OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition

-between-

SERGEANT'S BENEVOLENT ASSOCIATION,

Petitioner,

Decision No. B-08-2007 (ES)
Docket No. BCB-2603-07

-and-

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

Respondents.

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DETERMINATION OF EXECUTIVE SECRETARY

On February 21, 2007, the Sergeants Benevolent Association ("SBA" or "Union") and a SBA member, Sergeant Albert Jackson, filed an improper practice petition, BCB 2603-07, which was filed contemporaneously with a petition for injunctive relief, docketed as BCB-2603-07 (INJ). Petitioners seek an order from the Board of Collective Bargaining (the "Board" or "BCB") barring the New York City Police Department ("NYPD" or "Department") from offering into evidence at Jackson's pending disciplinary hearing the results of a positive hair follicle drug test. Petitioners, citing the Board's recent decision in *Detectives Endowment Association*, Decision No. B-37-2006, assert that the test was conducted in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). In responding to the petition for injunctive relief, the City argues that the petition is untimely and that Petitioners have failed to establish that there is reasonable cause to believe that an improper practice has occurred or that immediate and irreparable injury will occur.

Pursuant to § 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), the undersigned is, as Executive Secretary, required to evaluate all improper practice petitions for legal sufficiency, a review which explicitly requires scrutiny as to timeliness. For the reasons provided below, the petition is dismissed on the ground that the claims presented are untimely, as accruing outside the four month statutory limitations period.[1]

BACKGROUND

Commencing in August 2005, the NYPD began implementing the hair testing procedures in conducting random drug tests. On December 4, 2006, the Board issued its decision in *Detectives Endowment Association*, Decision No. B-37-2006, finding that the NYPD had violated § 12-306(a)(5) of the NYCCBL by unilaterally changing its drug screening procedures for random drug tests by requiring hair follicle testing instead of the previously utilized urine testing. This Board ordered the NYPD to rescind the random drug screening procedures implemented; restore the drug screening procedures in effect prior to August 2005; and cease and desist from implementing changes in drug screening procedures until such time as the parties negotiate such changes. Noting "the absence of specific evidence concerning discipline imposed on any member as a result of the changed procedures," the Board did "not find that the annulment of any discipline, or the expungement of any disciplinary records, as requested by the Unions, is warranted." *Id.*, Decision No. B-37-2006 at 24. The SBA was a party in *Detectives*

[1]In the interests of ensuring the most fair review of the petition possible, the affidavit accompanying the petition for injunctive relief has also been considered, as well as the factual components in the reply, and all factual allegations taken as true in this review.

Endowment Association.[2]

Three and half months prior to the Board issuing *Detectives Endowment Association*, on August 21, 2006, Jackson was randomly selected and directed to submit to a hair test, known as a "DOLE" test, to determine if he had ingested, used or abused any illegal substance or narcotic drug. Jackson was tested consistent with Patrol Guide Section 205-29 ("PG 205-29"), which called for three hair samples to be tested.[3] Consistent with PG 205-29, two samples were sent for immediate testing and third safeguarded to be tested in the event the first two samples tested positive.

On September 7, 2006, Jackson was notified that the first two samples had tested positive for cocaine and suspended. On September 8, 2006, at the request of Jackson, the third hair sample was sent for testing. The third hair sample was sent to a different laboratory than that which had tested the first two samples.[4] Jackson was served with Departmental Specifications

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[2] The City has appealed both *Detectives Endowment Association*, Decision No. B-37-2006, and its companion case, *Captain's Endowment Association*, Decision No. B-38-2006. This matter is currently pending before the Supreme Court of the State of New York, County of New York, *City of New York, et al. v. Patrolmen's Benevolent Ass'n*, Index No. 400007/07 (Wilkins, J.), pursuant to Article 78 of the Civil Practice Law and Rules; no decision has been rendered, as of this writing.

[3] A copy of Interim Order, Reference PG 205-29; subject: Revisions to Patrol Guide 205-29 "Random Drug Screening" (May 5, 2006), was appended to the Answer as Exhibit 1. Petitioners allege that Jackson's participation was mandatory and "the hair involuntarily removed from his body." Pet. at ¶ 7. The City denies that Jackson's participation was involuntary but does not dispute that participation in the hair test was mandatory. (Ans. at ¶ 23: "Employees are reminded that they must submit to a hair analysis drug screening test. Refusal to do so will result in suspension from duty and will be grounds for dismissal from the Department."). The characterization of Jackson's participation in the drug test is not germane to the request for injunctive relief.

[4] The first two samples were tested by Psychemedics Corporation, the third sample was tested by Quest Diagnostics.

and Charges on September 11, 2006, stating:

> Said Sergeant Albert Jackson, assigned to Transit Bureau Citywide Vandals Task Force, on or about May 21, 2006[,] through August 21, 2006, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Sergeant did wrongfully possess cocaine without police necessity or authority to do so.

Charges and Specifications, I.A.B. Log No. 06-30827 (September 11, 2006) (Petition, Exhibit B.)

At Jackson's request, the third hair sample was sent to another laboratory for mitochondrial DNA testing, which had not been completed at the time the petition was filed. Jackson's request was made on November 27, 2006, and the laboratory received the sample on January 4, 2007. On September 19, 2006, Jackson had an independent hair drug test performed. The samples from this test were sent to Quest Diagnostics, the same laboratory that tested the third sample, and tested negative for cocaine or any other illegal substance or narcotic drug. On October 16, 2006, Jackson had an independent polygraph test during which no deception was registered when he responded "no" when asked if he had ever used cocaine or any other illegal drug while employed as a Police Officer. No documentation has been submitted to this Board regarding either the September 19, 2006, hair drug test or the polygraph. On January 19, 2007, Jackson demanded that the NYPD restore him to service as he had been suspended at that point for over 130 days in violation of CSL § 75(3), which mandates that a suspension without pay cannot exceed 30 days.

Two status conferences have been conducted before Martin G. Karopkin, Deputy Commissioner for Trials for the NYPD. The first was on January 30, 2007; the second on February 27, 2007. A third conference is scheduled for April 3, 2007, and a trial is scheduled for

April 25 and 26, 2007.

In their affidavit accompanying their request for injunctive relief, Petitioners contend that since the hair test at issue had not occurred "at the time the matter was fully submitted to BCB, the Board could not have been aware that any uniform member of service had been adversely affected by the City's unilateral change in methodology of random drug testing." (Aff. at ¶ 11.)[5] In their Memorandum of Law, Petitioners state that:

> Here, because Sergeant Jackson's hair sample had not been tested at the time the matter was fully submitted to the BCB, the Board and SBA were unaware that any uniform member of service had been adversely affected by the City's improper unilateral change in methodology of random drug testing. As such, the Board held that Unions [sic] request to annul any discipline and expunge any discipline records was not required.

Id. at 4 (citing *Detectives Endowment Association*, Decision No. B-37-2006 at 22).[6] From this, Petitioners postulate that had the Board been aware of the testing of Jackson, "the Board would have been compelled -- based upon clear and [un]equivocal precedent -- to annul the existing disciplinary case against Sergeant Jackson." (Aff. at ¶ 12.)

Petitioners argue that because the Board found in *Detectives Endowment Association* that

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[5] Petitioners do not provide the date that it contends the matter was fully submitted. The Union's reply brief is dated November 23, 2005, but on September 14, 2006, the Board requested the parties submit a written statement as to their position on the applicability and impact of *PBA v. PERB*, 6 N.Y.3d 563 (2006), on the matter. The Union responded by letter on September 26, 2006, and again on October 9, 2006.

[6] The language of *Detectives Endowment Association* can speak for itself:

> However, in the absence of specific evidence concerning discipline imposed on any members as a result of the changed procedures, we do not find that annulment of any discipline, or the expungement of any disciplinary records, as requested by the Unions, is warranted.

Id., Decision No. B-37-2006 at 22.

it was an improper practice to unilaterally change the methodology of random drug testing, it is beyond question that using the results of such a test in discipline constitutes an improper practice. The Union further asserts that the "order directing Sergeant Jackson to submit to the hair follicle test and the use of the purported results for disciplinary purposes is a violation of the right against unreasonable searches and seizures set forth in both the U.S. Constitution, Fourth Amendment and New York State Constitution, Article 1, Section 12." (Petition ¶ 23.)

Petitioners further contend that the City's failure to withdraw or dismiss the disciplinary charges against Jackson after this Board declared the unilateral adoption of random hair drug testing procedures to constitute an improper practice was retaliatory action motivated by the SBA's success in *Detectives Endowment Association*. The City's anti-union motivation is demonstrated by the continued suspension of Jackson without pay and the institution of discipline charges against him after *Detectives Endowment Association* made the City aware that hair test results cannot be used against members of the SBA. Retaliatory motive can further be inferred by the City's harsh and illegal treatment of Jackson.

Additionally, the Union asserts that to allow the City to benefit from the use of a test itself resulting from an improper unilateral change to a mandatory subject of bargaining would irreparably harm the SBA's ability to represent its members and render *Detectives Endowment Association* meaningless. Finally, the Union argues that this action is timely because it was filed within four months of the action forming the basis of the improper practice charge, the issuance of *Detectives Endowment Association* on December 4, 2006. Petitioners state the filing of disciplinary charges on September 11, 2006, is not the basis of their improper practice petition. The basis is the retaliatory action which Petitioners describe as "the *continued* promise of

Respondents to use purported test results in the future against Sergeant Jackson. . . Put it another way, the use of the hair follicle result will be a retaliatory act against the favorable decision to the SBA, issued December 4, 2006." Reply Memorandum of Law at 4 (emphasis in original).

DISCUSSION

Pursuant to § 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), a copy of which is annexed hereto, the undersigned has reviewed the petition and determined that it must be dismissed in its totality as asserting actions which took place outside of the four month statute of limitations provided under both the NYCCBL and the OCB Rules. Petitions alleging improper practices must be filed within four months of the alleged violation; that is, 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. NYCCBL § 12-306(e); OCB Rules § 1-07(b)(4);[7] *see also Local*

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[7] NYCCBL § 12-306(e) provides, in pertinent 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.

OCB Rules § 1-07(b)(4) provides, in pertinent part:

> **Improper practices.** One or more public employees or any public employee organization acting on their behalf or a public employer may file a petition alleging that a public employeror its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

1549, District Council 37, Decision No. B-25-89 at 20 (timeliness measured from the dates of occurrence).

The dates in this matter are not in dispute; the issue is which date is controlling, or, rather, on what date did the improper practice occur. By definition, the act alleged to have taken place inconsistent with the NYCCBL was the administration of the hair drug test, a specific instance of the improper practice alleged in *Detectives Endowment Association*. The concrete injury in violation of the NYCCBL was consummated when the test was administered, on August 21, 2006. The result of that act and the service of disciplinary charges predicated on those tests were known on, respectively, September 7 and September 11, 2006. The statute of limitations begins to run upon the party having actual or constructive knowledge of definitive acts which put it on notice of the need to complain. *District Council 37*, B-34-06 at 13 ; *Correction Officers' Benevolent Ass'n.*, Decision No. B-26-2002 at 6; *Probation Officers Ass'n*, Decision No. B-44-86 at 18. *See Matter of Eadie v. Town of N. Greenbush*, 7 N.Y.3d 306, 316 (2006).

In this case, any one of the three discrete acts alleged to constitute a breach of the NYCCBL, or acted to have provided actual or constructive knowledge of the violation took place more than four months prior to the filing of the improper practice charge herein on February 21, 2007. As the events giving rise to the improper practice must have occurred no earlier than October 16, 2006 to be timely, whether the improper practice accrued upon the performance of the random hair drug test (August 21, 2006), the suspension of Jackson (September 7, 2006), or the serving with Departmental Specifications and Charges (September 11, 2006), the petition is in any event untimely.

Petitioners' characterizing the NYPD continuing to pursue the disciplinary case against

Jackson as retaliation for the Union's victory in *Detectives Endowment Association* does not make the underlying improper practice claim timely. The SBA does not dispute that the City is in compliance with *Detectives Endowment Association*, and has stopped the random hair drug testing. The Board did "not find that the annulment of any discipline, or the expungement of any disciplinary records, as requested by the Unions, is warranted." *Id.*, Decision No. B-37-2006 at 24. All the acts alleged in the petition occurred during the pendency of *Detectives Endowment Association*, and the Union had ample opportunity to inform the Board about Jackson. Petitioners' argument that the record was closed before Jackson was drug tested is belied by the facts, and, in any event, irrelevant. The Union never sought to apprise the Board of Jackson's situation, either through a motion to supplement the record or after the record was re-opened in September 2006 -- after Jackson had been suspended -- for the parties to comment upon recent legal developments. The pendency of *Detectives Endowment Association* did not act somehow to stay other improper practice charges arising out of similar circumstances even if based upon identical legal theories.

Nor are the Petitioners' constitutional claims, or claims under any statute other than the NYCCBL properly before the Board; "any claim under a statutory scheme other than the NYCCBL which Petitioner may have ... is also unavailing in this improper practice proceeding....[u]nless such a claim would also otherwise constitute an improper practice." *James-Reid,* Decision No. B-16-2006 at 8-9(ES), *quoting Edwards*, Decision No. B-35-2000, *citing*, *Pruitt*, Decision No. B-11-95, n. 7; *see also Samuels,* Decision No. B-1-2004 (ES); *citing Williams*, Decision No. B-48-97; *Siegel*, Decision No. B-23-91. Where such is not the case, "the Board of Collective Bargaining is without jurisdiction to consider claims in an improper practice

proceeding." *Id.* Thus, those claims are dismissed without prejudice to their being pleaded before a proper forum; Petitioners' claims under the NYCCBL are dismissed with prejudice.

Dated: New York, New York
March 20, 2007

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John F. Wirenius
Executive Secretary

Section 1-07(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1):

Executive Secretary Review of Improper Practice Petitions.

(i) Within 10 business days after a petition alleging improper practice is filed, the Executive Secretary shall review the petition to determine whether the facts as alleged may constitute an improper practice as set forth in § 12-306 of the statute. If, upon such review, the Executive Secretary determines that the petition is not, on its face, untimely or insufficient, notice of such determination shall be served upon the parties by mail. Such determination shall not constitute a bar to defenses of untimeliness or insufficiency which are supported by probative evidence available to the respondent. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four months prior to the filing of the charge, the Executive Secretary may issue a decision dismissing the petition or send a deficiency letter. Copies of such decision or deficiency letter shall be served upon the parties by certified mail.

(ii) Within 10 business days after service of a decision of the Executive Secretary dismissing an improper practice petition as provided in this subdivision, the petitioner may file with the Board an original and three copies of a written statement setting forth an appeal from the decision with proof of service thereof upon all other parties. The statement shall set forth the reasons for the appeal.

(iii) Within 10 business days after service of a deficiency letter from the Executive Secretary as provided in this subdivision, the petitioner may serve an amended petition upon each respondent and file the original and three copies thereof, with proof of service, with the Board. The amended petition shall be deemed filed from the date of the original petition. The petitioner may also withdraw the charge. If the petitioner does not seek to amend or withdraw the charge, but instead wishes to file objections to the deficiency letter, the petitioner may file with the Executive Secretary an original and three copies of a written statement setting forth the basis for the objection with proof of service thereof upon all other parties. If the petitioner does not timely file an amendment or otherwise respond, the charge will be deemed withdrawn and the matter closed. Upon review of the amended petition or written objection filed by the petitioner, the Executive Secretary shall issue either a notice that the petition is not on its face untimely or insufficient or a written decision dismissing the improper practice petition.