

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

PRESENT: Soan B. Lobis

PART C

Index Number : 100183/2011
SERGEANTS BENEVOLENT ASSN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE 5/11/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-6

7

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits X mot

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

2011 JUL 20 P 1:01
OFF. OF
COLLECTIVE BARGAINING
RECEIVED

Dated: 7/18/11

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Wong
MG
SD

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 100183/2011

SERGEANTS BENEVOLENT ASSN

vs
CITY OF NEW YORK

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE 6/14/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 7/18/11

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
**SERGEANTS BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, INC.,**

Petitioner,

Index No. 100183/11

For a Judgment Pursuant to Article 78 of the
C.P.L.R.,

Decision, Order and 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.

-----X
JOAN B. LOBIS, J.S.C.:

2011 JUL 20 P 1:02
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Motion Sequence Numbers 001 and 002 are hereby consolidated for disposition. In Motion Sequence Number 001, petitioner Sergeants Benevolent Association of the City of New York, Inc. ("SBA") brings this petition under Article 78 of the C.P.L.R. seeking to annul the November 29, 2010 decision and order (the "Decision") of the New York City Board of Collective Bargaining (the "BCB"). The Decision granted a petition filed by the City of New York (the "City") challenging the arbitrability of a claimed grievance filed by SBA on behalf of Sergeant Jure Olic and similarly situated sergeants. The City and the City of New York Office of Labor Relations (the "Municipal Respondents") cross-move for a judgment, pursuant to Section 12-308(a) of the New York City Administrative Code ("Administrative Code") and C.P.L.R. § 7804(f) and Rule 3211(a)(2), dismissing the petition on the ground that it fails to state a cause of action. In Motion Sequence Number 002, the BCB and Marlene Gold, Chair of the BCB (collectively the "BCB Respondents") separately move for similar relief.

The underlying dispute involves salary differences resulting from certain New York City Police Department ("NYPD") employees' promotions from the title of "detective" to "sergeant." SBA is the employee organization and bargaining representative for sergeants employed by NYPD. Detectives are represented by a separate organization, the Detectives Endowment Association ("DEA"). On December 23, 2008, Jure Olic ("Olic") was promoted from the title "Third Grade Detective" to "Sergeant." At the time Olic was promoted, third grade detectives were paid a salary of \$66,794 annually, according to the collective bargaining agreement between DEA and the City in place in December 2008. When he was promoted to sergeant, Olic began receiving a salary of \$73,000 annually, according to the collective bargaining agreement reached between the City and SBA on June 7, 2007, covering years 2005 through 2011 (the "SBA Agreement"). On March 31, 2009, after Olic was already promoted, DEA and the City entered into an agreement which raised the salary of third grade detectives to \$74,500 annually, retroactive to March 31, 2008. The retroactive increase in salary for third grade detectives meant that Olic and other similarly situated employees were being paid less as sergeants than the salary retroactively attributed to their positions as third grade detectives.

It is SBA's position that it has been the longstanding policy of the City and NYPD to prevent employees who are promoted from suffering a decrease in their overall annual salary upon promotion. On October 2, 2009, SBA filed a formal grievance on behalf of Olic and other similarly situated sergeants seeking to have these sergeants "placed in their proper salary steps." The grievance proceeded through the internal grievance channels without relief and, ultimately, on or about February 2, 2010, SBA filed a request that the claim be arbitrated with the Office of Collective Bargaining.

On or about March 2, 2010, the City and NYPD filed a petition challenging the arbitrability of SBA's grievance. According to the Decision, the City and NYPD maintained that SBA had failed to identify any contractual provision, NYPD rule, regulation, policy, or procedure on which its grievance was based. They asserted that the SBA Agreement did not furnish an independent basis for a grievance that a sergeant, upon promotion, would receive a salary higher than he or she had prior to the promotion. They further asserted that there was no provision in the SBA Agreement supporting the arbitration of a past practice. The City and NYPD contended that the grievance was not subject to arbitration because SBA could not establish a nexus between any past practice and a provision in the SBA Agreement.

According to the Decision, SBA maintained that there was a nexus between the salary that Olic and similarly situated employees were receiving as sergeants and the parties' past policy and practice as it related to officers promoted from detective to sergeant. SBA asserted that the SBA Agreement provided for a multi-step pay plan for sergeants and that the SBA Agreement was silent as to which salary step a newly-promoted sergeant must be placed. SBA maintained that it was this issue—the salary step at which detectives should be placed upon promotion to sergeant—that it sought to arbitrate before the BCB.

The Decision set forth that the BCB has exclusive power under New York City's Collective Bargaining Law (Chapter 3 of Title 12 of the Administrative Code) to "make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure[s.]" Administrative Code § 12-309(a)(3). In doing so, it applies a two-pronged test, first determining

whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions. If so, the BCB then asks whether the obligation is broad enough in its scope to include the particular controversy present; in other words, whether there is a nexus (a reasonable relationship) between the dispute and the parties' agreement. The BCB confirmed that the Collective Bargaining Law favors and encourages arbitration and that there is a presumption in favor of arbitration, but that it could not impose a duty to arbitrate a controversy where none exists, nor could it provide for a duty to arbitrate a controversy beyond the scope established by the parties' agreement.

The BCB determined that the first prong had been met, as there was no dispute that the parties had a valid collective bargaining agreement and that any alleged breaches under the SBA Agreement would be arbitrable. However, the BCB determined that the SBA Agreement was not broad enough to include the claim that petitioner sought to arbitrate. Under the SBA Agreement, in pertinent part, the term "grievance" is defined as either a claimed violation, misapplication, or inequitable application of a provision of the SBA Agreement, or a claimed violation, misinterpretation, or misapplication of the rules, regulations or procedures of the Police Department affecting terms and conditions of employment. The BCB concluded that the definition of grievance in the SBA Agreement did not include a violation of "past practice," and thus, no relationship could be established between the SBA Agreement and the basis for the right asserted. To the extent that SBA had argued that the past practice was actually a "policy" subject to arbitration, the BCB found this argument deficient because the definition of grievance in the SBA Agreement did not encompass "policies" and, moreover, there was no written policy in existence giving rise to SBA's claim. Accordingly, the BCB granted the City's petition and dismissed SBA's request for arbitration.

In this proceeding, SBA seeks to annul the Decision, arguing that the BCB refused to consider the parties' past practice in determining whether there exists a sufficient nexus to warrant arbitration of the dispute. SBA also argues that the Decision is arbitrary and capricious, an abuse of discretion, affected by errors of law, and not rationally based because it is inconsistent with public policy favoring arbitration and because there is a sufficient nexus between the rights asserted in the grievance and the SBA Agreement.

The Municipal Respondents and the BCB Respondents¹ assert in their respective cross motion and motion that petitioner has failed to state a cause of action because the petition simply repeats the arguments presented to, and rejected by, the BCB. Respondents argue that petitioner is asking the court to substitute its judgment for the BCB's rational, straightforward judgment that SBA's grievance relies solely on a claimed past practice which is not arbitrable under the SBA Agreement. They set forth that the claimed past practice is not an independent contractual right within the SBA Agreement. Respondents contend that the parties to the SBA Agreement did not agree to arbitrate past practices not rooted in the agreement itself, and that to argue (as SBA does) that any dispute touching on salary is arbitrable broadens the arbitration clause beyond that which was agreed to by the parties. They argue that SBA is "trying to have it both ways" by claiming that the past practice is both an independent obligation and a part of the contract. They conclude that the BCB is empowered to determine the arbitrability of claims; that it thoroughly analyzed SBA's contentions and determined that the matter was not subject to arbitration; that the Decision was

¹ Because the Municipal Respondents' and the BCB Respondents' respective cross-motion and motion advance similar arguments, they will be considered simultaneously.

consistent with the law, rational, and neither arbitrary nor capricious; and that, accordingly, the petition fails to state a tenable cause of action and should be dismissed.²

On a motion to dismiss a special proceeding, the court must “determine only whether the facts as alleged fit within any cognizable legal theory.” In re Yan Ping Xu v. New York City Dep’t of Health, 77 A.D.3d 40, 43 (1st Dep’t 2010) (citation omitted); see also, In re Y & O Holdings (NY), Inc. v. Bd. of Mgrs. of Exec. Plz. Condo., 278 A.D.2d 173 (1st Dep’t 2000). “[T]he facts alleged in the petition are deemed true and petitioners are ‘benefitted by the rule that every favorable inference must be afforded the facts alleged’ in the petition.” In re Anderson v. Town of Clarence, 275 A.D.2d 930 (4th Dep’t 2000) (citations omitted), quoting Held v. Kaufman, 91 N.Y.2d 425, 432 (1998). However, the petition must not consist of only a “conclusory assertion” of the wrong; it must contain factual allegations. Goldin v. Engineers Country Club, 54 A.D.3d 658, 659-60 (2d Dep’t 2008), app. denied, 13 N.Y.3d 763 (2009); see also Chappo & Co., Inc. v. Ion Geophysical Corp., 83 A.D.3d 499, 500 (1st Dep’t 2011).

Pursuant to Administrative Code § 12-309(a)(3), the BCB is empowered to determine “whether a dispute is a proper subject for grievance and arbitration procedure” It is well established that “an administrative agency’s construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight.” In re Herzog v. Joy, 74 A.D.2d 372, 375 (1st Dep’t 1980), aff’d, 53 N.Y.2d 821 (1981). “The determination of the BCB,

² The court notes that petitioner has not filed opposition papers to the cross motion or the motion to dismiss.

the statutorily authorized neutral adjudicative agency charged with making determinations under the . . . Collective Bargaining Law, will not be disturbed unless it is arbitrary and capricious or an abuse of discretion . . .” In re City of New York v. Uniformed Fire Officers Assoc., 95 N.Y.2d 273, 284 (2000) (citations omitted). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” Testwell, Inc. v. New York City Dept. of Bldgs., 80 A.D.3d 266, 276 (1st Dep’t 2010) (citations omitted).

The petition fails to state facts supporting SBA’s contention that the Decision is arbitrary and capricious. While petitioner contends that the Decision violates public policy favoring arbitration, thereby rendering the Decision arbitrary and capricious, the BCB addressed this very issue and the court agrees that while there is a strong presumption in favor of arbitration, the BCB cannot impose a duty to arbitrate a controversy beyond the scope established by the parties’ agreement. The provision for arbitration in the SBA Agreement is not a broad, sweeping statement that the parties agree to arbitrate any controversy or claim, but rather is narrow and tailored specifically to “grievances,” a term defined in the SBA Agreement. It was not irrational or unreasonable, nor does petitioner so argue, for the BCB to determine that the parties simply did not agree to arbitrate violations of past practices. While petitioner claims that the BCB should have examined the claimed past practice in order to interpret the salary step schedule in the Agreement, it is clear that SBA is not claiming that there has been a violation or misapplication of the salary steps in the SBA Agreement. Rather, SBA is claiming a violation of a past practice and is seeking to bring the alleged violation within the sphere of the grievance/arbitration procedure in the SBA Agreement by arguing that the SBA Agreement is “silent” with respect to which step an individual

should be placed at upon promotion. It is not disputed that Olic and the similarly promoted individuals were paid in accordance with the pay schedule in the SBA Agreement. In the BCB decision that petitioner cites for supporting its contention that “disputes concerning the proper placement of an individual on a salary step schedule . . . are arbitrable,” (Captain’s Endowment Ass’n, 79 O.C.B 17 [B.C.B. 2007] [Decision No. B-17-2007] [Arb.] [Docket No. BCB-2596-07] [A-12159-07]), the dispute involved newly promoted captains who were being paid Step 4 captain’s salaries (due to what NYPD alleged was an administrative error) and whose salaries were later reduced to lieutenants’ salaries. In Captain’s Endowment Ass’n, the BCB found a nexus between the reduction of the captains’ salaries and the violation of the pay plan set forth in the collective bargaining agreement; thus, the BCB determined that the grievance was arbitrable. Here, as set forth in footnote 8 of the Decision, SBA’s entire claim is based on what it asserts is NYPD’s past practice. Since parties shall not be compelled to arbitrate claims beyond the scope of their agreement, it cannot be alleged that it was arbitrary and capricious for the BCB to have determined that there was no nexus between a provision in the SBA Agreement subject to the grievance/arbitration process and the claimed violation of past practice. Accordingly, as the petition does not allege facts required to state a cause of action under C.P.L.R. § 7803(3), it is hereby

ORDERED that the cross motion on Motion Sequence Number 001 and the motion on Motion Sequence Number 002 are granted; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: July /8, 2011



JOAN B. LOBIS, J.S.C.