SUPREME COURT: COUNTY OF NEW YORK
SPECIAL TERM: PART I

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In the matter of the application of the
PATROLMEN'S BENEVOLENT ASSOCIATION, INC.,

Petitioner,

for a judgment pursuant to Article 78
of the Civil Practice Law ans Rules,

Index 8238/80

-against -

ROBERT J. MC GUIRE, as Police Commissioner
of the City of New York, THE NEW YORK
CITY POLICE DEPARTMENT, THE BOARD OF
COLLECTIVE BARGAINING and TEE CITY OF
NEW YORK,

Respondents.

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STECHER, J.:

The petitioner, Patrolmen's Benevolent Association, Inc. (PBA) seeks judgment setting aside a determination of the New York City Board of Collective Bargaining which dismissed a proceeding brought by the PBA to declare that the transfer of the duties of the parking enforcement squad (PES) of the New York City Police Department to the Department of Traffic of the City of New York, without collectively bargaining the issues of the transfer, was an unfair labor practice.

It is undisputed that these least-loved members of the New York City Police Department participated in and supervised the towing of cars parked in "No Parking" areas since 1967. During that period, it was customary for police officers to attach parking summonses to the cars which were then towed by PES officers to a central collecting point to which the frustrated driver had to go in order to obtain his summons and his car in exchange for a large sum of money.

The tow-away function has been transferred to the Department of Traffic; that is, summonses are issued by Department of Traffic personnel, among others, and the towing program is conducted by subcontractors of the Traffic Department. Participation by non-police officers is not without precedent. Summonses

have been issued by Traffic Department uniformed personnel [the so-called "meter maids"] for about 10 years and contract holders have been assisting in the tow-away program since 1976. The PBA contention that the New York City Charter grants exclusive jurisdiction for traffic control to the Police Department is in error; concurrent jurisdiction is given to the Department of Traffic [Chpt 71, §2903(b)(14)(a)].

What is really involved here is the concern which any labor union must have when job lines are eliminated from its jurisdiction. There is no question of dismissal of any PBA member because of the transfer of this function, Police Officers who were in the parking enforcement squad have been transferred to other duties. What a union relies on, however, is the dues of its members and, as all other unions do, the PBA is seeking to protect job lines so that its dues-paying membership may be enhanced.

Article 14 of the Civil Service Law, commonly known as the Taylor Law, authorizes municipalities and others to form agencies to hear and determine disputes between labor unions and public employers; and pursuant to Section 212 of the CSL, Chapter 54 of the Administrative Code of the City of New York [the New York City Collective bargaining Law] was enacted. The provisions of the Administrative Code under which the union proceeds are 1173-4.2(l) [which provides that it shall be an unfair labor practice "to dominate or interfere with the function or administration of any public employee organization"] and Section 1173-4.2(4) [which provides that it shall be an unfair practice "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of (the City's) public-employees."]

The petitioner-union contends that not only did the City fail to bargain collectively but that the Board of Collective Bargaining improperly denied the union a hearing, making its determination on the papers submitted.

Just as the obligation to bargain collectively may be the consequence of statute or of contract that which may be the Subject matter of bargaining is determined by the collective bargaining agreement itself or by applicable statute. I have examined the collective bargaining agreement between the parties and find that the issue before me is not the subject of contractual collective bargaining. Accordingly, if there is an obligation to bargain this issue, it must be found in a statute.

Section 1173-4.3 provides in part:
"§1173-4.2 Scope of Collective Bargaining; management rights.

"a. Subject to the provisions of subdivision b of this section and subdivision c of section 1174-4.0 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions...

"b. 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. <u>Decision of the city or any other public employer on those matters are not within the</u>

> 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 work-load or manning, are within the score of collective bargaining." [Emphasis supplied.]

The construction of the statute by the Board of Collective Bargaining to the effect that the transfer of the tow-away program did not impinge upon wages, hours or working conditions must be sustained.

> "It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld. [See, e.g., Matter of Mounting & Finishing Co. v McGoldrick, 294 NY 104,; Matter of Colgate-Palmolive-Peet Co. v Joseph, 308 NY 333,338; Udall v Tallman, 790 US 1, 16-18; Power Reactor Co. v Electricians, 367 US 396,408.] As this court wrote in the Mounting & Finishing Co. case (294 NY at p.108], 'statutory construction is the function of the courts "but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited" [Board v Hearst Publications, 322 US 111,131]. The administrative determination is to be accepted by the courts "if it has 'warrant in the record' and a reasonable basis in law" (same citation]. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" [Rochester Tel. Corp. v U.S. 307 US 125,1461.' " [Matter of Howard v Hyman, 28 NY 2d, 434, 438].

Where, as here, there is a rational basis for the construction of the statute the court may not say that the Board abused its discretion. The Court must, therefore, refrain from interfering with that determination [Matter of Northport-East Northport Union Free School District v Helsby, 54 AD 2d, 935], when the determination itself was neither arbitrary nor capricious [Matter of BOCES of Rockland County v New York State PERB, 50 AD 2d, 832].

The petitioner now, for the first time, raises the question of whether or not the transfer of the tow-away program to the Traffic Department had a "practical impact...on employees" [Administrative Code, section 1173-4.3(b)].

In my opinion, when the court is called upon to review the action or actions of an administrative agency charged with interpreting and administering a law of this character, the court should only review those issues which were raised before the agency. The court lacks original jurisdiction over the labor dispute and sits as a reviewing body only. The court must decline to review that which has not been raised previously [Seitelman v Lavine, 36 NY 2d, 165].

Beyond the question, however, of an issue raised for the first time before the court, it would appear, as a matter of law, that the petitioner has failed to establish a prima facie case of "practical impact." The allegations are conclusory only and no basis whatever is offered to show that this transfer of function has any "practical impact" whatever on the members of the Police Department of the City of New York.

As indicated previously, the union contends that by removing any function from the Police Department damage may be caused to the union itself and thereby ultimately to its members. Cited in support of that proposition is Fibreboard Paper Products v NLRB,[379 US 203] and its progeny. In Fibreboard, the employer had subcontracted maintenance work at a union plant which had previously been performed by union members. The Court held that under Section 8(a)(5) of the National Labor Relations Act, the replacement of employees who are members of the bargaining unit with an independent contractor's employees performing similar work under similar conditions is a subject of mandatory collective bargaining. The Fibreboard line of cases is not authority for the union's position in this case. As our Court of Appeals has said:

> "In the private sector the Supreme Court has held that the scope of mandatory bargaining is indeed wide, and that, even though the problem involves a management decision striking at basic company organization, it is subject to negotiation if industrial experience normally includes the problem and the union could realistically contribute yo a solution of the problem. [Fibreboard Corp. v Labor Bd., 379 US 203,211.] Four members of the court separately concurred on the ground

the majority language was too broad; that decisions concerning the commitment of investment capital and the basic scope and direction of the enterprise were not negotiable terms or conditions of employment [P.233]. The various case by case interpretations given the problem of independent employer action by the National Labor Relations Board and the Federal courts [see, Rabin, Fibreboard and The Termination of Bargaining Unit Work: The Search For Standards In Defining The Scope of The Duty To Bargain, 71 Columbia L. Rev. 803; Rabin, Limitations on Employer Independent Action, 27 Vanderbilt L. Rev. 1331, are, of course, not binding here [Matter of Civil Serv. Employees Assn. v Helsby, 21 NY 2d, 541, 546]. Nor is that line of authority especially persuasive except as it suggests that there is an area of nonnegotiable policy making left to the employer.

"As a reviewing court in an article 73 proceeding where the question is whether the administrative agency made a correct legal interpretation, our task is merely to see whether the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion' [CPLR 7803, subd. 21. So long as PERB's interpretation is legally permissible and so long as there is no breach of constitutional rights and protections, the courts have no power to substitute another interpretation on the strength of what the NLRB or the Federal courts might do in the same or a similar situation. The Legislature, in article 14 of the Civil Service Law, has provided that terms and conditions of employment are subject to mandatory negotiation (§204, subd. 2: Board of Education v Associated Teachers Of Huntington, 30 NY 2d, 122, l27], defined 'terms and conditions of employment' to mean salaries, wages, hours and 'other terms and conditions of employment' [§201, subd. 41, created PERB [§205], and lodged with PERB the power to resolve disputes arising out of negotiations [§209]. Inherent in this delegation is the power to interpret and construe the statutory scheme. Such construction given by the agency charged with administering the statute is to be accepted if not unreasonable [Udall v Tallman, 380 US 1, 16-18; Matter of Colgate-Palmolive-Peet Co. v Joseph, 308 NY 333, 338; Matter or Mounting & Finishing Co. v McGoldrick, 294 NY 294 NY 104, 108]. W. Irondequoit Teachers v Helsby, 35 NY 46, 50-51.]

Under all of the circumstances, the petition must be dismissed and judgment may be entered accordingly.

Dated: April 13, 1981