

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding :

-between- :

PATROLMEN'S BENEVOLENT
ASSOCIATION, :

DECISION NO. B-40-97

Petitioner, :

DOCKET NO. BCB-1879-96

-and- :

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

Respondents. :

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DECISION AND ORDER

On December 11, 1996, the Patrolmen's Benevolent Association (the "PBA" or the "Union") filed a verified improper practice petition and a verified petition for injunctive relief against the City of New York and the New York City Police Department (the "City" or the "Department") on behalf of certain members of the police service selected by the Department for assignment to investigative duties. The petitions allege that these officers have been coerced into signing waivers that would eliminate the Department's obligation, under Section 14-103(b)(2) of the Administrative Code, to designate them as Detectives and to pay them Detectives' wages after eighteen months of investigative service. The PBA claims that officers who do not sign the waiver will be redeployed to non-investigative assignments with no chance of promotion to the

position of Detective for the remainder of their careers. This coercion, according to the PBA, is an improper employer practice, in violation of Section 12-306a.(1) of the New York City Collective Bargaining Law ("NYCCBL").¹

The petition for injunctive relief sought "the maintenance of, or return to, the status quo. . ." The City filed its answer to the petition for injunctive relief on December 20, 1996, after twice receiving permission to extend its time to answer. The PBA also filed its reply on December 20th.

On December 23, 1996, the Board held a special meeting by telephone conference call to rule on the PBA's injunctive relief petition. The members unanimously decided to deny the petition without prejudice to resubmission, because there could be no irreparable harm in view of the temporary restraining order issued by a state Supreme Court justice in the related case of Scotto v. Giuliani, Index No. 121644/96 (N.Y. Co. Supreme Court, Tompkins, J.)

By letter dated December 24, 1996, the PBA requested that the Board reconsider its decision. By letter dated January 3, 1997, the City opposed the Union's request. On January 8, 1997, the Court issued a final decision in Scotto v. Giuliani, enjoining the City from requesting or requiring police officers to waive rights under Section 14-103 of the Administrative Code in

¹ NYCCBL §12-306a. provides, in pertinent part, as follows:

Improper practices: good faith bargaining.

a. Improper public employer practices.

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;

* * *

order to remain in investigatory assignments. On January 13, 1997, the Board members were polled individually to determine whether they were willing to reconsider their initial ruling on the PBA's injunctive relief petition. The Board unanimously denied reconsideration of the matter. It reiterated, however, that its denial was without prejudice to the resubmission of the petition in the event that circumstances changed.

Meanwhile, on January 3, 1997, the City filed its answer to the PBA's underlying improper practice petition. The Union filed a reply on January 13, 1997.

BACKGROUND

Under the Administrative Code, the position of Detective is not a separate civil service title; it is a discretionary assignment made by the Police Commissioner detailing police officers to serve in that capacity.² As part of a police officer's qualification for designation as Detective, the officer is assigned to work with experienced detectives for training and evaluation for a period of time. The time necessary for this training and evaluation has been a point of contention between the City and its police unions for many years. In July 1990, the New York State Legislature enacted legislation that amended the Administrative Code to provide that a police officer temporarily assigned to the duties of detective must be officially designated as a detective if he or she performs the duties of a detective in excess of 18 months. This requirement, contained in Section 14-103.b.2. of the Code and known as the "18 month law", became effective

² See Section 14-103.a. of the Administrative Code.

as of January 19, 1991.

In September 1991, the Police Commissioner promulgated an order limiting the application of the 18 month law to select commands and units. The Detectives Endowment Association ("DEA"), on December 31, 1991, commenced an Article 78 proceeding to compel the Commissioner to comply fully with the law. By memorandum decision dated September 17, 1992 the Supreme Court (M. Altman, J.) ruled for the union. The ruling declared the Commissioner's order null and void, and ordered the Department to comply with the 18 month law. The City appealed and the Supreme Court's judgment was affirmed by the First Department³ and then by the Court of Appeals.⁴

By memorandum dated October 1, 1996, the Department's Chief of Personnel sent a memorandum to members concerned, inviting them to participate in a Career Path Program for investigators. To participate in this program, members were requested to sign and notarize a "Waiver of Rights Under Section 14-103(b)(2) of the NYC Administrative Code [the 18 month law]." On October 17, 1996, the Chief sent a teletype message to all investigative commands, directing them to ensure that each police officer eligible to participate in the waiver program is so informed, and telling them that officers not submitting a waiver will be redeployed to non-investigative assignments.

The DEA responded by commencing a new Article 78 proceeding challenging the use of

³ Scotto v. Dinkins, 194 AD2d 415, 599 N.Y.S.2d 235 (1993).

⁴ Scotto v. Dinkins, 85 NY2d 209, 623 N.Y.S.2d 809 (1995).

the waivers (Scotto v. Giuliani). It obtained a temporary restraining order on December 11, 1996, from Supreme Court Justice Harold Tompkins, which, in a decision rendered on January 8, 1997, was replaced by a permanent injunction. [According to media reports, the City has announced its intention to appeal.]

The PBA's instant improper practice charge alleges that the waiver, and its dissemination and alleged element of coercion, constitutes an independent violation of the NYCCBL, regardless of the pendency and status of the DEA's civil litigation.

POSITIONS OF THE PARTIES

PBA's Position

The Union maintains that the enactment of Administrative Code §14-103.b.2. establishes the maximum period of time a police officer can be required to serve in an investigative capacity before being designated a Detective. In its view, the Department lacks the authority to circumvent this section by unilaterally requiring police officers to agree to serve longer than 18 months as investigators before being designated as detectives. Alternately, the Union contends that if the Code's provisions can lawfully be varied through private agreement, that agreement must be the product of collective bargaining between the City and the PBA, which is the certified bargaining agent for the affected employees.

The Union notes that in opposing enactment of the 18 month law, then First Deputy Commissioner of the Office of Labor Relations Hanley and then First Deputy Mayor Steisel both

represented to the Governor's office that the issue previously had been negotiated by the Detectives Endowment Association, and that passage of the bill would undermine the overall collective bargaining process. In the PBA's view, this representation is tantamount to an acknowledgment that the subject of detectives' assignment and pay clearly is part of the collective bargaining process.

According to the PBA, the distribution of the waivers is nothing more than a coercive attempt to circumvent the Administrative Code. Referring to a departmental directive informing officers that not signing the waiver will result in their "redeployment," it contends that this term is a euphemism. The real meaning, the Union claims, is that officers who fail to sign the waiver will have a "red flag" entered into their personnel jacket, which will prevent them from ever receiving another investigative post or career-enhancing assignment.

City's Position

The City denies that any "red flagging" of officers' personnel files has occurred, and contends that waivers were sought only from officers participating in "special initiatives" involving the investigation of narcotics in four of the City's boroughs. Although the City admits that the waivers are beneficial to the Department, it contends that the waiver system was devised at the behest of the PBA, which allegedly had asked the Department to find a way to extend the time in which officers could work in the special initiatives program. According to the City, redeployment of officers not signing waivers was done solely for budgetary reasons, and will

have no long-term effect on their career or promotional prospects. It also notes that officers were afforded ample time to discuss the waiver with their union representative, attorney, or both before deciding whether to sign it.

The City concedes that the length of time during which a police officer could be assigned to investigative duties was once a permissive subject of bargaining, but maintains that "once an imperative statutory requirement was created, the subject was removed from those which could be bargained." It also contends however, that such legislation can be waived, as long as the waiver does not contravene the public interest. In this regard, the City claims that departmental representatives met with the PBA in August 1996, and with the DEA on several occasions thereafter to discuss the waivers. By the City's account, the PBA did not object to their use, but the DEA was adamant that the 18 month law left no discretion to detail police officers to investigative assignments for more than eighteen months. In the City's view, the DEA's court proceedings should take precedence, because that may resolve whether the parties are required to or capable of negotiating over the Department's use of the waivers.

The City denies that it "bypassed" the Union, or that it "negotiated" with individual employees. It claims that the PBA was aware of and was consulted on the waivers, and that "no threat of reprisal or promise of benefit" or "interference with organizational rights" was associated with their distribution.⁵ The Department assertedly did not fail to bargain over a mandatory subject of bargaining, because it did not bypass the PBA, and because, in any event,

⁵ Citing the Board's analysis of "direct dealing" in Decision No. B-17-92.

the NYCCBL, unlike the National Labor Relations Act, does not contain a direct dealing provision. Finally, the City contends that the relief sought by the PBA ("return any Police Officers who have been removed from investigative assignments") contravenes the statutory managerial authority of the Police Commissioner. It points out that the Commissioner always has had the clear and unequivocal discretion to assign personnel to and from investigative duties prior to the accrual of the eighteen months, under both Section 14-103.a. of the Administrative Code and the management rights provisions contained in Section 12-307b. of the NYCCBL.

DISCUSSION

Section 14-103.a. of the Administrative Code provides that:

The commissioner shall organize and maintain a bureau for detective purposes to be known as the detective bureau and shall, from time to time, detail to service in said bureau as many members of the force as the commissioner may deem necessary and may at any time revoke any such detail.

The language of this section clearly expresses the intent of the City Council to vest discretion solely in the Police Commissioner to detail members of the police force as detectives and to revoke the detail at any time at his pleasure. As we held in Decision No. B-15-77, the statute leaves no room for bargaining on the subject of detectives' tenure.⁶ Similarly, the statute leaves no room to bargain over detailing or revoking police officers' assignments to investigative duties.

⁶ Aff'd N.Y. Co. Supreme Court 8/7/78 (N.Y. Law Journal, May 18, 1978 at p.12); Aff'd 412 N.Y.S.2d 576 (1st Dep't 1979).

In this case, the PBA charges that the Department circumvented the Union and coerced unit members when it informed eligible police officers individually that they would be redeployed if they did not sign an agreement waiving their rights to be designated Detectives and paid Detectives' wage scale after eighteen months of investigative service, as required under Section 14-103.b.2. of the Administrative Code.

With respect to the PBA's bypassing the union charge, we find that because detectives' appointment and removal, like detectives' tenure, is a prohibited subject of bargaining,⁷ the City legally could not have reached any sort of agreement with the PBA affecting the Police Commissioner's discretion to detail and/or revoke police officers' assignments to investigative duties. Since this matter is outside the scope of bargaining, the PBA, in effect, had no standing under the NYCCBL to seek to bargain or otherwise interfere with the Commissioner's decision to ask selected officers to waive statutory rights to appointment and salary if they wished to continue serving in investigative capacities.

Similarly, even if police officers were coerced into waiving certain salary and appointment rights provided by Section 14-103.b.2. of the Administrative Code, as claimed by the PBA, this alleged deprivation of a right arising outside of the NYCCBL would be a matter falling outside this Board's improper practice jurisdiction under the NYCCBL. Since the Police Commissioner has the unilateral discretion to allow police officers to serve in investigative duties, his attempt to seek concessions from officers wishing to remain in such service, whatever

⁷ See Decision No. B-15-77 at 16.

other rights it may implicate, does not implicate rights protected under the NYCCBL.

We emphasize that in finding that the PBA's instant petition does not state a claim within the jurisdiction of the Board of Collective Bargaining, its dismissal is without prejudice to any rights that the PBA or any other individual or labor organization may have in another forum. More particularly, our determination should not be construed as having any impact whatsoever on the injunction issued by Supreme Court Justice Harold Tompkins in the matter of Scotto v. Giuliani, Index No. 121644/96.

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 improper practice petition filed herein by the Patrolmen's Benevolent Association, and docketed as BCB-1879-96 be, and the same hereby is, dismissed.

DATED: New York, New York
September 18, 1997

STEVEN C. DECOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI

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MEMBER