Detectives Endowment Ass'n, 19 OCB 15 (BCB 1977) [Decision No. B-15-77 (S)], aff'd, Detectives Endowment Ass'n v. Anderson, N.Y.L.J., May 18, 1978, at 12 (Sup. Ct. N.Y. Co. May 4, 1978), aff'd, 67 A.D.2d 648, 412 N.Y.S.2d 576 (1st Dep't 1979).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

DETECTIVES' ENDOWMENT ASSOCIATION
OF THE POLICE DEPARTMENT OF THE
CITY OF NEW YORK, INC.,

DECISION NO. B-15-77

DOCKET NO. BCB-286-77

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.
- - - - - - - - - - - - - - - - - - - X

DETERMINATION AND ORDER

The Detectives' Endowment Association (the DEA), by petition filed November 1, 1977, sought a determination whether two of its demands for the contract term July 1, 1976 to June 30, 1978, were within the scope of collective bargaining. The City of New York, in its answer, filed November 3, 1977, alleged that the Union's demands "do not encompass matters within the scope of collective bargaining as defined in NYCCBL §1173-4.3." Both parties filed briefs, and the Board heard oral argument on November 16, 1977.

The two demands submitted by the Union were:

"Demand #25: Disciplinary Procedures (Arbitration)

Employees served with charges shall be entitled to use the grievance arbitration provisions of the contract wherein the final determination as to guilt or innocence and punishment, if any, will be made pursuant to binding arbitration.

"Demand #94: Tenure for Detectives
a. An employee, designated as a detective, shall be given tenure after three (3) years of services as a detective and may not be returned to the uniform force unless written charges filed against him are sustained pursuant to the grievance arbitration provisions of the contract. Time served as a detective prior to this agreement will be credited toward the tenure requirement. No detective will be returned to the uniform force in anticipation of this tenure agreement..

b. Any employee, who is transferred upon request or administratively, to another command, shall maintain his detective status."

At the oral argument before the Board, held on November 16, 1977, Counsel for the DEA explained what was requested in Demand 94; Tenure, by stating:

"[we] agree that the Commissioner does have the full and unquestionable right to detail as many detectives as he wishes . . . nor are we questioning his right to do so."

> Counsel for the Union explained that Demand #94 related not to loss of detective status as a result of economies or reorganization, but related solely to detectives being returned to the uniformed force for disciplinary reasons.

Board Member Schmertz, attempting to summarize the discussion, asked Mr. Hartman:

> "What you are saying . . . is that a detective after three years of service, if he is to be returned to the uniformed force for disciplinary reasons,'would then be entitled to the preferring of written charges filed against him and other due process procedures."

Counsel for the Union replied, "Yes. That is the intent, yes."

However, on December 20, 1977, the parties submitted a joint letter to the Board which stated:

> "The DEA and the City agree that only the tenure issue be presented to the Board for determination and that the issue regarding discipline be withdrawn."

Therefore, we shall make no ruling concerning the bargainability of disciplinary grievance and arbitration procedures in the Police Department. We note that the primary object of the tenure demand before the Board is to

give detectives tenure after three years of service. The reference in the demand to the method of removal (a grievance arbitration procedure), is secondary and hinges on the bargainability of the basic demand for tenure. Although the Union indicated at the oral argument that the two issues of tenure and disciplinary procedures were to some extent intertwined, in light of the fact that the Union has now withdrawn the discipline demand our decision will not deal with that issue in any way.

Relevant Statutory Provisions

Chapter 18 of the New York City Charter establishes the Police Department. It provides, inter alia:

> §434. Commissioner; powers and duties. a. The Commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the depart ment.
> b. The Commissioner shall be the chief executive officer of the police force. He shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department.

The Administrative Code provides:

> §434a-3.0 Detective division - a. The commissioner shall organize and maintain a division for detective purposes to be known as the detective division and shall, from time t-o time, detail to service in said division as many members of the force as he may deem neccssarv and may at any time revoke any such detail.
> * * *

> e. Any member of the force detailed to such division while so detailed shall retain his or her rank in the force and shall be eligible for pro motion the same as if serving in the uniformed force, and the time during which he or she serves in such divi- sion shall count for all purposes as if served in his or her rank or grade in the uniformed force.
> f. The commissioner may at his pleasure revoke any designation made pursuant to the provision oil this section.
> * * *
> §434a-13.0 Promotions. - a. Promotions of officers and members of the force shall be made by the commissioner, as provided in charter section eight hundred fourteen, on the basis of seniority, meritorious service and superior capacity, as shown by competitive examination, but a detail to act as inspector, or to service in the detective bureau, as hereinafter provided, shall not be deemed a promotion

The New York City Collective Bargaining Law provides:

> §1173-4.3 Scope of collective bargain ing; management rights.
> a. Subject to the provisions of subdivision b of this section and subdivision c of sec tion 1173-4.0 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (includ ing but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to over time and time and leave benefits) and working conditions . . . .

b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classificiations; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

Positions of the Parties

The City contends that the tenure demand is a prohibited subject of bargaining. The City argues that the trend of recent Court of Appeals decisions has narrowed the scope of bargaining in the public sector, and relies on cases discussing the special nature of the Police Department of the City of New York and the powers granted to the Commissioner to organize and control the police force.
Further, the City relies on the management rights clause of NYCCBL §1173-4.3(b).

Concerning the statutory history of the detective detail, the City has presented an extensive analysis showing that at the beginning of this century detectives could not be reduced in rank or salary except upon written charges and a trial before the Commissioner. However, as a result of recommendations of a grand jury and other interested citizens, this tenure system was changed to provide that detective status would not be considered a promotion but would instead constitute a revocable detail at the pleasure of the Commissioner. [1] The City concludes,

[1]The statutory history is dealt with extensively in Application of Hagan, 339 NYS2d 913(1963), aff'd 293 NYS2d 414 (App. Div. lst Dept., 1963).

therefore, that bargaining which would have the effect of curbing the Police Commissioner's statutory power in controlling the detective detail would be contrary to public policy.

The Union argues that the Commissioner's power to detail members of the force as detectives and to revoke such detail relates only to a determination of manning requirements and to economic or other factors indicating the desirability of a change in the number of detectives. The DEA asserts that the language of Administrative Code §434a-3.0 is not clear and that, at any rate:

> ". . . the power of the commissioner to demote detectives is necessarily circumscribed by NYCCBL section 1173-4.3(b) which provides that a public employer, acting through its agencies, may relieve its employees from duty only for lack of work or other legitimate reasons. Expressio unius est exclusio alterius."

The Union points out that assignment as a detective involves increased remuneration and thus involves "wages," a mandatory subject of negotiations. Further, the Union cites Buffalo PBA v. City of Buffalo, 9 PERB 3024 (1976), where PERB said of an eighteen month tenure demand:

> "This is a mandatory subject of negotiations. We recognize that there may be sound reasons why a city may wish to reassign detectives to alternate duty. Therse reasons go to the merits of the proposal and not to its negotiability

Finally, the Union argues:

> "It could not have been the intent of the legislature to empower the Commissioner to demote detectives for causes not related to their competence and dedication without allowing such detectives an opportunity to inquire as to the reasons for such a demotion."

Discussion

The language of Administrative Code §434a-3.0 expresses clearly the intent of the City Council to vest discretion in the Police Commissioner to detail members of the police force as detectives and to revoke the detail at any time at his pleasure. I t also seems clear that the Council intended that the usual incidents of promotion and appointment should not attach to the status of a detective. There is no indication as contended by the Union, that the language of the statute applies to economic or manning determinations only. Indeed, from the extensive legislative history cited by the City, the

conclusion is plain that the Commissioner was intended to have the power to designate and revoke designations to detective service without having to give any reason for his action or to answer therefor to any other authority. Of course, this power is limited by generally applicable provisions of State and Federal Law: the Commissioner may not, for example, violate anti-discrimination statutes such as Title VII' of the Civil Rights Act. What the Commissioner may do under the Administrative Code, however, is to detail and remove detectives without reference to procedures such as civil service examinations and determinations whether the removal was for just cause.

The management rights clause of NYCCBL §117374.3(b) does not limit the applicability of Administrative Code §434a-3.0. Management rights are generally applicable to public employers under the jurisdiction of the Board; however, other statutes may supplement the rights reserved to management, or may prohibit bargaining over what might otherwise be a permissive or mandatory subject of bargaining.[2]

[2] See Decision No. B-1-74, where a state statute was found to prohibit pension negotiations.

The Court of Appeals, in Cohoes City School Dist. v. Cohoes Teachers Association, 40 NY2d 774, 390 NYS2d 53 (1976), held that a "board of education cannot relinquish its ultimate responsibility with respect to tenure determinations and that a provision of a collective bargaining agreement which would have that effect [by submitting to an arbitrator the question whether discharge of a probationer was for just cause] is unenforceable as against public policy."

The section of the Education Law cited by the Court provides the following procedures for tenure

> "§2509.1(a) . . . The service of a person appointed [to a probationary term] may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools by a majority vote of the board of education."
> (emphasis supplied)
> * * *
> "§2509.2 At the expiration of the probationary term . . . or within six months prior thereto, the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory. By a majority vote the board of education may then appoint on tenure any or all of the persons recommended by the superintendent of schools."
> (emphasis supplied)

Sections 2573, 3012, 3013, 6206 all contain similar language, applicable to various boards of education.

The Court held that the language quoted above meant that:

> "A board cannot surrender its authority to terminate the employment of a non-tenured teacher at the end of the probationary period. Any provision of a collective bargaining agreement which would have that effect is accordingly unenforceable as against public policy."
> (390 NYS2d 55)

Even though the Education Law contains no express or explicit prohibition against delegating tenure decisions to an arbitrator under a contract containing a "just cause" provision, the Court said:

> "While the several sections of the Education Law do not explicitly forbid collective bargaining with respect to ultimate tenure decisions, we hold that this conclusion is inescapably implicit in such provisions."
> (390 NYS2d 56)

Thus, teacher tenure decisions are those concerning which bargaining is prohibited not by "plain and clear" provisions of statute as described in Syracuse Teachers Association v. Board of Education, 35 NY2d 743, 744;.361 NYS2d 913 (1974), but by "[public policy, whether derived

from and whether explicit or implicit in statute or decisional law, or in neither." Susquehanna Valley Central School District and Susquehanna Valley Teachers Association, 37 NY2d 614, 616-617; 376 NYS2d 427, 429 (1975).

On April 5, 1977, four months after the decision in Cohoes, the Court of Appeals again ruled against arbitration in the area of tenure decisions, finding that:

> "....a board of education cannot bargain away its right to inspect teacher personnel files and that a provision in a collective bargaining agreement which might reflect such a bargain is unenforceable as against public policy."
> [Board of Education Great Neck v. Areman, 394 NYS2d 143 (1977)]

The Court unanimously reinstated the decision at Special Term permanently staying arbitration upon a finding that the contract clause unlawfully restricted the board in its duty to appoint qualified teachers.

The decisions of the Court of Appeals in the Cohoes and Areman cases are applicable here. In those cases, the Court held that where a statutory scheme requires a body or officer to exercise judgment and discretion in making or denying appointments and clearly contemplates that no reasons need be given to justify the official decision, public policy would prohibit any infringement on the

making of the ultimate determination. In the instant case, the official decision as to detective assignments is even more unfettered than in the board of education cases decided by the Court of Appeals. In those cases, the teachers were entitled to a statutory probation period during which it was the duty of the board and its agents to evaluate and counsel the teachers, and the boards were required by law to take the probationary period into account when making tenure decisions.[3] In the instant case, however, the Police Commissioner is not required to take any action preliminary to designating an officer to serve as a detective, or prior to the revocation of such designation, nor are any procedural or substantive limitations placed upon his power by statute. Thus, in accord with the holdings of the Court of Appeals, we are constrained to find that Demand No. 94 is a prohibited subject of bargaining.

The decision of PERB in the Buffalo case, supra, is not apposite. There is no indication that the parties in Buffalo raised any of the arguments which have been presented to this Board, and it does not seem that a statutory provision such as Administrative Code §434a-3.0 was a factor in PERB's decision.

[3]Indeed, bargaining over probationary evaluation and and counseling procedures is mandatory upon request of the union, and arbitrators may rule on alleged violations of contractual probation procedures.

Finally, footnote 3 of the Union's brief calls attention to the fact that "a Federal Court has jurisdiction to enterain a complaint pursuant to 42 USC 1983 when a police officer, or civil servant, is dismissed from his job without a hearing on the allegations of the dismissal." We note that the DEA does not argue that the Fourteenth Amendment requires negotiations on Demand No. 94.
A recent decision of the Supreme Court, Special Term, dealt with a contention by employees of the Transit Authority that "a procedure which failed to afford petitioners a due process hearing prior to revoking their designation in the rank of detective" was unconstitutional. In Lonergan v. de Roos,- NYS2d- (1977), N.Y.L.J. Dec. 5, 1977, p. 10, Justice Nadel pointed out that the employer "may at any time revoke any assignment to detective detail, without reason. " Where the public employer has furnished a cause for removal, however, the employer may be subject to the United States Constitution if the employees "can demonstrate that they have been stigmatized.” In the case before him, Justice Nadel found there was no stigma where the detectives were told that they "lacked adaptability and motivation," and he "noted that the petitioners have not lost their jobs as patrolmen, but only their designation as detectives."

Based on our discussion of the specific statutory provisions contained in the Administrative Code and on the cited Court of Appeals decisions, we find that a demand for tenure is a prohibited subject of negotiations between the instant parties. We make no finding concerning any demand for arbitral review of disciplinary actions, nor do we comment on that part of Demand No. 94 which deals with the Union's proposal for a method of removing tenured officers.

We recognize that the Union has raised the practical impact" of a decrease in wages on detectives reassigned as Patrolmen. However, without deciding in this case whether the concept of "practical impact" as

defined in the managerial rights clause of the NYCCBL applies to a prohibited subject of bargaining such as Demand No..94 for tenure, we note that the wage rate for Patrolmen is fixed in negotiations with another bargaining unit not represented by the instant Petitioner. Therefore, a determination relating to the bargainability of wages of former detectives returned to the Patrolmen's unit is not appropriate in this proceeding.

O R D E R

Pursuant to the powers vested in the New York City Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that Petitioner's Demand No. 94 regarding tenure for detectives in the Police Department is a prohibited subject of bargaining; and it is further

ORDERED, that the Petition herein be and the same hereby is, denied.

DATED: New York, New York
December 30, 1977.

ARVID ANDERSON
C H A I R M A N

WALTER L. EISENBERG
M E M B E R

ERIC J. SCHMERTZ
M E M B E R

EDWARD SILVER
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