SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

----------X

PATRICK LYNCH, THE POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiff,

- v -

THE CITY OF NEW YORK, MICHAEL MCSWEENEY, THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD

Defendant.

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INDEX NO. 150957/2020

MOTION DATE 10/31/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioners Patrick J. Lynch and the Police Benevolent Association of the City of New York, Inc. (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents City of New York, Chief Clerk Michael McSweeny and the New York City Civilian Complaint Review Board (motion sequence number 001) is granted, and the instant Article 78 petition is dismissed in its entirety as against said respondents, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly in favor of said respondents; and it is further

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this hybrid proceeding for a declaratory judgment and relief pursuant to CPLR Article 78, petitioner Patrick J. Lynch (Lynch), acting on behalf of the Police Benevolent Association of the City of New York, Inc. (the PBA), seeks an order of mandamus compelling respondent City of New York (the City) to revoke certain amendments to the City Charter that were enacted pursuant to a ballot question that was approved in the November 5, 2019 general election. The City and co-respondents Chief Clerk Michael McSweeny (McSweeny) and the New York City Civilian Complaint Review Board (the CCRB) cross-move to dismiss the petition (together, motion sequence number 001). For the following reasons, the petition is denied, the cross-motion is granted, and this proceeding is dismissed.

FACTS

On August 2, 2018, Chief Clerk McSweeny transmitted to the New York City Board of Elections final versions of five ballot questions that concerned proposed amendments to the New York City Charter (the City Charter). *See* notice of cross motion, Kitzinger affirmation, ¶¶ 14-15; exhibit A. Those questions had been promulgated by a Charter Revision Commission that was duly established by order of the Mayor and the New York City Council pursuant to Local Law 91 of 2018. *Id.*, ¶¶ 4-11. The Charter Revision Commission held a number of public meetings, in which it sought public input and feedback on proposed City Charter amendments before it issued a final report that included the five aforementioned ballot questions. The second of those questions concerned the CCRB ("ballot question 2"), and provided as follows:

> "This proposal would amend the City Charter to:
> "Increase the size of the [CCRB] from 13 to 15 members by adding one member appointed by the Public Advocate and adding one member jointly appointed by the Mayor and Speaker of the Council who would serve as chair, and to provide that the

> Council directly appoint its CCRB members rather than designate them for the Mayor's consideration and appointment;
>
> *"Require that the CCRB's annual personnel budget be high enough to fund a CCRB employee headcount equal to 0.65% of the Police Department's uniformed officer headcount, unless the Mayor makes a written determination that fiscal necessity requires a lower budget amount*;
>
> "Require that the Police Commissioner provide the CCRB with a written explanation when the Police Commissioner intends to depart or has departed from discipline recommended by the CCRB or by the Police Department Deputy (or Assistant Deputy) Commissioner for Trials;
>
> "Allow the CCRB to investigate the truthfulness of any material statement that is made within the course of the CCRB's investigation or resolution of a complaint by a police officer who is the subject of that complaint, and recommend discipline against the police officer where appropriate; and
>
> "Allow the CCRB members, by a majority vote, to delegate the board's power to issue and seek enforcement of subpoenas to compel the attendance of witnesses and the production of records for its investigations to the CCRB Executive Director."

Id.; exhibit A (emphasis added).

Ballot question 2 was approved by the voters in the November 5, 2019 general election, along with the Charter Revision Commission's four other proposed amendments to the City Charter. *Id*.; Kitzinger affirmation, ¶ 16.

The PBA thereafter commenced this proceeding on January 28, 2020 seeking an order declaring that: 1) respondents exceeded their authority by including ballot question 2 in the November 5, 2019 general election; and 2) ballot question 2 and the subsequent amendments that it made to the City Charter are invalid and void. *See* verified petition, ¶¶ 60-92. Shortly thereafter, the COVID-19 national pandemic caused the court to suspend its operations indefinitely. The parties nevertheless executed several stipulations to extend respondents' time to respond to the petition. Ultimately, rather than file an answer, respondents submitted a cross motion on June 5, 2020 to dismiss the petition. *See* notice of cross motion.

Generally, the court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or

was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). However, here the PBA does not raise any arguments under the "arbitrary and capricious" standard. Instead, the PBA argues that ballot question 2 "is not a valid charter amendment accomplished by public vote," and that it "must be stricken in its entirety because . . . [it] cannot be severed from the other portions of this measure." *See* petitioner's mem of law at 11-19. These arguments, and the petition's prayer for relief, make it clear this is actually a hybrid proceeding for Article 78 relief coupled with a request for a declaration that ballot question 2 was invalid. Declaratory judgment is a cause of action that New York law considers to be a discretionary remedy that may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g.*, *Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999).

Respondents contend that this petition should be dismissed because petitioners lack standing, and to the extent petitions' claims fall within the purview of Article 78, they are barred by the four-month statute of limitations applicable in Article 78 proceedings. *See* respondents' mem of law at 5-13. After careful consideration, the court agrees.

Standing

To have standing, at least one of the petitioners must demonstrate that they will suffer a direct injury-in-fact separate from a general sense of harm to the broader public, and that their asserted injury falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted. *New York State Ass'n of Nurse*

Anesthetists v Novello, 2 NY3d 207, 211 (2004), *see also Citizens Emergency Comm. to Pres. Pres. v Tierney*, 70 AD3d 576, 576-77, (1st Dep't 2010) ("[P]etitioner must show that one or more of its members-as distinct from the general public-has suffered an injury in fact, and must demonstrate that the injury falls within the zone of interests protected by the legal authority being invoked"). The Court of Appeals recently revisited the law of standing as it pertains to petitioner organizations in *Matter of Mental Hygiene Legal Serv. v Daniels* (33 NY3d 44 [2019]), wherein it observed that:

> "An organization can establish standing in several ways. Under the standard established in [*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761 (1991)], it may demonstrate 'associational standing' by asserting a claim on behalf of its members, provided 'that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members.' Alternatively, an organization can demonstrate 'standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.' Under this option, an organization – just like an individual – must show that it has suffered an 'injury in fact' and that its concerns fall within the 'zone of interests' sought to be protected by the statutory provision under which the government agency has acted."
> 33 NY3d at 50-51 (internal citations omitted).

Here, respondents argue that "[t]he PBA fails to allege facts sufficient to satisfy either prong of this test or that this litigation is representative of the PBA's organizational purpose." *See* respondents' mem of law at 6-10. Respondents reply that they "have resident, voter and taxpayer standing," and that they "also have organizational standing." *See* petitioners' reply mem at 9-19.

Injury in fact

To establish an injury in fact, the asserted harm must be more than conjectural. *New York State Ass'n of Nurse Anesthetists*, 2 NY3d at 211; *Society of Plastics Indus.*, 77 NY2d at 772-73. Speculation that a party will likely be injured does not satisfy the "concreteness" required to establish injury in fact. *Id.* at 213. "[S]tanding requires a showing of 'cognizable harm,' meaning

that an individual member of plaintiff organizations 'has been or will be injured'; 'tenuous' and 'ephemeral' harm . . . is insufficient to trigger judicial intervention." *Id.* at 214 (quoting *Rudder v Pataki*, 93 NY2d 273, 279 (1999)).

Respondents correctly note that the petition does not allege "that the PBA or its members have been or will be harmed by the Minimum Funding Provision [contained in ballot question 2]," but rather that "any injury suffered would be suffered by the Mayor and the City Council . . . as the Minimum Funding Provision 'restricts the[ir] budget-setting authority.'" *See* respondents' mem of law at 8-9. The petition alleges that "the CCRB Budget Guarantee clearly impinges upon and restricts the budget-setting authority *of the Mayor and the City Council*." *See* verified petition, ¶ 4 (emphasis added). However, the petition does *not* allege that the PBA is harmed in any way by ballot question 2's CCRB budget setting provision. The plain language of ballot question 2 provides that the CCRB's budget is to be pegged to the budget of the New York City Police Department (NYPD) ("an amount sufficient to fund a CCRB employee headcount equal to 0.65% of the Police Department's uniformed officer headcount"), but it does not provide that the CCRB's budget is to be funded from the NYPD's budget.

The only reasonable interpretation of this language is that whatever funding is allocated to the CCRB in a given year (subject to Mayoral adjustment) is separate from the funding that is allocated to the NYPD during that year. The fact that the former is calculated by reference to the latter is of no moment. It is apparent that, without demonstrating any direct financial interference with the NYPD's budget, the PBA cannot show that it or its members have suffered a "sufficiently concrete, particularized, cognizable harm" caused by the fact that the CCRB's budget-setting formula relies on the NYPD's headcount in its calculation formula. Indeed, petitioners concede this point as their petition admits that only the Mayor and the City Council

have "an actual legal stake in the matter being adjudicated," because the budget setting provision in ballot question 2 "restricts their budget-setting authority" over the CCRB. However, since petitioners failed to demonstrate that they themselves will suffer any "cognizable harm" from the CCRB's budget-setting formula, they have also failed to satisfy the "injury in fact" prong of "standing" analysis. Petitioners raise two arguments in reply.

First, petitioners argue that they meet the "injury in fact" requirement because they "have resident, voter and taxpayer standing" to challenge ballot question 2. *See* petitioners' reply mem at 9-12. They cite to the Court of Appeals' 1926 decision in *Matter of McCabe v Voorhis* (243 NY 401 [1926]), and certain cases in its progeny, for the proposition that "a citizen and elector has a sufficient interest to make the application" to challenge a referendum on a proposed law, and assert that Lynch is "a City resident, voter and taxpayer" with the legal capacity to raise such a challenge. *Id*. at 9; 243 NY at 410. Respondents counter that *McCabe* and its progeny are inapposite because petitioners "failed to seek relief as voters prior to" the November 5, 2019 general election, and "in order to assert [their] claims now, they must satisfy traditional standing principles as ordinary litigants." *See* respondents' reply mem at 3-4. The court agrees. The Court of Appeals' long-held rule is that "it is generally inappropriate for the courts to consider the validity of a proposed legislation, [but] they may do so in a case such as this where a proposed referendum sought to be removed from the ballot is in direct conflict with a State statute." *Matter of Fossella v Dinkins*, 66 NY2d 162, 166-167 (1985); *see also, New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 (1977), *citing Matter of McCabe v Voorhis*, 243 NY at 411-412.

In this case, ballot question 2 was passed in the November 5, 2019 general election, but petitioners did not seek to challenge it until they commenced this hybrid proceeding on January

28, 2020; i.e., after ballot question 2 had been enacted as law. As ballot question 2 was no longer "proposed legislation" at that point, petitioners could no longer assert the principles of "resident, voter and taxpayer standing" described in *McCabe* and its progeny in the petition, since they had failed to raise their challenge before the election while they were still "electors" or "voters." Afterwards, *McCabe* and the standing rules described in its holding became inapplicable to the facts of this case. Therefore, the court rejects this argument as unsupported by applicable caselaw.

Petitioners' second argument is that "the law does not require an actual injury to establish standing, but rather a threatened injury, or a likelihood of harm, is sufficient." *See* petitioners' reply mem at 14-15. They cite the decision of the First Department in *Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v City of New York* (142 AD3d 53 [1st Dept 2016]) to support this proposition. *Id.* Respondents reply that petitioners' argument distorts both the law and the First Department's holding. *See* respondents' reply mem at 6. The court agrees. *Patrolmen* plainly held that the PBA "have demonstrated an 'injury in fact,'" because "there is a likelihood that [the PBA] and their members will suffer reputational harm whenever an officer is charged with bias-based profiling . . . , and they risk the prospect of having to pay attorneys' fees if they are denied defense and indemnification by the City." 142 AD3d at 58. It is reasonable to interpret that a "likelihood of reputational harm" coupled with a "risk of liability for legal fees" can constitute an "injury in fact," if those effects are caused by law being challenged. The statute being challenged in *Patrolmen* directly "target[ed] and regulate[d] the conduct of plaintiffs' members." Such is not the case here, as the statute challenged does not target or regulate in any manner the activities of police officers. The court thus reiterates its finding that petitioners have failed to establish the "injury in fact" prong of the standing test.

Zone of Interests

Respondents next argue that petitioners also fail to meet the second "zone of interests" prong of the Court of Appeals' standing test. *See* respondents' mem of law at 9-10. Petitioners respond that "changes to the CCRB's Charter [are] clearly within *the 'zone of interest' of the MHRL* [i.e., Municipal Home Rule Law] - namely, protection against unlawful expansions of municipal and agency powers," and that the "adoption of ballot question 2 *in violation of the MHRL* has resulted in unlawful changes to CCRB's Charter, of which police officers, as the subjects of CCRB investigations and disciplinary recommendations, feel the effects." *See* petitioners' reply mem at 15-16 (emphasis added). Respondents reply that "to the extent that the MHRL serves to protect the interests of the Mayor and City Council, they - and no others - are within the zone of interest established by the MHRL," but petitioners are not. *See* respondents' reply mem at 7-8. Again, the Court finds respondents' reasoning persuasive.

In *Roberts v Health & Hosps. Corp.* (87 AD3d 311 [1st Dept 2011]), the First Department opined that:

> "The second prong of the test requires that the injury 'must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.' This 'zone of interests' test permits the court to ascertain the petitioner's status without reaching the merits of the litigation. It also ensures that a group or individual 'whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes.'"

87 AD3d at 318-319 (internal citations omitted).

Here, the relevant statutory provisions are MHRL § 23 and ballot question 2, which respectively concern the amendment process for the City Charter and the calculation of the CCRB's budget. *See* verified petition, ¶ 65. However, petitioners' argument mistakenly focuses on the "zone of interest' of the MHRL" without also discussing *their* specific interests. Since the

Mayor and the City Council are charged with periodically amending the City Charter, and with promulgating the budget for the CCRB (among other City agencies), it is clear that their responsibilities fall within the "zone of interests" created by the overlap between MHRL § 23 and ballot question 2. However, neither the PBA nor Lynch have any responsibilities with respect to either amending the City Charter or to setting the CCRB's budget. Furthermore, the powers at issue here, in relation to the CCRB's budget, do not even relate to the Police Department's budget. Therefore, petitioners do not occupy the "zone of interests" circumscribed by MHRL § 23 and ballot question 2.

While petitioners' papers discuss the relationship between the PBA and the CCRB, they make no effort to explain how their conflicts implicate either of those two cited statutes. The court also notes the First Department's admonition not to allow "a group . . . whose interests are only marginally related to . . .the purposes of the statute . . . [to] use the courts to further their own purposes at the expense of the statutory purposes" (*Roberts,* 87 AD3d at 318-319). Here, as discussed, the statutory scheme grants the Mayor and the City's Council the exclusive authority to calculate the CCRB's budget. It would be antithetical to the statutory scheme to allow a rival agency such as the NYPD (or the PBA, an association composed of NYPD employees) to intrude on that prerogative. As petitioners' interests are only marginally related here, they have failed to establish they are within the zone of interests to be protected or vindicated.

Organizational Standing

Respondents also argue that petitioners failed to satisfy the alternative "organizational standing" test that the Court of Appeals described in *Matter of Mental Hygiene Legal Serv. v Daniels*. *See* respondents' mem of law at 6-7. To have organizational standing, the organization must establish that the proceeding "is representative of the organizational purpose it asserts."

Daniels, 33 NY3d at 51. Petitioner's organizational purpose is that it is the "exclusive bargaining representative for approximately 24,000 New York City police officers." See Petition, ¶ 8 Respondents argue that this "proceeding is not representative of the [PBA's] organizational purpose . . . [which] does not encompass budgetary allocations to the NYPD no less that of another City agency" such as the CCRB." *See* respondents' reply mem at 9. Petitioners argue that they "have organizational standing, because police officers, as the subjects of CCRB investigations and disciplinary recommendations, have a specific interest in remedying unlawful changes to CCRB's Charter." *See* petitioner's reply mem at 12-15.

This statement, however, appears to be an overly broad interpretation of the PBA's "organizational purpose." Although the courts have never definitively ruled on the parameters of the PBA's remit, in *Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v City of New York*, the First Department recognized the PBA's authority to challenge Local Laws which "specifically target[] and regulate[] the conduct of [the PBA's] members." 142 AD3d at 57-58. More recently in *Matter of Lynch v New York City Civilian Complaint Review Bd.* (183 AD3d 512 [1st Dept 2020]), the First Department reviewed the PBA's challenges to the CCRB's newly adopted rules regarding the filing of sexual misconduct complaints against NYPD officers and the filing of other complaints by third-party witnesses. Although that case did not involve a standing challenge, its holding reinforces the position that the courts should narrowly construe the PBA's "organizational purposes" to include the right to mount challenges only to laws and rules which directly regulate NYPD officers' conduct. The laws at issue in this proceeding do not do so.

Additionally, as noted by respondents, petitioner's designation as the police officers' collective bargaining representative does not give it *carte blanche* authority to commence any and all lawsuits on behalf of police officers, no matter the topic. This proceeding does not

implicate wages, hours, or working conditions of police officers. Rather, it challenges a provision of the Charter that relates to the budget of the CCRB, a completely separate agency. As respondents note, budgeting is a managerial prerogative as it goes directly to the determination of standards and services to be offered by the CCRB and is thus excluded from mandatory collective bargaining. See Admin. Code § 12-307(b); *De Lury v. New York*, 51 A.D.2d 288, 294-95 (1st Dep't 1976); *The City of New York v. Law Enforcement Employees Benevolent Association*, 3 OCB2d 29 at 45 (BCB 2010) (determinations as to how to expend funds is not a mandatory subject of bargaining; rather, it is the City's managerial prerogative). If petitioners' members were employed by the CCRB, the impact of the Minimum Funding Provision may be relevant to petitioner's organizational purpose. However, that is not the case here, and this litigation does not involve the economic impact of the Minimum Funding Provision on employees of the Police Department. As such, it is clearly beyond the scope of the PBA's organizational purpose.

Accordingly, having found that petitioners failed to satisfy any of the applicable tests for standing, the court consequently determines that petitioners' hybrid complaint should be denied, respondents' cross motion should be granted, and this matter dismissed for lack of standing.

Petitioners' Article 78 Claims are Barred

The court writes separately to note that petitioners' first and second causes of action for relief pursuant to CPLR Article 78 are also barred because the Court of Appeals has long recognized that "a challenge to the validity of legislation may not be brought under article 78." *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 (2007). Although the court recognizes an exception for "quasi-legislative acts and decisions of administrative agencies," it is inapplicable here because petitioners' prayer for relief plainly seeks rulings that

ballot question 2 was invalid. *Id.* at 194, *citing New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194 (1994); *see also Terence Cardinal Cooke Health Ctr. v Commissioner of Health of the State of N.Y.*, 175 AD3d 435 (1st Dept 2019). The challenge to the validity of legislation is proper under a declaratory judgment action but not Article 78. *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186 (2007)

While the validity of the legislation is beyond the scope of Article 78, sssuming *arguendo* that City Clerk McSweeny could have exercised discretion as to whether or not to certify question 2 for placement on the ballot, said determination is subject to evaluation under Article 78. However, a challenge to that determination is still time-barred by CPLR § 217(1), which holds that the statute of limitations for Article 78 proceedings is four months after the determination to be reviewed becomes final and binding. "A challenged determination is final and binding when it 'has its impact' upon the petitioner who is thereby aggrieved." *Edmead v McGuire*, 67 NY2d 714, 716 (1986). Here, that would be McSweeney's certification of Question 2 on August 2, 2019, and not when the local law eventually was adopted by voters in the November 2019 election. The statute of limitations thus began to run on August 2 and expired in December 2019, prior to the commencement of this proceeding in January 2020. Accordingly, the Article 78 claim is untimely. Moreover, it became moot once the election occurred, any challenge to that certification became moot.

It appears that petitioners' third cause of action for declaratory relief would have been timely pursuant to the six-year statute of limitations that CPLR 213 (1) specifies for such claims; however, as discussed, petitioners lacked standing to assert that claim. Given of the foregoing findings, the court need not consider the parties' respective arguments as to whether Lynch

and/or McSweeny are properly named as parties herein as this proceeding is dismissed in its entirety.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioners Patrick J. Lynch and the Police Benevolent Association of the City of New York, Inc. (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents City of New York, Chief Clerk Michael McSweeny and the New York City Civilian Complaint Review Board (motion sequence number 001) is granted, and the instant Article 78 petition is dismissed in its entirety as against said respondents, and it is further

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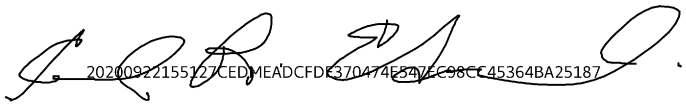
ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



9/22/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE