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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS Justice

PART 6

Index Number : 101893/2012
A-1 FIRST CLASS-VIKING MOVING
vs.
NYC OFFICE OF ADMINSTRATIVE
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. ____

MOTION DATE 3/27/12

MOTION SEQ. NO. ____

The following papers, numbered 1 to 21, were read on this motion to/for set aside decision

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition | No(s). 1→16

Answering Affidavits — Exhibits | No(s). 17→21

Replying Affidavits | No(s). ____

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION + Judgment

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 5/30/12

JSC

JOAN B. LOBIS, 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: IAS PART 6

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A-1 FIRST CLASS-VIKING MOVING & STORAGE, INC.,

Petitioner,

Index No. 101893/12

-against-

Decision, Order, and Judgment

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS CONTRACT DISPUTE RESOLUTION BOARD, CITY OF NEW YORK and NYC HUMAN RESOURCE ADMINISTRATION,

Respondents.

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JOAN B. LOBIS, J.S.C.:

Petitioner brings this proceeding under Article 78 of the C.P.L.R., seeking an order annulling, reversing, and setting aside the decision of respondent New York City Office of Administrative Trials and Hearings Contract Dispute Resolution Board ("CDRB"), dated October 29, 2011 ("the CDRB Decision"), on the grounds that the CDRB Decision is not warranted by the facts; is illegal, unjust, void, arbitrary and capricious; is unauthorized and violative of the laws of the state of New York; is not based on substantial evidence; and is an abuse of discretion. Respondents City of New York and New York City Human Resources Administration/Department of Social Services s/h/a NYC Human Resources Administration ("HRA") answer and assert affirmative defenses.

A-1 First Class-Viking Moving & Storage, Inc. ("A-1") is a moving industry employer. On or about June 15, 2009, A-1 entered into a contract with HRA to provide moving services (the "Contract"). Under the terms of the Contract, the wages are governed by the prevailing

wage schedule issued by the New York City Comptroller (the "Comptroller"). On July 1, 2010, the Comptroller issued changes to the prevailing wage schedule for moving industry employers. Most notably, petitioner states that the new prevailing wage schedule[1] required that "casual" employees, who had been earning $12 to $13 per hour under the previous wage schedule, be afforded benefits and increased wages of $30.60 to $38.90 per hour. Roughly 90% of A-1's employees are categorized as "casual" employees.

In light of the new prevailing wage schedule, A-1 requested an increase in its billable rates by letter dated July 7, 2010, addressed to Fern Vasile, Assistant Deputy Commissioner of HRA. By letter dated August 11, 2010, Ms. Vasile responded that HRA, along with the Office of Legal Affairs and the New York City Law Department, had reviewed A-1's request, and that, collectively, they made certain wage adjustments and increases in accordance with the new prevailing wage schedule, but had rejected some of A-1's requests.[2] The August 11, 2010 letter was also copied to five other individuals, including Edward LeMelle, Deputy General Counsel of HRA.

On September 3, 2010, Lawrence Laby, a principal of A-1, met with Mr. LeMelle. According to A-1, it requested the meeting in order to fully explain its position. By letter dated September 10, 2010, Mr. LeMelle reiterated HRA's position in light of the new prevailing wage

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[1] For the purposes of this motion, the "new prevailing wage schedule" refers to the prevailing wage schedule that was effective July 1, 2010.

[2] A-1 requested increases as follows: Industry A Driver: $42.88; Industry A Assistant: $47.86; Industry B Driver: $37.89; Industry B Assistant: $61.15.
HRA adjusted the rates as follows: Industry A Driver: $42.88; Industry A Assistant: $47.86; Industry B Driver: $37.01; Industry B Assistant: $42.59.

schedule and re-emphasized A-1's obligations under the Contract. On October 8, 2010, A-1 submitted a Notice of Dispute to Robert Doar, Commissioner of HRA. On December 7, 2010, Commissioner Doar issued a decision that the Notice of Dispute was time barred under 9 R.C.N.Y. § 4-09(d)(1). On June 17, 2011, A-1 submitted a petition to CDRB, and on October 29, 2011, CDRB issued the CDRB Decision, adopting HRA's position that A-1's petition was time barred.

A-1 now brings this petition challenging the CDRB Decision. Primarily, petitioner argues that CDRB incorrectly found that the 30-day statute of limitations under 9 R.C.N.Y. § 4-09(d)(1) began to run from the date of Ms. Vasile's letter on August 11, 2010. Petitioner contends that Ms. Vasile's August 11, 2010 letter was not a determination as intended by the statute because it lacked a "reasoned explanation," failed to analyze a bona fide dispute between the parties from which petitioner could seek relief, and did not acknowledge the complexity of the implications of the new prevailing wage schedule. Further, petitioner sets forth that CDRB arbitrarily and capriciously called into question the authenticity of an HRA organizational chart offered by A-1 in support of its claim that Ms. Vasile, as Assistant Deputy Commissioner, lacked actual or apparent authority to render a determination on behalf of HRA and that HRA's top ranking officials were unaware of the August 11, 2010 letter. Petitioner argues that Mr. LeMelle's September 10, 2010 letter actually triggered the running of the 30-day statute of limitations because, as Deputy General Counsel, Mr. LeMelle was authorized to render a decision on behalf of HRA, and because that letter resulted from a meeting during which A-1 communicated the complexity of the issues it was experiencing as a result of the new prevailing wage schedule. It further contends that

the September 10, 2010 letter contained a "reasoned explanation," rendering it a determination as intended by the statute. Petitioner also states that CDRB committed an error of law by determining that the "reasoned explanation" requirement set forth in 9 R.C.N.Y. § 4-09(b) is inapplicable to decisions rendered prior to the submission of a Notice of Dispute. Furthermore, petitioner argues that should the court find that Ms. Vasile's August 11, 2010 letter was a determination triggering the 30-day statute of limitations, its claim should nevertheless be permitted because the claim is meritorious and the delay was minimal.

In their response papers, the City of New York and HRA (collectively as the "Answering Respondents") argue that the CDRB Decision, denying A-1's claim as time barred, was rational and was not affected by an error of law. The Answering Respondents state that CDRB acted rationally in finding that Ms. Vasile's August 11, 2010 letter was a final determination triggering the 30-day statute of limitations, and that neither the September 3, 2010 meeting nor the September 10, 2010 letter by Mr. LeMelle tolled A-1's time to file its Notice of Dispute with the Agency Head. They state that CDRB rationally found that A-1 failed to establish that Ms. Vasile lacked authorization to render a decision on behalf of HRA, and that CDRB also rationally found that Ms. Vasile's August 11, 2010 letter placed A-1 on notice of the rates that HRA would pay in light of the new prevailing wage schedule. The Answering Respondents additionally argue that CDRB rationally interpreted that the "reasoned explanation" requirement in 9 R.C.N.Y. § 4-09(b) only applies to the Agency Head's decision and the CDRB's decision, and that this requirement is inapplicable to determinations made prior to the filing of the Notice of Dispute.

Furthermore, the Answering Respondents set forth that respondent CDRB is not a proper or necessary party to this proceeding, and request that the proceeding be dismissed against CDRB.[3] They cite C.P.L.R. § 7804(i) in support of their request, which authorizes a "judicial officer" to elect not to appear in an Article 78 proceeding unless ordered by the Court to do so upon a party's application. They further argue that although CDRB is an administrative body and not a judicial one, and that although section 7804(i) does not strictly apply to it, CDRB should nonetheless be dismissed because the same principles are at issue here.

This court's review of the CDRB Decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." C.P.L.R. § 7803(3); 9 R.C.N.Y. § 4-09(g)(6). An agency determination is arbitrary and capricious if it is without rational basis. In re Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). Where a rational basis exists for the agency action, the court may not substitute its judgment for that of the agency. In re Tockwotten Assocs., LLC. v. N.Y. State Div. of Hous. and Community Renewal, 7 A.D.3d 453, 454 (1st Dep't 2004). Moreover, "an agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable." Smith v. Donovan, 61 A.D.3d 505, 508 (1st Dep't) (citations omitted), lv. denied, 13 N.Y.3d 712 (2009). See also Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009).

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[3] CDRB submits its own verified answer, stating that it is administered by the New York City Office of Administrative Trials and Hearings, and that it determines disputes between suppliers and agencies of the City of New York pursuant to an alternative dispute resolution clause contained in the City's construction and service contracts, and pursuant to 9 R.C.N.Y. § 4-09. CDRB further states that it takes no position in this litigation adverse to either party, and refers the court to its decision.

Under 9 N.Y.C.R. § 4-09(d)(1), a "vendor shall present its dispute in writing ("Notice of Dispute") to the Agency Head within the time specified by the contract or, if no time is specified, within thirty days of receiving written notice of the determination or action that is the subject of the dispute." This language is also replicated under Article 14, Section 4(a) of the Contract. The parties do not dispute that the 30-day statute of limitations applies. The essence of the parties' dispute rests on the date which triggered the running of the statute of limitations. While petitioner contends that the statute of limitations did not start running until September 10, 2010, the date of Mr. LeMelle's letter, the Answering Respondents argue that Ms. Vasile's letter dated August 11, 2010 triggered the statute. For the following reasons, the court finds that the August 11, 2010 letter was HRA's final determination, thus triggering the statute of limitation and rendering A-1's Notice of Dispute, dated October 8, 2010, time barred.

The court finds unpersuasive petitioner's argument that Ms. Vasile lacked apparent or actual authority to render a decision on behalf of HRA. Petitioner contends that Ms. Vasile's title of Assistant Deputy Commissioner is not listed among the top twenty seven (27) positions on HRA's website. The Answering Respondents correctly points out that petitioner's argument is contradictory to the The Escalation Clause of Section 12 of the Contract, which provides that

> [i]n the event that the applicable New York State Labor Law establishing the prevailing wage for services performed under this Contract is increased during the term of this Contract, Contractor may request a contract modification to address such payroll modifications and related contract expenditures. Any requests for such change should be submitted in writing to the Contract Manager and the Assistant Deputy Commissioner for Contract Services, along with any official notification and documentation supporting the modification request.

Petitioner specifically addressed its request to Ms. Vasile. Not only does the Escalation Clause allow Ms. Vasile to make determinations, but petitioner requested that she make such a determination. Additionally, Ms. Vasile's August 11, 2010 letter stated that the request was reviewed by the Office of Legal Affairs and the New York City Law Department, and was copied to five individuals, including Mr. LeMelle. Accordingly, HRA was informed of A-1's request and was aware that Ms. Vasile was rendering a decision on behalf of HRA. Moreover, CDRB did not arbitrarily question A-1's evidence in support of A-1's proposition that Ms. Vasile lacked authority, because it is permitted to weigh evidence, and question the credibility of such evidence, in rendering its decision.

The court also finds unpersuasive petitioner's argument that the August 11, 2010 letter was not the predicate to the Notice of Dispute because it was not a final rejection of A-1's request. The August 11, 2010 letter placed petitioner on notice that a dispute had arisen by setting forth the rates that HRA would pay in light of the new prevailing wage schedule and that the decision was intended to be final. "Absent some clear indication that an agency has misled a petitioner into foregoing the right to commence a timely proceeding, a mere inquiry or even a request for reconsideration outside the formal administrative review process will not render a prior determination nonfinal." In re Cauldwest Realty Corp. v. City of N.Y., 160 A.D.2d 489, 491 (1st Dep't 1990) (internal citations omitted) (citations omitted).

The court further finds unpersuasive petitioner's argument that CDRB erroneously found that the "reasoned explanation" provision in 9 R.C.N.Y. § 4-09(b) was inapplicable to

decisions rendered prior to the filing of a Notice of Dispute. Petitioner argues that, in contrast to the August 11, 2010 letter, the September 10, 2010 letter did give an explanation as required by 9 R.C.N.Y. § 4-09(b), because the latter referenced and analyzed the applicable changes in the wage schedule and addressed the relevant contract provision. The statute states that

> [a]ll determinations required by this section shall be clearly stated, with a reasoned explanation for the determination based on the information and evidence presented to the party making the determination. Failure to make such determination within the time required by this section shall be deemed a non-determination without prejudice that will allow application tot he next level.

9 R.C.N.Y. § 4-09(b). But, this provision comes into operation only after a Notice of Dispute is filed and applies to determinations made pursuant to the statute, such as that of Commissioner Doar or the CDRB. The only requirement set forth by section 4-09 that is applicable to a determination that is the subject the dispute, such as the August 11, 2010 letter, is that it must be written. Moreover, the CDRB is given deference to its interpretation of the statute governing its area of expertise. See In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009).

The CDRB Decision, finding that petitioner's Notice of Dispute is time barred, was not arbitrary, capricious, nor affected by fraud or error of law. The court need not consider the parties' remaining requests. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: May 30, 2012

ENTER:

JOAN B. LOBIS