PBA, 12 OCB2d 21 (BCB 2019)

(IP) (Docket No. BCB-4271-18)

Summary of Decision*:** The City alleged that the PBA violated NYCCBL § 12-306(b)(2) and (c)(1) when it refused to bargain in good faith over health benefits during negotiations for a successor collective bargaining agreement. The PBA filed a motion to dismiss and argued that the Board lacks jurisdiction over the petition, that the petition is untimely and moot, and that the City waived its right to the relief it seeks. The City opposed the dismissal of the petition. The Board determined that it had jurisdiction over the petition, which was timely filed. It further found that the City's claim was neither moot nor waived. Accordingly, the motion was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Respondent.

INTERIM DECISION AND ORDER

On April 16, 2018, the City of New York ("City") filed a verified improper practice petition against the Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA" or "Union") claiming that it violated § 12-306(b)(2) and (c)(1) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by refusing to bargain in good faith over health benefits during negotiations for a successor collective bargaining agreement. On October 26, 2018, the Union filed a motion to dismiss the petition ("Motion"), in

which it argues that the Board lacks jurisdiction over the petition, that the petition is untimely, that the petition is moot in light of PERB's recent designation of a public interest arbitration panel, and that the City has waived its right to the relief it seeks. In response to the Motion, the City argues that the Board has jurisdiction to hear the claim, that the petition is timely and not moot, and that it has not waived its right to seek relief. The Board finds that it has jurisdiction over the petition, which was timely filed. It further finds that the City's claim is not moot and that the City did not waive its right to file the instant improper practice petition. Accordingly, the Motion is denied.

BACKGROUND

In considering a motion to dismiss, the Board "accepts as true . . . the facts alleged in the petition and draw[s] all permissible inferences in favor of Petitioner from the pleadings." *Kingsley*, 1 OCB2d 31, at 2 (BCB 2008); *see also James-Reid*, 77 OCB 29, at 11-12 (BCB 2006). As to relevant facts or events alleged in the Motion that arose after the petition was filed, the facts relied upon by the Board are taken from documents in evidence that are undisputed.

Since the late 1960s, the City has negotiated and entered into agreements with the Municipal Labor Committee ("MLC") concerning the terms and conditions of the Citywide health benefits program. The MLC is a council of certified public employee organizations representing City employees created pursuant to a Memorandum of Understanding ("MOU") dated March 31, 1966, and codified in NYCCBL § 12-303(k). Representatives of the Union have served in leadership roles in the MLC and have historically been a part of the MLC's negotiation of Citywide health benefits. Additionally, the terms of MLC-negotiated agreements have been applied to PBA bargaining unit members.

In 2014, the City and the MLC entered into a letter agreement ("2014 Health Benefits Agreement"), in which the MLC agreed to negotiate with the City to generate a specified amount of savings derived from modifications to Citywide health benefits for fiscal years 2015 through 2018 and expressly provided that the parties would continue to negotiate savings for fiscal year 2019 and beyond. In 2016, the City and the MLC entered into another agreement ("2016 Health Benefits Agreement"), which identified agreed-upon modifications to Citywide health benefits to reach the savings targets set forth in the 2014 Health Benefits Agreement. Following the execution of the 2016 Health Benefits Agreement, the Union disclaimed any obligation imposed by both the 2014 and 2016 Health Benefits Agreements. It also filed a lawsuit against the City in Supreme Court, New York County, seeking to prevent the City's implementation of modifications to health benefits for Union members. In response, the City filed an improper practice petition alleging that the Union failed to bargain in good faith with the City when it challenged the 2014 and 2016 Health Benefits Agreements in court ("2016 IP"). While both matters were pending, on February 1, 2017, the City and the Union negotiated a MOU covering the years 2012-2017 ("2012-2017 MOU"). The 2012-2017 MOU expressly incorporated the 2014 and 2016 Health Benefits Agreements. Additionally, the parties agreed to the withdrawal of the pending matters.

On April 2, 2017, the Union delivered a bargaining notice to the City to commence negotiations towards a successor to the 2012-2017 MOU. The parties held their first negotiation session on May 1, 2017, and the Union submitted proposals, but none that related to health benefits. A second bargaining session was held on July 27, 2017, at which the City submitted proposals including one that sought a 10% savings in costs for "Pre-65 retiree health benefits for active employees." (Pet., Ex. 12) Thereafter, on August 14, 2017, the Union responded to the City's

bargaining proposals in a letter that also stated its belief that the parties had reached impasse. With regard to the City's health benefits proposals, the Union responded that they were:

> vague and overbroad, and concern prohibited and/or nonmandatory subjects of bargaining. Moreover, the PBA categorially rejects these proposals, as we have done in prior rounds, since there is no economic justification for further reducing the fringe benefits of the New York City police officers given their competitive standing with police officers working in comparable communities.

(Pet., Ex. 13)

On August 15, 2017, the Union filed a Declaration of Impasse with the New York State Public Employment Relations Board ("PERB"). In an August 22, 2017 letter to PERB, the City opposed the Declaration of Impasse as premature and asked that the parties be directed to resume negotiations. After further letters from both the Union and the City in support of their positions, on September 12, 2017, PERB's Director of the Office of Conciliation found that impasse was premature and directed the parties to bargain for an additional 45-day period.

On September 27, 2017, the City and the MLC met, and the City proposed modifications to the Citywide health benefits to generate future savings. The Union's General Counsel and Fund Administrator were both present at this meeting. Thereafter, on October 6, 2017, the City and the Union held a third bargaining session. The Union submitted a revised proposal, which also did not contain any terms relating to health benefits. On October 13, 2017, the Union sent the City a letter advising it that it "has not ceded, and will not cede, the PBA's Authority to bargain on behalf of police officers to any other person or entity, including the [MLC] . . . with respect to any subject, including but not limited to, health care benefits." (Pet., Ex. 20) That letter ended by stating that the Union "look[s] forward to bargaining with the City with respect to all terms and conditions of employment." (*Id*.)

A fourth bargaining session was held on October 18, 2017, during which the City submitted a proposal that the Union, as a member of the MLC, achieve its proportion of the savings targets proposed at the September 27, 2017 MLC meeting. The City claims that the Union did not respond to or engage in bargaining over this proposal.

The following day, the City responded to the Union's October 13 letter by stating that it would continue bargaining with the MLC over health benefits. The letter further stated that "[n]otwithstanding that [the] MLC is and has historically been the bargaining representative for municipal workers on health benefits, we are always happy to engage in discussion with you on whatever specific issues the PBA might have on any mandatory subject of bargaining." (Pet., Ex. 22)

On October 27, 2017, the Union once again wrote to PERB and requested that it accept the Union's declaration of impasse. The City submitted a letter voicing its opposition to a declaration of impasse and requesting that the parties be directed to continue negotiations. On November 21, 2017, PERB appointed its Assistant Director of Conciliation as a mediator for the parties.

The first mediation session was held on January 4, 2018, at which the City submitted a written contract proposal but the Union did not. The City's proposal included comprehensive PBA-specific health benefits but expressly reserved its position with respect to the MLC's status as the Union's health benefits bargaining representative.[1] The City asserts that the Union refused

[1] Specifically, the City's proposal stated that:

> The City believes that the PBA has already authorized the [MLC] to be its agent for purposes of collective bargaining with respect to health and welfare issues and, accordingly, is bound by negotiations between the City and the MLC with respect to those issues. Notwithstanding the City's belief and without prejudice thereto, in the event the PBA successfully establishes that it has not so

to bargain over the health benefits proposal at this mediation session, as well as during the second and third mediation sessions held on February 8, 2018, and March 1, 2018.[2] Therefore, during the March 1 session, the City specifically asked the Union to state its position as to whether the MLC was or was not its bargaining representative for health benefits. In response, the Union merely referred the City to its October 13, 2017 letter.

On March 23, 2018, the Union filed a Petition for Interest Arbitration ("Interest Arbitration Petition") with PERB. As part of the Interest Arbitration Petition, the Union submitted its October 6, 2017 bargaining proposals. In response, the City requested that the Interest Arbitration Petition be denied or, alternatively, held in abeyance pending the resolution of an improper practice charge that the City filed with PERB ("PERB IP") on that same day. In the PERB IP, the City claimed that the Union violated Civil Service Law ("CSL") § 209-a.2(b) by failing and refusing to negotiate in good faith concerning health benefits. The City relayed its position to PERB that a finding that the Union failed to negotiate in good faith would "preclude the existence of an impasse and, in turn, nullify the basis upon which the Arbitration was brought." (Pet. ¶ 7 (citing Pet., Ex. 5))

> authorized the MLC and is free to negotiate on an individual unit basis on issues negotiated by the MLC on behalf of its members, the City submits the following proposals for individual unit negotiations with the PBA. In addition, the City reserves its right to add, delete or otherwise modify this proposal, or reinstate any of its original proposals.

(Pet., Ex. 22)

[2] During the March 1, 2018 session, the City submitted a revised health benefits proposal, once again reserving its position that the Union had already authorized the MLC to be its bargaining agent for purposes of health benefits negotiations.

On April 13, 2018, PERB's Director of Public Employment Practice and Representation notified the parties that the PERB IP was deficient because PERB lacked jurisdiction since the allegation concerned a refusal to bargain in good faith, rather than a scope of bargaining issue.[3] On April 16, 2018, the City sent a letter to PERB seeking reconsideration and a determination that the PERB IP was sufficient because PERB had exclusive jurisdiction over the impasse resolution process, which the City alleged included the PERB IP. Notwithstanding this submission, the City also filed the instant improper practice petition with this Board on April 16, 2018. As relief, the City requested that the Board declare that the Union violated the NYCCBL, order the Union to bargain in good faith, post an appropriate notice of the violation, and order any other remedies the Board deems appropriate.

On April 23, 2018, the Union filed a Petition for Declaratory Ruling with PERB seeking a ruling as to the scope of negotiations under the Taylor Law. In particular, that petition seeks a ruling that several of the City's proposals for health benefits should not be submitted to interest arbitration because they relate to prohibited and/or non-mandatory subjects of bargaining.[4]

In a decision dated July 2, 2018, PERB's Director of Public Employment Practice and Representation upheld the decision that PERB lacked jurisdiction over the PERB IP. Both parties

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[3] The deficiency notice cited to *Patrolmen's Benevolent Assoc. of the City of New York, Inc., v. City of New York and the New York State Public Employment Relations Board*, 97 N.Y.2d 378 (2001) ("*PBA v. City of New York*"). In that case, the Court of Appeals held that once PERB has declared that an impasse exists between the City and the PBA, PERB has jurisdiction over scope of bargaining issues "to the extent necessary for PERB to exercise its exclusive jurisdiction to resolve impasses. Until such time, [the Board of Collective Bargaining ("BCB")] retains jurisdiction to determine scope of bargaining outside of the impasse context." *PBA v. City of New York*, 97 N.Y.2d 378, 389-90. This includes "a charge that a party is refusing to negotiate in good faith concerning terms and conditions of employment— a dispute which would require BCB to determine scope of bargaining issues." *Id*. at 391.

[4] The Petition for a Declaratory Ruling is scheduled for hearing.

filed exceptions to this decision. On September 5, 2018, PERB issued a decision upholding the Director's dismissal of the PERB IP because PERB did not have jurisdiction over the dispute.

After the Office of Collective Bargaining ("OCB") processed the instant petition and a Trial Examiner held a preliminary conference, on July 3, 2018, the Union filed a hybrid CPLR Article 78 proceeding and action for a declaratory judgment in Supreme Court, Albany County, seeking to enjoin the Board from exercising jurisdiction over the petition.[5] On October 10, 2018, the Court denied the Union's Article 78 petition.[6]

Regarding the Union's Interest Arbitration Petition, PERB sent the parties a list of qualified, disinterested persons for the selection of the public member of the arbitration panel on August 10, 2018. On September 10, 2018, PERB designated the interest arbitration panel, which included John Donoghue as the neutral chairperson.[7]

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the Board lacks jurisdiction over this improper practice petition, that the petition is untimely, that it is moot in light of PERB's recent designation of a public interest

[5] The Article 78 petition also sought a finding that the Board's assertion of jurisdiction was arbitrary and capricious and/or contrary to the law and declaring that PERB had exclusive jurisdiction over the allegations in the improper practice petition.

[6] The Supreme Court's decision found that, at the time the Article 78 petition was filed, neither PERB nor this Board had made a final determination that was reviewable regarding jurisdiction. Additionally, the Court rejected the Union's allegation that *PBA v. City of New York* mandated that PERB had jurisdiction over the dispute. *See Matter of Patrolmen's Benevolent Association of the City of New York, Inc. v. New York State Public Relations Bd., et al.*, Index No. 904303/2018 (Sup. Ct. Albany Co. Oct. 10, 2018) (Ferreira, J.).

[7] The panel also includes one member designated by the City and one member designated by the Union.

arbitration panel, and that the City has waived its right to the relief it seeks by failing to file exceptions to PERB's declaration that the parties are at impasse.

Jurisdiction

The Union contends that the Board lacks jurisdiction over the petition because the claims concern post-impasse conduct that occurred throughout the course of a mediation ordered and conducted by PERB, and that this conduct is therefore "inextricably intertwined with PERB's exclusive jurisdiction over the impasse resolution process . . . ." (Motion at 3) In support of this argument, it points to the Court's holding in *PBA v. City of New York* and the legislative history of the 1998 Taylor Law amendment, which transferred jurisdiction over police officer impasse arbitrations from the Board to PERB.

The Union claims that the Court's holding in *PBA v. City of New York* "relates to any post-impasse charge that raises issues 'necessary for PERB to exercise its exclusive jurisdiction to resolve impasses.'" (Motion at 13 (citing *PBA v. City of New York*, 97 N.Y.2d 378, at 390)) Here, PERB has already declared an impasse, and the instant petition directly challenges this determination since the City has argued that "a finding that the PBA has failed to negotiate in good faith as alleged . . . would preclude the existence of an impasse . . . ." (Motion at 14 (citing Pet., Ex. 23 at 2)) Consequently, the Union argues that the issues raised by the petition are fundamental to PERB's exclusive jurisdiction to declare an impasse and, therefore, cannot be addressed by the Board. Furthermore, for this Board to determine whether the Union bargained in good faith, it would first need to determine whether the City's proposals to modify health benefits relate to mandatory subjects of bargaining. However, this issue is currently before PERB in a Petition for a Declaratory Ruling.

The Union also claims that the Board's exercise of jurisdiction over the petition would undermine the legislative intent of removing impasse jurisdiction from the Board to PERB. The Union argues that should the Board determine whether and to what extent the Union is bound by City negotiations with the MLC over health benefits, its decision would encroach upon the interest arbitration panel's exclusive jurisdiction to determine the terms and conditions of employment for police officers for the successor contract period. Moreover, the Union contends that the Legislature did not intend to have the Board resolve a dispute "arising out of a PERB mediation before a PERB mediator after PERB has declared an impasse." (Motion at 16) The Union argues that PERB should decide the import of the events that took place during a PERB mediation, not this Board.

Timeliness

The Union asserts that the City's petition is untimely because it was filed more than four months after the City knew or should have known that the Union allegedly failed to bargain in good faith. According to the Union, the City had notice of the conduct that it claims constitutes bad faith bargaining on August 14, 2017, when the Union notified it that it "categorically reject[ed]" the City's proposal concerning health benefits. (Motion at 9 (citing Pet., Ex. 13)) The Union claims that this letter "was an unequivocal statement to the City that the PBA rejected the premise that it was required to accept cuts to health benefits to fund general wage increases that the City might offer." (Rep. Memo at 8) Regardless of whether health benefits were to be negotiated with the MLC or the Union directly, the Union asserts that it consistently maintained this position.

Alternatively, assuming *arguendo* that the August 14 letter did not put the City on notice of the alleged bad faith conduct, the Union argues that the statute of limitations would have begun

to run no later than November 21, 2017, when PERB appointed a mediator to assist the parties. The Union contends that this appointment of a mediator meant that PERB had declared an impasse and that this event created the City's "injury" since the City claims that impasse was not warranted.[8] (Rep. Memo at 9)

The Union rejects the City's claim that the statute of limitations did not begin to run until March 1, 2018, when the Union refused to negotiate over the City's final health benefits proposal. The Union argues that the cases cited by the City in support of this proposition are not applicable because they involved situations in which a party refused to negotiate over a proposal it believed was a non-mandatory subject of bargaining or refused to negotiate entirely because it contended that its counter-party was not the authorized bargaining agent for the employees, neither of which is the case here. Likewise, the Union contends that the alleged bad faith conduct is not a continuing violation. The City's repeated proposals to cut Union members' health benefits after the Union had already considered and rejected any reduction in health benefits does not toll the limitations period.

Mootness

The Union argues that the Board has previously stated that once PERB has granted a party's petition for interest arbitration and appointed an arbitration panel, a pending bad faith bargaining claim must be dismissed as moot. (Motion at 3 (citing *PBA*, 73 OCB 21 (BCB 2004) ("*PBA*")) The Union argues that this case is similar to *PBA*, since both involved claims that the Union engaged in bad faith bargaining by filing for impasse when none existed and "before the parties

[8] The Union relies upon CSL § 209.4(a), which states that PERB may appoint a mediator only if it "*determines that an impasse exists* in collective negotiations between [an] employee organization and a public employer." (Rep. Memo at 11 (quoting CSL § 209.4(a)) (internal quotation marks omitted) (emphasis added)

had engaged in meaningful bargaining" over health benefits. (Motion at 4 (quoting *PBA*, 73 OCB 21, at 5)) The Union also argues that both cases involved a situation in which PERB declared the parties to be at impasse after the filing of the improper practice petition.[9] Therefore, the Union contends, the Board lacks authority to order the relief sought by the City, including an order sending the parties back to the bargaining table. Such a remedy would be "wholly inconsistent with, and rendered irrelevant by, PERB's determination of an impasse." (Motion at 7 (quoting *PBA*, 73 OCB 21, at 6)) Moreover, the Union contends that the fact that the City requested other remedies, such as a posting of a notice, does not save its claim since the same relief was requested in *PBA* and the petition was nevertheless declared moot.

The Union asserts that, contrary to the City's arguments, it is irrelevant that the petition here was filed before the PERB mediation and not after, as in *PBA*, since the outcome of that case did not turn on such timing. Rather, the Board's holding in that case was clear that PERB's intervening declaration of impasse rendered the petition moot. Furthermore, the Union contends that the City's assertion, that rendering this petition moot will incentivize parties to refuse to bargain until impasse is declared, is "misguided." According to the Union, applying the Board's holding in *PBA* "will simply encourage parties, such as the City, to raise their allegations about allegedly improperly declared impasse caused by an alleged failure to bargain in good faith at an appropriate time and in an appropriate forum in the context of a challenge to impasse procedures." (Motion at 6)

[9] The Union argues that the case cited by the City, *Uniformed Sanitationmen's Assn*, 35 OCB 9 (BCB 1985) ("*USA*"), cannot "override" the Board's subsequent decision in *PBA*. (Rep. Memo at 7) Further, it asserts that the case is distinguishable because it involved the Board's decision regarding impasse, not PERB's, and the Board can order the relief sought here in cases that impact its own determinations.

Additionally, the Union argues that the doctrine of issue preclusion should apply since this case involves the same parties and the same issue as in *PBA*. As such, the Union contends that the City is barred from re-litigating the effect of PERB's declaration of impasse on this improper practice proceeding.

Waiver

Finally, the Union argues that the City has waived its right to the relief it seeks by failing to object to PERB's declaration of an impasse and appointment of a mediator when the City had that opportunity. Specifically, the Union contends that the City could have filed exceptions to the November 2017 appointment of a mediator but instead only opposed the Union's request in a letter, dated October 27, 2017, which did not raise any alleged failure by the Union to bargain in good faith over health benefits. Additionally, the City actively participated in the selection of the interest arbitration panel by designating its partial member and participating in the process to select a neutral arbitrator. Consequently, the Union argues that "having failed to seek relief before PERB, the City should not be permitted to make an end run around the PERB statute of limitations by seeking the same relief" in the instant petition. (Motion at 11-12)

City's Position

Jurisdiction

The City asserts that the Court's holding in *PBA v. City of New York* did not divest the Board of jurisdiction over post-impasse improper practice charges. In that case, the Court decided whether the Board or PERB has jurisdiction over scope of bargaining claims after parties have entered PERB's formal impasse procedures. The Court's conclusion that PERB has jurisdiction over post-impasse scope of bargaining claims did not disrupt the Board's established jurisdiction over improper practice charges.

Moreover, the City argues that the Court dismissed the same arguments made by the Union in the instant matter regarding the legislative history of the relevant Taylor Law statutory provision. The Court specifically noted that the Legislature did not amend CSL § 205(5)(d), "which authorizes [the Board] to exercise jurisdiction over improper practice charges, including a charge that a party is refusing to negotiate in good faith concerning terms and conditions of employment— a dispute which would require [the Board] to determine scope of bargaining issues." *PBA v. City of New York*, 97 N.Y.2d 378, at 391. Thus, the Court found that the Board retained jurisdiction to determine whether an issue constitutes a mandatory subject of bargaining in the context of an improper practice proceeding.

Accordingly, the City contends that PERB and the courts agree that the petition is properly before this Board. Thus, if the petition is dismissed, the City will have no recourse to challenge the Union's bad faith bargaining.

Timeliness

The City asserts that its petition is timely. It argues that its claim that the Union refused to negotiate health benefits, either as part of the MLC or separately, did not accrue until bargaining ceased when the Union refused to negotiate over the City's last health benefits proposal.[10] The City's last health proposal was submitted on March 1, 2018. The Union did not submit a counter proposal and otherwise failed to respond. The City asserts that the filing of the Interest Arbitration Petition, on March 23, 2018, was notice that the Union would "categorically refuse to bargain health benefit proposals . . . ." ("Opp. Memo at 8) The improper practice petition was filed a few weeks later, well within the statute of limitations.

[10] In support of this assertion, the City cites *Village of Malone*, 8 PERB ¶ 3045 (1975), and *Village of Lake Success*, 28 PERB ¶ 3073 (1995).

Further, the City asserts that the Union's August 14, 2017 letter rejecting the City's initial health proposals did not provide notice of the City's claims, which involve the Union's conduct through the mediation process. The City also argues that the appointment of a mediator in November 2017 also did not provide notice of its claims because mediation was a continuation of bargaining. Citing *PBA*, 9 OCB2d 32 (BCB 2016), in which the Board found that the Union's expressions of disapproval regarding prior health benefits agreements negotiated by the MLC were insufficient to place the City on notice of its challenge to the implementation of the 2016 Health Benefits Agreement, the City asserts that, even if it were on notice of the Union's refusal to bargain at either of these times, mere knowledge of the Union's responses to each of its demands did not trigger the statute of limitations. Therefore, the City maintains that the Union's categorical refusal to bargain over health benefits did not accrue until its last bargaining proposal was made and mediation ended.

Finally, the City argues that the petition is timely because it alleges a continuing violation of the Union's duty to bargain in good faith. Consequently, the Board should consider the totality of the Union's conduct throughout the entire round of bargaining.

Mootness

The City asserts that the Union's argument that this petition is moot based on PERB's appointment of an interest arbitration panel contravenes established Board precedent and, if accepted, would have the effect of endorsing bad faith bargaining.

The City contends that a determination that an impasse exists and a determination that a party has engaged in bad faith bargaining are two distinct enquiries. The Board expressly stated this principle in *USA*, in which it emphasized that "an impasse may exist for the very reason that one of the parties has not negotiated in good faith." 35 OCB 9, at 7. As such, the City asserts that

the Board has flatly rejected the City's argument that a declaration of impasse renders any question as to whether a party violated the duty to bargain in good faith moot.

The City argues that the facts of this case are distinguishable from those in *PBA*, which is the sole case relied upon by the Union for its argument that the petition is moot. In that case, the improper practice petition alleged that the Union had engaged in "surface bargaining" and had prematurely filed for a declaration of impasse when no impasse existed. After the petition was filed, the parties participated in mandated mediation, which proved unsuccessful. Thereafter, PERB appointed a public interest arbitration panel. The City asserts that the petition in *PBA* was declared moot because circumstances had changed between the filing of the petition and the Board's decision since the parties had mediated and continued negotiating, "thereby curing the 'surface bargaining' allegation such that a bargaining order remedy would no longer be relevant." (City Opp. At 5) Here, the only relevant change that occurred after the petition was filed is that an interest arbitration panel was appointed. The City submits that while this may establish that the parties are at impasse, it is not dispositive of the issue of whether the Union engaged in bad faith bargaining by refusing to bargain over health benefits. Moreover, the City contends that, since *PBA* is distinguishable, the doctrine of issue preclusion does not apply.

Additionally, the City asserts that, even assuming *arguendo* that one of its requested remedies—a bargaining order—is no longer appropriate, improper practices are not subject to dismissal based on a lack of remedies. Nevertheless, the petition seeks other remedies that are still available, including a declaration that the Union violated the NYCCBL and a posting of a notice of violation. Thus, the City asserts that the availability of these remedies maintains the viability of the petition.

Waiver

The City asserts that it did not waive its right to challenge the Union's failure to bargain in good faith by not objecting to the appointment of a mediator. It maintains that part of its claim is that the Union failed to bargain in good faith during the mediation itself. Therefore, the City did not waive its right to seek redress for this continued refusal to bargain by not filing exceptions before the conduct occurred. Moreover, the City asserts that it consistently objected to the Union's insistence on prematurely advancing the dispute to interest arbitration prior to it negotiating health benefits. In particular, the City cites to its letter to PERB opposing mediation, in which it noted that the Union had failed entirely to respond to the City's proposals.

Notably, the City also contends that PERB did not declare the parties to be at impasse before appointing a mediator. Moreover, according to the City, filing an exception is not the only avenue in which to challenge a final determination that an impasse exists. PERB has stated that a party may challenge an impasse declaration through filing exceptions or an improper practice charge. As such, the City submits that it did not waive its right to challenge the Union's bad faith bargaining and premature request for referral to interest arbitration.

DISCUSSION

This Board has long held that "for purposes of evaluating a motion to dismiss, we must deem the factual allegations of the petition to be true and limit our inquiry to whether, taking the facts as alleged by the petitioner, a cause of action under the NYCCBL has been stated." *UFA*, 45 OCB 39, at 13 (BCB 1990). As such, we "cannot rely upon facts asserted by the moving party that are contrary to those alleged in the petition since we do not resolve questions of credibility and weight." *PBA*, 9 OCB2d 32, at 18 (BOC 2016) (citing *Farina*, 31 OCB 20, at 7 (BCB 1983)).

Such issues are properly considered after an evidentiary hearing. We first consider the threshold issues of jurisdiction and timeliness.

Jurisdiction

This Board has been presented with issues concerning bargaining between these two parties on numerous occasions. *See, e.g., PBA*, 11 OCB2d 20 (BCB 2018); *PBA*, 10 OCB2d 3 (BCB 2017); *PBA*, 9 OCB2d 32; *PBA*, 6 OCB2d 36 (BCB 2013). Indeed, since the inception of the NYCCBL, we have asserted jurisdiction over claims alleging that one party or the other has violated the NYCCBL by failing to bargain in good faith. Here, however, the Union has called into question our jurisdiction in the narrow circumstances in which one of the parties has invoked PERB's impasse procedures. In particular, the Union argues that the Court of Appeals' decision in *PBA v. City of New York*, as well as relevant legislative history, compels a finding that this Board does not have jurisdiction to resolve the instant improper practice petition. For the reasons stated below, the Board disagrees and asserts jurisdiction over the claims now before it.

PBA v. City of New York involved Chapter 641 of the Laws of 1998 ("Taylor Law Amendment"), which amended the Taylor Law to allow City police and fire unions to access PERB's binding arbitration impasse procedures and addressed the question of whether PERB or this Board maintained jurisdiction over scope of bargaining issues after a declaration of impasse is filed with PERB. The Court of Appeals held that, once PERB has declared that an impasse exists, "it has jurisdiction over scope of bargaining issues between [the] PBA and the City, to the extent necessary for PERB to exercise its exclusive jurisdiction to resolve impasses." *PBA v. City of New York*, 97 N.Y.2d at 389-390. However, "[u]ntil such time, BCB retains jurisdiction to determine scope of bargaining outside of the impasse context." *Id*. at 390.

Moreover, regarding claims of an improper practice, the Court noted:

> [C]hapter 641 does not divest BCB of all authority to determine scope of bargaining issues arising from collective negotiations between the City and police and fire unions . . . . Notably, the Legislature did not amend Civil Service Law § 205 (5) (d), which authorizes BCB to exercise jurisdiction over improper practice charges, including a charge that a party is refusing to negotiate in good faith concerning terms and conditions of employment— a dispute which would require BCB to determine scope of bargaining issues. Because chapter 641 did not amend Civil Service Law § 205 (5) (d) or alter BCB's improper practice jurisdiction thereunder, BCB retains jurisdiction to decide whether an issue constitutes a mandatory subject of bargaining in the context of an improper practice proceeding.

PBA v. City of New York, 97 N.Y.2d at 390-391 (citing *Matter of Town of Brookhaven v. New York State Bd. of Equalization & Assessment*, 88 N.Y.2d 354 (1996)). As such, the Court addressed the exact situation with which the Board is now confronted and found that the Board has jurisdiction to determine whether a party has committed an improper practice by refusing to negotiate in good faith, even after impasse has been declared. In making this finding, the Court considered the Taylor Law Amendment's legislative history and decided that the Amendment read together with the remainder of the Taylor Law "plainly evince the intention to equip PERB with all the powers it needs to resolve impasses but not to otherwise disturb BCB's improper practice jurisdiction." *Id*. at 391 (citing Mem of Michael R. Cuevas, Chairman of PERB, Bill Jacket, L 1998, ch 641).

After this improper practice charge was filed, PERB issued a decision affirming its Director's decision to dismiss the City's PERB IP. In the decision, PERB recognized and addressed the Union's arguments regarding the legislative intent of the Taylor Law Amendment and the import of the court's ruling in *PBA v. City of New York* but found that this Board has jurisdiction over the Union's claim. *See City of New York*, 51 PERB ¶ 3018 (2018). The Supreme Court likewise rejected the Union's arguments that PERB had jurisdiction over this claim. *See*

Matter of Patrolmen's Benevolent Association of the City of New York, Inc. v. New York State Public Relations Bd., Index No. 904303/2018 (Sup. Ct. Albany Co. Oct. 10, 2018) (Ferreira, J.).

Like PERB and the Supreme Court, we reject the Union's arguments that the City's improper practice claim is inextricably intertwined with PERB's jurisdiction over impasse. We are not persuaded that a finding by this Board that the Union failed to bargain in good faith over health benefits would "preclude the existence of an impasse" or otherwise challenge PERB's declaration of impasse and appointment of an interest arbitration panel.[11] (Motion at 14 (citing Pet., Ex. 23 at 2)) To the contrary, both this Board and PERB have found that "an impasse may exist for the very reason that one of the parties has not negotiated in good faith." *See USA*, 35 OCB 9, at 7 (citing *City of Newburgh*, 15 PERB ¶ 3116 (1982)). Therefore, consistent with *PBA v. City*, this Board finds that it has jurisdiction over the instant improper practice claim.

Timeliness

Under NYCCBL § 12-306(e), an improper practice petition may be filed no later than four months after the disputed action occurred. Here, the City challenges the Union's alleged failure to bargain in good faith throughout the course of bargaining for a successor agreement. In particular, the City challenges the Union's course of conduct between April 1, 2017, when bargaining began, and March 23, 2018, when the Union filed the Interest Arbitration Petition. It

[11] Regarding the Union's pending Petition for Declaratory Ruling with PERB, we note that the question of whether certain subjects are proper for determination by the interest arbitration panel is a separate inquiry from whether the Union's conduct in the negotiations leading up to the appointment of the panel constituted bad faith bargaining. *See USA*, 35 OCB 9, at 8 (a finding that an impasse exists is not a determination on the merits of a claim of refusal to bargain in good faith). In addition, the Petition for Declaratory Ruling concerns only certain portions of the City's proposals on health benefits. Nevertheless, to the extent that the Board believes that PERB's resolution of this claim is relevant to the Board's determination on the underlying improper practice, we will take such into consideration in determining when and how to proceed with the resolution of this case.

argues that the totality of the Union's conduct "demonstrates its intent to circumvent and abuse the bargaining process." (Pet. ¶ 50)

The Union contends that the four-month limitations period should be measured from its August 14, 2017 letter, in which it notified the City that it "categorically reject[ed]" its health benefits proposal since "there is no economic justification for further reducing the [police officers'] fringe benefits." (Pet., Ex. 13) Thus, it claims that the City had notice by this date "of what it now claims is the PBA's failure to bargain in good faith." (Motion at 9) This Board has found that a determination as to whether a party has refused to bargain in good faith "should not be made on the basis of an isolated act during the course of negotiations, but should be based on the totality of a party's conduct." *NYSNA*, 6 OCB2d 23, at 9 (BCB 2013) (quoting *LEEBA*, 2 OCB2d 29 at 8 (BCB 2009)). Further, the City's claim does not concern one isolated incident in which the Union declared its position on health benefits.[12] Rather, it concerns the Union's overall conduct throughout the course of bargaining and its alleged refusal to bargain over health benefits either individually or as part of the MLC. This conduct allegedly continued throughout PERB-sponsored mediation sessions, the last of which was held on March 1, 2018. Therefore, the City's petition, filed on April 16, 2018, was well within the four-month statute of limitations period. Thus, while the contents of the August 14, 2017 letter may be relevant in determining the merits of the petition, we do not find the letter is dispositive in rendering the City's petition untimely.

We also do not find that PERB's appointment of a mediator to assist the parties in bargaining on November 21, 2017 constitutes the date on which the statute of limitations began to

[12] Moreover, we note that the Union's rejection of the City's proposals in its August 14, 2017 letter was not unequivocal but was contingent on the City's economic proposals. Additionally, the Union stated that it was still willing to bargain with the City on *all* terms and conditions of employment in its October 13, 2017 letter.

run. Even assuming, *arguendo*, that PERB's appointment of a mediator constituted a finding that the parties were at impasse, "[i]t is well-settled that the duty to negotiate in good faith . . . extends to conduct following a declaration of impasse . . . ." *City of Ithaca*, 49 PERB ¶ 3030, at 3097 (2016) (citing *Village of Wappingers Falls*, 40 PERB ¶ 3020, at 3083 (2007); *City of Mount Vernon*, 11 PERB ¶ 3095, 3156 (1978); *Poughkeepsie Public School Teachers Assn*, 27 PERB ¶ 3079, 3182 (1994); *County of Rockland*, 29 PERB ¶ 3009 (1996)); *see also NYSNA*, 6 OCB2d 23 (BCB 2013) (evaluating whether the submission of modified bargaining proposals to an impasse panel constituted bad faith bargaining). Thus, the Union's conduct during mediation sessions is relevant to the question of whether it engaged in bad faith bargaining as alleged by the City. Consequently, we find the petition is timely.

Mootness

This Board has held that "issues raised in an improper practice petition charge [become] moot when a change in circumstances eliminates the underlying controversy and the policies of statutory law are not served by further consideration." *PBA*, 73 OCB 21, at 5 (citing *PBA*, 23 OCB 22, at 2 (BCB 1979); *City of Peekskill*, 26 PERB ¶ 3062 (1993)); s*ee also Matter of Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach*, 98 N.Y.2d 165, 172 (2002). Here, relying on *PBA*, 73 OCB 21, the Union argues that the petition should be dismissed because PERB's appointment of an interest arbitration panel renders moot the question of whether it bargained in good faith prior to the appointment.

PBA involved the same parties and concerned the City's claim that the Union engaged in "surface bargaining" tactics and filed a Declaration of Impasse with PERB when no such impasse existed. As a remedy, the City sought an order 1) finding that the Union breached its obligation under the NYCCBL to bargain in good faith; 2) requiring the Union to meet for negotiations with

sincere resolve to reach an agreement; and 3) directing the Union to withdraw its Declaration of Impasse filed with PERB. The Board found that since PERB declared the parties to be at impasse subsequent to the filing of the improper practice petition, it had necessarily decided the "gravamen of the City's complaint" when it determined that the parties had bargained to exhaustion. *PBA*, 73 OCB 21, at 5. As such, the Board found that the City's claim was moot.

The instant case is factually distinguishable. While the City does allege that the Union's refusal to bargain over health benefits was part of an effort to prematurely engage the parties in interest arbitration, this is not the "gravamen" of its complaint since it does not allege that the filing of the Interest Arbitration Petition in and of itself was a violation of the NYCCBL. Unlike our ruling in *PBA*, the alleged unlawful conduct here is not mooted by the appointment of the interest arbitration panel. Rather, the City's claim concerns the Union's overall conduct throughout the course of bargaining and its alleged refusal to bargain over health benefits either individually or as part of the MLC. A ruling on the merits of this claim may be relevant to the parties' ongoing health benefits bargaining obligations and, therefore, the policies of statutory law may be served by further consideration.[13] Consequently, this is not a situation in which the underlying controversy has been eliminated by a change in circumstances.[14]

[13] Moreover, the City's 2016 IP involved many of the same facts as the instant dispute and similar allegations. In an Interim Decision, the Board denied the Union's motion to dismiss, and the City subsequently withdrew the petition as part of a settlement. Therefore, "[e]ven if we were to find that the [instant] dispute had been rendered moot, the circumstances present here [fit within] 'the established exception to mootness for disputes capable of repetition, yet evading review.'" *DC 37, L. 299*, 6 OCB2d 8, at 13, n. 8 (BCB 2013) (quoting *OSA*, 1 OCB2d 45, at 15 (BCB 2008); *DC 37, L. 1457*, 1 OCB2d 32, at 24 (BCB 2008)).

[14] Because we find that *PBA* does not concern the same issue as the instant matter, the doctrine of issue preclusion does not apply.

As to the parties' arguments regarding available remedies, we note that the Board "has broad authority to craft an appropriate remedy to an improper practice and is not confined by the remedy sought." *NYSNA*, 6 OCB2d 23, at 8 (BCB 2013) (citing NYCCBL § 12-309(a); *UFT*, 5 OCB2d 26 (BCB 2012)). At this point in time, it is premature to determine available remedies that the Board might order should it find that the PBA committed an improper practice. Accordingly, we find that the possible preclusion of one requested remedy does not render this petition moot.

Waiver

It is well established that "[t]he Board will find a waiver of statutory or contractual rights only when the intention to waive such rights is clear, unmistakable, and unambiguous." *DC 37, L. 376*, 75 OCB 20, at 11 (BCB 2005); *see UFA*, 73 OCB 3A (BCB 2004) (applying the state court standard for waiver). Far from explicitly waiving its right to challenge the Union's conduct, the City voiced its objections to the Union's conduct at numerous times throughout the course of bargaining, both in letters to various PERB Directors as well as in the PERB IP.

We find no support for the Union's assertion that the City waived its right to seek relief from this Board by not filing formal exceptions to PERB's appointment of a mediator and by allegedly not raising the Union's failure to bargain at that time.[15] Here, the City has not taken any action that could be could be considered a "clear, unmistakable, and unambiguous" waiver of its right to file an improper practice petition. *See, e.g.*, *DC 37*, 6 OCB2d 14, at 20 (2013) (rejecting a waiver argument when there was "no evidence of a clear and unmistakable relinquishment of a known right.") (citing *NYSNA*, 4 OCB2d 23, at 11 (BCB 2011); *CEA*, 75 OCB 16, at 10 (BCB

[15] We note that the City was under no obligation to raise its claim in front of an entity without jurisdiction to consider it before it had ripened.

2005)). In this regard, we do not find the City's cooperation with PERB's process for selecting the arbitration panel following the Union's request for interest arbitration to be a waiver of its rights. To the contrary, had the City refused to participate, it may have waived its right to do so at a later time. *See City of New York*, 40 PERB ¶ 3010, at 3034 (2007) (stating that "[i]t is well-settled that a party that fails to seek the disqualification of an arbitrator based on a known disqualifying relationship will be deemed to have waived the objection," which "must be made to the Director during the name striking period.") (citations omitted)

For the reasons given above, we deny the PBA's Motion. This matter shall proceed to a hearing before a hearing officer.

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 defer or dismiss the petition, filed by the Patrolmen's Benevolent Association of the City of New York, Inc., be and hereby is, denied; and it is further

ORDERED, that the case shall proceed to hearing.

Dated: July 30, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

PAMELA S. SILVERBLATT
MEMBER

DANIEL F. MURPHY
MEMBER

I dissent. GWYNNE A. WILCOX
MEMBER

I dissent. PETER PEPPER
MEMBER