

UPOA v. DOP, DC37, 43 OCB 48 (BCB 1989) [Decision No. B-48-89]

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

In the Matter of the

UNITED PROBATION OFFICERS
ASSOCIATION,

DECISION NO. B-48-89

DOCKET NO. BCB-1111-88

Petitioner,

-and-

CITY OF NEW YORK DEPARTMENT of
PROBATION,

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondents.

-----x

DECISION AND ORDER

On November 17, 1988, the United Probation Officers Association ("Union" or "UPOA") filed a Level of Bargaining Petition against the New York City Department of Probation ("Department") and against District Council 37, AFSCME, AFL-CIO ("District Council 37" or "DC 37"). The petition asserts that, in light of changed circumstances, the current city-wide bargaining representation and coverage is no longer appropriate, and it seeks a determination enabling the UPOA to bargain separately at the unit level over all terms and conditions of employment. The Department, appearing by the Office of Municipal

Labor Relations, filed its answer to the petition on December 2, 1988. District Council 37 filed its answer on December 22, 1988. The Petitioner filed a reply on January 5, 1989. The Department filed a sur-reply on January 17, 1989.

BACKGROUND

The United Probation Officers Association is the certified representative of Probation Officer Trainees, Probation Officers, Senior Probation Officers and Supervising Probation Officers employed by the New York City Department of Probation. However, pursuant to Section 12-307a.(2) of the New York City Collective Bargaining Law ("NYCCBL"),¹ District Council 37, as the current certified employee organization, negotiates all matters which

¹ NYCCBL §12-307a.(2) reads as follows:

[Public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages, hours and working conditions, except that:]

(2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all such employees....

must be uniform for employees who are subject to the city-wide Career and Salary Plan and Standard Leave Regulations, including members of the UPOA's bargaining unit.

On September 28, 1988, the New York City Department of Personnel notified the Petitioner by letter that it planned to revise the job specification for the title of Probation Officer. The letter reads as follows:

Based on a request from the Department of Probation and after careful study, we have determined that it is appropriate to revise the class specification for subject title. Attached is a copy of our proposed revision.

Please be advised that the City Personnel Director plans to adopt this revised class specification five (5) days from now.

Attached to the letter was a revised job specification for the title of "Probation Officer." Among the revisions was a newly-added section containing the following provision:

When assigned to the Field Services Unit, may be required to perform violation of probation warrant investigations; make collateral field visits; enforce violation of probation warrants; execute warrants; perform "failure to report" investigations and requisite field visits; detain or take into custody probationers wanted by law enforcement agencies; assist the Office of General Counsel in the preparation of cases for the Violation of Probation process; and execute search orders.

The Petitioner, by its Counsel, set forth its objections to the proposed revised class specification, in a letter addressed to the City Personnel Director, as well as to the Office of

Municipal Labor Relations, and the Commissioner of the Department of Probation, and dated October 3, 1988, which reads, in pertinent part, as follows:

A review of the proposed revised class specifications indicates that the major revision therein appears to pertain to the insertion of "Typical Tasks" to be performed by Probation Officers assigned to the Field Service Unit and the physical and psychological examinations required for assignments to Field Services.

* * *

[At the present time, Probation Officers in the Field Services Unit] are required to carry weapons, wear bullet proof vests and work side by side with law enforcement officers from the New York City Police Department. The danger to the health and safety of Probation Officers serving in the Field Service Unit are inherently greater than those faced by Probation Officers serving in traditional functions of supervision, investigation or CLO in the Supreme, Criminal or Family Courts.

* * *

[The Union asks the Department] to refrain from formalizing the "Typical Tasks" of Probation Officers in the Field Service Unit until such time as [the Department] meets with [the Union] to bargain over the health and safety dangers facing Probation Officers in the Field Service Unit....

The Office of Municipal Labor Relations, in behalf of the Department, replied by letter dated October 12, 1988, which reads, in pertinent part, as follows:

The subject matter of your missive is the job specification for Probation Officer. Determination of the content of a job specification is a managerial prerogative.

* * *

In accordance with the [New York City Collective Bargaining Law], the City will not negotiate over the content of job classification for Probation Officer or any other job title.

The City Personnel Director also replied by letter dated October 29, 1988, in which she stated that "[t]here is no requirement in the [city-wide] agreement that we delay adoption of the revision until the union negotiates on possible impact."

On November 2, 1988, the Union filed a scope of bargaining petition with the Office of Collective Bargaining docketed as BCB-1107-88, alleging that the Department had refused to negotiate over the impact on the health and safety of Probation Officers who have been given new job specifications and have been assigned to the Field Services Unit ("FSU"). In Decision No. B-70-88, an Interim Determination and Order, this Board directed that a hearing be held on the issue of a practical impact on the safety of Probation Officers assigned to the Unit. The Interim Determination also held, however, that "Section 12-307b. of the [NYCCBL] gives management the express right to determine the content of a job classification," and that the Department "has no statutory or contractual duty to bargain over the revision in the class specification for the title of Probation Officer."

On July 19, 1989, this Board issued its final Decision and Order in the matter of BCB-1107-88, in Decision No. B-38-89, in which it reiterated that "the issuance of the revised job

specification for Probation Officers so as to include Field Services Unit duties is a proper exercise of reserved managerial authority, as defined in Section 12-307b. of the [NYCCBL]." The decision also recognized, however, that "the issuance of such revised job specification can have a practical impact on the safety of Probation Officers," and it went on to require that "prior to implementation of involuntary assignments to the Field Services Unit, the Department of Probation shall bargain in good faith concerning the means to be used and the steps to be taken to relieve the practical impact."

POSITIONS OF THE PARTIES

UPOA's Position

The UPOA contends that the work and employment conditions of the Field Services Unit is different than the work and employment conditions of other Probation Officers. It maintains that FSU duty is the "functional equivalent" of police work, and, therefore, officers assigned to the Field Services Unit "should be compensated at the same or similar levels as to wages, fringe benefits, pensions, disability protection, life insurance and

other working conditions."

In the Union's view, because the revised job specification means that any Probation Officer may be assigned to the Field Services Unit, the revision represents a substantial change in the duties and conditions of employment of its bargaining unit members. Therefore, the Union concludes, in light of the "special circumstance" provision of NYCCBL §12-307a.(2)², city-wide representation and coverage is no longer appropriate. Instead, it asserts, the UPOA should be permitted to bargain separately for its membership on all terms and conditions of employment.

The Union also maintains that a change in the job content of Probation Officers that goes beyond their traditional functions is mandatorily bargainable, and that the remedies requested in the instant petition are different from those sought by the Union in its previous scope of bargaining petition.

² The final clause of NYCCBL §12-307a.(2) provides an exception to the uniform city-wide bargaining requirement, as follows:

but nothing contained herein shall be construed to deny to a ... certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved;

City's Position

The City puts forth two arguments urging that the Union's level of bargaining petition be dismissed. First, the City contends that the UPOA is actually trying to force it to bargain over the job specifications for Probation Officer. According to the City, it is clear that the content of job specifications and the qualifications for appointment and employment are a management right, and, thus, are a non-mandatory subject of bargaining.

The City also points out that Section 12-307(a)(2) of the NYCCBL requires that city-wide issues can only be bargained for by the city-wide representative, District Council 37, unless special or unique circumstances have been established by a local unit. According to the City, other than "conclusory allegations as to the alleged situation of approximately thirty-six of its members," the Union has offered no evidence to support the existence of unique and special circumstances that would permit it to negotiate over city-wide issues in place of DC 37.

District Council 37's Position

District Council 37 contends that, inasmuch as the UPOA has

filed a scope of bargaining petition "alleging the exact same facts as set forth in the instant petition," and seeking a remedy "identical to that sought in the instant case," the level of bargaining petition should either be dismissed or held in abeyance until the scope of bargaining petition has been decided. DC 37 points out that this course of action would conserve this Board's resources by avoiding the waste of time involved in the simultaneous processing of identical cases.

DISCUSSION

Under the existing structure of the New York City Collective Bargaining Law there are only two avenues open to an employee organization that desires to bargain directly in its own behalf over uniform matters subject to the Career and Salary Plan: It may bargain independently if it qualifies as a representative of the uniformed police, fire, sanitation or correction services;³ or it may bargain for a variation of a particular application of

³ NYCCBL §12-307a.(4) provides that:
all matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, shall be negotiated with the certified employee organizations representing the employees involved.

a city-wide policy, or for a particular term of the city-wide agreement, if it can show that special and unique considerations exist within its department, class of employees, or collective bargaining unit concerning the particular application.⁴

With respect to the first approach, although the UPOA contends that some of its members perform the "functional equivalent" of police work, Probation Officers are neither police officers, nor are they members of a New York City uniformed police, fire, sanitation or correction service.

According to the Classification and Compensation Schedules of the Classified Service of the City of New York, Probation Officers are not members of the New York City Police Service, the Correction Service, the Fire Service, or the Sanitation Service. Thus, even if Probation Officers were accorded statutory police officer status through legislative enactment, they still would not qualify for independent bargaining over uniform matters subject to the Career and Salary Plan under the NYCCBL, because they do not meet the §12-307a.(4) classification criterion.

Further, the New York State Criminal Procedure Law, which defines "police officer" as, inter alia, a sworn officer of the division of state police or of an authorized county, city, town or village police district; an investigator employed in the office of a district attorney; a fire marshal in New York City

⁴ Decision Nos. B-2-73 and B-11-68.

fire department bureau of fire investigation; and a special investigator employed in the statewide organized crime task force,⁵ clearly does not include Probation Officers within the statutory definition of police officer.

We conclude, therefore, that even if, arguendo, certain bargaining unit members are doing work that is "functionally similar" to work done by police officers, this does not bring the UPOA within the ambit of the §12-307a.(4) exception.

In order to bring a matter within the scope of bargaining under the "special and unique considerations" provision of §12-307a.(2), there are two conditions that must be met: employees subject to the Career and Salary Plan must demonstrate a special and unique consideration with regard to a particular term of the city-wide agreement or policy; and the term itself must be a mandatory subject of bargaining.

The only term that the Union has specifically cited in this case is the revised job specification for Probation Officer. In Decision Nos. B-70-88 and B-38-89, we declared that the Department of Probation has no duty to bargain over the revision of the job specification for Probation Officer, and that the issuance of a revised job specification is a proper exercise of the Department's reserved managerial authority. The Union has provided no new argument that would cause us to reconsider our

⁵ Criminal Procedure Law Section 1.20.34.(a)-(q).

earlier decision.

We further note, however, that even if this case did involve a mandatory subject of bargaining, the Union's "special and unique considerations" contention is based solely upon the work of thirty-four Field Services Unit officers, out of a bargaining unit that contains in excess of 900 members. Put another way, FSU work amounts to less than four percent of the more typical work performed by the other ninety-six percent of the officers in the Probation Department. Even if it were demonstrated that special and unique considerations exist with respect to the work of the minority of bargaining unit members who serve with this unit, this fact would not furnish a sufficient basis to prove that special and unique considerations for the entire unit exist, nor would it justify an order to bargain at the unit level over all terms and conditions of employment, as requested by the Union.

At some future time, the UPOA may be able to prove that Probation Officers perform police duties of a broad enough nature so as to constitute a special and unique consideration within the meaning of §12-307a.(2), thus permitting the Union to bargain for a variation or a particular application of any term of the city-wide contract relating to such special and unique consideration. However, even if it does so, the Union would not be authorized to negotiate a variation of every city-wide term that it desires to

change. Rather, the burden would remain on the Union to demonstrate a nexus between each of its demands and the claimed special and unique consideration.

In conclusion, based upon the foregoing reasons, we find that the UPOA has no standing to bargain independently over city-wide Career and Salary Plan issues under §12-307a.(4) of the NYCCBL, because it is not a member of one of the four specified services, and we find that it may not demand to bargain over the revised job specification because the Union has not demonstrated the existence of a special and unique consideration, and because, in any event, the content of a job specification is a non-mandatory subject of bargaining.

ORDER

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 level of bargaining petition filed by the United Probation Officers Association, be, and the same hereby

is, dismissed.

Dated: New York, New York
September 13, 1989
