SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100114/2014 (BCB) 3004-12

PATROLMEN'S BENEVOLENT

vs

NYC OFFICE OF COLLECTIVE

Sequence Number : 001

ARTICLE 78

PART IA PART 16

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this cross motion is granted, the petition is denied, and the proceeding is dismissed in accordance with the accompanying memorandum decision.

OFF. OF COLLECTIVE BARGAINING RECEIVED 2015 APR 21 P 4:32

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

Dated: APR 10 2015

ALICE SCHLESINGER J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16
Justice

Index Number : 100114/2014
PATROLMEN'S BENEVOLENT
vs.
NYC OFFICE OF COLLECTIVE
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this cross-motion is granted, the petition is denied, and the proceeding is dismissed in accordance with motion sequence 001.

OFF. OF COLLECTIVE BARGAINING RECEIVED
2015 APR 21 P 4:32

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

Dated: APR 10 2015

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

----------X

In the Matter of the Application of

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

Petitioner,

Index No. 100114/14
Mot. Seq. Nos. 001 & 002

for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

THE NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, THE CITY OF NEW YORK, and THE NEW YORK CITY POLICE DEPARTMENT,

Respondents.

----------X

SCHLESINGER, J:

Before the Court are two related Article 78 proceedings between the same parties, the above-captioned proceeding and another entitled *The City of New York, The Police Department of the City of New York, and William Bratton, as Commissioner of the Police Department of the City of New York against Board of Collective Bargaining of the City of New York, and Patrolmen's Benevolent Association of the City of New York, Inc.,* Index No. 400091/14. In the first proceeding captioned above, the City of New York and the Police Department (the City or NYPD) have moved to dismiss, as did the Board of Collective Bargaining (the BCB). In the second proceeding, the BCB has moved to dismiss, but the Patrolmen's Benevolent Association (PBA) has filed an Answer. Both cases involve the December 19, 2013 Decision and Order by the BCB, which granted in part and denied in part the Improper Practice Petition filed by the PBA as the collective bargaining agent for the NYPD police officers (Petition, Exh 1). The two proceedings and the motions are consolidated herein for disposition.

Background Facts

The PBA and the City are parties to a collective bargaining agreement commencing August 1, 2006, the terms of which still apply with certain changes (Exh 2). In 2011 two orders were issued that changed the scope of police officer participation in performance evaluation procedures. In October of 2011, the NYPD published Operations Order 52 (OO 52, Exh 3) and Interim Order 49, entitled "Revision to Patrol Guide 205-57 'Police Officer's Monthly/Quarterly Performance Review and Rating System'" (IO 49, Exh 4). The issuance of those orders led to this dispute.

The PBA maintains that these two orders "fundamentally changed the scope of police officer participation in performance evaluation procedures" and that the changes were therefore subjects of mandatory bargaining (Pet, ¶10). The City disagrees, asserting that the changes are exempt from bargaining because they fall within management prerogatives.

Before the orders were issued, evaluation procedures were governed by the NYPD Patrol Guide, and particularly Patrol Guide Procedure No. 205-57 (PG 205-57, Exh 5). PG 205-57 required officers to complete a Monthly Performance Report to record the number of specific enforcement actions, such as arrests and the issuance of summonses, performed by the officer during that month (Exh 6). The officer was required to submit the Report to a designated sergeant by the third day of the following month. Officers were ***not*** required to carry the Report while on duty, nor to meet with the supervisor to discuss the report. Nor were the officers evaluated on a monthly basis.

Nevertheless, the supervisor used the Monthly Performance Reports when performing the Quarterly Performance Review, and notations would be made on the

Monthly Reports that were reviewed. The Quarterly Review included a meeting with the officer to discuss performance. If two negative Quarterly Reviews were received, the officer was required to meet with the Commanding Officer. The officer was not required to sign the Quarterly Review, and did have the right to appeal it, as the Quarterly Reviews formed the primary basis for an officer's evaluation and also played a role in career movement within the Department (PG 205-56, Exh 7; IO 17 of 2011, Exh 8).

IO 49 suspends and replaces PG 205-57. Its stated purpose is to "evaluate the monthly/quarterly performance of police/officers/detective specialists assigned to patrol duties, and to identify and reward uniformed members of the service involved in enforcement activity ...." IO 49 changed the procedures in certain very specific ways.

First, the Monthly Performance Report was replaced with a "Police Officer's Monthly Conditions Impact Measurement Report" (POMCIMR, Exh 9). The POMCIMR lists two conditions within the officer's command that must be addressed during the officer's tour. The officer must carry the form in the officer's memo book on his or her person at all times while working and complete the form contemporaneously with any relevant action taken, noting the assignment, the condition addressed, and the specific action taken.

According to the PBA, when the POMCIMR was introduced at a meeting in March 2011, it was allegedly presented as "a pilot program to shift the focus away from tracking numbers of summonses, arrests and other enforcement actions in favor of determining whether crime and other conditions present in a command were being appropriately addressed by personnel," with no discussion of any contemplated changes to evaluation procedures. (Pet, ¶18). The impact of the changes on evaluation procedures became clear later on.

For example, whereas before the officer submitted a report only once monthly, the new rules require that the officer submit the POMCIMR to the sergeant for review and signature on the seventh, fourteenth, and twenty-first day of each month, and the two meet after each submission. The stated purpose of the meeting is to "provide the supervisor with a weekly opportunity to evaluate the member's performance ...."

Additionally, at the month's end, the officer must complete the back of the POMCIMR to indicate total monthly activities and any comments, and then submit the competed report to the supervisor. Significantly, the supervisor must then complete the section of the form entitled "Officer's Impact on Declared Condition", indicating whether the member was"effective" or "ineffective" in addressing the specified condition, and discuss the comments with the officer. The POMCIRs are considered during the officer's Quarterly Performance Review, and the officer must sign to confirm that the discussion was held.

The completed POMCIMR form is stored electronically, along with the Quarterly Performance Reviews, in an NYPD management system known as "Quest for Excellence Application," and it is available to supervisors (OO 50, Exh 10). According to IO 49, the POMCIMR and Quarterly Performance Reviews "should be the primary basis and documentation for members' annual evaluation."

The Improper Practice Petition

The PBA filed an Improper Practice Petition on February 17, 2012, alleging that the City violated the New York City Collective Bargaining Law (NYC Admin Code § 12-301 *et seq.*, hereafter NYCCBL) by unilaterally changing the terms and conditions of employment for police officers relating to evaluation procedures without engaging in

bargaining (Exh 11). Specifically, the PBA asserted that the following changes were subject to mandatory bargaining:

1. That officers submit POMCIMRs to supervisors three times per month and participate in performance reviews at those times;

2. That officers meet with supervisors monthly for an evaluation;

3. That officers sign the Quarterly Performance Report to confirm their meeting with their supervisor for the quarterly evaluation; and

4. That officers carry the POMCIMR at all times, complete it contemporaneously, and present it upon request.

In response, while not disputing that evaluation procedures are typically subjects of bargaining, the City relied on § 12-307(b) of the NYCCBL, commonly known as the management's rights clause, to seek an exemption from mandatory bargaining. In particular, the City claimed that some of the changes were not bargainable because they were *de minimus* in nature and others related to the NYPD's mission of combating and preventing crime.

The Decision and Order Challenged Herein.

On December 19, 2013, the BCB issued a Decision and Order granting in part and denying in part the PBA's Improper Practice Petition (Exh 1)[1]. The BCB agreed with the PBA that the City had violated the law by unilaterally implementing, without bargaining, the following new requirements: 1) that officers submit POMCIMRs to supervisors three times per month and participate in performance reviews at that time as part of their evaluations; 2) that officers meet with a supervisor at the end of each month

[1] Four of the seven BCB members joined in the decision, two dissented in separate opinions, and one concurred in judgment and dissented in part in a separate opinion.

for a performance review; and 3) that officers sign the Quarterly Performance Report to confirm the quarterly evaluation. In so concluding, the BCB rejected the City's defense that it had a managerial prerogative to adopt the changes because they were closely tied to "the heart of the NYPD's mission" and/or were *de minimus.*

In contrast, however, the BCB rejected the PBA's claim that the City was required to bargain in connection with the new obligation to carry the POMCIMR at all times, record conditions on it contemporaneously, and present it to a supervisor upon request. The BCB characterized these requirements as "additional tasks or responsibilities, which are within the NYPD's managerial right to determine." While acknowledging that the requirements have "an indirect impact on the performance evaluation process," the BCB concluded that the primary purpose of the new requirement was to gather information "for the purpose of facilitating the Quest for Excellence program" designed to reduce crime.

Discussion

The scope of judicial review in an Article 78 proceeding such as this is limited; the BCB "determination should not be upset unless 'arbitrary and capricious or an abuse of discretion' ..." *Matter of Levitt v Board of Collective Bargaining,* 79 NY2d 120, 128 (1992), quoting CPLR 7803(3) and *Matter of Incorporated Vil. of Lynbrook v New York State Pub. Employment Relations Bd.,* 48 NY2d 398, 404 (1979). If the decision meets that test, the court may not substitute its judgment for that of the BCB, even if the court might have reached a different decision in the first instance. 48 NY2d at 129-130.

What is more, the BCB has particular expertise in determining whether a particular subject matter is bargainable, and that expertise is typically entitled to judicial

deference, particular in light of the highly specialized and difficult nature of the determination. *Id.* As the *Levitt* court explained (at p. 127):

> Although terms and conditions of employment (subject to bargaining) and management prerogatives (exempt from bargaining) may be neatly separated in principle, the practical task of assigning a particular matter to one category or the other is often far more difficult. Indeed, in many instances a matter may partake of both categories, requiring a balancing of the interests involved ... No litmus test has yet been devised that automatically identifies a term or condition of employment, or a management prerogative, or establishes whether a particular subject should be placed into the first category or the second ...

The Court here finds that the BCB decision is neither arbitrary nor capricious. On the contrary, as demonstrated below, the decision has a rational basis in the facts and the law. The BCB thoroughly reviewed the governing law on the subject, and carefully considered the competing arguments of the parties as to how that law should be applied to the undisputed facts presented. While it is often difficult to distinguish between topics subject to bargaining and those exempt, as the Court of Appeals noted in *Levitt* quoted above, the distinction made by the BCB here was a sound one.

In reaching its determination, the BCB relied on well-established principles of law set forth in various administrative and judicial decisions, including *Matter of Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v New York City Bd. of Collective Bargaining,* 38 AD3d 482 (1st Dep't 2007), *lv denied* 9 NY3d 807. There, the Appellate Division affirmed a decision by Justice Marcy Friedman which had dismissed an Article 78 proceeding by the PBA challenging a decision by the BCB as arbitrary and capricious.

As in this case, the PBA in the case before Justice Friedman had filed an unfair labor practice complaint with the BCB, arguing that certain changes made by the City

violated the Collective Bargaining Law because they had been made unilaterally when they were subjects of mandatory bargaining. Slip Op. Index No. 112687/04 (Sup. Ct., NY Co. Aug. 17, 2005). Citing cases such as *Matter of Levitt v Board of Collective Bargaining,* 79 NY2d 120 (1992), the court held that the BCB had considerable expertise to determine whether a particular issue was a subject of mandatory bargaining and that the BCB had followed established precedent in reaching its determination in the case before it.

This Court reaches the same conclusion in the case here. The basic principles of law applied by the BCB in this case are the very same principles applied in the decisions cited above.[2] Those well-established principles are as follows.

Procedures for the evaluation of employees are mandatory subjects of bargaining. In contrast, substantive changes or additions to the criteria used for evaluation are not mandatory subjects of bargaining because they fall within the area of managerial prerogative. Thus, the issue properly identified by the BCB was whether the changes detailed above were procedural in nature and thus a mandatory subject of bargaining, or substantive in nature and within the scope of managerial prerogative.

Citing Justice Friedman's decision and the affirmance, the BCB correctly noted that changes to a performance evaluation that require an employee to take additional actions are deemed procedural and are thus subject to bargaining. The BCB rationally held that the "modifications to the performance evaluation process constitute procedural changes because they require police officers to submit performance reports and

---

[2] The BCB also cited numerous administrative decisions in its decision. Those cites will not be repeated here but are available in the BCB decision.

participate in performance evaluation meetings with a supervisor on a more frequent basis than under the prior policies." Thus, they are subject to mandatory bargaining.

Similarly, the requirement that officers sign the POMCIMR following their quarterly performance review is procedural, as it requires increased employee participation and constitutes an acknowledgment that a discussion of an evaluative nature had been held. Based on the language in IO 49, the BCB rationally concluded that "there is clearly a significant evaluation component" to the additional meetings with supervisors, even though the new procedures may also serve to assist the NYPD in its mission of deterring and addressing crime more effectively.

As the BCB correctly noted, the PBA in its complaint "does not challenge the Department's right to institute the Quest for Excellence or the criteria for evaluating the performance of police officers pursuant to it. Instead, it seeks to bargain solely over the procedures used to evaluate the performance of police officers. Thus, the fact that these changes are closely tied to the Department's mission is not a defense to its failure to bargain over them." This conclusion is neither arbitrary nor capricious and is entitled to judicial deference.

Relying upon its expertise and precedent, the BCB made a distinction and reached a different result with regard to the requirements that police officers carry the POMCIMR on their person at all times, contemporaneously record specific conditions on it on a daily basis, and present it to a supervisor upon request. The BCB characterized these requirements as "additional tasks or responsibilities, which are within the NYPD's managerial right to determine." While recognizing an "indirect impact on the performance evaluation process," the BCB appropriately applied the holding of the *Levitt* court that

"managerial decisions which impinge only directly or tangentially upon the employment condition, will generally be treated as exempt from mandatory collective bargaining." *Matter of Levitt v Bd. of Collective Bargaining of City of NY, 140 Misc.2d 727, 731 (1988), aff'd,* 171 AD2d 545 (1st Dep't 1991), *rev'd in part, aff'd in part*, 79 NY2d 120 (1992). Thus, this aspect of the BCB decision also has a rational basis in the record and is entitled to be upheld.

Accordingly, it is hereby

ORDERED that the various motions to dismiss the two Article 78 proceedings are granted; and it is further

ADJUDGED that the petition filed in each of the cases is denied and the proceedings are dismissed. The Clerk shall enter judgment accordingly.

Dated: April 10, 2015

APR 10 2015

J.S.C.

ALICE SCHLESINGER