

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 24

----- x
THE CITY OF NEW YORK,

Petitioner,

Index No. 44429/91

-against-

MALCOLM D. MacDONALD, as Chair of the
New York City Board of Collective
Bargaining, PHIL CARUSO, as President
of the Patrolmen's Benevolent Association
of the City of New York, Inc.,

Respondents.

----- x
PARNES, J.:

Petitioner, the City of New York, brings this petition pursuant to Article 75 and Article 78 of the CPLR to annul the determination of the Board of Collective Bargaining ("BCB") in a proceeding between the City and the Police Benevolent Association ("PBA"), as representative of the members of the New York City Police Department. This proceeding arose out of negotiations for a new contract to succeed the one which expired on June 30, 1990. As part of the negotiation procedure PBA submitted demands to have certain items included in the contract.

When the City refused to negotiate two of these Demands, # 22.a and 62, PBA filed a request with the Office of Collective Bargaining for the appointment of an impasse panel pursuant to § 12-311 c of the NYCCBL and Part 5 of the Rules of the BCB. The two disputed demands provide as follows;

"PBA Demand 22.a (Disciplinary System)

Any disciplinary action taken by the department may be grieved by the members through the grievance procedure up to and including arbitration.

PBA Demand 62 (Disciplinary Procedures - Probationary Employees)

An employee shall not be terminated from employment at the completion of his probationary period without a due process hearing under the grievance procedure including arbitration."

The City contended before the BCB that these demands were "prohibited" subjects for collective bargaining and, therefore, inappropriate for impasse panel action.

The BCB determined by a 4-1 vote that the subject of Demand 22.a was not a "prohibited" subject of bargaining. It also held that depending on what was sought in the demand it was either a "permissive" or "mandatory" subject for bargaining.

These terms have been defined in Matter of Village of Lynbrook v. PERB, 48 N Y 2d 398, at 402 (F.N.) as follows:

"Prohibited" subjects Are those forbidden by statute or otherwise, from being embodied in a collective bargaining agreement.

"Mandatory" subjects are those over which employer and employees have an obligation to bargain in good faith to the point of impasse, i.e. must go to an impasse panel if no agreement can be had.

"Permissive" subjects are those as to which either side may but is not obliged to bargain; "though neither party must continue to bargain on a permissive issue to the point of impasse, once it becomes the subject of an agreement, it is fully binding.

The BCB ruled that Demand 22.a would be a "permissive",

rather than a "mandatory" subject, if the intent of that demand was to substitute a grievance arbitration for the present departmental trial of disciplinary charges against a tenured police officer. As a "Permissive" subject it would require consent of both sides in order to be referred to an impasse panel - a consent which the city will not give and absent which impasse panel action is barred.

However, BCB held further that if in Demand 22. petitioner seeks to implement an arbitral review of a disciplinary charge after the departmental trial and imposition of discipline by the Police Commissioner, that would constitute a "mandatory" subject for bargaining and thus appropriate for impasse panel action. It reasoned that such review procedure would not conflict with the Police Commissioner's authority to initially adjudicate the charge and determine the penalty. It would merely provide a grievant officer with the option to either seek Article 78 review or review in an arbitral setting.

The City objects to the institution of such a procedural format alleging such proposed arbitration review panel would have the power to overrule the Police Commissioner's determination who, it argues, is invested by statute with the sole authority to make the ultimate determination in disciplinary cases. It therefore, seeks to annul the decision of the BCB as violative of that statutory authority and bar this issue from proceeding to impasse panel.

Under the Taylor Law (CSL 200 et seq) as implemented in section 12-301 et seq Administrative Code), working conditions,

which include discipline, may in the absence of statutory prohibition be mandatory subjects for bargaining between public employer and employee.

With respect to the Disciplinary Procedures, CSL §75 and §76, set forth general procedural guidelines which must be observed in the disciplinary process.

However, CSL §76 (4) states that said section 75 and 76 may be supplemented, modified or replaced by agreement negotiated between the state and an employee organization. It is this section which PBA contends authorizes it, through mandatory bargaining, to seek a modification or replacement of the present Police Department Disciplinary Procedures with the one proposed in its Demand #22.a.

Section CSL 76 (4) further provides, however that ...

"...nothing contained herein shall repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division".

Thus any item concerning discipline which if supplemented would "repeal or modify"... any local law relating to removal or suspension of officers or employees would be an impermissible subject for negotiation.

The issue presented is whether, as petitioner City contends, the procedure proposed in its Demand 22.a, would unlawfully "repeal or modify" the sections of the Administrative Code relating to discipline within the Police Department.

A reading of the applicable statutes clearly reflect the in-

tent of the legislature and public policy as expressed in the New York City Charter that the disciplining of police officers be within the discretion of the Police Commissioner which includes the right to determine guilt or innocence of breach disciplinary rules and penalty to be imposed upon conviction. This is evident from the provisions of §434 (a) (b) the New York City charter which states:

"(a) The Commissioner shall have cognizance and control the . . . discipline of the department and of the police force of the department"

"(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"

Under Administrative Code §14-115 (a), it is the Police Commissioner who is invested with the discretion over discipline of police officers.

§14-115 (a) provides in part:

". . . the Commissioner shall have the power in his or her discretion on conviction by the commissioner . . . of a member of the force of any . . . breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force"

(b) members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them after such charges have been examined, heard and investigated by the Commissioner or one of his or her deputies upon such reasonable notice to the member of members charged and in such manner or procedure, practice, examination as such Commissioner may by rules and regulations, from time to time

prescribe (see *Cassese v. Lindsay*, 51 Misc 2d 59, 66, S. Ct. N.Y. Co., 1966).

This issue was considered in the Matter of Town of Greenburgh, 94 A D 2d 771 [2nd Dept]. Motion for leave to appeal denied, 60 N.Y. 2d at 551.(1983). There, the police union demanded that arbitration replace provisions of the Westchester County Police Act, which placed discipline in the hands of certain officials. When the negotiations of that contract reached an impasse, the issue was referred to an arbitration panel, the equivalent of an impasse panel, which decided it was a proper subject for bargaining. The Court, however, in the Town of Greenburgh supra held the local law invested discipline in the Police Commissioner and that CSL §76 (4) which prohibits collective bargaining agreements which modify or repeal a local statute was violated by the proposed arbitration contract provisions by creating an alternate form of discipline procedure to that imposed by the local law (see also *Rockland County Patrolmen's Benev. Assn. v. Town of Clarkstown*, 149 A D 2d 516 [2nd Dept 1989]; In the present case, the proposed arbitration procedure as set forth in Demand 22.a, if implemented, would have that very result.

Respondents seek to distinguish the facts in Town of Greenburgh from that in the instant case.

It contends that for a subject to be in the prohibited bargaining category, there must be specific statutory language proscribing such subject for collective bargaining (see *Incor-*

porated Village or Lynbrook V. N.Y. State PERB, 48 NY2, 398 (1979)).

PBA contends that such language is present in the Town of Greenburgh case in the specific direction in the local law that the disciplinary hearing cannot be delegated. However, that direction does not specifically rule out negotiations of a different procedure. Secondly, it has been held by our Court of Appeals that to create a prohibited subject of collective bargaining a statute need not containing specific provisional exception if same can be implied from its language. (Webster v. PERB, 75 NY2, 619).

In the instant matter, the Administrative Code provides that the Police Commissioner shall... have control of the government, administration, disposition and discipline of the department and its Police force. With respect to the procedure, the Code, #14-115 (b), specifically provides that charges be "heard by the Commissioner or one of his or her deputies ... in such manner or procedure ... as such Commissioner may... prescribe".

Of greatest significance is the fact that the Code provides that the Commissioner shall have power in his or her discretion to punish the offending party or... by reprimand. or withholding pay, supervision or dismissal".

The use of the word, "discretion", in describing the authority given the Commissioner in disciplining an offending officer clearly indicates a legislative intent that any decision concerning discipline be made by him and not by others. The

word "discretion" as used in a statutory or administrative grant of power means that the recipient must exercise his authority according to his own understanding and conscience (Accardi v. Shaugnessy, 745 Sup. ct, 499, 503). Implicit in such statutory grant of discretionary authority is that any determination made be based upon the public officials own dictates and conscience and not the judgment and conscience of others (Banks v. Elwel, 163 A 2d, 342; Peo. Ex Rel. Fund American v. Calif., 43 Ca 3rd, 423; Arrow Express Forwarding Co. v. Iowa State Commerce Commission, 130 NW 2d, 451 (1964)). "It..... perverts and destroys the meaning of the word to hold that exercise of discretion may be reviewed or controlled by some person or tribunal other than the person or tribunal on whom it is conferred" (27 Corpus Juris Secundum, P. 292 see cases cited FN 48). Thus, any negotiated contract provision which would establish an arbitral body with the power to substitute its judgment for that of the Commissioner would be antithetic to such grant of discretion.

In sum, any attempt to impose a supervening arbitration process upon the Police Commissioner would remove from him the discretion specifically given him by statute to determine and impose discipline and would modify br repeal the mandates of the Charter and Code that so provide and violate CSL 476 (4). The decision of BCB which validates Demand 22.a as a mandatory subject for bargaining is, therefore, annulled.

Accordingly, the petition to enjoin the enforcement of Decision B-42-91 of the BCB as to Demand 22.a through an impasse

panel intervention is granted.

The withdrawal by PBA in its answer of Demand 62 concerning probationary officers has rendered review of BCB's determination thereof moot.

Settle judgment.

Dated: