

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Helen E. Freedman
Justice

INDEX NO. 1084791/98

Social Service Employees Union, Local 371,

Petitioner,

v.

New York City Board of Collective
Bargaining and New York City Department
of Health

Respondent.

Cross-Motion:[] Yes [X] No

Petition by Social Service Employees Union, Local 371 (the "Union" or "Petitioner") for an order vacating the Decision and Order dated April 16, 1998 (the "Decision") of respondent New York City Board of Collective Bargaining (the "BCB") which dismissed the Union's Improper Practice Petition Docket No. BCB-1477-02 (the "IPP") as untimely, is decided as follows:

The Union filed its IPP on March 17, 1992, claiming that DOH violated the New York City Collective Bargaining Law by replacing certain Union members with members of the International Brotherhood of Teamsters. The IPP did not identify the aggrieved Union members (as is now required) or specify the dates by which the replacement occurred. By letter dated March 19, 1992, the BCB acknowledged receipt of the IPP, and stated among other things that the IPP was "not, on its face, so untimely ... as to warrant summary dismissal under [BCB rules]". The DOH filed its answer on May 5, 1992, the answer raised various affirmative defenses, including untimeliness, inasmuch "no position ... that was filled by a member of [the Union] has been replaced by members of a different union within the four months preceding filing of the [IPP]". In its reply, the Union denied the allegations of untimeliness but did not provide any rebuttal evidence of timeliness.

The BCB took no action on the petition for more than three years, until the Union's counsel wrote to the BCB in September 1995, requesting a conference and hearing. The original Trial Examiner overseeing the case left the employ of the agency in December 1995, and the case was reassigned. The matter of timeliness would be a subject at the hearing. Thereafter numerous hearing dates were scheduled but adjourned. Petitioner then requested the assistance of the Trial Examiner in obtaining subpoenaed documents that would facilitate the presentation of its case, and the Trial Examiner sought

to afford assistance. In February 1998, the IPP was reassigned to a third Trial Examiner, who by letter dated February 19 informed the parties that he was "evaluating whether it is necessary to have a hearing in this matter." The Trial Examiner did not say anything about revisiting the issue of timeliness, nor did he request information on the subject. On April 16, 1998, the seven-member BCB issued a Decision dismissing the IPP as untimely without holding any hearing. The BCB specifically found that the Union presented no evidence to rebut the DOH's defense of untimeliness, stating:

In the absence of any evidence or argument that the members of [the Union] were being discriminated against, interfered with, restrained or coerced, or that DOH refused to bargain collectively in good faith, within four months of the filing of the petition herein, we must dismiss the petition as time-barred pursuant to RCNY § 1-07(d).

This Article 78 proceeding ensued.

Petitioner contends that "under the circumstances", the Decision was arbitrary and capricious, and violated Petitioner's right to due process of law. In particular, the Union objects to the BCB's dismissal of the IPP, after a preliminary determination that the petition was not untimely on its face and a six-year delay in the proceedings, without affording the Union an opportunity to be heard.

The Court's inquiry is limited to determining whether respondents acted arbitrarily or capriciously in unilaterally reversing its decision concerning timeliness. Levitt v. BCB, 79 NY2d 120 (1992). The BCB has conceded in its papers and at oral argument that the agency mismanaged this case and does not attempt to justify either its prolonged inactivity or its lack of communication. BCB rules do provide that, even if the agency has initially determined that a petition is not untimely on its face, "such determination shall not constitute a bar to the assertion by respondent of defenses or challenges to the petition based upon the allegations of untimeliness or insufficiency and supported by probative evidence available to the respondent." 61 RCNY § 1-07(d). However, that rule does not give the agency unfettered discretion to dismiss the matter as untimely, after having made a preliminary determination that on its face it was not so untimely, and after scheduling hearings, delaying the process for six years, and failing to notify petitioner that it was reconsidering the issue of untimeliness. Such action is fundamentally unfair and violates due process.

Accordingly, the petition is granted to the extent that the matter is remanded for a preliminary hearing on notice to all parties concerning the timeliness of the IPP, with the burden of demonstrating timeliness on the petitioner.

This is the order and judgment of the Court.

Dated: 4/5/99

H.E. Freedman

