

SUPREME COURT : NEW YORK COUNTY
IAS PART 52

----- x
In the Matter of the Application of

MEREDITH P. BROWN,

Petitioner,

Index No. 42146/910

-against-

THE NEW YORK CITY OFFICE OF
COLLECTIVE BARGAINING,

Respondent.

----- x

FRANCIS N. PECORA, J.:

This is an Article 78 proceeding by a former provisional Program Officer with the New York City Department for the Aging, who seeks to vacate the determination of the respondent's Board of Collective Bargaining (No. B-27-90), rendered on May 24, 1990, in its finding that the Social Service Employees Union, Local 371, of which petitioner is a member, had not breached a duty of fair representation to her.

Respondent moves, pursuant to CPLR 7804 (f), to dismiss the proceeding as improperly commenced as required by CPLR 304 and time barred as beyond the period of limitations provided in CPLR 213.

Petitioner was employed by the New York City Department for the Aging from August, 1988 until January 20, 1989, when she was terminated as a result of a performance evaluation which rated that performance as "unsatisfactory."

Petitioner's union, Social Service Employees' Union, Local 371, submitted a Step I grievance on February 15, 1989, a Step II grievance upon denial of that application on March 14, 1989 and a final Step III grievance on April 4, 1989 when that also failed. On May 2, 1989, the Step III hearing officer found the petitioner to be without standing as a provisional employee to appeal her termination.

Petitioner met with the union's counsel subsequent to the decision and he informed her that the issue of standing, underlying the final denial of her grievance, was sub judice in four cases before the Board of Collective Bargaining and a decision on further viability of her claim of violation of the evaluation procedure which led to her termination would be made on determination of those matters.

The union kept petitioner informed of developments and in October, 1989, as a consequence of review of the outcome of the pending cases before the Board, as indicated above, the union decided that petitioner's case was not prospectively successful and informed her of that decision not to pursue the appeal effort. After weeks of communications exchanged between petitioner and the union, petitioner filed a pro se improper practice petition against it with respondent on February 5, 1990, charging that the union had breached its duty of fair representation in refusing to proceed, since the determinations made by the Board in the pending cases were supportive of petitioner's right to contest her performance evaluation.

The union appeared and answered, asserting that it acted in good faith and proceeded on the basis of its attorney's evaluation of the situation.

The Board found on the basis of the evidence from both sides and its own view of the cases that were sub judice before it at the time the decision not to proceed was made, that those cases were distinguishable from petitioner's and no bad faith or arbitrary conduct on the union's part was perceptible.

By decision dated May 24, 1990, the Board dismissed petitioner's improper practice petition.

Petitioner was notified of the determination by certified mail, the return receipt indicating delivery on May 26, 1990.

Article 14 of the Civil Service Law provides under section 213 (a) that a period of thirty (30) days is the time limitation within which an Article 78 proceeding to review a final determination of the Board may be commenced and petitioner's affidavit of the process server dated June 25, 1990, showing service of a petition and affirmation on respondent on that date would be timely in that regard.

The showing of respondent on this motion indicates, however, that the notice of petition, containing the return date, was not served on June 25, 1990 as required by law (cf. CPLR 7804 [c]; CPLR 304; CPLR 403 [a]).

Petitioner's contentions that consideration should be extended in view of her pro se status to overlook the defect as de minimus, or to consider it waived in view of the venue change are unavailing in the face of the jurisdictional failure by improper commencement of the proceeding within the permissible period (Davis v Anderson, 51 AD2d 528, lv to app denied 139 NY2d 707).

In addition, even if petitioner had timely commenced this proceeding, petitioner has failed to present any valid reason to vacate the respondent's determination.

Accordingly, petitioner's motion is denied.

The respondent's motion to dismiss the petition is granted.

The foregoing constitutes the decision and order of the court.

Dated: November 1, 1991

J. S. C.