

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 50L

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In the Matter of the Application of
PHIL CARUSO, as President of the
Patrolmen's Benevolent Association
of the City of New York, Inc., and
THE PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, INC.,

Petitioners,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Index No. 25827/87

-against-

ARVID ANDERSON, Chairman of the Board
of Collective Bargaining of the City
of New York; THE BOARD OF COLLECTIVE
BARGAINING OF THE CITY OF NEW YORK
OFFICE OF COLLECTIVE BARGAINING;
ROBERT W. LINN, as Director of the
Office of Municipal Labor Relations
of the City of New York; THE OFFICE
OF MUNICIPAL LABOR RELATIONS OF THE
CITY OF NEW YORK; BENJAMIN WARD, as
Police Commissioner of the City of
New York; THE POLICE DEPARTMENT OF
THE CITY OF NEW YORK; and THE CITY
OF NEW YORK,

Respondents.

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ISRAEL RUBIN, J.:

Petitioners seek an order pursuant to CPLR Article 78
annulling a determination by respondent Board of Collective
Bargaining ("the Board") and granting petitioners the relief

sought before the board, viz. an injunction against implementation of changes in the composition of the Civilian Complaint Review Board as provided in Section 440 of Chapter 18 of the New York City Charter, as amended by Local Law 55 of 1986.

In an improper practices petition (BCB 926-86) filed with the Board on December 7, 1986, petitioners sought to prevent a change in the composition of the Civilian Complaint Review Board from seven persons, all full-time members of the New York City Police Department ("NYPD") or its administrative staff, to twelve persons, six of whom remain full-time NYPD employees and six of whom are appointed from the public at large. On September 22, 1987 the Board dismissed the petition (decision number B-41-87) finding that the language of Section 44 of the New York City Charter was mandatory in providing that the Civilian Complaint Review Board ("CCRB") "shall consist of twelve members, of whom six shall be members of the public" The Board therefore concluded that the composition of the CCRB "is a prohibited subject of bargaining."

Also in December, 1986, petitioners commenced an Article 78 proceeding seeking a declaration that Local Law 55 (Introductory Number 13-A), signed by the Mayor on November 24, 1986, is null and void. In that proceeding petitioners noted that they had been instrumental in obtaining passage of a referendum, passed by the voters in November of 1966, which required all members of the CCRB to be full-time NYPD employees and argued that the New York City Council lacked the power to amend voter-initiated legislation. In an order dated July 9, 1987 (Blyn, J.), the court held that the Council was vested with the power to amend Section 440 of the New York City Charter to include civilian members on the CCRB.

In the instant proceeding, commenced on October 21, 1987 petitioners continue to press the argument advanced

before the Board, that implementation of the amended statute should be enjoined on the ground that, in the twenty years since the CCRB was created, its composition has become "a term and condition of employment" of the membership of petitioner Patrolmen's Benevolent Society. Thus, framed, it is clear that petitioners seek to achieve, by only a marginally different presentation of the issue, the same result which has been specifically denied to them in the prior Article 78 proceeding. Indeed, were Justice Blyn still on the bench, the Individual Assignment System rules would require submission of the instant matter to that court. A litigant should not be permitted to obviate the benefits of the IAS system by denominating as a separate proceeding an attempt to achieve the same result by alternate means.

It is clear that were it not for the requirement that petitioners first take their contract dispute before the Board and exhaust their administrative remedies, the issue raised in the instant proceeding would have been appropriate for resolution in the proceeding before Justice Blyn (see Schuylkill Fuel Corp. v Nieberg Realty Corp., 250 NY 304 [1929]; Smith v Russell Sage College, 54 NY2d 185 [1981], rearg denied 55 NY2d 878 [1982]; El Sawah v Penfield Mechanical Contrs., Inc., 119 AD2d 980 (4th Dept 1986)). It is obvious that petitioner's intent in both instances is to avoid the effect of Local Law 55. Having received an order and judgement which upheld the validity of that enactment, petitioners may only seek to avoid the consequences of that ruling by appeal or by way of motion pursuant to CPLR 5015. As one court succinctly stated, "No plenary action lies to set aside a prior judgement" (James v Shave, 97 AD2d 927 [3d Dept 1983]). The inquiry of this court is therefore limited to the narrow issue of whether the Board's finding that the composition of the CCRB is not a subject of collective bargaining was arbitrary question to CPLR 7803 (3).

In order to view petitioner's' claim in perspective, it is appropriate to consider the function performed by the CCRB and the level at which it operates. The CCRB has an advisory role in the investigation of complaints involving the Police Department and the recommendation of appropriate disciplinary action. The CCRB is established by the commissioner whose members serve at his pleasure (New York City Charter, Chapter 18, Sec 440(c)). Its function is strictly advisory, and the statute expressly provides that disciplinary measures may only be taken "upon written charges, after such charges have been examined, heard and investigated by the commissioner, one of his deputies or the assistant to the commissioner" (Id., Sec 440(c)). Therefore, it may be seen that the CCRB functions at the top level of Police Department management in a purely advisory capacity.

It is a management prerogative to seek advice from persons outside the Department. The selection of advisors, their qualifications and their association with NYPD are all matters which fall directly within the discretion of the commissioner, both as a general principle and as a matter of statute. In this regard, the qualifications of the members of the CCRB are not only a management prerogative, but a legislative one.

Local Law 55 is far from unique. For instance, an analogous statute, Section 74 of the Executive Law, empowers the Attorney General to establish an advisory council to investigate code of ethics violations (Section 74, Public Officers Law) by officers and employees of State agencies and to render an advisory opinion on the question of culpability. The Attorney General is not limited by restrictions as to the qualifications of persons who may be appointed to the council. In other statutes, the legislature has provided fairly detailed criteria for the selection of participants. For example, Section 110(g) of

the New York City Civil Court Act provides that the Housing Advisory Council shall contain two representatives each from the real estate industry, tenants' organizations, civil associations and bar associations together with four members chosen from the public at large. Other examples could be culled from the listing of advisory groups contained in McKinney's Consolidated Laws of New York which fills nearly two pages of the General Index. The conclusion to be drawn is that the power of a legislative body to provide for the establishment of advisory boards -and to set qualifications for membership is not seriously open to question.

It is abundantly clear that the composition of the CCRB is not, as petitioners claim, a term or condition of employment as a New York City police officer. It is not a contract provision, either expressly or by implication. Rather, it constitutes a part of the legislative framework in which the duties of a police officer are performed. While the statute determining the composition of the CCRB was originally enacted by the vote of the people, it cannot be said that, under our representative form of government, the vote of the Council charging its composition does not also reflect the will of the people as it exists twenty years hence. Any further restrictions on CCRB membership which petitioners might wish to have imposed are more appropriately sought through the legislative and not the judicial process.

Accordingly, it is the finding of this court that the determination of the Board of Collective Bargaining was not arbitrary or capricious and the petition is therefore dismissed.

Settle judgment.

DATED: February 19, 1988

J.S.C.