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

PRESENT: LOTTIE E. WILKINS PART 18

Lottie E. Wilkins *Justice*

Matter of CITY OF NEW YORK, et al..

Petitioners,

- v -

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

Respondents.

INDEX NO. 400007/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for art. 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

Upon the foregoing papers, it is ordered that

Petition to annul determinations of respondent, New York City Board of Collective Bargaining is granted in accordance with the attached decision and judgment.

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

Dated: December 5, 2007

DEC 05 2007

Lottie E. Wilkins J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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In the Matter of the Application of

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, RAYMOND W. KELLY, as Commissioner of The New York City Police Department, THE NEW YORK CITY MAYOR'S OFFICE OF LABOR RELATIONS and JAMES F. HANLEY, as Commissioner of The New York City Mayor's Office of Labor Relations,

Petitioners,

- against -

THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., PATRICK J. LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., THE SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., EDWARD D. MULLINS, as President of the SERGEANTS' BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., THE CAPTAINS ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK, JOHN DRISCOLL as President of THE CAPTAINS ENDOWMENT OF THE CITY OF NEW YORK, THE DETECTIVES ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK, MICHAEL J. PALLADINO as President of THE DETECTIVES ENDOWMENT ASSOCIATION OF THE CITY OF NEW YORK, THE NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, and MARLENE A. GOLD as Chairman of THE NEW YORK BOARD OF COLLECTIVE BARGAINING,

Respondents.

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PART 18

Index No. 400007/07

DECISION and JUDGMENT

Michael A. Cardozo, Corporation Counsel, New York City (William S.J. Fraenkel of counsel) for petitioners. Certilman Balin Adler & Hyman, LLP, East Meadow (Michael C. Axelrod of counsel) for the "union" respondents. Greenberg Burzichelli Greenberg P.C., Lake Success (Harry Greenberg of Counsel) for respondents Captains Endowment

Association and John Driscoll. Steven C. Decosta, New York City (John F. Wirenius of counsel) for respondent Board of Collective Bargaining.

Lottie E. Wilkins, J.:

The central issue to be decided in this proceeding is whether petitioners' decision to use a particular kind of test to screen officers of the New York City Police Department for drug use – and the implementation of procedures for administering such a test – fall within the ambit of the New York City Police Commissioner's non-negotiable disciplinary authority or are instead conditions of employment subject to collective bargaining between the NYPD and the various labor organizations that represent its officers[1]. At the outset it should be noted that drug screening in one form or another has been widely used by the Police Department for about 20 years and there is no question that it will remain in use for the foreseeable future. Even the particular drug test at issue in this proceeding, a type of hair follicle testing, has been used in certain situations within the Police Department since 1995. The dispute here relates only to the NYPD's expanded use of this hair follicle test, known as radioimmunoassy of hair (RIAH), to situations where urine analysis had previously been the method of screening in use.

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[1] The term "officers" is used in a broad sense throughout, intended to connote Police Department employees of all ranks and classifications who are represented by the respondent unions including Police Officers, Detectives, Sergeants, Captains, etc.

Background

This dispute comes before the Court in an article 78 petition from the City of New York, New York City Police Department, Raymond W. Kelly, New York City Mayor's Office of Labor Relations and James F. Hanley which seeks to vacate two decisions of the New York City Office of Collective Bargaining (OCB) dated December 4, 2006, and bearing numbers B-37-2006 and B-38-2006, each holding that the proposed expansion of RIAH testing by the Police Department to situations where urine analysis had previously been the testing method in use amounted to a unilateral and impermissible change in conditions of employment and were therefore mandatory subjects of collective bargaining. Respondents Patrolmen's Benevolent Association, Sergeant's Benevolent Association, Captains Endowment Association and Detectives Endowment Association oppose the petition arguing that the two challenged determinations are the result of the correct and rational application of both the administrative and decisional law of New York to the particular facts. Respondent Office of Collective Bargaining (OCB) opposes the petition on similar grounds and also cross-moves for an order dismissing the proceeding. In this Court's view, the cross-motion by OCB is procedurally unnecessary since a straightforward denial of the petition would necessarily result in dismissal of the proceeding and would also leave the two challenged determinations in force. For that reason the cross-motion will not be

referred to extensively herein and will instead be treated for what it truly appears to be, which is opposition to the petition on its merits.

As mentioned above, hair follicle testing, or RIAH, has been employed by the New York City Police Department in various contexts since 1995. Even prior to the current dispute, RIAH was the standard method of drug screening for end-of-probation police officers, as well as officers already under a reasonable suspicion of drug use, and officers who voluntarily submit to its use. The dispute here centers on the manner in which NYPD went about expanding the use of RIAH to situations where urine analysis had been the prior method of testing. The challenged expansion was announced on August 1, 2005 when, after some preliminary discussions with the respondent unions, the Police Department sent a "Finest Message" indicating that RIAH would be the testing method for random (i.e., not for cause) drug screening of officers, screening for promotions, and screening for officers applying to certain specialized units of the NYPD such as the Organized Crime Control and Internal Affairs Bureaus. The proposed expansion would effectively make RIAH the sole method of drug screening for all purposes within the Police Department. Although the respondent unions had been advised of the proposed expansion of RIAH testing, they claim to have not been given an opportunity to negotiate or consent to its implementation.

On August 26, 2005, the Detectives Endowment Association filed an

improper practice petition with the New York City Board of Collective Bargaining (referred to hereafter as "BCB") on behalf of itself, the Patrolmen's Benevolent Association and the Sergeants Benevolent Association challenging the expanded use of hair testing. Thereafter, on November 7, 2005, the Captains Endowment Association filed its own, essentially identical, improper practice petition. The unions argued that, while the Police Commissioner's disciplinary authority over the police force included the right to screen officers for drug use, the expanded use of a particular testing method such as RIAH, along with the implementation of different procedures to administer the test, altered the terms and conditions of the represented officers' employment and therefore were mandatory subjects of collective bargaining. According to the unions, more widespread use of RIAH, along with changes in the choice of laboratory, collection procedures, chain of custody requirements, sample screening standards, conditions for re-testing and procedures for reporting and recording of test results altered conditions of employment that had hisorically been negotiated by the officers through collective bargaining.

In addition to claimed violations of the collective bargaining laws, the various unions also claimed that aspects of the new testing procedures raised concerns affecting their members' rights to privacy, due process and equal protection. For example, because RIAH testing can detect a much longer history of drug use, limited

only by the length of the hairs that are tested, the unions claimed that there was an increased risk that the test could expose past behaviors unrelated to an officer's employment. Additionally, in the absence of head hair, sample collection for RIAH might involve taking hair from other parts of the body including the pubic region which, the unions argued, has the potential to be particularly embarrassing and demeaning. Another argument put forward by the unions was that RIAH testing could have a disparate negative impact on African American officers because their cultural traditions, namely a preference for short hair on men, could make it difficult to obtain a sufficiently long hair sample from the head thereby requiring recourse to other parts of the body. Even more concerning, it was argued that studies show that darkly pigmented hair accumulates the chemical indicators for cocaine use more efficiently than lighter colored hair, raising a concern that similarly situated African American officers would test positive for cocaine use at a higher rate than officers with lighter colored hair.

The City respondents defended their decision to implement wider use of RIAH claiming that, because hair follicle testing had been in use since 1995 in numerous contexts, and since the procedures for administering the test were identical to those that were already in place, the decision to expand the use of hair follicle testing did not actually amount to a change in the terms and conditions of employment. More

significantly for purposes of this proceeding, the City argued that the entire dispute had essentially been settled by the Court of Appeals' decision in Matter of Patrolmen's Benevolent Assn. v New York State Public Employment Relations Bd. which, the City argued, took a more expansive view of the scope of disciplinary authority and the rule that matters related to discipline cannot be the subject of collective bargaining (see, 6 NY3d 563 [2006]).

On December 4, 2006 the BCB issued substantially identical decisions on both petitions holding that the challenged testing procedures affected terms and conditions of employment and were therefore mandatory subjects of collective bargaining. In the opinion of BCB, the choice of testing methodology and the procedures for implementing such testing did not directly involve the NYPD's general disciplinary power. Pointing to a number of its own past decisions as well as decisions from the Public Employment Relations Board, BCB found that the implementation of drug testing methodologies and procedures had consistently been held to constitute mandatory subjects of collective bargaining. BCB also distinguished the Court of Appeal's decision in Patrolmen's Benevolent Assn. v PERB, supra, on its facts, explaining that the disciplinary procedures at issue in that case were more inextricably intertwined with disciplinary power than the drug testing procedures at issue in this dispute. BCB further pointed out that its own earlier rulings were consistent with the

holding in Patrolmen's Benevolent Assn. v PERB when it came to the question of disciplinary procedures, however, the issue of drug testing was a distinct matter and one which both BCB and PERB had uniformly ruled was not so inextricably intertwined with disciplinary authority so as to remove it as a subject of collective bargaining (see, Matter of Detectives Endowment Assn. et al v City of New York et al, Decision No. B-37-2006 at pp. 18-20 [12/4/06]). Consistent with that reasoning, BCB ordered the NYPD to rescind its changes to drug screening procedures and to restore the screening procedures in effect prior to August 1, 2005. This article 78 proceeding ensued.

Discussion

A court sitting in review pursuant to CPLR article 78 will not disturb an agency determination of the kind at issue in this proceeding absent a finding that the determination was arbitrary or capricious (see, Matter of Pell v Bd. of Ed. of Union Free School Dist., 34 NY2d 222 [1974]). Stated another way, "[it] is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (Matter of Arrocha v Bd. of Ed. of the City of New York, 93 NY2d 361,365-365 [1999] [emphasis in original; citations omitted]). Moreover, an agency's interpretation of the statutes it interprets are entitled to great deference, especially when

the interpretation at issue does not involve a matter of pure statutory interpretation (see, New York City Campaign Finance Bd. v Ortiz, 38 AD3d 75 [1st Dept. 2006]).

As already stated, the factual question to be answered is whether the expanded use of RIAH testing and the various procedures for implementing that method of testing fall under the Commissioner's disciplinary authority or are instead more generic conditions of employment. Viewed in terms of the standard of review, the issue is properly framed as follows: Was it arbitrary and capricious for BCB to rule that the choice of testing methodology and the implementation of procedures for administering that test were not sufficiently connected to the Police Commissioner's disciplinary authority to exempt those issues from collective bargaining? For the reasons that follow, this Court answers that question in the affirmative.

It is essentially undisputed that, in the past, the City has negotiated with the unions representing its police officers on issues relating to the implementation of specific drug screening methodologies and the procedures for administering such tests and evaluating their results – a fact which favors respondents' argument that these matters are properly considered terms and conditions of employment . Moreover, there is little reason to doubt respondents' contention that with expanded use of RIAH a number of conditions of the represented officers' employment will be affected. The City does not explicitly deny that administering a hair test can sometimes involve intrusive

and potentially uncomfortable methods of sample collection, or that the test can detect a larger number of drugs over a longer period of time than urine analysis. Thus, were it simply a matter of determining whether the challenged action would have the effect of altering terms and conditions of employment for the represented officers, this would be a much easier case.[2]

What is called for, however, is balancing of competing interests. On the one hand, the law favors resolution of disputes affecting conditions of police officers' employment via collective bargaining. On the other hand there is a public policy which favors giving the Police Commissioner all necessary and proper authority to maintain discipline within police ranks. Even the challenged BCB determinations recognize that the mere fact that a workplace practice has the effect of changing terms or conditions of employment does not necessarily mean that it cannot be exempted from collective

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[2] To the extent they relate to arguments concerning privacy, due process and equal protection, some of these claims, such as the claim that RIAH disparately impacts African Americans because of the tendency of dark hair to test positive for cocaine, clearly require extensive scientific substantiation. Without objective support, which does not appear in the record here, such claims cannot be seriously considered. Other claims, such as the claim that RIAH could be used to screen for other unrelated diseases and genetic abnormalities, appear to be somewhat misleading since such screening currently requires DNA from tissue only available at the root of hair. Similarly, the claim that some sample collections for hair testing have resulted in "bloodlettings" is quite dramatic but not particularly illuminating without comparative analysis about collection methods and rates of mishap with respect to urine analysis.

In addition, these claims seem better suited to an effort to abolish the use of RIAH testing in its entirety, as opposed to challenging its expanded use. This Court has a difficult time understanding how these claims, if accepted, could justify halting the expanded use of RIAH, but still allow the test to continue to be administered to a great many officers in other contexts.

bargaining based on an overriding policy interest. Indeed, Patrolmen's Benevolent Assn. v PERB, supra, reaffirms the policy that the legitimate exercise of disciplinary authority may not be encumbered by the collective bargaining process, even when it affects the terms and conditions of employment. Moreover, that decision demonstrates that even though the parties may have bargained over a particular practice in past negotiations, that practice can be exempted from future collective bargaining based upon a more evolved and practical understanding of the legitimate scope of disciplinary authority (6 NY3d 563, 570 [2006]).

Based on its own past rulings and those of the Public Employment Relations Board, BCB has developed a body of administrative law which holds that the use of particular drug testing methodologies and procedures for implementing such tests are too far removed from the disciplinary function to be exempted from collective bargaining (see, Matter of Detectives Endowment Assn. et al v City of New York et al. Decision No. B-37-2006 [12/4/06], citing, County of Nassau, 27 PERB 3054 [1994]; City of Utica, 25 PERB 4641 [1992]; District Council 37, Decision No. B-16-96 [BCB]; Communications Workers of America, Local 1182, Decision No. B-47-98 [BCB]). BCB also argues here that, because of its different facts, the holding of Patrolmen's Benevolent Assn v. PERB does not undermine this long-held position. However, just as Patrolmen's Benevolent Assn v. PERB demonstrates that past negotiations are not

determinative when the proper scope of disciplinary authority has been redefined, so too must outdated agency interpretations of public policy yield to new pronouncements from the courts.

What most distinguishes the holding of Patrolmen's Benevolent Assn v. PERB from its precedents seems to be the endorsement of the principle articulated by the Appellate Division below that even matters which previously may have been considered to be "ancillary" or only "tangentially" related to the disciplinary function are in reality essential to the effective administration of discipline when considered in their proper context (see, Matter of Patrolmen's Benevolent Assn. of the City of New York v New York State Public Employment Relations Bd., 13 AD3d 879 [3d Dept. 2004]). Thus BCB's analysis of the issue from the perspective of whether expanded use of the RIAH drug test was inextricably intertwined with the disciplinary function did not accurately reflect the current legal standard. A more suitable test would be to ask whether submitting the practice in question to negotiation through collective bargaining would meaningfully impair the ability of a police commissioner to administer discipline within a police department. In this Court's view, requiring that drug screening methodologies and practices be submitted to collective bargaining seriously limits the Commissioner's ability to effectively enforce discipline within the New York City Police Department.

The ability to detect and eradicate drug use among police officers is quite obviously a legitimate and important disciplinary function. Furthermore, given the unique public trust placed in the police force and the need for quasi-military discipline within its ranks, this Court is inclined to agree with petitioners' assertion that there should be no greater limitations placed on "proactive" efforts to detect drug use among officers on the job than those placed on "reactive" efforts to monitor officers who are already under heightened suspicion of drug use. In other words, if RIAH testing is the preferred method of testing for probationary officers as well as those already suspected of drug use – presumably because it is a better test – then there is no reason to limit its use in other contexts such as for random, "not-for-cause" drug screening.

Even utilizing the same criteria applied by BCB to determine this question, this Court takes issue with the conclusion reached by the Board that drug testing methodologies and practices are not sufficiently related to the disciplinary function to warrant removing those issues from collective bargaining. In this regard, there is a logical disconnect between recognition of the underlying authority to conduct drug screening and the imposition of limits on how that authority is exercised. To say that the Commissioner has the authority to screen for drug use among police officers but must negotiate with those same officers as to which test will be used, to whom it will be administered, when it will be administered, how it will be administered, etc., renders

the Commissioner's authority illusory and meaningless in any practical sense. It seems evident that if the Commissioner is not at liberty to use a particular drug test even after determining that such a test would be more effective at exposing drug use among police officers, then his ability to carry out his disciplinary "authority" has been significantly limited. Similarly, decisions about when and where to use such a test – especially in the area of random drug testing – has an obvious bearing how effective efforts to detect drug use will ultimately be. Thus, even under the stand applied by BCB, derived from its own internal precedents, which require a much closer connection between the disciplinary authority and the practice at issue, the determination reached here lacks the quality of clear reason. That is to say it appears arbitrary to this Court.

At this point it is important to note that there is a distinction between the authority to conduct drug screening in order to maintain discipline and the availability of procedures for validating the results of such tests and challenging any disciplinary action that flows from them. In this regard the Court fully agrees with BCB's own precedents that even where policy dictates that the Commissioner have "certain rights, including the right to take disciplinary action against its employees, [those rights] do not affect the right of a union to bargain over procedures for review and appeals of disciplinary action" (see, Matter of Detectives Endowment Assn. et al v City of New York et al. Decision No. B-37-2006 at p. 15 [citing District Council 37, Decision No. B-25-

2001 at 6-7] [internal citations omitted]). Police officers incriminated by drug screening are entitled to have procedures in place for challenging the results of such tests and for raising valid defenses at disciplinary proceedings. The problem presented in this case, however, is that by making specific screening methodologies and practices subject to collective bargaining, BCB's determination goes beyond procedures relating to the review and appeals of disciplinary action (i.e., the adjudicative process) and instead makes the respondent unions "partners" in determining the best and most effective way to detect drug use (i.e., the enforcement process). The inclusion of the enforcement process – which is a wholly disciplinary function – as matter which must be negotiated with the unions in collective bargaining represents an unnecessary impingement on disciplinary authority.

In the final analysis, recent developments in the law compel a different result in this dispute. Even under the former standard, this Court would question the logic used by BCB to reach the conclusion that drug testing methodologies and procedures are mandatory subjects of collective bargaining. Nonetheless, given the deference afforded BCB, calling that determination arbitrary or capricious would have been a much more difficult call. Post-Matter of Patrolmen's Benevolent Assn. v New York State Public Employment Relations Bd., however, and the re-balancing of priorities with respect to disciplinary authority which took place in that case, the

determinations at issue now appear to be untenable (see, 6 NY3d 563 [2006]). For that reason, the determinations are annulled. Accordingly, it is

ORDERED and ADJUDGED that the petition is granted and the decisions of respondent Board of Collective Bargaining dated December 4, 2006 and numbered B-37-2007 and B-38-2006 are hereby annulled; it is further

ORDERED that the cross-motion by respondent New York City Office of Collective Bargaining is denied.

This constitutes the decision and judgment of the Court.

Dated: 12/05/07

DEC 0 5 2007

Lottie E. Wilkins, J.S.C.

Lottie E. Wilkins