

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NY, INC.

Petitioners,

Index No. 108875/00

-against-

HOWARD SAFIR, AS POLICE COMMISSIONER OF
THE CITY OF NEW YORK, ET.AL.,

Respondents.

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SHEILA ABDUS-SALAAM, J.:

In this Article 78 proceeding, petitioner Patrolmen's Benevolent Association of the City of New York ("PBA") claims that the New York City Police Department ("Department") has wrongfully deprived two police officers of their statutory and contractual rights to union representation in a disciplinary investigation and interrogation, and in so doing, has interfered with lawful union activities.

On December 21, 1999, Police Officers Michael V. Quinn and James R. Howard were interrogated regarding off-duty employment, questioning that was collateral to a broader investigation of a brothel protection "racket" in the Midtown South ("MTS") Precinct that had come to light in 1996. When the officers appeared for their interrogations accompanied by legal counsel and a union representative, as was their entitlement under the Civil Service Law, Collective Bargaining Agreement, and internal police procedures, the union representative, petitioner Walter J. Liddy, was barred from the interrogation. The stated reason for his exclusion was that Officer Liddy is a potential witness in the brothel investigation. Petitioners claim that this reason was a bad faith,

patently pretextual explanation for the Department's interference with lawful union activities and discrimination against a senior union official for participating in lawful union activities.

Support for the contention that the exclusion of Officer Liddy, who is described by petitioners as a high ranking and highly regarded union official, was in bad faith and was for purely pretextual reasons, can be found in the following circumstances:

In 1996, approximately three years prior to the interrogations of Officers Quinn and Howard, the Police Department's Internal Affairs Bureau ("IAB") began investigating whether police officers assigned to the MTS Precinct, located on West 35th Street in Manhattan, were engaged in criminal activity by frequenting and protecting the operations of a brothel on West 39th Street. The Manhattan District Attorney also began investigating the conduct of police officers at the MTS Precinct. Subsequently, in July 1998, twenty police officers were placed on modified duty as a result of the investigation and thereafter, two officers pleaded guilty to criminal charges and two other officers (in April 1999) were arrested in connection with the criminal investigation.

Officer Liddy was never questioned by the District Attorney's office, did not appear as a witness before the Grand Jury, and avers here that he was never involved in the events underlying the criminal investigation and was not a witness to the events underlying the administrative investigation. His sole involvement was limited to counseling police officers who were involved as subjects or witnesses, as to their rights. Liddy's first notification that he was considered a potential witness to the Department's investigation came on December 21, 1999 when he was excluded from attending the

interrogations of Officers Quinn and Howard.

On February 4, 2000, counsel to the PBA wrote to the Chief of the IAB, advising him that there had been a "serious violation of our members' rights of representation which occurred on December 21, 1999" and asked that corrective action be taken. Three days later, Officer Liddy was notified that he was to be interrogated as a witness in the investigation. About one month later, on March, 3, 2000, a story appeared in the civil service publication The Chief Leader, concerning Liddy's exclusion from the Quinn and Howard interrogations. Chief Thomas Lahey was quoted as saying that Liddy is being questioned as a subject in the case. Thus, according to the Department, from December 1999 to March 2000, Liddy's status had gone from "potential witness" to "witness" to "subject." And, while respondents have taken the position in this lawsuit that Liddy is not a subject, they have taken no steps to see that the labeling of Liddy as a subject is publicly retracted.

As for respondents' assertion that Liddy is a witness because he worked in the MTS Precinct during the relevant 15 year period that is the focus of the investigation, petitioners point out that the same can be said for hundreds, if not thousands of police officers, who are not similarly deemed to be witnesses to the brothel protection scheme. And, in response to a question posed by this court during oral argument of petitioners' application for a temporary restraining order, respondents' counsel stated that even were Liddy to be questioned as a witness, and it were determined that he had no personal knowledge relevant to the brothel investigation, he would be excluded from representing members in the investigation. Thus, respondents have taken the position that the mere

labeling of Liddy as a witness, notwithstanding that he may have no knowledge relevant to the investigation, serves to eliminate him as a representative for union members who seek his counsel.

Respondents also argue here that the Civil Service Law and the Collective Bargaining Agreement do not give union members the right to a representative of their choice. In response, petitioners assert that the court need not decide that issue in connection with the application for injunctive relief, although petitioners take the position that the choice of representative is guaranteed by statute and the agreement, Petitioners frame the issue before the court differently: Can the Department use bad faith and pretextual grounds to render Civil Service Law § 75(2), the statute that entitles union members to union representation during questioning a nullity?

Before commencing his lawsuit, petitioners filed an improper practice petition with the Office of Collective Bargaining (“OCB”), claiming that the Department had committed an improper practice by excluding Liddy from the interrogations for pretextual reasons and without justification. The petition before the OCB also alleges that after the PBA had filed an official written grievance against the Department, the Department further discriminated against Liddy by libeling him in a newspaper and wrongly designating him as a "witness" and "subject" of an investigation without any basis to do so. Petitioners also filed a demand for arbitration arising out of respondents' violation of the Collective Bargaining Agreement. In connection with their grievance, petitioners sought an injunction from the Board of Collective Bargaining ("BCB") which would inter alia prevent the Department from designating Liddy as a witness and/or subject in the

investigation; prevent the Department from excluding Liddy from representing members in the investigation; and enjoin the Department from interrogating Liddy with respect to any observations and communications had with any police officer in Liddy's capacity as a union representative.

The OCB did not rule on the merits of petitioners' request for injunctive relief.

Rather, in a terse determination, the OCB declined to act. The OCB stated as follows:

This is to inform you that in view of the fact that the Labor Members of the tripartite Board of Collective Bargaining have not yet been appointed, the Impartial Members believe that it would be inappropriate to attempt to convene a meeting of the Board, without Labor representation, to act on the petition for injunctive relief. We understated that the Board's failure to act by April 7, 2000, will result in the petition being deemed denied, pursuant to Civil Service Law § 209-a.5(b) for purposes of judicial review.

[OCB letter dated April 7, 2000, Petition, Ex. D)

In opposition to this motion for preliminary injunctive relief, and in support of the cross-motion for dismissal of this proceeding, respondents argue that this court should "reject the PBA's invitation to inject itself into an internal police investigation."

(Memorandum of Law, p.9). However, granting injunctive relief pending arbitration, pursuant to CPLR 7502(c), is within this court's discretion where appropriate, and I believe that the exercise of such discretion is appropriate here. I do not wish to "inject" myself into the Department's investigation, and, I do not believe that granting relief to petitioners would be doing so.

Under all of the circumstances set forth in this record, petitioners have demonstrated that there is merit to their claim that the Department has committed an unfair practice and violated the collective bargaining agreement by inter alia, preventing

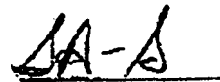
Officer Liddy from representing union members for reasons based on pretext. Such action may constitute violations of Civil Service Law §§ 202, 203, 209-a(1)(a). The body that has the expertise to determine this grievance has not yet acted, and has declined to act with respect to the application for injunctive relief. If the Department is permitted to continue to conduct interrogations from which Liddy is prevented from representing union members, and the BCB ultimately determines that the Department acted wrongfully, the PBA's victory would be a hollow one. And with respect to the Department's interrogation of Liddy, since there is no indication that Liddy has any personal knowledge of facts relevant to the brothel investigation, but has gained any knowledge that he might have through his counseling and representation of union members, petitioners have also shown that the interrogation of Liddy may be improper. As they point out, since this is an administrative investigation, and not a criminal investigation, Liddy does not have the right not to answer the questions. Rather, as explained by petitioners, "Liddy has the unenviable choice of betraying the confidences of the union members he was elected to represent or refusing to answer questions and suffer the penalty of suspension from the Department." (Memorandum of Law, p. 23). Such an interrogation of Officer Liddy may well violate Civil Service Law § 209-e (1)(a)(see City of Newburg v. Newman, 70 AD2d 362; Seelig v. Shepaid, 152 Misc.2d 699). All of the foregoing leads this court to conclude that preliminary injunctive relief should be granted pending the determination by the OCB of the serious issues raised in the arbitration and unfair practice petition, so that the award to which petitioners may be entitled may not be "rendered ineffectual" (CPLR 7502 (c)).

The motion for preliminary injunctive relief is granted to the extent that pending resolution of the arbitration and unfair practice petition, respondents are enjoined from interrogating any police officer in the course of the Department's investigation of events surrounding the brothel matter where the police officer has requested representation by Officer Liddy and such request is denied by the Department; and further, is enjoined from interrogating Officer Liddy concerning his observations and communications with any police officer derived from his capacity as a union representative.

Respondents' cross-motion for an order dismissing the petition is denied. Respondents are directed to serve an answer within 20 days after service of a copy of this order with notice of entry.

Dated: June 1, 2000

ENTER

A handwritten signature in black ink, appearing to be "JA-S", written over a horizontal line.

J.S.C.