Matter of Mulgrew v City of New York
2012 NY Slip Op 33613(U)
September 12, 2012
Sup Ct, New York County
Docket Number: 102170/12
Judge: Manuel J. Mendez

[* 1]

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

In the Matter of the Application of

MICHAEL MULGREW, AS PRESIDENT OF THE UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Petitioner,

-against-

THE CITY OF NEW YORK; the OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS; DAVID GOLDIN in his official capacity as ADMINISTRATIVE JUSTICE COORDINATOR, OFFICE OF THE MAYOR and SUZANNE A. BEDDOE in her capacity as COMMISSIONER AND CHIEF ADMINISTRATIVE LAW JUDGE OF THE OFFICE OF ADMINISTRATIVE TRIALS AND HEARING,

Respondents,

for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

INDEX NO. 102170/12
MOTION DATE 08-15-2012
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this petition to/for Art. 78 and Cross-Motion to Dismiss the Petition

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits cross motion	4 - 6
Replying Affidavits	7

Cross-Motion: X Yes No

Petitioner pursuant to CPLR Article 78, seeks a declaration that the policy instituted by the respondents requiring Hearing Officers (per session) in the bargaining unit represented by the United Federation of Teachers, CIO (UFT) who are assigned to the Health Tribunal at the Office of Administrative Trials and Hearings (OATH), to submit decisions and see the Managing Attorney, prior to dismissal of any Notice of Violation in its entirety, is arbitrary and capricious, in error of law, ultra vires and in violation of the Rules of the City of New York (RCNY). Petitioner also seeks an order directing respondents to refrain from any further unlawful conduct; and ordering respondents to take further action to ensure the effects of these unlawful practices are eliminated including a written rescission of the unlawful procedure with notice to the UFT and all members of the relevant bargaining unit of HOPS for the City of New York.

Respondent opposes the petition and cross-moves to dismiss pursuant to CPLR §3211[a][3], [5], for lack of standing and as time-barred.

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

Petitioner is President of the United Federation of Teachers, AFL-CIO (UFT), an employee organization within the meaning of Civil Service Law §201[5] as well as a voluntary unincorporated association operating pursuant to the General Associations Law. UFT represents and is the exclusive collective bargaining representative for Hearing Officers (per session) hereinafter referred to as "HOPS," employed by the City of New York as was certified in September of 2007. There is currently no agreement in place between the City and the UFT on behalf of its members. In 2008, the Environmental Control Board (ECB) tribunal was consolidated into OATH. During the summer of 2011, the Health Tribunal which included the HOPS was consolidated into OATH. Prior to consolidation the Health Tribunal had the HOPS render decisions sustaining or dismissing charges in notices of violation autonomously, without any review. On November 15, 2011 and November 22, 2011, after the consolidation of the health tribunal, the OATH Managing Attorney issued directives requiring the HOPS to submit all full dismissal decisions for supervisory review prior to issuance.

Petitioner seeks a declaration that the policy instituted by the respondents requiring HOPS in the bargaining unit represented by UFT assigned to OATH to submit decisions and see the Managing Attorney, prior to dismissal of any Notice of Violation in its entirety, is arbitrary and capricious, in error of law, ultra vires and in violation of the Rules of the City of New York (RCNY). Petitioner claims that it has standing because it has authority to act on behalf of HOPS as a certified collective bargaining representative and if one or more members has standing, UFT has standing. Petitioner also claims it has standing because injury to HOPS is within the zone of interest and is sufficiently related to its organizational purpose. Pursuant to 24 RCNY §7.11[l], HOPS are given authority to render their own autonomous decision, a provision that has been in effect for many years before the consolidation. Respondents directives seeking to enforce OATH procedure as stated in 48 RCNY §3-57, place HOPS in the position of violating them and being deemed "insubordinate" by OATH, alternatively observing the directives and violating relevant existing statutory provisions. Petitioner claims this action is timely and not barred by the statute of limitations because it has been commenced within four months of the respondent's November 15, 2011 and November 22, 2011, directives.

Respondents seek to dismiss this proceeding claiming petitioner lacks standing because this action involves office management and training, which is outside the scope of collective bargaining. Petitioner is only seeking to protect the public appearing at tribunals and not the HOPS. Alternatively, respondents claim that petitioner is relying on conjecture and fails to provide any evidence that a hearing officer has been improperly told to change a decision or punished for failure to abide by the directive. Respondents seek to dismiss the petition as time-barred because the relevant four month statute of limitations has expired. Respondents claim this action is time-barred because the supervisory review of decisions has taken place at OATH since approximately 2007, as part of the ECB tribunal with no objection from the petitioner. The Health Tribunal was consolidated into OATH during the summer of 2011, and from that point in time ECB oversight and policies apply to HOPS, as additional counterparts.

The standard of review in an Article 78 proceeding, is for the Court to determine whether an administrative decision was arbitrary and capricious or made in error of law (Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 N.Y. 2d 753, 573 N.E. 2d 562, 570 N.Y.S. 2d 474 [1991]). An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is

not arbitrary and capricious (Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974]).

A motion to dismiss pursuant to CPLR §3211[a][3], is based on lack of capacity to sue. The two-part test to determine standing in challenging governmental action requires (1) a showing that the individual will be actually harmed by administrative action, and the harm is more than conjectural and (2) that the injury falls within the "zone of interests or concerns sought to be protected by the statutory provision under which this agency has acted," Roberts v. Health & Hospitals Corp., 87 A.D. 3d 311, 928 N.Y.S. 2d 236 [N.Y.A.D. 1st Dept., 2011], quoting from New York State Assn. of Nurse Anesthetists v. Novello, 2 N.Y. 3d 207, 810 N.E. 2d 405, 778 N.Y.S. 2d 123 [2004]). A past practice cannot be unilaterally modified by a public employer. Past practice is not a contractual right independent of an express source (Matter of Aeneas McDonald Police Benevolent Assn. v. City of Geneva, 92 N.Y. 2d 326, 703 N.E. 2d 745, 680 N.Y.S. 2d 887 [1998]).

The test for associational and organizational standing requires a demonstration that, "(1) some or all of the members have standing to sue (2) that the interests advanced in the case are sufficiently related to UFT's organizational purposes to satisfy the court that UFT is an appropriate representative of those interests and (3) that the participation of the individual members is not required to assert a claim or to afford the UFT complete relief"(Mulgrew v. Board of Educ. Of the City School Dist. Of the City of New York, 75 A.D. 3d 412, 906 N.Y.S. 2d 9 [N.Y.A.D. 1st Dept., 2010]).

24 RCNY §7.11[i], titled Department of Health and Mental Hygiene, Hearings and Mail Adjudications, states, "A written decision sustaining or dismissing each charge in the notice of violation shall be promptly rendered by the decision examiner who presided over the hearing, or who conducted the adjudication by mail, or who rendered a default decision...Where a violation is sustained, the hearing officer shall impose a penalty. A copy of the decision, other than a default decision shall be mailed...shall be served forthwith on the respondent or the respondent's counsel..."

48 RCNY §3-57, titled Office of Administrative Trials and Hearings (OATH), Decisions provides, "As soon as possible after the conclusion of the hearing, the hearing officer shall prepare a recommended decision and order...The recommended decision and order shall be filed with the executive director and served on all parties."

Pursuant to CPLR §3211[a][5], an action may be dismissed based on a specific claim that, "the cause of action may not be maintained because of ... collateral estoppel...res judicata, statute of limitations...." Pursuant to CPLR §217[1], A proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding. This abbreviated time frame is said to serve public policy by freeing government operations from the cloud of potential litigation. The statute begins to run from when a final and binding decision is rendered that inflicts injury and may not be prevented or ameliorated by further action (Best Payphones, Inc. v. Department of Information, Technology and Communications of the City of New York, 5 N.Y. 3d 30, 832 N.E. 2d 38, 799 N.Y.S. 2d 182 [2005]). The four month statute of limitations period runs from receipt of the adverse determination (Matter of Rocco v. Kelly, 20 A.D. 3d 364, 799 N.Y.S. 2d 469 [N.Y.A.D. 1st Dept., 2005]; Matter of Yarbough v. Franco, 95 N.Y. 2d 342, 717 N.Y.S. 2d 79, 740 N.E. 2d 224 [2000]). The statute of limitations cannot be circumvented (In re Long Island Power Authority Ratepayer Litigation, 47 A.D.3d 899, 850 N.Y.S.2d 609 [N.Y.A.D. 2nd Dept., 2008]).

Upon review of all the papers submitted this Court finds that respondents' directives seeking to have HOPS dismissals reviewed by a managing attorney, do not have a rational basis and are arbitrary and capricious. Pursuant to 24 RCNY §7.11[l], HOPS are given authority to render their own autonomous decision. OATH procedure as stated in 48 RCNY §3-57 requires that a hearing officer prepare a decision as a "recommendation," to be filed with the executive director. The Mayor's Committee on Consolidation of Administrative Tribunals Report and Recommendations dated June 7, 2011, (Respondents' Reply Memorandum, Appendix, p. 38) refers 24 RCNY §7.11 and states, "This section continues in effect as a rule of OATH." It does not state that 24 RCNY §7.11, or any of its subsections were deemed superseded or replaced, or that exceptions should be made, as indicated for other subsections of Title 24 of the RCNY. Respondents directives are seeking to enforce OATH procedure as stated in 48 RCNY §3-57 and replace 24 RCNY §7.11[i], or re-interpret the intent of the Mayor's Committee on Consolidation of Administrative Tribunals Report and Recommendations.

Petitioner has standing, the UFT represents the interests of its HOPS members and is acting within its capacity as their agent, which does not require individual members to come forward. The concerns involved are within the "zone of interest. Respondents' managing attorney's directives have an immediate impact on HOPS, as they render decisions. Petitioner has established that this action is timely because it has been commenced within four months of Respondents' November 15, 2011 and November 22, 2011, directives.

Accordingly, it is ORDERED, ADJUDGED AND DECLARED, that the petition is granted, and the policy instituted by the respondents requiring HOPS who are assigned to the Health Tribunal at OATH, to submit dismissal decisions and see the Managing Attorney, prior to dismissal of any Notice of Violation in its entirety is irrational arbitrary and capricious, and it is further,

ORDERED, ADJUDGED, AND DECLARED, that respondents directives dated November 15, 2011 and November 22, 2011, requiring HOPS to submit decisions and see the Managing Attorney, prior to dismissal of any Notice of Violation is in violation of 24 RCNY §7.11[i], and respondents shall refrain from further seeking to enforce those directives, and it is further,

ORDERED, ADJUDGED, and DECLARED, that respondents shall take affirmative action to ensure the effects of the November 15, 2011 and November 22, 2011 directives are eliminated, including a written recission of the unlawful procedure with notice to the UFT and all members of the relevant bargaining unit of HOPS, and it is further,

ORDERED and ADJUDGED, that the cross-motion to dismiss the petition pursuant to CPLR §3211[a][3], [5], for lack of standing and as time-barred, is denied.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: September 12, 2012

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

heck if appropriate: ☐ DO NOT POST ☐ REFERENCE