

**Lynch v Office of Labor Relations of City of New York**

2004 NY Slip Op 30227(U)

July 27, 2004

Supreme Court, New York County

Docket Number: 0105360/2004

Judge: Lewis Bart Stone

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. LEWIS BART STONE

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

PART 105

*Patrick J. Lynch,*

INDEX NO. 105360104

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

*N/C Office of Legal Research*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

**FILED**  
PAPERS NUMBERED  
AUG 06 2004

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion  
*is decided in accordance with*  
*attached Decision & Order.*

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

Dated: 27 July 2004 *L. Bart Stone*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50S

-----X  
PATRICK J. LYNCH, as President of the :  
Patrolmen's Benevolent Association of :  
the City of New York :

Petitioner, : DECISION AND  
ORDER

-against- :

Index Number

THE OFFICE OF LABOR RELATIONS OF THE :  
CITY OF NEW YORK, RAYMOND W. KELLY, as :  
Police Commissioner of the City of New York, :  
the POLICE DEPARTMENT OF THE CITY OF :  
THE CITY OF NEW YORK, and THE CITY :  
OF NEW YORK :

105360/04

Respondents. :  
-----X

**FILED**  
AUG 11 2004

Hon. Lewis Bart Stone, J

This special proceeding was commenced on April 7, 2004, by Petitioner, Patrick J. Lynch, as President of the Patrolmen's Benevolent Association of the City of New York, ("PBA") against Respondents, the Office of Labor Relations of the City of New York ("OLR") and Raymond W. Kelly as Police Commissioner of the City of New York and the Police Department of the City of New York ("NYPD") pursuant to Civil Practice Law & Rules ("CPLR") §2308 to force NYPD and OLR to comply with a subpoena duces tecum served on them by the PBA on February 12, 2004. The subpoena, issued on behalf of PBA sought

certain documents which were asserted by PBA to be relevant to a proceeding pending before the New York City Board of Collective Bargaining (“OCB”) relating to a dispute between PBA and Respondents.

As the subpoena relates to a proceeding before OCB, it is deemed a non-judicial subpoena, and CPLR §2302(b) applies. CPLR §2308(a) provides that, upon motion by the issuer of the subpoena to enforce it, “[i]f the court finds that the subpoena was authorized, it shall order compliance.” The OLR and NYPD after receiving the subpoena, responded to PBA on February 19, 2004, pursuant to CPLR §2304, that the subpoena was over-broad as to scope and time, and requested that PBA modify the subpoena accordingly or withdraw it. On February 20, 2004, PBA refused to withdraw or modify the subpoena and instead commenced this proceeding to compel compliance with the subpoena.

Having preserved their right to do so and having made their preliminary direct response to PBA pursuant to CPLR §2304, NYPD and OLR, in turn seek in this proceeding to quash the subpoena, on the grounds that the subpoena is both burdensome and irrelevant.

The Court initially attempted to resolve the differences between the parties, and in such connection NYPD and OLR have made available certain documents to PBA. Certain additional documents, with respect to which NYPD and OLR have

claimed privilege, have also been submitted to the Court, under seal, in accordance with the agreement of the parties, for its determination whether privilege attaches. At the end of these discussions, the parties were unable to reach agreement, and have submitted this dispute to this Court for determination.

The underlying dispute between the parties arises out of the designation by NYPD of certain officers as “Detective Specialists.” Such designated officers are promoted to the rank of “Detective,” receive additional economic benefits, and are subsequently represented by the Detective Endowment Association, a union separate and distinct from PBA.

The PBA has long opposed the concept of Detective Specialist or any expansion of such title, claiming that the designation or promotion of police officers to such title constitutes a form of merit pay, which PBA asserts is subject to collective negotiation. Unsaid is also the fact that officers placed in such title no longer pay dues to PBA, but pay dues to a different union.

Designations of police officers to the classic police detective category has long been determined to be an inherent power of the Police Commissioner to enable the NYPD to develop and maintain an effective investigative cadre. PBA does not challenge such process or the appointment of “classic” detectives. What they challenge is the extent to which NYPD may designate “Detective

Specialists,” i.e. persons who may have certain special or unique skills, which may not fall within the type of investigative activity traditionally performed by investigative detectives.

This underlying dispute is not of recent development. Detective Specialists have been designated since the 1970's. While PBA has over the years objected to the category and the designation of police officers to that title, in the absence of a negotiation with PBA, in 1973, a decision in an arbitration between NYPD and PBA resolved the issue, at least for a while, in favor of NYPD's position, and under such award, NYPD has, over the years, continued to appoint Detective Specialists. PBA recently has reprised this dispute, contending that Detective Specialists are now appointed in a manner far exceeding the scope permitted by the 1973 award, and that in any event, such appointments still constitute an improper scheme to bypass NYPD's obligation, under law, to negotiate all issues of pay, including merit pay, with PBA, before implementing such changes. It is NYPD's position that it has an inherent right under law to appoint Detective Specialists, and that the 1973 arbitration award recognized the right to make such appointment rather than limiting the scope of the duties in such title to those specialties and circumstances which existed in 1973.

To advance its contention PBA, in 2000, commenced a CPLR Article 78 proceeding to challenge the NYPD's then mode of designating Detective Specialists. While this PBA theory was sustained by the Supreme Court, the Appellate Division, in In Re Application of Patrolmen Benevolent Association, 293 A.D2d 253 (1<sup>st</sup> Dept. 2002) (hereafter, "In Re PBA"), vacated the Supreme Court ruling on the grounds that the body having primary jurisdiction to resolve issues relating to this controversy is OCB, and that the courts should not consider controversies in this area until OCB has ruled on them. Implicitly, this holding relegates court review of any decision of OCB to the standards for the review of an administrative order under CPLR Article 78.

The problem presented by this proceeding is that to properly decide PBA application, this Court must determine a significant portion, if not the entire merits, of the underlying dispute. To determine whether the subpoena is for material relevant to the proceeding before OCB, the Court must determine whether PBA's position that the continuance of the Detective Specialist category or its "expansion," absent collective negotiations between NYPD and PBA, can at this time be re-considered at all by OCB. If it may not be reconsidered (as is NYPD's position before OCB), the subpoenaed material is irrelevant to proceeding before OCB and therefore the subpoena must be quashed as irrelevant; if PBA's position

is to be entertained by OCB (as PBA contends), depending on how OCB frames how it will reconsider the issue, the subpoenaed material could well be relevant and the Court would be faced with second issue presented here, the scope of the subpoena, that is, whether it is over-broad, a determination which would depend on OCB's framing of its own scope of reconsideration.

To maintain the integrity of the legal structure for dispute resolution in this area, as enunciated by the Appellate Division in In Re PBA, OCB should make the initial determination as to the scope of its inquiry.

Unfortunately, at this time, the OCB has not so ruled, and attempts by this Court to have the parties stipulate to seek an OCB ruling on this issue have been unsuccessful.

Because OCB is not a party to this proceeding this Court cannot order OCB to determine its position. This Court is further unaware of any authorized procedure for a reference of this question to OCB.

While the parties to this procedure seem to be willing to have this Court make whatever determination is necessary the Court finds, as discussed above, that to do so it must reach the merits of the ultimate dispute pending before OCB. Doing so, however, seems proscribed by In Re PBA.

Although, the parties' determination to submit this dispute to this Court for resolution may be argued to be a waiver of any objection to the resolution of this matter by the Court rather than OCB notwithstanding In Re PBA, an analysis of the policy grounds implicit in In Re PBA indicate that such objection should not be waivable by the parties. To make any determination on the merits, the decision maker must consider competent, admissible and relevant material relating to the question as well as any arguments both factual and legal. Such material and arguments has not been made available to this Court at this time. Further, if such were to have been submitted to this Court, any decision of this Court would be appealable to the Appellate Division which in turn would eventually be forced to review this Court's decision on both the facts and law thus finding themselves in the very thicket they rejected in In Re PBA.

To resolve this circular conundrum, this Court will therefore, at this point, abstain from ruling on the subpoena until the parties have obtained from OCB rulings on 1) whether or not OCB will entertain PBA's position and reject the position of NYPD that is has an inherent right to designate Detective Specialists, and 2) in the event that NYPD's position is rejected, the scope of the material which OCB would consider in reviewing PBA's position. At that point, this Court would be in a position to rule upon the PBA's petition and NYPD's motion to

quash, without violation of In re PBA, and be able to carry out its mandate under CPLR §2308 to enforce proper subpoenas in proper cases.

As this Court cannot be certain that OCB will issue such a clear ruling, this Court cannot be certain that this suggested process will resolve the dispute before it.

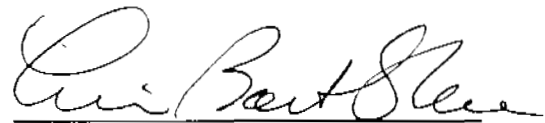
Accordingly, this Court hereby dismisses this petition as unripe with leave to PBA to reinstate its petition at such time as the matter has become ripe, also with leave to NYPD and OLR to reassert their motion to quash or limit the subpoena.

This result will preserve PBA's ability to move the underlying dispute to resolution by seeking an OCB ruling on the two issues above discussed. NYPD has advised this Court that it not only does not object to returning to the OCB for such a ruling but would support it. On the other hand, this Court's decision also accords PBA the option to appeal the Order of this Court dismissing the petition for enforcement of the subpoena as unripe to allow PBA to argue that the Appellate Division should re-consider its determination in In Re PBA and if successful, PBA could then return to this Court, which would then be required to determine the underlying dispute for the purposes of determining whether the subpoena sought was issuable.

Because the resolution of this petition as above set forth does not require the Court to rule whether the material submitted under seal is privileged, this Court does not rule on such issue and has returned such material to NYPD, without prejudice to NYPD to assert any claim of privilege as to such material in the future.

This is the Decision and Order of the Court.

DATED: JULY 26, 2004  
NEW YORK, NEW YORK



Hon. Lewis Bart Stone  
Justice of the Supreme Court

**FILED**  
AUG 06 2004  
COUNTY CLERK'S OFFICE