L.599, SEIU, Probation & Parole Officers v. City, 17 OCB 2 (BCB 1976) [Decision No. B-2-76]

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

PROBATION AND PAROLE OFFICERS ASSOCIATION, LOCAL 599, SEIU, AFL-CIO

Petitioner

DECISION NO. B-2-76

DOCKET NO. BCB-229-75

-and-

CITY OF NEW YORK,

Respondent
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DECISION AND ORDER

The Union, the Probation and Parole Officers Association, filed a bargaining notice with the City on June 10, 1975, seeking to negotiate the "impact" of impending layoffs on employees in the following titles: Supervising Probation Officer, Senior Probation Officer, Probation Officer, Probation Officer (Incumbent), Probation Officer Trainee, Probation Officer Trainee BEA-6, Community Worker, Community Worker EEA, and Community Worker EEA-6.

On June 16, 1975, the Board of Collective Bargaining issued Decision No. B-18-75, which dealt exclusively with questions raised by demands for bargaining on the impact of layoffs.

On June 30, 1975, the Union received a reply to its bargaining notice from the Off-ice of Labor Relations which reads, in part, as follows:.

> "The appropriate time for negotiations with respect to the impact of lay-offs is solely during the open contract negotiation period. Moreover your request for bargaining must be refused because the only authorized bargaining representative with respect to the impact of lay-offs on the aforementioned titles is the Citywide collective bargaining representative pursuant to Section 1173-4.3(a)(2) and Decision B-18-75 of the Board of Collective Bargaining."

Thereupon, the Union commenced this proceeding to determine the bargainability of the subject of its demand for bargaining, namely, the impact of layoffs upon the remaining employees in the above referred to titles.

The Union has alleged that:

(1) The City's decision to layoff employees in the covered titles has created an impact upon the workload of remaining employees; and

(2) that the impact issue created by such layoffs with respect to employees in the covered titles is so unique as to require title bargaining; and

(3) that such impact issues are immediately bargainable; and

(4) that respondent's position as set forth in the OLR letter of June 25, 1975, is contrary to the holding in BCB Decision No. B-18-75.

In its Answer, the City denied the above allegations and presented three arguments[1] in support of its position.

> (1) The appropriate level of all layoff impact negotiations is Citywide so that petitioner, which is not the Citywide bargaining representative, is barred from seeking to negotiate the impact issues raised herein; and
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> (2) that the Union "has failed to establish that the employees it represents are so special and unique as to warrant separate negotiations . . . "; and
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> (3) that no impact has resulted to any employees remaining on payroll by reason of the City's managerial decision to implement layoffs.

The Existence of an Impact

The Union argues that the City's decision to layoff employees in the covered titles has created a per se impact upon the remaining employees in such titles.

The Union contends that the services provided by these employees "are not such services as are capable of being terminated, curtailed or reduced by executive action on the part of the Respondent City." The Union states that these employees are subject to a fixed and/or increasing workload, the dimensions of which are controlled by

[1] The City abandoned arguments 1 and 2 at the evidentiary hearing.

the "judicial branch by its imposition of sentences of probation of varying lengths upon defendants in the Supreme Criminal and Family Courts of this City pursuant to State Law."

The Union concludes:

> . . . that where a group of employees who collectively render a service which is not capable of termination, curtailment or reduction is subjected to the exercise of a managerial prerogative to lay off some number of such employees a per se impact is immediately visited upon the remaining employees by reason of the exercise of such managerial prerogative. It may be that the quantitative and qualitative dimensions of such impact may be difficult to ascertain, but the existence of such impact cannot be denied, for common sense alone dictates that if less employees are forced to collectively perform the same functions formerly performed collectively by a greater number of employees, the workload of the remaining employees is necessarily affected and increased."

The City "affirmatively alleges that no impact has resulted from any managerial decision regarding layoffs on those employees who remain on the payroll," and, therefore, the Union's demand to bargain is outside the scope of collective bargaining.

The Board, in Decision No. B-18-75, at page 35 stated:

> " . . there is a distinction between the impact of layoffs on employees laid off (or to be laid off) and the impact of layoffs on the workload of remaining employees. Whereas in MEBA, we declared the former to be a per se impact, we did not in that decision deal with the impact of personnel reductions on remaining employees. The City correctly points out that layoffs do not necessarily produce an impact on the workloads of remaining employees, especially if the City reduces the service to the public. Therefore, a Board determination requiring immediate bargaining an that demand would be premature. If, subsequent to the issuance of this decision, there is a demand to bargain about the effects of layoffs on remaining employees, we will deal with the issue at the time, and if necessary will require an evidentiary hearing in order to determine whether a practical impact has, in fact, resulted from the implementation of layoffs."

At the direction of the Board, evidentiary hearings were held on January 9 and 16, 1976, to determine whether the layoffs had resulted in a practical impact on the remaining employees and, if so, the magnitude thereof.

The Union-produced statistics (Union Ex. I and 2) which showed that the layoffs were effected on June 30, 1975, in the following manner:

Probation officers:	3 per diems 10 provisionals 30 permanents
Probation officer Trainees:	34 permanents
Community Workers	5 per diems 13 provisionals

The layoffs resulted in the loss of ninety-five employees out of 766, a reduction of approximately 12%.

That the 12% reduction in work force has caused the workload of Probation Officers to become unduly burdensome or unreasonably excessive the Union argues, is a necessary conclusion if one examines the role and functions of Probation officers in the criminal justice system. Said functions are primarily investigation of persons convicted of felonies or of crimes carrying sentences of probation or imprisonment for greater than ninety days, and supervision of persons who receive a sentence of probation in lieu of incarceration. Similarly, Probation Officers investigate and supervise cases brought in Family Court.

At the evidentiary hearings, the Union produced three Probation Officers who testified that their respective supervision caseload assignments had increased from ninety to one hundred and fifty cases Mr. p. 77), from eighty to one hundred fifty-seven cases (Tr. p. 87), and from seventy to one hundred and forty-five cases (Tr. p. 94), since the layoffs were effectuated. The Probation Officers also testified that they had been 'assigned additional tasks since the layoffs, which they were not required to perform prior to the layoffs (Tr. pp. 78, 88, 96). It is not disputed that those additional tasks are covered by the job specifications for this title. (See City Exs.1, 2 and 3.)

Because state law and the rules and regulations of the State Division of Probation impose certain duties upon Probation Officers when investigating and supervising persons subject to the state's criminal justice system, the Union argues, additional cases cannot simply be ignored or processed in a summary fashion. Moreover, the Union notes, the Administrative Board of the Judicial Conference recently promulgated standards and goals for the timely disposition of cases in the criminal courts of the state; a pre-sentence report requested by a court

must be completed by a Probation Officer within a time limit specified by the Judicial Conference. As further evidence that its members are not able to cope with their workload, the Union produced a Probation Officer at the evidentiary hearing who testified that he had been threatened with contempt of court by a Supreme Court Judge because he had not been able to complete a probation Violation report as expeditiously as the Judge would have preferred.

The City argues that the increase in caseloads is not due solely to the layoffs and denies that the workload of Probation Officers has become unduly burdensome or unreasonably excessive.

The City maintains that the increase in Probation Officer caseload is attributable, at least in part, to the steady increase in Probation Department workload relating to the increasing crime rate. It argues, further, that even to the extent that increased caseload may be the result of layoffs, it cannot be said either that the layoffs or the increased caseload have made Probation Officer workload unduly burdensome or unreasonably excessive. In this connection, the City points out, and the testimony of union witnesses on cross-examination

shows, that both before and after the layoffs, Probation Officers have been required to work to fullest capacity during the seven hour work day; the City shows, in fact, that the work week has been reduced from 37-1/2 hours (which included 2-1/2 hours of involuntary overtime) to 35 hours effective January 1, 1976. As to the requirements and standards created by state law and by the State Division of Probation, the City maintains that they impose certain duties and responsibilities upon the Department of Probation but not-upon individual Probation Officers.

According to the City, the result of the layoffs is that either a Probation Officer is spending less time on each case assigned, or a backlog of cases has occurred. The City maintains that in either case the impact is not on the work required of an individual Probation Officer, but rather on the amount of service provided to the public. The effect of such an impact must be borne by the department, and not by the individual Probation Officer.

The question is, then, whether the effect of the layoffs on the remaining Probation Officers, i.e., the assignment of additional cases, is to be considered as having caused the workload of the Probation Officers to become unduly burdensome or unreasonably excessive.

DISCUSSION

Section 1173-4.3b of the NYCCBL specifically gives the City the right "to relieve its employees from duty because of lack of work or for other legitimate reasons." The rationale behind such a provision was well-expressed by the New York Public Employment Relations Board as follows:

> "A public employer exists to provide certain services to its constituents, be it police protection, sanitation or, as in the case of the employer herein, education. Of necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees."[2]

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[2] City School District of the City of New Rochelle and New Rochelle Federation of Teachers, Local No. 280, AFL-CIOF, 4 PERB 3060 (1971).

However, both §1173-4.3b of the NYCCBL and PERB case law provide that questions concerning the practical impact, if any, of managerial decisions. on employees are bargainable. The Union herein does not contest that layoffs are a managerial right, but rather contends that a practical impact has been occasioned on the workload" of remaining employees within the Department of Probation by reason of the layoffs that took place in June, 1975.

The term "practical impact" has been defined by the Board to mean wan unreasonably excessive or unduly burdensome workload as a regular condition of employment."[3] As the Board noted in Decision No. B-3-75, a per se practical impact does not flow from every exercise of a managerial prerogative; scope of bargaining disputes involving alleged practical impact are to be determined on a case by case basis. Concerning the particular issue to be resolved in this case, the Board, in Decision B-18-75, stated that a per se impact on the workload of remaining employees does not automatically result whenever layoffs occur.

The Board has stated that the purpose of the practical impact language in the NYCCBL is to

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[3] See Board Decisions B-9-68; B-18-75; B- 23-75.

provide a means of cushioning, or reducing to the extent possible, the adverse effects upon employees arising from the City"s exercise of its management prerogatives.[4] The adverse effect complained of by the Union herein is that layoffs have accounted for an increase in the caseload of remaining Probation Officers, which when coupled with the requirement of complying with the rules of the State Division of Probation and the time limitations imposed by the Judicial Conference, has subjected these employees to an unduly burdensome and unreasonably excessive workload. The Board disagrees.

An examination of §255 of the Executive Law-Probation in the City of New York - reveals that while the general duties of the New York City Department of Probation are dictated by state law, the actual programs and, methods of procedure instituted in the department are determined by the Director of Probation, who is appointed and serves at the pleasure of the Mayor.[5] Therefore, the Director

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[4] See Board Decisions B-18-75; B-21-75.

[5] Section 255 of the Executive Law
"2. The head of such department (probation) shall be a director of probation appointed by the Mayor of the City of New York to serve during the pleasure of the Mayor
"3. ...(the director) may adopt department rules...to regulate the policies, programs, standards, and methods of procedure in relation to probation and the powers and duties of officers and employees as in his judgment he deems, proper."

has the authority to amend the department's procedures and implement new programs in order to maximize the efficiency and ability of the Probation staff to contend with the increasing demands placed on the agency. In response to a question about the effect of increased caseloads on Probation officers, the Director of Probation, Charles Fastov., at the January 9th hearing testified as follows:

> "Adding or giving additional cases would mean or require cjreater selectivity on the Pro-bation Officer's part as to where he would apportion his time within the working day. This principle of selectivity is in keeping with the principle of the rule relative to differential supervision which the Probation -- the State Division of Probation has.
>
> We, in effect, are performing differential supervision under these conditions." (Tr. P. 43)

Thus, the workload of Probation Officers is not completely fixed by the directives of the judiciary, neither are the dimensions of the job completely beyond the control of the agency's administration.

In the instant case, moreover, it should be noted that the City maintains that the standards and requirements imposed by state law and/or by Judicial Conference policy are directed to the Department of Probation and that the responsibility of complying with such standards falls on the department and not on individual Probation Officers.

> "I would say that the individual Probation Officer has to work under the supervision and direction of his superiors. He is subject to whatever directions he gets from his superiors.
>
> "If a superior were to say to him that under certain circumstances certain things should be done or not done or be given priority, then he would be expected to do it. The administrator would have to take responsibility for whatever directive he issued."
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> ((emphasis added)
> (Fastov, Tr. p. 47))

The Union, which has the burden of establishing the existence of a practical impact, has failed to produce evidence to prove conclusively that this City contention is incorrect. Indeed. Counsel for the Union made the following stipulation:

> ". . . it [the Union] does not here contend that there is any individual duty on the part of an individual Probation Officer, under the law or rules of the State Department of Probation or the New York City Department of Probation, to adhere to workload or caseload standards published by the State Depart ment of Probation."
> (Tr. p. 69)

In addition, the Union witness who was threatened with contempt proceedings over the delayed completion of a report, further testified that the Judge, upon hearing the witness' explanation for the delay, responded:

> "I won't be prepared to act against you, but I want to deal with your administration."
> (Tr. P. 30)

Conclusion

The record clearly indicates that Probation Officers have been subject to increased caseloads. There is also indication in the record that there has been some increase in workload. However, we are not persuaded that the indicated workload increase is sufficient to constitute "an unreasonably excessive or unduly burdensome workload as a regular condition of employment." The City's establishment that both before and after the layoffs, Probation officers have been required to work to capacity during the seven hour workday taken together with concern expressed by the Union regarding non-compliance with statutory and Judicial

Conference time requirements, prove that the increase in caseload has been accompanied by the relaxation of other requirements. The Union concedes that there has been an increase in the backlog of cases[6] and that under present conditions, a Probation officer "must of necessity spend less time" on each case.[7] The extent to which these factors offset the indicated workload increase, however, is not sufficiently dealt with by the Union in view of its reliance on proof on caseload increase to demonstrate an increase in workload.

Therefore, we find that the Union has failed to demonstrate that a practical impact, as defined herein, has resulted from any increase in caseload or workload experienced by the remaining Probation officers as a consequence of the layoffs which took place in June, 1975, and, thus, the City has no obligation upon the record in this case to bargain pursuant to §1173-4.3 over the impact of its managerial decision to layoff Probation Officers.

DETERMINATION

For the reasons set forth above and pursuant to the powers vested in the Board of Collective Bargaining, it is hereby

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[6] See the Union's Post-Hearing Brief, p. 12.

[7] Ibid., p. 22.

DETERMINED, that the Union having failed to demonstrate a practical impact on remaining employees, the City has no obligation to bargain over the impact of it's managerial decision to layoff Probation Officers.

DATED: New York, N.Y.

May 12, 1976

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

E. J. SCHMERTZ
MEMBER

THOMAS J. HERLIHY
MEMBER

EDWARD F. GRAY
MEMBER