Fire Alarm Dispat. Benevolent Ass. V. City, 55 OCB 1 (BCB 1995) [Decision No. B-1-95 (INJ)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
----------X

FIRE ALARM DISPATCHERS BENEVOLENT ASSOCIATION,

Petitioner, Decision No. B-1-95(INJ)

-and- Docket No. BCB-1715-95(INJ)

CITY OF NEW YORK,

Respondent.
----------X

DECISION AND ORDER

On January 13, 1995, the Fire Alarm Dispatchers Benevolent Association ("the Union") filed a verified improper practice petition and a verified petition for injunctive relief against the City of New York ("the City"). On January 17, 1995, the City filed a verified response to the request for injunctive relief. On January 18, 1995, the attorney for the petitioner filed a memorandum of law on behalf of the Union.[1]

BACKGROUND

Since March 2, 1981, under consecutive collective bargaining agreements, Fire Alarm Dispatchers ("FADs") and Supervising Fire Alarm Dispatchers ("SFADs") have been working under a scheduling system, hereinafter referred to as "the old chart." Under the old chart, a two-platoon, 25-group system consisted of two rotating tours from 7:00 A.M. to 7:00 P.M. and 7:00 P.M. to 7:00 A.M. The FADs and SFADs would work two "day" shift tours of twelve hours each day, followed by 24 hours off. This would be followed by two "night" shift tours of twelve hours each night, followed by 96 hours (four days) off. This cycle would be repeated twice and after the third cycle of two day and two night shifts, there would be a period of 120 hours (five days) off. In a

[1] In the cover letter accompanying the memorandum, the Union's attorney requested that the Board refuse to accept the City's response to the petition on the ground that it was not verified by an official of the Fire Department.

period of 25 days, FADs and SFADs would have worked six day and six night shifts of twelve hours each.

On October 11, 1994, the Fire Department announced a 90-day pilot program instituting a work chart change for FADs and SFADs working in the borough of Manhattan. The chart to be implemented under the pilot program changed the starting and finishing times of FADs and SFADs to 11:00 A.M. to 11:00 P.M. and 11:00 P.M. to 11:00 A.M., while maintaining the 25-group system. The program also included an increase in the number of day shifts (to seven tours per 25-day cycle) to be worked by FADs and a concomitant decrease in the number of night shifts (to five tours per 25-day cycle). As a result, in the first cycle of the chart, the number of consecutive days increased from two to three and as a consequence the number of off hours between shifts decreased from twenty four to twelve.

At a labor-management meeting held on November 2, 1994, the Union objected to the pilot program, stating that the proposed changes in the work chart must be done through collective bargaining. The Union alleged that the changes in the work chart gave rise to a duty to bargain over changes in the number of hours FADs and SFADs have off between tours, and changes in the number of tours per year in which unit members work more than 40 hours. The Fire Department contended that it was not a collective bargaining issue because changes in work schedules are management's prerogative.

Several labor-management meetings were held in December 1994, in which alternative work schedules were exchanged, however, both sides maintained their positions concerning whether the proposed work chart change was a collective bargaining issue. On January 3, 1995, a memorandum was issued by the Chief of Dispatch Operations, setting forth another work chart, hereinafter referred to as the "new work chart", to be implemented in all boroughs on January 9, 1995.

Under the new work chart, the day tour hours have been changed to 9:00 A.M. to 9:00 P.M. and the night tour hours have been changed to 9:00 P.M. to

9:00 A.M., with the two platoon, 25-group system remaining in effect. The days worked are as follows: the first cycle consists of three consecutive "day" shifts (twelve hours each), followed by 24 hours off which is then followed by one night shift which is followed by 96 hours off. The remaining two cycles remain the same; two day shifts with 24 hours off followed by two night shifts followed by 96 hours off and two day shifts with 24 hours off and two night shifts followed by 120 hours off. The total number of hours in each shift did not change nor did the number of days worked per cycle. The number of appearances and the number of tours per year remained the same.

As in the previous pilot program, the new work chart also included increasing the number of day shifts to seven and decreasing the number of night shifts to five per 25-day cycle. Also, in the first cycle of the new chart, the number of consecutive days worked increased from two to three and as a consequence the number of hours off between shifts decreased from twenty-four to twelve.

POSITIONS OF THE PARTIES

The Union's Position

Pursuant to Section 209-a.5 of the Civil Service Law ("CSL") and Section 1-07(l)-(t) of the Rules of the City of New York ("RCNY") (hereinafter the "OCB Rules"), the Union asks the Board to determine that (1) there is reasonable cause to believe that an improper practice has occurred, and (2) it appears that immediate and irreparable harm has resulted and will continue to result thereby (i) rendering a resulting judgment on the merits ineffectual, and (ii) necessitating a return to the status quo ante to provide meaningful relief. The Union further requests that the Board petition the Supreme Court, New York County, for injunctive relief, or in the alternative, issue an order permitting the Union to seek injunctive relief.

In the underlying improper practice petition, the Union maintains that the City has violated Section 12-306a(1) and (4) of the NYCCBL by refusing and

failing to bargain in good faith on mandatory subjects of collective bargaining and by unilaterally implementing a new work chart for FADs and SFADs. According to the Union, the new work chart changes the hours and working conditions of its members by changing the number of hours a FAD or SFAD has off between tours, and by changing the number of tours per year in which unit members work more than 40 hours.

In addition, the Union alleges that the new work chart violates Article IV, Section 1 of the Unit Agreement, which, it maintains, incorporates by reference the old work chart that specifies an average work week of 40.32 hours.[2] Article IV of the Unit Agreement, entitled Hours and Leave, provides as follows:

> Section 1.
> The hourly work week for **Fire Alarm Dispatchers** and **Supervising Fire Alarm Dispatchers** shall be 40 hours. It is understood and agreed the **Fire Alarm Dispatchers** and **Supervising Fire Alarm Dispatchers** are currently scheduled to work on the average of 40.32 hours per week [emphasis in original].

* * *

Contrary to the City's assertion that "a change in work hours is not a mandatory subject of bargaining," the Union maintains that not every change in work schedules is a management prerogative. The Union argues that where changes in hours, wages or other conditions of employment are implicated by work chart changes, the City may not act unilaterally. The Union alleges that because the new chart changes the hours off between tours, the number of night and day appearances, and the number of weeks per year in which FADs and SFADs work over 40 hours, the new chart could not be instituted unilaterally.

According to the Union, the following irreparable injury will result from a continuation of the new work chart: (1) complete disruption of family life of dispatchers who share parenting responsibilities or are single parents; (2) loss of employment and/or income for dispatchers who work second

---

[2] The Union refers to a letter agreement between the parties entered into in 1981, which established the two platoon, 25-group work chart.

jobs; (3) traffic delays as a result of having to arrive at work at the height of the rush hour; (4) additional day tour in every 25 day cycle results in one less day spent at home with family doing errands or performing other activities; (5) increased workload on dispatchers working the night tour, adding increased strain to an already stressful job and diminished ability to fulfill responsibilities adequately; (6) less opportunity to work extra overtime; (7) less opportunity for dispatchers assigned to the night tour to use holiday bank time due to decreased staffing during the night tour. The Union maintains that the harm FADs and SFADs are suffering as a result of the work chart change cannot be made whole by money.

The City's Position

The City opposes the Union's request for injunctive relief, maintaining that the petition fails to satisfy the two-pronged test required by Section 1-07 of the OCB Rules. According to the City, a petitioner requesting an injunction must prove: (1) reasonable cause to believe an improper practice has occurred; and (2) irreparable harm which would render a decision on the merits ineffectual.

The City claims that a change in the starting and finishing times of FADs and SFADs to provide service more productively and efficiently is not a mandatory subject of bargaining. Citing Section 12-307b of the NYCCBL, the City maintains that the Fire Department has the managerial prerogative to make this change in the work chart unilaterally. In support of this argument, the City cites Decision No. B-4-69 (the establishment of shift hours a reserved management right); Decision No. B-5-75 (the City alone has the power to determine levels of manning); and Decision No. B-10-75 (setting the starting and finishing times of schedules is a management prerogative).

Characterizing the Union's allegations as a demand to bargain over "the issue of less opportunity for overtime which may be available [to FADs and SFADs] by a unilateral change in shift hours," the City maintains that the assignment of overtime falls within the City's statutory management right to determine "the methods, means and personnel by which government operations are to be conducted." Thus, the City argues, the subject is outside the scope of mandatory collective bargaining.

Contrary to the Union's argument, the City denies that it has limited this management right in the Unit Agreement, maintaining that the side letter cited by the Union in support of its claim was effective only for the term of the 1980-1982 collective bargaining agreement between the parties.

The City also argues that the Union has not satisfied the second prong of the above test, i.e., a showing of irreparable harm. In this connection, the City argues that a "clear" showing of harm is required and mere

speculation is insufficient. The City maintains that the Union's proof of irreparable harm, i.e., less opportunity for extra overtime, loss of employment on a second job and inability to use holiday bank time, is merely a list of monetary inconveniences which result from the change in the work charts. In this regard, the City points out that where an action is essentially for an amount of money, injunctive relief will not be granted.

As for the "quality of life" complaints, i.e., increased travel time due to traffic in rush hour and the lack of time with employees' families, the City maintains that these do not equate with irreparable harm. Citing American Postal Workers v. U.S. Postal Service, 99 LRRM 3465 (E.D.N.Y. 1978), the City maintains that the court denied a request for injunctive relief in a case where the union alleged irreparable harm to employees who attended night classes and to an employee who alleged "family" inconvenience in that the change would cut into her time with family at night. According to the City, while the court was mindful of the inconvenience the change caused, it did not find that there was irreparable harm.

Discussion

Initially, we address the Union's contention that the City's Verified Response to its petition was, in fact, "not verified." The Union argues that the Response is, therefore, defective, and should not be considered by this Board. We note that the original Response filed in this office was verified by the attorney for the City, upon personal knowledge based upon "books and records of the City of New York, and statements made by officers and employees of the City of New York." Whether or not these sources provided a sufficient basis for the attorney's verification, or whether it would have been better to have had an official of the Fire Department verify the Response, are not issues which call into question the admissibility of the City's pleading. Therefore, we have considered the Response in reaching our determination herein.

Prior to 1992, it was unclear whether the New York courts could grant injunctive relief to preserve the status quo during the pendency of improper practice proceedings before this Board or our State counterpart, the Public Employment Relations Board ("PERB"). In Uniformed Firefighters Association v. City, 79 N.Y.2d 236, 581 N.Y.S.2d 734 (1992), the Court of Appeals resolved that uncertainty, ruling that the courts lacked jurisdiction to consider such requests for injunctive relief. The Court noted that no statutory authority existed for the exercise of such jurisdiction, and that,

> permitting courts to grant preliminary injunctive relief in public sector labor disputes pending before the Board or PERB would have the undesirable effect of embroiling the courts in the merits of such disputes, a matter best left to the "impartial body with expertise in th[at] area" [citations omitted]. Such judicial involvement would necessarily occur because a determination as to whether a preliminary injunction should be issued necessarily entails an inquiry into the likelihood of the applicant's ultimate success on the merits [citations omitted]. 79 N.Y.2d at 241, 581 N.Y.S.2d at 737.

Thereafter, the State Legislature enacted and the Governor signed a law (1994 Laws of New York, Chapter 695) which amended §209-a of the Taylor Law (Civil Service Law, Article 14) to provide an injunctive relief mechanism that would accommodate both the necessity of redressing improper practices that were causing irreparable harm and the desire to avoid judicial interference in the initial adjudication of improper practices. Additionally, the law mandated that the PERB and this Board adopt rules for the implementation of the amendment. The rules which we adopted pursuant to the statutory mandate and in accordance with the City Administrative Procedure Act (City Charter §1043) are set forth in §1-07, subdivisions (l) through (u) of the RCNY. Both the amendment to the Taylor Law and our injunctive relief rules became effective on January 1, 1995. The instant case is the first filed with this Board under the new law and rules.

The law does not empower this Board to issue preliminary injunctions; that power continues to reside in the courts. What the law does is to give the courts jurisdiction to consider applications for injunctive relief in improper practice cases where there has been a finding by PERB or this Board

that the statutory standard has been satisfied. Both the law and our rules set forth what is essentially a two-part standard that a petitioner must meet in order to be authorized by this Board to seek injunctive relief in the courts. The standard requires that a petitioner show that:

> (1) there is reasonable cause to believe that an improper practice has occurred, and
>
> (2) it appears that immediate and irreparable injury, loss or damage will result thereby, (i) rendering a resulting judgment on the merits ineffectual, and (ii) necessitating maintenance of, or return to, the status quo to provide meaningful relief.

We believe that the Legislature did not intend that the PERB and this Board exactly duplicate the functions performed by the courts in injunction cases. Rather, it was intended that we perform a screening function, utilizing our expertise to prevent the courts from being burdened with applications for injunctive relief in cases presenting doubtful issues of improper practice. It is our view that the Legislature, responding to the decision of the Court of Appeals in the Uniformed Firefighters case, intended that this Board utilize its expertise in improper practice cases to evaluate the probable merit and likelihood of success of the underlying improper practice charge, and to be satisfied that there is reasonable cause to believe that an improper practice has occurred, before permitting an application for injunctive relief to be submitted to the courts. This responsibility requires that we carefully examine the improper practice claim to insure that it has a likelihood of success. That does not mean that the improper practice charge must be definitively proven at this early stage of the process of adjudication; nor does it mean that we must, at this stage, resolve all factual disputes that may be material to the merits of the charge. What it does mean is that upon a review of the record before us, we must be able to find reasonable cause to believe that an improper practice under the NYCCBL has occurred. In making this determination, we will consider whether documentary evidence or other convincing proof has rebutted mere allegations

in a pleading; but we will not permit a bona fide dispute as to material facts to negate the sufficiency of a prima facie claim of improper practice.

It is further our view that the second part of the statutory standard, the part requiring that "it appears that immediate and irreparable harm or damage will result," involves an area of law which traditionally has been within the province of the courts. Accordingly, we do not believe that the Legislature could have intended that we examine and assess allegations of irreparable harm with the same degree of scrutiny that we apply to allegations of improper practice. Our inquiry will focus on examining whether, on the record before us, claims of irreparable harm are supported by apparently bona fide allegations of probative fact, or are doubtful or merely conclusory, or are otherwise legally insufficient. We will also examine whether there appears to be a causal connection between the alleged irreparable harm and the specific acts which are alleged to constitute an improper practice under the NYCCBL.

Turning to the case before us, we find that there is reasonable cause to believe that one element of the Petitioner's charge states an apparently meritorious claim of improper practice. The petition alleges that one effect of the changed work schedule unilaterally imposed by the Fire Department is to shorten the time off between certain shifts. Our reading of the charts and calendars submitted by the parties, and the January 3, 1995 memorandum from the Fire Department, supports the contention that, compared to the previous schedule, the introduction of a "swing shift" day tour during a FAD's first evening tour results in twelve hours off preceding that shift, rather than twenty-four hours off under the previous schedule. Stated another way, FADs previously worked two twelve hour tours followed by twenty-four hours off; they now must work three twelve hour tours before having twenty-four hours off. Pursuant to §12-307a. of the NYCCBL, the subject of "hours" is a mandatory subject of bargaining. We have long held that the duty to bargain

over hours includes the duty to bargain over time off.[3] Therefore, the allegation that the new work schedule unilaterally imposed by the Fire Department changes the time off between certain shifts states an apparently meritorious claim of an improper practice in violation of §12-306a.(4) of the NYCCBL.

The other elements of the improper practice charge appear to be of doubtful merit. The petition refers to the fact that, under the new work schedule, the starting and finishing times of day and night tours will change from 7 A.M. - 7 P.M. and 7 P.M. -7 A.M., to 9 A.M. - 9 P.M. and 9 P.M. - 9 A.M., respectively. However, in its memorandum of law, the Union disclaims any intent to argue that the change in starting and finishing times is bargainable. In any event, we have held that, in recognition of the City's statutory management right to:

> . . . determine the standards of services to be offered by its agencies; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization and the technology of performing its work,[4]

that the setting of starting and finishing times is a matter of scheduling, which is a managerial prerogative and not subject to mandatory collective bargaining.[5] We also note, regarding the schedule change in this case, that the change does not affect the number of hours worked per tour, per 25-day cycle, or per year, nor the number of appearances per 25-day cycle or per year.

The Union contends that the change in the work schedule changes the number of weeks per year in which FADs and SFADs work over 40 hours (referred

---

[3] See, e.g., Decision No. B-5-75.

[4] NYCCBL §12-307b.

[5] See, e.g., Decision Nos. B-24-75; B-10-75.

to by the Union as "FLSA weeks").[6] The City argues that this has to do with the scheduling or assignment of overtime, which is a management prerogative. The Union's memorandum of law counters that "FLSA weeks" are not considered overtime, though it does seek to bargain over them as hours and compensation issues. We find the Union's argument on this point somewhat confusing. However, for purposes of evaluating the likelihood of success of this claim, we note the following: the petition for injunctive relief alleges that there will be less opportunity to work "extra overtime (above their regularly scheduled overtime)". On its face, this seems like a complaint concerning the assignment of overtime. We have held that, absent any contractual guarantee, the assignment of overtime is a management prerogative.[7] A union is free to demand bargaining over the rate of compensation to be paid when overtime work is performed; but, the decision whether and when to assign overtime belongs to management.

The Union argues that the old work chart has been part of the contract between the parties since 1981. To support this contention, the union refers to a letter agreement entered into in 1981 which established a pilot program utilizing a two platoon, twenty-five group work chart. As evidence that this work chart was carried over into the current collective bargaining agreement, the Union cites to Article IV, Section 1, which provides,

> The hourly work week for **Fire Alarm Dispatchers** and **Supervising Fire Alarm Dispatchers** shall be 40 hours. It is understood and agreed that **Fire Alarm Dispatchers** and **Supervising Fire Alarm Dispatchers** are currently scheduled to work on the average 40.32 hours per week.

The Union observes that 40.32 hours is the average amount worked per week under the old work chart.

---

[6] It appears that the change in the schedule will result in employees working more hours in excess of 40 over a fewer number of weeks.

[7] Decision No. B-29-87.

It is a management right to determine and to change work schedules, provided the change does not affect the number of hours worked, the number of appearances, or other mandatory subjects of bargaining.[8] Management's prerogative in this area, nevertheless, may be limited through voluntary bargaining on a permissive basis.[9] However, any claim that management has agreed to limit the exercise of its prerogative must be supported by reference to an express statement of such limitation in the collective bargaining agreement.[10] We are not convinced that the contract's reference to an average of 40.32 hours of weekly work constitutes such an express statement of a limitation on the right of the Fire Department to establish and change the work chart during the term of the contract, or an express statement that the parties agreed to include the work chart in the contract, and to be bound thereby. Therefore, without foreclosing further opportunity for the Union to prove this point in the underlying improper practice proceeding, we cannot say that the Union has demonstrated a likelihood of success on this point.

The petition for injunctive relief alleges that the reduced staffing during the night tour, under the new schedule, will increase the workload and responsibilities of affected employees, making it likely, that under certain circumstances (such as two fires at the same time in one borough) dispatchers will not be able to fulfill their responsibilities adequately. Although these allegations are raised in support of the claim of irreparable harm and not as evidence of an improper practice, we will address the duty to bargain implicated therein. These allegations may be construed as a claim that an action taken by management regarding levels of staffing has had or will have a practical impact on employees. In a proper case, pursuant to §12-307b. of the NYCCBL, management can be required to bargain over the alleviation of a practical impact. However, the law is clear that no duty to

[8] Decision Nos. B-24-75; B-10-75; B-5-75; B-6-74; B-4-69.

[9] Decision Nos. B-21-87; B-11-68.

[10] Decision Nos. B-2-92; B-11-81; B-22-80.

bargain arises until this Board makes a determination that a practical impact within the meaning of the law actually exists.[11] That is a factual matter that must be determined by this Board on a case by case basis. In the present case, the Union's allegations of such impact arising from reduced staffing are conclusory and speculative. Accordingly, even if the allegations of harm are considered as the equivalent of allegations of practical impact, there would be no basis to find that there is any likelihood that the City will be found to have committed an improper practice in this regard.

Having found that one element of the Union's petition (concerning time off between certain tours) presents an apparently meritorious claim of improper practice, we must consider whether the Union has submitted factual allegations of irreparable harm resulting therefrom. We find that most of the examples of harm alleged by the Union relate to the impact on employees' personal and family life of the change in the starting and finishing times of the tours. While we recognize and are sympathetic to the hardship these changes may bring for employees and their families, we find that they are a consequence of a decision that is a matter of management prerogative. As such, they cannot be considered to support a request for injunctive relief regarding a different claim, i.e., the change in the amount of time off before certain tours. As to the latter claim, the only allegation of irreparable harm which appears to be at all causally linked to the matter of time off is the claim that:

> Dispatchers will work an additional tour every 25 day cycle, thus having one less day to spend at home with family doing errands or performing other activities.

Mindful that the courts have been reluctant to deem interference with family life resulting from a schedule change to constitute irreparable harm,[12] we

---

[11] Decision Nos. B-39-93; B-25-93; B-36-90; B-47-88; B-46-88.

[12] American Postal Workers v. U.S. Postal Service, 99 LRRM 3465 (EDNY 1978).

also find that the loss alleged is more in the nature of an inconvenience and not an irreparable harm sufficient to warrant injunctive relief.

Based upon the above, we conclude that the Union's request for injunctive relief must be denied. This denial is without prejudice to the determination of the underlying improper practice petition in due course upon a full record.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the NYCCBL, it is hereby

ORDERED, that the petition for injunctive relief of the Fire Alarm Dispatchers Benevolent Association be, and the same hereby is, dismissed.

Dated: New York, New York
January 23, 1995

Daniel G. Collins
Member

George Nicolau
Member

Saul G. Kramer
Member

Anthony P. Coles
Member

Carolyn Gentile
Member

Jerome E. Joseph