Patrolmen's Benevolent Association, et al., **79 OCB 32 (BCB 2007)**
[Decision No. B-32-2007] (IP) (Docket Nos. BCB-2291-02 and BCB-2419-04)[consolidated].

Summary of Decision: After the Board denied a motion to preclude based on allegations of collateral estoppel and ordered that a hearing be held, a second union (DEA) moved to intervene at the hearing. The petitioning union (PBA) opposed intervention. The Board granted intervention, finding that the motion was not untimely and the second union had a direct and substantial interest in the outcome of the proceedings. ***(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,

-and-

DETECTIVES ENDOWMENT ASSOCIATION,

Proposed Intervenor.

SECOND INTERIM DECISION AND ORDER

On March 29, 2007, the Board of Collective Bargaining issued Decision No. B-12-2007 in

which it decided a motion by the Patrolmen's Benevolent Association of the City of New York ("PBA" or "Petitioner") to preclude respondents the New York City Police Department ("NYPD" or "Department") and the City of New York ("City") from offering evidence or legal argument on the issue framed by the Board for hearing: whether specified Police Officers who have been designated Detective Specialists are third grade detectives. The PBA argued that the same issue already had been decided by the courts and that, therefore, there was no need to hold a hearing on this question. Rather, according to the PBA, the City was estopped from attempting to prove that officers in the Detective Specialist positions were detectives third grade. However, the PBA further contended that there were other factual issues beyond the specified question that did warrant a hearing. The Board held that neither collateral estoppel nor the doctrine of estoppel against inconsistent positions was applicable to preclude the City from offering evidence on the questions whether the appointment of Police Officers as Detective Specialists is within the Police Commissioners' powers under Administrative Code § 14-103; and whether, in fact, Detective Specialists are detectives third grade. Accordingly, the Board denied the motion to preclude and ordered that the hearing previously directed to be held in these matters be rescheduled and held.[1]

On June 8, 2007, the Detectives Endowment Association of the Police Department of the City of New York ("DEA" or "Intervenor") filed a "Verified Petition for Intervention," which the Trial Examiner, by letter dated June 11, 2007, deemed a motion to intervene pursuant to § 1-12(k) of the Rules of the City of New York, Title 61, Chapter 1 ("OCB Rules"). The PBA submitted papers in opposition to the motion on June 25, 2007, to which the DEA replied on July 9, 2007. The

[1] The complicated and unusual procedural history of these matters, which was intertwined with a subpoena enforcement proceeding in State Supreme Court as well as an appeal to the Appellate Division, is set forth in detail in Decision No. 12-2007 and will not be repeated here.

City did not take a written position with respect to the motion. Because the Board finds that the DEA has an interest in the outcome of these proceedings that is distinct from the interests of the City, and that intervention would not prejudice the rights of any other party, it grants the motion to intervene.

BACKGROUND

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.[2] All detectives, including Detective Specialists, are represented by the DEA, which heretofore has not been a party in these proceedings.[3] 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.[4] The City asserts, and the PBA denies, that Detective Specialists are third grade detectives.

---

[2] Certification No. 54-68.

[3] Certification No. 5 NYCDL # 77.

[4] 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. . . .

The PBA's improper practice petitions challenge NYPD's designation, on specified dates, of Emergency Service Unit ("ESU") Officers, as well as certain other Police Officers, as Detective Specialists. The PBA claims that the designation is a form of merit pay which requires bargaining. It alleges that the officers 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. 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 subject of the motion decided herein is the request of the DEA to intervene in the hearing ordered to be held in these matters and to file an answer "so that the interests of DEA members could be protected." The DEA previously, in May 2006, had requested and been granted permission to review and copy the pleadings filed by the PBA and the City. Following issuance of the Board's interim decision on the PBA's motion to preclude, the DEA filed its motion to intervene.

POSITIONS OF THE PARTIES

DEA's Position

The DEA states that since the PBA's first petition in this matter was filed in June 2002, hundreds of Police Officers assigned to the ESU have been designated as Detective Specialists. These Detective Specialists are third grade detectives and are represented by the DEA in every

respect. They receive the salaries, membership in the detectives variable supplement fund ("VSF") and welfare fund, and share in the prestige of being a detective and the esprit de corps that all members of the DEA enjoy. More importantly, they are eligible for promotion to second and first grade detective positions, which are not available to Police Officers.

The DEA argues that if the PBA is successful in its improper practice charges, the DEA will lose members, their dues, and a means of gaining additional members. This would negatively impact the viability of the DEA's bargaining unit. Additionally, if the PBA prevails, approximately 600 detectives who have been Detective Specialists may lose salary, the benefit of pension contributions, VSF status, and welfare fund contributions.

The DEA's intervention will not interfere with the processing of these cases or the conduct of the hearing. The DEA states that it will only be active in the hearing to protect the rights of its members and the maintenance of the Detective Specialist designation. It will not take a position on the PBA's arguments concerning the negotiability of the criteria and procedures for the designation of Detective Specialists, since that impacts only Police Officers who are not within the DEA bargaining unit.

If the DEA were permitted to file an answer as an intervenor, it asserts that it would raise as an affirmative defense the argument that the Police Commissioner's designation of ESU Officers to be Detective Specialists is a valid exercise of the Commissioner's powers under Admin. Code § 14-103 and that, therefore, the PBA's petitions fail to state a claim upon which relief can be granted.

In its reply (¶ 6), the DEA responds to the PBA's allegations concerning the delay that might be occasioned by the submission of further pleadings and the possibility of discovery, by stating that the DEA will forego its request to file an answer and will not seek discovery. The DEA also points

out (¶ 5) that there is no time limit for filing a motion for intervention under § 1-12(k) of the OCB Rules.[5] Because of the protracted litigation between the PBA and the City over discovery matters earlier in these proceedings, there was no need for the DEA to seek intervention prior to the Board's decision ordering a hearing, which was issued in March 2007.

PBA's Position

The PBA opposes the motion to intervene on the grounds that it is untimely and the DEA has no interest in the outcome of the proceedings. Neither the DEA nor any of its members will suffer any injury regardless of the Board's determination of the PBA's improper practice charges. To the extent the DEA has any interest, that interest is already being fully represented by the City. The PBA submits that the DEA's intervention would contribute nothing to the resolution of the improper practice charges and would further delay the proceeding, resulting in prejudice to the PBA.

Section 1-12(k) of the OCB Rules requires that motions for intervention be "timely made." The DEA's motion was made nearly five years after the PBA's first petition was filed in June 2002. The DEA did not even state any intention to intervene until May 2006, nearly four years after the petition was filed. The parties have already exchanged two sets of pleadings and engaged in discovery and motion practice. Delays of far shorter duration have been found by the courts to render intervention untimely.

---

[5] § 1-12(k) of the OCB Rules provides:
A person, public employer or public employee organization desiring to intervene in any proceeding shall file a verified written application and three copies thereof, setting forth the facts upon which such person, employer or organization claims an interest in the proceeding. Such application must be timely made, served on all parties and filed with proof of service. Failure to serve or file such application as above provided shall be deemed sufficient cause for the denial thereof, unless good and sufficient reason exists why it was not served or filed as herein provided.

Section 1-12(k) also requires that the person or organization seeking intervention be "interested" in the proceeding. While this term is not defined in the OCB Rules, the courts have looked to ascertain whether the movant has a "direct and substantial interest in the outcome of the litigation." Intervention should be restricted " where the outcome of the matter to be determined will be needlessly delayed, the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute." *Osman v. Sternberg*, 168 A.D.2d 490 (2d Dep't 1990).

The PBA argues that the DEA has no direct and substantial interest in the outcome of the litigation because the relief sought by the PBA is limited to a bargaining order and does not seek the removal of the designation from any Officer who already has been made a Detective Specialist. Thus, the DEA, which has disavowed any interest in the negotiability of the criteria and procedures for the designation of Detective Specialists, is not at risk of losing members nor are its members at risk of losing benefits. To the extent the DEA has an interest in maintaining its membership, that is not implicated in these improper practice proceedings.

The PBA contends that the DEA's intervention would further delay and complicate an already protracted proceeding. If granted, the DEA and the current parties would have to exchange pleadings. At the hearing, the DEA would have the right to present its own witnesses and to cross-examine the other parties' witnesses.

Moreover, the DEA's argument regarding the Police Commissioner's power to designate Detective Specialists has already been advanced by the City. DEA submissions presenting the same argument would add nothing to the resolution of the improper practice charges.

For these reasons, the DEA's motion should be denied.

DISCUSSION

The question presented on this motion is whether the DEA should be permitted to intervene in the ongoing improper practice proceedings between the PBA and the City. Because we find that the DEA possesses sufficient interest in the outcome of this litigation and that its participation will not prejudice the rights of the PBA, we grant the motion to intervene.

Intervention in proceedings under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") is authorized by § 1-12(k) of the OCB Rules. This Board considers requests to intervene on a case by case basis and in the exercise of its discretion under the NYCCBL and the OCB Rules. *See, e.g., Uniformed Sanitationmen's Ass'n*, Decision No. B-68-90 at 2; *District Council 37*, Decision No. B-6-82 at 2; *District Council 37*, Decision No. B-5-71 at 1. The courts have recognized that the allowance or denial of applications to intervene in administrative proceedings rests in the discretion of the agency. *Matter of Village of Pleasantville v. Lisa's Cocktail Lounge*, 33 N.Y.2d 618, 619 (1973); *Matter of Cortland Glass Co. v. Angello*, 300 A.D.2d 891, 892-893 (3d Dep't 2002). It has been held that the standard for permitting intervention in administrative proceedings is broader than that for standing to sue in judicial proceedings. *Matter of Cortland Glass*, 300 A.D.2d at 892-893. The provision for intervention in § 1-12(k) of the OCB Rules is analogous to the rule for intervention in judicial proceedings against bodies or officers set forth in § 7802(d) of the New York Civil Practice Law and

Rules ("CPLR").[6] The Report of the Advisory Committee on Practice and Procedure (NY Legis Doc, 1958, No. 13, 1958) states that this subdivision, although derived from the CPLR rules for intervention generally, grants a court broader power to allow intervention than would be the case in other judicial proceedings. *Accord, Matter of Elinor Homes Co. v. Lawrence*, 113 A.D.2d 25, 28 (2d Dep't 1985). It is within this framework that this Board considers the DEA's motion to intervene herein.

We are persuaded that the DEA has an interest in the outcome of these improper practice cases. Even accepting the PBA's representation that the remedy it seeks in these cases is limited to a bargaining order and it does not seek the removal of the designation from any Officer who already has been made a Detective Specialist, a remedial order, should the PBA prevail, necessarily would have an impact on the criteria and procedures by which future Detective Specialists are designated. The DEA claims that Detective Specialists are third grade detectives, whom the DEA is certified to represent, and that the remedy sought by the PBA may affect the means by which the DEA would gain additional members. We find that this potential impact on the membership of the DEA provides a plausible basis for the DEA's interest.

Moreover, the question for hearing posed by this Board, *i.e.*, whether Detective Specialists are third grade detectives, certainly involves the interests of the DEA. It is undisputed on this motion that the DEA currently represents Officers designated as Detective Specialists.[7] If upon the record

---

[6] CPLR § 7802(d) provides:
(d) Other interested persons. The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to intervene.

[7]. The DEA's claim in this regard finds support in a determination of the appellate courts. *See Matter of Patrolmen's Benevolent Ass'n v. City of New York*, 293 A.D.2d 253, 254 (1st Dep't 2002):

of the hearing to be held this Board were to find that Detective Specialists are not third grade detectives, it would appear that they would not be in the DEA's bargaining unit and could not be represented by them. Such a result clearly would affect the interests of the DEA. Accordingly, we find that the DEA has a direct and substantial interest in the outcome of these proceedings.

We do not accept the PBA's contention that the City adequately can represent the interests of the DEA. While both the City and the DEA contend that Detective Specialists are third grade detectives, the fact remains that the City is the public employer and the DEA is a labor organization. While we welcome labor-management cooperation generally, in the context of an improper practice proceeding we cannot assume that the interests of the employer and the union are entirely the same. We believe the union should be able to represent its own interests.

Finally, while it is true that the motion to intervene was filed several years after the improper practice petitions, in the unique circumstances of these cases we do not find the delay to render the motion untimely. As described in detail in our earlier interim decision in these matters, the cases have had a long and complicated procedural history, including litigation in the Supreme Court and Appellate Division concerning discovery issues, and a motion to preclude that was ruled upon by this Board. *See Patrolmen's Benevolent Ass'n*, Decision No. B-12-2007 at 2-9. It was only upon issuance of the Board's Decision on March 29, 2007, that these matters were ready to proceed to a hearing. The DEA's motion was filed just over one month later. We recognize that the courts have

---

> 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.

permitted intervention even as late as the appellate stage. Siegel, New York Practice (4th Ed. 2005) at 313. We hold that the DEA's motion is not untimely.

Since the DEA has stated that it will forgo any request to file an answer or to seek discovery, there will be no impediment to the prompt re-scheduling of the hearing in these matters. Therefore, for the reasons stated above, the motion to intervene is granted and we will permit the DEA to participate fully in the hearing.

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 intervene filed by the Detectives Endowment Association in the improper practice proceedings docketed as BCB-2291-02 and BCB-2419-04, be, and the same hereby is, granted; 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.

Dated: September 25, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER

PETER PEPPER
MEMBER

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