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Patrolmen's Benevolent Assn. of the City of New York, Inc. v New York City Off. of Collective Bargaining
2012 NY Slip Op 50997(U)
Decided on May 29, 2012
Supreme Court, New York County
Schoenfeld, J.
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Decided on May 29, 2012

Supreme Court, New York County

Patrolmen's Benevolent Association of the City of New York, Inc., Petitioner,

against

The New York City Office of Collective Bargaining; the City of New York; The New York City Police Department, Respondents.

106323/2010

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Martin Schoenfeld, J.

In this Article 78 proceeding, Petitioner, Patrolmen's Benevolent Association (PBA), seeks a judgment annulling the portion of an April 6, 2010 Final Decision and Order (the BCB 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 under the New York City Collective Bargaining Law (NYCCBL). Respondents, The City of New York (the "City"), The New York City Police Department (the NYPD) and BCB oppose the petition. For the reasons set forth below, the Court grants the petition.

BACKGROUND [*2]

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 provided up to $15,000 over five years for each applicant to reimburse lenders holding the police officer's student loans. At a new officers' orientation meeting, NYPD supervisors informed these new recruits that those who had educational loans could receive this benefit. They instructed the recruits to fill out a form. *Patrolmen's Benevolent Association of the City of New York v. The City of New York,* 3 OCB2d 18, at 12 (BCB 2010) [hereinafter BCB Decision]. To maintain eligibility, officers were required to continue their employment with the NYPD and remain in good standing. *See Id.* at 14 (outlining criteria for participation in the Program). NYPD officers administering the Program then followed up personally with individual recruits regarding the specifics of their applications. *Id.* at 12-13. More than 800 PBA members received benefits through the Program. Petition at 6 ¶13.

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. BCB Decision at 6. TheCommissioner expressed this concern to the Police Foundation, a not-for-profit organization funded through private donations, which is the only organization authorized to fund raise for the NYPD. Its mission is to assist the NYPD in improving public safety in New York. *Id.* at 6-7.

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 engaged in mandatory mediation, "which precedes a declaration of impasse, the appointment of an impasse panel and the resolution of the successor contract though interest arbitration." *Id.* at 11n.7. One of the central issues of the negotiation was the compensation of newly hired police officers, which had been reduced to $25,100 per year as part of a collective bargaining agreement which resulted from a 2005 interest arbitration award. *Id.* at 5-6. 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. Before this round of bargaining, neither side requested any type of compensation linked to academic achievement. *Id.* at 6.

Despite these negotiations, PBA only became aware of the Program by reading about it in the newspaper. Petition at 5 ¶10. It quickly 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. BCB Decision at 11. PBA representatives requested that the Program be abolished, arguing that it undermined PBA's ability to negotiate on behalf of its members. *Id.* NYPD did not discontinue the Program as a result of this request.

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 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 [*3]unilaterally changing a mandatory subject**[FN1]** of bargaining during a period of negotiations (*status quo*); and 3) NYCCBL §12-306(a)(1) by bypassing the union and engaging in impermissible "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 Petition on the ground that the Police Foundation had stopped the Program after the July 2008 recruit class and it had no intention of instituting the Program again. In fact, 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. BCB Decision at 18. Thus, the City argued, any decision of the Board would be purely academic. In an earlier November 23, 2009 interim 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. *Patrolmen's Benevolent Association v. New York City*, 2 OCB 2d 36 (BCB 2009).

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 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 violation of its duty to bargain under NYCCBL §12-306(a)(4).

BCB Decision at 24-25 (emphasis added).

The Board 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).**[FN2]** The [*4]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." *Id.* at 34. 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." *Id.*

Moreover, the Board found that the NYPD's implementation of the Program did not unilaterally change a mandatory subject of bargaining during a period of negotiations in violation of NYCCBL § 12-306(a)(5), relying on the fact that the Program was never part of the parties' previous collective bargaining agreement. *Id.* at 36.

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).

In this Article 78 petition, PBA challenges the Board's dismissal of its claims under NYCCBL §§12-306(a)(1) and (5). After the petition was filed, Respondents moved to dismiss the petition on the grounds that PBA did not have standing to challenge the decision and that it had failed to state a cause of action. By decision dated June 16, 2011, in *Patrolmen's Benevolent Association v. New York City Office of Collective Bargaining*, 31 Misc 3d 1244(A)(Sup. Ct. NY Co.) , this Court denied Respondents' motions to dismiss finding that PBA had standing[FN3] and that PBA had made out a cognizable claim that the decision was arbitrary and capricious. This Court further directed Respondents to answer the petition. Now, having received and reviewed all the pleadings[FN4] in this case, the Court grants PBA's petition.

DISCUSSION

Judicial review of an Article 78 proceeding is limited to whether an administrative determination was "affected by an error of law or was arbitrary and capricious, or an abuse of discretion" CPLR § 7803(3); *see Pell v. Board of Education of Union Free School District*, 34 NY2d 222, 230-31 (1974)). A decision is arbitrary and capricious if it is "without sound basis in reason and is generally taken without regard to the facts." *Pell*, 34 NY2d at 231. Courts generally defer to the expertise of the administrative body charged with enforcing particular statutes. *District Council 37 v. City of New York*, 22 AD3d 279, 283 (1st Dept. 2005). A court [*5]"may not substitute its judgment for that of" the administrative body when the determination is reasonable. *Pell*, 34 NY2d at 232 (citations omitted); *see District Council 37*, 22 AD3d at 284 (noting that the court "typically" defers to the expertise of the Board in its interpretation of the NYCCBL).

Nevertheless, "[a] decision inconsistent with an agency's own precedent which ignores the existence of prior rulings or provides no basis for lack of adherence thereto is arbitrary and capricious and will not be upheld." *Uniform Firefighters of Cohoes, Local v. Cuevas*, 276 AD2d 184, 187 (3d Dept. 2000). Moreover, where "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" and not on the expertise of the agency, deference is not afforded. Roberts v. Tishman Speyer Props., L.P., 13 NY3d 270, 285 (2009) (internal citations and quotations omitted); *Belmonte v. Snashall*, 2 NY2d 560, 565-66 (2004); Smith v. Donovan, 61 AD3d 505, 508-09 (1st Dept. 2009). In such cases, if the "language... is clear on its face, it should be construed so as to give effect to its plain meaning." *Liberty Lines Express v. New York City Envtl. Control Bd.*, 160 AD2d 295, 296 (1st Dept. 1990).

1. *Direct Dealing*

The NYCCBL "has no express direct dealing provision." *Uniformed Firefighters Assoc. Of Greater New York v. The City of New York,* 69 OCB 5, at 7 (BCB 2002). Nevertheless, the Board has determined that direct dealing may violate the NYCCBL in certain circumstances. The criteria the BCB has adopted to determine when direct dealing violates the NYCCBL is similar to those followed by the National Labor Relations Board (NLRB) and the New York Public Relations Board (PERB). *See id.* at 7; *Committee of Interns and Residents v. New York City Health and Hospitals Corp.*, 49 OCB 22, at 21-22 (BCB 1992). To make out a case, the union must show that the employer " impermissibly bypassed the employee organization for the purpose of negotiating or attempting to negotiate with an employee or a group of employees aimed at reaching an agreement on the subject under discussion.'" *District Council 37, AFSCME, AFL-CIO, Local 2507 v. The City of New York et. al.*, 2 OCB2d 28, at 10 (BCB 2009) (quoting *Dutchess Comm. College*, 41 PERB ¶ 3029, 3129 (2008)). Of course, not all of an employer's direct communications with union members are impermissible direct dealing. To make out a claim, the Union must show that in dealing directly with the employees "the employer made threats of reprisal or force, or promises of benefit, or [that] the direct dealing otherwise subverted the members' organizational and representational rights." *Uniformed Firefighters Assoc.*, 69 OCB at 7; *Committee of Interns and Residents*, 49 OCB at 22; *Social Services Employees Union v. New York City Administration for Children's Services and the City of New York*, 69 OCB 2002, at 9 (BCB 2002).

In finding impermissible direct dealing in *Uniformed Firefighters*, the Board explained this standard by contrasting the facts of that case to those of *Committee of Interns and Residents*. In the latter, a message was sent to union members that merely "focuse[d] on the benefits that would be derived from the implementation of . . . proposed changes" concerning a mandatory subject of bargaining. The message made no reference to the union. *Id.* at 8. By contrast, the *Uniformed Firefighters* case concerned a published message in a newsletter to firefighters that made a promise of benefits to union members — "extra overtime and increased pay, among other things" — and "assailed" the union's position on the proposal. *Id.* BCB explained that "employers are allowed to disseminate information to their employees" but it is improper direct dealing when in doing so it "attempts to subvert the Union's representation with the information." *Id.* [*6]

In the instant 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. It contrasted *Uniformed Firefighters Association*, noting that here "the NYPD informed Police Officers of a program that would benefit the eligible employees . . . but never stated or insinuated that the Union opposed this program, and never threatened reprisal if Police Officers did not avail themselves of this additional monetary benefit." Decision at 33 - 34.

While acknowledging the deference paid to decisions of administrative agencies and to BCB in particular, the Court must still find that BCB's decision with regard to direct dealing in this case was arbitrary and capricious as it did not follow its own precedent. *See Uniform Firefighters of Cohoes, Local*, 276 AD2d at 187. As indicated above, an employer's discussions with union members concerning subjects of bargaining will violate NYCCBL if there is a threat of reprisal orpromise of benefit or interference with the union's "organizational rights by compromising its bargaining position." *Committee on Interns* at 22.In the instant case, the BCB cites to this rule, yet misapplies it. BCB correctly found that NYPD did not threaten reprisal if the cadets did not take part in the Program. Yet, contrary to BCB's decision, according to BCB's own precedent, this fact is not dispositive. It is undisputed that the NYPD did communicate directly with union members, offering and then providing them loan reimbursements. What the BCB failed to address was whether under its direct dealing standard, the NYPD's offer of the Program's loan benefit along with its actual distribution of this benefit and its knowledge that PBA objected to it, were enough to violate

the NYCCBL's direct dealing prohibition even where there was no mention of the union's opinion with regard to the Program. This Court finds that they were.

The NYPD, believing that previously negotiated starting salaries were too low, created and announced the Program to help alleviate this problem without informing the Union. The Program was announced while PBA and the NYPD were in negotiations for a successor collective bargaining contract. One of the most important topics of these negotiations was the low starting salaries of new recruits. During the negotiations PBA had, in fact, suggested a benefit linked to education. Despite these ongoing negotiations, NYPD supervisors had face-to-face meetings with new recruits to offer them a wage enhancement in the form of the Program. To receive this benefit recruits attended meetings with their employer, filled out forms provided to them by the NYPD and were required to remain employed and in good standing with the NYPD.

These actions were enough to constitute impermissible direct dealing in violation of the NYCCBL. First, there is no doubt that through the Program the NYPD promised a benefit to eligible officers, which was not offered as part of the collective bargaining agreement. In fact, the Board explicitly found that the NYPD "granted an economic benefit" to eligible recruits. BCB Decision at 24-25. Second, the dealing between the NYPD and its employees over Program benefits went far beyond the newsletter communication described in *Uniformed Fire Fighters*, in which the Board found impermissible direct dealing. Here, the promised benefits were communicated in person to the recruits. Recruits were required to fill out and return forms containing personal information and thereafter to meet the criteria set by the NYPD to receive and maintain their benefits. In essence, the NYPD and the police officers entered into an extra-union agreement concerning the benefits provided by the Program. NYPD supervisors then followed up with individual recruits to ensure they remained eligible for the Program. [*7]

Third, while there is no evidence that the NYPD explicitly told the recruits that the PBA opposed the program, it is undisputed that the NYPD created and administered it without seeking the input of the PBA and, in fact, with the knowledge that the union objected to its implementation and believed that the Program undermined the collective bargaining process. Finally, hundreds of new NYPD recruits, who met the criteria by remaining in good standing, actually received the wage enhancement benefit offered by their employer despite the union's

opposition and the fact that wages were a focus of the on-going collective bargaining talks. Considering all of these factors, it is clear that, contrary to the BCB's decision, in implementing the program the NYPD violated the NYCCBL's prohibition on direct dealing, as laid out in its previous decisions, by offering (and extending) a wage benefit outside of the collective bargaining negotiations, and under protest from PBA, thereby subverting the Union and the negotiation process.

Moreover, BCB erred in finding that the Program did not interfere with the union's "organizational rights by compromising its bargaining position." As PERB has explained, "the provision of benefits that are more than what is called for in a collective bargaining agreement is inherently destructive of a union's representation rights." *Uniformed Firefighters of Cohoes*, 39 PERB ¶ 4589, at 3. Here, the Program which was an attempt to remedy the low starting salaries of recruits, provided benefits beyond what was offered in the union package, implicitly sending the message to recruits that they "would do better if they abandoned their union." *Id.* Thus, the Program undermined the Union's bargaining position concerning wages. What's more, even after PBA became aware of the Program and filed its improper practice petition, the NYPD refused to end the Program immediately, further weakening the Union's credibility during the negotiation period.

As the BCB failed to follow its own precedent in determining the direct dealing allegation and thereby erred as a matter of law in making its determination in this regard, the Court grants the petition with regard to this charge.

2. *Unilateral Change to a Mandatory Subject During Negotiations*

NYCCBL § 12-306(a)(5) explicitly prohibits an employer from unilaterally changing either "any term and condition of employment found in a collective bargaining agreement" or "a mandatory subject of bargaining" during a period of negotiations. BCB dismissed PBA's unilateral change claim finding "no violation of NYCCBL § 12-306(a)(5)" because the Program was not part of the "previous collective bargaining agreement." BCB Decision at 34-35. It noted that failure of the employer " to continue all the terms of an expired agreement until a new agreement is negotiated'" would be sufficient to state a claim here but did not discuss the other element of unilateral change in the NYCCBL — changes in mandatory subjects of bargaining — or why it did not consider this element. Decision at 34

(quoting *LaRiviere v. White, et. al*, 39 OCB 36, at 12 (BCB 1987).

In its pleadings, BCB justifies its decision to look only at whether there was a unilateral change to the previous collective bargaining agreement by explaining that the applicable improper practice standard for this case is found in the Taylor Law § 12-311, not the NYCCBL. The former, BCB argues, governed the "impasse" between the parties and thus its provisions should be applicable here. The Taylor Law's definition of improper unilateral change is more narrow than that of the NYCCBL, focusing solely on whether the NYPD failed to continue the terms of the expired collective bargaining agreement during the *status quo* period. No inquiry as to a change of mandatory subject of bargaining is required. BCB contends that because the [*8]Program was not part of the previous collective bargaining agreement between PBA and the NYPD, its creation did not constitute a mandatory change under the Taylor Law, and thus its decision should be upheld. *See* Memorandum of Law in Support of BCB's Answer at 38-43.

The Court rejects this argument. "Judicial review of the propriety of any administrative determination is limited to the grounds invoked by the agency in making its determination." *Timmerman v. Board of Education of the City School Dist. Of the City of New York*, 50 AD3d 592, 593 (1st Dept. 2008); *see Aronsky v. Board of Education*, 75 NY2d 997, 1000-01 (1990). PBA brought its improper practice claim under the NYCCBL and the BCB's decision explicitly finds no violation of that law. BCB Decision at 34 ("Nor did the NYPD, by instituting the college loan repayment program, violate NYCCBL § 12-306(a)(5)"). There is no mention of the Taylor Law when discussing the claim of unilateral change nor does the BCB indicate within the body of its decision that it is applying anything other than the NYCCBL in making its decision. The Court cannot rely on BCB's post hoc justification to find its decision rational.

The question then becomes did BCB's decision go against the plain meaning of section 12-306(a)(5) as is argued by PBA. The Court finds that BCB applied this provision too narrowly. Under its plain meaning it is an improper practice to make a unilateral change to *either* the terms of the collective bargaining agreement *or* to a mandatory subject of bargaining during a period of negotiations. *See The United Federation of Teachers v. The City of New York,* 3 OCB2d 44, at 10 (BCB 2010) ("establishing a violation of NYCCBL § 12-306(a)(5) requires only that the change to a mandatory subject of bargaining be made during a period of negotiations.'") (citation omitted). In its decision BCB explicitly found

that by instituting the Program the NYPD unilaterally "violated its duty to bargain in good faith as to a **mandatory subject of bargaining**." BCB Decision at 32-33 (emphasis added). Thus, it follows that by helping to pay off new recruits college loans, it was unilaterally changing a mandatory subject of bargaining, a violation of NYCCBL § 12-306(a)(5) .

Respondents argue, however that under NYCCBL, PBA and NYPD were not in a "period of negotiations" which is defined as "the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed." NYCCBL §12-311(d). They contend that the Program was announced more than three months after an impasse panel was appointed. Therefore, they argue, there could be no NYCCBL violation.

It is well established that a court may not sustain an administrative determination on a newly argued basis, even if it seems a "more appropriate" ground. *Aronsky*, 75 NY2d at 1000-01. Here, the decision makes no mention of the period of negotiation as the basis for rejecting the section 12-306(a)(5) claim. This omission is not surprising as the evidence suggests that it was generally accepted that the parties were in a period of negotiation when the Program was instituted. In fact, in the decision the BCB notes that when the Program was announced PBA and NYPD "were participating in mandatory mediation, which **precedes** a declaration of impasse, [and] the appointment of an impasse panel." BCB Decision at 11n. 7 (emphasis added). In addition, in a directly related decision which discusses the Program, BCB found that "[p]ursuant to NYCCBL § 12-311(d), the terms and conditions set forth in the Agreement are in *status quo*." *PBA v. The City of New York & The NYPD*, 1 OCB2d 14 (BCB 2008), at 3. Moreover, in its own papers, the NYPD conceded that "at the time the College Loan Repayment Program was implemented the parties were in negotiations for a successor agreement." Petitioner's Exhibit 3, (Post Hearing Brief Submitted on Behalf of the City of New York and the [*9]NYPD, at 18). At any rate, BCB did not mention let alone reject the section 12-306(a)(5) claim based on whether or not the parties were in a period of negotiations and, thus, the Court may not affirm the BCB's decision on these grounds.

Therefore, the Court finds that the BCB's decision with regard to NYCCBL § 12-306(a)(5) was arbitrary and capricious. By offering the Program to new recruits the NYPD violated the plain meaning of NYCCBL § 12-306(a)(5), unilaterally changing a mandatory subject of bargaining during a period of negotiations.

In accordance with the foregoing, it is

ORDERED and ADJUDGED that the Petition is granted; and it is further

ORDERED and ADJUDGED that the BCB Decision is modified; and it is further

ORDERED and ADJUDGED that NYPD is in violation of NYCCBL §12-306(a)(1) and 12-306(a)(5), as well as 12-306(a)(4).

This constitutes the decision and judgment of this Court.

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J.S.C.

Dated:New York, New York

May 29, 2012

Footnotes

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

Footnote 2: It did, however, note in a footnote that there was a derivative violation of §12-306(a)(1). It did not explain that decision.

Footnote 3: Respondent BCB again challenges standing in its Answer and as part of its Memoranda of Law in Support of its answer raising its prior objections to preserve them and introducing a new argument. This Court, however, having already held that PBA has standing and seeing no merit in BCB's newly raised argument will not revisit this issue.

Footnote 4: Respondents BCB and The City (along with the NYPD, collectively self identified in the briefs as Municipal Respondents), separately submitted answers and memoranda of law in support of their answers. For purposes of this decision, unless otherwise noted, the Court discusses the arguments made by the Respondents together without differentiating which arguments were made by which Respondent.

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