

**Detectives' Endowment Assn., Inc. v City of New York**

2012 NY Slip Op 32873(U)

November 20, 2012

Supreme Court, New York County

Docket Number: 100946/2012

Judge: Geoffrey D. Wright

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

JUDGE GEOFFREY D. WRIGHT

PRESENT: \_\_\_\_\_  
Justice

PART 62

Index Number : 100946/2012  
DETECTIVES' ENDOWMENT  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001

The following papers, numbered 1 to 10, were read on this motion to/for Article 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1-3

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 4

Replying Affidavits \_\_\_\_\_ | No(s). 5-6

Amicus Curiae 7, 8

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with the annexed hereto decision.

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

## FILED

DEC - 5 2012

NEW YORK  
COUNTY CLERK'S OFFICE

  
GEOFFREY D. WRIGHT  
AJSC

Dated: 11/20/12

\_\_\_\_\_, 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 IAS PART 62

-----X  
DETECTIVES' ENDOWMENT ASSOCIATION, INC.  
OF THE POLICE DEPARTMENT OF THE CITY  
OF NEW YORK,

Petitioner,  
For a Judgment pursuant to Article 78 of the  
CPLR

Index No. 100946/2012

**DECISION**

-against-

THE CITY OF NEW YORK, THE CITY OF NEW  
YORK OFFICE OF LABOR RELATIONS, THE  
NEW YORK CITY BOARD OF COLLECTIVE  
BARGAINING, and MARLENE GOLD, as Chair of the  
New York City Board of Collective Bargaining,

Respondents.

**Present:**  
Hon. Geoffrey D. Wright  
Acting Justice Supreme Court

-----X

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of  
this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Petition - Verified Petition - Exhibits...	<u>  1  </u>
Notice of Motion - Affirmation- Exhibits	<u>  2  </u>
Notice of Cross Motion-Affirmation - Exhibits.....	<u>  3  </u>
Memorandum in Opposition.....	<u>  4  </u>
Amicus Curiae .....	<u>  5,6  </u>
Affirmation in Support.....	<u>  7  </u>
Reply Memorandum in Response to Amicus Curiae.....	<u>  8  </u>
Memorandum of law.....	<u>  9, 10  </u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The petitioner Detectives' Endowment Association, Inc. of the Police Department of  
the City of New York (Detectives' Endowment Association) brings this Article 78 Proceeding

for a judgment: annulling a decision and order of the respondent New York City Board of Collective Bargaining (Board of Collective Bargaining), dated December 20, 2011, which denied a request for arbitration of a grievance filed by the Detectives' Endowment Association; and compelling arbitration of the grievance.

The respondents Board of Collective Bargaining and Marlene Gold move, pursuant to CPLR 7804 (f) (objection in point of law), for an order dismissing the petition and affirming the Board of Collective Bargaining's decision.

The respondents The City of New York (City) and The City of New York Office of Labor Relations (Office of Labor Relations) cross-move, pursuant to CPLR 7804 (f) (objection in point of law), and 3211 (a) (2) and (7), for an order dismissing the petition on the ground that it fails to state a cause of action.

The petitioner Detectives' Endowment Association is a labor organization representing New York City police detectives. The respondents represent management. The dispute involves the proper placement on the salary step schedule of detectives promoted on or after March 31, 2004, but before March 31, 2006. The petition alleges that well after the Detectives' Endowment Association negotiated annual base salaries for 2004, the 2004 salaries for police officers represented by the Police Benevolent Association were raised significantly by an arbitration award. Detectives promoted after March 31, 2004 received a basic entry salary of \$60,840, while the basic pay for police officers was raised to \$62,269. It is alleged that, as a result, detectives lost money by accepting the promotion.

On September 27, 2007, the Detectives' Endowment Association and the City executed a side letter re-opener agreement providing:

If another uniformed collective bargaining unit has an adjustment made to their

salary schedule through the collective bargaining or arbitration process or otherwise during the time period covering April 1, 2006 through March 31, 2012 which results in a greater percentage wage increase, then, at the DEA's request, this agreement will be reopened for the purposes of negotiating the effect of that adjustment-through the final steps of the bargaining process.

Subsequently, a collective bargaining agreement covering the period 2008 through 2012 was executed which failed to address the 2004 salary discrepancy.

The collective bargaining agreement provides at Article XX Sections 1 (a) (1), and (2) (Exhibit 9 to the petition):

For the purposes of this Agreement, the term "grievance" shall mean: (1) a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement; (2) a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of the Police Department affecting terms and conditions of employment, provided that, except as otherwise provided in this Section 1(a), the term "grievance" shall not include disciplinary matters.

The collective bargaining agreement provides at Article XX Section 8:

Within 20 (twenty) days following receipt of the Police Commissioner's STEP IV decision, the Union shall have the right to bring grievances unresolved at STEP IV to impartial arbitration pursuant the New York City Collective Bargaining Law and the Consolidated Rules of the New York City Office of Collective Bargaining.

The collective bargaining agreement provides at Article XX Section (Exhibit 9 to the petition):

In the case of grievances falling within Sections 1(a) (1) or 1(a) (2) of this Article, the Arbitrator's decision, and order or award (if any), shall be limited to the application and interpretation of the collective bargaining agreement, rule, regulation, procedure, order or job title specification involved.

A step IV grievance filed by the Detectives' Endowment Association challenging the discrepancy in annual base salaries between police officers, and detectives who had been promoted after August 1, 2004, but before March 31, 2006, was denied by the Personnel

Grievance Board, consisting of the Police Commissioner and two deputies.

On December 20, 2011, the respondent Board of Collective Bargaining denied a request for arbitration, finding the dispute is not arbitrable because there was "no reasonable relationship between the act complained of in the Detective Endowment Association's grievance and the parties' applicable collective bargaining agreement" (Exhibit 2 to petition, page 19). The petition alleges that the Board of Collective Bargaining's decision is affected by an error of law, and is arbitrary and capricious.

In support of their motion and cross motion to dismiss the petition, the respondents inappropriately argue the merits. For example, the arguments raised include the following: the petitioner lacks standing; there was no agreement to arbitrate; there is no reasonable relationship between the subject matter of the dispute and the general subject matter of the agreement; a past practice does not fit the definition of a "grievance"; and the members were paid in accordance with the terms of their collective bargaining agreement.

The Court also has before it amicus curiae briefs filed by the Uniformed Fire Officers Association, and the Sergeant's Benevolent Association.

It is well settled that judicial review of administrative determinations is limited to whether the determination was affected by an error of law, was arbitrary and capricious, or constituted an abuse of discretion (CPLR 7803; *Matter of Langham Mansions, LLC v New York State Div. of Hous. & Community Renewal*, 76 AD3d 855, 857 [1<sup>st</sup> Dept 2010]). An action is arbitrary if it "is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Where a rational basis exists for

an agency's action, a court may not substitute its judgment for that of the agency, and the agency's determination, acting pursuant to legal authority and within its area of expertise, is entitled to deference (*Matter of Tockwotten Assoc., LLC v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 454 [1<sup>st</sup> Dept 2004]).

However, where, as here, "objections in point of law" are raised by motion (CPLR 7804 [f]), the court must judge the legal sufficiency solely on the face of the petition's allegations, and any factual issues are beyond the scope of the motion (*Matter of Garcia v Rhea*, 85 AD3d 549 [1st Dept 2011]). Therefore, a proper motion to dismiss an Article 78 proceeding must be based solely on a point of law, and may not dispute any of the facts alleged by the petitioner (*Matter of 108 Realty LLC v Department of Hous. Preserv. & Dev. of the City of N. Y.*, 83 AD3d 556, 557 [1st Dept 2011]). Judging the petition solely on its face, deeming the allegations true, and according the petitioner the benefit of every possible inference, I find that the petition states a claim (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012]).

Contrary to the respondents' assertion, courts may look to the past practice of the parties to give definition and meaning to language in a collective bargaining agreement. Moreover, as a legal matter, a public employer is statutorily obligated to negotiate in good faith, and where a past practice between a public employer and its current employees is established, involving a mandatory subject of negotiation, the employer is barred from discontinuing that practice without prior negotiation (*Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326 [1998]).

Ultimately, this Court would rather have the arbitrator determine the exact scope of the substantive provisions of the collective bargaining agreement. However, it is enough at this

point to state that there may be a reasonable relationship between the subject matter of the dispute and the general subject matter of the collective bargaining agreement (*Matter of Board of Educ. of Watertown City School Dist. v Watertown Educ. Assn.*, 93 NY2d 132 [1999]).

Among the issues of fact presented on these papers are: the effect of subsequent collective bargaining agreements on the petitioner's claim; which collective bargaining agreement and side letters the petitioner is proceeding under; whether the respondents violated any pay plan; was there an established past practice on the part of the parties; whether a reasonable relationship exists between the collective bargaining agreement and the grievance; whether the arbitrator's authority extends to the instant dispute; whether the parties expressly agreed to arbitrate the instant dispute; and whether it is for the arbitrator to determine whether or not the aforementioned reasonable relationship exists.

To the extent that *Matter of Sergeants Benevolent Assn. of the City of N.Y. v City of New York* (2011 NY Slip Op 32022U, 2011 WL 3022203, 2011 NY Misc LEXIS 3614 [Sup Ct NY County July 18, 2011], Exhibit "C" to Board of Collective Bargaining's motion) is inconsistent with this decision, the court respectfully disagrees with it. Moreover, emanating as it does from a court of coordinate jurisdiction, the legal holding is not binding on this Court.

Therefore, the motion and cross motion to dismiss the petition, on the ground of an objection in point of law, must be denied.

This Court having denied the pre-answer motion to dismiss, it must allow the respondents an opportunity to submit an answer (CPLR 7804 [f]; *Matter of Bethelite Community Church, Great Tomorrows Elementary School v Department of Envtl. Protection of City of N.Y.*, 8 NY3d 1001, 1002 [2007]). For a proper adjudication of the rights of the parties, pleadings and a

distinct issue are essential. Therefore, no disposition on the petition may be made until after the answer is served (*Matter of Camacho v Kelly*, 57 AD3d 297, 298 [1st Dept 2008]).

Accordingly, it is

ORDERED that the motion and cross motion are denied; and it is further

ORDERED that the respondents serve and file their answers within five days of service upon them of a copy of this order with notice of entry and the petitioner may re-notice the matter for hearing upon service of the answer upon seven days' notice.



**GEOFFREY D. WRIGHT**  
**AJSC**

Dated: November 20, 2012

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JUDGE GEOFFREY D. WRIGHT  
Acting Justice of the Supreme Court

**FILED**

**DEC - 5 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**