PBA v. NYPD, 39 OCB 18 (BCB 1987) [Decision No. B-18-87]

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, Inc.,

Petitioner,

DECISION NO. B-18-87

-and-

DOCKET NO. BCB-937-87

THE POLICE DEPARTMENT OF THE CITY
OF NEW YORK,

Respondent.

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INTERIM DECISION AND ORDER

On February 20, 1987, the Patrolmen's Benevolent Association ("the PBA") filed a petition requesting the Board of Collective Bargaining ("the Board") to determine whether a directive issued by Police Commissioner Benjamin Ward on February 17, 1987 concerns a matter within the scope of collective bargaining. The City of New York, appearing through its Office of Municipal Labor Relations ("the City"), filed its answer on March 27, 1987, to which the PBA replied on April 23, 1987.

## Positions of the Parties

### Union's Position

On February 17, 1987, Commissioner Ward issued the following teletype message:

TO: ALL COMMANDS

SUBJECT: RESTRAINT OF PERSONS IN POLICE CUSTODY

1. EFFECTIVE IMMEDIATELY, PERSONS IN POLICE CUSTODY WILL NOT BE RESTRAINED BY CONNECTING OR TYING REAR CUFFED HANDS TO CUFFED OR SHACKLED ANKLES OR LEGS.

2. IF EXTRAORDINARY RESTRAINT IS REQUIRED, THE EMERGENCY SERVICE UNIT WILL BE NOTIFIED TO RESPOND.

3. ANY PROVISIONS OF THE DEPARTMENT MANUAL OR OTHER DEPARTMENT DIRECTIVES IN CONFLICT WITH THIS MESSAGE ARE SUSPENDED.

The PBA claims that the Police Department failed to give notice or engage in collective bargaining prior to issuing the message. Thus, according to the PBA, the Department's action "in transmitting the message and revoking and/or suspending provisions of the Department Manual and other Department Directives constituted a unilateral change in the terms and conditions of employment... in that said change has a substantial and definable impact upon the safety conditions of the [PBA] membership."

Specifically, the PBA asserts that the standard procedure of handcuffing all arrested persons to the back is insufficient to provide a suitable restraint in every case. Although leg shackles provide an additional restraint, the PBA claims that a shackled person can "use his joined legs and feet as a devastating weapon." For this reason, in the

Union's view, additional restraint is necessary for the safety of police officers, bystanders, and the arrested person himself, when dealing with extremely violent individuals. In such cases, the PBA asserts, police officers have linked the rear handcuff to the leg shackle in a tactic it terms the "full body immobilizing restraint." Furthermore, the PBA alleges that this practice is known to the Department's superior officers and that no police officer has been disciplined or criticized for appropriately using the restraint.

The PBA notes that the use of the tactic has been "fairly rare." Nevertheless, according to the PBA, instances have occurred where arrested persons, particularly those who are mentally ill or who are under the influence or drugs or alcohol, have displayed tendencies to such violent behavior that additional restraints are "absolutely necessary." Thus, the PBA argues that a situation may arise at any time requiring implementation of this tactic.

The PBA further points out that police officers are particularly vulnerable when transporting a violent individual to the precinct house; since most police radio cars lack barriers between the front and rear seats, an officer who is kicked could readily lose control of the car. The Department's solution for these cases, i.e., contacting the Emergency Service Unit for assistance, is ineffective

in the Union's view. While awaiting the Unit's arrival, the officer would still be required to avoid the arrested individual, yet somehow maintain control over him to pervent escape. Such control, the PBA alleges, presumably would include physical force, which would be otherwise unnecessary if the full body immobilization restraint tactic could be used.

The PBA also argues that since the individuals in these cases are often insane or intoxicated, they are highly likely to injure themselves. In the interval prior to the arrival of the Emergency Service Unit, the police officer remains liable for the personal safety of the arrested person and could be subject to Departmental charges if the person succeeded in harming himself. In addition, if these self-inflicted injuries are wrongfully attributed to the officer's conduct, he would be at risk of "public censure, investigation by Internal Affairs or Federal or State Prosecutors, or even potential indictment and trial." All of these potential risks are unnecessary, the PBA asserts, since it is “indisputable” that the restraint does not cause injury to the arrested person.

Therefore, the PBA requests that the Board enter an order declaring that the utilization of the full body immobilization restraint tactic is an issue within the scope of collective bargaining.

City's Position

The City first argues that the directive issued by Commissioner Ward on February 17, 1987 reflects existing Police Department policy. According to the City, the restraint at issue, which it terms "hogtying," is not an approved Departmental practice and is not included in any Department manual or patrol guide of approved police procedures. The City thus claims that, through this directive, it "sought to reinforce its own procedures, which do not include the practice of "hogtying," and which are designed to ensure the optimum safety of both the offender and the police officer."

In addition, the City contends that the directive was an exercise of its management prerogative under Section 1173-4.3b of the New York City Collective Bargaining Law to determine the means by which a part of its operation is to be conducted. According to the City, since the restraint of persons placed under arrest is a central element of its mission, the Department must have the freedom to act unilaterally in determining the methods and means by which that element is achieved. Furthermore, the City claims that a determination that this matter is within the scope of collective bargaining would effectively ,permit the PBA to challenge any change by the Department in its procedures.

The City also contends that the PBA has failed to

demonstrate any practical impact as a result of the Commissioner's directive, since Department procedure requires the police officer to contact the Emergency Service Unit in situations where extraordinary restraint is necessary. By reiterating this established procedure, the Commissioner's directive prevents, rather than creates, any adverse safety impact, in the City's view.

Finally, the City claims that, even assuming the PBA could establish a practical impact on safety, such impact is *de minimis*. The City points out that the PBA's petition refers to the use of this restraint as "rare" and notes that "a given police officer may spend his entire career without utilizing such a tactic." Furthermore, although it refers to general situations in which the tactic may be necessary, the PBA has allegedly failed to cite any specific instance in which the technique has in fact been used. The City thus concludes that since the potential impact is so insignificant, a finding by the Board that this matter is within the scope of bargaining would be unwarranted.

## Discussion

The City urges that the action at issue here is a protected management right within the meaning of §1173-4.3b, which provides as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; 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. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

The statute recognizes, however, that decisions falling within the scope of the City's management prerogative may have a practical impact on employees. Thus, if Commissioner Ward's directive restricting the use of extraordinary restraint created a practical impact upon the safety of the Department's police officers, then the City must bargain with the Union concerning such impact.[1]

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[1] See, e.g., Decision No. B-41-86 (the existence of a clear threat to employee safety constitutes a per se practical impact, which gives rise to a duty to bargain Cover the impact of a management decision at the time of its implementation); B-5-75 (when it is apparent that a particular exercise of management prerogative would constitute a threat to employee safety, bargaining is required at the time when implementation of any projected change is proposed).

In Decision No. B-9-68, the Board first set forth the procedures governing the application of §1173-4.3b, which have been reaffirmed many times since.[2] Generally, the duty to bargain over practical impact does not arise until the Board determines whether the alleged practical impact actually exists. This determination involves a question of fact, which may require a hearing.[3]

In the instant case, we find that such a hearing is necessary in order to resolve questions of fact arising from the pleadings. The City alleges that Commissioner Ward's directive simply reflected existing Departmental policy. The PBA, in contrast, claims that the restraint at issue here has become a "usage" of the Department, known to and condoned by superior officers, and that police officers have justifiedly believed that the restraint may be utilized in appropriate situations.

Clearly, the City has no duty to bargain over a directive that merely reiterates existing policy since such an action could not, by its very nature, create a practical impact upon employees. If the evidence reveals that the directive does involve a change in policy, the Board will

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[2]Decision Nos. B-38-86; B-23-85; B-21-75; B-16-74; B-7-74 B-1-74.

[3]Decision Nos. B-38-86; B-36-86; B-18-85; B-2-76; B-16-74.

then determine whether such directive presents a practical impact, as the PBA alleges.[4] Accordingly, we will direct that a hearing be scheduled to determine whether Commissioner Ward's directive constituted a new policy creating a practical impact upon the PBA's members or whether it simply reflected a pre-existing Departmental policy.

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 question of whether the directive issued by Police Commissioner Benjamin Ward on February 17, 1987 constitutes a change in policy, which created a practical impact upon the safety of members of the Patrolmen's Benevolent Association, be referred to a Trial Examiner designated by the office of Collective Bargaining for the purpose of conducting a hearing and establishing a record upon which this Board may make its determination.

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[4] See Decision No. B-5-75 ("If the proposed change is challenged as a threat to safety... it must, if there is a dispute as to bargainability, be submitted to this Board which, on the basis of the relevant evidence, will determine whether or not the proposed plan in fact involves a threat to safety.")

DATED: New York, N.Y.
May 21, 1987

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