishing times of each tour of duty;

b) The number of different charts, the number of platoons on each chart and the percentage of appearances on each platoon;

c) The number of tours in a set, the time off between sets of tours (length of swings), and the number of swings that a patrolman receives in a chart cycle."

The City takes the position that all of the issues comprehended in a), b), and c) above are "non-mandatory subjects of negotiations . . . which may not be submitted to an impasse panel" over the City's objections.

Although the PBA did not submit a formal Answer herein, the papers submitted by PBA argue the merits of the scope of bargaining issues raised by the City's petition. The PBA cites Waldo v MacNish, 212 NY 348 (1914) as support for its contention that "a police officer may lawfully be required to perform pre-patrol or post-patrol duties ancillary to his position even though the workday is thereby extended to a length in excess of eight hours." The PEA takes the position that none of the aspects of duty charts at issue herein "fall within the purview of any 'management rights' as to the level of manning; they all relate to hours of work scheduling within the manning framework." Finally, the PEA argues that the decision of the Court of Appeals in Board of Education, Huntington v Associated Teachers, 30 NY 2d 122 (1972), supports its position that the aspects of the duty charts which it seeks to negotiate are mandatorily bargainable.

PBA Motion

The PBA motion requesting that the Board dismiss the City petition as untimely and inappropriate is denied. The law requires that the Board render a determination as to whether a matter is within the scope of bargaining "on request of a public employer." We have such a request before us and we shall render the statutory determination. (City of New York and PBA, Decision No. B-5-75; City of New York and UFOA, Decision No. B-22-75.)

Although the Board has dealt with the bargainability of duty charts in Decision No. B-5-75, the parties have raised further questions concerning the scope of bargaining and the interpretation of our prior decision. Therefore, we find that a further decision on duty charts is not inappropriate under the circumstances where the parties require amplification of an earlier decision. The parties do not agree on what may be submitted to the impasse panel and a Board determination is necessary to clarify the scope of the panel's authority.

Nor do we find that it would be appropriate for this Board to stay the instant proceeding pending determination of the improper practice case before the PERB. The New York City Collective Bargaining Law requires that the Board render a scope of bargaining decision upon request of a public employer. There is an impasse panel currently constituted under authority of this Board, and thus we retain continuing jurisdiction and the responsibility to render decisions in aid of the impasse procedures. Contrary to the PBA assertion, it has been the policy of this Board not to stay scope of bargaining determinations pending improper practice case decisions by the PERB. (See Decisions Nos. B-5-75, B-12-75 and B-22-75.)

We are satisfied that to exercise our jurisdiction in the instant proceeding doe s not constitute an interference with the PERB in the exercise of its jurisdiction to determine improper practices, nor does the exercise of our jurisdiction in any way prejudice the rights of the parties in the PERB proceeding.

Having determined that it is our duty to entertain and determine the instant proceeding, we now turn to the merits.

Starting and Finishing Times

The City requests that the Board mine the bargainability of

> "The starting and finishing times of each tour of duty."

Decision No. B-5-75 made clear that hours are a mandatory subject of bargaining and that the total number of hours worked per day and per week may be submitted to the impasse panel. However, the Board held in B-5-75 that "the City alone has the power and duty to determine the level of manning in the Police Department" and that "it alone may determine the level of manpower required and the number of patrolmen who must be on duty at a certain time." The City's power and duty arise from NYCCBL §1173-4.3b which gives the City the right "to determine the standards of services to be offered by its agencies" and from §971 of the Unconsolidated Laws which provides:

> "In the City of New York, the police commissioner shall promulgate duty charts for members of the police force which distribute the available police force according to the relative need for its services. This need shall be measured by the incidence of police hazard and criminal activity or other similar factor or factors. No member of the force shall be assigned to perform a tour of duty in excess of eight consecutive hours excepting only that in the event of strikes, riots, conflagrations or occasions when large crowds shall assemble, or other emergency, or on a day on which an election authorized by law shall be held, or for the purpose of changing tours of duty so many members may be continued on duty for such hours as may be necessary. No member shall be assigned to an average of more than forty hours of duty during any seven consecutive day period except in an emergency or as permitted in this subdivision or for the purpose of changing tours of duty or as otherwise provided by law."
> (Laws 1969, chapter 177, effective March 30, 1969)

The managerial determination of the level of police manpower required at each hour of the day is the criterion used for determining at what times patrolmen and policewomen must report for duty. Therefore, in bargaining between the PBA and the City, it is clear that the starting and finishing times of each tour of duty are not bargainable. Moreover, the Board has ruled on this point even more recently than Decision No. B-5-75. In Lieutenants Benevolent Association and The City of New York, Decision No. B-10-75, we said that the attempt to bargain over "the starting and finishing times of schedules" of the police officers involved would constitute "an invasion of the City's management prerogative."[1]

Our holding is not inconsistent with Board of Education, Huntington v Associated Teachers, 30 NY 2d 122 (1972). In City Employees Union, Local 237, IBT, Decision No. B-6-74, we discussed at length our view that the management rights clause of the NYCCBL may be harmonized with the decision of the Court of Appeals in Huntington. We said:

---

[1] The PBA filed a brief amicus in the LBA case.

> "We do not believe that the broad language employed by the Court of Appeals in the Huntington decision (cited above) was intended to deprive a public employer of the managerial discretion necessary to carry out its mission. In Huntington, the employer argued that certain contract provisions granting economic benefits to school teachers and providing for the arbitration of disputes concerning disciplinary action were illegal in the absence of express authorization in the Education Law granting a school board the power to agree to those provisions.
>
> "The Court framed the question before it as 'whether there is any fundamental conflict between the provisions of the Taylor Law and the provisions of any other statute dealing with the powers and duties of school boards.' The Court held that no express grant of power to bargain about any particular subject was necessary:
>
>> 'Under the Taylor Law, the obligation to bargain as to all terms and conditions is a broad and unqualified one and there is no reason why the mandatory provision of that act should be limited in any way, except in cases where some other applicable statutory provision explicitly and definitely prohibits the public employer from making an agreement as to a particular term or condition of employment.'

> "Thus, the thrust of the decision was to lay to rest conclusively the old restrictive view of a public employer's lack of authority to bargain with its employees, and to make it clear that under the Taylor Law, the public employer is presumed to have all the authority necessary to enter into collective bargaining agreements. The Court did not discuss management rights and we find no basis to believe that the Court, by any indirect implication, disposed of such an important question in public employment labor relations."

We construe §971 of the Unconsolidated Laws and the management rights clause of the NYCCBL to be such an explicit prohibition as described by the Court of Appeals in Huntington. We find that the Police Department is "explicitly and definitely" prohibited by §971 from agreeing to any provision that would hinder the Commissioner's duty "to distribute the available police force according to the relative need for its services." As we said in Decision No. B-5-75:

> "The Police Department is charged with insuring the public safety. Therefore, it has the duty to determine the level of services it will provide to the public and it alone may determine the level of manpower required and the number of Patrolmen who must be on duty at a certain time."

Applicability of §971

The parties have raised the issue of the bargainability of a work day in excess of eight hours in view of the proscription in §971 of the Unconsolidated Laws against a "tour of duty in excess of eight consecutive hours." The City contends that any work performed beyond eight hours per day would violate §971. The Union cites MacNish v. Waldo, 212 NY 348 (1914), which held that the precursor statute to §971 was not violated by a requirement that a patrolman report for drill for "an hour seven times during the year" in addition to his stated tours of duty. The language of the decision reveals that the court stressed the purpose of the statute, to promote the health and efficiency of policemen, and that the court strongly disapproved of the method employed to test the validity of the required drill; i.e., disobedience of a direct order.

While both the City and the PBA now ask that the panel find an eight hour day, we note that most patrolmen now work eight and one half hours per day. As described at length in Decision No. B-5-75, the Police Department, in October 1972, instituted a "24

squad system" which provided that patrolmen work eight and one half hours per day and make 243 appearances per year. The parties, at that time, agreed that 243 appearances of eight and one half hours each resulted in an average work week of forty hours and thus satisfied the requirements of §971. In the current round of negotiations, the City has asked that patrolmen work only eight hours per day but make 261 appearances per year. The PBA demand is that the present system of 243 appearances be retained except that the working day shall consist of only eight hours.

As we have previously held in Decision No. B-5-75, the City must bargain with the Union on the length of the work day and the work week. Thus, we find that the panel may find a work day of eight hours or any other length of work day combined with a total number of appearances that will satisfy the requirements of §971. In our judgment, the intent of §971 will not be violated if the panel takes into consideration the length of a tour, pre and post tour duties, and any other lawful factors.

We note that the Lieutenants Benevolent Association case, cited above, held that although the Police Department had the power to determine what the duties and activates of employees would be during the hours set forth in the duty charts:

> "The Union is entitled to demand that those hourly requirements, once formulated by the Department, be clearly and explicitly stated by the Department so that unit employees may know what work performance is properly expected of them.
>
> "In short, we find that LBA's Proposal 1 is a mandatory subject of bargaining insofar as it asks the Police Department to provide a clear indication as to . . . portions of their work schedules, if any, to be devoted to roll call, inspection, briefing and debriefing, training or other functions generally referred to as pre-tour and/or post-tour duties; and that the Department make known its requirements in these matters in a form and manner which will clearly define the rights and obligations of the affected employees."

Number of Charts and Platoons

The City has requested that the Board determine that it has full managerial prerogative to determine:

> "The number of different charts, the number of platoons on each chart and the percentage of appearances on each platoon."

The determination of the number of charts (or work schedules), the number of platoons on each chart and the percentage of appearances on each platoon[2] is a determination of the level of manpower required to be on duty at each hour of the day to protect the public safety. This decision is reserved to management by NYCCBL §1173-4.3b and by §971 of the Unconsolidated Laws; therefore, it may not be submitted to the impasse panel over the City's objections.

Although manning decisions are a management prerogative, the parties are obligated to provide the impasse panel with sufficient information to determine the issues found herein to be bargainable.

---

[2] "Platoons" refers to the subdivision of the day into certain working hours; e.g., day, afternoon, and night tours.

Swings

The City urges that the issue of swings is not a mandatory subject of bargaining. The issue is stated as:

> "The number of tours in a set, the time off between sets of tours (length of swings), and the number of swings that a Patrolman receives in a chart cycle."

We find that the number of tours in a set is a mandatory subject of collective bargaining. This phrase, "tours in a set," is another way of expressing the number of hours worked in a week; therefore, under Decision No. B-5-75, this subject is bargainable, as is the number of appearances in a year.

The process by which swings (time off between tours) are fixed is a combination of bargaining on mandatory items and of managerial decisions. The average duration of a swing is determined by the results of bargaining on the hours and number of appearances required of an individual and by manage-

ment decisions relating to manning, starting times and platoons. Thus, while the issue of time off between tours is bargainable, the negotiability of many details of this issue is limited by the above noted factors.

Continuation of Impasse Panel Proceedings

The motion of the PBA urges that the Board stay any further proceedings of the impasse panel the PERB shall have determined the improper practice proceeding pending before it. The City of New York argues that the Board:

> ". . . should . . . provide the parties and the currently sitting Impasse Panel with the statutorily required guidelines necessary to permit speedy resolution of the matter at impasse between the parties.
>
> "The pendence of the charge filed at PERB by the PBA could have no effect on the jurisdiction of the Board of Collective Bargaining to determine the Bargainability of the chart related matters before it."

A dispute on charts was submitted to the impasse panel. The parties have been unable as yet to reach agreement with the mediatory aid of the impasse panel and the dispute over charts has not been settled. The Board found that the parties were at impasse over duty charts on July 16,1975; manifestly, the parties are still at impasse on the issue of duty charts. Therefore, under §1173-7.0c(3)(a), the panel should now proceed to take such action as it deems necessary to effectuate the prompt issuance of a written report and recommendations on the disputed issue of charts. Of course, under the cited section of the statute, the panel retains its powers to mediate whenever it deems such mediation advisable to resolve the impasse.

For the reasons set, forth in the discussion above of our jurisdiction in relation to the PERB jurisdiction over improper practices, we see no reason to stay the proceedings of the impasse panel. The PERB itself has not indicated that a stay is in any way necessary to preserve its jurisdiction over improper practices. Indeed, the best way to effectuate the policies and purposes of the NYCCBL (and, in our view, the Taylor Law

as well) is to permit the impasse proceedings to go forward as expeditiously as possible so that the contract dispute between the parties may be finally resolved.

In sum, for the purpose of aiding the impasse panel in the proceedings now pending before it and for the purpose of clarifying and reiterating our earlier holdings in Decisions Nos. B-5-75 and B-10-75, we restate our finding that "the City must bargain over those aspects of the duty charts and 24-squad systems which affect hours of work, including days of work and days off, and which are not fixed by law and which do not infringe on the City's right to determine the level of manning required to provide police protection to the public." However, we find that starting and finishing times, the number of different charts, the number of platoons on each chart and the percentage of appearances on each platoon are not mandatory subjects of bargaining between the parties to this proceeding. Further, the number of tours in a set, the length of each tour and the total number of appearances are mandatory subjects of bargaining. Swings are a

mandatory subject of bargaining to the extent that they result from bargaining on hours and number of, appearances, but not to the extent that they result from management decisions relating to manning, starting times and platoons.

DETERMINATION

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 motion of the PBA herein to dismiss the petition or, alternatively, for a stay of the instant proceeding be, and the same hereby is, denied; and it is further

DETERMINED, that the impasse panel heretofore appointed in the instant dispute over charts shall continue its proceedings; and it is further

DETERMINED, that starting and finishing times are not a mandatory subject of bargaining between the instant parties; and it is further

DETERMINED, that the number of different charts, the number of platoons on each chart, and the percentage of appearances on each platoon are not a mandatory subject of bargaining between the instant parties; and it is further

DETERMINED, that the number of tours in a set, the length of each tour and the total number of appearances, are mandatory subjects of bargaining and that swings are a mandatory subject of bargaining only to the extent described in the decision above.

DATED: NEW YORK, NEW YORK
September 18, 1975.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

THOMAS F. ROCHE
M e m b e r

EDWARD F. GRAY
M e m b e r