

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH

PART 32

Index Number : 450703/2017
CITY OF NEW YORK
vs
UNIFORMED FIREFIGHTERS
Sequence Number : 003
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits No(s) 1
Answering Affidavits -- Exhibits No(s) 2
Replying Affidavits No(s) _____

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the accompanying memorandum decision, order and judgment.

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

Dated: 3/14/18

[Signature] J.S.C.
HON. ARLENE P. BLUTH

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] 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: PART 32**

----- X
**In the Matter of the Application of
THE CITY OF NEW YORK; THE FIRE DEPARTMENT
OF THE CITY OF NEW YORK; ROBERT W. LINN as
the Commissioner of the New York City Office of Labor
Relations; and THE NEW YORK CITY OFFICE OF
LABOR RELATIONS,**

Petitioners,

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

- against-

**UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL
94 IAFF, AFL-CIO; JAMES SLEVIN, as the President of
the Uniformed Firefighters Association; THE BOARD
OF COLLECTIVE BARGAINING OF THE CITY OF
NEW YORK; and SUSAN J. PANEPENTO, as Chair of the
Board of Collective Bargaining,**

Respondents.

----- X
Motion sequence numbers 001, 002 and 003 are consolidated for disposition. The motion to dismiss (Mot Seq 003) by respondents the Board of Collective Bargaining of the City of New York and its chair, Ms. Panepento, (collectively, "BCB") and the motion to dismiss (Mot Seq 002) by respondents Uniformed Firefighters Association, Local 94 IAFF, AFL-CIO and Mr. Slevin (collectively, "UFA") are granted and this petition (Mot Seq 001) is dismissed.

**Index No. 450703/2017
Mot-Seq Nos. 001, 002 &
003**

**Decision, Order &
Judgment**

ARLENE P. BLUTH, JSC

Background

This proceeding asks this Court to consider the differences and potential overlap between discipline and pay in the context of the Fire Department of the City of New York (“FDNY”). It is undisputed that discipline falls under the powers of the FDNY Commissioner (“Commissioner”), who has the authority to impose discipline as he sees fit. Pay must be negotiated as part of the collective bargaining process between FDNY employees and the City. The question, then, is whether the FDNY Commissioner has the power to change the formula used to calculate the amount of day’s pay for purposes of a disciplinary fine.

The FDNY has two types of discipline: informal and formal. Informal discipline includes punishments such as reprimands, instruction and Command Discipline. Command Discipline can involve the loss of vacation days or the forfeiture of up to seven days of pay, although the definition of a day’s pay is not included in the FDNY’s Personnel Administrative Information Directive. Formal discipline is where the employee refuses to accept Command Discipline or is punished for conduct that is deemed more severe.

Before 2013, the value of a day’s pay was $1/365$ for firefighters, fire marshals, marine wipers, pilots and marine engineers (collectively, “uniformed employees”) and $1/261$ for all other employees such as FDNY civilian personnel and EMS employees (collectively, “non-uniformed employees”).¹ In 2013, the Commissioner changed the methodology for calculating a day’s pay when imposing fines so that a fine was $1/261$ of the employee’s annual salary for all employees.

¹At oral argument, the parties were unable to pinpoint exactly when the formula used to calculate the value of a day’s pay was implemented. But all sides agreed that this disparity has existed for many decades.

Obviously, this had the effect of raising fines for uniformed employees.

Respondent Uniformed Firefighters Association filed an improper practice petition with BCB challenging the Fire Commissioner's unilateral change of the value of a day's pay. UFA claims that this change must be a part of the collective bargaining process between UFA and the City. UFA insisted that because the disciplinary fines affected its members' paychecks, it was related to wages rather than discipline.

Petitioners opposed the improper practice petition and claimed that these fines relate to discipline and, therefore, need not be part of the collective bargaining process. On February 16, 2017, BCB granted UFA's petition and found that the FDNY violated the New York City Collective Bargaining Law ("NYCCBL") by unilaterally changing the value of a day's pay while the parties collective bargaining agreements were in status-quo. BCB stressed that the value of a day's pay is fundamentally tied to an employee's pay, which is subject to mandatory collective bargaining.

BCB moves to dismiss the petition and emphasizes that its decision was rational. BCB observes that the Commissioner's unilateral change to a day's pay was done without any notice to uniformed employees. BCB concludes that the value of a day's pay does not affect the Commissioner's power to investigate misconduct, decide whether to impose discipline, the type of discipline to impose or how much to fine the employee (assuming the discipline is monetary).

UFA also moves to dismiss on similar grounds as BCB's motion and contends that BCB's decision was rational.

In opposition, petitioners claim that the Commissioner did not change the method by which employees would pay disciplinary fines; rather, the amount of the fines were changed.

Petitioners insist that the disciplinary authority of the Commissioner is severely limited if he is unable to unilaterally determine the dollar value of a disciplinary fine. Petitioners also emphasize that the reason for changing the value of a day's pay, "to ensure internal consistency regarding the disciplinary pay fine calculation methodology pertaining to all FDNY Employees" (NYSCEF Doc. No. 31 at 6), demonstrates that this issue is a critical part of the Commissioner's responsibility to maintain discipline.

Discussion

When reviewing an Article 78 petition, "[t]he courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary or capricious" (*Pell v Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]). A 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" (*New York City Dept. of Sanitation v MacDonald*, 87 NY2d 650, 656, 642 NYS2d 156 [1996]).

"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" (*Herzog v Joy*, 74 AD2d 372, 375, 428 NYS2d 1 [1st Dept 1980]). "When an administrative agency is charged with implementing and enforcing the provisions of a particular statute, the courts will generally defer to the agency's expertise and judgment regarding that statute" (*Dist. Council 37 American Fedn. of State, County & Mun. Empls., AFL-CIO v City of New York*, 22-AD3d 279, 283, 804 NYS2d

10 [1st Dept 2005]). “A court cannot simply substitute its judgment for that of an administrative agency when the agency’s determination is reasonable” (*id.* at 284).

“It is well settled that New York’s Taylor Law (Civil Service Law § 200 et seq.) requires collective bargaining over all terms and conditions of employment. . . . In the City of New York, the NYCCBL regulates the conduct of labor relations between the City and its employees. Consistent with the Taylor Law, the NYCCBL requires public employers and certified or designated employee organizations to bargain in good faith on wages, hours and working conditions” (*Roberts v New York City Office of Collective Bargaining*, 113 AD3d 97, 101, 976 NYS2d 450 [1st Dept 2013] [citations omitted] [finding that the imposition of a zero tolerance policy for EMS workers who failed drug tests was not subject to mandatory collective bargaining]).

“New York has a strong policy of supporting collective bargaining, and a presumption exists that all terms and conditions of employment are subject to mandatory bargaining. This presumption can be overcome, however, where there exists clear legislative intent to remove an issue from mandatory bargaining” (*id.* at 101-02). “New York City Charter § 487(a) gives the Fire Commissioner the ‘sole and exclusive power’ to ‘perform all duties for the government, discipline, management, maintenance and direction of the fire department’” (*id.* at 103).

The Court of Appeals has found that the key question is whether the disputed action is “inextricably intertwined with the Commissioner’s authority” to oversee discipline or merely “ancillary or tangential to his disciplinary authority” (*see City of New York v Patrolmen’s*

Benevolent Assn. of City of New York, Inc., 14 NY3d 46, 59; 897 NYS2d 382 [2009]).²

NYCCBL § 12-306(a)(4) provides that it is an improper practice for a public employer “to refuse to bargain collectively in good faith on matters within the scope of collective bargaining within certified or designated representatives of its public employees.”

The central issue in this proceeding is whether BCB’s determination that the Fire Commissioner’s unilateral change in the definition of day’s pay relates to wages (rather than disciplinary powers) was rational. Here, the BCB found that “[t]he value of a day’s pay is fundamentally tied to an employee’s wages” and that “wages are a mandatory subject of bargaining” (NYSCEF Doc. No. 3 at 15). BCB also noted that the methodology used to calculate pay must also be a subject of bargaining (*id.*). BCB reasoned that “even where there is a management right to take unilateral action, there may be an impact that warrants bargaining under the NYCCBL” (*id.*). BCB further observed that while the value of a day’s pay might impact a Commissioner’s decision about a particular fine, “negotiation over that value does not limit the FDNY Commissioner’s authority to determine whether to discipline an employee or the penalty” (*id.* at 16-17).

The Court finds that the BCB decision was rational and, therefore, the petition must be dismissed. The Court acknowledges that there is a clear overlap between the value of a day’s pay and the Commissioner’s power to discipline. Obviously, if a disciplinary fine is imposed, it will affect an employee’s take-home pay. But the value of a day’s pay is not inextricably intertwined with disciplinary powers because the Commissioner retains the ability to impose

²The Court observes that the disciplinary powers of the Fire Commissioner and the Police Commissioner are viewed similarly (*see Roberts*, 113AD3d at 103 [“FDNY, like the police department, is a quasi- military organization demanding strict discipline of its workforce.”]).

whatever discipline he sees fit in a particular instance. The Commissioner is not prevented from imposing severe discipline for conduct that he deems reprehensible.

The rationale advanced by petitioners also suggests that changing the value of a day's pay is merely ancillary, rather than inextricably intertwined, to the Commissioner's disciplinary powers. Petitioners claim that this change was implemented to ensure consistency between uniformed and non-uniformed employees— it is not hard to imagine that non-uniformed employees would be upset with the disparity in how fines are calculated. While ensuring consistency might make the Commissioner more popular among non-uniformed employees or possibly boost morale, it does not directly impact the Commissioner's power to discipline. The Court also observes that if the Commissioner decided that he wanted to impose equal discipline on uniformed and non-uniformed employees, then he could do so in spite of the difference in the value of a day's pay between these two groups by issuing larger fines (by penalizing more days) to uniformed employees than to non-uniformed employees.

Summary

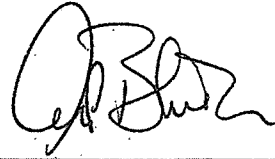
To be clear, this Court can only consider whether BCB's justification was rational. The Court cannot make its own determination and, here, BCB provided a rational basis for its conclusion that changing the value of a day's pay was not inextricably intertwined with the Commissioner's power to discipline. The Commissioner's ability to impose informal and formal discipline on his employees is not directly affected by the value of a day's pay. In fact, the Commissioner could impose equal discipline to uniformed and non-uniformed members through the amount of discipline imposed.

Accordingly, it is hereby

ORDERED and ADJUDGED that the motions to dismiss by respondent BCB (Mot Seq 003) and by UFA (Mot Seq 002) are granted, the petition (Mot seq 001) is dismissed, and the clerk is directed to enter judgment accordingly.

This is the Decision, Order and Judgment of the Court.

Dated: March 14, 2018
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH