PBA, 3 OCB2d 18 (BCB 2010)
(IP) (Docket No. BCB-2677-07).
affd. in part, revd. in part, Matter of Patrolmen's Benevolent Assn. v. NYC Off. of Collective Barg., 2012 NY Slip Op. 50997(U) (Sup. Ct. N.Y. Co. May 29, 2012) (Schoenfeld, J.)

Summary of Decision: The Union claimed that the New York City Police Department violated NYCCBL § 12-306(a)(1), (4), and (5) when it unilaterally instituted a college loan repayment program, thereby allegedly interfering with the statutory rights of Police Officers, failing to bargain in good faith regarding this program, and unilaterally changing the terms and conditions of employment. The City claimed that the alleged implementation of this new program did not violate the NYCCBL because, *inter alia*, an independent, third-party was the sole party responsible for the institution of this program. The Board held that the college loan repayment program was created, implemented and administered by the NYPD, and therefore the institution of this program constituted a violation of § 12-306(a)(4) of the NYCCBL. The Board also held, however, that the NYPD did not engage in direct dealing in violation of § 12-306(a)(1) and did not unilaterally change the terms of an agreement during a period of *status quo*, in violation of NYCCBL § 12-306(a)(5). Accordingly, the petition is granted, in part, and dismissed, in part. ***(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.

DECISION AND ORDER

On December 12, 2007, the Patrolmen's Benevolent Association of the City of New York ("Union" or "the PBA") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD") alleging, in pertinent part, that the NYPD 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) by unilaterally instituting a program providing grants of money to new recruits for repayment of college loans.[1] The City denied this claim on the ground that the implementation of this program was not inherently destructive of Police Officers' statutory rights, did not constitute a failure to bargain in good faith, and did not unilaterally change Police Officers' terms and conditions of employment during a period of *status quo*.

The Union alleges that the NYPD rebuffed its attempts to bargain, unilaterally imposed this program and, in so doing, interfered with the statutory rights of the PBA members. The City argues that the college loan repayment program does not violate the NYCCBL because it was created, funded and managed by the New York City Police Foundation ("NYCPF"), a private, non-profit organization, and the NYPD's role in the program was solely ministerial. We find that

[1] We note that this case has already given rise to two decisions: *PBA*, 1 OCB2d 14 (BCB 2008), in which we severed the claims at issue herein from similar claims regarding a uniform allowance advance program, which was deferred to arbitration; and *PBA*, 2 OCB2d 36 (BCB 2009), in which we denied as both unfounded and belatedly made the City's motion to dismiss the instant claims as moot. We assume familiarity with both of these decisions herein.

the record establishes that, as to this particular program, the NYPD exercised control over the institution, implementation, and administration of the college loan repayment program, and that the NYPD's unilateral actions in this regard violated its duty to bargain in good faith as to a mandatory subject of bargaining. We further hold that the NYPD's actions do not amount to interference with the statutory rights of the PBA members or violation of the *status quo* provision of the NYCCBL, and therefore, these claims are dismissed. Accordingly, the petition is granted, in part, and dismissed, in part.

BACKGROUND

The Trial Examiner held four days of hearing and found that the totality of the record established the relevant background facts to be as follows:

Procedural History

Finding that questions of relevant facts existed, based on the contradictions between the parties' factual contentions, the Board ordered that an evidentiary hearing be held concerning the college loan repayment program. On June 26, 2009, the PBA issued two subpoenas *duces tecum* to the NYPD and NYCPF, respectively, requesting the production of all relevant documents.

On July 21, 2009, the PBA issued a subpoena *ad testificandum* to NYCPF's President and Chief Executive Officer, Pamela Delaney, ("NYCPF's President") to offer testimony in connection with the instant matter. The City objected to this subpoena on the grounds that NYCPF was not a proper party to this proceeding.

On July 22 and 23, 2009, an evidentiary hearing was conducted by the Trial Examiner in the instant matter. During the second hearing day, it became clear, due to the credible testimony of one of the witnesses that the NYPD had not complied with the PBA's issued subpoenas regarding documents related to the college loan repayment program and that a witness from NYCPF was necessary. Accordingly, the Trial Examiner ordered the parties to exchange all necessary and discoverable documents and that the NYPD make a witness from NYCPF available. The third hearing day was scheduled for Wednesday August 26, 2009, but due to the retention of counsel by NYCPF to represent its president, that hearing day was adjourned. At that time, the NYPD had failed to comply with either the Union's subpoena or the Trial Examiner's order and had not submitted any documents to the PBA.

On September 18, 2009, the Union submitted a written application to the Trial Examiner to issue an order sanctioning the City for refusing to disclose the subpoenaed documents by striking the City's Answer.[2] This written application followed an oral request made by the PBA at the July 23, 2009 hearing date in the instant matter, during which Counsel for the Union moved to strike the City's Answer on the grounds that the City's submission was inconsistent with evidence presented at the hearing as well as to compel compliance from the NYPD with the subpoena. The City, in response to the PBA's application, orally represented that it stood by the contentions

[2] In the alternative, the Union requested that, if the Answer was not struck, the Board should preclude the City from introducing any evidence regarding the issue of whether the college loan repayment program was under the control of NYCPF or the NYPD.

contained in its pleadings, exhibits annexed thereto, and its motion to dismiss as moot.

On September 24, 2009, the third hearing date was held at which NYCPF's President testified. Then, on November 20, 2009, the fourth hearing date was held, at which documentary evidence was presented. The parties renewed their respective arguments for summary disposition of the instant matter, with the City advancing its theory that the instant matter was moot, and the Union advocating that the City's Answer be stricken and the Board direct a verdict in their favor.

On November 23, 2009, the Board issued its Decision denying the City's motion to dismiss as moot. *PBA*, 2 OCB2d 36 (BCB 2009).

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). Additionally, NYCPF has its own Chairperson, Executive Committee, Board of Trustees, and staff,[3] and the NYPD Commissioner Raymond Kelly ("Commissioner"), nor any other employee of the NYPD, does not hold a position within NYCPF. (Ans., Ex. 2). According to the testimony of NYCPF's President, NYCPF is an

[3] Members of the Executive Committee and Board of Trustees are all independent citizens involved in professional activities in New York ranging from real estate to fashion who are interested in New York City and in the welfare of the police department.

independent organization whose mission is to assist the NYPD's ability to improve public safety in New York, and NYCPF's agenda is established by the NYPD through a "cooperative dialogue" between these two entities. (Tr. 156).[4] 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.

In furtherance of the NYCPF's mission, NYCPF's President is responsible for supervising day-to-day operations, raising funds, monitoring the NYPD "programs that we have funded," reviewing requests for support from the NYPD, and making recommendations to NYCPF's Board. (Tr. 192). According to NYCPF's President, NYCPF is currently engaged in numerous programs to assist Police Officers, including the funding of horses for the mounted units, purchasing of bullet-resistant vests for police officers, and funding for the Realtime Crime Center, which is a center that synchronizes a variety of databases containing information on criminals and their records. In the past, NYCPF's assistance included providing equipment, such as biohazard masks, emergency evacuation bags, and bike patrol gear.

[4] "Tr." refers to citations from the hearing transcript.

At the time the instant improper practice petition was filed, the 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").[5] As per the Agreement, the starting salary of Police Officers in the police academy was $25,100. According to NYCPF's President, in November 2005, the Commissioner raised concerns to NYCPF about how this starting salary would impact recruitment and retention. (Tr. 163).

According to the PBA Vice-President John Puglisi ("Union Vice-President"), during the relevant time period, 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. One of these proposals was 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, 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.*). Prior to this round of bargaining, neither side ever asked for any type of compensation that was linked to

[5] 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. Since the issuance of the Agreement, the parties negotiated a successor collective bargaining agreement which currently governs the terms and conditions for Police Officers, however this successor contract is not pertinent to the instant matter.

academic achievement.

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, thereby addressing his "top priority" of recruiting. (Union Ex. 15). He expressed this sentiment to NYCPF. Although it expressed "reluctance to become involved in NYPD compensation matters," NYCPF agreed that it "would serve as a conduit for donations for stipends for police recruits." (*Id.*). On August 2, 2006, the New York City Conflicts of Interest Board ("COIB") issued an opinion in response to a joint application by the NYPD and NYCPF finding that a supplemental compensation plan from NYCPF to Police Officers, wherein the funds originate from private donations, would not violate the applicable provisions of the New York City Conflict of Interests Law and similar provisions of the City Charter. (Union Ex. 32). Subsequently, in September 2006, NYCPF passed a resolution that any non-program specific monetary gift given to the NYPD should be designated a charitable donation and should be tied to repaying "expenses" of Police Officers. (Union Ex. 17).

On November 14, 2006, the Commissioner attended NYCPF's Board of Trustees meeting where he again expressed his concern regarding the adverse effect the $25,100 starting salary had on recruitment of candidates for the police academy. Further discussed at this meeting were the tax implications of such a monetary award to Police Officers and the fact that NYCPF's Counsel was seeking to obtain a ruling from the United State Internal Revenue Service ("IRS") relating to

such a "stipend." (Union Ex. 18). NYCPF petitioned IRS for a ruling that would provide the repayment of Police Officers' student loans to be deemed not as taxable income, so that these officers would gain the full benefit of the monetary award.[6] (Tr. 205). NYCPF's President further testified that, when formulating the ideas for the monetary assistant program for Police Officers, NYCPF did not want it to be need based because a need-based program gets very complicated. (Tr. 209).

According to NYCPF's President, the Commissioner's solicitation of funds for new recruits in order to counteract the low starting salary that was imposed by the Agreement, resulted in NYCPF's Executive Committee convening, discussing how best to assist the NYPD regarding the recruitment problem, and developing a college loan repayment program. Although NYCPF discussed and explored numerous means of achieving the goals enunciated by the Commissioner, such as "an outright stipend," "equipment reimbursement," "hardship" pay, and/or "incentive" pay, the reimbursement of college loans was the most suitable because it addressed the issue as well as met the standards that NYCPF found imperative. (Tr. 202). In fact, according to NYCPF's President, NYCPF utilized the services of an outside third-party consultant in devising

[6] Nevertheless, due to the still pending determination by IRS with regard to NYCPF's particular application, Police Officers who received funds pursuant to the college loan repayment program were issued IRS Forms 1099 in order to document the monetary award given to their respective lending institutions on behalf of these individuals. We note that NYCPF's President testified that no other program or initiative administered by NYCPF involves the issuing of IRS Forms 1099, which are typically used to document income to an individual, to beneficiaries. (Tr. 244).

the general idea of the college loan repayment program. She further testified that "the form" and various logistical aspects of the college loan repayment program arose out of the discussions between the NYPD and NYCPF. (Tr. 177; Tr. 213-214).

In furtherance of this newly developed concept, on January 9, 2007, the NYPD again petitioned NYCPF to assist in its recruitment efforts, which had been negatively effected by the starting salary for Police Officers in the police academy. (*See* City Ex. 4). On January 19, 2007, the NYPD "conducted a survey to measure the student loan obligations of members of the January 2007 Recruit Class." (City Ex. 15). According to this survey, out of the 1,062 recruits in that class, 40% of them had outstanding college loans, of which $6,958,603 was still outstanding at the time. These results were passed onto NYCPF. On May 15, 2007, NYCPF's Executive Committee met and discussed, in part, "the latest proposal," which was to "develop a scholarship fund to reimburse new police officers' for their student loans." (Union Ex. 19).

On July 23, 2007, NYCPF's President and two other members of NYCPF met Joe Wuensch and Marina Estevez from the NYPD to further discuss the proposed plan to reimburse Police Officers in the January 2008 recruit class for unpaid college loans "as an inducement to join the NYPD." (City Ex. 12). A memorandum memorializing the meeting provided an outline of the elements of a proposed program and a "timetable" and "action plan" for the implementation of this program. The memorandum further recognized NYCPF's need to rely on the NYPD because the NYPD would be in the best position to know the names of Police Officers who had

college loans, whether these employees had attained a degree, and with which institution did these officers have loans. (Tr. 206).

On September 4, 2007, NYCPF's President issued a memorandum to the Commissioner stating that NYCPF was finalizing the college loan repayment program and would loosely model this program after the Federal Student Loan Repayment Program. (City Ex. 11). This memorandum draws from the July 23, 2007 memorandum and details some specifics of the college loan repayment program and involvement of both NYCPF and the NYPD. Additionally, it sets forth that this program would provide partial reimbursement for outstanding student loans in five annual payments as an employment incentive to candidates who:

> Posses a bachelor's degree from an accredited, four year educational institution earned prior to entry into the NYPD,
> Have outstanding debt held by a public or private institutional lender . . .,
> Successfully complete the Police Academy . . .,
> Remain employed in good standing.

(*Id.*). This memorandum further provides that NYCPF will "manage the funds and administer the program" and create an independent selection committee; establish eligibility requirement and make all final decisions based on information provided by the applicant." (*Id.*). NYCPF's President testified that, under this plan, NYCPF would hold the funds raised in their account, would make payments, keep track of payments, and "do all the paperwork." (Tr. 203). However, NYCPF's President testified that NYCPF never formed an independent selection committee referenced in this memorandum. (Tr. 204).

At a September 2007 NYCPF Executive Committee meeting, the tax implications of the college loan repayment program and NYCPF's request to IRS "to allow awards to be hardships and tax-free" were discussed. (*Id.*). On October 16, 2007, NYCPF's Executive Committee further discussed this program, stating that NYCPF will manage the funds and administer the program," but the NYPD would "advertise the program; determine the number of eligible candidates; determine the amount due for outstanding loans; and administer the applications forms." (Union Ex. 21). To that end, NYCPF sent out "Program Summaries" soliciting funds for the college loan repayment program. (City Exs. 17 and 18). NYCPF's President further testified that, since NYCPF is staffed only by eight full-time employees, including NYCPF's President, and one part-time employee, most of the administrative and ministerial work could not be handled by NYCPF, thereby requiring this organization to enlist the assistance of the NYPD and its employees. Specifically, NYCPF looked to the NYPD to communicate to them whether certain Police Officers, "were still employed and whether . . .[they] remained in good standing." (Tr. 212).

On October 22, 2007, NYCPF issued a press release announcing that the college loan repayment program, which would be funded by an initial donation by one private contributor in the amount of $1.5 million, would commence with the class entering the police academy in January 2008. This press release also stated that eligible recruits could receive up to $15,000 over the course of five years. Additionally, this press release stated that this program would be managed

and administered by NYCPF, would be funded completely by donations from private benefactors, and would start making payments to lending institutions upon the recruits' completion of the police academy. Additionally, if any beneficiary of the program separated from service with the NYPD for any reason during the initial five year period during which loan payments were made by NYCPF, it would not attempt to recoup such payments.

The next day, on October 23, 2007, the PBA sent a letter to Deputy Commissioner John Beirne requesting a meeting to discuss the college loan repayment program.[7] 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 the PBA to contact NYCPF regarding the parameters of the college loan repayment program. According to the Union Vice-President, the college loan repayment program severely undercut the "Education Pay" proposal made by the PBA and had a deleterious effect on its collective bargaining leverage and the manner in which the Union was viewed by its members. (Tr. 42-43). During cross-examination, he admitted that the Union's proposal to the NYPD concerning "Education Pay" was different from the college loan repayment program because the PBA's proposal called for "premium pay" to be given to Police Officers based on their academic achievements, as opposed to the direct repayment of loans on behalf of officers at issue here. (Tr.

[7] At the time of this program was announced, the 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.

35-37).

On November 13, 2007, the Commissioner further briefed NYCPF's Board of Trustees, in part, on the status and logistics of the college loan repayment program. Also in November 2007, Ryan Nivakoff, who is a former Police Officer, attended his orientation session for new recruits and was informed that the NYPD "was going to be offering $15,000 in tuition reimbursement . . . as an incentive to continue the . . . process." (Tr. 51). Nivakoff testified that, on January 7, 2008, which was the day he was appointed and sworn into service for the NYPD, he and other new recruits were given a college loan repayment program application form. He was instructed that if he had any outstanding college loans, he should complete that form, which sought such pertinent information as where he went to school, official school records verifying the receipt of a degree, and all relevant student loan information, including name and address of the lending institution. (Tr. 52; *see also* Union Ex. 7). Nivakoff testified that he was advised by the NYPD personnel present at that meeting that in order to be eligible for the college loan repayment program, employees had to have incurred student loan debt and needed to maintain employment with the NYPD, as well as other criteria Nivakoff could not specifically recall at the time of his testimony. The following day, January 8, 2008, Nivakoff submitted the completed version of this form to a police academy instructor. (Tr. 55).

Nivakoff further testified that in March 2008 he was "approached by his company

sergeant," Elliot McGuiness,[8] who instructed Nivakoff to re-submit the college loan repayment program application because that office "had either lost the [first set of] forms or needed us to do it over again." (Tr. 53). According to Nivakoff, the recruit operations office instructed the company sergeants He testified that he and other recruits within his company were instructed by their company sergeant to complete another college loan repayment program form and re-submit them to "the recruit operations office in room 523" at the academy. (Tr. 70).

According to Police Officer Timothy Fox, his primary tasks included performing administrative tasks involving paperwork because "there was a ton of paperwork with all new recruits. We were there to help out." (Tr. 78-79). Police Officer Fox testified that he was familiar with the college loan repayment program because he "was in charge of organizing the paperwork" for this program. (Tr. 80). He also testified that a sergeant placed him in charge of six other "holdovers" and assigned them with the task of organizing the completed application forms; and this task, which took these "holdovers" two days to complete, occurred on the sixth floor of the police academy, which houses some of the administrative offices for the police academy. (Tr. 81-82). Police Officer Fox further stated that he was never aware of NYCPF until he was contacted by the Union concerning the instant matter, despite his duties in connection with the college loan repayment program.

[8] The record reflects that the "company sergeant" is an unofficial rank amongst newly appointed NYPD recruits, "is the elected head of a particular company, generally 30 to 40 recruits," has "authority over other recruits," and typically has a military background. (Tr. 69).

Nivakoff further testified that, as late as November 2008, he was contacted by Sergeant Peter Krauss, who requested Nivakoff's "tax I.D. number and loan information so they [the NYPD] could process my tuition reimbursement." (Tr. 56). Nivakoff, who stated that he never heard of NYCPF before he was contacted concerning the instant matter, admitted on cross-examination that his student loans were never paid by NYCPF, primarily because he left the NYPD.

According to Sergeant Krauss, who is currently the technology coordinator for the NYPD's Chief of Personnel, he was responsible for administering the college loan repayment program on behalf of the NYPD and was in occasional contact with NYCPF concerning this program. He testified that he would receive completed college loan repayment program applications from Police Officer Fox and other such officers. He would then help "identify" particular recruits who would be eligible for this program by using a set of criteria "promulgated by the NYPD." (Tr. 97). The specific criteria used by Sergeant Krauss were as follows:

- Receive an overall rating of 3.0 on each Performance Evaluation
- Cannot be chronic A or B
- Receive no Charges & Specifications
- Has not been administratively transferred
- Has not received a Disciplinary Penalty of more than 10 days
- Cannot be suspended or on modified assignment
- Cannot be referred by Commanding Officer for placement into Monitoring Program

(Union Ex. 9).[9]

NYCPF's President testified that the general eligibility criteria for the college loan repayment program was established by NYCPF, and then communicated to the NYPD, but she admitted that she was not familiar with the NYPD's rating system as it relates to performance evaluation, the definitions of "chronic sick," or the performance monitoring program. (Tr. 157 and 236). She further testified that, although NYCPF created the general criteria of this program, which was that the Police Officer had to graduate the Police Academy, remain employed by the NYPD, have outstanding college loans, and must be in "good standing," the NYPD would be responsible for implementing the specific eligibility criteria and would simply provide NYCPF with a roster of eligible Police Officers. (Tr. 175).

[9] This document was provided by Chief Robert Lucena to Sergeant Krauss, who used this document to determine eligibility of candidates for the college loan repayment program.

Sergeant Krauss further testified that he would create a "profile" for each eligible candidate based upon the above-stated criteria, which was never seen by NYCPF. (Tr. 98). If a candidate for this program had no problems regarding disciplinary issues, sick leave usage, or performance evaluations, that candidate was approved to receive loan repayments from NYCPF. "Basically [a candidate has] to be disapproved for this program. We have to decide you can't get it [college loan repayments]." (Tr. 101). If a candidate had "some sort of blemish on their record," such as a pending disciplinary charge or a poor performance evaluation, Sergeant Krauss would obtain all relevant paperwork respecting it, and present that candidate to "the board."[10] (*Id.*). This board, comprised exclusively of NYPD personnel, and absent any NYCPF representatives, would then review the "personnel profile snapshot" provided to them by Sergeant Krauss concerning each respective candidates' eligibility, and determine the eligibility of the candidate, informing Sergeant Krauss of the decision. (Tr. 100). According to Sergeant Krauss, if a candidate's eligibility was in question due to "a simple thing like maybe somebody had charges that were exonerated, they [this board] would say, '[a]pprove that guy. . . . or if it's something more heinous they may say, [t]he person doesn't get the loan.'" (Tr. 102). In addition, during NYCPF's President testimony, she could not refute any of the contentions made by Sergeant Krauss concerning this board, their meetings, or the manner in which they deliberated and made

[10] According to Sergeant Krauss, this board consisted of Chief Lucena, who was Sergeant Krauss's direct supervisor, Deputy Inspector Theresa Tobin, and Inspector Jones. (Tr. 102).

decisions. (Tr. 170-171).

After candidates were approved, Sergeant Krauss sent to NYCPF a spreadsheet detailing the eligible candidates' names, tax numbers, social security numbers, the lending institution's information, the amount that is owed, and the account numbers. (Tr. 103; Union Exs. 10-12). According to NYCPF's President, NYCPF requested that this spreadsheet be sent over by the NYPD to NYCPF. This spreadsheet, which is compiled using a program created by Sergeant Krauss at the direction of Chief Lucena, would be sent to Diana Johnson at NYCPF. The names and information for the candidates who were deemed ineligible by the NYPD were never communicated to NYCPF. (Tr. 102). During this program's institution, NYCPF's President affirmatively stated that NYCPF never disagreed with a determination made the NYPD with respect to the eligibility of candidates or the college loan repayment of those candidates. (Tr. 240). In addition, NYCPF never exercised independent judgment as to whether a particular Police Officer was eligible for the college loan repayment program and never disagreed with a determination of the NYPD regarding a particular Police Officer's eligibility. (Tr. 171-172).

Sergeant Krauss also communicated with NYCPF when there were "discrepancies" concerning the repayment of a particular candidate's college loan. (Tr. 106). For example, if checks were mailed back to NYCPF because there was a change in lending institution, or a change in account numbers and mailing addresses, NYCPF contacted Sergeant Krauss, who would, in turn, contact the candidate, obtain the correct information, and then advise NYCPF of the correct

data. Also, Sergeant Krauss would contact participating Police Officers in order to determine "the current status of . . . [the] loan. (Union Ex. 30). On occasion, NYCPF referred Police Officers who were participating in this program to Sergeant Krauss when their college loan repayments were not received by their respective lending institutions because, according to Sergeant Krauss, he was the person responsible for sending out the actual checks he received from NYCPF to the respective lending institutions. (Tr. 118). According to NYCPF's President, NYCPF, upon receipt of the "spreadsheet," would then "send checks to the relevant lending institutions on behalf of the officers in . . . the eligible amount." (Tr. 170 and City Ex. 20).

According to NYCPF's President, once a Police Officer was deemed eligible for this program, NYCPF sent out a letter stating, in pertinent part:

> Police Commissioner Kelly recognizes the financial sacrifice you and officers like you made to join the ranks for the NYPD. He created the College Loan Reimbursement Program in 2007 to assist you . . . with your outstanding tuition indebtedness and asked the New York City Police Foundation to help
>
> On behalf of the Police Foundation, I am please to inform you that, as part of our College Loan Reimbursement Program, a payment of $ _____ will be made toward your tuition loan.

(Union Ex. 13).

NYCPF's President testified that, alternatively, if an applicant was rejected from this program, NYCPF would send a letter detailing the criteria for eligibility for the college loan repayment program and explained the reason for such disqualification. The City submitted a

sample exchange between a Police Officer, who initiated the correspondence, and NYCPF, in which NYCPF explained that the Police Officer was not eligible to participate, as the program was not retroactive for members of classes pre-January 2008 who were paid at the annual salary of $25,100. (City Ex. 16).

The record establishes that after the creation of the program, the NYPD monitored its implementation. Chief Lucena contacted various commands who had Police Officers participating in the college loan repayment program when information on their application was incorrect. Chief Lucena instructed these commands to contact Sergeant Krauss with any inquiries and made no mention of NYCPF. (Union Ex. 23). In addition to a record of all eligible Police Officers with loans supported with proper documentation within the eligible classes of cadets, the NYPD also maintained a record of all Police Officers who had applied for this program, the names and Tax I.D. numbers for those currently participating in this program, the names and addresses of the respective lending institutions, the amount initially loaned, the outstanding balance of the loan, and the payment awarded to these participants under this program, as well as the names and Tax I.D. numbers for those Police Offices who "were disqualified" and the reason for said disqualification. (Union Ex. 26; City Ex. 23). The NYPD further maintained a website within its private intranet specifically designated for Police Officers participating in the college loan repayment program, which contained such information as the name of the academic institution they attended, the degree they attained, the schedule of payments including amounts of such payments, and any applicable disciplinary notes in their personnel files. (Union Ex. 27).

According to NYCPF's President, after the starting salary for Police Officers in the police academy was raised, pursuant to a subsequent collective bargaining agreement, NYCPF decided to discontinue the college loan repayment program because the recruitment and retention concerns

had been ameliorated by the execution of a new collective bargaining agreement between the parties. (Tr. 245). Despite this program's discontinuance, payments continue to be made on behalf of Police Officers who were in the January and July 2008 classes who remain eligible for reimbursement. Finally, NYCPF's President states that she cannot "foresee having such a program again." (*Id.*).

The Union Vice-President testified that there are NYPD guidelines that prohibit Police Officers and other members of the NYPD from receiving gifts. According to the Union, NYPD Procedure No. 203-13, entitled "Financial Restrictions - Prohibited Acts" ("Procedure 203-13"), applies to the college loan repayment program. This provision, in pertinent part, prohibits:

> Accepting [a] testimonial award, gift, loan or thing of value to defray or reimburse any fine or penalty, or reward for police service except: (a) award from City of New York Employee's Suggestion Board, (b) award of Departmental recognition, (c) award to a member of officer's family for a brave and meritorious act, from a metropolitan newspaper, [and] (d) monetary prize or award from foundations, universities, institutions, etc., after review by the Deputy Commissioner, Legal Matters and the approval of the Commissioner.

(Rep., Ex. A).

Additionally, according to the Union, NYPD Procedure No. 203-16, entitled "Guidelines for Acceptance of Gifts and other Compensation by Members of the Service" ("Procedure 203-16"), applies to the college loan repayment program. This provision provides "guidance to members of the service relating to acceptance of gifts and other compensation . . . to insure that the

general public does not misinterpret the justification for these gifts." (Rep., Ex. B). Procedure 203-16 requires Police Officers who are offered such "gifts, awards and other things of value" to "comply with Department regulations relating to financial restrictions and prohibited acts/prohibited interests," and notify their commanding officer. (*Id*.). The commanding officer then reviews the circumstances regarding the offering of the gift and prepares a report for the Commissioner, "for review and final determination regarding acceptability of gift." (*Id*.).

POSITION OF THE PARTIES

Union's Position

The Union argues that the implementation of the college loan repayment program violates NYCCBL § 12-306(a)(4) and (5) because the college loan repayment program deals with a monetary benefit, which is mandatory subject of bargaining as defined in NYCCBL § 12-307(a).[11] Since no bargaining occurred concerning this program, the PBA was expected to accept the implementation of this program as a "*fait accompli*" without the benefit of collective bargaining. (Pet. ¶ 13).[12] Furthermore, the implementation of the college loan repayment program occurred

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[11] 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.

[12] NYCCBL § 12-307(a) provides in pertinent part:
"[P]ublic 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 . . ., working conditions and provisions for the deduction from the wages and salaries

while the City and the PBA were in the midst of bargaining, and by allowing them to be eligible for up to $15,000 for college loan reimbursements, the NYPD clearly changed the *status quo*.

The Union contends that the City's attempt to deflect responsibility for the implementation of the college loan payment program upon NYCPF is disingenuous and contradicts the NYPD's own procedures. First, this program was created at the behest of the Commissioner, who solicited from NYCPF additional money to supplement the wages for Police Officers who were attending the police academy. Second, Police Officers, as set forth in Procedure 203-13 and 203-16, are not allowed to accept gifts, awards, or loans unless they are reviewed by the Deputy Commissioner of Legal Matters for the NYPD and approved by the Commissioner. Thus, any Police Officer, including those in the police academy, would not be allowed to accept any monetary gift and/or award from any third-party entity without prior approval of the Commissioner. Based upon these facts, the City's argument that the NYPD does not control this program is disingenuous and, as such, the NYPD should be required to bargain over the economic benefit received by members of the PBA.

The Union further argues that the college loan repayment program application is disseminated by the NYPD, not NYCPF, and the application contains the NYPD logo. Police Officers were required to collect the completed applications, alphabetize them, review them for

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of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of an agency shop fee to the extent permitted by law.

completeness, and forward these completed applications to the administration office of the NYPD located on the 6th floor of the police academy. Further, the NYPD, through Sergeant Krauss and the board, decided eligibility and NYCPF was never part of these determinations. Based upon the foregoing, the NYPD exercised direct control over the management of the college loan repayment program, thereby bringing the monetary benefit received pursuant to this program within the scope of the NYPD and the PBA's collective bargaining relationship.

The PBA further alleges that the NYPD violated NYCCBL § 12-306(a)(1) by engaging in direct dealing with Police Officers by implementing the college loan repayment program, which gives a benefit to Police Officers that is not memorialized in the Agreement and which was implemented through circumvention of the Union and the collective bargaining process. By implementing this program, the NYPD interfered with the the PBA's ability to represent its constituency and has engaged in direct dealing.

Finally, the Union argues that the City's attempt to obstruct the adjudicatory procedures of the Office of Collective Bargaining and to patently misrepresent facts to the Board, should result in the striking of the City's Answer. Alternatively, the Union argues that a negative inference should be drawn against the City's for its behavior during the instant matter. The City refused to comply with an attorney-issued subpoena requesting the disclosure of all relevant, non-confidential material within the possession of the NYPD relating to the college loan repayment program. The City further ignored an order from the Trial Examiner presiding over

this matter on behalf of the Board directing the disclosure of the requested documents. All of this egregious behavior by the City resulted in motion practice, thereby further delaying the adjudication of the instant matter. Despite the fact that the NYPD finally cooperated with the disclosure of the documents initially requested, the Board should not condone such obstructionist behavior. As such, the Board should penalize the City for its attempt to conceal the truth about the college loan repayment program by refusing to disclose discoverable documents adverse to the NYPD's position.

City's Position

The City contends that the NYPD's implementation of the college loan repayment program does not violate any provision of the NYCCBL because this program is funded, managed, and administered by NYCPF, which is a wholly-independent entity from the NYPD and is a private non-profit organization incorporated under the laws of the United States and State of New York. Since the money awarded to Police Officers through the college loan repayment program comes from private donations, the NYPD cannot be held responsible for a benefit that it does not grant. Further demonstrating the independence between the NYPD and NYCPF, this program was created by NYCPF; the Board of Trustees for NYCPF had to approve use of the funds for this program; and NYCPF established the parameters that govern the college loan repayment program. In addition, the availability of funds through this program does not interfere with Police Officers' statutory rights under the NYCCBL because the NYPD did not determine how much money each

beneficiary receives. Therefore, the NYPD did not violate NYCCBL § 12-306(a)(4).

The City further argues that the NYPD did not violate NYCCBL § 12-306(a)(1) in the instant matter. The NYPD could not have committed an independent violation of this provision because, under the standard used by the Board, the NYPD did not engage in conduct that was either inherently destructive or comparatively slight. Simply stated, this provision only protects employees from acts committed by their employers and, since in the instant matter the NYCPF was the entity responsible for the college loan repayment program, the NYPD was incapable of interfering with the rights of Police Officers in the instant matter.

The City further argues that the NYPD did not violate NYCCBL § 12-306(a)(5). The PBA failed to prove any facts to support its position that the NYPD made a unilateral change to a mandatory subject of bargaining during a period of negotiations. First, NYCPF was the party responsible for creating, implementing and managing the college loan repayment program, and a third-party organization's action cannot be imputed to the NYPD. Second, this program does not overlap with any term and conditions contained in the Agreement, or in any proposed provision by the Union. Although the PBA argued that during negotiations for a successor contract to the Agreement it proposed an "Education Pay" provision, this proposal was quite different from the program at issue in the instant matter. The Union's proposed language rewarded all Police Officers based upon their respective level of academic achievement. The college loan repayment program was given only to Police Officers in the academy who graduated with a degree and who

had outstanding loans from their education.

DISCUSSION

The only issues remaining for determination in the instant matter deal with the NYPD's alleged creation, implementation and administration of the college loan repayment program. The Union contends that the NYPD violated NYCCBL § 12-306(a)(1), (4), and (5), by creating, implementing and managing this program which ultimately conferred an economic benefit, a mandatory subject of bargaining, without negotiations. In contrast, the City contends that the NYPD did not violate the NYCCBL with respect to this program because NYCPF, an independent third-party entity, was responsible for the creation and management of the college loan repayment program. Based upon the specific facts herein, we find that the NYPD was the impetus behind the creation of the college loan repayment program, implemented the means by which NYCPF funds were given to some Police Officers as an added monetary benefit, and administered and managed this program by establishing specific eligibility criteria and determining eligibility on an individual-by-individual basis for college loan reimbursement, and maintaining extensive records. Based upon the specific facts found herein, we conclude that the NYPD exercised effective control of the college loan repayment program. Through its exercise of control, the NYPD unilaterally granted an economic benefit to selected Police Officers, in violation of its duty to bargain under NYCCBL § 12-306(a)(4). We also hold, however, that the NYPD's action in the instant matter

did not constitute direct dealing in violation of NYCCBL § 12-306(a)(1) and (4) or a unilateral change in the terms and conditions of employment during *status quo*, under NYCCBL § 12-306(a)(5).

The PBA's primary claim is that the NYPD circumvented the collective bargaining procedure by unilaterally instituting the college loan repayment program. It "is an improper practice under NYCCBL § 12-306(a)(4) for a public employer or its agents 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." *DC 37, L. 1457*, 1 OCB2d 32, at 26 (BCB 2008); *see also SSEU, L. 371*, 69 OCB 10, at 4 (BCB 2002). "Mandatory subjects of bargaining generally include wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *Id*. (citing, *inter alia*, *DC 37*, 63 OCB 35, at 12 (BCB 1999)).

Both this Board and the New York State Public Employment Relations Board ("PERB") have consistently found that monetary benefits to employees, including reimbursement for college tuition are mandatory subjects of bargaining similar to wages. *NYSNA*, 11 OCB 2, at 14 (BCB 1973) (finding that "tuition reimbursement" constitutes a mandatory subject of bargaining); *see County of Suffolk*, 34 PERB ¶ 3034 (2001) (holding that "payment or reimbursement of the cost of education . . . is an aspect of employee compensation"); *Town of Henrietta*, 20 PERB 3013 (1987) (holding that employer "payment of educational expenses, whether work related or not, is

compensation and a mandatory subject of bargaining"); *see generally*, *DC 37*, 77 OCB 34, at 14 (BCB 2006).

However, both we and PERB have also held that an employer does not violate its duty to bargain in good faith when a benefit provided by a third-party entity is either given or rescinded, because the employer "can only be deemed to be responsible for its own actions." *DC 37*, 71 OCB 12, at 8-9 (BCB 2003); *see also New York City Transit Auth.*, 19 PERB ¶ 4623, at 4811 (ALJ) (1986), *aff'd*, 20 PERB ¶ 3025, at 3043 (1987) (finding that the New York City Transit Authority did not violate the Taylor Law when the NYPD deployed Police Officers to patrol subways in the absence of evidence that the Transit Authority "had any role whatsoever" in the NYPD's operational decision). In *District Council 37*, 71 OCB 12, at 8-9, we found that the New York City Health and Hospitals Corporation's rescinding the parking rights of New York City Fire Department employees could not be attributed to the Fire because decision to rescind the benefit was made by a third party, and not the employer.

Nevertheless, an employer is not always "insulated from the acts of independent entities when such acts are not beyond its reach and control." *City of Amsterdam*, 28 PERB ¶ 4516, at 4540 (1995). Where a public employer has the ability to exercise control, and ratifies the acts of the third party, or in fact exercises such control, the fact that the actions were performed through a third party does not remove them from the duty to bargain. *See City of Rochester*, 21 PERB ¶ 4541, *aff'd*, 21 PERB ¶ 3040 (1988), *conf'd sub nom. City of Rochester v. Pub. Empl. Rel. Bd.*, 155

A.D. 2d 1003 (4th Dept. 1989). In *County of Niagara*, 26 PERB ¶ 4582, at 4756 (1993), a public employer's control of activities carried on within the parks led PERB to reject the employer's claim that it could not control the actions of third parties who were performing grounds keeping duties within those parks. PERB found the employer's acquiescence in the third parties' activities to constitute a violation of its obligation to bargain. *See Id.*, 26 PERB ¶ 4582, at 4756. A similar example may be found in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), in which the United States Supreme Court held that an employer committed an unfair labor practice when an in-plant food service company raised prices of the food without bargaining. Because the employer's contract with the food service company allowed the employer to "retain the right to review and control the food services and prices," food pricing was a mandatory subject of bargaining and the failure to bargain over the change in those prices constituted an unfair labor practice. *Id.*, at 501-503.

Under the specific facts before us, we find that the NYPD exercised such control over the college loan repayment program, by its involvement in the creation, implementation, and administration of this program, as to be accountable for the program.. It is undisputed that, as early as May 2006, the Commissioner communicated to NYCPF his desire to provide Police Officers who were economically effected by the starting salary set forth in the Agreement with an additional economic benefit. After initially discussing it with the NYPD, NYCPF began developing a program to provide these officers with a monetary gift from this organization.

Additionally the record demonstrates that on a number of occasions, the NYPD asked NYCPF for a program that would provide these officers with financial assistance to help the NYPD counteract the deleterious effects that the $25,100 starting salary had on recruitment and retention.

NYCPF's President admitted as much and further explained that, without the Commissioner's approval, NYCPF would not have been able to offer such monetary award in the first place. NYCPF admitted that, in furtherance of the Commissioner's desire to economically supplement the pay of Police Officers subjected to the starting salary in the Agreement, it "would serve as a conduit." (Union Ex. 15). In addition, if the Commissioner had not sought such monetary assistance, NYCPF would not have initiated the college loan repayment program because NYCPF "is not in a position" to provide such assistance on its own initiative. (Tr. 164). Thus, we find that the record establishes that the NYPD essentially created the program that became the college loan repayment program. This finding is supported by the acceptance letter from NYCPF to the recipients of this program that states the Commissioner "created the College Loan Reimbursement Program in 2007 to assist you . . . with your outstanding tuition indebtedness and asked the New York City Police Foundation to help." (Union Ex. 13).

We find that the record is replete with evidence establishing that the NYPD also directly controlled, in significant part, the implementation of this program. Upon orientation into the NYPD, Police Officers were advised by personnel from the NYPD, not NYCPF, about the college loan repayment program. These officers received applications which contained the NYPD logo

on it from the NYPD, were instructed to complete these forms providing information such as where they graduated from and whether they had outstanding student loans, and return these forms to the NYPD, not NYCPF. In fact, both Nivakoff and Police Office Fox testified that they were not even aware of NYCPF's involvement in this program until they were contacted by the Union with respect to the instant matter. The applications were then organized by Police Officers, led by Police Officer Fox, at the police academy. Moreover, NYCPF's President admitted that at the outset of this program, NYCPF knew it would need the NYPD's assistance to obtain necessary information about the Police Officers and their respective lending institutions, and to handle the implementation due to the limited staff of NYCPF. Accordingly, we find the NYPD was the main party responsible for the implementation of the college loan repayment program.

We further find that the NYPD's involvement went well beyond administrative assistance and support, but rather constituted effective control over the college loan repayment program sufficient to find that the NYPD was the party responsible for instituting this program. It is undisputed that Sergeant Krauss was intimately involved in the administration of this program because of the myriad of tasks he performed in furtherance of this program. He was the sole person responsible for compiling a dossier on each applicant for this program using databases only available to the NYPD, and, in fact, created a program specific to the administration of this program. He also dealt with lending institutions, candidates and NYCPF when information was incorrectly listed on a candidates application.

Sergeant Krauss also was responsible for determining the applicants' eligibility, using a detailed criteria established by the NYPD to review the applications. (Union Ex. 9). Although the City contends that NYCPF established the eligibility criteria for this program, we find that the actual criteria used by the NYPD differed by a significant degree. While NYCPF offered a vague set of criteria for eligibility, the NYPD created a set of specific requirements for eligibility, limiting benefits to candidates who:

- Receive an overall rating of 3.0 on each Performance Evaluation
- Cannot be chronic A or B
- Receive no Charges & Specifications
- Has not been administratively transferred
- Has not received a Disciplinary Penalty of more than 10 days
- Cannot be suspended or on modified assignment
- Cannot be referred by Commanding Officer for placement into Monitoring Program

(Union Ex. 9). Essentially, the NYPD inserted its own, highly specific refinements to NYCPF's criteria, and distributed its list to Sergeant Krauss who then made eligibility determinations based upon this standard. Moreover, NYCPF's President testified on cross-examination that she was not familiar with the NYPD's "Monitoring Program," could not define "chronic A or B," did not know what a "3.0 on each Performance Evaluation" signified, and could not explain the term "administratively transferred."

If the applicants satisfied the criteria, Sergeant Krauss would approve that applicant and initiate the paperwork so that the applicant could receive funds pursuant to this program. If the

applicant had "some sort of blemish" on his/her record, he would refer the applicant's file to a board of three high ranking NYPD officers, who would then make the ultimate determination on whether that applicant received funds under the program. After either Sergeant Krauss or the board made their determinations regarding the eligibility of the applicants, the names and requisite information of the approved candidates were communicated to NYCPF via a spreadsheet that Sergeant Krauss forwarded to NYCPF. It is unrefuted that the names of the rejected candidates were never sent over to NYCPF. Moreover, NYCPF's President testified that neither she, nor NYCPF, ever challenged the determinations from the NYPD or requested to see the names of the applicants who were rejected. Essentially, the NYPD was the sole party responsible for determining which applicant would receive reimbursement pursuant to this program. Based upon these salient facts, we must find that the NYPD was the sole party responsible for administering this program, and thus exercised sufficient control over the college loan repayment program.

Furthermore, we note that the Commissioner, as set forth by Procedure 203-13 and Procedure 203-16, has the ultimate authority to allow Police Officers to receive any type of added monetary award. Generally, Procedure 203-13 prohibits, among other things, Police Officers from accepting any award or gift as reward for police service except monetary awards from foundations after review and approval by the Commissioner. Additionally, Procedure 203-16 provides guidance to Police Officers insuring that the general public does not misinterpret the justification for these gifts. This provision requires Police Officers who are offered gifts and

awards covered by Procedure 203-13 to comply with the NYPD regulations relating to such financial restrictions, to notify their commanding officer, who then prepares a report for the Commissioner, for review and final determination regarding acceptability of a particular gift or award. Essentially, Police Officers cannot receive additional monetary benefits related to their status as Police Officers without the authorization from the Commissioner. Furthermore, NYCPF's President testified that NYCPF would not be able to provide any award, gift or service to Police Officers if the Commissioner did not allow it.

Accordingly, based upon these facts, we find that the college loan repayment program is a mandatory subject of bargaining, monetary compensation in the form of college loan reimbursement, and that the NYPD exercised sufficient control over the creation, implementation and administration of this program to require it to bargain. Therefore, by unilaterally instituting and administering this program, the NYPD violated NYCCBL § 12-306(a)(1) and (4).[13] *See NYSNA*, 11 OCB 2, at 14 (BCB 1973); *Town of Henrietta*, 20 PERB 3013 (1987); *see generally, DC 37*, 77 OCB 34, at 14 (BCB 2006).

[13] Having determined that the NYPD violated its duty to bargain in good faith, under NYCCBL § 12-306(a)(4), by instituting the college loan repayment program, we further find a derivative violation of NYCCBL § 12-306(a)(1). *See MEBA*, 3 OCB2d 4, at 24 (BCB 2010); *DC 37, AFSCME*, 77 OCB 34, at 18; *see also DC 37*, 71 OCB 20, at 5-6 (BCB 2003) (when an employer violated its duty to bargain in good faith, there is a derivative violation of NYCCBL § 12-306(a)(1)).

The record does not support the City's claim that NYCPF, not the NYPD, was the party responsible for the creation, the implementation and the administration of the college loan repayment program. NYCPF is a non-profit corporation organized under Internal Revenue Code § 501(c)(3); it has its own Board of Trustees, Executive Committee and President; and the Commissioner does not hold any position within this charitable organization. The City argues that NYCPF was the primary party responsible for this program because, after the Commissioner petitioned NYCPF for monetary assistance for new Police Officers, NYCPF engaged in a series of independent activities to organize a college loan repayment program and to secure donations to fund it. In addition, NYCPF issued checks to the recipients' respective lending institutions, issued IRS Forms 1099 to the recipients, sent out letters of acceptance to Police Officers, and, in certain instances, sent declination letters to applicants who were deemed ineligible for this program. Finally, NYCPF made the ultimate decision to stop accepting applications from new police academy classes.

We do not suggest any impropriety on the part of NYCPF under its bylaws or any governing law. However, the overwhelming evidence in the record before us demonstrated that the NYPD was the party mainly responsible for the creation, implementation and administration of the college loan repayment program. Although NYCPF performed some ministerial tasks related to this program, such as issuing checks and letters of acceptance, its level of management was minimal. It never established an independent selection committee or kept extensive records

about the candidates receiving funds pursuant to this program. Instead, NYPD made all the eligibility determinations, applied it own eligibility criteria, and rejected applicants, who did not meet the NYPD-established criteria. NYCPF never questioned or reviewed the independent judgment of the NYPD with respect to any of the NYPD's decisions. Further, the NYPD maintained extensive dossiers on the recipients and established a website for the college loan repayment program on the NYPD intranet. Given these facts, we conclude that NYCPF merely provided the funding for an operation that was managed on a day-to-day basis by the NYPD.

Accordingly, based upon all these facts, we find that the NYPD and not NYCPF was responsible for the institution, implementation, and administration of the college loan repayment program. The NYPD's unilateral actions in this regard violated its duty to bargain in good faith as to a mandatory subject of bargaining. *See City of Amsterdam*, 28 PERB ¶ 4516; *County of Niagara*, 26 PERB ¶ 4582; *Ford Motor Co.*, 441 U.S. at 501-503; *contrast New York City Transit Auth.*, 19 PERB ¶ 4623, at 4811 (ALJ) (1986), *aff'd*, 20 PERB ¶ 3025, at 3043 (1987); *DC 37*, 71 OCB 12.

The Union, in the instant matter, also claims that the NYPD, through its decision to unilaterally institute the college loan repayment program, violated the NYCCBL, by engaging in conduct that constituted direct dealing. Direct dealing with union members may violate the NYCCBL, when there is an accompanying threat of reprisal or promise of benefit." *SSEU, Local 371*, 69 OCB 1, at 8-9 (BCB 2002); *see Committee of Interns and Residents*, 49 OCB 22, at 22

(BCB 1992) (holding that, in order for the union to prevail in a direct dealing claim, it must prove that the direct dealing contains a threat of reprisal or force, or promise of benefit, or if the direct dealing otherwise subverted the members' organizational and representational rights). Further, a violation may be found where an employer impermissibly bypasses the employee organization for the purpose of negotiating or attempting to negotiate with "an employee or a group of employees aimed at reaching an agreement on the subject under discussion." *SSEU, Local 371*, 2 OCB2d 28, at 10 (BCB 2009) (citing *Dutchess Comm. College*, 41 PERB § 3029 (2008)).

We find that the record does not support a claim of direct dealing. The record does not demonstrate the NYPD threatened any reprisal against the Police Officers or subverted the organizational rights of the PBA by instituting this program. In contrast, in *Uniformed Firefighters Association*, 69 OCB 5 (BCB 2002), the union proved a claim of direct dealing when the head of the agency disseminated a letter which focused on benefits that employees would gain if they favored the position of the employer and rejected the position of the union and its leadership. Here, the NYPD informed Police Officers of a program that would benefit the eligible employees in reducing their college debt, but never stated or insinuated that the Union opposed this program, and never threatened reprisal if Police Officers did not avail themselves of this additional monetary benefit. *See Committee of Interns and Residents*, 49 OCB 22 (no direct dealing occurred when the employer merely laid out several options available to employees and made no mention of the union). Nor did the NYPD condition, explicitly or implicitly, receipt of

the benefits on employees' taking any position on matters involving the Union. Therefore, we cannot find that the NYPD violated the NYCCBL through direct dealing with Police Officers.

Nor did the NYPD, by instituting the college loan repayment program, violate NYCCBL § 12-306(a)(5) by unilaterally changing a term and condition of the Agreement during a period of *status quo*. In the past, we have held that a failure by the employer "to continue all the terms of an expired agreement until a new agreement is negotiated . . . states a claim of an improper practice." *LaRiviere*, 39 OCB 36, at 12 (BCB 1987); *see also CWA, Local 1180*, 69 OCB 28, at 13 (BCB 2002) (the employer is required to "maintain the provisions of the expired collective bargaining agreements during the period of negotiations"). In *LaRiviere*, we found that the union satisfied its *prima facie* burden demonstrating that the employer unilaterally changed, during *status quo*, the work schedules of ferry boat officers, which were set forth in the parties' previous collective bargaining agreement. Here, the college loan repayment program was never part of the parties' previous collective bargaining agreement. In fact, the Union Vice-President affirmatively stated that neither side ever sought to bargain over any type of compensation that was linked to academic achievement. Although the Union argues that during the round of bargaining immediately following the Agreement, the PBA proposed an "Education Pay" provision which provided for "premium pay" to Police Officers who attained delineated levels of academic achievement, the record is clear that no such provision existed at the time the PBA's proposal regarding this issue was exchanged with the City. Accordingly, we find no violation of NYCCBL

§ 12-306(a)(5).

Finally, with regard to the Union's request that this Board strike the City's Answer or alternatively draw an adverse inference against the NYPD for its failure to comply with the discovery process and an order from the Trial Examiner, we find that such relief is not warranted in the instant matter. This Board is troubled by the City's conduct during the litigation of the instant matter. We find that the City engaged in dilatory tactics regarding providing requested documents, that it filed, in the middle of the hearing, a belated and ultimately baseless motion to dismiss, and it presented a record displaying inconsistencies between its factual allegations and the evidence of its own witnesses. Nevertheless, we find that, in view of the lack of prejudice, and the fact that the Board has sustained the PBA's paramount claim herein and afforded them full relief, striking the City's Answer is not warranted. *Cf. Blake v. Chawla*¸ 299 A.D2d 437, 440-441 (2nd Dept. 2002). This finding should not be deemed to constitute approval of the City's conduct in this case.

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 petition filed by the Patrolmen's Benevolent Association, docketed as

BCB-2677-07, be, and the same hereby is dismissed, to the extent that it involves claims that the unilateral creation and implementation of the college loan repayment program is independently violative of NYCCBL § 12-306(a)(1) and (5); it is further

ORDERED, the petition filed by the Patrolmen's Benevolent Association, docketed as BCB-2677-07, be, and the same hereby is granted, only to the extent that it involves claims that the unilateral creation and implementation of the college loan repayment program is violative of NYCCBL § 12-306(a)(1) and (4); it is further

ORDERED, that New York City Police Department and its management cease and desist from unilaterally granting monetary benefits through the college loan repayment program without negotiating with the Union; and it is further

ORDERED, that New York City Police Department post appropriate notices detailing the above-stated violations of the NYCCBL.

Dated: New York, New York
April 6, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU

MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER

PETER PEPPER
MEMBER

NOTICE
TO

ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 3 OCB2d (BCB 2010), determining an improper practice petition between Patrolmen's Association, and the City of New York and the New York City Police Department.

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 petition filed by the Patrolmen's Benevolent Association, docketed as BCB-2677-07, be, and the same hereby is dismissed, to the extent that it involves claims that the unilateral creation and implementation of the college loan repayment program is independently violative of NYCCBL § 12-306(a)(1) and (5); it is further

ORDERED, that the petition filed by the Patrolmen's Benevolent Association, docketed as BCB-2677-07, be, and the same hereby is granted, only to the extent that it involves claims that the unilateral creation and implementation of the college loan repayment program is violative of NYCCBL § 12-306(a)(1) and (4); it is further

ORDERED, that New York City Police Department and its management cease and desist from unilaterally granting monetary benefits through the college loan repayment program without negotiating with the Union; and it is further

ORDERED, that New York City Police Department post appropriate notices detailing the above-stated violations of the NYCCBL.

THE NEW YORK CITY POLICE DEPARTMENT
DEPARTMENT

DATED

POSTED BY

TITLE

THIS NOTICE MUST REMAIN CONSPICUOUSLY POSTED FOR CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED DEFACED OR COVERED BY ANY OTHER MATERIAL