

SUPREME COURT OF THE STATE OF NEW YORK
HON. JENNIFER G. SCHECTER J.S.C. **NEW YORK COUNTY**

Index Number : 400103/2014
 CITY OF NEW YORK
 vs
 NYC BOARD OF COLLECTIVE
 Sequence Number : 001
 ARTICLE 78

PART 57

INDEX NO. _____
 MOTION DATE 4-22-15
 MOTION SEQ. NO. 01

The following papers, numbered 1 to 1, were read on this motion to/for Vacate Determination
 Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ || No(s). 1
 Answering Affidavits — Exhibits _____ || No(s). _____
 Replying Affidavits _____ || No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion~~ is proceeding
is decided in accordance with the foregoing
the accompanying Decision and Judgment.

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

Dated: 6/15/18

 J.S.C.
HON. JENNIFER G. SCHECTER
 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

HON. JENNIFER G. SCHECTER
J.S.C.

PRESENT: _____
Justice

PART 57

Index Number : 400103/2014
CITY OF NEW YORK
vs.
NYC BOARD OF COLLECTIVE
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 08

The following papers, numbered 1 to 3, 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). 3

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

accordance with the accompanying
Decision and Judgment.

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

Dated: 6/15/15

[Signature]
HON. JENNIFER G. SCHECTER
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

HON. JENNIFER G. SCHECTER
J.S.C.

PRESENT: _____
Justice

PART 57

Index Number : 400103/2014
CITY OF NEW YORK
vs
NYC BOARD OF COLLECTIVE
Sequence Number : 003
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 03

The following papers, numbered 1 to 3, 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). 3

Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the accompanying
Decision and Order.

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

Dated: 6/15/15



HON. JENNIFER G. SCHECTER
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
COUNTY OF NEW YORK: PART 57

-----X
In the Matter of the Application of

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,

DECISION AND JUDGMENT

Index No. 400103/14

Petitioners,

-against-

BOARD OF COLLECTIVE BARGAINING OF THE CITY
OF NEW YORK, and PATROLMEN'S BENEVOLENT
ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Respondents,

For a Judgment and Order Pursuant to Article 78
of the New York Civil Practice Law and Rules.

-----X

JENNIFER G. SCHECTER, J.:

Motion sequence numbers 01, 02 and 03 are consolidated
for disposition.

Petitioners the City of New York, the Police Department
of the City of New York (NYPD) and William Bratton as
Commissioner of the NYPD commenced this article 78 proceeding,
seeking to vacate and annul the determination of the Board of
Collective Bargaining of the City of New York (BCB). The BCB
and Patrolmen's Benevolent Association of the City of New
York, Inc. (PBA) move to dismiss the petitions. Their motions
are granted.

Background

The procedures for police officers' performance evaluations are contained in the NYPD Patrol Guide. Patrol Guide Procedure No. (PG) 205-58 ("Evaluations--General Members of Service") sets forth the requirements for appealing an evaluation. It does not include any deadline for an officer to appeal an evaluation.

In July 2012, the NYPD issued Interim Order 41 (IO 41), which, effective immediately, suspended PG 205-58 (Petition [Pet], Ex F). IO 41, for the first time, imposed a specific time limit for an officer to appeal an evaluation: 30 days from the ratee's interview/hearing with the commanding officer or next higher command.

On December 10, 2012, the PBA filed an improper practice petition, alleging that issuance of IO 41 constituted an improper practice that violated the New York City Collective Bargaining Law (NYCCBL). The NYPD opposed the petition, urging that it had authority to adopt the new procedures as an exercise of managerial rights pursuant to NYCCBL § 12-307(b) and that the new procedures were non-mandatory subjects of bargaining. It also argued that any changes were *de minimis*, explaining that prior:

"to the issuance of IO 41, the amount of time an officer had to appeal his or her evaluation was

until the next evaluation was issued. Moreover, this allotted time to file was subject to the discretion of individual [commanding officers], creating great disparity and inequity between various precincts. Under the interim order, the deadline is written out but the procedure itself remains identical. Simply stating that there are thirty days for an officer to appeal, rather than some number determined by a [commanding officer] is a *de minimis* change, and the change made is not as material, substantial, or significant as to represent a change in the performance evaluation process" (Pet, Ex H at ¶ 80).

The BCB agreed with the PBA, "finding that the institution of the appeal deadline was a procedural change that altered employee participation by shortening the time officers had to prepare and submit their appeals and, thus, was not within the NYPD's managerial rights nor a *de minimis* change" (Pet, Ex A at 8). The BCB concluded that the appeal deadline "is a procedure as it concerns the appeal process itself and not the standards or criteria applied" (*id.* at 9-10). It explained that "we have consistently held that the procedures for implementing performance evaluations are mandatory subjects of bargaining" (*id.* at 10). It also emphasized: "That police officers still possess the right to appeal their performance evaluations, albeit subject to a deadline, does not render the change *de minimis*" (*id.* at 11). The BCB ordered NYPD to rescind IO 41's 30-day appeal deadline and to "cease and desist from implementing that provision

until such time as it bargains over such provision in accordance with its obligations" (*id.* at 13).

Petitioners commenced this article 78 proceeding seeking to annul BCB's determination, urging that it is arbitrary and capricious and without sound basis. They contend that implementation of IO 41 was consistent with the NYPD's express statutory management rights and does not impose any additional responsibility on officers who have to follow the exact same steps as before.'

BCB and PBA each move to dismiss the petition. They maintain that BCB's determination is rational and based on precedent.

Analysis

BCB's determination cannot be annulled "unless 'arbitrary and capricious or an abuse of discretion'" (*Matter of Levitt v Board of Collective Bargaining*, 79 NY2d 120, 128 [1992] citation omitted); *Mahinda v Board of Collective Bargaining*, 91 AD3d 564, 565 [1st Dept 2012]). Its conclusion that IO 41's imposition of a deadline for appeal effected a procedural change related to the performance evaluation process is

'At oral argument, petitioners withdrew arguments based on the City Charter as they were not raised before the BCB.

rational as it is undisputed that PG 205-58 did not contain any cutoff for an appeal. IO 41 for the first time set an official and uniform time bar for appeals whereas in the past a police officer "could theoretically wait months or even years from the date of the evaluation to file an appeal" (Memorandum of Law in Support of Petition at 12). In its determination, moreover, BCB rejected petitioners' argument that "IO 41 merely clarifies a pre-existing protocol" (see Memorandum in Opposition to Respondents' Motions [Opp Mem] at 12). BCB rationally distinguished its COBA decision (69 OCB 26 [BCB 2002]), in which it had found that a revision in a directive clarifying that the written term "timely appeal" meant five days was not mandatorily bargainable (Pet, Ex 1 at 10).

Accordingly, it is ORDERED and ADJUDGED that the motions to dismiss are granted, the petition is DENIED and the proceeding is dismissed.

This constitutes the Decision and Judgment of the Court.

Dated: June 15, 2015



HON. JENNIFER G. SCHECTER