

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III PART IAS MOTION 62EFM
Justice

THE CITY OF NEW YORK; BILL DE BLASIO, as Mayor of the City of New York; ROBERT W. LINN, as Commissioner of the Mayor's Office of Labor Relations; and, THE MAYOR'S OFFICE OF LABOR RELATIONS,

INDEX NO. 450078/2019
MOTION DATE 07/25/2019
MOTION SEQ. NO. 001

Petitioners,

- v -

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION ("LEEBA"); KENNETH WYNDER, as President of LEEBA; THE BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK; and, SUSAN J. PANEPENTO, as Chair of the Board of Collective Bargaining,

DECISION AND ORDER

Respondents.

Table with 3 columns: Document Type, No(s), and Article 78 / DISMISS. Rows include Notice of Petition - Affidavits - Exhibits (1-18), Answering Affidavits - Exhibits (19-26), and Replying (27-29).

Petitioners City of New York, Bill de Blasio, as Mayor of the City of New York, Robert W. Linn, as Commissioner of the Mayor's Office of Labor Relations, and the Mayor's Office of Labor Relations seek an order pursuant to New York City Administrative Code § 12-308 enforcing a determination and order of the Board of Collective Bargaining ("BCB") dated February 15, 2018.

The BCB determination and order directs the Law Enforcement Employees Benevolent Association ("LEEBA") to 1) "cease and desist its efforts to renegotiate the terms of the memorandum of agreement, dated May 19, 2015, by and between the Laborers' International Union of North America, Local 1042, Pavers and Road Builders District Council and the City of New York", 2) "sign a successor unit agreement incorporating the terms of the memorandum of agreement, dated May 19, 2015, by and between the Laborers' International Union of North America, Local 1042, Pavers and Road Builders District Council and the City of New York", and 3) "post the attached notice [describing the BCB determination] for no less than 30 days at all locations it uses for written communications with its unit members".

Facts and BCB Determination

The Highways and Sewers Inspectors' bargaining unit entered into a Memorandum of Agreement ("MOA") for 2010 to 2018 while the unit was represented by Laborers' International

Union of North America (“LIUNA”). The MOA was ratified by the bargaining unit on April 9, 2015; LIUNA executed the MOA on May 19, 2015.

The MOA sets relevant pay rates for the period from 2010 to 2018 and provides that “[e]xcept as provided for in Section 7, no party to this agreement shall make additional economic demands during the term 2010-2018 MOA or during the negotiations for the Successor Unit Agreement”.

Section 7 states, in relevant part: “Nothing contained in this current Agreement shall preclude the parties from their continuing discussions to identify, review, recommend and develop initiatives that will generate workplace savings, maximize the potential of the City workforce and ensure the provision of essential services, while at the same time providing increased compensation for the workforce. The parties must conclude all discussions regarding this Section no later than 24 months after the date of ratification [April 9, 2015]”. The deadline to conclude discussions was therefore April 9, 2017.

Subsequent to ratification and execution of the MOA, and following an election by the bargaining unit, on October 6, 2015, Law Enforcement Employees Benevolent Association (“LEEBA”) was certified as the bargaining representative for the Highway and Sewers Inspectors’ bargaining unit.

On February 15, 2018, more than six months after the deadline to finish discussions under the MOA, the Board of Collective Bargaining issued a decision on the City of New York’s “improper practice petition” against LEEBA. The Board found that LEEBA engaged in bad faith bargaining by failing to execute a successor unit agreement within 24 months pursuant to the MOA (*see* Section 7, *supra*) and by attempting to renegotiate certain economic terms.

In its answer to the petition, respondent LEEBA admits that it has refused to execute the successor unit agreement or post notice of the determination, as directed by the BCB determination dated February 15, 2018 (LEEBA Answer at ¶ 19).

#### Parties’ Positions

Petitioners seek enforcement of the BCB determination dated February 15, 2018, which directed respondent LEEBA to cease efforts to renegotiate the terms of the MOA, sign a successor unit agreement, and post a notice of the decision. Petitioners contend that respondent LEEBA has no legal justification for its conduct in, first, failing to execute a successor unit agreement pursuant to the MOA, and, second, refusing to comply with the BCB determination.

Respondent LEEBA opposes the petition, arguing that their bargaining conduct—seeking “clarity on the mechanism as to how a member can advance to Maximum pay”; refusing to execute a successor unit agreement due to “outstanding issues that were unresolved”—was proper. With respect to the BCB proceeding and decision specifically, respondent LEEBA maintains that “issues of fact were raised in Respondents Answer to the Improper Practice Petition” before BCB, and that the matter should be remanded “to BCB so that a full and fair hearing can be conducted, and full consideration of the facts can be fairly adjudicated.”

Respondents BCB and Susan J. Penepento, as Chair of BCB (“Penepento”), support the petition, contending that respondent LEEBA is precluded, by virtue of expiration of the 30-day time limitation set forth in Admin Code § 12-308 (a) (1), from appealing the merits of the BCB determination. Additionally, respondents BCB and Penepento stress that the duty to bargain in good faith includes the obligation “to execute upon request a written document embodying the agreed terms, and to take such steps necessary to implement the agreement” (Admin Code § 12-306 [c] [5]; *see* Admin Code § 12-306 [b] [2] [improper practice includes refusal to bargain in good faith]; Admin Code § 12-309 [a] [4] [BCB “shall have the power and duty... (4) to prevent and remedy improper... public employee organization practices]).

### Oral Argument

The parties appeared before this court for oral argument on July 25, 2019. The parties reiterated the positions outlined in their papers. Of note, Mr. Kenneth Wynder, President of LEEBA, appeared on his own behalf. Additionally, he stated that LEEBA had ceased its relationship with its counsel, Mr. Stuart Salles, Esq. The court, being notified by Mr. Wynder that Mr. Salles, Esq., was in the courthouse, summoned Mr. Salles to appear. Messrs. Wynder and Salles, Esq., described the amicable dissolution of Mr. Salles representation of LEEBA due to a disagreement over LEEBA’s general legal strategy (outside the scope of this application). Mr. Wynder stated that he and LEEBA intended to rely upon the papers submitted by Mr. Salles, Esq., in this proceeding, which were submitted prior to dissolution of the attorney-client relationship.

### Applicable Law

The Board of Collective Bargaining is established by Chapter 54 of the New York City Charter (“Charter”). Section 1173 of the Charter provides that “the board of collective bargaining... shall have such powers and duties with respect to labor relations and collective bargaining as shall be prescribed by law.”

New York City Administrative Code (“Admin Code”) § 12-309 provides:

“The board of collective bargaining... shall have the power and duty: (1) [up]on... a disagreement concerning the interpretation or application of the provisions of [Admin Code Title 12, Chapter 3, “The Collective Bargaining Law” or “NYCCBL”], to consider such disagreement and report its conclusion to the parties and the public; (2)... to make a final determination as to whether a matter is within the scope of collective bargaining; (3)... to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to [Admin Code] section 12-312...; (4) to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in [Admin Code] section 12-306 [including discrimination, coercion, refusal to bargain in good faith, or breaching the duty of fair representation];... (6) to hold hearings and compel the attendance of witnesses and the production of documents”.

Admin Code § 12-308 provides that:

“Any order of the board of collective bargaining...shall be (1) reviewable under [CPLR Article 78] and rules upon petition filed by an aggrieved party with thirty days after service by registered or certified mail of a copy of such order upon such party, and (2) enforceable by the supreme court in a special proceeding, upon petition of the board of collective bargaining...or any aggrieved party.”

61 RCNY 1-07 (b) (4) provides, in relevant part, that “a public employer may file a petition alleging that...a public employee organization or its agents has engaged in or is engaging in improper practice in violation of [Admin Code] § 12-306...and request that [BCB] issue a determination and remedial order.” Pursuant to 61 RCNY 1-07 (c) (8), BCB “may [upon a 61 RCNY 1-07 (b) petition] decide the dispute on the papers filed, may direct that oral argument be held, may direct a hearing before a trial examiner, or may take such other disposition of the matter as it deems appropriate and proper.”

#### Standard of Review and Limitations Period

Generally, upon judicial review of a BCB determination pursuant to CPLR article 78, “[t]he determination of the Board of Collective Bargaining...may not be upset unless it is arbitrary and capricious or an abuse of discretion, as the Board is the neutral adjudicative agency statutorily authorized to make specified determinations” (*NYC Dept. of Sanitation v MacDonald*, 87 NY2d 650 [1996]). The courts defer to the Board’s expertise in applying and interpreting the provisions of the NYCCBL, so long as the determination is reasonable. (*District Council 37, AFL-CIO v City of New York*, 22 AD3d 279 [1st Dept 2005]; see *Matter of Herzog v Joy*, 74 AD2d 372, 375 [1st Dept 1980] *affd* 53 NY2d 821 [1981] [“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”]).

Where a party seeks enforcement of a BCB determination pursuant to Admin Code § 12-308, and the 30-day period for appeal has expired, objections to the substance of the determination are untimely (*Uniformed Firefighters Ass’n of Greater N.Y. v New York City Off. Of Collective Bargaining, Bd. of Collective Bargaining*, 163 AD2d 251 [1st Dept 1990] [“Review of BCB determinations must be sought within 30 days after service of the final order”]).

#### Discussion

Petitioners in this special proceeding apply pursuant to Admin Code § 12-308, by petition filed January 24, 2019, to enforce the BCB determination entered February 15, 2018 (see CPLR 217 (1); Admin Code § 12-308). The BCB determination and order was not appealed. Therefore, to the extent that respondents challenge the substance of the determination, respondent’s objections are untimely (*Uniformed Firefighters Ass’n of Greater N.Y. v New York City Off. Of Collective Bargaining, Bd. of Collective Bargaining*, 163 AD2d 251 [1st Dept 1990]).

Because this is an enforcement proceeding commenced after the 30-day period for review of the merits of a BCB final determination (Admin Code § 12-308 [a] [1]), the court is “not at

liberty to consider ‘either the determinative or the remedial provisions of the [BCB] orders’ (*New York State Pub. Empl. Relations Bd. v County of Westchester*, 280 AD2d 849, 850 [3d Dept 2001] citing *Matter of New York State Pub. Empl. Relations Bd. v Board of Educ. of City of Buffalo*, 39 NY2d 86, 91; compare Civil Service Law § 213 with Admin Code § 12-308 [equivalent state and municipal enforcement provisions]).

In any event, this court finds, upon a review of the record, that the BCB determination was not arbitrary and capricious or an abuse of discretion. Moreover, respondent LEEBA’s objections to the BCB determination—namely, 1) that BCB did not hold hearing prior to rendering its determination and 2) that its duty of fair representation precludes its execution of the previously agreed-to successor unit agreement—are without merit. First, BCB is explicitly empowered to render a determination on submitted papers and without holding a hearing, if it so elects (61 RCNY 1-07 [c] [8] [BCB “may decide the dispute on the papers filed, may direct that oral argument be held, may direct a hearing before a trial examiner, or may take such other disposition of the matter as it deems appropriate and proper.”]). Second, the Highways and Sewers Inspectors’ bargaining unit ratified the MOA on April 9, 2015, and their representative executed the MOA on May 19, 2015. The unit’s decision to replace its representative with LEEBA did not alter the terms to which the unit was bound. The MOA provided the terms of the agreement in whole with respect to economic issues, and the only remaining item to be negotiated was described in MOA section 7, said item being, under the MOA, non-economic in nature. Consequently, LEEBA’s efforts to negotiate mechanisms for maximum pay constituted an effort to avoid the unit’s obligations under the MOA. Similarly, LEEBA’s attempts to continue negotiation after expiration of the agreed upon 24-month period for reaching agreement constituted a violation of the bargaining unit’s obligations under the MOA.

Finally, BCB is empowered to “to prevent and remedy improper...public employee organization practices” (Admin Code § 12-309 [a] [4]), and the BCB determination and order dated February 15, 2018, rationally addressed the issues before it, including through its concluding directives.

Accordingly, it is ORDERED that the petition is granted; and it is further

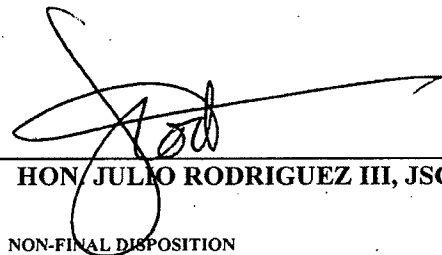
ORDERED that the decision of the New York City Board of Collective Bargaining dated February 15, 2018, is confirmed and enforced in all respects; and it is further

ORDERED that petitioners shall serve a copy of this order with notice of entry upon all respondents, the Clerk of the Court (60 Centre Street, Room 141B), and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), within 20 days; and it is further

ORDERED that respondent Law Enforcement Employees Benevolent Association shall comply with the decision and order of the New York City Board of Collective Bargaining dated February 15, 2018, by November 1, 2019.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

September 10, 2019



HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE