LBA v. City, 15 OCB 10 (BCB 1975) [Decision No. B-10-75 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD or COLLECTIVE BARGAINING

In the Matter of

LIEUTENANTS' BENEVOLENT ASSOCIATION — DECISION NO. B-10-75

and — DOCKET NO. BCB-188-74

THE CITY OP NEW YORK

DECISION AND ORDER

In its petition, filed August 22, 1974 the Lieutenants Benevolent Association (LBA) seeks a finding by this Board that following five subjects advanced by LBA in the current negotiations with the City of New York are mandatory subjects of bargaining under §1173-4.3, NYCCBL:

Proposal 1 "The duty charts for Lieutenants, shall be revised to incorporate adequate tine allowances for such ore-tour and post-tour activities as are necessary for the proper performance of the duties of a superior officer."

Proposal 3 "The minimum salary for the Lieutenant title shall be 66-2/3% above the maximum salary for the Patrolman's title."

Proposal 18d "Full Health and Welfare Benefits shall be provided for, a suspended Lieutenant during the period of suspension."

Proposal 42 "The department shall immediately destroy upon receipt all anonymous correspondence and memoranda relating to phone calls received concerning the personal lives of Lieutenants."

Proposal 45 "A Lieutenant shall not be suspended without pay prior to an administrative hearing before his department heard, except where the Lieutenant has been indicted for a felony,"

The City filed its Answer and Brief on October 2, 1974, contending that all the proposals constituted invasions of the City's management rights as prescribed in §1173-4.3 b, NYCCBL, ane, therefore, were not mandatory subjects of bargaining.

The LBA filed a Reply Brief on October 9, 1974, and, on October 17, 1974, the Patrolmen's Benevolent Association, the Detectives' Endowment Association, the Sergeants' Benevolent Association, and the Captains' Endowment Association filed an amicus curiae brief in support of the LBA's petition for a determination that its five bargaining proposals are mandatory subjects of bargaining.

PROPOSAL 1

Background

This bargaining demand calls for the "revision of the duty charts for Lieutenants in order to incorporate adequate time allowances for such pre-tour and post-tour activities as are necessary for the proper performance of the duties of a superior officer." in the 1972 negotiations, the LRA unsuccessfully advanced a demand similar to Proposal 1 seeking department-wide crediting of Lieutenants with~pre-and-post-tour-duties, a condition which the PBA and the SBA-had previously won for their members. Although failing in its major objective, the LBA was successful, however, in obtaining from the Employer an agreement that the Department would notify the Association in advance of duty chart changes affecting its members. The last agreement

between the LBA and the City expired June 30, 1974, but its terms continue in force and affect at this tine under the status quo provisions of the NYCCBL.

Since 1972, patrolmen's duty charts call for B-1/2 hour tours. These tours include the following pre-and-post-tour activities:

Pre-tour: 5 minutes to get ready
for roll call;
15 minutes training by
sergeants.

Post-tour: 10 minutes for writing
of reports.

Similarly, pursuant to a contract provision in the SBA contract, some sergeants are scheduled for 8 hours and 50 minutes per day.

The LBA maintains that the Lieutenants' duty charts should similarly be revised to credit each Lieutenant with pre-and-post-tour activities in addition to their normal eight hours of work.

Positions of the Parties

The LBA's Position

While it is not explicitly stated in the Union's demand, it is apparent from LBA's supporting brief that the Union maintains that Lieutenants are required to perform

certain duties, completion of which necessitates their working beyond the hours set forth in the duty charts. The LBA contends that the purpose of this demand is to correct the alleged discrepancy between the duty chart hours credited to Lieutenants and the hours of service they are alleged actually to perform. In this connection the brief argues:

> 1. Most lieutenants - and particularly those assigned to precinct duty - are required to devote substantially more than eight hours of work to each tour.
>
> 2. The alleged, purpose of LBA's demand is to require the Employer to conform its duty charts to the realities - to reflect the actual hours of work performed.
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> 3. Arbitrators have acknowledged the fact that some Lieutenants work in excess of eight hour tours.
>
> 4. The Lieutenants are allowed no duty chart time comparable to that credited to patrolmen and sergeants even though, in order to perform their duties as superior officers, they must start work before, and complete it after their subordinates have done theirs.
>
> 5. The LBA is not asking for pay, or for duty time credit, for time not worked ,but for accurate crediting of all the time required to be put in on the job.
>
> 6. It is not a management right under any labor relations statute, either in the private or public sector, to insist that an employee work more hours than he is credited with on the record.

7. The obligation to bargain under §1173-4.3 of the NYCCBL is a broad one, not to he narrowed unless the presumption in favor of negotiability is rebutted by a showing that statutory provisions expressly prohibit collective bargaining as to a particular term or condition. The employer has failed to prove that the instant proposal is non-negotiable.

8. The LBA proposal with respect to duty charts invades none of the management rights reserved to the City under NYCCBL.

The City's Position

In its Answer to the LBA petition, the City contends:

1. The LBA demand for duty chart revision relates solely to scheduling, not to the number of hours of work. The arrangement of hours within a work week (scheduling) is a management prerogative; the number of hours per week or per year is a negotiable subject of bargaining.

2. The City cites, Decision No. B-4-69, in which a union demand that all Motor Vehicle Operators shall be employed on one of three standard shifts was held by the Board to infringe on the City's managerial right to establish shifts.

3. The LBA implies that Lieutenants are required to work time for which they are not reimbursed. There is no basis for such an assertion, and, were it true, the demand would be quite different than it is. Although the City does not say so explicitly, it maintains that the Lieutenants do not perform the pre-and-post-tour duties alleged in the LBA petition. Thus, the City's brief declares:

> "The Lieutenant who goes off duty at the end of a midnight to 8 AM shift in fact briefs the Sergeant who arrived for his 7:40 AM to 4:10 PM shift. The Lieutenant's tour is non-structured and he does not work as part of a constant team. The over-lapping Sergeants provide whatever continuity is necessary. In fact, many Sergeants still serve eight hour tours, and precinct continuity is maintained through consecutive tours of three eight-hour tours per day, without overlap.

> All of LBA's discussion in this area, however, is no more than an argument on why one type of scheduling would be better than another. The key point is that the arrangement of the duty chart into a schedule is the prerogative of the City and the duty of the Police Commissioner." (emphasis added)

4. The Board must be particularly mindful of §971 of the Unconsolidated Laws which the present Police Commissioner and OLR's General Counsel both understand clearly to prohibit tours in excess of eight hours per day. The LBA is asking for some tours in excess of eight hours per day (as made clear from prior bargaining, but not from LBA's petition), and, as such, their demand is not bargainable by reason of Section 971 as well. The City appears to say, in effect, that Section 971 makes the LBA demand for duty charts in excess of eight hours per day to be a prohibited subject of bargaining.

The LBA's Reply Brief

The LBA responded to the City's Answer as follows:

1. The LBA does not propose any change in the scheduling of Lieutenants; it merely asks that the scheduling charts promulgated by the PD show the Lieutenants' actual work time.

2. In Dec. B-2-73 the Board of Collective Bargaining held that the demand of the New York State Nurses' Association for the posting of work assignments was a mandatory subject of bargaining.

3. The Lieutenant is required by the duties and responsibilities of his job to put in many more hours than the existing charts credit him with. The LBA has the right to establish that fact and obtain duty charts which reflect that fact.

The Amicus Brief

The Amicus brief contends that LBA's proposal seeks a change in the number of daily hours worked, and their crediting towards the basic work week, and that it is a mandatory subject of bargaining.

Since we find the demand, as we understand it, to be bargainable on the basis of the LEA and City presentations above, we do not discuss further the matters raised in the Amicus brief.

ANALYSIS

This demand is bargainable only to the extent that it seeks an accurate statement of management's decision as to the duties it requires the Lieutenants to perform, and the precise hours during which these duties are to he performed. In Matter of N.Y.S. Nurses Association v. City of New York, Decision No. B02073, a case involving an analogous issue, we held:

> Numbered Item 6, for the posting of work assignments, is objected to by the City as an infringement of management's prerogative to "direct its employees, determine the methods, means and personnel by which governmental operations are to be conducted ... and exercise complete control and discretion over the organization ... of performing its work." We see no such infringement in this demand. No participation in the decision -making process is sought by the Association. It is asked only that management, once it has made its decision on the matter of work assignments, publish the information to those who are affected by it. Ile find that this demand relates to working conditions and that it is a mandatory subject of bargaining.

The City contends that the duty charts of Lieutenants accurately reflect the hours they are required to work, and denies that Lieutenants are required to perform duties which necessitate working beyond their officially scheduled hours of work or to perform any duties without reimbursement. We make no findings

on this issue. We do hold, however, that since Lieutenants are required to perform certain enumerated duties, and, further, are required to perform them during certain 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 the hours and days of work required of Police Lieutenants, and the 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 natters in a form and manner which will clearly define the rights and obligations of the affected employees. It would be an improper invasion of the City's statutorily protected decision-making power, however, for the Union to demand that the City share its reserved authority in this area. Thus, if the Union were to assert the right to bargain over

(1) the starting and finishing times of schedules; or

(2) determination whether work time is to be used to perform any of the functions referred to as pre-tour and/or post-tour activities; or

> (3) determination of how much of the scheduled work time should he devoted to any such pre- or-post-tour duties as the Department may require,

it would go beyond the limits of mandatory bargaining, and constitute an invasion of the City's management prerogative to determine the level and quality of service to be delivered to its citizens, and the methods, means and personnel by which government operations are to he conducted.

The City objects to the demand on the ground, among others, that it would violate Section 971 of the Unconsolidated Laws, as amended in 1969, which regulates maximum hours. The Section authorizes the Police Commissioner of New York City to:

> ... 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 bf changing tours of 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 for by law.

In City v Patrolmen's Benevolent Assn., Decision No. B-4-75, the Board recently passed upon a similar duty chart issue in which the City had raised the matter of 5971. In that case, however, the City sought a Board determination that duty charts in excess of eight hours per day which were already provided for in an expiring PBA contract were a permissive subject of bargaining. In its decision, the Board declared:

> "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. (Board of Education v. Associated Teachers of Huntington, 30 NY 2d 122, 130; 331 NYS 2d 17, 23). Any PBA or City demand which would require a contravention of law is therefore a prohibited subject of bargaining (Decision No. B-11-68).
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> * * *
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> "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."

In light of the fact that we have found LBA's demand to seek no more than a clear statement by the City of its requirements as to work schedules and the pre-and-post-tour duties, if any, to be performed within such schedules, the demand cannot be said to conflict with the law or to seek bargaining for a prohibited contract provision.

Proposal 3

In a letter dated April 1, 1975, LBA's counsel clarified this demand as follows:

> "LBA Proposal 3 has a dual purpose. Primarily the Association would like to negotiate a fixed salary ratio to be maintained during the term, of the agreement ... In the event., however, that the Board of Collective Bargaining should determine that the negotiation of such a continuing ratio would be incompatible with sound bargaining principles, the Association would limit Proposal 3 to the establishment of salary levels in absolute dollar amounts. in the establishment of such levels, the Association would not, of course, be precluded from submitting evidence with respect to salary scales in other positions and titles."

The foregoing indicates that the LBA demand has two distinct and significantly different aspects. The union's preference would be for a provision fixing a 66⅔% differential between the salaries of Police Lieutenants and Patrolmen and maintaining that differential throughout the term of the contact. In the usage of New York City municipal labor relations this would constitute a parity clause.[1]

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[1] The term "parity",in the context of collective bargaining between the City and the Police and Fire unions, has come to have a special usage in recent years. Initially, it referred only towage equality between Patrolmen and Firefighters which had to be maintained during the term of a contract. As currently used, however, it has come to include any fixed pay relationship between two titles which must be maintained for the life of a contract. Thus, the "parity" concept now includes fixed wage differentials as well as wage equality which are maintained during the term of the contract. The fixed pay relationship between titles in different departments is sometimes called "horizontal parity"; that between titles within the same department - that is, the relationship between supervisory and supervised titles - is called "vertical parity". The title to which the wage of the contracting unit is pegged is referred to as the benchmark title. Fixed differentials may be expressed as a ratio or percentage above some benchmark title or as an absolute dollar amount above such benchmark title. Maintenance of a fixed relationship to a benchmark title entails automatic mid-term adjustments when the wage level of the benchmark title is altered.

The union's second position recognizes the Possibility that "the negotiation of such a continuing ratio would be incompatible with sound bargaining principles" and calls for the establishment of salary levels in absolute dollar amounts "based upon evidence with respect to salary scales in other positions and titles." Cast in this manner the proposal constitutes a demand for "comparability" bargaining.[2]

The union is correct in its anticipation that this Board would find a demand for a lock-step parity agreement "incompatible with sound bargaining principles." We discussed this issue in our decision B-14-72. In that case the City contended that a parity clause advanced by the Uniformed Firefighters Association seeking equality in the wage levels of Firefighters and Patrolmen, and a clause advanced by the Uniformed Fire officers Association establishing and maintaining a 3.0 to 3.9 wage relationship between the Firefighters and Fire officers, were "prohibited, or at least, permissive subjects of bargaining." The City maintained in that case that a parity or differential clause, if agreed to by the City, would constitute an improper labor practice because it would interfere with the bargaining rights of employees in the benchmark title who were represented by a different union, not a party to the parity agreement; would require the City to make automatic and unilateral changes in terms and conditions of employment; and would involve the City in assisting the contracting union to limit, control or otherwise adversely affect bargaining in the unit of benchmark employees.

[2] Comparability bargaining is the practice of re-aching agreement on The wages of one group by comparing that group's duties, responsibilities and rewards with another group of employees asserted to be doing similar work.

The LBA and the Amicus briefs stress the comparability feature of parity/differential clauses, but do not seriously address themselves to the issue of the inhibiting impact of-the maintenance feature of such clauses on the bargaining position of the unions representing the benchmark employees, or to the possibility that the simultaneous achievement of parity by the contracting group and a differential clause by the benchmark group of employees might set off a never-ending round of mid-term wage adjustments.

The Board's decision in B-14-72, distinguished parity/differential clauses from the practice of "comparability bargaining," pointing out that comparability was traditional in collective bargaining in both the private and public sectors, and that it was expressly stated in the NYCCBL as only one of the criteria to be used by impasse panels in recommending settlements [Section 1173-7.0 c (3) (B) (1)].

Thus, we find that the LBA demand for salaries in fixed dollar amounts, based, in part, on a comparison with the salaries of Patrolmen, but without any guarantee of maintenance of a fixed differential between the salaries of the two groups is a mandatory subject of bargaining.

In holding as we do that parity/differential clauses establishing fixed pay relationships with other titles which must be maintained throughout the life of a contract, are "incompatible with sound bargaining principles," we note that PERB has reached a similar conclusion in City of Albany and Albany Permanent Professional Firefighters Association, Local 2007, AFL-CIO, Case No. U-1371 (Dec. 19, 1974). That decision, in pertinent part, reads as follows:

> "Local 2007's unnumbered demand that if, during the lifetime*of the agreement, any disparity in dollar benefits occurs between police and"firefighters of the City of Albany, the agreement 'may immediately be reopened and that said disparity shall be corrected' raises a particularly challenging question. To the extent that it is a demand for a wage reopener and for subsequent negotiations, it is a mandatory subject of negotiation. However, if the demand is not to reopen the agreement for negotiations but to reopen it for the mechanical change of instituting the dollar value of benefits obtained later by the police in their negotiations, it is not negotiable. The firefighters can no more insist that during the life of their agreement the wage provisions thereof will be adjusted upwards automatically to equal those obtained thereafter in police negotiations, than the police can insist that the wage provisions of their agreement be reopened to guarantee that they receive some amount more than the firefighters have obtained thereafter by negotiations. Such a demand concerns terms and conditions of employment outside their own negotiating unit. In effect, the firefighters seek to be silent partners in negotiations between the employer and employees in another negotiating unit. Moreover, an agreement of this type between the City and one employee organization would improperly inhibit-negotiations between the City and another employee organization representing employees in a different unit.

> "In reaching this conclusion we recognize that there is a relationship between the settlement of a public employer with the employee organization representing some of its employees and the settlement with another employee organization representing other employees. Settlements often follow established patterns, historical relationships, as well, as cost-of-living indices. in negotiations, -parties appropriately develop demands that reflect an awareness of such Patterns and relationships. This is not inappropriate. These prior settlements may diminish the willingness and even the ability of a public employer to grant certain benefits to other employee organizations thereafter, but the restrictions involved in a parity clause are of a different and greater dimension.
>
> "Accordingly, we find that the demand for parity is not a mandatory subject of negotiations."

A comprehensive discussion of this subject is found in the decision of the Connecticut State Labor Board in City of New London (Police Department), Case No. MPP 2268, 505 GERR F-5, (1973), which reads in pertinent part:

> "The question whether two separate bargaining units should receive equal treatment is necessarily one of vital concern to both of the concerned groups. Equality is a term of relationship; by its very nature it cannot characterize a single entity. Where one of two groups has already made its terms with the city, the other may then of course seek to attain equal treatment without impinging on the former group's

> freedom to bargain. But that is not this case. Where equality in future treatment is in question, then each of the groups sought to be equated has a statutory right to bargain about the point. It is this right which the parity clause in the firemen's contract actually interferes with and restrains. If this clause is given effect, the policemen will he bound to a rule of equality in negotiating their own terms and conditions, without ever having had a chance to negotiate the rule itself. This we conclude constitutes a violation of the Act. Only by joint bargaining can a rule of parity properly be imposed by contract.
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> * * *
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> "To emphasize the narrow scope of our ruling, let us point out clearly certain things:
>
> -- We are not deciding that parity between policemen and firemen is forbidden by the Act, or that it is wrong or undesirable.
>
> -- We are not deciding that the existence of a parity clause in and of itself constitutes a violation of the Act under all circumstances.
>
> -- We are not holding that the Act forbids the police and fire units to agree upon parity, or to bargain jointly for benefits with an understanding that they a are to be equal.
>
> "What we find to be forbidden is an agreement between one group (e.g., firemen) and the employer that will-impose equality for the future upon another group (e.g., policemen) that ha had no part in making the agreement. We find that the inevitable tendency of such an agreement is to interfere with, restrain and coerce the right of the later group to have untrammeled bargaining. And this affects all the later negotiations (within the scope of the parity clause) even though it may he hard or impossible to trace by proof the effect of the parity clause upon any specific terms of the later contract (just as in the

> case before us). The parity clause will seldom surface in the later negotiations but it will surely be present in the minds of the negotiators and have a restraining or coercive effect not always consciously realized. And while the evidence in the present case may not have shown a specific connection between the parity clause and the terms of the Police contract, it certainly did not indicate the lack of such connection."
>
> (Emphasis added)

Thus, we find that to the extent that this demand seeks a lockstep parity or fixed ratio wage relationship with employees in a bargaining unit not party to these negotiations, it is not a mandatory subject of bargaining. Except for that limitation, and insofar as the demand seeks salaries in absolute dollar amounts, based in part, upon comparison with the salaries of any other group or groups of City employees, but without any provision for guaranteeing or maintaining a differential between the salaries of unit employees and those of any other group, the demand is mandatorily bargainable.

Proposal 42:

Position of LBA

The Police Department's practice of retaining anonymous correspondence and memoranda of anonymous phone calls regarding the personal lives of Lieutenants, the LBA asserts, violates the basic civil rights of employees, does not serve to fight corruption because the anonymous communications are not hard evidence, and constitutes an invasion of the Lieutenants' right of privacy. The City's open admission that its policy is to store such anonymous information, LRA alleges, "is in effect a solicitation of such dirty business." Both the LBA and Amicus briefs assert that all the police organizations support the Department's ongoing effort to raise the ethical standards of the force; they insist that the proposal for the destruction of anonymous correspondence is not meant to thwart the investigation of complaints about police personnel, but rather "to protect the job tenure interests of personnel upon such investigation." Management's reserved "right to take disciplinary action" does not preclude bargaining over the methods and procedures of discipline. A union proposal regarding the disposition of unsupported complaints in no way infringes upon the taking of disciplinary action, is therefore outside the management right, and hence is a mandatory subject of bargaining.

City's Position

The City's answer asserts that the LBA proposal relates to "the means hy which the Police Department operates its intelligence and internal affairs." Although no police officer may be convicted or penalized for a charged violation of law or department rule on the basis of the anonymous evidence alone, the cumulation of anonymous information about a police officer "may warrant extra scrutiny of a frequently reported officer where members of the public are afraid to come forward and identify themselves as affected persons." The Police Department's duty to the public extends to keeping so close a watch over its personnel that other than ordinary procedures are justified. Keeping anonymous information is a "method ... by which government operations are to be conducted; part of the (Department's) duty and right to 'direct its employees;' and the 'exercise (of) complete control and discretion over its organization and the technology of performing its work." Sec. 1173.4.3b, NYCCBL.

ANALYSIS

LBA characterizes the retention of anonymous correspondence and memoranda of telephone "tips" about the private lives of Lieutenants as "odious," and describes the contents of such writing as "drivel" and "whispered gossip, too often salacious and obscene and the product of perverted personalities."

Obviously not all such anonymous information can be so described. Some of it - no one can say which, or how much - is surely valuable in disclosing wrongdoing by police officers, which later can be established or substantiated by hard, legal evidence. In any case, it is within the prerogative of the Police Department to avail itself of whatever clues, evidence, or tips are offered it in order to carry out its peace-keeping, crime-detecting and law obligations to the public at large.

The mission of the Police Department is to enforce the laws against citizens who violate them. This includes enforcing the laws against citizens who happen to wear the Police Lieutenants' uniform. The Police Department readily, and properly, accepts anonymous information about all types of crime; if the Lieutenant is the subject of such a report, he is in the same situation as any other citizen. The demand here would afford the Police Lieutenant an immunity not enjoyed by his fellow citizens and would constitute direct interference with the effective performance of the fundamental mission of the Police Department. Moreover, the problem of enforcing the law upon the law enforcers themselves is one of acute importance, as witness the age-old query of Plato: Who guards the guardians?

The detection and investigation of wrongdoings and the lawful gathering and retention of information or evidence thereof, precedes the leveling of a criminal charge against an accused person. In the case of a police officer departmental disciplinary proceedings may also be commenced. Receiving and retaining

anonymous information regarding Lieutenants is not unlawful. As to the uses of such information in departmental disciplinary proceedings, the Board has held in B-3-73, that once disciplinary action has been begun or carried through by the employer, employees have redress against the consequences of such disciplinary action by recourse to statutory channels (Art. 75 procedure) or to contractual arbitration. It is at this point that procedural due process, review, and appeal provide protection of the employees' civil rights.

We shall therefore dismiss the LBA's Proposal 42 as not being a mandatory subject of bargaining.

Proposal 45

LBA's Position

LBA's counsel makes clear in a letter dated April 1, 1975, that the "administrative hearing" called for by the Union before the Department imposes suspension is neither a formal trial nor a bargaining session. It is asserted to be merely a meeting between an accused Lieutenant, accompanied by an LBA representative,- and a Police Department representative for the purpose of affording the accused, "at a most critical moment of his career," an opportunity to set forth the extenuating factors or other considerations which might persuade the Police Commissioner, in the exercise of his conceitedly exclusive discretion, not to suspend without pay pending the trial of the merits of the charge.

> "In theory a suspension pending trial is not a penalty. In fact, it is *** * *** Suspension pending formal trial erodes the Lieutenant's morale, impairs his status as a superior officer, and causes considerable distress to his family in their home community. All that the Association seeks is the opportunity for the effective expression of the reasons why such a suspension should not be ordered." (LBA brief)

LBA expressly states that it does not seek to infringe upon or derogate from the Police Commissioner's statutory authority and discretion to impose upon members of the police force suspensions without pay pending formal trial of charges (§434 a-20.01, Administrative Code). The demand, it maintains, does not conflict with or encroach upon the City's reserved right to initiate discipline or to dismiss; it does not seek to change the departmental procedures for determination of guilt or innocence, nor does it relate to suspension with pay. The demand is intended merely to "work out a procedure which might avoid the irreparable damage done by an unnecessary suspension to a Lieutenant and his family."

The Amicus brief argues that working conditions are bargainable; that suspension affects working conditions; and that, therefore, since there are no specific or explicit statutory limitations on the bargainability of the proposal, it is a mandatory subject of bargaining.

The City's Position

The City contends the proposal is an invasion of management prerogatives: to determine the standards of service to be offered by its agencies; to determine the standards of selection for employment; to determine the personnel by which government operations are to be conducted: and to take disciplinary action.

ANALYSIS

The Administrative Code imposes no limitation on the duration of a suspension without pay ordered by the Police Commissioner, although the Civil Service Law does limit to 30 days the pre-hearing suspension of civil servants generally. As the court stated in People v. Russell, 227 N.Y.S. 2d 826 (1962), although the members of the police force are civil service employees, "yet unlike most other civil service employees they are subject to strict discipline and special proceedings, sanctions, and punishments."

In Matter of Cugell (Monaghan), 107 N.Y.S. 2d 117 (1951)i the court upheld the right of the Police Commissioner to suspend members of the police force indefinitely without pay pending trial of charges, notwithstanding the 30 day limit on suspension of other

civil servants, on the ground that the Administrative Code (Chapter 18) contained within itself the complete law with reference to the Police Department, and that it was intended that there be a distinction in the powers of suspension of the Police Commissioner and those of the heads of other Departments, This greater discretion of the Police Commissioner, of course, increases the hardships flowing from suspension.

It is clear that Proposal 45 is directed at seeking protection for Lieutenants against the hardship which an indefinite suspension entails, and which non-police civil servants do not face.

As we see it, the LBA demand is a request to create an additional or preliminary procedural step, in cases not involving indictment for felony, at which an accused employee and his Union representative can appear before the Police Commissioner or his authorized agent to be heard on the limited question whether a contemplated suspension should he imposed, or whether, perhaps, a lesser measure such as the recently created "modified assignment," should be employed pending departmental trial. Since no statute prohibits such a consultory meeting before the Police Commissioner exercises his unilateral discretion, we conclude that Proposal 45 is a mandatory subject of bargaining.

We note that, as advanced, the proposal would exclude cases where an accused Lieutenant had already been indicted by a Grand Jury. It is possible of course, that an accusation of serious Wrongdoing might be leveled against a Lieutenant even before indictment, and that such accusation night warrant immediate separation of the Lieutenant from his regular duties

under the particular circumstances of the case. In such situations, the demand as set forth in Proposal 45, for a meeting between accused and the Police commissioner before suspension without pay is imposed, would not preclude the Commissioner's suspending with pay for the short time it took to hold the meeting called for by the demand, and such suspension would not be bargainable. In any case, our finding that Proposal 45 it bargainable, is not a finding as to the merit or lack of merit of the demand.

In the recent case of N.L.R.B. v. J. Weingarten, Inc., 88 LRRM 2689, Feb. 19, 1975, the Supreme Court of the United States passed upon the much litigated issue whether an employee is entitled under the Labor-Management Relations Act to be accompanied by a union representative to an investigatory (pre-disciplinary) interview conducted by the employer. Noting that to require a lone employee to attend such an interview perpetuates the inequality which the Act is designed to eliminate, the Court declared that the right to have union representation at such time inhered in the law's guarantee of the employee's right to act in concert for mutual aid and protection. However, the Court limited the employee's right to request union representation to situations where the employee reasonably believes the investigation will result in disciplinary action, and declared that the exercise of the right could not interfere with the employer's legitimate prerogatives. Thus, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview.

The Court said:

> "Certainly his presence (the union representative's) need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. in other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At this point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than in re-examining them."

Although it relates to a different issue, the Weingarten case is relevant to the instant matter in that it indicates the broad view of union representation taken by the Court in respect to pre-disciplinary discussions, and the limitations placed on such right. The now recognized right under the LMRA to have union representation at a meeting when the employer is deciding whether certain conduct deserves discipline, is not too different from the question presented in this Case, whether the union is entitled to be heard before the employer makes a decision as to whether the employee's conduct merits the pre-disciplinary imposition of suspension without pay. To the extent that the Union representation does not interfere with the exclusive right of the Police Commissioner to determine whether suspension is merited and should be imposed, LBA's Proposal 45 is within the mandatory scope of bargaining.

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 Proposal 1 of the Lieutenants Benevolent Association is a mandatory subject of bargaining insofar as it asks the Police Department to provide a clear indication as to all hours and days of work required of Police Lieutenants, in accordance with the Opinion herein; and it is further

DETERMINED, that Proposal 3 of the Lieutenants Benevolent Association is a mandatory subject of bargaining insofar as it requests a salary increase in absolute dollar amounts above the salaries of Patrolmen, but without a guarantee to maintain any salary differential and that it is not a mandatory subject of bargaining insofar as it calls upon the City for a contract clause that establishes and maintains a fixed salary relationship between Lieutenants and Patrolmen for the duration of a contract; and it is further

DETERMINED, that Proposal 42 of the Lieutenants Benevolent Association calling for the immediate destruction upon receipt of all anonymous correspondence or memoranda of anonymous phone calls relating to the personal lives of Lieutenants is not a mandatory subject of bargaining; and it is further

DETERMINED, that Proposal 45 of the Lieutenants Benevolent Association that a Lieutenant shall not be suspended without pay prior to the holding of a meeting with his department head or the latter's deputy, except where the Lieutenant has been indicted

for a felony is a mandatory subject of bargaining in accordance with the Opinion herein; and it is further~

DETERMINED, that decision is reserved as to Proposal 18d of Lieutenants Benevolent Association calling for the provision of full health and welfare benefits for a suspended Lieutenant during the period of suspension, pending the receipt of briefs from the interested parties.

DATED: New York, New York
April 14, 1975

ARVID ANDERSON
Chairman

ERIC J. SCHMERTZ
Member

WALTER L. EISENBERG
Member

EDWARD F. GRAY
Member

EDWARD SILVER
Member

THOMAS J. HERLIHY
Member

JOSEPH J. SOLAR
Member