

Captains Endowment Ass'n, 79 OCB 42 (BCB 2007)

[Decision No. B-42-2006] (IP) (Docket No. BCB-2628-07).

Summary of Decision: The Union alleges that the City violated NYCCBL § 12-306(a)(1), (4), and (5) when NYPD made unilateral changes to existing evaluation procedures by changing the specified timing of a probationary Captain's performance evaluations and by changing the Captain's evaluator/rater from the commanding officer, as specified by procedure, to persons other than the commanding officer. The Board found that the petition was filed in an untimely manner and dismissed the claims in their entirety. ***(Official Decision Follows.)***

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

In the Matter of the Improper Practice Petition

-between-

CAPTAINS ENDOWMENT ASSOCIATION,

Petitioner,

-and-

**CITY OF NEW YORK and the NEW YORK CITY
POLICE DEPARTMENT,**

Respondents.

DECISION AND ORDER

On July 2, 2007, Captains Endowment Association ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD") alleging that the City violated New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") §§ 12-306(a)(1), (4), and (5) by unilaterally changing existing evaluation procedures by changing the specified timing of a probationary

Captain's performance evaluations and by changing the Captain's evaluator/rater from the commanding officer, as specified by procedure, to persons other than the commanding officer. The City argues that the claim was filed in an untimely manner and, in any event, should be deferred to arbitration. In the alternative, the City argues that the Union failed to establish a unilateral change in evaluation procedures or to establish that any changes that may have occurred involved a mandatory subject of bargaining. The Board finds that the petition was filed in an untimely manner and dismisses the claims in their entirety.

BACKGROUND

NYPD appointed Joseph Z. Davids to the rank of Police Officer on July 25, 1983. On May 29, 1992, NYPD promoted Davids to the rank of Sergeant and on February 27, 1998, he was promoted to Lieutenant. Davids was promoted to Captain on December 30, 2005. After a mandatory training course, NYPD assigned Davids to his command as Executive Officer of Police Service Area 8 ("PSA 8") on January 20, 2006.

Administrative Guide ("AG") 314-01, titled "Evaluations – General – Members of the Service" outlines the general procedures that a Commanding Officer and Rater or Reviewer should follow when evaluating uniformed and civilian members of the force. At the time of Davids' promotion to Captain, AG 314-01 provided that all newly promoted sergeants, lieutenants, and captains were to be on probation in a rank for a period of 18 months, but after completion of 12 months of probation, members could request that the balance of the probationary period be waived. On August 26, 2006, NYPD wrote a memorandum called a "Finest Message," which announced that, effective immediately, probationary periods for promotion to all supervisory ranks would be 12

months unless cause existed to extend the period an additional six months. Extension of a probation period beyond 12 months would be authorized on a case by case basis by the Police Commissioner. The Union does not contest this change in the instant matter. AG 314-07, titled “Evaluation of Captain Through Deputy Chief,” mandates that probationary captains be evaluated “three times during [the] probationary period, on the 4th, 10th, and 16th month, if necessary, using the Performance Evaluation Captain (PD 439-1518).” (Union Exhibit 1.)¹ A “Note” states:

The 16th month evaluation is only required for captains whose last six (6) months of probation have not been waived. Interim evaluations are to be submitted when necessary. . . . Raters must conscientiously evaluate probationary captains to ensure that members who are unable to satisfactorily perform their duties are identified. Those members in the rank of captain who are on probation, yet are serving in the capacity of commanding officer, may be rated on **PERFORMANCE EVALUATION CAPTAIN THROUGH DEPUTY CHIEF (PD439-1517)**. The bureau chief concerned will make the determination of which evaluation instrument is best suited to the ratee.

(Union Ex. 1.) (Emphasis in original.)

Furthermore, a section titled “Additional Data” states in part, “Captains assigned as precinct commanders will be rated by patrol borough operations commander and the patrol borough commander will serve as the reviewing officer.” (Union Ex. 1.)

The City asserts that during his tenure as Captain at PSA 8, Davids was instructed on how to properly perform his duties by his superiors, and when his performance was deemed to be below standards, he was counseled on numerous occasions, beginning in April 2006, on how to improve the quality of his work. (City Answer ¶¶ 48-55; City Ex. 7-8.) The Union admits that Davids’ superiors met with him but deny all of the other City allegations regarding this issue. On October 5, 2006, an Inspector held a supervisory conference with Davids to discuss the contents of his four

¹ The word “Exhibit” will hereinafter be abbreviated as “Ex.”.

month evaluation, which was prepared on September 25, 2006, for the period from January 20 through May 20, 2006. The evaluation had been completed by the Inspector and he rated Davids' performance as "Below Standards" on a majority of the items.

On November 1, 2006, a Deputy Inspector held a supervisory conference with Davids to discuss the contents of Davids' ten month evaluation, which was prepared on October 10, 2006, for the period from April 30, 2006, through October 29, 2006. The evaluation had been completed by the Deputy Inspector, in consultation with the Commanding Officer. The Deputy Inspector rated Davids' performance as "Below Standards" on a majority of the items. He recommended that Davids' probationary period be extended to the full 16 months. The City, in its pleadings, and in a supporting affidavit from an Assistant Chief, Executive Officer of the Housing Bureau of NYPD, claims that the two employees who completed Davids' evaluations, though not his Commanding Officer, were best-suited to serve as the raters on his evaluation. The claim is based upon the assertion that they had extensive experience, had knowledge of Davids' duties and responsibilities, had worked closely with him, and because his Commanding Officer was a newly assigned Captain. (City Answer ¶¶ 44-45; City Ex. 7.)

Davids' probationary period was extended but, according to the City, he remained unable to satisfactorily perform his duties. Davids was demoted to the rank of Lieutenant on May 29, 2007.

As a remedy, the Union requests that the Board order the restoration of the *status quo ante*, order NYPD to promote Davids to Captain effective the date of his demotion, restore any pay or benefits lost, and order the City to bargain changes in the evaluation procedures prior to any change.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that AG 314-01, AG 314-07, and past practice require that the commanding officer of the probationary captain complete a performance evaluation, as long as the probationary captain is not assigned as a commanding officer. Neither of the two NYPD employees who rated Davids were his Commanding Officer and neither indicated the length of time that they had supervised Davids on the evaluations. There have not been any revisions to the AG procedures. Furthermore, Davids' first four month evaluation was completed months after what is prescribed by AG 314-07 and only 15 days before his ten month evaluation was completed. As evaluation procedures are a mandatory subject of bargaining, NYPD's change in the evaluator/rater from the commanding officer to persons other than the commanding officer and the change in the timing of evaluation procedures unilaterally changes those procedures. Therefore, NYPD's actions in this matter violate the NYCCBL.

Although the City claims that this matter is time barred, the Union asserts that Davids had no notice that NYPD would not follow performance evaluation procedures until NYPD improperly ordered his demotion on May 29, 2007. Thus, the claim accrued on May 29, 2007, and the petition was filed in a timely manner on July 2, 2007. Additionally, the Union argues that the claim should not be deferred to arbitration because a unilateral change in performance evaluation procedures is not defined as a grievance by the parties' collective bargaining agreement.

City's Position

As a preliminary matter, the City argues that the Union's allegations are untimely. Assuming that the Union did not have actual knowledge that Davids failed to receive a four month probationary

performance evaluation until the date he received that evaluation on October 6, 2006, the Union's claim that NYPD changed the timing of evaluations is time barred since the petition was not filed until July 12, 2007. Regarding the claim that both the four month and ten month evaluations were improperly prepared by a rater who was not Davids' Commanding Officer, the latest the claims could accrue was on November 1, 2006, as the ten month evaluation, completed by someone other than his Commanding Officer, was proffered to Davids on that date. This claim accrued outside of the statute of limitations as well and, therefore, all of the Union's claims should be dismissed.

The City argues that the Union's claims should be deferred to a grievance/arbitration proceeding, and not raised in an improper practice petition. Since the Union alleges that NYPD did not adhere to the procedures of the AGs, what the Union truly asserts is a claimed violation, misinterpretation, or misapplication of NYPD procedures, and an interpretation of the parties' Agreement is at the center of the dispute. Therefore, the Board has no jurisdiction over the matter and it should be deferred to the grievance/arbitration procedure.

The City further contends that the petition must be dismissed for failure to allege facts sufficient to find that NYPD violated NYCCBL § 12-306(a)(4), since there has been no unilateral change in the evaluation procedure. There is nothing in the relevant AGs that mandate a probationary captain be evaluated by his commanding officer, and NYPD's practice of providing four month evaluations to probationary captains remains unchanged. Additionally, the City argues that substantive changes to performance evaluations, such as changes to criteria and standards, are not subject to bargaining. Thus, the Unions claims under NYCCBL § 12- 206(a)(4) and (5) and any remaining derivative claim under NYCCBL § 12-306(a)(1) must be dismissed in their totality.

DISCUSSION

After having reviewed the issues presented by the parties in this case, this Board finds that Petitioner's claim is time-barred by the four month statute of limitations under § 12-306(e) of the NYCCBL. That section provides, in relevant part:

A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

See also Section 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1); *District Council 37, Local 1508*, Decision No. B-21-2007 at 18-19; *Tucker*, Decision No. B-24-93 at 5.

In the instant matter, the petition was filed on July 12, 2007. The Union contends that the claims in the petition accrued on May 29, 2007, the date of Davids' demotion, thus, the petition was filed in a timely manner. We disagree, since we have stated that, "[w]hen a claim arises more than four months prior to the filing of the petition and there is no allegation that the action continued or in other manner accrued at any time within the four-month time limitation, the petition will be dismissed as untimely." *District Council 37*, Decision No. B-34-06 at 12; *See District Council 37, AFSCME*, Decision No. B-61-91 at 8.

Reviewing the record, the Union focuses on two claims in its pleadings. First, Petitioner asserts that NYPD changed the timing of evaluations from that prescribed in the AG provisions by failing to complete Davids' four month performance evaluation at the mandated time. Second, the Union claims that NYPD changed the evaluator from the commanding officer, as mandated by the AG provisions, to someone other than the commanding officer. The date on which the first claim

accrued was, at the earliest, when Davids failed to receive his four month probationary evaluation on time and, at the latest, when Davids signed his belated four month evaluation on October 6, 2006. The date on which the second claim accrued was, at the latest, November 1, 2006, the date on which Davids received his second, ten month performance evaluation, completed by someone other than his Commanding Officer.

The date on which Davids received his late performance evaluation and the dates on which he had his evaluations completed by someone other than his Commanding Officer are separate and distinct alleged acts from the date that he was demoted. The courts and PERB have recognized the distinction between a claimed failure to follow employee evaluation procedures and the adverse consequences that may result from an unfavorable evaluation. Issues concerning the evaluation procedures may be addressed independently, both at the bargaining table and through the parties' grievance and arbitration process, even where the potential consequences are beyond the scope of bargaining or arbitration. *Board of Education, Middle Island Central School District v. Middle Island Teachers Ass'n*, 50 N.Y.2d 426 (1980) (teacher may arbitrate claimed violation of evaluation procedures although tenure decision is not arbitrable); *South Country Central School District v. Bellport Teachers Ass'n*, 184 A.D.2d 771 (2d Dep't 1992) (same); see *City of Yonkers*, 39 PERB ¶ 4580 (ALJ 2006) (challenge to new evaluation procedures held timely).² Further, the courts have similarly addressed the determination of accrual dates as to legally separate causes of action when discussing timeliness. See *McDermott v. New York*, 50 N.Y.2d 211 (1980) (indemnity claim was

² We also note that in the context of deferral, this Board has stated that, "[i]t is well settled that a controversy arising out of the same set of facts may involve related but separate and distinct rights and that a particular dispute may encompass rights which are derived from both the NYCCBL and the applicable collective bargaining agreement." *Local 375, Civil Service Technical Guild, AFSCME*, Decision No. B-11-99 at 9.

a separate, substantive cause of action, independent of the underlying wrong; accrual applies to each distinct cause of action); *See also Helfland v. Sessler*, 194 Misc.2d 38 (2002) (claim for unjust enrichment accrues upon the commission of the wrongful act creating a duty of restitution).

Taking the above into consideration, we determine that the claims regarding Davids' performance evaluations constitute alleged independent violations of the NYCCBL and/or the parties' collective bargaining agreement under which Petitioner could have filed an improper practice petition or a grievance at the time they arose, since they are independent of his demotion. In this instance, the City's alleged failure to adhere to performance evaluation procedures in this matter cannot be linked to the demotion, as the demotion cannot be construed as a continuance of the alleged performance evaluation violations. Therefore, since the Union's petition was filed July 12, 2007 and the Union's claims accrued well outside of the four-month statute of limitations, we find that they were filed in an untimely manner and dismiss the petition in its entirety.

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 docketed as BCB-2628-07, be and the same hereby is, dismissed in its entirety.

Dated: New York, New York
December 4, 2007

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| _____ | <u>MARLENE A. GOLD</u> CHAIR |
| _____ | <u>GEORGE NICOLAU</u> MEMBER |
| _____ | <u>CAROL A. WITTENBERG</u> MEMBER |
| _____ | <u>M. DAVID ZURNDORFER</u> MEMBER |
| _____ | <u>ERNEST F. HART</u> MEMBER |
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