Patrolmen's Benevolent Ass'n, 39 OCB 41 (BCB 1987) [Decision No. B-41-87], aff'd, Caruso v. Anderson, No. 25827/87 (Sup. Ct. N.Y. Co. Feb. 19, 1988), aff'd, 150 A.D.2d 994, 541 N.Y.S.2d 1007 (1st Dep't 1989).

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., DECISION NO. B-41-87

Petitioner, DOCKET NO. BCB-926-87

-and-

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

Respondents.
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DETERMINATION AND ORDER

On December 8, 1986, the Patrolmen's Benevolent Association ("PBA" or "petitioner") filed a verified improper practice petition in which it alleged that the New York City Police Department ("City" or "respondent") violated section 1173-4.2a(4) of the New York City Collective Bargaining Law ("NYCCBL")[1]

[1]Section 1173-4.2a(4) of the NYCCBL provides:

> a. Improper public employer practices. 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 with certified or designated representatives of its public employees.

in that the City, through its legislative body, the City Council, changed the composition of the Civilian. Complaint Review Board ("CCRB") of the Police Department so as to include non-Police Department members. On April 2, 1987, the City, appearing by its Office of Municipal Labor Relations ("OMLR"), filed a verified answer to the petition. The PBA submitted a verified reply on April 23, 1987.

Background

In 1966, section 440 was added to the New York City Charter authorizing the Police Commissioner to establish a review board within the police department with the power, inter alia, to investigate and recommend action upon civilian complaints filed against members of the Police Department.[2] Section 440(c) required that each member of such review board have been "a regularly-appointed, full-time member or full-time administrative employee of the police department" for at least one year prior to his appointment.

On November 6, 1986, the New York City Council passed Local Law No. 13-A, which eliminates the requirement that review board members be full-time employees of the Police Department and, instead, provides that the review board shall be comprised of twelve members, six of whom are members or employees of the Police Department, as under the prior law, and six of whom are members of the public. The latter group

[2]Local Law No. 40 (1966).

of six is to include one resident of each of the five boroughs of the City of New York and o~e representative-at-large.[3] On November 24, 1986, the Council bill was signed by the Mayor and became law (Local Law No. 55).

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[3]Section 440(c) of the City Charter, as amended, provides in its entirety:

> (c) Review of civilian complaints. There shall continue to be within the police department a review board, with the power to receive, to investigate, to hear and to recommend action upon civilian complaints against members of the police department. The board shall consist of twelve members, of whom six shall be members of the public selected so that one resident from each of the five boroughs of the City and one citywide representative are members. The public representatives shall be appointed by the mayor for terms of two years with advice and consent of the council in the same manner as is provided in section forty-six of this charter. Six members shall be appointed by the commissioner for terms of two years. Each member appointed by the commissioner must have been, for a period of at least one year prior to his appointment to such board, a regularly appointed, full-time member or full-time administrative employee of the police department. Any such member shall be a member of the board only for such time as he or she is so employed. In the event of a vacancy on the board during the term of office of a member by reason of removal, death, resignation, or otherwise, a successor shall be chosen in the same manner as was the present member whose position became vacant. A member appointed to fill a vacancy shall serve for the balance of the unexpired term. Neither the mayor, the commissioner, nor any other administrator or officer of the city of New York shall have power to authorize any person, agency, board or group to receive, to investigate, to hear, or to require or recommend action upon civilian complaints against members of the police department except as provided in this section, provided that nothing herein shall limit or impair the authority of the commissioner to discipline members of the force pursuant to law.

In its improper practice petition, filed shortly thereafter, the PBA alleges that the composition of the CCRB under the 1966 legislation has become a term, or condition of employment of police officers and that the Charter amendment changing the composition of the review board to include non-Police Department members cannot properly be effected without negotiations with the certified representative of police officers, the PBA.[4] Petitioner contends moreover that, since the CCRB is a "sub-agency" of the Police Department and is responsible for recommending disciplinary action against PBA members, it cannot be altered through administrative or legislative action. Therefore, Petitioner seeks an order directing the City to:

> not implement the terms of the purported amendment to 440 of the Now York City Charter, and to disallow any internal administrative action within the New York City Police Department which has any relationship, predicate or other connection with a Civilian Complaint Review Board whose members include non-New York City Police Department Personnel.

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[4]The PBA also initiated an Article 78 proceeding seeking a judgment declaring Local Law No-13-A null and void. The PBA argued that the City Council was without authority to change the composition and size of the CCRB because the City Charter provision sought to be amended was enacted by a voter initiative and, it was argued, could only be changed by the electorate. The court dismissed the petition, reasoning that:

> Inasmuch as a legislative body may modify or abolish its predecessor's acts subject only to its own discretion ... it likewise should be able, in the absence of an express regulation or restriction, to amend or repeal an enactment by the electorate, its co-ordinate unit, and vice versa.

Caruso v. City of New York, Sup. Ct., N.Y. Co., IA Pt. 26, N.Y.L.J., July 17, 1987 (Blyn, J.).

Respondent's arguments in opposition to a finding of improper practice may be summarized as follows:

a) The Board lacks jurisdiction over the controversy presented because its powers and duties are limited to resolving disputes concerning the interpretation or application of the NYCCBL and do not extend to determining the propriety of other laws such as the City Charter;

b) The CCRB is merely an investigatory body. Although it makes advisory recommendations to the Police Commissioner, it has no authority to take disciplinary action. Both PERB and this Board have held that investigatory procedures are not mandatory subjects of bargaining. A fortiori, the composition of a purely investigative review board is outside the scope of collective bargaining;

c) Bargaining over the composition of the CCRB is prohibited because it is a matter fixed by law. Further, the legislation determining the composition of such board embodies a strong public policy that fair and impartial investigation of civilian complaints filed against police officers can best be accomplished by representatives of the public acting in conjunction with members of the Police Department. Such a public policy is not subject to negotiation; and

d) The operations of the CCRB, as well as its membership, are management prerogatives within the meaning of section 1173-4.3b of the NYCCBL. Thus, even if there were no legislation making the composition of the review board a prohibited subject of bargaining, this issue would be, at best, a non-mandatory subject of negotiations.

Discussion

The instant proceeding is another in a series initiated by the PBA in which it is alleged that some action or process of the Civilian Complaint Review Board-involves a term or condition of employment of police officers which cannot be unilaterally altered or implemented by the Police Department.[5] In each case, petitioner's concern has been that the particular circumstance complained of would affect or involve disciplinary action against its members and therefore could not be implemented without prior negotiations with the PBA. In the present case, petitioner argues that, since the CCRB is responsible for recommending disciplinary action against police officers, the composition of the review board itself is a term or condition of police officer employment.

Respondent argues initially that we lack jurisdiction over the present controversy because our authority is limited to resolving disputes concerning the interpretation or application of the NYCCBL and does not extend to the review of other laws. We agree that we are without general authority to review acts of the City Council. However, this does not leave us without jurisdiction in this matter for the petition presents a question for which we have direct responsibility under the NYCCBL i.e., whether the City of New York has, in compliance with the mandate of Local Law No. 55, Acted unilaterally with respect to matters that it must negotiate with the representative of its employees. Accordingly, we reject the

[5] See, Decision Nos. B-42-86; B-37-86; B-22-85.

City's first basis for opposing the petition in this case.

Next, respondent argues that the composition of the CCRB is a prohibited subject of bargaining because it is a matter fixed by law or, alternatively, because the City Charter embodies a strong public policy which may not be the subject of collective bargaining. We do not agree with the assertion that a matter covered by a statute is necessarily a prohibited subject of bargaining. It is well-settled that the requirement of good faith bargaining extends to matters covered by law when they 61 relate to terms and conditions of employment.[6] However, a subject that otherwise would be negotiable only on a permissive basis may be pre-empted by statute such that any agreement in contravention of the statute is illegal and unenforceable.

In the case at bar, Local Law No. 55 provides that:

> The [civilian complaint review] board shall consist of twelve members, of whom six shall be

[6]See, e.g., National Labor Relations Board v. Harris, 200 F.d 656, 31 LRRM 2232 (5th Cir. 1953)(although employer was required to comply with Fair Labor Standards Act setting new minimum wage rate, its refusal to discuss wage increases with union constituted bad faith refusal to bargain); County of Orange, 15 PERB ¶3017 (PERB 1982)(unilateral institution of additional maintenance charge at county-owned residences occupied by employees, in accordance with legislative resolution, was improper because no negotiations were held); Committee of Interns and Residents v. New York City Health and Hospitals Corporation, Decision No. B-25-85 (unilateral deduction of non-resident earnings tax from wages of HHC employees pursuant to ten-year old City Charter provision without bargaining over effect of change constituted improper refusal to bargain).

> members of the public so that one resident from each of the five boroughs of the city and one citywide representative are members ... (emphasis added).

The language of the Charter amendment is clear. It leaves no room for bargaining concerning the composition of the review board. Based upon the above, we conclude that, for purposes of the instant case, the composition of the CCRB is a prohibited subject of bargaining.[7]

Even if there were no legislation making the composition of the CCRB a prohibited subject of bargaining, however, we would not agree with petitioner's contention that such subject is mandatorily bargainable. It is well-established that the statutory powers of the CCRB within the Police Department - "to receive, to investigate, to bear and to recommend action upon civilian complaints against members of the ... department" - are separate and distinct from the power to take disciplinary action, which rests exclusively with the Police Commissioner.[8] Moreover, we have previously

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[7]See, National Labor Relations Board v. Wooster Division of Borg-Warner, 356 U.S. 342, 42 LRRM 2034 (1958); Decision No. B-11-68. Since we find that the City Charter pre-empts bargaining on the composition of the CCRB, we need not consider respondent's argument that the Charter embodies a strong public policy that fair and impartial review of civilian complaints shall be made by a board that includes-public members.

[8]In Cassese v. Lindsay, 51 Misc. 2d 59, 272 N.Y.S. 2d 324 (1966), the New York Supreme Court held that the creation of the CCRB was not an illegal delegation by the Police Commissioner of his decision-making or investigatory powers with respect to departmental discipline because the board's advisory recommendations were not binding on the Commissioner and the decision whether disciplinary action would be taken remained with the Commissioner.

held that the decision to take disciplinary action and the preliminary investigation of an employee which may result in a decision to take such action are matters of management prerogative under section 1173-4.3b of the NYCCBL.[9] Since the PBA has failed to allege how the change in the composition of the CCRB will affect disciplinary actions that may be taken against its members as a result of the investigation of civilian complaints, and since it appears that the composition of the review board has more to do with the "methods, means and personnel by which government operations are to be conducted" than with any term or condition of police officer employment, we would find, in the hypothetical circumstance where there is no pre-emptive legislation, that the composition of the CCRB

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[9]Decision Nos. B-37-86; B-16-81; B-10-75. NYCCBL section 1173-4.3b provides:

> 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

(continued...)

is, at best, a permissive subject of bargaining and we would not direct the City to negotiate with the PBA.[10]

Finally, it should be noted that an obligation to bargain concerning a practical impact on terms and conditions of police officer employment resulting from the implementation of the Charter amendment, not alleged herein, would not arise, in any event, until the existence of a practical impact were established and the City afforded an opportunity to alleviate such impact.[11] Since petitioner has not alleged that the change in the composition of the review board will entail any particular practical impact, but rather insists that the composition of the CCRB is itself a term or condition of police officer employment, an argument which we have rejected, we have no alternative but to dismiss the petition in its entirety.

(...continued)

> 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.

[10]Consistent with this view is the holding of the State Public Employment Relations Board ("PERB") that the composition of a committee that evaluates employees is not a term or condition of employment of the employees being evaluated. Board of Higher Education v. Professional Staff Congress, 7 PERB ¶3028 (1974); accord, Onondaga Community College Federation of Teachers, 11 PERB ¶3045 (1978); Orange County Community College Faculty Association, 10 PERB ¶3080 (1977).

[11]Decision Nos. B-37-87; B-38-86; B-23-85; B-5-75; B-9-68.

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 improper practice petition filed by the Patrolmen's Benevolent Association be, and the same hereby is, dismissed.

DATED: New York, N.Y.
September 22, 1987

ARVID ANDERSON
CHAIRMAN

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MEMBER

DANIEL G. COLLINS
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