SUPREME COURT: NEW YORK COUNTY
IAS PART 52

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In the Matter of the Arbitration of Index No. 20861/92
Certain Controversies between

GERALD NELSON,

Petitioner,

- against -

BOARD OF COLLECTIVE BARGAINING
CITY OF NEW YORK DEPARTMENT OF
SANITATION,

Respondent.

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LEWIS R. FRIEDMAN, J.:

Petitioner seeks to vacate an order and decision of the Board of Collective Bargaining ("Board") dated April 30, 1991. (It is clear that the decision was rendered in April 1992). Respondent Board moves to dismiss on the grounds that this proceeding was not timely commenced. The Department of sanitation joins that motion.

The jurisdictional facts are not in dispute. Petitioner a former Department of Sanitation employee brought in unfair labor practice complaint to the Board against the Department of Sanitation. The Board has authority to hear those complaints pursuant to Civil Service Law §212 at the Now York City Collective Bargaining Law, Admin Code §12-301, at. seq. An evidentiary hearing was held and post-trial memoranda were filed. In the decision at issue (B-16-92), the Board found that the conduct at issue did not constitute an unfair labor practice. The decision was mailed to petitioner by certified mail, return

receipt requested. The return card shows petitioner's receipt of the decision on May 7, 1992. This proceeding was commenced, by service (CPLR 2211), on August 4, 1992, more than 3 months later.

Although the pro as petitioner to the court refers to CPLR 7511, the court will construe this as a proceeding under Article 78. Clearly there was no arbitration here. Petitioner himself describes the proceeding before the Board and does not claim to have consented to arbitration. However, decisions of the Board are subject to court Article 78 review pursuant to Civil Service Law §12-308(a)(1). Thus, the papers are properly treated as an Article 78 petition, CPLR 103(c).

However, the law is clear that the proceeding is untimely. The law that provides for court review limits it to proceedings commenced "within 30 days after service by registered or certified mail of a copy of "(the order to be reviewed) upon such party." That provision has routinely been upheld in the courts as a valid statute of limitations. See, e.g. Uniformed Firefighters Assn. v New York City of Office of Collective Bargaining, 163 AD2d 251, 252; Matter of Davis v Anderson, 51 AD2d 528. Clearly the specific 30 day statute, rather than general, 4 months for an Article 78 proceeding applies. See CPLR 217.

In short, this proceeding was brought too late.
The proceeding is dismissed.
This shall be the decision and order of the court.

Dated: September 11, 1992.

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART II

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GERALD NELSON,

Petitioner-Appellant,

- against -

Index No.
20861/92
SEQ. No. 003

BOARD OF COLLECTIVE BARGAINING,
CITY OF NEW YORK DEPARTMENT OF
SANITATION,

Respondent-Respondent.

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LEWIS R. FRIEDMAN, Justice

Petitioner seeks reargument, renewal and oral argument on the record to review a decision of this court date September 7, 1993 which denied petitioner leave to file a late notice of claim.

The court need not repeat at length the extended history of this litigation by which petitioner has sought to review his discharge. This court denied Article 78 review; petitioner has appealed. The court denied leave to file a late notice of claim, petitioner has appealed.

Clearly the papers here present no new facts not available to petitioner on the prior motion, nor do they show matters which have been Overlooked. Accordingly argument and renewal are both unavailable (Foley v Roche, 68 AD2d 558, 568).

Petitioner argues that his "constitutional rights" were violated because this court refused to have a court reporter present for oral argument on the original motion. This court is not aware that any rule, statute or constitution requires recording argument of a motion made on papers (outside the context of a trial) where no evidence is being, taken. Petitioner resented at extreme length in his papers the reason that he believed warranted this court to exercise its discretion to permit a late notice of claim. Nothing said at argument is a part of

the record on appeal (cf CPLR 2219[a]; 5017 [b]) nor was it relied on. Oral argument is not for offering any facts; it is to explain a party's explanation of its position on the facts in the record. Accordingly there is no reason to burden the system with needless records of argument, absent some reason which the court in its discretion finds relevant.

The motion to reargue and to renew is denied in all respects.

This shall constitute the decision and order of the court.

Dated: November 3, 1993

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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GERALD NELSON,

Petitioner-Appellant

- against -

Index NO.
2086/92
SEQ. NO. 002

BOARD OF COLLECTIVE BARGAINING
CITY OF NEW YORK DEPARTMENT OF
SANITATION,

Respondent-Respondent

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LEWIS R. FRIEDMAN, Justice

Petitioner seeks leave to file a late notice of claim in this case.

Previously petitioner, Department of Sanitation employee ("DOS") brought an article 78 proceeding challenging the April 30, 1992 decision of the Board of Collective Bargaining ("BCB") which dismissed his claim of retaliation for union activity. This court dismissed the petition as an untimely effort to review the determination of the BCB. An appeal is now pending before the Appellate Division.

In this application Petitioner alleges that he has a cause of action respondents BCB and DOS for, "fraud, wrongful discharge, abusive process, intentional infliction of emotional distress, damage to reputation, libel, slander, embarrassment in the community and in his job and violation of 42 USCAC 1983. The Respondents contend that the application has no merit and, in any event, is untimely.

Petitioner's papers, including his voluminous, prolix reply give only some clues the theory of his propose action. In any event the motion is denied.

The moving papers suggest that a portion of the alleged claim arises from matters that occurred during the hearings before BCB. Clearly, since the last hearing date was February 18, 1992 and this motion was made in August 1993, any claim under the theory is untimely (GML § 50-e[5]). The moving papers also suggest that DOS acted improperly in

terminating petitioner. Since the termination was on January 29, 1991 clearly the instant motion is too late (GML § 50-e[5]).

The claim against BCB, allegedly arising from its decision may also be time barred, under the one year and 90 day rule. The decision is dated, April 30, 1993 but was only mailed May 5. The Order to Show Cause here was signed August 5, 1993, (one year and 92 days later). Petitioner argues that since he did not receive the decision until May 7, 1992 his motion is timely. It is irrelevant for the instant motion against BCB should be denied on the merits under General Municipal Law § 50-e.

There is a valid excuse offered for the delay in making the motion. Petitioner certainly knew of the basis for his claims when all the papers were filed before this court, in September 1992. He claims that he was mislead by BCB and that until January 15, 1993 he did not know of the applicable statute of limitations. Thus, even by his own admission the motion was made more than 7 months after he knew his rights. A brief look at the proposed notice of claim shows that the proposed action is nothing more then yet another effort to review petitioner's discharge and the BCB decision. The courts have uniformly held that Article 78, with its short statute of limitations is the exclusive remedy. Insofar as the notice is, at best, on the last day to make it, there is no reason to believe that the Comptroller had any notice of the allegations or timely opportunity to investigate. The ninety day rule for notices of claim should not be extended absent good cause. There is none here.

The motion is denied.

This shall constitute the decision and order of the court.

Dated: September 7, 1993

J.S.C.