COBA v. City, 37 OCB 41 (BCB 1986) [Decision No. B-41-86 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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CORRECTION OFFICERS BENEVOLENT
ASSOCIATION,

DECISION NO. B-41-86

Petitioner,

DOCKET NO. BCB-843-86

-against-

THE CITY OF NEW YORK,

Respondent.
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INTERIM DECISION AND ORDER

On January 15, 1986, the Correction Officers Benevolent Association ("COBA" or the "Association") filed a scope of bargaining petition in which it alleges that the issuance by the City of New York ("respondent") of Chief order #1005/85 whereby Post #4 at Elmhurst Hospital Prison Ward ("EHPW") was eliminated and no longer staffed ha resulted in a practical impact on the safety of officers assigned to Post #3. On February 3, 1986, the New York City Office of Municipal Labor Relations ("OMLR") filed the City's answer, to which COBA replied on February 14, 1986.

Position of the Parties

Union's Position

Petitioner contends that the function of EHPW, facility operated by the Department of Correction (the "Department") is, inter alia, "to house inmates who

by virtue mental illness and aberrant behavior, are unsuited to be housed with other inmates." Since officers from the different posts have offered each other assistance and observation, the elimination of Post #4 has left officers at Post #3 more vulnerable to attack, and has created "an environment that is detrimental to the security and safe operation of EHPW." Respondent has not, it is alleged, provided a replacement for the security functions performed by the deleted post. The Association requests that the Board of Collective Bargaining make a determination that respondent's actions affect safety and working conditions and that practical impact exists within the meaning of Section 1173-4.3b of the New York City Collective Bargaining Law ("NYCCBL").

City's Position

The City contends that it has the management right under Section 1173-4.3b of the NYCCBL to determine "the methods, means and personnel" by which its operations are conducted, and that it alone may establish staffing levels at EHPW. The City argues that the duty to bargain on an alleged practical impact does not arise until the question of whether a practical impact exists has been decided by the Board.

Respondent maintains that the Association has presented no evidence to substantiate its allegations in that "[ilt offers no specific dates, names or facts which are even arguably probative of its allegations regarding a safety impact." Since, it is argued, the petitioner has not even raised a prima facie case of impact, the petition should be dismissed.

Alternatively, the City maintains that even if the Board were to find that a practical impact exists, it would have the right to act unilaterally to relieve the impact. Citing past Board decisions, the City claims that only upon a Board determination that the impact has not been relieved is there a duty to bargain over the means to be used and the steps to be taken to relieve the impact. In the instant proceeding, it is argued, "petitioner's own delay in filing the ... petition and its failure to plead any specific facts, demonstrate that there is no safety impact which would warrant any immediate action by the Board or respondents."

Discussion

Section 1173-4.3b of the NYCCBL, the management rights provision of our law, reserves to an employer exclusive control and sole discretion to act unilaterally in certain enumerated areas which are outside the scope of

bargaining. This section provides that it is the right of the City, or any other public employer acting through its agencies to

> ... maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted, ... take all necessary actions to carry out its mission in emergencies, and exercise complete control and discretion over its organization and the technology of performing its work.

Section 1173-4.3b also provides, however, that

> ... questions concerning the practical impact that decisions on the above matters have on employees ... are within the scope of bargaining.

Thus, along with the reservation to management of areas of exclusive control, is the expressed recognition that certain employer actions may have a significant effect, or practical impact, on employees, the subject of which is within the scope of bargaining.

Beginning in 1968, this Board has held, consistent with Section 1173-4.3b, that the existence of practical impact is a condition precedent to determining whether there are any bargainable issues arising from that impact. Since the Board has the power and duty, pursuant to Section 1173-5(a)(2) of the NYCCBL, to decide whether a matter is within the scope of bargaining, the question

of practical impact is a proper subject for final determination by the Board.[1]

The City argues that petitioner has presented no evidence to substantiate its allegation of practical impact other than "the conclusory and unfounded statement that the elimination of Post 4 from EHPW constitutes a 'safety and security risk'." Respondent argues that despite the four months that have passed since the elimination of the post, petitioner offers no specific dates, names or facts which are even arguably probative of its allegation regarding safety impact.

In considering questions of practical impact, we have recognized that the existence of a clear threat to employee safety constitutes a per se practical impact which gives rise to a duty to bargain over the impact of a management decision at the time of its implementation. In so doing, we have, however, stressed that this does not mean that a union need only claim a practical impact on safety in order to require the employer to bargain, nor does it relieve the union of the burden

[1] §1173-5(a)(2) provides that the Board shall have the power and duty

> on the request of a public employer or a certified or designated employee organization to make a final determination as to whether a matter is within the scope of collective bargaining.

of first proving the existence of such threat to safety.[2] Thus, this Board has indicated that only

> [w]here it is apparent to the Board that a particular exercise of a management prerogative would constitute a threat to employee safety ... [is there] a warrant for a finding which will require bargaining when implementation of any projected change is proposed. [Emphasis supplied].[3]

In COBA and the Department of Transportation, BCB-585-85, this Board considered the claim that the civilization of motor vehicle operation on Rikers Island jeopardized the safety of correction officers. In our decision, B-34-82, we stated that it was not apparent to this Board that the operation of motor vehicles by civilians resulted in safety impact in that

> [t]he consequences to island security enumerated by the Union in its petition are speculative and, as presented, bear no direct correlation to the safety of correction officers.

A different result was reached in Communication Workers of America and the New York City Human Resources Association, BCB-560-82, where we considered the Union's allegation that the combination of the Reception unit with

[2] Decision No. B-37-82.

[3] Decision No. B-5-75.

Bargaining for the purpose of establishing a record upon which the Board could determine whether there existed any impact upon the safety of the employees assigned to the combined units.

In the instant proceeding, the Union claims that officers assigned to Post #3 are now more vulnerable to attack since the direct assistance and observation formerly provided to them from officers at Post #4 is no longer available. The City has not refuted this claim.

In deciding issues of practical impact, we have repeatedly held that the negotiability of a subject is best determined on a case-by-case basis by balancing the extent of the impingement upon the mission of the employer which would result from granting the demand against the increased risk of danger to the employees which would result if the demand were rejected. We find that a prima facie case has been brought by the Union herein. Accordingly, we shall direct that a hearing be held for the purpose of ascertaining the nature and extent of the impact so that we may determine whether the safety implications of respondent's actions herein rise to the level of practical impact contemplated by NYCCBL Section 1173-4.3b, warranting relief pursuant to that provision of the law.

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

ORDERED that the issue of practical impact upon the safety of correction officers assigned to Post #3 at Elmhurst Hospital Prison Ward be referred to a Trial Examiner designated by the office of Collective Bargaining

Law for the purpose of conducting a hearing and establishing a record upon which this Board may determine whether practical impact exists.

DATED: New York, N.Y.
September 25, 1986

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