SCANNED ON 8/17/2005

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

PRESENT: MARCY S. FRIEDMAN PART 57
Justice

Patrolmens Benevolent Assn

- v -

NYC Board of Collective Bargaining

INDEX NO. 112687/04

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this ~~motion to~~ petition for Article 78

Notice of ~~Motion~~/ ~~Order to Show Cause~~ — ~~Affidavits~~ — ~~Exhibits~~ Petition and motion	PAPERS NUMBERED 1,2
~~Answering Affidavits — Exhibits~~ Cross-motion	3,3a, 4
Replying Affidavits	5,6
Memo of Law	M1-M5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this petition and cross-motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED
AUG 17 2005
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/8/05

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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

Petitioner,

For a Judgment Pursuant to Article 78 of the CPLR,

- against -

THE NEW YORK CITY BOARD OF
COLLECTIVE BARGAINING, et al.,

Defendants.

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Index No.: 112687/04

DECISION/ORDER

In this Article 78 proceeding, petitioner, Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA") challenges a determination of respondent New York City Board of Collective Bargaining ("BCB"), dated July 29, 2004, which dismissed an improper practice charge filed by the PBA with the New York City Office of Collective Bargaining concerning the "Performance Monitoring Program" ("PMP") of the New York City Police Department ("NYPD"). BCB moves, and the City of New York cross-moves, to dismiss the petition.

The PBA's improper practice charge claimed that a PMP implemented by the NYPD in 2003 imposed new terms and conditions of employment in six areas which were subject to mandatory collective bargaining. The BCB determination held that the 2003 PMP did not impose new terms or conditions of employment in certain of these areas, and that any new terms in other areas were not "mandatorily negotiable."

It is well settled that an administrative decision may not be set aside "unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.' " (Matter of Pell v Board of Educ., 34 NY2d 222, 231 [1974]; CPLR 7803[3].) The Court of Appeals has held, with reference to the BCB in particular, that its determination "is entitled to deference by the courts" (Matter of Levitt v Board of Collective Bargaining, 79 NY2d 120, 129 [1992]), and is not to be vacated unless it is arbitrary and capricious or unreasonable as a matter of law. (Id. at 133 [Simons, J., dissenting on other grounds].)

It is further settled that under the New York City Collective Bargaining Law (Administrative Code of City of New York § 12-301 et seq.), it is an "improper practice" for a public employer to alter a term or condition of employment without prior good faith bargaining. (See Administrative Code § 12-306[a][4]; Matter of Levitt, 79 NY2d at 126.) However, "certain fundamental managerial decisions – management prerogatives" are specifically excluded from the scope of collective bargaining. (Id. at 127. See Administrative Code § 12-307[b].) As the Court of Appeals has explained, "[a]lthough these decisions are excluded from bargaining, their practical impact on employees may be bargainable." (Id.) Moreover, "[a]lthough 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." (Id.) It is for the BCB to decide in the first instance whether the employer is exercising a managerial prerogative that does not affect terms and conditions of employment, and this determination should not be set aside unless arbitrary and capricious or an abuse of discretion. (Id. at 128.)

In the instant case, it is undisputed that the NYPD has implemented a Performance

Monitoring Program in some form since 1991, in order to provide enhanced supervision of officers whose performance is substandard and meets the criteria (e.g., a specified number of civilian or force complaints within specified periods) for inclusion in the program. The 1991 PMP is described in a manual (Ex. C4 to Dunn Reply Aff.). In 2003, the NYPD issued a new manual describing the PMP (Ex. C3 to Dunn Reply Aff.). Petitioner's improper practice charge contended that the 2003 manual imposed changes in terms and conditions of employment that were not included in the 1991 PMP, and affected evaluations, training, shifts, promotions, reassignments, and "integrity checks." (See Dunn Letter to BCB, dated Oct. 27, 2003 [Ex. F to Dunn Reply Aff.].)[1]

As to evaluations, according to the BCB Decision, petitioner argued that the 2003 PMP increased the frequency of and shortened the time for evaluations of police officers in the program, while the 1991 PMP contained no similar provision. Petitioner also argued that the 2003 PMP imposed a new requirement for officers to participate in the assessment process by requiring officers to develop a customized monitoring plan. The City argued that the 2003 PMP clarified the criteria for supervisors to employ for monitoring officers in the PMP, and that such criteria are not subject to bargaining. The City also argued that officers do not participate in the assessment process.

The BCB rejected the PBA's contention that the evaluations or assessments ("Performance Profiles") made of officers in the PMP changed or eliminated the annual

[1]The NYPD also issued a PMP manual in 2001. However, as the PBA contended that it did not receive a copy of this manual until 2003, the Board considered the differences between the 1991 and 2003 manuals in determining whether the latter imposed any changes in the terms and conditions of employment. (See BCB Decision at 13.)

evaluations required for all officers. The BCB further found that the 2003 PMP revised the timing for assessments by specifying intervals for required reviews of officers in the program "rather than the unspecified 'updates' under the 1991 Manual." (BCB Decision at 15.) However, the BCB held that the 2003 PMP "dictates the requirements only for supervisors in assessing officers in the PMP and does not necessitate any participation by the employees." (Id. at 16.) The BCB thus concluded that "the requirements for supervisors completing Performance Profiles are nonmandatory subjects of bargaining." (Id.)

In reaching this conclusion, the BCB cited established administrative law, with which the PBA does not take issue, that "[a]though the imposition of criteria used for evaluation, and substantive changes in that criteria, are areas of managerial prerogative which need not be bargained with an employee organization, procedural aspects of an evaluation system are mandatorily negotiable, especially where the implementation of the evaluation system involves employee participation." (Matter of Police Benevolent Assn. [County of Nassau], 35 PERB ¶ 4566 at 7 [2002]; Matter of County of Ulster [Ulster County Unit of Local 856], 16 PERB ¶ 4646 [1983].)

There is considerable authority finding employee participation where the employer adds a requirement that the employee who is being evaluated must sign a form. (See (Matter of Police Benevolent Assn. [County of Nassau], 35 PERB ¶ 4566, supra; Matter of County of Ulster [Ulster County Unit of Local 856], 16 PERB ¶ 4646, supra; Matter of County of Niagra [AFSCME], 19 PERB ¶ 4607 [1986].)

Here, as the BCB noted, the PBA made no allegation that an officer must sign a Performance Profile. (BCB Decision at 16.) The PBA also does not contend that it sought

before the BCB to submit affidavits or documents from officers in the program, showing the impact of the alleged changes or the level of participation that was actually required of them. Rather, in arguing that the 2003 PMP unilaterally imposed changes in the terms and conditions of employment, the PBA appears to have relied largely on a facial comparison of the provisions of the written PMP manuals issued in 2001 and 2003.

Under these circumstances, the court cannot find that the BCB lacked a rational basis for its determination that the evaluation requirements in the 2003 manual were not the subject of mandatory bargaining. In so holding, the court rejects the PBA's contention that the BCB was required to hold an evidentiary hearing to determine the extent of employee participation in the evaluation process. The BCB was required to give the PBA a meaningful opportunity to be heard. Under sound administrative authority, it was required to "present more than conclusory statements of a practical impact in order to * * * warrant a hearing to present further evidence." (Matter of Social Serv. Empls. Union [New York City Admin. for Children's Servs.], BCB Decision No. B-10-2002 at 8; Matter of Uniformed Firefighters Assn. [City of New York], Decision No. B-19-2003.)

The PBA also claims that the BCB erred in refusing to permit it to supplement the record with the 2004 PMP manual (Ex. G to Dunn Reply Aff.). The PBA now argues that this manual demonstrates that officers were required to participate in the program, thus triggering the bargaining requirement. In particular, the PBA cites the statement in this manual that "each Performance Evaluation of the monitored member must accurately reflect the attitude, appearance and work performance of the member, must be reviewed with the member and submitted in a timely fashion. This review affords the member with an opportunity to discuss

performance and establish long-term and short-term goals aimed at improving performance." (2004 PMP Manual, Section I at 1; PBA's Brief In Support of Petition at 12.) In proffering this manual to the BCB, however, the PBA did not cite this statement but asserted in wholly conclusory fashion that the manual "helps establish the PBA's position that this is a new program," and that the PMP "creates new unilaterally created timelines for mandatory evaluations, * * * obligations to participate in mandatory training, automatically disqualifies members from certain shift bidding rights and establishes a schedule of apparently mandatory discipline penalties." (Dunn Letter to BCB, dated March 16, 2004 [Ex. 4 to BCB's Motion to Dismiss].) The BCB denied the PBA's request to supplement the record with the 2004 PMP manual, based on the fact that the record had already been closed. (See Letter of Elaine Unkeless [Labor Relations Trial Examiner] to Dunn, dated May 18, 2004 [Ex. 3 to BCB's Motion to Dismiss].) Based on the delay in submitting this evidence, as well as the failure of the PBA to make a showing that any specific provision of the manual was probative of its claims in the improper practice charge, the BCB's decision to reject the manual was not irrational or arbitrary and capricious.

Further, contrary to the PBA's contention, mandatory bargaining was not triggered by the fact that the 2003 (or 2004) PMP manual required officers to meet with or review their performance with evaluators. The PBA cites authority that where an employer imposes a new requirement that an employee meet with a supervisor as part of an evaluation process, this requirement is a procedure that is subject to mandatory bargaining. (See Matter of Suffolk County Bd. of Cooperative Educ. Servs. [BOCES II Teachers Assn.], 17 PERB ¶ 3043 [1984]. See also Matter of Patchogue-Medford Congress of Teachers [Patchogue-Medford Union Free

School Dist.], 30 PERB ¶ 3041 [1997].) In the instant case, however, the BCB found, and review of the 1991 manual confirms, that as of 1991 "officers in the PMP were subject to interviews to learn that they became part of the Program and to understand the ramifications of their placement." (BCB Decision at 17.) Significantly, although the interviews imposed by the 2003 PMP have been regularized, there is no indication that the PBA submitted any evidence to the BCB in support of its conclusory assertion that the frequency or content of the interviews conducted under the 2003 (or 2004) program differs from that of the interviews conducted under the 1991 program in more than the de minimis respect found by the BCB. The court finds that there is therefore a rational basis for the BCB's conclusion that the 2003 PMP did not impose new counseling/interview procedures, and thus did not trigger mandatory bargaining.

The court further holds that substantial administrative authority supports the BCB's determination that the NYPD was not required to bargain over the provisions of the 2003 PMP regarding training (see, e.g., Matter of Uniformed Firefighters Assn., Decision No. B-19-2003, supra; Matter of City of New York [Uniformed Firefighters Assn.], Decision No. B-43-86), and assignments or shifts. (See, e.g., Matter of Uniformed Firefighters Assn., Decision No. B-19-2003, supra; Matter of Corrections Officer's Benevolent Assn. [New York City Dept. of Correction], Decision No. B-26-2002.) To the extent that the 2003 PMP requires conferral with the Performance Monitoring Unit when an officer in the program is being considered for "career movement" or promotion, governing authority supports the BCB's determination that this requirement is an exercise of managerial prerogative that is not subject to mandatory bargaining. (See Levitt, 79 NY2d at 128.) Finally, review of the 1991 and 2003 PMP manuals supports the BCB's finding that the 2003 PMP did not change the terms and conditions of employment

regarding integrity tests.

It is accordingly hereby ORDERED that the petition is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
August 8, 2005

MARCY FRIEDMAN, J.S.C.