SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK
PART 57

Index No. 404122/99

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CITY OF NEW YORK, FIRE DEPARTMENT OF THE CITY OF NEW YORK,

Petitioners,

For an Order Pursuant to Articles 75 and 78 of the New York Civil Practice Law and Rules

-against-

DECISION/ORDER

STEVEN C. DeCOSTA, as chair of the Board of Collective Bargaining of the City of New York, the BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK, DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCALS 2507 and 3621,

Respondents.

In this Article 78 proceeding, petitioners, The City of New York and Fire Department of the City of New York, seek to annul a decision of respondent Board of Collective Bargaining ("BCB") which granted an improper practice petition filed by District Council 37. Respondents have not yet answered the petition, and "cross-move" to dismiss the petition on the ground that it is barred by the statute of limitations.

It is not disputed that a party aggrieved by an order of the BCB must seek review of the order by filing a petition under CPLR Article 78 “within thirty days after service by registered or certified mail of a copy of such order upon such party.” (Administrative Code of City of NY § 12-308.) It is also undisputed that a copy of order of the BCB was served on petitioners by certified mail on September 3, 1999 and received by them on September 7, 1999; that petitioners subsequently received a copy of the order on

September 13, 1999; and that the latter copy differed from the original copy in that the middle initial of the name of one of the dissenters was different on the two copies.

Petitioners contend that the order of the BCB was "reissued," and that the time to commence this Article 78 proceeding ran from their receipt on September 13 of the reissued order. Respondents deny that the order was reissued. It is agreed that this proceeding was untimely if the time to commence the proceeding ran from service of the original copy.

There is no evidence on this record that the second copy was re-served upon petitioners by certified mail. The mere facts that petitioners received a second copy of the order (by unspecified means), and that the middle initial of one of the dissenters was different on the two copies, do not show that the order was reissued.

However, it is well settled that the statute of limitations "does not commence to run where the agency has created the impression that the determination, albeit issued, was intended to be nonconclusive." (Matter of Edmead v. McGuire, 67 NY2d 714, 716 [1986].) Petitioners submit the affidavit of Steven Latino, Assistant General Counsel in the Office of Labor Relations of the City of New York ("OLR"), in which he attests that OLR served as a conduit between BCB and the dissenting members of the Board; that it transmitted "faxed copies" of the signed dissents to facilitate BCB's issuance of decisions; that it also transmitted signed originals of the dissenting opinions; and that it was the Office of Collective Bargaining's ("OCB's") procedure to wait for the signed originals of the dissenting opinions before issuing final BCB decisions. Mr. Latino further attests that at the time he received the first copy of the order in question, he had not yet forwarded the originals of the dissent to BCB, and that he therefore telephoned Wendy Patitucci, counsel for OCB, to inform her of this problem, and was informed by

her that the BCB order “would be reissued once the original and finalized Dissent was received by OLR, and forwarded to BCB." In reply, Ms. Patitucci does not deny that OLR acted as the conduit to BCB for dissenting opinions, but she denies that it was the "practice" or "procedure" of BCB to wait until it received the originals of the dissents from OLR before issuing its decisions. Rather, she claims that "OCB deals with these issues on a case-by-case basis," and that there was no need to wait for the originals in the instant case because there was no dispute about the authenticity of the faxed signatures. Ms. Patitucci further denies any recollection of the conversation with Mr. Latino about reissuance of the decision, but states that she is "certain that [she] would not have said that the decision would be reissued upon receipt of the same dissent with original signatures," as there was no reason to reissue the decision.

"[W] hen an administrative body itself creates ambiguity and uncertainty" as to whether a final and binding determination has been made, " `the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court.' " (Matter of Mundy v. Nassau County Civ. Serv. Commn., 44 NY2d 352, 358 [1978] (quoting Matter of Castaways Motel v. Schuyler, 24 NY2d 120, 126-127.)

Here, while respondents dispute petitioners' contention as to the procedures for issuing decisions, they do not point to any written procedures governing the issuance of decisions. Respondents also acknowledge that the procedures were decided on a case by case basis, and point to at least one case in which BCB agreed, as a result of a telephone conversation with OLR (Mr. Latino), to reissue a decision. Under these circumstances, there was ambiguity created by the agency itself as to whether the BCB decision at issue was a final determination. Moreover, as respondents' counsel has no actual recollection that she did not represent to petitioners that the decision would be reissued, there was an

ambiguity as to the procedures that would be followed in issuing the decision at issue, which should be resolved against respondents.

Respondents' motion to dismiss the petition is accordingly denied. Respondents may serve an answer to the petition within twenty days after service of a copy of this order with notice of entry. This proceeding shall appear on the calendar of Part 57 of this Court on August 17, 2000 at 9:30 a.m. All papers shall be tiled with the Clerk of the Part at least two days before the return date.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 20, 2000