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

PRESENT: Schoenfeld PART 28

Justice

Index Number : 106323/2010

PATROLMEN'S BENEVOLENT ASSN

VS.

NYC OFFICE OF COLLECTIVE

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for Art 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits File	5
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion pursuant to Art 78, sequence #1 is consolidated with motion and cross-motion to dismiss, motion sequence #2, and is decided in accordance with the decision accompanying motion sequence #2.

Dated: 5/16/11

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

PRESENT: schoenfeld PART 28

Index Number : 106323/2010

PATROLMEN'S BENEVOLENT ASSN

VS

NYC OFFICE OF COLLECTIVE

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion, sequence #2 to dismiss is consolidated with motion sequence #1 Art. 78, and is decided in accordance with the accompanying memorandum decision

Dated: 5/16/11

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

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PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, INC.,

Petitioner,

MEMORANDUM DECISION AND ORDER

-against-

Index No.: 106323/2010

THE NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING; THE CITY OF NEW YORK; & THE NEW YORK CITY POLICE DEPARTMENT,

Respondents.

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For Petitioner:
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HON. MARTIN SCHOENFELD, J.:

In this Article 78 proceeding, Petitioner Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA") seeks a judgment annulling the portion of an April 6, 2010 Final Decision and Order (the "Decision") of The New York City Office of Collective Bargaining/the Board of Collective Bargaining (the "Board" or "BCB") which dismissed two of three claims made by PBA. Respondent, BCB moves, and Respondents The City of New York (the "City") and The New York City Police Department (the "NYPD") cross-move to dismiss the Article 78 proceeding.

BACKGROUND

On October 22, 2007, the NYPD and the New York City Police Foundation ("Police Foundation") issued a joint announcement for the commencement of the College Loan Reimbursement Program (the "Program") for NYPD recruits entering the January 2008 Police Academy class. The Program allowed the NYPD to provide up to $15,000 over five years for each applicant to reimburse lenders holding the police officer's student loans. New recruits with outstanding educational loans were instructed to fill out a form. To receive the benefit, officers were required to maintain employment with the NYPD and remain in "good standing." More than 800 PBA members received benefits through the Program.

The Program was conceived as early as May 2006 when the NYPD Commissioner became interested in providing subsidies to police recruits to lessen the economic impact of their low starting salaries. The Commissioner expressed this concern to the Police Foundation, a not-for-profit organization funded through private donations, which is the only organization authorized to fundraise for the NYPD. Its mission is to assist the NYPD in improving public safety in New York.

At the time the NYPD and the Police Foundation announced the Program in October 2007, PBA and the NYPD were attempting to negotiate a successor agreement to their 2002 to 2004 collective bargaining agreement. The parties were in a period of "impasse" and were engaged in mediation. One of the central issues of the negotiation was the compensation of newly hired police officers, which had been recently reduced to $25,100 per year. In addition to higher wages for recruits, the union had proposed a form of education pay for police officers,

through which police officers would receive "premium pay" that was commensurate with their respective academic degrees. Prior to this round of bargaining, neither side had asked for any type of compensation linked to academic achievement.

Despite these negotiations, PBA only became aware of the Program by reading about it in the newspaper. It immediately wrote to the City requesting that the City and the NYPD stop offering the Program as it was in violation of the collective bargaining law. PBA representatives met with NYPD representatives to request that the Program be abolished, arguing that it undermined PBA's ability to negotiate on behalf of its members.

In December 2007, PBA filed an Improper Practice Petition with BCB, alleging that the creation and implementation of the Program by the NYPD and the City violated the New York City Collective Bargaining Law (NYCCBL) sections 12-306(a)(1),(4) and (5). Specifically, PBA alleged that the City had violated: 1) NYCCBL § 12-306(a)(4) by failing to bargain in good faith; 2) NYCCBL §12-306(a)(5) by unilaterally changing a mandatory subject[1] of bargaining during a period of negotiations (*status quo*); and 3) NYCCBL §12-306(a)(1) by bypassing the union and engaging in "direct dealing" with PBA members.

The City filed an answer to PBA's petition defending the Program. It argued that it did not violate the NYCCBL because the Program was created, funded and managed by the Police Foundation and the NYPD's role was solely ministerial. The Board held hearings on July 22nd 23rd, September 24th and November 30th, 2009.

After the first three days of hearings, the City moved to dismiss the Improper Practice

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[1] A "mandatory subject" for collective bargaining is any subject with a "significant or material" relationship to a condition of employment such as wages.

Petition on the ground that, because the Police Foundation stopped the Program after the July 2008 recruit class and the Police Foundation had no intention of instituting the Program again[2], any decision of the Board would be academic. In a November 23, 2009 decision, the Board denied the City's motion to dismiss on several grounds. The Board, *inter alia*, found that the dissolution of the Program did not preclude a finding that the City engaged in an improper practice. Moreover, because PBA sought a remedy beyond the dissolution of the program, namely the posting of appropriate notices that the NYPD had committed improper practices, it was proper for the Board to conclude the proceedings and render a decision.

On April 6, 2010, after the parties submitted post-hearing briefs, the Board issued the Decision granting in part and dismissing in part PBA's Improper Practice Petition. The Board granted PBA's petition to the extent that it found that the City had violated NYCCBL §12-306(a)(4) by failing to bargain in good faith with the PBA over the Program. The Board found that the Program, which the NYPD claimed was under the control of the Police Foundation, was actually under the control of the NYPD. In relevant part it explained:

> we find that the NYPD was the impetus behind the creation of the college loan repayment program, implemented the means by which [the Police Foundation] funds were given to some Police Officers as an added monetary benefit, and administered and managed this program by establishing specific eligibility criteria and determining eligibility on an individual by-individual basis for college loan reimbursement, and maintaining extensive records. Based upon the specific facts found herein, we conclude that the NYPD exercised effective control of the college loan repayment program. Through its exercise of control, **the NYPD unilaterally granted an economic benefit to selected Police Officers**, in

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[2]The Program was discontinued after police officers' starting salaries were raised pursuant to the new collective bargaining agreement. Payments continued for the police officers who had enrolled in the January and July 2008 classes.

violation of its duty to bargain under NYCCBL §12-306(a)(4). (Emphasis added).[3]

The Board, however, dismissed PBA's other claims. Specifically it held that the City's conduct in implementing the Program did not constitute "direct dealing" in violation of §12-306(a)(1). The Board based this conclusion on its finding that the NYPD "never stated or insinuated that the Union opposed this program, and never threatened reprisal if Police Officers did not avail themselves of this monetary benefit." The Board further relied on the fact that the NYPD did not "condition, explicitly, or implicitly, receipt of the benefits on employees' taking any position on matters involving the Union."

Moreover, the Board found that the City's implementation of the Program did not unilaterally change a mandatory subject of bargaining during a period of negotiations, noting that the Program was never part of the parties' previous collective bargaining agreement.

In accordance with its decision, the Board directed the NYPD to stop granting monetary benefits through the Program without negotiating with PBA and directed the NYPD to post appropriate notices detailing its violations of the NYCCBL.

Thereafter, the NYPD posted a notice to all employees reflecting the specific findings of the Board. The posted notice stated, among other things, that the Board dismissed PBA's petition insofar as it claimed that the Program independently violated NYCCBL §12-306(a)(1) and (5) and granted PBA's petition only to the extent that it claimed a violation of NYCCBL §12-306(a)(4) and a derivative violation of NYCCBL §12-306(a)(1).

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[3]Having determined that the NYPD violated its duty to bargain in good faith and unilaterally granted an economic benefit to selected police officers under NYCCBL §12-306(a)(4), the Board also noted in a footnote that there was a derivative violation of §12-306(a)(1). It did not explain this decision.

In this Article 78 petition, PBA now challenges, as arbitrary and capricious, the Board's dismissal of its two claims. Respondents, respectively, move and cross-move to dismiss the petition on the grounds that the PBA does not have standing to challenge the decision and that PBA failed to state a cause of action. For the reasons set forth below, the court denies the motion and cross-motion to dismiss and directs the Respondents to answer the Petition.

DISCUSSION

Standing

Under NYCCBL § 12-308 an "aggrieved party" may bring an Article 78 petition challenging a Board decision. To determine whether a party is "aggrieved" courts look to whether the petitioning party suffered "injury in fact" and whether that injury "falls within the zone of interests to be protected by the statute challenged." *Hunts Point Terminal Produce Co-op Ass'n, Inc. v. New York City Economic Development Corp.*, 36 A.D.3d 234, 245 (1st Dept. 2006). The Court of Appeals has defined an "injury in fact" as "an actual legal stake in the matter being adjudicated." *Society of Plastic Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772 (1991). In general, the parties to the underlying administrative decision are considered "aggrieved parties" for purposes of Article 78. *See Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*, 69 N.Y.2d 406, 412 (1987) (noting that "the immediate parties to an administrative proceeding are aggrieved persons who may seek judicial review"); *Keyspan Energy Services Inc. v. Public Service Comm'n of State of New York*, 295 A.D.2d 859, 861 (2002) (finding petitioner who was "deemed a party to the underlying administrative proceeding" is aggrieved party).

Here, Respondents[4] argue that PBA is not an aggrieved party under NYCCBL § 12-308 because the Decision provided complete relief to PBA. They contend that the Board, by finding a violation of NYCCBL §12-306(a)(4) and a derivative violation of NYCCBL §12-306(a)(1), directing the City to dissolve the Program, and ordering it to post notices detailing its violations of the NYCCBL, provided the same remedies available to PBA if the Board had found violations of NYCCBL §12-306(a)(1) for direct dealing and (5) for unilateral change of a mandatory subject as well. The fact that the Board rejected two of the three theories offered by PBA is irrelevant, according to Respondents, because there are no further remedies available other than discontinuing the Program and posting the findings of the Board. They also note that PBA does not cite to any practical impact of the dismissal of the two claims.

In opposition, PBA argues that as a party to the underlying administrative hearing it is an "aggrieved" party for purposes of Article 78 and NYCCBL § 12-308. It further argues that even if it were not a party to the administrative proceeding it still has standing because it suffered an "injury in fact" when the Board dismissed PBA's charges of direct dealing and unilateral change and ordered the posting of a notice to that effect. By doing so, the relief requested – notice that Respondents violated these provisions – was not granted. PBA argues that if the petition is granted, Respondents would be directed to remedy its injury by amending and reposting the notices to show the City's other violations.

This Court finds that PBA has standing. A party who has received an unfavorable

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[4]Respondents BCB and The City (self identified in the briefs as "Municipal Respondents") separately submitted briefs in support of the motion and cross-motion to dismiss and a reply. For purposes of this decision, the Court discusses the arguments made by the Respondents together without differentiating which arguments were made by which Respondent.

decision in an underlying administrative proceeding may be presumed to be an "aggrieved party." *See Sun-Brite*, 69 N.Y.2d at 412; *Keyspan*, 295 A.D.2d at 861. Only where such a party has suffered no injury do courts find lack of standing to appeal. *See Fisher v. City of Binghamton*, 309 A.D.2d 1111, 1112 (3d Dept. 2003) (finding Article 78 Petitioner not "aggrieved" although a party to the underlying proceeding because the parking ticket in question was dismissed); *Katrina Mixon et al. v. TBV, Inc.*, 76 A.D.3d 144, 148 (2d Dept. 2010). Here, the Board's decision was clear that two of the three claims were resolved against PBA. Moreover, PBA clearly suffered an injury from the Board's denial of two of its claims. *See Mahoney v. Pataki*, 98 N.Y.2d 45, 52 (2002) ("we must preserve access to the courts for those who have been wrongly injured by administrative action (or inaction) directly flowing from statutory authority). In fact, when the Board denied the City's motion to dismiss the proceeding as moot because the Program was dismantled, this was an acknowledgment that regardless of the existence of the Program, PBA was entitled to remedial measures, including a notice announcing any NYPD violations of the NYCCBL. The consequent notice, issued pursuant to the Decision, did not simply announce a general finding of an improper practice. Instead, it catalogued the NYPD's violation of the NYCCBL and listed those PBA claims that were dismissed by the Board. Clearly, both PBA and the NYPD have a stake in the Board's consideration of each violation and the consequent announcement of the Board's findings to the public.

Additionally, it is the Board's role to examine each claimed NYCCBL violation on its own merits. It may find that the NYPD violated all, none or any of the three provisions of the NYCCBL cited by PBA. In fact, in its Verified Improper Practice Petition form, the Office of Collective Bargaining asks the applicant to list each subsection of NYCCBL §12-306 claimed to

have been violated and then to articulate the facts constituting each violation. Each violation addresses different conduct. The remediation of such conduct requires a separate declaration of wrongdoing.

Thus, PBA is an aggrieved party under NYCCBL and has standing to bring this Article 78 petition.

Failure to State a Claim

When considering a motion to dismiss an Article 78 petition, the court must deem the allegations in the petition to be true and afford them "the benefit of every favorable inference." *Eastern Oaks Development, LLC v. Town of Clinton*, 76 A.D.3d 676, 678 (2d Dept. 2010) (citations omitted). The court should deny a motion to dismiss if "the facts stated are sufficient to support any cognizable legal theory." *Brodsky v. New York State Department of Environmental Conservation*, 1 Misc.3d 690, 695 (Sup. Ct. Albany County 2003) (citing *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 (1995)); *Northway 11 Communities v. Town Board of the Town of Malta*, 300 A.D.2d 786, 787 (3d Dept. 2002).

Petitioner is challenging two decisions made by BCB: its dismissal of PBA's claim of a violation of "direct dealing" under NYCCBL § 12-306(a)(1) and its dismissal of the claim of unilaterally changing a mandatory subject of collective bargaining during the *status quo* period in violation of NYCCBL § 12-306(a)(5). Respondents argue that Petitioner has failed to state a claim that either of these decisions was arbitrary or capricious. The court will deal with each of these challenges separately.

1. Direct Dealing

In its decision BCB found that "the record does not support a claim of direct dealing"

because there was no evidence that "the NYPD threatened any reprisal against the Police Officers or subverted the organizational rights of PBA by instituting this program." BCB Decision at 33. PBA argues that this decision was arbitrary and capricious because BCB used the wrong standard in making its direct dealing decision. It cites to Board and other administrative decisions indicating that the proper question is whether "the employer made threats of reprisal or force, or promises of benefit, or if the direct dealing otherwise subverted the members' organizational and representational rights." *Uniformed Firefighters Assoc. v. City of New York, et.al*, 69 OCB5 (BCB 2002) (emphasis added). Essentially it argues that evidence of reprisal is not required to show direct dealing if there is evidence that a benefit was promised and that there was negotiation with employees which bypassed the union

Respondents agree that a direct dealing claim may be sustained if the employer sought to "negotiate directly with member for some return in exchange for the promised benefit." They assert, however, that PBA presented no evidence of direct negotiation between the NYPD and the police officers for the benefits provided by the program and that merely providing a benefit with nothing more does not constitute direct dealing.

Without expressing its "opinion as to whether [Petitioner] can ultimately establish the truth of [its] allegations", the Court finds that there is enough in the record to allow the Petition to go forward with its challenge of BCB's direct dealing decision. *Campaign for Fiscal Equity*, 86 N.Y. 2d at 318. First, the Board based its decision on the reprisal issue. Yet, both Respondents and Petitioner appear to agree that evidence of reprisal is not necessary to find direct dealing if there is a benefit conferred and direct negotiating with union members outside of the collective bargaining process. Thus, PBA has made out a cognizable claim that BCB may

have used an incorrect legal standard in making its decision concerning direct dealing.

Second, BCB's own decision found that the NYPD directly offered police officers a "benefit" – monies toward repayment of their educational debt, without negotiating the terms with PBA. What is at issue, then, is whether the NYPD bypassed PBA and directly negotiated with union members concerning the Program. In reviewing the evidence in a light most favorable to Petitioner, it may be read to suggest that the City did just that. Without informing the Union, the NYPD directly introduced and discussed the Program with the new recruits, instructing those who desired to receive the benefits of the Program to fill out a form. In exchange for the repayment of loans, the new police officers were required to stay on the police force, and remain in "good standing." Hundreds of PBA members received benefits from the Program. In light of this evidence, the Court finds that PBA may go forward with its challenge of the Board's direct dealing decision.

2. Unilateral Change of a Mandatory Term During a Period of *Status Quo*

BCB dismissed PBA's claim that by implementing the program the NYPD made a unilateral change to a mandatory subject of the collective bargaining during a period of negotiations or *status quo* period in violation of NYCCBL 12-306(a)(5). It found that to state such a claim the evidence must show that the employer failed "to continue all the terms of an expired agreement until a new agreement is negotiated." BCB Decision at 34 (internal quotations and citations omitted). The Program, according to BCB, was never part of the previous collective bargaining agreement.

PBA argues in essence that BCB's interpretation of what constituted a unilateral change was too narrow and its decision was, therefore, arbitrary and capricious. It asserts that under the

plain meaning of NYCCBL § 12-306(a)(5) "an employer is prohibited, during a period of negotiations, from changing either (i) a mandatory subject of bargaining or (ii) any term and condition of employment found in a collective bargaining agreement." It notes that in finding that the NYPD failed to bargain in good faith, BCB also found that the benefits provided by the program constituted a change in a mandatory subject of bargaining. Moreover, it points out that the City conceded that at the time the Program was implemented they were in a period of negotiations.

Respondents counter that PBA has failed to state a claim because it is relying on the wrong statute in making its argument. Respondents contend that BCB must look not to NYCCBL to determine whether an improper practice occurred but to the Taylor Law which governed the "impasse" between the parties.[5] Under that statute, the relevant question here is whether the NYPD failed to continue the terms of the expired collective bargaining agreement during the *status quo* period. Respondents contend that because the Program was not part of the previous collective bargaining agreement, its creation did not constitute a mandatory change under the Taylor law and therefore PBA has not stated a claim that BCB's decision was arbitrary or capricious.

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[5]Respondents also argue that PBA is attempting to use the best parts of the NYCCLB and the Taylor law to bolster its argument. They contend that under NYCCBL § 12-306(a)(5) and § 12-311, which has a broader definition of unilateral change, the *status quo* period would have expired when the impasse panel began. They note that the Program was announced during this impasse period and thus was not instituted during a *status quo* period for purposes of NYCCBL. Respondents further argue that under the Taylor Law, which defines unilateral changes more narrowly, the *status quo* period encompasses the impasse period and thus is longer. Respondents believe that PBA is attempting to use the definition of unilateral change under the NYCCLB but apply the *status quo* terms of the Taylor Law. This Court declines to decide this matter at this point, finding that even under the more constrictive Taylor Law PBA's arguments have survived the motion to dismiss.

BCB did not provide guidance on this issue in its decision in terms of exactly what statute it relied on and why it chose this narrow interpretation of unilateral change. The court declines to make a determination at this stage of the proceedings. Nevertheless, even under the narrow interpretation used by BCB, PBA has a "cognizable claim" that the Board's decision in this regard was arbitrary and capricious. As BCB itself found, through the Program, the City offered a "monetary benefit" to police officers. The issue is whether by providing this benefit, the NYPD failed to maintain the expired collective bargaining agreement in violation of NYCCLB. Viewing the evidence in light most favorable to Petitioner, the Court finds that there is enough evidence to support the proposition that by instituting the Program, the City altered the compensation structure for new police officers. Thereby, it altered the terms of the expired collective bargaining agreement during a period when PBA and the City were attempting to renegotiate the agreement, and in this way failed to maintain their original agreement. Whether or not PBA will ultimately be able to show that BCB's decision in this regard was arbitrary and capricious is again a question to be decided after the parties are given a full chance to be heard on the merits.

Accordingly, the Court denies Respondents' motion and cross-motion to dismiss for lack of standing and for failure to state a claim under CPLR 3211(a)(7), and finds that PBA should be allowed to litigate its Article 78 petition. Therefore, Respondents are now directed to answer the Petition. The Court further notes that in continuing this proceeding, the parties may want to address whether any of the issues to be decided are substantial evidence questions which should be transferred to the Appellate Division pursuant to NYCCBL § 12-308(b) and CPLR 7803(4).

In accordance with the foregoing, it is

ORDERED that Respondents The New York City Office of Collective Bargaining, The City of New York and The New York City Police Department's motion and cross- motion to dismiss are denied; and it is further

ORDERED that Respondents have 20 days from service of notice of entry of this order in which to answer the Petition.

This constitutes the decision and order of the Court.

J.S.C.

Dated: New York, New York
June 16 , 2011