PBA v. City, 25 OCB 5 (BCB 1980) [Decision No. B-5-80 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

PATROLMEN'S BENEVOLENT ASSOCIATION, Petitioner	
-and-	DECISION NO.B- 5-80
CITY OF NEW YORK,	DOCKET NO. BCB -366-79
Respondent	DOCKET NO. BCB-367-79

DECISION AND ORDER

These proceedings were commenced on October 11, 1979 by the Patrolmen's Benevolent Association (hereinafter "PBA" or "the Union") by the filing of two petitions. In BCB-366-79 (Scope of Bargaining), the PBA alleges that subsequent to the execution of its 1978-1980 unit contract with the City of New York (hereinafter "the City"), the Police Department instituted, without prior negotiation with the Union, a program whereby auxiliary police officers are being used to perform duties previously performed exclusively by the police officers of the New York City Police Department. The Union demands a finding by this Board that institution of such a program is a mandatory subject of bargaining. In BCB-367-79 (Improper Practice), the Union alleges that the unilateral implementation of an auxiliary police program constitutes an improper practice under NYCCBL S1173-4.2(a)(1),(2),(3), and (4).

The PBA demands that the City be directed to cease and desist from using auxiliary police to perform police officer functions and that it be required to negotiate with the Union concerning the program.

The City contends that its use of auxiliary police is a matter of management prerogative, a non-mandatory subject of negotiation, and that its unilateral action is outside the scope of collective bargaining.

BACKGROUND

On September 17, 1979, an experimental program was by the Police Department pursuant to its Operations Order No. 96. The Order provides that auxiliary police officers may operate police radio motor patrol cars (RMPs) under certain conditions. For example, RMP cars may be assigned to auxiliary police only when a ranking auxiliary officer will be present in the vehicle. Also, three magnetic signs which read "Auxiliary" must be placed in specified locations on patrol cars when the cars are used by auxiliary police officers. Auxiliary police officers assigned to operate RMP cars must:

"a. Obey traffic regulations at all times,
b. Not respond to radio runs unless specifically directed by the radio dispatcher or a regular police officer,
c. Not engage in vehicle pursuits."

Also relevant to the pleadings in this matter is a contract demand made and subsequently withdrawn by the PBA during the negotiation of its current unit contract with the City. Demand No. 101, made on March 28, 1978, stated:

> The City of New York or the Police Department, City of New York, shall NOT at any time, assigned [sic] any Auxiliary Police Officer or any Auxiliary Supervisor to any type of patrol or field assignment with any New York City Police Officer.

The demand was withdrawn on June 19, 1978.

POSITIONS OF THE PARTIES

Union Position

The PBA alleges that auxiliary police officers are "unskilled, untrained, unfamiliar with and not cognizant of the practices and procedures employed by the Police Department" and that, since auxiliary officers are placed in circumstances where they interact with police officers, they interfere with the ability of police officers to carry out their duties.

The PBA contends that the use of auxiliary police results in detriment to the public because the auxiliary officers wear uniforms that are "substantially similar" to uniforms worn by police officers, to the "confusion of the citizenry of the City of New York." Further, the PBA asserts, the public may rely, to it detriment on the presumed skill of an auxiliary police officer who appears on the scene resembling an ordinary police officer.

"The Union also alleges that the use of auxiliary police officers results in detriment to a police officer who may be called to the scene. Specifically, the PBA contends that due to their lack of training and to the fact that auxiliary police officers do not carry equipment which could be of assistance to a police officer called to an incident, the presence of-an auxiliary police officer is actually counter productive; instead of having the aid of trained fellow police officers, the officer at the scene, in addition to dealing with the circumstances requiring police action, has the additional burden of protecting the auxiliary police officer. Thus, says the PBA, "untrained individuals clothed with quasi Police authority

are roaming the streets of the City of New York looking for actual criminals or other illegal situations which inevitably necessitate the response of a Police Officer who upon arrival will not have the benefit of a similary trained Officer already on the scene."

The Union alleges not only that the City has violated NYCCBL §1173-4.2(a) (Improper public employer practices) by its implementation of Operations Order No. 96, but also that it has violated its contract with the Union:

> "pursuant to the contract enacted ... by and between the Patrolmen's Benevolent Association and the City of New York, the parties thereto agreed that the PBA would be the sole bargaining representatives [sic] for police officers in the City of New York. As a result of the new procedures of Respondents Auxiliary Police are driving and riding in radio motor patrol cars in violation of the above stated contract. Furthermore, Auxiliary Police are performing many of the functions as police officers, in violation of the contract."

City Position

The City admits that auxiliary police "perform certain traffic control functions, assist disabled motorists and perform certain pedestrian traffic control function However, it denies all other substantive allegations of the Union's petitions. The City defends the auxiliary police program as a legitimate exercise of its management rights set forth in §1173-4.3(b) of the NYCCBL.[1]

The City explains that the auxiliary police program has been in existence since 1951 and has as its purpose to "civilianize"

[1] Among these are the right to determine "the standards of services to be offered ...[and] ... the means and personnel by which government operations are to be conducted...."

certain functions performed by Police Department personnel, thus freeing uniformed police officers for "more extensive activities within the ambit of 'Police duty'". In furtherance of these objectives, the Police Department issued Operations Order No. 96 which authorizes auxiliary police officers to use certain RMP cars under prescribed conditions.

The City also defends its auxiliary police program on the ground that it was implemented pursuant to and is operated in accordance with the New York State Defense Emergency Act (NYSDF-A) which is a "valid state law".[2]

In response to the PBA's contention that auxiliary police lack training and skill, the City states that participants in the program are required to complete a ten-week training course which, the City maintain adequately trains auxiliary police officers to perform their functions safely. The City has attached to its answer a copy of the "Auxiliary Police Primary Training Course", a New York City Police Department publication, to support the above statement.

The City claims further that, even if implementation of an auxiliary police program is within the scope of bargaining, the Union is precluded by NYCCBL §1173-7.0(3) from demanding bargaining. The PBA had demanded, during contract negotiations, that auxiliary police officers be precluded from assignment to any type of patrol

[2] The auxiliary police program was established under the directive of the Police Commissioner, in response to the NYSDEA mandate upon each city to establish a civil defense

or field assignment with any New York City police officer [Contract Demand No. 101 is quoted above] and, when the City refused to discuss the demand on the ground that it was a non-mandatory subject of bargaining, the Union withdrew it. Thus, the position of the City is -that the PBA is attempting to achieve before the Board what it was unable to achieve at the bargaining table.

Finally, the City states that the auxiliary police program has operated without adverse effect upon or protest from the PBA membership for over 25 years. Since the PBA has never alleged such adverse effect and makes only conclusory allegations in the instant petition, the City asserts that the auxiliary police program remains a valid exercise of its management prerogative under the New York City statute.

The City seeks dismissal of both petitions in their entirety.

DISCUSSION

Our decision in each of the cases presented by the PBA must turn on the question of whether the use of auxiliary-police is, for the purposes set forth in this record, a mandatory subject of bargaining. If we find, as alleged in BCB-366-79, a mandatorily negotiable subject, it follows that the unilateral action taken by the Police Department constitutes a refusal to bargain under NYCCBL §1173-4.2(a)(4) and therefore an improper practice, as alleged in BCB-367-79. Because identical issues are raised by the

two PEA petitions, we shall consolidate the cases for purposes of decision.[3]

The PEA alleges violations for all four subdivisions of NYCCBL S1173-4.2(a) but states no single fact relating to any of the first three. As to subdivision (4), it relies on NYCCBL §1173-4.3(a) which provides that public employers and... employee organizations shall have the duty to bargain in good faith on wages. . . hours..., and working conditions. The employment of auxilary police cannot be said to relate to wages or hours of PBA member- Hence, in order to constitute a mandatory subject of bargaining as to which unilateral employer action would be and improper practice, it would have to have relevance to police officer working conditions . If such a case is to be made, however, it must be clearly stated and supported in order for the Board to consider granting relief.

The use of volunteer workers to provide a municipal service or to augment the performance of such service by other personnel is not an unusual means of increasing the quantity of and/ or supplementing services provided to the public. Moreover, section 1173-4.3(b) of the NYCCBL provides that "it is the right of the City to determine the standards of services to be offered by its agencies ... [arid to]... determine the methods, means and personnel by which government operations are to be conducted."

[3] Section 13.12 of the Revised Consolidated Rules of the office of Collective Bargaining provides: "Two or more proceedings may be consolidated by the Board on notice stating the reasons therefor, with an opportunity to the parties to make known their positions." See also, Symphony Fabrics Corp. v. Berson Silk Mills, 12 NY2d 409, 240 NYS 2d 23; Vigo Steamship Corp. v. Marship Corp., 26 NY 2d 157, 309 NYS 2d 165; Board Decision No. B-18-71.

The Union in this case has presented no evidence or persuasive argument to support a finding that its members have any exclusive right to perform the work assigned to auxiliary police or that management's right unilaterally to set standards of services and to determine the methods, means and personnel by which they are to be performed has been limited or circumscribed, by contract or otherwise, in its relationship with PBA. The New York City Collective Bargaining Law is a statute drafted with bilateral consent of management and labor. inclusion in such a law of the broad management prerogative provisions of section 1173-4.3(b)must be deemed to have unique significance. We have consistently interpreted and applied this provision accordingly.[4] We have also found that it was the intent of the drafters of this legislation to prescribe certain necessary and appropriate limitations upon the effects of exercise of the management prerogative, in adding provisions as to bargaining on the practical impact of
such unilateral management actions. Any claim of right more directly to limit management's exercise of its statutory rights must be based upon clear and explicit management waiver whether in the form of contractual provisions,[5] statutory limitations, or a showing that the work belongs exclusively to the bargaining unit.

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[4] See, e.g., Board Decision No. B-1-74.

[5] See, e.g., Board Decision No. B-17-79 in which the union's claim of a right to prevent-assignment of "unit" work to non-unit employees was held to constitute an arbitrable issue in light of inclusion of a detailed job description arguably constituting a work jurisdiction provision.

We therefore find that the use of a volunteer corps such as the auxiliary police is a matter of management prerogative because it relates to the determination of "methods, means and personnel" by which the City provides police services to the community; and that the City's use and assignment of auxiliary police as dealt with herein is a matter as to which it had and has no duty to bargain with the Union.[6]

The Union alleges that auxiliary police officers are "unskilled, untrained, unfamiliar with and not cognizant of the practices and procedures employed by the Police Department." However, the City submits evidence that auxiliary police are required to complete a ten-week training program before being sent out on patrol. A copy of a twenty-one page "Auxiliary Police Primary Training Course", a publication of the New York City Police Department, is appended to the City's answer. Neither petitioner nor this Board has authority or responsibility to share with the Police Commissioner determinations as to the best means of performing and fulfilling the mission of the Police Department; nor may they review or pass upon the wisdom of the Commissioner's determinations in such matters.

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[6] See the decision of the New York Public Employment Relations Board in Amherst Police Club v. Town of Amherst, 12 PERB §3071 (1979) holding that a police union's demand that would limit assignment of auxiliary police to civil defense or civil emergency was a non-mandatory subject of negotiation. This demand would restrict the kind of work to which auxiliary police could be assigned and the union had no authority to negotiate for such restrictions upon the work of non-unit employees. See also Bd. of Ed. of the City of New York, 12 PERB §3037 (1979) .

The Union alleges that the use of auxiliary police and their interaction with police officers interferes with the ability of police to carry out their duties. The PBA claims that the police officer is put in the difficult position of having to deal with a hostile opponent and has, as an added burden, to protect the unarmed auxiliary officer. Such allegations go to the issue of effective deployment of police by the City of New York, and lack of effectiveness is not a subject for presentation to this Board. It may be that these allegations go beyond merely suggesting that the use of auxiliary police has a negative effect upon police operations, however; it may be that they imply and/or are intended to imply that the use of auxiliary police has a negative effect, a practical impact, on the safety of police officers.

The PBA contends that auxiliary police are responding to radio runs and have used roof lights and sirens to speed through traffic intersections in violation of the Police Department's Operations Order No. 96. An allegation of a single incident in violation of Departmental rules and regulations does not substantiate a claim of practical impact, however. Further, if the allegations are true, the Union is not without a remedy. Such a violation may be grieved under Article XXIII of the PBA's contract with the City, provided that the prerequisites for the use of the grievance and arbitration procedure have

been met. Article XXIII, Section 1(a)(2) of the contract defines "grievance" as:

> a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the Police Department affecting terms and conditions of employment....

Thus, it is not enough that the PBA allege a violation of Police Department rules or regulations. It must also show that the violation affects terms and conditions of police officers' employment.

The Union has alleged that the PBA is the sole bargaining representative for police officers under its contract with the City, and that auxiliary police driving and riding in RMP cars violates the contract, as does the performance by auxiliary police of many other police officer functions. We interpret these statements to be an assertion of an exclusive work jurisdiction claim by the PBA, a demand for protection by this Board against the assignment of the bargaining unit work of Patrolmen and Policewomen to non-unit employees. however, we have no basis for finding that tasks allegedly being performed by auxiliary police officers are exclusively the work of police officers. We therefore find that the City has no duty, in the circumstances of this case, to bargain with the Union concerning such use of auxiliary police.

0 R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petitions filed herein by the Police Benevolent Association, seeking a determination as to the scope of bargaining and a finding of improper practice on the part of the City of New York, be dismissed in their entirety, without prejudice, however, to the filing of a demand for bargaining on practical impact.

DATED: New York, N.Y.
March 20, 1980

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