PBA v. City, NYPD, 37 OCB 37 (BCB 1986) [Decision No. B-37-86 (IP)]

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

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-37-86

DOCKET NO. BCB-757-85

-and-

THE CITY OF NEW YORK AND THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.
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DECISION AND ORDER

This proceeding was commenced on January 11, 1985, with the filing of a verified improper practice petition by the Patrolmen's Benevolent Association ("PBA") charging that:

> Respondents have violated §1173-4.2 (a)(4) and §1173-7.0(d) of the New York City Collective Bargaining Law,[1]

[1] Section 1173-4.2a (4) of the New York City Collective Bargaining Law ("NYCCBL") provides that it shall be an improper practice for a public employer or its agents:

> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

(more)

in that Respondents have unilaterally changed certain disciplinary procedures to be imposed upon the membership of Petitioner. Discipline is a term and

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([1] continued)

Section 1173-7.0(d) of the NYCCBL provides:

> d. Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and , if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending sixty days thereafter of thirty days after the panel submits its report, whichever is sooner, provided, however, that upon motion of the panel, and for good cause shown, the board of collective bargaining may allow a maximum of two sixty-day extensions of time for the completion of impasse panel proceedings, provided further, that additional extensions of time for the completion of impasse panel proceedings may be granted by the panel upon the joint request of the parties, and during the pendency of any appeal to the board of collective bargaining pursuant to sub-division c of this section, the public employee organization party to the negoti-ations, and the public employees it repre-sents, shall no induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass

> resignations, and the public employer shall refrain from unilateral changes in wages, hours or work conditions. This subdivision shall no be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties

(more)

condition of employment and is a matter within the scope of collective bargaining. By letter dated December 12, 1984, Respondents advised Petitioner of the implementation of Rules of Procedure Governing Informal Hearings of the Civilian Complaint Review Board (CCRB), a subdivision of Respondent Police Department (Exhibit A). CCRB is an investigative arm of the Police Department and makes recommendations to Respondents whether to bring administrative charges against police officers; it does not have the power to recommend findings of fact and penalties to the Commissioner. As the last hearings held in CCRB were in 1977, Petitioners were led to believe that the practice of CCRB hearings were abandoned then; therefore, said hearings were not subject, to contractual negotiation between the parties on three subsequent bargaining agreements, to wit, those of 1978, 1980, 1982, and 1984. Institution of new CCRB hearings would add an additional layer of discipline to the membership of Petitioner and would constitute an unwarranted duplication of exposure of the membership

to disciplinary sanctions, unduly prejudicing rights of the membership, both administratively, civilly, and criminally, causing irreparable harm. As the 1982-84

(1 continued)

of public employees and employee organizations under statelaw. For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

> collective bargaining agreement expired June 30, 1984, and the parties are in the midst of negotiations for a successor agreement, Respondents are prohibited from making any unilateral changes as in Exhibit A.

For a remedy, the petition requests that the Board direct respondents to

> Rescind the Rules of Procedure Governing Informal Hearings of the Civilian Complaint Review Board, dated November 15, 1984, and transmit it [sic] to Petitioner by letter dated December 12, 1984; order Respondents to bargain with Petitioner over any changes in the role of CCRB in police discipline.

The respondents, the City of New York and the Police Department of the City of New York ("the City"), filed a verified answer on May 15, 1985 denying that they committed any improper practices and setting forth a statement of facts and various affirmative defenses. PBA did not file a reply.

On September 24, 1985, the Board ordered that a hearing be held before a Trial Examiner to consider the question of whether the City had engaged in actions constituting an improper practice. Such a hearing was held on February 13, 1986. At the hearing, no witnesses were called to testify. Rather, counsel for each side presented arguments in support of their respective positions. Thereafter, both parties filed briefs.

Facts

As pointed out by the City, Section 7.9 of the Revised Consolidated Rules of the Office of Collective Bargaining provides that "[a]dditional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply." Thus, since no reply has been filed, the facts to be considered herein are as set forth in the pleadings, and are as follows:

As alleged in the petition, the Civilian Complaint Review Board ("CCRB"), which has existed since 1966, is an investigative arm of the City Police Department which investigates certain civilian complaints brought against members of the Police Department and recommends action to the Police Commissioner. The types of complaints investigated deal with unnecessary use of force, abuse of authority, discourtesy, or ethnic slurs.

When the CCRB receives a civilian complaint falling within its jurisdiction, it assigns an investigator who interviews the complainant, the police officer involved, and other witnesses and, if necessary, examines medical records. The investigator then makes a recommendation as to what action, if any, should be taken. That recommendation is ultimately reviewed by the CCRB which makes a final recommendation. The CCRB cannot itself either

take disciplinary action or reject a complaint.

Prior to 1977, the CCRB had utilized "Face to Face" hearings during the course of its investigation. These hearings were reinstituted on November 15, 1984 for use in more serious and sensitive cases. In this regard, on December 12, 1984, the CCRB sent the following letter to the PBA:

> I am enclosing for your information the final draft of the Rules of Procedure Governing Informal Hearings of the Civilian Complaint Review Board, reflecting our discussion of November 5, 1984.
>
> We are scheduling the first informal hearing for December 27, 1984, and appreciate your cooperation in what we anticipate will be an efficient and useful mechanism for resolving civilian complaints.

A "Face to Face" hearing is closed to the public and is tape recorded. It is conducted by a hearing officer who is an employee of the CCRB and who does the questioning of witnesses himself. Testimony is not given under oath. Both the complainant and the officer are present, and may be represented by counsel. The hearing officer then issues a written recommendation within a reasonable time following the hearing.

Positions of the Parties

The PBA's Position

The PBA argues that discipline is a term and condition of employment of its membership, and that the manner in which discipline is imposed upon its membership is a matter within the scope of collective bargaining. It follows, according to the PBA, that the promulgation and implementation of the Rules of Procedure which reinstituted the use of hearings by the CCRB on November 15, 1984 constituted unilateral action in violation of Sections 1173-4.2a(4) and 1173-7-0d of the NYCCBL. The PBA concedes that investigatory techniques used by the City are not terms and conditions of employment, but claims that the hearings at issue herein transcend the bounds of a mere investigation and constitute an additional level of discipline since they involve the use of counsel and serve to unnecessarily harass, police officers. The PBA concludes that, as a remedy, this Board should invalidate the Rules of Procedure which govern the CCRB's informal hearings.

The City's Position

The City contends that the PBA has failed, as a matter of law, to establish a prima facie case; that

the hearings are no more than an investigatory tool to be used by the :CCRB, and, as such, are non-mandatory subjects of bargaining; and that the wisdom of the CCRB's use of hearings to aid in its investigations is not properly before the Board. Thus, the City concludes that the reinstitution of the hearings did not trigger a bargaining obligation and did not constitute a unilateral change in wages, hours or working conditions. It follows, according to the City, that the petition must be dismissed in its entirety.

Discussion

Section 1173-4.3b of the NYCCBL makes it clear that the taking of disciplinary action is a management right and therefore got a mandatory subject of bargaining. Further, this Board[2] and PERB[3] have recognized that procedures used to investigate law enforcement personnel are not mandatory subjects of bargaining.[4] However, a union does have a right to bargain over procedures

[2] Decision No. B-16-81, at pp.17-21.

[3] Patrolmen's Benevolent Association of White Plains, PERB 13046 (1979).

[4] See also New Paltz United Teachers, 16 PERB 14552 (1983), in which PERB noted that "... investigations ... are normally an essential aspect of government managerial prerogative which overides the duty to negotiate."

for review of disciplinary actions.[5] Thus, as both parties apparently recognize, this case turns upon whether the "Face to Face" hearings are investigatory or disciplinary in nature. If they are disciplinary procedures, they are conditions of employment that must Lie bargained with the PBA and cannot be unilaterally implemented, at least without such bargaining having taken place. If, on the other hand, the hearings are purely an investigative tool, then they amount to no more than a permissive subject of bargaining and the petition must be dismissed.

In resolving this question, we are aided by a prior comment of ours:[6]

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

In this case, at the time the hearings are held, no determination whatsoever has been made regarding the merits of any complaint against an officer. Indeed, the hearings are several steps removed from any such determination since the CCRB itself can do no more than

[5] Decision No. B-3-73, at p.11.

[6] Decision No. B-10-75, at p.20.

make a final recommendation. Even the PBA, in its brief, has characterized the CCRB as "a fact gatherer and not a fact finder...."

Put another way, the underlying purpose of the hearings is to assist the Police Commissioner in ultimately determining whether any discipline is appropriate. They are used to determine whether there was misconduct, which apparently may also constitute a violation of law, and not to implement disciplinary action. Accordingly, they are investigative rather than disciplinary in nature despite the fact, relied upon by the PBA, that officers are entitled to counsel at the wisdom of the "Face to Face: hearings,[7] regardless of the wisdom of the city's decision to start using them again. Therefore, we will direct that PBA's petition be dismissed.[8]

O 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

[7] See also Police Association of New Rochelle, Inc., 10 PERB §3042 (1979).

[8] In so doing we deny the City's motion to dismiss since the petition does present a prima facie case in that it does at least allege facts that could support the underlying theory of the PBA's case.

ORDERED, that the petition herein be, and the same hereby is, dismissed.

DATED: New York, N.Y.
June 18, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER