

Patrolmen's Benevolent Association, et al., 79 OCB 12 (BCB 2007)
[Decision No B-12-2007] (IP) (Docket Nos. BCB-2291-02 and BCB-2419-04)[consolidated].

Summary of Decision: Union moved for a Board order finding that the City was collaterally estopped from litigating whether Police Officers designated as Detective Specialists are third grade Detectives, an issue framed by the Board for hearing. The City argued that the court decisions relied on by the Union did not decide that issue, nor preclude its litigation in the present case. The Board denied the motion, finding that the courts had not determined the issues in dispute. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

**PATROLMEN'S BENEVOLENT ASSOCIATION, and
PATRICK J. LYNCH, AS PRESIDENT OF THE
PATROLMEN'S BENEVOLENT ASSOCIATION**

Petitioners,

- and -

**THE CITY OF NEW YORK, the
NEW YORK CITY POLICE DEPARTMENT and
RAYMOND W. KELLY, AS POLICE COMMISSIONER
OF THE CITY OF NEW YORK,**

Respondents.

INTERIM DECISION AND ORDER

On June 21, 2002,¹ Patrick J. Lynch, as President of the Patrolmen's Benevolent Association of the City of New York ("PBA" or "Union"), filed a verified improper practice petition, docketed

¹ This matter has had a complicated and unusual procedural history and has been intertwined with a subpoena enforcement proceeding in State Supreme Court as well as an appeal to the Appellate Division. In view of the age of this case and its procedural complexity, the details of its history will be set forth more fully below.

as BCB-2291-02, against Police Commissioner Raymond Kelly (“Police Commissioner”), the New York City Police Department (“NYPD” or “Department”), and the City of New York (“City”). The petition alleges that NYPD awarded merit pay to police officers in the form of a Detective Specialist designation without bargaining over the criteria and procedures for the award in violation of § 12-306(a)(1), (4), and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”). The City argues that this was not an attempt to award merit pay and, in any event, the right to designate police officers as Detective Specialists is within the Police Commissioner’s discretion. On July 26, 2004, the PBA filed another improper practice petition, docketed as BCB-2419-04, challenging the further designation of an additional 38 Police Officers as Detective Specialists allegedly as an award of merit pay without bargaining. The two petitions have been consolidated for hearing and determination. This decision addresses a motion to preclude made by the PBA in the course of the proceedings in these cases. For the reasons stated below, the Board denies the motion.

PROCEDURAL HISTORY

The Union’s claim that NYPD’s designation of Detective Specialists was a form of merit pay, advanced by the PBA in BCB-2291-02, was first considered by the Board of Collective Bargaining (“Board”) at a meeting held on September 25, 2003, at which time, pursuant to the request of the PBA, the attorneys for the parties were permitted to present oral argument. Following the meeting, by letter dated September 30, 2003, the PBA requested that the record remain open and an evidentiary hearing be scheduled. The next day, October 1, 2003, the PBA submitted to the Chair of the Board three forms of subpoena for signature, seeking the production of documents by the

Board, the Department, and the Office of Labor Relations. By letter dated October 3, 2003, the Deputy Director/General Counsel of the Office of Collective Bargaining informed the parties that the agency would not sign the requested subpoenas, but would make its own request for the production of such documents and/or information as the Board deemed necessary to its deliberations.²

In a second letter from the Deputy Director/General Counsel, dated October 3, 2003, the parties were directed to submit specified additional documentary evidence and information requested by the Board. The City responded by the date set by the Board and the PBA responded belatedly.³

After a careful review of the full record, the Board directed that a hearing be held on the following issue of fact:

whether the Emergency Services Unit officers who were designated Detective Specialists on February 19 and May 30, 2002, are detectives third grade?

The parties were informed of the issue noticed for hearing by letter dated February 2, 2004.

On February 5, 2004, counsel for the PBA submitted to the Chair of the Board two forms of subpoena for signature, again seeking documents referring or relating to the designation of Detective Specialists within the NYPD. By letter dated February 10, 2004, the request for subpoenas was denied, and the PBA was informed that if it desired the requested documents its counsel could act in accordance with § 1-11(c) of the revised Rules of the Office of Collective Bargaining (Rules of

² When the PBA questioned the refusal to sign its subpoenas, the parties were informed, by letter dated October 10, 2003, that the denial of the request for subpoenas was made with the concurrence of all Board members.

³ The City objected to the PBA's late submission. The parties were informed that the Board, at a meeting on October 30, 2003, because of the unique circumstances of the case, agreed to consider the materials submitted belatedly by the PBA.

the City of New York, Title 61, Chapter 1, as amended), which provides that, “Pursuant to CPLR § 2302, attorneys admitted to the practice of law in New York State may . . . issue subpoenas in accordance with applicable law.” Accordingly, the letter reminded the PBA that “counsel for the parties may issue their own subpoenas and, if necessary, seek their enforcement in the courts.” The PBA served subpoenas on the City and the Department on February 12, 2004. When the City did not comply, the PBA commenced a proceeding to enforce its subpoenas in New York State Supreme Court.

The Trial Examiner designated by the Board held a pre-hearing conference in this case on February 25, 2004, at which time the parties agreed to attempt to stipulate to the relevant facts. In the event a mutually acceptable stipulation of facts could not be reached, a hearing was scheduled to be held on June 3 and 4, 2004, subject to change if the pending subpoena issue was not resolved or judicially determined by then. On February 27, 2004, the PBA wrote to qualify what it believed it could and could not stipulate to. A further pre-hearing conference was held by the Trial Examiner on March 10, 2004, at which it became evident that the parties would not be able to stipulate to the facts.

On March 12, 2004, the PBA wrote to ask for clarification of the issue framed by the Board for hearing. The PBA asserted that the issues raised in its petition were broader than the issue framed by the Board. The City responded that the issue stated by the Board was appropriate. Copies of the parties’ letters were provided to the Board, which at its meeting on March 19, 2004, ruled:

The Board adheres to the question previously framed in the direction of hearing that was communicated to you in the letter of . . . February 2, 2004:

Whether the Emergency Services Unit officers who were designated Detective Specialists on February 19 and May 30, 2002, are

detectives third grade?

However, this question shall be understood to include the one police officer assigned to a precinct who was so designated on May 30, 2002, as well as the Emergency Services Unit officers referred to in [the] letter.

The parties were informed of this ruling by letter dated March 31, 2004.

The City wrote on May 12, 2004, and May 21, 2004, to express its concern regarding the relationship between the issue scheduled for hearing and matters presented in the continuing litigation in State Supreme Court over enforcement of the PBA's subpoenas, and to request clarification of the issue framed for hearing and guidance as to the relevance of information sought by the PBA in court. In its May 21 letter, the City also requested that the hearing scheduled for June 3 and 4, 2004, be adjourned until resolution of the subpoena issues. Counsel for the PBA orally agreed with the requested adjournment. By letter dated May 26, 2004, the Trial Examiner granted the adjournment, stated that the issue framed by the Board for hearing "could not be more clear," and declined to interject the Office of Collective Bargaining into questions of relevance raised in the court proceeding. The Trial Examiner noted that any relevancy issues that arise in the course of the agency's hearing will be ruled on at that time.

On June 2, 2004, the PBA submitted a letter and attachments evidencing additional appointments by the NYPD of Police Officers as Detective Specialists. The City objected to consideration of the submission. In a letter dated June 17, 2004, the Trial Examiner ruled that the information submitted was beyond the scope of the petition in this case, but that the PBA was free to assert any new and additional claims in a new petition, if it was so advised. In response to an allegation by the PBA that it would be submitting "in excess of 1,000 pages of documents" produced by the City in response to subpoenas issued by the PBA, the Trial Examiner cautioned that,

it appears that the scope of the subpoenas may extend well beyond the Board's request for information You may offer such documents as are relevant at the hearing in this matter, and I will rule on their admissibility in due course.

Finally, the parties were asked to confer and to propose dates so that the hearing could be rescheduled.

The PBA responded to the Trial Examiner on June 18, 2004, advising that the subpoena enforcement proceeding was still pending in court and arguing that the documents produced by the City to that date should have been submitted to the Board in October 2003 pursuant to the Board's request.

By decision dated July 26, 2004, the Supreme Court dismissed the PBA's proceeding to enforce its subpoena. *Lynch v. Office of Labor Relations*, No. 105360/04 (Sup. Ct., New York Co.). The PBA filed an appeal to the Appellate Division, First Department. At the request of the parties, the instant Board proceeding continued to be held in abeyance at that time, due to the pendency of the judicial appeal.

Also on July 26, 2004, the PBA filed a new improper practice petition, docketed as BCB-2419-04, raising substantially the same claim made in its original petition in BCB-2291-02, but alleging new facts related to NYPD's designation of an additional 38 Police Officers as Detective Specialists during the period from March 26 through June 25, 2004. By letter dated August 24, 2004, the City requested that BCB-2419-04 be held in abeyance pending the Board's determination of BCB-2291-02. The PBA, by letter dated September 8, 2004, opposed the City's request and offered its own request that the two cases be consolidated for purposes of hearing and decision. In a letter dated September 9, 2004, the Trial Examiner informed the parties that the request to hold BCB-2419-04 in abeyance was denied, the City was directed to serve and file its answer in that case,

and the PBA's request for consolidation was deferred, subject to renewal after completion of the pleadings.

On September 20, 2004, the Trial Examiner held a status conference to ascertain the parties' views on whether the improper practice proceeding should go forward while the PBA's appeal on the subpoena issue was pending. The Trial Examiner noted that the PBA had alleged that, with the court's assistance, numerous pages of documents had been produced by the City in response to the subpoena. He inquired whether the PBA believed it had enough information to proceed with a hearing. Counsel for the PBA responded that he believed that the PBA had not received all the documents that would be responsive to the subpoena and that its case would be prejudiced if it were required to go forward without them. The City's counsel argued that 1,000 pages of documents had been turned over to the PBA, that the subpoena was much broader in scope than the issue before the Board, and that the City was prepared to go forward at a hearing. The Trial Examiner stated that while the Board was ready to hold a hearing as soon as the parties were able to do so, it would not force the Union to go forward if it believed it required information that was the subject of pending litigation in the courts. Accordingly, the parties were directed to keep the Trial Examiner informed of the status of the appeal, and the scheduling of a hearing was adjourned *sine die* during the pendency of the appeal.

After the pleadings in BCB-2419-04 were complete, the PBA wrote to renew its request for consolidation on March 7, 2005. The City, by letter dated March 30, 2005, reiterated its objection to consolidation. No ruling on the request was made at that time since BCB-2291-02 was still being held in abeyance pending the subpoena enforcement appeal.

In March 2006, the attorney for the PBA informed the Trial Examiner that the Appellate

Division had issued its decision concerning the subpoena matter. *See Lynch v. Office of Labor Relations*, 21 A.D.3d 831 (1st Dep't 2005)(petition to enforce subpoena was properly dismissed; dispute was not ripe for adjudication). The Trial Examiner held a further conference on May 11, 2006, to deal with the consolidation issue and any other pre-hearing matters. At this time, the City withdrew its objection to consolidation, and the Trial Examiner ruled that the PBA's request for consolidation was granted.

The Trial Examiner gave the parties copies of a letter the Office of Collective Bargaining received from counsel for the Detectives' Endowment Association ("DEA"), the certified representative of employees serving in the Detective title. In his letter, dated May 1, 2006, the DEA's counsel requested the opportunity to view and copy any relevant documents filed in the present cases involving Detective Specialist designations, so that he could consider preparing a motion to intervene "so that the interests of DEA members can be protected." The Trial Examiner informed the parties that counsel for the DEA had been advised that the pleadings and briefs filed in Board cases are considered public documents; therefore his request to view and copy such documents would be granted. The PBA indicated that it would oppose any motion by the DEA to intervene. The Trial Examiner told the parties that in the event the DEA filed a motion to intervene, it would be required to serve the City and the PBA and all parties would be given an opportunity to respond.

The Trial Examiner reviewed with the parties the precise question, as amended, that had been framed by the Board for hearing:

Whether the Emergency Services Unit officers who were designated Detective Specialists on February 19 and May 30, 2002, together with the one police officer assigned to a precinct who was so designated

on May 30, 2002, are detectives third grade?

However, based on the consolidation of the PBA's two petitions, this question now would be expanded to include the additional Police Officers designated Detective Specialists on March 26, May 26, and June 25, 2004, as alleged in the second petition. The fundamental question in these consolidated cases is whether these various officers designated as Detective Specialists are detectives third grade.

At the May 11, 2006, conference, counsel for the PBA raised for the first time an argument that the issue framed by the Board already has been decided by the courts; therefore, there was no need to hold a hearing on this question.⁴ The City disputed that any court decision has addressed or is dispositive of the question framed by the Board. The PBA suggested that the dispute over this issue should be addressed by the Board on motion papers and without a hearing. The City agreed that the Board should decide this issue. Accordingly, the Trial Examiner established a schedule for the submission of motion papers to place this dispute before the Board for determination.

BACKGROUND OF THE MOTION IN THE CONTEXT OF THIS CASE

The PBA is the certified collective bargaining representative for all NYPD employees in the civil service title of Police Officer, except those designated as first, second, and third grade Detectives.⁵ All Detectives, including Detective Specialists, are represented by the DEA, which is

⁴ Nevertheless, the PBA contends that there are other factual issues beyond the question framed by the Board that warrant a hearing.

⁵ Certification No. 54-68.

not a party in this proceeding.⁶ The Police Commissioner is empowered by New York City Administrative Code § 14-103 (“Admin. Code § 14-103”) to designate Police Officers to serve as Detectives, including Detectives of the first, second, and third grade.⁷ The City asserts, and the PBA denies, that Detective Specialists are third grade Detectives.

Prior Related “Merit Pay” Litigation

On June 10, 1998, the PBA filed a verified improper practice petition alleging that NYPD violated NYCCBL § 12-306(a)(1) and (4) when it refused to bargain over a plan to designate 2,000 police officers as being on “Special Assignment,” for which they would have been paid a pensionable bonus of \$1,400 for one year. The City argued that the Special Assignment Differential (“SAD”), which has existed since 1972, had already been bargained for and that it was within NYPD’s discretion both to select police officers for the “special assignment” and to award the differential for it. The Board found that this particular use of SAD “was intended as a means to award certain officers merit pay” and that “disguising the incentive/merit pay increase as an assignment does not suffice.” *Patrolmen’s Benevolent Ass’n*, Decision No. B-4-99 at 12-13. The

⁶ Certification No. 5 NYCDL # 77.

⁷ Admin. Code § 14-103 provides in pertinent part that:

a. 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.

b. Of the members of the force so detailed the commissioner may designate:

* * *

2. . . . a certain number of police officers as detectives of the third grade, who while performing duty in such bureau and while so designated as detectives of the third grade shall be paid such salary as may be determined by the mayor. . . .

Board ordered that the City “cease and desist from unilaterally implementing the Special Assignment Differential in the manner described herein (i.e., merit pay) without negotiating concerning criteria and procedures with the petitioner’s bargaining unit.” *Id.* at 14.

In 1999, the parties met to discuss the criteria and procedures for the granting of merit pay to police officers, but no agreement was reached. Rather than continue bargaining, NYPD, by Teletype Message dated December 23, 1999, announced that it would promote and designate the same 2,000 officers as Detective Specialists, to “underscore the primacy of patrol, recognize high performers in the field, reward members of the service who have made major contributions to their command, and encourage members to remain in patrol assignments.” Under the existing salary structure, the 2000 police officers designated as Detective Specialists would realize an over \$6,000 annual pay increase in base salary, which was pensionable.

On December 29, 1999, the PBA commenced a proceeding in court pursuant to Article 78 of the N.Y. Civil Practice Law and Rules (“CPLR”) seeking enforcement of *Patrolmen’s Benevolent Ass’n*, Decision No. B-4-99, and an order enjoining the City from awarding merit pay to police officers in the form of a Detective Specialist designation without negotiating the criteria and procedures for their selection. The court granted the PBA’s petition and found that NYPD’s attempt to promote the same 2,000 police officers to Detective Specialists at an increased rate of pay with no additional duties violated the NYCCBL and was an attempt to award merit increases and circumvent the Board’s decision. *Patrolmen’s Benevolent Ass’n v. City of New York*, No. 125726/99 (Sup. Ct. N.Y. Co. Feb. 9, 2000) (Parness, J.). Judgment was entered on April 21, 2000, and the City appealed.

On February 19, 2002, NYPD issued a Teletype Message announcing that it intended to

promote and designate 15 Emergency Service Unit (“ESU”) Officers as Detective Specialists. On February 20, 2002, these Officers were so designated. Like other Detectives, they are represented by the DEA and are covered by the terms and conditions of the DEA’s collective bargaining agreement with the City.

According to the PBA, it advised NYPD that the 15 Detective Specialist designations were unlawful and, when NYPD failed to respond, the PBA wrote to the court on February 20, 2002, seeking a temporary restraining order enjoining NYPD from promoting these ESU Officers on the grounds that NYPD’s actions contravened the court’s April 21, 2000, judgment. The City opposed this application. On March 12, 2002, the PBA followed with a formal Order to Show Cause seeking an order adjudging the City and NYPD guilty of civil and/or criminal contempt of court for alleged violation of the April 21, 2000, judgment and granting injunctive relief reversing the City’s designation of the 15 ESU Officers to Detective Specialist. The court denied the PBA’s request and stated:

Justice Parness asserted jurisdiction and in his decision dated February 9, 2000, at p. 3 found “[t]here can be little doubt that [NYPD’s] current plan to ‘promote’ officers to the title of detective specialist is an attempt to award a merit increase and circumvent the order of the BCB.” Apparent from the decision of Justice Parness, when read in conjunction with the BCB order, and dispositive of the instant application, is that where the uniformed officers are performing specialized duties, as herein, the promotion to Detective Specialist is not clearly prohibited.

The Emergency Services Unit (“ESU”) of the Police Department of the City of New York (“NYPD”) is a specialized unit. It has often been said, and it was repeated in respondents’ affirmation in opposition and at oral argument herein, that “when people are in trouble they call the police; when the police are in trouble they call the ESU.” The members of the ESU receive intensive special training for approximately six months before being assigned to the field. On September 11, 2001 twenty-three members of the NYPD were killed, 14 of whom were members of the ESU. The 15 officers who received the designation of Detective Specialist on February 20, 2002 were those members of the ESU with the most seniority. While respondents concede

that the designation was to “reward” the members of the ESU for their valor on September 11, 2001, they assert that the designation was not a violation of the order of Justice Parness and further assert that the issues in this matter must first be presented to the Board of Collective Bargaining (“BCB”). This Court agrees. The application for further injunctive relief is denied, as the PBA has failed to demonstrate a likelihood of success on the merits. This Court need not and does not reach the issue of whether the designation of the 15 ESU officers to the rank of Detective Specialist was a permissible exercise of discretion under New York City Administrative Code § 14-103(b)(2).

Patrolmen’s Benevolent Ass’n v. City of New York, No. 125726/99 at 3-4 (Sup. Ct. N.Y. Co. Mar. 13, 2002) (Suarez, J.).

On April 5, 2002, the Appellate Division, First Department, vacated Justice Parness’ order and judgment entered April 21, 2000, which enjoined the City from promoting and designating the 2,000 police officers as Detective Specialists. The Appellate Division stated:

To the extent we can evaluate the programs from the record, the Special Assignment Program was, by its very nature, devised to allow the Department to quickly, and unilaterally, shift personnel from routine tasks to more specialized tasks, warranting increased remuneration because of the nature of the work, but to also shift officers back again to routine duty. Such assignments seem inherently transient. Patrolmen's Benevolent Association (PBA) has an understandable interest in negotiating the terms and conditions of such assignments and, equally important, criteria for making and unmaking individual assignments if additional remuneration is to be involved. That was the import of the BCB order, with which we do not, nor could we, take issue. The Detective Specialist Program, though, is different in one important respect so that, notwithstanding some parallels between the programs which are aptly noted by the motion court, it is qualitatively different. In the Special Assignment Program, merit increases are paid to employees in the same position, while in the Detective Specialist Program employees are designated to a different position based on merit. The designated officers in the Detective Specialist Program will be promoted to the rank of detective. The new rank correlates with a different and higher salary grade, and a different compensation ladder. In contrast with the earlier program, the promoted officers in the Detective Specialist Program, upon reaching top pay as Detective Specialists, would realize over \$6,000 in increases in their salaries which, as in the earlier proposed program, would be pensionable. The newly promoted detectives are represented by a different bargaining unit, the Detectives Endowment Association (DEA), which has an existing collective bargaining contract with the Department governing the terms and conditions of employment affecting its

members. An officer thus promoted to the rank of detective after three years attains a kind of tenure as such and cannot be demoted absent good cause or another such criterion established in that contract. Hence, even if a similar number of officers are likely to be affected (and given the Department's apparent intent to expand the program, that is not certain), and even if there is seemingly comparable initial funding for the respective programs, and even if each program envisages patrol rather than investigative or other duties, and even if a common motive to recognize merit may be discerned in the alternative programs, nevertheless they appear to be different programs, with different consequences for the Department and the designated officers and, obviously, for the PBA (which may well lose some 2,000 members). However, an evaluation of the merits of the Police Department's claim that such a promotional program is not subject to collective bargaining, and PBA's claim that such "promotions" are a sham devised to evade such a procedure, must be determined by BCB.

Matter of Patrolmen's Benevolent Ass'n, 293 A.D.2d 253, 254-55 (1st Dep't 2002). Nevertheless, NYPD did not thereafter designate these 2,000 police officers as Detective Specialists.

On May 29, 2002, NYPD sent a Teletype message that it intended to promote and designate another 17 ESU Officers as Detective Specialist on May 30, 2002.

The PBA brought another Article 78 proceeding seeking an order enjoining the City from designating the ESU Officers as Detective Specialists on the grounds that the promotions violated Admin. Code § 14-103(a) as well as the merit and fitness clause of the New York State Constitution ("Constitution") and the N.Y. Civil Service Law ("CSL"). The DEA moved to intervene. The court dismissed the petition for lack of subject matter jurisdiction finding that the issue whether there was a duty to bargain over the designation of the ESU Officers as Detective Specialists must first be raised before the Board. In dismissing the petition without reaching the PBA's statutory claims, the court relied on the PBA's statement in its reply that this action was fundamentally a dispute over whether these Detective Specialist designations involve merit pay which is bargainable. *Lynch v. Kelly*, No. 113292/02 at 4-5 (Sup. Ct. N.Y. Co. Dec. 26, 2002) (Friedman, J.).

The Instant Improper Practice Petitions

The PBA's June 21, 2002, improper practice petition in BCB-2291-02 challenges NYPD's February 19 and May 30, 2002, designation of ESU Officers as Detective Specialist, claiming that the designation is a form of merit pay which requires bargaining. The PBA seeks an order directing respondents to cease and desist from promoting and designating police officers as Detective Specialists without negotiating over the criteria and procedures for awarding such merit pay, or, in the alternative, an order declaring, first, that all ESU officers are entitled to a pay differential of \$6,000 per year in recognition of their "special assignment" and, second, that respondents cease and desist from promoting officers as Detective Specialists without negotiating the criteria and procedures for the award of merit pay. The PBA's July 26, 2004 petition in BCB-2419-04 challenges NYPD's further designation of an additional 38 Police Officers as Detective Specialists on March 26, May 26, and June 25, 2004. The petition alleges that these officers, like those previously so designated, did not receive new or additional duties commensurate with their designation, but were granted the designation as a retrospective award based on past accomplishments or performance. In the latter case, the PBA also seeks an order directing the City to cease and desist from promoting Police Officers to the rank of Detective Specialist without negotiating with the PBA concerning criteria and procedures for awarding what constitutes a form of merit pay.

The Present Motion

The PBA filed its motion on June 12, 2006, asking the Board to find, based on the decisions of the courts in three cited cases, that the City is collaterally estopped from relitigating whether Detective Specialist designations are within the Police Commissioners' powers under Administrative

Code § 14-103; is collaterally estopped from relitigating factual issues regarding the origins and purpose of the Detective Specialist title; and is precluded by the doctrine of estoppel against inconsistent positions from arguing that Detective Specialists are Detectives third grade.

The City answered, seeking denial of the motion in all respects.

POSITIONS OF THE PARTIES

Union's Position

Implicit in the PBA's position is the contention that the Police Commissioner's designation of Detective Specialists is not authorized by Admin. Code § 14-103, and that consequently, the question framed by the Board – whether Detective Investigators are third grade Detectives – must be answered in the negative. The PBA argues that the issue whether the Police Commissioner's designation of Detective Specialists is authorized by Admin. Code § 14-103 was actually litigated and necessarily determined in the Supreme Court in *Lynch v. Kelly*, No. 113292/02 (Sup. Ct. N.Y. Co. Dec. 26, 2002) (Friedman, J.). In concluding that the court lacked subject matter jurisdiction over the PBA's request for an injunction, the court necessarily decided that the issue was not one of statutory interpretation of Admin. Code § 14-103 but rather one of the application of the NYCCBL which was within the Board's exclusive jurisdiction. If the court had determined that Admin. Code § 14-103 was relevant to the Detective Specialist designation, it would have reached that issue, thereby ending the dispute. In declining jurisdiction and stating that the matter should be raised before the Board, the court can only have found that the Detective Specialist title is not authorized under Admin. Code § 14-103. Since the City was a party in the proceeding before Justice Friedman, it is collaterally estopped from relitigating this question.

The PBA also argues that the same issue was raised and decided in two other court proceedings. In each, the courts were asked to determine whether the promotion of Police Officers to the Detective Specialist position was violative of the determination of the Board in Decision No. B-4-99. In the first, the City relied on Admin. Code § 14-103 in seeking to avoid a finding of contempt. According to the PBA, the court (Suarez, J.) ignored the City's argument, recognizing that the dispute was a collective bargaining matter, not a matter of statutory interpretation. In the second case, an appeal from an injunction granted by the lower court (Parness, J.), the Appellate Division, in vacating the injunction, did not disagree that the dispute concerned a matter that was within the jurisdiction of the Board.

Moreover, argues the PBA, even if the Board were not precluded from considering the City's arguments based on Admin. Code § 14-103, a plain reading of that section reveals that Detective Specialists were never contemplated by its provisions. In order to determine whether another statute removes an otherwise mandatory subject from the bargaining process, the Board must examine whether the statute evinces a "plain and clear" legislative intent to remove a mandatory subject from negotiations despite "the strong and sweeping public policy of this State in favor of collective bargaining." Here, there is no indication that the legislature intended that Admin. Code § 14-103 remove the designation of Detective Specialists from collective bargaining.

The PBA further contends that factual issues concerning the origins and purpose of the Detective Specialist title, and the nature of the designations to that title, were litigated in the court proceeding before Justice Friedman and necessarily formed part of the basis for her determination. Therefore, the City is also precluded from relitigating those factual issues before the Board.

Finally, the PBA asserts that in the proceeding before Justice Friedman, the City alleged that

Detective Specialists have the status of third grade Detective, so it is precluded by the doctrine of estoppel against inconsistent positions from claiming in the present case that Detective Specialists are third grade Detectives.

In summary, the PBA asks that the Board credit the findings of the courts that the Detective Specialist designations are not authorized by the Police Commissioner's "limited" powers under Admin. Code § 14-103; give preclusive effect to other issues decided by Justice Friedman as to the genesis and purpose of the Detective Specialist title; and estop the City from taking a position inconsistent with its prior positions. By implication, the PBA asks the Board to find that Detective Specialists are not third grade Detectives, and to proceed to examine the merits of the PBA's claim that the designations to this title are a form of merit pay, in violation of the duty to bargain.

City's Position

The City argues that the PBA's motion is without basis in law or fact and that the three court decisions on which it relies do not support its contentions. None of the decisions makes findings, either explicitly or implicitly, concerning the Police Commissioner's broad powers to appoint Detectives and assign them within the NYPD. Indeed, two of the decisions explicitly state that they do not address the scope of authority given the Commissioner by Admin. Code § 14-103. The decisions of Justice Friedman and the Appellate Division only relegate to future Board proceedings the question whether the Detective Specialist designations are materially different from prior efforts by NYPD to designate certain Police Officers as Patrolmen Special Assignment.

Justice Friedman's decision explicitly states that the court,

need not and does not reach the issue whether the Detective Specialist designations are authorized by New York City Administrative Code § 14-103(a).

This language in this decision is fatal to the PBA's argument. Similarly, Justice Suarez' decision states that the court,

need not and does not reach the issue of whether the designation of the 15 [Emergency Services Unit] officers to the rank of Detective Specialist was a permissible exercise of discretion under New York City Administrative Code § 14-103(b)(2).

In addition, there is no basis for the PBA's claim that the Appellate Division decided any question concerning the applicability of Admin. Code § 14-103. In fact, the Appellate Division decision relied on by the PBA does not even mention Admin. Code § 14-103.

The PBA's "through the looking glass" argument that the courts must have determined that Admin. Code § 14-103 is inapplicable, notwithstanding what the courts wrote in their opinions, cannot overcome the explicit statements of the courts. Justices Friedman and Suarez wrote that the court "need not and does not reach the issue whether" Admin. Code § 14-103 permits or authorizes the Detective Specialist designations. Therefore, there cannot be collateral estoppel on this issue.

The fact that the in-house title of Detective Specialist is not referenced in Admin. Code § 14-103 does not support a conclusion that the Commissioner lacks the power to assign Police Officers to Detective positions in units whose functions are not primarily investigative. The courts in other cases have ratified the Commissioner's power to use Detectives for a variety of work, including work that is not investigative. The Board should examine external law, including Admin. Code § 14-103 and the court decisions interpreting the Commissioner's powers under that section, in considering the question whether the designation of Detective Specialists is within the scope of mandatory bargaining.

Finally, the City submits that it has not taken an inconsistent position regarding the status of

Detective Specialists. The City has never argued that Detective Specialists are anything other than Detectives. That the City once stated that Detective Specialists have the status of third grade Detective, and another time wrote that Detective Specialists are third grade Detectives, is of no consequence. To the extent the PBA argues that the former statement suggests that the Detective Specialists are still Police Officers, and that the latter statement implies that they are not, the PBA is mistaken. All Detective positions are assignments and not a separate civil service title. A member of the police force, upon being assigned as a Detective of any grade, including those assigned as Detective Specialists, retains his/her civil service status, which more often than not is as a Police Officer.

For these reasons, the City asks that the PBA's motion be denied.

DISCUSSION

The PBA's motion asks this Board to find, based on the decisions of the courts in three cited cases, that the City is collaterally estopped from relitigating whether the appointment of Police Officers as Detective Specialists is within the Police Commissioners' powers under Administrative Code § 14-103; as well as from relitigating certain factual issues regarding the origins and purpose of the Detective Specialist title. The motion also asks the Board to find that the City is precluded by the doctrine of estoppel against inconsistent positions from arguing that Detective Specialists are Detectives third grade. We find that the motion is without merit, and it is hereby denied.

This board has said that in order for an issue to be precluded by collateral estoppel, the issue must be: (1) identical with an issue in a prior action; (2) actually litigated and determined in the prior action; (3) necessary to the determination of the prior judgment. *Lieutenants' Benevolent Ass'n,*

Decision No. B-13-92 at 12; *Uniformed Firefighters Ass'n*, Decision No. B-39-90 at 13, fn.6; *Patrolmen's Benevolent Ass'n*, Decision No. B-22-86 at 10-11. The issued framed by the Board for hearing in this case is whether the Police Officers in question who were designated as Detective Specialists are third grade Detectives. We will examine whether that issue was raised, litigated, and necessarily determined in the court proceedings relied on by the the PBA.

The Union points first to the decision of Justice Friedman in *Lynch v. Kelly*, No. 113292/02 (Sup. Ct. N.Y. Co. Dec. 26, 2002). There, the PBA argued that the Police Commissioner's designation of 32 Police Officers serving in the Emergency Service Unit ("ESU") to the position of Detective Specialist, without change in duties or reassignment to the Detective Bureau, was not authorized by Admin. Code § 14-103(a) and was in violation of the merit and fitness provisions of Article V, § 6 of the State Constitution and Civil Service Law § 52. The PBA argues that this is the same issue raised by the City's assertion in the present case that the Detective Specialist designations are within the Commissioner's powers under § 14-103(a); and it contends that the issue was litigated and necessarily determined in the court proceeding before Justice Friedman.

The Union further relies upon the decision of Justice Suarez in *Patrolmen's Benevolent Ass'n v. City of New York*, No. 125726/99 (Sup. Ct. N.Y. Co. Mar. 13, 2002). In that case, the PBA sought to punish the City for contempt for designating 15 ESU Police Officers to the position of Detective Specialist in violation of an earlier order of the court enjoining NYPD. *Id.* (Feb. 9, 2000) (Parness, J.) Justice Suarez denied the petition, finding that the earlier order applied only to the designation of Officers who were performing ordinary patrol duties while the challenged designations involved Officers performing specialized functions. The PBA argues that the City's defense in that case raised the issue of the Police Commissioner's power to designate Detectives pursuant to Admin.

Code § 14-103(a), the same issue raised, according to the Union, in the present matter.

The Union also refers to the decision of the Appellate Division, First Department, in *Matter of Patrolmen's Benevolent Ass'n*, 293 A.D.2d 253 (1st Dep't 2002). That was an appeal from the first (February 9, 2000) order issued in above matter. The court reversed the order of the lower court (Parness, J.) and vacated the injunction. The PBA argues that although the City did not raise the issue of Admin. Code § 14-103(a) in the appeal, it is precluded from relitigating the question before the Board because it had a "full and fair opportunity to litigate the issue in the earlier action."

We observe, initially, that the issue identified by the PBA is not the same as the issue this Board framed for hearing. We asked simply whether Detective Specialists, as a matter of fact, are third grade Detectives. We did not seek to hold a hearing on the scope of the Police Commissioner's authority to appoint Detectives under Admin. Code § 14-103(a); that is a question of law that does not require a hearing. However, even assuming that the issue identified by the PBA was the same as or that it substantially overlapped with the issue framed by the Board, and that it was actually litigated in the two court proceedings, we find that the decisions of Justices Friedman and Suarez expressly indicate that they did not determine the issue. Justice Friedman dismissed the PBA's petition for lack of original subject matter jurisdiction, holding that the dispute concerned a collective bargaining dispute over a claim that the Detective Specialist designations were a form of merit pay, a matter that should have been presented to the Board through an improper practice petition. The court wrote,

In view of this holding, this court need not and does not reach the issue of whether the Detective Specialist designations are authorized by New York City Administrative Code § 14-103(a).

Lynch v. Kelly, *supra*, memorandum opinion at 5. Justice Suarez, on the other hand, dismissed the

PBA's contempt petition on the merits, finding that the injunction order had not been violated. In concluding, he wrote, similarly to Justice Friedman:

This court need not and does not reach the issue of whether the designation of the 15 ESU officers to the rank of Detective Specialist was a permissible exercise of discretion under New York City Administrative Code § 14-103(b)(2).

Patrolmen's Benevolent Ass'n v. City of New York, supra, memorandum opinion at 4. Finally, we note that the Appellate Division's decision in *Matter of Patrolmen's Benevolent Ass'n, supra*, does not mention any issue under Admin. Code § 14-103.

The PBA argues that, despite the Justice Friedman's statement that the court did not reach the above issue, the court necessarily must have decided that issue because it found that the dispute belonged within the jurisdiction of the Board, not the court. If the court had believed that Admin. Code § 14-103(a) had any relevance to the dispute, reasons the PBA, it would have retained jurisdiction and decided the question raised under § 14-103(a). Since it did not, the court must have found that § 14-103(a) did not support the City's actions. Similarly as to Justice Suarez' decision, the PBA contends that since the City's defense based on § 14-103 was "ignored" by the court, the court must have found that it did not authorize the City's actions.

The City characterizes this as a "through the looking glass" argument which is counterintuitive and wrong. This Board agrees. The plain language of the opinions of Justices Friedman and Suarez contradicts the PBA's contentions. We hold that the lower courts, here, cannot be deemed to have "necessarily determined" the issue identified by the PBA when they both have stated that they "do not reach" that issue, at least in the context of these cases. In addition, we do not read the courts' recognition that improper practice claims are within the jurisdiction of this Board as constituting a finding, implicit or explicit, on the merit or relevance of the Police Commissioner's

authority under Admin. Code § 14-103. Since the decisions of Justices Friedman and Suarez as well as the decision of the Appellate Division were all based on grounds other than the interpretation and/or application of Admin. Code § 14-103, any issue relating to that section has not been necessarily determined, so the doctrine of collateral estoppel cannot apply.

We next consider the Union's argument that because factual issues concerning the origins and purpose of the Detective Specialist title, and the nature of the designations to that title, were litigated in the court proceeding before Justice Friedman and necessarily formed part of the basis for her determination, they are entitled to preclusive effect in the present Board case. The PBA contends that that the court necessarily determined the facts regarding the origins and purpose of the Detective Specialist title in order to find that it lacked jurisdiction because the matter in controversy concerned a collective bargaining dispute. Specifically, the PBA claims that the court found:

1. That the Detective Specialist program is a merit pay program developed in the 1970's to reward Police Officers; and
2. Detective Specialists are not Third Grade Detectives, but Police Officers who continue to work in the patrol function.

Reference to the court's opinion is instructive. The matters the PBA characterizes as the facts regarding the origins and purpose of the Detective Specialist title are found in three sentences, consisting of seven lines, of the five-page decision. The opinion states:

The position was developed in the 1970's as a way of rewarding superior performance on the part of uniformed police officers, and of encouraging the development of specialized skills needed by the Department. Detective Specialists would receive the pay and shield of Third Grade Detective, but they would continue the patrol function, rather than performing traditional detective functions. For example, members of the Bomb Squad, officers who are members of the bar and serve as attorneys within the Department, and officers who serve as Training Officers have been designated as Detective Specialists.

Lynch v. Kelly, supra, memorandum opinion at 3. As acknowledged by the PBA, most of the facts stated by the court were not disputed by the City.

The portion of the court's opinion quoted above is, on its face, more in the nature of a background statement than a statement of findings of fact. A comparison of the text of the opinion to the wording of the two "findings" claimed by the PBA reveals that the latter differ in significant respects from language of the court. First, the court did not hold that the Detective Specialist program was a "merit pay" program; it said that the program was "a way of rewarding superior performance on the part of uniformed police officers, and of encouraging the development of specialized skills needed by the Department." We find that the Union's assertion that the quoted language equates to "merit pay" is not a fact but, rather, a legal conclusion drawn, not by the court, but by the PBA. Whether to draw that conclusion is a question the court properly identified as being within the jurisdiction of this Board to determine.

Second, the court did not say that Detective Specialists are not Third Grade Detectives. In fact, Justice Friedman's opinion states that "Detective Specialists would receive the pay and shield of Third Grade Detective." Whether receiving the pay, shield, and "status"⁸ of Third Grade Detectives is the same as, or different from, actually being Third Grade Detectives cannot be determined from the Justice Friedman's opinion. Interestingly, in explaining the differences between the designation of Detective Specialists and the Special Assignment Program previously held to constitute the payment of merit pay, the decision of the Appellate Division in *Matter of Patrolmen's Benevolent Ass'n, supra*, states:

⁸ The Union alleges the City previously took the position that Detective Specialists have the status of third grade Detectives.

The designated officers in the Detective Specialist Program will be promoted to the rank of detective. The new rank correlates with a different and higher salary grade, and a different compensation ladder. . . . The newly promoted detectives are represented by a different bargaining unit, the [DEA], which has an existing collective bargaining contract with the Department governing the terms and conditions of employment affecting its members.

293 A.D.2d 253, 254. This strongly suggests that the Appellate Division believed that Detective Specialists are Detectives. Ultimately, whether Detective Specialists are Third Grade Detectives is the factual issue framed by this Board for hearing in this matter. We find no basis to believe that the courts have precluded the parties' litigation and the Board's determination of that issue.

The flaw in the Union's argument that the City should be estopped from "taking inconsistent positions" is similar to that which we have described above regarding whether Detective Specialists are Third Grade Detectives. The "inconsistency" claimed by the PBA is that the City argued in court that Detective Specialists have the status of Third Grade Detectives, while in the present matter the City alleges that Detective Specialists are Third Grade Detectives. However, whether there is any material difference between having the "status" of Third Grade Detective and actually being a Third Grade Detective cannot be determined on the present record. Accordingly, we cannot determine that there is any "inconsistency" in the City's position.

For all of these reasons, the Union's motion to preclude the City is denied in all respects. The hearing previously directed by this Board shall be scheduled and held promptly so that a record can be adduced upon which these improper practice petitions can be determined.

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 preclude, filed by the Patrolmen's Benevolent Association against the City of New York and the New York City Police Department, in the improper practice proceedings docketed as BCB-2291-02 and BCB-2419-04, be, and the same hereby is, denied; and it is further

ORDERED, that the hearing previously directed to be held in these matters be scheduled and held promptly on the factual issue framed by the Board, as amended to date, specifically:

Whether the Emergency Services Unit officers who were designated Detective Specialists on February 19 and May 30, 2002, together with the one Police Officer assigned to a precinct who was so designated on May 30, 2002, and the additional Police Officers designated Detective Specialists on March 26, May 26, and June 25, 2004 are Detectives Third Grade?

Dated: March 29, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER

Note: City Member M. David Zurndorfer recused himself and did not participate in the decision in this case.