SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of
PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.., and SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC..,

Index No. 113062/04

Petitioners,

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

DECISION/JUDGMENT

-against

THE CITY OF NEW YORK, THE CITY OF NEW YORK. OFFICE OF LABOR RELATIONS, and THE NEW YORK CITY BOARD OF COLLECTIVE BARGAINING, MARLENE GOLD, as Chair of the New York City Board of Collective Bargaining,

Respondents.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 78 proceeding, Petitioners Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA"), and Sergeants Benevolent Association of the City of New York, Inc. ("SBA") (collectively "Petitioners") seek judgment to annul the decision of Respondent the New York City Board of Collective Bargaining ("BCB") dismissing the Petition filed by Petitioners which sought the production of documents and information concerning health insurance.[1]

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[1]Specifically, Petitioners request an Order,
(a) annulling *in toto* the BCB Decision and Order;

Respondents, the City of New York ("the City") and The New York City Board of Collective Bargaining ("OCB") (collectively "Respondents") seek dismissal of the Petitioners' Article 78 petition.

Factual Background

Petitioner, PBA, is an employee organization and is the exclusive bargaining representative for employees of the New York Police Department ("NYPD") with the title "Police Officer." Petitioner, SBA, is also an employee organization and is the exclusive bargaining representative for employees of the NYPD with the title "Sergeant." In previous instances, Petitioners and the City agreed to bargain over health, hospital and prescription benefits through the Municipal Labor Committee ("MLC"). Notwithstanding such previous agreements, the MLC is not the bargaining representative for any member of the Petitioners' bargaining units.

On May 2, 2003, the Coalition of the Police & Fire Unions on Pension and Health ("Coalition")[2] requested certain utilization data regarding medical and hospital claims ("utilization data") and data regarding psychotropic, injectible, chemotherapy, and asthma

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(footnote 1, contd.)

(b) directing that the BCB hold a hearing to resolve disputed issues of fact;
(c) holding that the acts of the City violated §§ 12-306(a)(1), (2), (3), (4) and 12-306(c)(4) of the New York City Administrative Code;
(d) granting the Petitioner the costs and disbursements in this matter; and
(e) such other and further relief as to the Court seems just.

[2] In addition to Petitioners herein, the Coalition included the Detectives Endowment Association ("DEA"), Lieutenants Benevolent Association ("LBA"), Captains Endowment Association ("CEA"), Uniformed Firefighters Association ("UFA") and Uniformed Fire Officers Association ("UFOA").

("PICA") claims from the City. The Petitioners, as members of the Coalition, made such requests in furtherance of their attempt to negotiate successor agreements with the City regarding health, hospital and prescription benefits for their respective constituents. In response, the City stated that the request for utilization data should be directed to the MLC. The Coalition repeated its request and stated that the City had an obligation to furnish the requested information directly to the unions. The City again referred the Coalition to the MLC. On September 3, 2003, the MLC requested the PICA data from the City and included a list of unions, including the Petitioners, that requested such PICA data from the MLC. Thereafter, additional requests and correspondence regarding the requested data were exchanged between the Coalition and the City.

On November 7, 2003, the Coalition filed an Improper Practice Petition with Respondent, BCB, to compel the City to comply with the requests for utilization and PICA data. The Coalition, which included the Petitioners, argued that the City's failure to provide Petitioners with the requested documents violated NYCCBL §§ 12-306(a)(1) and (4). The Coalition further argued that the City's insistence that Petitioners' information requests could only be requested through the MLC constituted a violation of NYCCBL §§ 12-306(a)(1), (2), (3) and (4).[3] To that

[3] NYCCBL §12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter,
(2) to dominate or interfere with the formation or administration of any public employee organization;
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees....

effect, the Coalition specifically requested and Order from the BCB, (1) "compelling the City to comply with the Petitioners' request for information and documents" and (2) "holding that the City's acts violate New York City Administrative Code §§ 12306(a)(1), (2), (3), and (4)."

Thereafter, the Coalition reiterated its request for utilization data. The City then wrote to various health carriers to ascertain whether the utilization data requested by the Coalition was normally maintained in the carriers' regular course of business and whether there were any costs that would be incurred to provide such data. Additionally, the City produced the requested PICA data to the MLC with separate packets for each union that made the request, including Petitioners.

On November 25, 2003, the City forwarded the carriers' responses regarding the utilization data to the Coalition. Two of the carriers stated that the requested information was not available. Two others stated that small segments of the requested information were available but the remainder of the request was either not maintained in the regular course of business, not consistently maintained, or would violate the privacy rules under the Health Insurance Portability and Accountability Act of 1996. One of the carriers indicated that the cost to produce the available portion of the request would amount to approximately $60,000 to $85,000.

On December 18, 2003, the City and the MLC reached a tentative agreement on health

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NYCCBL § 12-305 provides in pertinent part:
Public employees shall have the right to self-organization, to form, join or assist public

(footnote 3 contd.)

employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities....

benefits. This tentative agreement with the MLC must be ratified by petitioners before it becomes a final agreement. At the time of the filing of this petition, the Agreement was not

ratified. On February 3, 2004, the DEA, LBA, CEA, UFA, and UFOA withdrew from the Improper Practice Petition originally filed by the Coalition.

The BCB dismissed the Petitioners' Improper Practice Petition finding that the "Petitioners have received the PICA information requested; in addition, by its good faith effort to obtain other information not in its possession, the City satisfied its duty to provide information under the NYCCBL" The BCB found that the improper practice charge became moot since a change in circumstances eliminated the underlying controversy. Specifically, the BCB held that the claim regarding the PICA information was moot because the City provided the PICA information to Petitioners, albeit through the MLC.

With regard to Petitioners' request for utilization data, the BCB held that the City made a good faith effort to obtain the information not in its possession and thereby satisfied its duty to provide the information under the NYCCBL. The BCB noted that since it dismissed the petition on the grounds that the City provided or attempted to provide the requested information, it need not reach the issue of whether the City was required to respond to information requests from the individual unions.

The BCB's dismissal of the petition and decision not to address the question of whether the City was required to respond to the document requests from the individual unions are the bases of this Article 78 proceeding.

Petition and Cross~Motion to Dismiss

Petitioners now seek an Order from this Court annulling the BCB's dismissal of the Improper Practice Petition and an Order directing the BCB to resolve disputed issues of fact. Petitioners argue that the BCB incorrectly found that the petition was moot based on its finding that (1) the City entered into an agreement with the MLC resolving the issue; (2) the Petitioners have received certain of the information requested; and (3) the City made good faith efforts to obtain information from the health insurance providers and thereby fulfilled its obligation under the statute. Petitioners claim that the City's refusal to provide the requested information directly to the PBA and SBA violated NYCCBL §§ 12-306(a)(1), (2), (3), (4) and 12-306(c)(4)[4]. The Petitioners contend that the matter is not moot because the agreement with MLC is tentative and subject to ratification by the Petitioners, the outstanding information requested is relevant for administration of health and welfare plans, and because requiring that all information be disseminated through the MLC constitutes an independent violation of law.

Petitioners argue that in order to negotiate on behalf of their respective members, and responsibly administer welfare funds that supplement health, hospital and prescription drug benefits on behalf of the beneficiaries, Petitioners must have information regarding the cost and usage of health, hospitalization and prescription drugs. The Petitioners further contend that the City has the obligation to provide Petitioners with information relevant to collective bargaining,

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[4]NYCCBL § 12-306(c)(4) provides:

> c. Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargaining collectively in good faith shall include the obligation:
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> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining . .

and/or needed by Petitioners to adequately represent their bargaining unit members. Petitioners claim that the BCB Decision failed to address the City's alleged violations of NYCCBL §§ 12 306(a)(1), (2), (3), and (4) which arise from the City's insistence that the information requests at issue can only be requested through the MLC. Such failure by the BCB, Petitioners contend,

was arbitrary, capricious, an abuse of discretion, effected by errors of law and not rationally based.

Further, Petitioners contend that the City failed to produce evidence of an agreement between the MLC and the City on the instant health insurance issues. Nevertheless, any such agreement between the MLC and the City would be tentative, subject to an overall agreement on all collective bargaining issues. Thus, Petitioners conclude that the BCB's decision that the petition was moot based on a tentative agreement between the City and the MLC was arbitrary and capricious, an abuse of discretion, effected by errors of law and not rationally based.

Petitioners also argue that the BCB's conclusion that the City's agreement with the MLC on health insurance rendered the Petition moot failed to address the Petitioners' ongoing need for information to administer the funds, and was therefore arbitrary and capricious, an abuse of discretion, effected by errors of law and not rationally based.

Petitioners further contend that the BCB precedent recognizes that where an employer engages in an illegal act, as alleged here, the public purpose of remedying the violation and deterring future similar conduct militates against a dismissal for mootness. Thus, Petitioners argue, the BCB acted improperly by dismissing the case without remedying the violation.

While the Petitioners concede that a final agreement on all pending disputed matters

deprives an administrative agency or a court of jurisdiction over the dispute, they argue that this principle is inapplicable here since disputed issues between the parties remain unresolved. Petitioners claim that the City's insistence to provide the documents through the MLC gives rise to violations of the law. Thus, Petitioners contend, the Improper Practice Petition was not moot merely because the Petitioners received some of the requested documents, since the BCB should have considered the matter to deter future violations and remedy prior violations. Petitioners assert that by dismissing the matter as moot, the BCB improperly failed to remedy a wrong and deter violations in the future.

Respondent, the City, cross moves to dismiss the petition, claiming that Petitioners failed to demonstrate that the BCB's decision was arbitrary and capricious or an abuse of discretion. The City argues that by providing the Petitioners with the PICA documents and making an effort to obtain the health utilization data, there was a change in circumstances sufficient to eliminate the underlying controversy. The City contends that the BCB based its decision on the City's good faith effort to obtain the requested health utilization data and the fact that Petitioners received the requested PICA information. Thus, the City claims that no relief could be or needed to be granted and any opinion as to the City's ability to provide information to Petitioners through the MLC in the future would be an advisory opinion.

The City argues that the BCB can, at its discretion, decide whether it will address issues which no longer present an actual controversy to remedy prior violations of law and or deter future violations. Accordingly, the City contends that it was not an abuse of discretion for the BCB to determine that the interests of labor relations would not be served by deciding an abstract issue.

Respondent, the Office of Collective Bargaining ("OCB") contends that the Petitioners have failed to establish that the BCB's decision was arbitrary and capricious or an abuse of discretion. OCB asserts that the BCB's determination was rational and consistent with the record. The OCB further argues that the BCB's holding was not based on a finding that a tentative agreement on health benefits had been reached by the MLC and the City, as claimed by Petitioners; instead the BCB found the petition to be moot based on the fact that the City appropriately responded to the Coalition's information request and satisfied its duties under NYCCBL § 12-306(c)(4). The OCB claims that when a change in circumstances eliminates the underlying controversy, a finding of mootness is appropriate.

The OCB also contends that the BCB's holding does not preclude the Coalition from seeking other types of information if the need arises. If the Coalition requires additional information to negotiate future contracts or administer the existing contracts, the OCB argues that the Coalition is free to make such requests as the decision is limited to information requests that existed at the time of the underlying petition.

Finally, the OCB asserts that since the Coalition received the information, it was within the BCB's discretion to decline consideration of the method of requesting and producing such information.

Analysis

CPLR 7803 states that the court's review of a determination of an agency, such as the BCB, consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed (CPLR *7803 (3); Windsor*

Place Corp. v New York State DHCR, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept. 1988]; *Bamheck v, DHCR* 129 A.D.2d 51 [151 Dept. 1987], *lv. den. 70* N.Y.2d 615 [1988]. An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts" (Matter of *Pell v Board of Education*, 34 N.Y.2d 222, 231 (1974)). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*Matter of Pell v Board of Education*, 34 N.Y.2d at 231). The court's function is completed on finding that a rational basis supports the BCB's determination (see *Howard v Wyman*, 28 N.Y.2d 434 [1971]. Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion *(see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], aff'd 66 N.Y.2d 1032 [1985]).

Pell v Board of Ed. of Union Free School Dist. No. (356 N.Y.S.2d 833 (1974)), is instructive on the basic standard of Article 78 review:

> in article 78 proceedings: 'the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; 'the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence. '" (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see Matter of Halloran v. Kirwan, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). 'The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious." (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460-461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par: 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; Matter of Colton v. Berman, 21 N.Y 2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681--682).

Pell at 839.

At the outset, the Court notes that Petitioners raised two distinct issues in the Improper Practice Petition before the BCB. First, Petitioners alleged that the City's failure to provide the requested PICA and utilization data violated New York City Administrative Code §§ 12306(a)(1) and (4) (Improper Practice Petition, '¶162). Second, Petitioners all 4 ged that the City's insistence to act through the MLC constituted a violation of New York City Administrative Code §§ 12-306(a)(1), (2), (3), and (4) (Improper Practice Petition, ¶63).

Petitioners partly misstate the basis for the BCB's determination. Contrary to Petitioners' assertion, the BCB's determination was not based on the City's agreement with the

MLC. In any event, this Court finds that the BCB's determination that the portion of the petition for the utilization and PICA data is moot was supported by the record before it. The record before the BCB indicates that the City provided Petitioners with the PICA data and made a good faith effort to obtain the utilization data. A change in circumstances which eliminates the underlying controversy may render an issue moot (*see Matter of Dreikausen v. Zoning Board of Appeals of the City of Long Beach*, 98 N.Y.2d 165, 172 [2002]; *Patrolmen's Benevolent Assn, Decision No.* B-22-79 [1979]; *City of Peeskill*, 26 PERB ¶13062 (1993)). Thus, regardless of the lack of finality of the agreement between the City and the MLC, a rational basis exists for finding the. Petitioners' request for documents moot.[5]

Petitioners' concerns for the availability of information necessary to administer the

[5] Since the tentative agreement between the City and the MLC has no bearing on this Court's decision, Petitioners' assertions regarding the lack of evidence of such agreement are immaterial.

welfare funds are also immaterial. Insofar as those concerns pertain to information requests at issue here, they were deemed moot by the BCB. The record supports the BCB's finding that the City has either provided the requested information or made a good faith effort to provide the rest. Furthermore, the BCB's decision does not preclude any future information requests.

The Court next addresses the BCB's determination as to the portion of the improper practice petition seeking a holding that the City violated the Administrative Code by requiring petitioners to obtain documents from the MLC. Unlike the issue regarding the production of documents as mentioned above, this latter issue concerns the method by which such documents must be provided. Contrary to Respondents' assertions, the second issue regarding the method by which the City provided the documents did not dwarf into a request for an advisory opinion

merely because the documents had been provided. Therefore, the latter issue remained before board for determination, notwithstanding the Petitioners' receipt of documents from the MLC.

In this regard, the BCB declined to reach the merits of this latter issue. Specifically, the BCB stated, "Since we dismiss the petition because the City has provided or properly attempted to provide the requested information, we do not reach the issue whether the City was required to respond to information requests from the individual unions within the MLC" (emphasis added, BCB Decision, p.11, n.6). However, Petitioners' receipt of the documents through the MLC does not resolve the issue as to whether the City's method of production, to wit, through the MLC, was appropriate under the Administrative Code. The Court notes that this is not an instance where the City provided the documents directly to the Petitioners, in which case the latter issue may have

been rendered moot.[6]

Accordingly, this Court finds that the BCB's decision to dismiss the entire Petition without addressing the separate and distinct issue noted above is arbitrary and capricious and not supported by the record.

It is therefore,

ORDERED and ADJUDGED, that the application of Petitioners, Police Benevolent Association of the City of New York and Sergeants Benevolent Association of the City of New York, for a judgment annulling Decision No. B-14-2004 of Respondent, The New York City Board of Collective Bargaining, Docket No. BCB-2366-03, as arbitrary and capricious and in violation of the law, is granted in part and denied in part and the proceeding is remanded to the Board of Collective Bargaining to make a determination as to whether the City violated the New York City Administrative Code when it insisted that Petitioners information requests be channeled through the MLC; and it is further

ORDERED, that the application of Respondents, The City of New York and The Office of Collective Bargaining, for an Order dismissing the Petition, is granted in part and denied in part consistent with this order.

This constitutes the decision and judgment of the Court.

Dated: February 4, 2004

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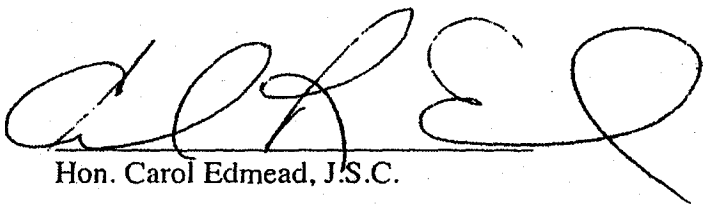
[6] This Court expresses no opinion as to whether such an action would obviate the BCB's obligation to make a determination or provide a basis not to reach the issues before it.



Hon. Carol Edmead, J.S.C.