PBA, 12 OCB2d 22 (BCB 2019)

(IP) (Docket No. BCB-4285-18)

Summary of Decision*:** The City alleged that the PBA breached its duty to bargain in good faith, in violation of NYCCBL § 12-306(b)(2), (c)(2), and (c)(3), by its efforts to prevent the City's representative from serving on an interest arbitration panel. The PBA filed a motion to dismiss the City's petition, arguing that the Board lacks jurisdiction over the petition, that the petition lacks merit because the filing of a lawsuit is not an improper practice, and that the same issues have been presented to the New York State Supreme Court. The City opposed the dismissal of the petition, arguing that that the Board has jurisdiction over its claims, which concern the totality of the Union's conduct and not simply the filing of the lawsuit. The City also argued that the lawsuit is frivolous and therefore not afforded protection under the law, and that the legal issues in the petition are distinct from those in the lawsuit. The Board found that it has jurisdiction to consider the claims, but that the City's allegations concerning the Union's actions did not state a claim of a breach of the duty to bargain in good faith. Accordingly, the motion to dismiss was granted, and the petition was dismissed. ***(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.

DECISION AND ORDER

On October 3, 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), (c)(2), and (c)(3) of the New York City

Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it sought to prevent the Commissioner of Labor Relations from serving as the City's representative on an interest arbitration panel, in breach of its duty to bargain in good faith. On November 19, 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 lacks merit because the filing of a lawsuit is not an improper practice, and that the same issues have been presented to the New York State Supreme Court. In response to the Motion, the City argues that the Board has jurisdiction over its claims, which concern the totality of the Union's conduct and not simply the filing of the lawsuit. The City also argues that the lawsuit is frivolous and therefore not afforded any protection under the law, and that the legal issues in the improper practice petition are distinct from those in the lawsuit. The Board finds that it has jurisdiction to consider the claims, but that the City's allegations concerning the Union's actions do not state a claim of a breach of the duty to bargain in good faith. Accordingly, the Motion is granted, and the petition is dismissed.

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) (citing *James-Reid*, 77 OCB 6, at 11-12 (BCB 2006); *DC 37*, 49 OCB 37, at 12-13. (BCB 1992)).

The City and the Union are parties to a collective bargaining agreement for the period from August 1, 2010, through July 31, 2012, as modified by a January 31, 2017 Memorandum of Understanding for the period from August 1, 2012, through July 31, 2017 ("2012-2017 MOU"). At the time the petition was filed, Robert W. Linn served as Commissioner of the City's Office of

Labor Relations.[1] Sometime in April 2017, the parties began bargaining for a successor agreement. However, after several months of bargaining as well as three mediation sessions mandated by the New York State Public Employment Relations Board ("PERB"), the parties were unable to reach a successor agreement. On March 23, 2018, the Union filed a Petition for Interest Arbitration ("Interest Arbitration Petition") with PERB. The City filed a response to the Interest Arbitration Petition on April 9, 2018, and named Commissioner Linn as its party-appointed member to serve on the interest arbitration panel ("Panel").[2]

On April 20, 2018, the Union wrote a letter to PERB's Director of the Office of Conciliation, Kevin Flanigan, objecting to the City's designation of Commissioner Linn as its party-appointed Panel member. In particular, the letter stated that "Commissioner Linn's role as the PBA's attorney and advocate in a prior interest arbitration between these same parties disqualifies him from serving in this proceeding adversely to his former client the PBA." (Pet., Ex. 11) The letter also claimed that Commissioner Linn's appointment violated New York State Rule of Professional Conduct 1.9 because "a lawyer [Commissioner Linn] who has formerly represented a client [the PBA] in a matter shall not thereafter represent another person [the City] in the same or a substantially related matter [impasse arbitration] in which that person's interests are materially adverse to the interests of the former client." (*Id.*) (brackets in original) The PBA therefore requested that the City withdraw its designation of Commissioner Linn as its

[1] We take administrative notice of the fact that Linn retired as Commissioner on or about February 15, 2019.

[2] Pursuant to § 209.4 (c)(ii) of the New York State Public Employees' Fair Employment Act (New York Civil Service Law, Article 14) ("Taylor Law"), the Panel is made up of one member appointed by the employer, one member appointed by the union, and one public member, who serves as a neutral chairperson, selected jointly by the parties.

representative or, in the alternative, that PERB exercise its "explicit *and* implicit authority to exclude Commissioner Linn" from the Panel. (*Id*.) (emphasis in original)

This was not the first time the Union objected to Commissioner Linn's appointment to an interest arbitration panel. In 2014, during the course of bargaining for a successor to a collective bargaining agreement that had expired on July 31, 2010, the parties once again failed to reach an agreement and proceeded to an interest arbitration panel. Commissioner Linn had served as the City's Chief Negotiator during that round of bargaining as well, and the Union similarly objected to his participation on the interest arbitration panel. The City opposed the Union's request to have Commissioner Linn removed from the panel and, on September 19, 2014, Director Flanigan notified the parties that PERB did not have the authority to disqualify a party-appointed panel member. Thereafter, the Union submitted a request to the interest arbitration panel to remove Commissioner Linn, and a pre-trial hearing was held to determine whether the panel had jurisdiction to do so. In an interim decision, the neutral member of the panel, Arbitrator Howard Edelman, concluded that the panel did not have jurisdiction to remove a party-appointed panel member and suggested that the Union could appeal Commissioner Linn's appointment judicially, by filing an Article 78 petition. The Union did not file an Article 78 petition at that time, and the dispute proceeded to arbitration before the panel, which included Commissioner Linn. An award was issued on November 13, 2015. The PBA did not seek review of either the interim decision or the November 13, 2015 award.

On April 24, 2018, the City wrote a letter to Director Flanigan in response to the Union's request to have Commissioner Linn removed from the Panel. The letter stated that the Union's current request was as baseless as its 2014 request to remove Commissioner Linn and should therefore be denied. On May 18, 2018, the Union again wrote to PERB objecting to Commissioner

Linn's service on the Panel. After receiving no response, the Union wrote another letter on July 11, 2018, requesting that PERB issue the list of public arbitrators. On August 10, 2018, PERB sent the parties a list of qualified, disinterested persons for the selection of the public member of the arbitration panel. Both the Union and the City, including Commissioner Linn, participated in the selection process. On September 10, 2018, PERB designated the Panel, which included Commissioner Linn as the City's representative, Kenneth R. Feinberg as the Union's representative, and John M. Donoghue as the neutral chairperson mutually chosen by the parties.

On September 17, 2018, the Union filed a hybrid Article 78 petition and declaratory judgment action against the City and PERB in Albany County Supreme Court ("Article 78 Action") seeking to have Commissioner Linn disqualified from serving as the City's party-appointed member of the Panel. The petition asserted four grounds upon which the Union argued that Commissioner Linn must be disqualified. First, the Union claimed that Commissioner Linn's participation on the Panel violated Rules 1.9 and 1.6 of the New York State Rules of Professional Conduct because Commissioner Linn served as the Union's attorney in prior collective bargaining negotiations and arbitrations against the City. Second, the Union argued that Commissioner Linn's disqualification was required to avoid the fact and the appearance of representing conflicting interests. Third, the Union argued that the City's Commissioner of Labor Relations was ineligible for appointment as an arbitrator under the Taylor Law and common law because a party cannot appoint itself. Finally, the Union asserted that Commissioner Linn demonstrated "evident partiality" when he "publiciz[ed] his disdain for the PBA's conduct in the very matters in dispute and [] has already pre-determined the issues before the arbitration has even begun." (Motion at 5) On March 15, 2019, the Court granted the City's motion to dismiss the Union's Article 78 petition. *See Patrolmen's Benevolent Assn. of the City of New York, Inc., v. The New York State Public*

Employees Relations Bd. and the City of New York, Index No. 905843/18 (Sup. Ct. Albany Co. Mar. 19, 2019) (Weinstein, J.).

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the Board lacks jurisdiction over the instant petition because the City's claim concerns conduct arising after the interest arbitration process began. Citing *Fairview Fire District*, 13 PERB ¶ 3102 (1980), the Union argues that, once an impasse was declared, negotiations were "by definition [] already exhausted," and therefore its efforts to disqualify Commissioner Linn from the Panel could not constitute a failure to bargain in good faith. (Motion at 14) Additionally, the Union contends that the Board does not have jurisdiction over the sufficiency of a challenge to an arbitrator appointed by PERB. Rather, the Union contends that the law is clear that PERB has jurisdiction over all matters relating to the administration of an impasse.

The Union next contends that "it is black-letter law that the commencement of a court proceeding cannot be deemed an improper practice." (Motion at 17) The Union argues that PERB has routinely dismissed improper practice claims that are based on the filing of a lawsuit, which the courts have affirmed. Moreover, it asserts that the United States Supreme Court has held similarly, finding that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." (Motion at 18) (quoting *Bill Johnson's Restaurants, Inc. v. Natl. Labor Relations Bd.*, 461 U.S. 731 (1983)) (internal quotation marks omitted) The Union also asserts that, since the Court ruled in the City's favor in the Article 78 Action by finding that Commissioner Linn was not disqualified from serving on the Panel, "it did not change the status quo [and] there is no controversy that is ripe for [the Board's] determination."

(PBA March 26, 2019 Letter) Additionally, the Union contends that the City, for the first time in its Motion opposition memo, has attempted to recast its claim as a continuing violation in order to argue that conduct preceding the filing of the Article 78 Action constitutes a violation of the duty to bargain in good faith. According to the Union, this theory should be rejected because any conduct occurring before June 3, 2018, is outside of the NYCCBL's statute of limitations.

Finally, the Union contends that the improper practice petition should be dismissed because the issues the City raises have already been presented, fully submitted, and now decided by the Court. The Union argues that is a well-established principle, codified in the New York State Civil Practice Law and Rules ("CPLR") § 3211(a)(4), that a proceeding should be dismissed in favor of a first-filed proceeding where "the identity of the parties and causes of action are substantially the same, thus raising the danger of conflicting rulings related to the same matter." (Motion at 20) (quoting *Errico v. Stryker Corp.,* No. *650990/12,* 2013 N.Y. Slip Op 30244(U) (Sup. Ct. N.Y. Co. Jan. 14, 2013) (internal quotation marks omitted)) Moreover, the Board has dismissed improper practice petitions where the petitioner is attempting to re-litigate matters already contested in court proceedings. The Union contends that "just as [it] had a right to file the lawsuit, [it] has a right to pursue an appeal" of the Court's decision. (PBA March 26, 2019 Letter)

City's Position

The City asserts that this Board has jurisdiction over the instant dispute because it concerns conduct that occurred prior to the interest arbitration process. In particular, the City's claim concerns the Union's interference with the City's selection of its Panel member, which continues to this date and has prevented the Panel from conducting the arbitration. Additionally, the City argues that the duty to negotiate in good faith applies to all phases of the negotiation process, including following a declaration of impasse and throughout impasse procedures. As such, the

Union was and is obligated to act in good faith throughout the impasse procedures, including during the process of appointing the Panel members. Furthermore, PERB's statutory authority to designate the Panel does not affect the City's right to bring the instant improper practice petition concerning the Union's conduct during that process.

The City next asserts that the premise of the Union's Motion is incorrect because the improper practice petition concerns the totality of the Union's conduct in attempting to interfere with the City's choice of bargaining representative, and the Article 78 petition is only one instance of the Union's unlawfully motivated conduct. The Union's attempts to interfere with the City's appointment of Commissioner Linn began as soon as the City named him as their party-appointed Panel member. In particular, the Union filed multiple letters with PERB objecting to Commissioner Linn's appointment, yet nevertheless participated in the process of designating the Panel. After PERB properly refrained from removing Commissioner Linn, the Union furthered its attempts to undermine the City's choice of representative by filing the Article 78 Action.

The City contends that the totality of the Union's bad faith conduct includes the Union's actions in the years preceding 2018 during which the Union raised the same objections to Commissioner Linn's appointment to the panel in the 2015 interest arbitration proceedings; abandoned those objections when they were rejected by both PERB and the panel itself; proceeded with the interest arbitration hearing and accepted the award without a legal challenge; continued to engage in negotiations with Commissioner Linn representing the City in additional rounds of bargaining, including the instant round; participated in PERB-administered mediation with Commissioner Linn continuing to represent the City; and only after mediation failed and the Union petitioned for interest arbitration, reversed course and revived the same previously-abandoned objections to Commissioner Linn's appointment to the Panel.

Furthermore, the City contends that the PBA's argument that the filing of a lawsuit cannot be an improper practice ignores the established rule that frivolous litigation is not entitled to any protection. Also relying upon *Bill Johnson's Restaurants, Inc. v. Natl. Labor Relations Bd.*, the City asserts that "baseless" lawsuits are not afforded First Amendment protection. (City Opp. Memo at 6) The City avers that lawsuits that lack a reasonable basis and are improperly motivated may be enjoined as unfair labor practices. According to the City, the Union's failure to seek judicial recourse after abandoning its objections to Commissioner Linn's participation in the 2015 panel, as well as its voluntary participation in that interest arbitration process and acceptance of the 2015 panel's award, are evidence that the Article 78 Action's claims are frivolous and advanced in bad faith. Moreover, the City argues that the Union's Article 78 Action is "patently groundless." (City Opp. Memo at 10)

Finally, the City asserts that the Union's Article 78 Action does not warrant dismissal of the instant improper practice petition because the two concern different causes of action. The cases cited by the Union in support of dismissal are inapplicable because they dealt with an unsuccessful party seeking to re-litigate the same issue under the guise of an improper practice. Here, the City is not a losing party seeking to renew a previously-filed cause of action and obtain a remedy denied by the Courts. Rather, for the first time, the City is seeking a finding that the Union is interfering with the City's choice of Panel member and violating its duty to bargain in good faith. The City has not sought to adjudicate this dispute in the Courts and could not do so because only the Board has jurisdiction over these claims.

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 do not "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."[3] *PBA*, 9 OCB2d 32, at 18 (BOC 2016) (citing *Farina*, 31 OCB 20, at 7 (BCB 1983)).

We first consider the threshold issue of jurisdiction. Initially, we agree with the Union that this Board does not have jurisdiction to rule on a party's objections to the composition of an interest arbitration panel. Such jurisdiction lies with PERB in the first instance or the Courts, if PERB's final designation is being challenged. *See City of New York*, 40 PERB ¶ 3010 (2007) (ruling on the Union's exceptions to the PERB Director's designation of an interest arbitration panel and upholding Director's determination that two arbitrators were "disinterested" and thus qualified to serve on the panel); *see also* Taylor Law §209.4(c)(vii) ("the determination of the public arbitration panel shall be subject to review by a court of competent jurisdiction in the manner prescribed by law."). However, it is not necessary for the Board to rule directly on the question of whether Commissioner Linn is properly designated as the City's member or should be disqualified. Rather, this case concerns the discrete question of whether in this instance, the Union's objections to Commissioner Linn's participation on the Panel, including the filing of the Article 78 Action,

[3] We note that any facts concerning the Union's efforts in 2014 to disqualify Commissioner Linn from serving on an interest arbitration panel are considered solely as background information. This conduct occurred during two prior rounds of bargaining, which culminated with an interest arbitration award that was accepted and implemented by the parties. As such, any allegations regarding the Union's conduct in this regard are well beyond the four-month statute of limitations and cannot form the basis of an improper practice claim. *See* NYCCBL § 12-306(e).

constituted a violation of the Union's duty to bargain in good faith. PERB has recently confirmed that with respect to the City and the Union, "claims of *conduct* violative of the provisions of § 209-a of the Taylor Law, unlike scope of bargaining cases, fall within the jurisdiction of the BCB, even when 'ancillary to the mediation/ arbitration.'" *City of New York*, 51 PERB ¶ 3018, at 3077 (2018) (quoting *Patrolmen's Benevolent Ass'n of City of New York Inc. v. City of New York*, 97 N.Y.2d 378, at 391 (2001)) (emphasis in original). This Board recently reiterated this finding. *See* PBA, 12 OCB2d 21 (2019). Here, we find that the Union's objections to Commissioner Linn's participation on the Panel, while ancillary to the interest arbitration proceedings, concern conduct alleged to constitute a breach of the duty to bargain in good faith. Consequently, the City's claims regarding this conduct fall within the Board's jurisdiction.

Additionally, this Board has jurisdiction to consider an improper practice claim concerning conduct that occurred after the interest arbitration process has begun. Contrary to the Union's claim, "it 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 ¶3 020, at 3083; *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)). As such, this Board has never ruled that allegations of bad faith bargaining can no longer be considered once an impasse has been declared and an interest arbitration panel has been designated. Indeed, we have previously exercised jurisdiction to determine whether the submission of modified bargaining proposals for the first time to an impasse panel constituted bad faith bargaining. *See NYSNA*, 6 OCB2d 23 (BCB 2013). Here, the allegations are that the Union objected to the City's choice of representative prior to the commencement of the interest arbitration proceedings. We find the fact that the Union was

unsuccessful in these efforts, because PERB designated the Panel despite its objections, does not divest this Board of jurisdiction to determine the City's claims. Accordingly, we reject the Union's argument that the petition should be dismissed for lack of jurisdiction.[4]

Turning to the merits, we find that the Union's efforts to disqualify Commissioner Linn from the Panel, including its filing of an Article 78 Action, do not constitute an improper practice. This Board has not previously considered whether the filing of a lawsuit can constitute an improper practice in and of itself.[5] Nevertheless, PERB has consistently ruled that "the commencement of a lawsuit itself cannot constitute an improper practice." *Local 418, CSEA (Diaz)*, 16 PERB ¶ 3108, at 3182 (1983), *affd.*, *Diaz v. Pub. Empl. Relations Bd.*, 115 A.D.2d 871 (3d Dept. 1985) (quoting *Board of Educ. of the City Sch. Dist. of the City of New York*, 15 PERB ¶ 3136, at 3213 (1982); and citing with approval *Bill Johnson's Restaurants, Inc. v. Natl. Labor Relations Bd.*, 461 U.S. 731 (1983)) (internal quotation marks omitted). *See also Town of Fishkill Police Fraternity, Inc. (Montegari)*, 47 PERB ¶ 4594, at 4869 (ALJ 2014) (stating that "the commencement of a lawsuit itself cannot constitute an improper practice because a party is entitled to bring a lawsuit to

[4] We note that contrary to the Union's arguments, *Fairview Fire District*, 13 PERB ¶ 3102 (1980) does not stand for the proposition that claims of an improper practice can no longer be considered once the interest arbitration process has begun. Rather, PERB has clarified that *Fairview* "is properly construed as holding, not that we lack jurisdiction over improper practice charges arising after a public interest arbitration panel has been convened, but that, as a general proposition, the conduct of parties before the arbitration panel is appropriately subject to the jurisdiction of the arbitration panel pursuant to Rules § 205.8. This does not mean that this Board lacks jurisdiction in all respects over improper practice charges during the arbitration process." *City of Yonkers*, 22 PERB ¶ 3024 (1989). The instant case does not concern the Union's conduct before the Panel, as the Panel has yet to begin proceedings. Thus, *Fairview* does not support the Union's argument that the Board lacks jurisdiction over the petition.

[5] However, the Board has ruled that in the context of improper practice charges that a party's "exercise of its right to file an improper practice with the Board . . . cannot be construed to constitute an improper practice under any provision of the NYCCBL." *CWA, L. 1180*, 6 OCB2d 31, at 7 (BCB 2013) (citing *LEEBA*, 79 OCB 18, at 23 (BCB 2007)).

adjudicate its claims.") (internal quotation marks and citations omitted). Moreover, PERB has clarified that "[t]he motive behind the filing is immaterial as long as the charge is not frivolous." *Fishkill Police Fraternity, Inc. (Montegari)*, 47 PERB ¶ 4594, at 4869 (citing *Dundee Cent Sch Dist.*, 17 PERB ¶ 4503, *affd.*, 17 PERB ¶ 3047 (1984)).

The City makes multiple arguments as to why it believes the Article 78 Action is frivolous and "patently groundless." (City Opp. Memo at 10). Subsequent to the filing of the improper practice petition and the Motion, the Court determined that the Union's claims lacked merit and dismissed the Article 78 Action. However, a finding that a claim is meritless does not necessarily mean that the claim was frivolous. *See CWA, L. 1180*, 6 OCB2d 31, at 7 (BCB 2013). Furthermore, there is nothing in the Court's 22-page decision, which thoroughly analyzed the Union's claims, to indicate that the Court viewed it as such. As a result, we do not find that the Article 78 Action was frivolous or that the filing of the Article 78 Action alone constitutes an improper practice.[6]

The City also alleges that the Union's filing of the Article 78 Action is only one instance of the Union's bad faith conduct, which it contends began as soon as the City named Commissioner Linn as its party-appointed Panel member. However, we do not find that the Union's objections to Commissioner Linn's participation on the Panel, and its arguably inconsistent participation with PERB's process for designating the Panel despite its objections, give rise to a breach of the Union's duty to bargain in good faith. The Union's actions in this regard were consistent with PERB's

[6] In this regard, we note that during the prior dispute involving Commissioner Linn's participation on an interest arbitration panel, that panel ruled that it did not have jurisdiction over the dispute and suggested that the Union could pursue its claims in an Article 78 proceeding. Here, the Union did just that, and the Court determined that it had exhausted its administrative remedies before filing the Article 78 Action.

procedures and a party's rights thereunder, and had little to no impact on the City's choice of Commissioner Linn as its representative. Indeed, PERB appointed Commissioner Linn despite the Union's objections. As such, we do not find that these actions rise to the level of a breach of the Union's duty to bargain in good faith.[7]

Accordingly, because we cannot conclude, under the facts as plead by the City, that the Union violated NYCCBL §§ 12-306(b)(2), (c)(2), and (c)(3), we grant the Union's motion to dismiss the improper practice petition.[8]

[7] We need not determine whether the Union's April and May 2018 letters to PERB raising the same argument as the Article 78 Action are part of a "continuing violation" because they do not constitute a breach of the duty to bargain in good faith for the same reason that the filing of the Article 78 Action does not.

[8] Having found that the City's claims fail on the merits, we need not address the Union's remaining arguments.

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 dismiss the improper practice petition, filed by the Patrolmen's Benevolent Association of the City of New York, Inc., be, and the same hereby is, granted; and it is further

ORDERED, that the improper practice petition filed by the City of New York be, and the same hereby is, dismissed.

Dated: July 30, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

I dissent. PAMELA S. SILVERBLATT
MEMBER

I dissent. DANIEL F. MURPHY
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER