PBA, 2 OCB2d 36 (BCB 2009)

(IP) (Docket No. BCB-2677-07).

Summary of Decision: During a hearing concerning the Union's claim that the New York City Police Department violated NYCCBL § 12-306(a)(1), (4), and (5) when it allegedly instituted a college loan repayment program, the City made a motion to dismiss contending that the Union's claims should be dismissed as the controversy at issue was moot, since the organization involved with the college loan repayment program ceased its operation. The Union argued that the instant petition should not be dismissed, as the issues in question involve a live controversy. The Board held that the issues involved in the instant matter regarding the college loan repayment program were not moot because rescission of the college loan repayment program did not eliminate these specific underlying allegations that the NYPD violated the NYCCBL. Accordingly, the City's motion to dismiss was denied, and the evidentiary hearing with regard to the college loan repayment program continued. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK,

Petitioner,

-and-

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

Respondents.

SECOND INTERIM DECISION AND ORDER

On July 28, 2009, the City of New York ("City"), on behalf of the New York City Police Department ("NYPD"), filed a motion to dismiss, dated July 28, 2009 ("Motion"), claiming that the verified improper practice petition filed by the Patrolmen's Benevolent Association of the City of

New York ("Union" or "PBA") claiming in part that the institution of a college loan repayment program for certain Police Officers violated New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (4), and (5) should be dismissed on the grounds of mootness. The City argues that the controversy at issue has been rendered moot because the charitable organization that funded and administered this program, the New York City Police Foundation ("NYCPF"), ceased accepting applicants for this program and has represented that it will not re-institute this program or any other program of its type. The Union argues that the issues related to the college loan repayment program are actual controversies that require adjudication by the Board because PBA's underlying petition alleged that the implementation of this program was a unilateral change in a term and condition of employment, and interfered with the rights guaranteed by NYCCBL§ 12-305. Based upon the submissions of the parties and in conjunction with the existing record in the instant matter, the Board finds that the City's argument regarding mootness is unfounded. We further find that PBA's allegation that the NYPD violated the NYCCBL by its unilateral imposition of the college loan repayment program present an actual and live controversy that requires this Board to continue its evidentiary hearing and to make a determination on these allegations as to their substantive merits. Accordingly, the Motion is denied.

BACKGROUND

At the outset, we state that the instant decision addresses only the facts and arguments raised in the Motion and PBA's Opposition to the City's Motion to Dismiss, dated August 12, 2009 ("Opposition"), and we rule only on the limited issue of whether the Union's instant improper practice petition is moot. A comprehensive description of the record with regard to the college loan

repayment program will be contained in this Board's ultimate determination on the substantive merits of the Union's instant improper practice proceeding. Nevertheless, we briefly summarize facts and allegations made throughout the proceeding in the instant matter.

Procedural History

On December 12, 2007, the Union filed the instant improper practice petition alleging that the NYPD, by implementing a uniform allowance advance and a college loan repayment program, violated NYCCBL § 12-306(a)(1), (4), and (5). As remedies, PBA requested this Board find that the NYPD acted in contravention of the NYCCBL, order the NYPD to cease further participation in these programs, rescind any and all Operations Orders related to these two programs, and post appropriate notices.

On April 29, 2008, the Board issued an interim decision, *PBA*, 1 OCB2d 14 (BCB 2008), in which we severed the Union's claims with regard to these two programs and deferred the Union's claim regarding the uniform allowance advancement program to arbitration. Thereafter, the parties filed additional submissions with the Board with regard to the college loan repayment program. On February 4, 2009, a preliminary conference was held, and the parties were allowed an opportunity to discuss their positions, proffer additional information, and refine their respective arguments. It was also revealed at the February 4, 2009 conference that the college loan repayment program was only instituted for a limited period of time and that, since filing the instant improper practice petition, this program ceased to operate.

Over the City's objections that no questions of relevant facts existed, we granted PBA's request to conduct an evidentiary hearing with regard to the remaining issues raised concerning the college loan repayment program because we found contradictions between the parties' factual

contentions that could only be resolved by taking testimony and allowing submission of additional documentary evidence.

On July 28, 2009, after three days of evidentiary hearings, the City made the Motion arguing that the instant matter was moot because the college loan repayment program was stopped by NYCPF after the July 2008 recruit class, and NYCPF had no intention on instituting this program again. The City argued that any Board decision would be purely academic, and the Board should wait until a live controversy presented itself. On August 12, 2009, PBA filed the Opposition and contended that the Motion should be denied. Furthermore, PBA argued that the Motion was nothing more than an attempt by the City to avoid its discovery obligations.[1]

Substantive History

NYCPF is a non-profit organization, established in 1971 by New York City business and civic leaders. NYCPF is funded through private donations, not public contributions, and "is the only organization authorized to raise funds for [the NYPD]." (Ans., Ex. 1). The governance of this entity is set forth by NYCPF's bylaws and constitution, and is operated in accordance with United States Internal Revenue Code § 501(c)(3). (*See* Motion, Ex. A). Additionally, NYCPF has its own Chairperson, Executive Committee, Board of Trustees, and staff, and the Commissioner of the NYPD, nor any other employee of the NYPD, holds no position within NYCPF. (Ans., Ex. 2). According to the testimony of NYCPF's Chief Executive Officer Pamela Delaney, this

[1] On June 26, 2009, PBA issued two subpoenas *duces tecum* to the NYPD and NYCPF, respectively, requesting the production of: "All documents . . . referring to or relating to the NYPD's 'College Loan Reimbursement Program' [and] . . . [a]ll documents . . . referring to or relating to the reimbursement of college tuition loans of NYPD police officers by the NYPD or by [NYCPF]." (PBA Subpoena *Duces Tecum* issued to NYPD, dated June 26, 2009 and PBA Subpoena *Duces Tecum* issued to NYCPF, dated June 26, 2009, respectively).

organization's agenda is established by the NYPD through a "cooperative dialogue" between these two entities. (Tr. 156). She further testified that she frequently speaks with the Commissioner on various topics, and it not unusual for the Commissioner to solicit funds for the NYPD from NYCPF.

At the time the instant improper practice petition was filed, PBA and the City were parties to a collective bargaining agreement covering the period from August 1, 2002 to July 31, 2004, which was the result of a 2005 Interest Arbitration Award ("Agreement").[2]

According to PBA Vice-President John Puglisi ("Union Vice-President"), during the relevant time period in the instant matter, the parties were in the midst of bargaining a successor collective bargaining agreement. According to the Union Vice-President, throughout the negotiation process, the Union submitted contractual proposals to the NYPD, and one such proposal included a provision for "Education Pay." (Union Ex. 1). According to this document, the Union proposed that Police Officers receive "premium pay" that was commensurate with their respective academic degrees/levels, such as 10% of salary and longevity for an associate's degree, 15% of salary and longevity for a bachelor's degree or 20% of salary and longevity for a master's degrees. (*Id.*).

The record demonstrates that, as early as May 16, 2006, the Commissioner became "interested in providing subsidies to new police officers" in order to lessen the economic impact of the low starting salary of a Police Officer in the Police Academy. (Union Ex. 15). Although NYCPF expressed its "reluctance to become involved in NYPD compensation matters," NYCPF agreed that

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[2] The City, on July 7, 2006, filed a Declaration of Impasse with the New York State Public Employee Relations Board ("PERB"). After mediation proved unsuccessful, an Impasse Arbitration Panel was designated and held hearings. On May 22, 2008, this panel issued its award setting forth the economic terms for Police Officers for the period from August 1, 2004 to July 31, 2006. The parties then negotiated a successor collective bargaining agreement which currently governs the terms and conditions for Police Officers, however these successor contracts are not pertinent to the instant matter.

it "would serve as a conduit for donations for stipends for police recruits." (*Id.*). Then on September 16, 2006, NYCPF passed a resolution that any monetary gift given to the NYPD should be done as a charitable donation that is not tied to base salaries of Police Officers, rather should be tied to repaying "expenses" of these employees. (Union Ex. 17).

On October 22, 2007, NYCPF issued a press release announcing a new college loan repayment program for the NYPD recruits, which was set to commence with the class that entered the Police Academy in January 2008. The actual terms of the college loan repayment program dictated that recruits would be eligible to receive up to $15,000 over the course of five years to alleviate a portion of the financial burden placed upon them by the repayment of their college loans. This program would be managed and administered by NYCPF, would be funded completely by donations from private benefactors. NYCPF would start making payments to lending institutions upon the recruits' completion of the Police Academy. Additionally, if any beneficiary of this program separated from service with the NYPD for any reason during the five year period during which time his or her college loan was being repaid by NYCPF, this organization would not attempt to "recoup monies already distributed" to the respective lending institutions. (Ans. ¶ 40).

The next day, on October 23, 2007, PBA sent a letter to Deputy Commissioner John Beirne requesting a meeting to discuss the college loan repayment program.[3] The Union stated that monetary compensation is a mandatory subject of bargaining and requested that the parties bargain over the implementation of this program. The NYPD responded to this request by directing PBA to contact NYCPF regarding the parameters of the college loan repayment program.

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[3] At the time of this program was announced, PBA and the NYPD were participating in mandatory mediation, which precedes a declaration of impasse, the appointment of an impasse panel and the resolution of the successor contract through interest arbitration.

Based upon the record currently before this Board, the college loan repayment program was available to the January and July 2008 recruit classes, and Police Officers who were approved for this program received payments for their college loans. However, the college loan repayment program was not offered to the January 2009 recruit class because this program was discontinued. According to CEO Delaney, after the starting salary for Police Officers in the Police Academy was raised, pursuant to a subsequent collective bargaining agreement, the college loan repayment program "was discontinued" because the concerns for which this program addressed, recruitment, hiring and retention, no longer existed to such a grave degree. (Motion, Ex. A). Despite this program's discontinuance, "payments . . . will continue to be made on behalf of members of service who were in the January and Ju[ly] 2008 classes who remain eligible for reimbursement. (*Id.*). Finally, CEO Delaney states that she cannot "foresee having such a program again." (*Id.*).[4]

POSITION OF THE PARTIES

City's Position

The City argues that the Motion should be granted because the Union's improper practice petition in the instant matter has been rendered moot. Specifically, the college loan repayment program has been terminated; the Union has admitted that it does not want the current recipients of these college loan repayments to cease receiving this benefit; and the NYPD has already given PBA the remedy requested in the instant petition, namely, the ceasing of the college loan repayment program. Any remedy ordered by the Board "would have no effect on the bargaining relationship

[4] Since the instant decision only addresses the Motion, we need not delve into the specific factual contentions regarding the operation, management and administration of the college loan repayment program because those facts do not relate to the instant motion.

between the parties . . . [because] the program no longer exists." (Motion, pp. 4-5). An issue is moot when a change in circumstances eliminates the underlying controversy, and the policies of statutory law are not served by the further consideration of the charge. Moreover, the exceptions to the mootness doctrine are not applicable in the instant matter. Specifically, "there is not a likelihood of repetition, this is not an issue which constitutes a phenomenon capable of evading review, and . . . [there] is not a substantial or novel issue." (Motion, pp. 6-7).

The City further argues that PBA failed to demonstrate that the establishment and operation of the college loan repayment program was motivated by anti-union animus. Although allegations that an employer's conduct was motivated by anti-union animus require the Board to rule, where there is an issue that is purely academic and no actual controversy exists, the matter is moot. Moreover, any attempt by the Union to claim that a live controversy still exists because the NYPD violated the duty to bargain by instituting a program that was proposed by PBA at collective bargaining is inaccurate because the Union, during the bargaining for the successor contract to the Agreement, never proposed a program similar to the program at issue in the instant matter. Rather, the Union was seeking monetary compensation based upon the level of education/degree that each respective officer achieved, whereas the college loan repayment program only applies to Police Officers who have outstanding college loans.

Finally, the City argues that the Motion should be granted on the basis of administrative economy. Since the college loan repayment program has been terminated and NYCPF has represented that it will never reinstate this program, "the continuance of this matter would be economically wasteful for all parties involved . . . [and] it would result in the needless expenditure of time of all included parties and the Board." (Motion, p. 4).

Union's Position

The Union contends that the question at issue in the instant matter, whether the institution of the college loan repayment program violated NYCCBL § 12-306(a)(1), (4), and (5), is not moot.[5] The Board has not yet determined whether the NYPD managed and administered the college loan repayment; and if so, whether the management and administration of this program by the NYPD violated their statutory obligations as a public employer under the NYCCBL. Further, the mere ceasing of an action that is alleged to have constituted an improper practice does not render the issues concerning that action purely academic because "the question of remedy for prior violation[s] of law and the matter of deterring future violations remain open to consideration." (Opposition, p. 7). Although the college loan repayment program has been ended, the NYPD is not enjoined from re-instituting it, or from initiating another program by which certain Police Officers are "unilaterally grant[ed] monetary benefits in excess of those contained in the [Agreement] . . . without negotiating with [the Union]." (Opposition, p. 8). As it relates to the NYPD's argument that this Board should

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[5] NYCCBL § 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(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; . . .
(5) to unilaterally make any change as to any mandatory subject of bargaining or as to any terms and condition of employment established in the prior contract, during a period of negotiations with a public employee organization . . . .

Further, § 12-305 of the NYCCBL provides, in pertinent part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

grant the Motion since no remedy is available to PBA, PBA contends that it has requested this Board to make a finding that the NYPD violated the NYCCBL and that the NYPD be required to post appropriate notices.

The Union further contends that the exceptions to the mootness doctrine, as referenced by the City, are applicable in the instant matter and thereby justify the Board's denial of the Motion. First, although the City has alleged that the college loan repayment program would never be reinstated, there is a likelihood that this program or something similar to it could again be initiated by the NYPD, since this program arose out of the NYPD's problems/disagreements with the 2005 Interest Arbitration Award that greatly reduced Police Officer's salaries while they were in the Police Academy. Thus, if the NYPD faced similar issues, they could again "seek to circumvent the NYCCBL by creating a similar program with [NYCPF] or some other private entity in order to avoid bargaining." (Opposition, p. 12). Second, this program could easily be susceptible to repetition while continuing to evade review because the City's position, which was designed to avoid this Board ruling on the issues contained in the underlying improper practice petition, was that the college loan repayment program was "provided by a third party." (Opposition, p. 13). Finally, the instant matter involves a substantial and novel issue, which can be viewed as whether "an employer will be liable for the actions of a third-party when such acts are not beyond its employer's reach or control." (Opposition, p. 14).

In response to the City's argument that the instant improper practice petition is moot because the Union failed to allege that the institution of the college loan repayment program by the NYPD was motivated by anti-union animus, PBA contends that it has submitted testimony during the hearing which demonstrates that the NYPD's initiation of this program was improperly motivated.

Furthermore, all of the cases cited by the City in support of its position that the instant matter is moot fail to account for the Union's unique allegation that the NYPD's initiation of the college loan repayment program undermined PBA's status as bargaining representative.

With regard to the City's argument that the Motion should be granted because continuing with the proceedings in the instant matter is economically wasteful, PBA contends that "any costs brought on by a full and fair hearing may not have been necessary if the City had merely been forthright regarding its involvement in the [college loan repayment program]." (Opposition, p. 11). With no more than two more hearing days remaining in the instant matter, the denial of the Motion will merely impose a small economic burden on the parties, but will result in the benefit of resolving a labor dispute and the Board's guidance concerning these and other similar issues in the future.

DISCUSSION

The single issue requiring determination in the instant interim decision is whether the Union's improper practice petition has been rendered moot. When deciding the issue of mootness, we have held that "issues raised in an improper practice petition become moot when a change in circumstances eliminates the underlying controversy and the policies of statutory law are not served by further consideration." *PBA*, 73 OCB 21, at 5 (BCB 2004); *see also Matter of Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach*, 98 N.Y.2d 165, 172 (2002); *City of Peekskill*, 26 PERB ¶ 3062 (1993). However, we have also found that "an improper practice proceeding does not become moot merely because the acts that allegedly violated the law have ceased." *Feder*, 1 OCB2d 27, at 11 (BCB 2008); *see also Cotov*, 53 OCB 16, at 15 (BCB 1994); *Cosentino*, 29 OCB 44, at 11 (BCB 1982).

In *Patrolmen's Benevolent Association*, 73 OCB 21, the City filed an improper practice petition alleging that the union engaged in bad faith bargaining when it prematurely sought a declaration of impasse from the New York State Public Employment Relations Board ("PERB"). We held that, since PERB's decision granting a declaration of impasse was necessarily predicated upon its conclusion that the parties engaged in and exhausted good faith bargaining, the City's improper practice petition was rendered moot because a change of circumstances had occurred that eliminated the underlying controversy. *Id.*, 73 OCB 21, at 5-6; *see also City of Peekskill*, 26 PERB ¶ 3062 at 3109 (finding that the union's improper practice petition alleging the employer's issuance of a resolution violated the duty to bargain in good faith was rendered moot by the rescission of the resolution and the finalization of an agreement between the parties with respect to the topic addressed in the resolution).

In contrast, in *Feder*, 1 OCB2d 27, a petitioner filed an improper practice petition claiming that his employer interfered with his statutory rights under the NYCCBL and discriminated against him when, among other things, it deliberately delayed the issuance of his Step II grievance determination. We held that, although this employer later issued that determination, this change of circumstances did not render this petitioner's improper practice petition moot because the underlying claim, that the employer retaliated against this petitioner due to his protected union activity, remained to be determined. *Id.*, 1 OCB2d 27, at 10-11. We applied our well-established rule that "an improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased." *DC 37*, 75 OCB 14, at 12 (BCB 2005); *Feder*, 1 OCB2d 27, at 10.

In the instant underlying action, PBA alleges that the NYPD violated NYCCBL § 12-

306(a)(1), (4) and (5), when the college loan repayment program was instituted. Although NYCPF funded this program through private donations and issued checks to the eligible participants' lending institutions, the Union avers that this program was a means by which the NYPD interfered with the statutory rights of Police Officers, circumvented the Agreement without bargaining, and unilaterally changed a mandatory subject of bargaining. Here, this Board must determine whether, as alleged by the Union, the NYPD solicited, created, managed and administered the college loan repayment program and whether the NYPD's alleged rejection of PBA's request to bargain over this particular subject constituted an improper practice as defined by the NYCCBL. The mere fact that NYCPF, through CEO Delaney's testimony and affidavit, asserted that this program ended and would likely never be reinstated does not render moot the allegations that past actions contravened the NYCCBL. *See DC 37, Local 1457*, 1 OCB2d 32, 24. Accordingly, PBA's petition in the instant matter sets forth live controversies that require this Board to rule. *See Feder*, 1 OCB2d 27, at 11.

Additionally, pursuant to the terms of the college loan repayment program, recruits were eligible to receive up to $15,000 over the course of five years, provided the continued to satisfy this program's eligibility criteria. CEO Delaney also testified that NYCPF continues to provide remuneration for these eligible Police Officers who attended the Police Academy in the January and July 2008. As such, since the program is still active, to the extent that it still provides college loan repayments, we deny the Motion and allow the underlying improper practice petition to proceed to a determination on its substantive merits.

In further support of this Board's decision to deny the Motion, we note that the City has failed to satisfy its "heavy burden" of establishing that PBA's underlying improper practice petition was rendered moot by the alleged cessation of the college loan repayment program by NYCPF. *Am.*

Fed'n of Gov't Employees Council of Prison Locals, Local 4052, 59 FLRA 787, 793 (2004) (finding grievance was not rendered moot by management's order that a supervisor accused of sexual harassment not supervise grievant; "the party urging mootness meets its burden by demonstrating that: (1) there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely or irrevocably eradicated the effects of the alleged violation") (citing *Soc. Sec. Admin., Boston Region (Region 1), Lowell Dist. Office, Lowell, Mass*, 57 FLRA 264, 268 (2001) (reassignment of grievant to different supervisor did not render dispute moot).

Furthermore, we are unpersuaded by the City's argument that, since NYCPF has ceased operation of the college loan repayment program and the Union seeks no other remedial measures, this Board can award no remedies in the underlying action. In cases where the allegedly violative act has ended, "the question of a remedy for a prior violation of law, and the matter of deterring future violations, remain open to consideration." *DC 37, Local 1457*, 1 OCB2d 32, 24 (BCB 2008); *see also Cotov*, 53 OCB 16, at 15; *Cosentino*, 29 OCB 44, at 11. In the instant matter, we find that remedial measures requested by the Union may still be available. A review of the record in the underlying action clearly demonstrates that the Union has sought remedies outside the ceasing of this program. Namely, PBA seeks the posting of notices that the NYPD has committed an improper practice petition and the enjoining of the NYPD from "unilaterally granting monetary benefits in excess of those contained in the [Agreement] . . . without negotiating." (Pet. ¶ 25 and Opposition, p 8). Clearly, if the Union's contentions are proven to be true, this Board could provide such remedial measures to the Union.[6]

[6] With regard to the City's argument that granting the Motion would be in the interest of administrative economy, we reject it. The underlying action was initiated on December 12, 2007, (continued...)

[6](...continued)
and the parties have participated in three days of hearings. The City has provided no authority suggesting that, absent deficiency, administrative economy provides of its own force grounds for dismissal of an otherwise viable proceeding, and we are aware of no such grounds for dismissal. Moreover, at the time the Motion was filed, the parties had submitted all their pleadings, provided additional evidence and submissions on the underlying dispute, participated in a preliminary conference and three days of hearings, and been involved in an extensive and ongoing discovery dispute. During this extended procedural wrangling, the college loan repayment program ceased to operate. Thus, we find that the filing of the Motion, which necessitates the instant decision is an uneconomical use of administrative resources at best. Accordingly, we find this argument by the City to have no merit.

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 Motion to Dismiss filed by the New York City Police Department in the improper practice proceeding docketed as BCB-2677-07 be, and hereby is, denied in its entirety.

Dated: New York, New York
November 23, 2009

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER