2019 WL 4239256 (N.Y.Sup.), 2019 N.Y. Slip Op. 32628(U) (Trial Order)
Supreme Court of New York.
New York County

**1 CORRECTION OFFICERS' BENEVOLENT ASSOCIATION, Petitioner,
v.
NEW YORK CITY BOARD OF COLLECTIVE BARGAINING, City of New York, New York City Department of Corrections, Respondent.

No. 159233/2018.
September 5, 2019.

Decision + Order on Motion

Present: Hon. W. Franc Perry, Justice.

MOTION DATE *April 4, 2019*

MOTION SEQ. NO. *001*

***1** The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30 were read on this motion to/for *ARTICLE 78 (BODY OR OFFICER)*.

Petitioner brings this Article 78 petition to challenge a determination by respondent New York City Board of Collective Bargaining (BCB) which concluded that respondents New York City Department of Corrections (DOC) and the City of New York (City) did not commit an improper practice under the City Collective Bargaining Law (CBL) when it altered the procedures by which correction officers represented by petitioner secure promotions to the title of correction captain. Respondents City and DOC cross-move to dismiss the petition. Respondent BCB also cross-moves to dismiss the petition.

BACKGROUND

Petitioner Correction Officers' Benevolent Association is a municipal labor union representing correction officers working for DOC. DOC is responsible for management and operations of jail facilities throughout New York City, including the care and custody of DOC inmates (*see* Petition exhibit C, ¶¶ 24-26). On April 24, 2017, petitioner filed an improper practice petition (IPP), alleging that the City and DOC violated New York City CBL §§ 12-306 ****2** (a) (1) and (4) when DOC issued directive 2230, entitled "Pre-Promotional Assignment Procedures (*see* Petition, exhibit A).

DOC issued directive 2230, on December 23, 2016, in accordance with *Nunez v City of New York*, 11 Civ 5845 (LTS) (JCF) (SDNY 2015), a case involving allegations of excessive use of force incidents in DOC facilities (*see* Petition, exhibit J). As a result of settlement negotiations between the class of plaintiffs in that case and the City and DOC, on October 21, 2015, the federal court signed the Nunez Consent Judgement, which had the purpose of "protect[ing] the constitutional rights of the inmates confined in jails operated by [DOC]" (*see* Petition, exhibit A). Directive 2230 concerns promotions within DOC, and three of the considerations within this directive are relevant to the IPP. These three considerations are: 1) a review of a correction officer's use of force and disciplinary history during the five years prior to the consideration for promotion; 2) a prohibition of the promotion of candidates who were found guilty or plead guilty on two or more occasions to five categories of discipline for excessive use of force during the prior five year period; and 3) a prohibition of a promotion from correction

officer to captain while disciplinary charges related to use of force incidents are pending (*see* Petition, exhibit J).

Before the promulgation of Directive 2230, multiple units within DOC conducted a review to determine whether a court officer had been subject to past or pending investigation in that unit and then submitted a pre-promotional form, known as the HQPP form with one of the following options selected: 1) inquiry reveals negative results - no history; 2) inquiry reveals past / present investigation - will not affect promotion; 3) inquiry reveals confidential investigation pending, promotion not recommended; and 4) do not recommend promotion for following reasons (with space for listing reasons) (*see* Petition, exhibit A). Following the ****3** implementation of Directive 2230, the DOC units continued to submit HQPP forms (Petition, exhibit A). Even though the HQPP forms were updated, there was no substantive change in the information sought from most of the DOC units. The Trials and Litigations Unit and Investigations Unit now include in the HQPP form the option: "Do not recommend promotion possible Nunez implications." (Petition, exhibit A). A correction officer's commanding officer must also submit Form No. 22R which contains information such as the corrective interviews and command disciplines within the last 12 months, memoranda of complaints and their dispositions since the correction officers' appointment to DOC, and the correction officer's prior disciplinary history including any and all use of force charges (*see* Petition, exhibit A). This form was required before and after implementation of Directive 2230 (*see id*.).

***2** After petitioner, DOC, and the City submitted all respective documents for the IPP, BCB issued its decision on September 6, 2018 dismissing the IPP, stating in its decision that "Directive 2230 concerns criteria for promotion, which is a non-mandatory subject of bargaining. Consequently, we find that the DOC did not make an improper unilateral change when it promulgated Directive 2230" (Petition, exhibit J at 17). On October 4, 2019, petitioner commenced this Article 78 proceeding.

DISCUSSION

"In reviewing administrative proceedings in general," courts are "limited to considering 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' " (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363 [1986], quoting CPLR 7803 [3]). "The proper test is. whether there is a rational basis for the administrative orders. . .. Rationality is what is reviewed under ... the arbitrary and capricious standard" (*Matter of* ****4** *Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] [internal quotation marks and citation omitted]).

Respondents cross-move to dismiss the petition for failing to state a cause of action on the grounds that the petition does not demonstrate that the BCB decision was arbitrary and capricious or in violation of the law. In determining whether a petition is sufficient to withstand a motion to dismiss pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Thus, where if is clear that a petition is legally insufficient, it must be dismissed (*see Matter of Altieri v City of N.Y. Civ. Serv. Comm.*, 57 AD3d 248, 248-249 [1st Dept 2008]). Plaintiff opposes respondents' cross motions arguing that BCB's determination was arbitrary and affected by errors of law.

Section 12-306 (a) of the CBL provides the following:

> "a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
>
> > (1) To interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-505 of this chapter;

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(4) To refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;"

Section 12-307 (b) of the CBL provides in relevant part:

> "It is the right of the city or any other public employer, acting through its agencies **to determine the standards of services to be offered by its agencies**; . . . direct its employees; . . . maintain the efficiency of the governmental operations; **determine the methods, means and personnel by which government operations are to be conducted** . . . and exercise complete control and discretion over its organization. . . Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining . . . (emphasis added).

****5** "In cases involving the issue of mandatory or prohibited bargaining subjects under the Civil Service Law, we have defined our review power as a limited one: [s]o long as [the agency's] interpretation is legally permissible and so long as there is no breach of constitutional rights and protections, the courts have no power to substitute another interpretation" (*Matte Board of Edu. of City School District of City of N.Y. v New York State Pub. Empl. Rel Bd.*, 75 NY2d 660, 666 [1990] [internal quotation marks and citation omitted]; *see also District Co 37, Am. Fed. of State, County and Mun. Empl., AFL-CIO v City of New York*, 22 AD3d 279, 284 [1st Dept 2005]). New York courts have deferred to BCB's expertise in applying and interpret' the provisions of the CBL (*New York City Dept. of Sanitation v MacDonald*, 87 NY2d 650, 656 [1996] [finding that "[t]he determination of the [BCB] in this matter 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"]; *Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 114 AD3d 510, 514 [1st Dept 2014] [finding that "if the board's determination has a rational basis, we must affirm, even if this [c]ourt would have interpreted the provision differently"] [internal citation omitted]).

***3** In the instant case, BCB held that Directive 2230 does not constitute a unilateral change to a term of condition of employment, thus DOC did not make a unilateral change to a mandatory subject of collective bargaining (*see* Petition, exhibit J at 17). In its decision, BCB cited to prior BCB cases, which held that criteria for promotion are a managerial prerogative and not a mandatory subject of collective bargaining. On its review of the record, BCB concluded "that the contested changes in promotions set forth in Directive 2230 concern criteria for promotion" (*id*. at 15). BCB found that DOC exercised its managerial prerogative when DOC took into consideration for promotion to captain a correction officer's use of force incidents, ****6** discipline for use of force two or more times in the past five years, and investigations for use of force. BCB found that these aspects are "most akin to promotional considerations like aptitude, demeanor, and judgment, or to awarding greater points for those candidates with a less extensive disciplinary history" (*id*. at 15). Such BCB conclusions are rational and consistent with BCB's decisions in other cases (*see Uniformed Firefighters Assn.*, 114 AD3d at 514; *New York City Department of Sanitation* 87 NY2d at 656). BCB's decision was "legally permissible" and there was "no breach of constitutional rights [or] protections" in its determination. Therefore, this court has "no power to substitute another interpretation" (*Matter of Board of Edu.*, 75 NY2d at *666* [internal quotation marks and citations omitted]).

Petitioner uses the same arguments in the instant proceeding as it did before BCB in its IPP. Petitioner argues that the Directive 2230 criteria regarding whether a corrections officer should be recommended for promotion to captain is analogous to imposing mandatory penalties for disciplinary violations, which is a mandatory subject of collective bargaining. Petitioner cites the same cases as it did in its IPP, which were reviewed and rejected by BCB. (*see* Petition, exhibit J at 17). New York courts, like BCB in the instant proceeding, have held that discipline is not the same as failure to promote (*see e.g. Matter of Patel v New York City Hous. Auth.*, 26 AD3d 172 [1st Dept 2006] [finding that demotion was warranted where the petitioner had not completed his probationary term at higher position, and could not be considered punishment absent bad faith]; *Schwartzbaum v Horn*, 49 AD3d 324, 324 [1st Dept 2008] [finding that "[petitioner's] reassignment was not a disciplinary punishment, which would implicate the procedural protections afforded by Civil Service Law § 75, but one based on the assessment that [petitioner] lacked the requisite integrity and judgment to retain his position"]).

****7** Petitioner reargues that Directive 2230 is a mandatory subject of collective bargaining because it deprives members of a professional advantage. Petitioner relies on *Matter of Solvay Union Free School District v Solvay Teachers Assn.*, 28 PERB ¶

3024 (1995) in support of this argument, which was already considered by BCB. BCB held in its decision that *Solvay* was not applicable, as *Solvay* addressed proposed contract language that stated, "no member of the bargaining unit will be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause" (Petition, exhibit J at 16 [internal quotation marks omitted]). BCB found that in *Solvay*, this specific language dealt with "the grounds for the imposition of discipline and the penalties which may be invoked upon satisfaction of the predicate for disciplinary action which are generally mandatory subjects of bargaining" (Petition, exhibit J at 16-17 [internal quotation marks omitted). BCB, in its decision, distinguished petitioner's IPP matter from *Solvay*, explaining that Directive 2230 does not concern discipline or penalties, but rather outlines criteria for promotion, which is a non-mandatory subject of collective bargaining.

Petitioner also argues as it did in its IPP that promotion rules for competitive titles are mandatory subjects of collective bargaining. In support, petitioner again relies on *City of Albany v Albany Police Officers Union, Local 2841, AFSCME, AFL-CIO* (7 PERB ¶ 3078 [1974]. BCB already considered this case and found it inapplicable, noting that in *City of Albany* "a bargaining proposal concerning an employer's discretion under which the . . . rule may be mandatorily negotiable 'where civil service law and rules are not obligatory,' " whereas in the IPP, petitioner has taken the position that "applicable civil service law and its promotion rules are obligatory". (emphasis in original, Petition exhibit J at n. 13).

***4 **8** The court has considered the remaining arguments and finds them unavailing. Therefore, respondents' cross motions are granted, and the petition is dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the cross motions by respondents New York City Board of Collective Bargaining, New York City Department of Corrections, and the City of New York are granted; and it is further

ADJUDGED that the application is denied, and the petition is dismissed, with costs and disbursements to respondents in the amount as taxed by the Clerk, and that respondents have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

DATE *9/5/2019*

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W. FRANC PERRY, J.S.C.

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