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As a Special Proceeding Commenced
Pursuant TO Article 78 of the Civil
Practice Law and Rules

ROBERT M. KANE, ESQ.,

Petitioner,

Index No. 24115/88

-against-

MALCOLM MacDONALD, individually and as
Chairman of the Office of Collective
Bargaining of the City of Now York; THE
BOARD OF COLLECTIVE BARGAINING of the
City of New York; ABRAHAM BIDEPUMAN, in-
dividually and as Commissioner of the
Department of Housing Preservation and
Development of the City of New York;
THE DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT of the City of New
York; THE SOCIAL SERVICE EMPLOYEES
UNION LOCAL 371 OF DISTRICT COUNCIL 37;
THE CIVIL SERVICE BAR ASSOCIATION,
TEAMSTER LOCAL 237,

Respondents.

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BEVERLY S. COHEN, J:

This petition is brought pursuant to CPLR Article 78 to
annul the dismissal of petitioner's Improper Labor Practice
petition by respondent Board of Collective Bargaining ("Board").

Petitioner, appearing pro so, is an attorney employed by
respondent Department of Housing Preservation and Development
("HPD"). Initially, petitioner held the civil service title of
Attorney Trainee, but in 1985 he was transferred to the position

of Community Coordinator. As an Attorney Trainee petitioner was a member of the collective bargaining unit represented by respondent Civil Service Bar Association, Teamsters Local 237 ("CSBA"). As a Community Coordinator petitioner in now represented by respondent Social Service Employees Union Local 371 of District Council 37 ("SSEV").

In the Verified improper Labor Practice petition brought before the Board, petitioner objected to HPD's Practice of placing some of its attorneys, and petitioner in particular, on lower paying Social Service lines, such as the title of Community Coordinator, rather than on the higher paying attorney lines represented by CBSA. Petitioner claimed that this practice fragments CSBA membership because it allows potential CSBA members to be represented by SSEV. He argued that this constituted an unfair labor practice under the New York City Collective Bargaining Law ("NYCCBL") §1173-4.2 (now §12-306a(2)) because it "interferes with the formation of the attorney's collective bargaining unit and shows bad faith toward and flagrant disregard of the current collective bargaining agreement with CSBA".

Petitioner sought recompense in the sum of \$5000.00, representing the amount by which he had allegedly been underpaid as an attorney in a social service title, and sought to be placed back on the "attorney line".

The Board issued a decision on November 29, 1988. As a

threshold issue the Board found that petitioner's claim was partially time-barred pursuant to the four month statute of limitations for the filing of improper labor practice claims contained in 17.4 of the Revised Consolidated Rules of the Office of Collective Bargaining. The Board agreed that the acts of which petitioner complained could constitute a continuing violation of the NYCCBL, because a portion of his claim fall within the four month period immediately preceding the filing of the petition. Therefore, petitioner's claim would be allowed, but would be limited as to damages awarded, if any, to a four month period, rather than for the entire period in which petitioner hold the title of Community Coordinator. On consideration of the merits of the petition, the Board found that petitioner had failed to state a cause of action against HPD, CSBA or SSEV (both named by petitioner an "necessary parties"), and dismissed the petition.

In the instant proceeding petitioner argues that the Board's decision was arbitrary and capricious. and tainted by error of law in that the Board misconstrued petitioner's arguments and failed to address crucial issues. Petitioner stresses that he was not challenging the work assignment he received (i.e. he does not claim that he was required to perform out-of-title work) but rather that the work assignment was correct (i.e. attorney's duties) but that the "job title, union arbitration and salary were wrong, thereby adversely impacting on the CSBA and

petitioner in a manner prohibited by §12-306 a(2) of the NYCCBL". Specifically, petitioner challenges the placement of attorneys on lines belonging to unions other than that of the "attorney line" (CSBA). Petitioner claims that the Board erred in failing to address this issue, and in failing to assess "the impact on the CSBA of the use of competing job titles belonging to other unions on its ability to attract and retain its membership", an assessment petitioner claims is crucial to determining whether HPD's practice violates NYCCBL §12-306a(2).

Petitioner also objects to the Board's application of the four month statute of limitations on the grounds that the limitations period as applied is "unduly restrictive" and violates public policy.

Pursuant to NYCCBL §12-309 (4) the Board is directed to "prevent and remedy improper public employer and public employee organization practices...". To accomplish this end the Board is empowered to "establish procedures, make final determinations, and issue appropriate remedial orders". §12-306(a)(2), the section on which petitioner relies, provides that it shall be an improper practice for a public employer or its agents to "dominate or interfere with the formation or administration of any public employee organizations. §7.4 of the Office of Collective Bargaining Rules provides a four month statute of limitations for the filing of a petition alleging a violation of §12-306.

The scope of the court's review of an administrative agency's interpretation of the regulations it is charged with implementing necessarily limited. The court may only overturn such a determination if it is affected by an error of law, is arbitrary and capricious or an abuse of discretion. Deference must be granted to the decisions of an agency concerning the areas in which it is presumed to have developed an expertise. Matter of Incorporated Village of Lynbrook v New York State Public Employment Relations Board, 48 NY2d 398, 404.

A review of the Board's lengthy determination fails to reveal any error of law or abuse of discretion sufficient to warrant this court's interference.

The Board's application of the four month statute of limitations, to recognize, yet limit, petitioner's claims, was neither unreasonable nor "unduly restrictive", and does not violate public policy. It is irrelevant that other methods of applying the statute of limitations might have been utilized, as long as the Board's application was reasonable. Therefore petitioner's argument that some sort of continuous treatment doctrine, such as applies to malpractice cases, should apply is without merit.

Nor does it appear that the Board failed to appreciate or adequately address petitioner's arguments, although it is apparent that the Board cast its decision broadly so as to

encompass what it considered petitioner's broad and conclusory allegations.

The Board ruled that HPD has "the clear right to create job titles and to classify employees within those titles". The Board found that the classification or assignment of employees to a specific civil service title is not an improper practice, "[i]n the absence of any allegation of fact establishing improper motive". This is consistent with NYCCBL §12-307(b) which states that the public employer is entitled to determine the content of its job classifications, and is consistent with the Board's policy as set forth in previous decisions of the Board. In so deciding the Board addressed petitioner's claim that the placing of certain employees, here, attorneys, in certain job titles was an improper practice. Further, to the extent that petitioner was objecting to the placement of certain employees, such as attorneys, into certain collective bargaining units, the Board noted that an individual has no right to inclusion in any particular bargaining unit (such as one composed entirely of attorneys), but only the right to inclusion in an appropriate unit as determined by the Board of Certification. NYCCBL §12-309b (1).

The Board was not required to assess the impact of the alleged improper practice on CSBA in order to reach its determination, where petitioner provided only bare conclusions

and surmise as to the alleged negative effect upon CSBA. This is especially true where it is clear that HPD had the right to create the two divergent job lines, and where no improper motive was shown in HPD's actions.

Petitioner also objects to the standards the Board applied in reaching its decision, such as whether there was pleading and proof of an improper motive, or of discrimination or an anti-union animus in HFD's actions. Use of such standards, although not specified in the broad language of the NYCCBL, constitutes a reasonable exercise of the Board's power under §12-309 to address and resolve questions of improper labor practices by public employees.

Lastly it is noted that the Board did not act arbitrarily in dismissing the petition in light of its earlier determination that the petition was not, on its face, so untimely or insufficient as to warrant summary dismissal pursuant to §7.4 of The Office of Collective Bargaining Rules.

Under §7.4 the Executive Secretary is routinely required to make this threshold determination as to a petition's validity, and this preliminary review is not meant to be a bar to the assertion of defenses by the respondent, or to further review by the Board.

Because the petitioner has failed to show that the determination of the Board was either arbitrary or irrational, or

infected by error of law, the instant petition must be dismissed.

Accordingly, the petition is dismissed.

This decision constitutes the judgment of the court.

Dated: June 27, 1989

J. S. C.