UPOA, Coluccio (Pres. of UPOA) v. City, DOP, 43 OCB 31 (BCB 1989) [Decision No. B-31-89 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
---------- x

In the Matter of

UNITED PROBATION OFFICERS ASSOCIATION and UPOA President DOMINIC COLUCCIO,	DECISION NO. B-31-89
	DOCKET NO. BCB-1146-89
Petitioners,	
-and-	
CITY OF NEW YORK, DEPARTMENT OF PROBATION, Respondent.	

---------- x

INTERIM DECISION AND ORDER

On March 3, 1989, the United Probation Officers Association and its President ("Petitioner" or "Union") filed a scope of bargaining petition against the New York City Department of Probation ("Department" or "Respondent"), alleging that the Respondent has refused to negotiate over the impact of the implementation of a revised program requiring Probation officers and Probation Officer Trainees to make regular visits to the homes of probationers. The petition was accompanied by a letter from the Union's counsel requesting an expedited decision "due to the gravity of this situation." The Department, appearing by the Office of Municipal Labor Relations, filed its answer to the petition on March 13, 1989. The Petitioner filed a reply on March 16,1989.

BACKGROUND

Probation Officers are responsible for the investigation and supervision of persons who have come under the jurisdiction of the courts. As part of their job duties, Probation Officers are required to supervise probationers in order to provide services for such matters as narcotic addiction, psychiatric disorders, unemployment, and marital problems, and they are required to make initial and supervising investigations of cases involving family problems, such as neglect, child abuse, adoption, and non-support.[1]

On or about February 10, 1989, the Department implemented a "Revised Differential supervision Program" ("Revised Program") that requires regular visits to the homes of probationers by Probation Officers and Probation Officer Trainees.

By letter dated February 7, 1989, addressed to the Commissioner of the Department of Probation and to the Director of the Office of Municipal Labor Relations, the Union President requested collective bargaining over the alleged increased danger to the health and safety of the Officers required to make the

[1] New York City Department of Personnel job specification for the title of Probation Officer.

home visits under the Revised Program. The letter reads as follows:

> The undersigned recently became President of the United Probation Officers Association. Concurrently with my assumption of the Presidency, I learned that the Department of Probation was in the final stages of implementing a Revised Differential Supervision Program which will apparently require home visits by Probation Officers and Probation officer Trainees in areas of New York City which have experienced an explosion in the crime rate in the last few years partly as a result of the increased use of drugs.
>
> Many of the required home visits by Probation Officers and Probation Officer Trainees will expose them to a substantial increase in the danger to their health and safety.
>
> We are requesting to bargain for Probation Officers and POTs not presently weapons-qualified, (2) the type of firearms to be utilized by these employees, (3) availability of bulletproof vests, (4) availability of police radios, (5) availability of backups or the conduct of home visits in pairs, (6) use of Probation Department vehicles to make these home visits, (7) expanded disability, (8) expanded leave provisions, (9) improved retirement opportunities, increased remuneration for the high risks involved and other related fringe benefits.
>
> With respect to the POs and POTs who are not qualified or who are not capable of making home visits in the revised supervision program on the basis contemplated by the Department, we wish to bargain over alternative methods for the required home visits to be made.
>
> If you are not agreeable to commencement of bargaining within 2 business days of your receipt of this letter, the UPOA will take further legal action as required.

There is no record of any direct response by the City to the Union President's letter.

On February 14, 1989, the Union instituted a Special Proceeding in the Supreme Court New York County, pursuant to Article 78 of the Civil Practice Law and Rules, by Order to Show Cause, against the city and the Department of Probation. The petition sought a temporary restraining order and injunctive relief enjoining the Department from implementing its Revised Program. The Court denied the request for a temporary restraining order, and it scheduled a hearing for February 24, 1989, on the matter of an injunction.

Oral argument took place on February 24, 1989, after which the Court granted the Union's request for a preliminary injunction to the extent that "[the only] probation officers to make home visits in high risk crime areas [are those] who are members of Special Field Services Unit, Community Contacts Unit or have received supplemental training before being sent on home visits." It scheduled an evidentiary hearing for March 6, 1989.

On March 2, 1989, the City served the Union's counsel with a copy of an Affirmation of Intention to Seek Leave to Appeal. The request for leave to appeal had the effect of automatically staying the preliminary injunction and nullifying the hearing scheduled for March 6, 1989.

On March 13, 1989, the Court dismissed the Article 78 petition.

POSITIONS OF THE PARTIES

Petitioner's Position

According to the Union, the Probation Department's Revised Differential Supervision Program imposes a dangerous new duty upon Probation Officers by requiring them to make more frequent visits to probationers at their homes. The Union argues that, because many probationers live in crime-ridden and crack-infested neighborhoods, home visits in these areas expose the Officers to increased danger to their health and safety. It notes that the officers receive no special training to deal with the alleged increased danger, and it points out that they are equipped neither with police radios, nor are they permitted to carry firearms to protect themselves.

The Union also contends that, before the Revised Program went into effect, Probation Officers were not actually required to make home visits. Previously, Officers had the option of filling out a "field exemption form" if they felt that a visit would be dangerous, and exemptions allegedly were routinely granted. The Union identifies two Branch Chiefs who, it says, placed field exemption forms in every case file as a routine matter. It also contends that officers had the option to request

that an armed Field Services Unit team make the visit in their stead. Further, according to the Union, prospective Probation Officers were routinely told at pre-employment interviews that, although the job description calls for field visits, no one was really expected to make them.

The Union disputes the City's claims that Probation officers have always made home visits and that no Officer has ever been hurt while doing so. It maintains that incidents did, in fact, occur, noting that one Intensive Supervision Program Officer had shotgun pellets fired at him, and another Officer was assaulted. Moreover, according to the Union, the number of past incidents is not a valid predictor of future events because the actual number of past visits was low and the most dangerous neighborhoods generally were avoided.

While acknowledging that Probation officers assigned to the Family Court routinely make home visits, the Union distinguishes these visits by contending that they are relatively few in number, and that they do not involve dealing with convicted felons. It underscores its claim that, under the Revised Program, all officers have to make home visits. This, according to the Union, is a sufficiently changed circumstance to merit a practical impact hearing.

Making reference to its Article 78 petition, the Union contends that the dismissal of the petition by the Court on March 13, 1989, vitiates any possible estoppel or duplicative

litigation claim that the City may raise. Moreover, according to the Union, because there is no statutory waiver requirement in a scope of bargaining proceeding under the New York City Collective Bargaining Law ("NYCCBL"), there is no support for the proposition that a union cannot seek relief from both the court and this Board under the same set of facts.

Respondent's Position

The City maintains that, long before the Revised Program went into effect, Probation Officers conducted home visits to probationers in accordance with the requirements of the New York State Rules and Regulations for Probation. It also notes that field visits are one of the typical job tasks listed in the job specification for Probation Officer. The City points out that members of the Family Court Services Unit routinely make home visits in the same neighborhoods and under the same conditions as the officers subject to the Revised Program encounter, and it claims that during the past seven years no Union member has been reported injured as a result of making a home visit.

Referring to Board Decision No. B-18-87, the City argues that it is under no duty to bargain over a practical impact until such time as this Board determines that an alleged practical impact actually exists. Such determination, according to the

City, must rest upon specific details showing evidence of a practical impact on employee safety due to change in policy by management, or by inaction by management in the face of changed circumstances. The City contends that no such evidence of impact has been included with this petition, and, in its view, the Union's arguments are speculative at best.

The City denies that any action or inaction by management has occurred. It maintains that the institution of the Revised Program does nothing more than formalize the ongoing policy for home visits by Probation Officers that was developed under the rules and regulations of the State of New York, and that has been in place for at least the past seven years.

Finally, the City argues that the Union should not be afforded the opportunity to simultaneously argue its case in more than one forum. It notes that the Petitioner has made the same arguments and it has sought the same remedy in the Supreme Court. According to the City, it is inimicable to the spirit of the Office of Collective Bargaining, as the arbiter of the NYCCBL, to allow the prosecution of a claim simultaneously before the court and this Board.

DISCUSSION

This case appears to involve an action by the Department of Probation in the face of allegedly changed circumstances that gives rise to an issue of safety. In its initial filing, the Union seemed to complain that the revised home visit program amounted to a dangerous new policy. Subsequently, the Union tacitly acknowledged that Probation officers, or at least Officers assigned to the Family Court, had been making home visits for some time, but it sought to distinguish Family Court visits by pointing out that these clients were relatively few in number, and they were not convicted felons.

The parties have not submitted a copy of the Department's Revised Differential Supervision Program, and we do not know for sure whether this Program even has been reduced to writing. We are constrained, therefore, to rely upon the representations made by the parties for our understanding of what the Program entails.

The New York City Collective Bargaining Law imposes a duty upon the employer, as well as upon the employees' representative, to bargain in good faith on matters that are within the scope of collective bargaining. These matters, which include wages, hours and working conditions, are regarded as mandatory subjects of bargaining. This does not mean, however, that every decision of a public employer which may affect a term and condition of

employment automatically becomes a mandatory subject of negotiation, and, although the parties also remain free to bargain over non-mandatory subjects, there is generally no requirement that they do so.[2]

Under the final sentence of NYCCBL §12-307b. (the statutory management rights clause), however, a decision made by an employer in the exercise of its management prerogatives, and, thus, outside the scope of collective bargaining, may have adverse effects upon matters of employment, such as questions of workload, manning or safety, which rise to the level of a practical impact requiring alleviation. The requirement of alleviation of a practical impact may, in a given case, give rise, in turn, to a requirement that the parties bargain over the means to be employed in effecting such alleviation.

Thus, although the Union has no right initially to demand bargaining over a matter within the statutorily defined area of management prerogative, it may nevertheless have the right to demand bargaining for purposes of obtaining alleviation of the adverse effects upon unit employee working conditions of an exercise of management prerogative. In order to avail itself of the practical impact procedures of the law, however, it is incumbent upon the Union to demonstrate that the alleged impact results either from a management decision or action, or from

[2] See City School District of the City of New Rochelle, 4 PERB 3060 (1971). Also see Decision No. B-7-77.

management's inaction in the face of changed circumstances.[3]

The Union's right to bargain with regard to a practical impact comes into existence only after this Board makes a finding that management, pursuant to its authority under NYCCBL 12-307b., has acted unilaterally in such a way as to create a condition through which practical impact occurs, and it has failed to alleviate such impact. The Union thereupon is entitled to seek alleviation through negotiation with the employer.[4]

In certain types of cases, however, we have recognized that the potential consequences of the exercise of a management right are so serious as to give rise to an obligation to bargain before actual impact has occurred. In such cases, we have said that the existence of a clear threat to employee safety constitutes a per se impact, which warrants the imposition of a duty to bargain over the impact of a management decision prior to the time that the decision is implemented.[5]

The fact that a threat to safety may constitute a per se impact justifying the imposition of a duty to bargain does not relieve the union of the responsibility of first proving the existence of such threat to safety.[6] The question whether there

---

[3] Decision No. B-43-86.

[4] Decision No. B-69-88.

[5] See Decision No. B-34-88; B-31-88; B-6-79; B-5-75; and B-3-75.

[6] Decision Nos. B-31-88; B-37-82; and B-5-75.

is a clear threat to employee safety, if disputed by the employer, is a matter to be determined by this Board before the obligation to bargain arises. Such an issue of fact generally will require a hearing. It has been our regular practice to order such hearings provided the Union's demand for a finding of practical impact is based upon allegations of probative fact rather than mere conclusions and unsupported assertions that impact has occurred or will occur.[7]

In the instant case, the Petitioner contends that the implementation of the Revised Plan will result in more Probation Officers making more home visits to convicted felons in crack infested neighborhoods, thereby endangering their safety and security. On the record before us, we are unable to determine whether this is so because there is some doubt as to whether regular Probation Officers have always been required to visit felons in high crime areas of the City.

Taking the spread of the drug "crack" into account, however, we recognize that the danger to Probation Officers making home visits may have increased, even if they routinely made such visits in the past. These circumstances lend support to the Petitioner's claim that the Revised Program has created a practical impact upon employee safety. Accordingly, we will direct that a hearing be held before a Trial Examiner designated

[7] Decision Nos. B-31-88; B-38-86; and B-23-85.

by the Office of Collective Bargaining, in order to allow the parties the opportunity to present evidence and arguments for the purpose of establishing a record upon which we may ascertain whether a practical impact on the safety of the employees involved has occurred.

We reiterate, however, that the decision whether to continue, modify or rescind the Revised Program is a matter solely within management's discretion and is not a mandatory subject of bargaining. This fact is not changed by the existence of a practical impact, if any, resulting from the exercise of management's discretion in this case. Thus, we emphasize, that any duty to bargain which might exist in this case would concern the alleviation of practical impact resulting from the Revised Program, and would not concern the implementation or the continuation of the program itself.

In any bargaining which might be mandated as a result of a finding of practical impact in this matter, the Union would consequently acquire no entitlement to bargain on the specifics of the Revised Program. Moreover, in the event that bargaining on alleviation of practical impact reached impasse, an impasse panel would not have the authority to direct that the program be modified or eliminated.

Finally, we find the issue moot with respect to the waiver assertion raised by the City, inasmuch as the Union's Article 78 petition has been dismissed without reaching the merits.

ORDER

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

DETERMINED, that the Department of Probation acted in the proper exercise of its reserved management rights, as defined in Section 12-307b. of the New York City Collective Bargaining Law, when it refused to cancel or to modify its Revised Differential Supervision Program regarding home visits of probationers by Probation officers; and it is hereby

ORDERED, that the issue of practical impact on the safety of employees represented by the United Probation Officers Association due to the refusal of the Department of Probation to cancel or to modify its Revised Program regarding the home visits, is to 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 determine whether a change in departmental policy, in fact, was made; if so, whether any practical impact resulted from such

change; or, if departmental policy was not changed, whether changed circumstances caused any practical impact to occur.

DATED: New York, N.Y.
May 23, 1989

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD SILVER
MEMBER