SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 112139/2008
PLUMBERS LOCAL UNION
vs.
GOLD, MARLENE A.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

n this motion to/for

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Petition is decided
as stated during oral argument
and order
Submit judgment to Chambers Room 351
on notice.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/2/10

EMILY JANE GOODMAN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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In the Matter of the Application of

PLUMBERS LOCAL UNION NO. 1, U.A., AFL-CIO,

Petitioner,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

Index No. 112139/08

-against-

MARLENE A. GOLD, in her capacity as CHAIR of the NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING/BOARD OF COLLECTIVE BARGAINING;

JOEL KLEIN, in his capacity as CHANCELLOR, CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK;

MICHAEL R. BLOOMBERG, in his capacity as MAYOR of THE CITY OF NEW YORK; and

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

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**Emily Jane Goodman, J.S.C.:**

Both the Plumbers Local Union No. 1, U.A., AFL-CIO, and in the related proceeding, the New York City Council of Carpenters, UBCJA (the Unions) bring Article 78 proceedings[1] for orders vacating the decisions of respondent New York City Office of Collective Bargaining/Board of Collective Bargaining (the Board),

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[1]As agreed to by the parties, due to the similarity of the matters raised, and in the relief sought, this Decision and Order is binding in this proceeding, and in a separate proceeding, entitled Matter of the Application of NEW YORK CITY COUNCIL OF CARPENTERS, UBCJA v MARLENE A. GOLD, Index No. 114353/09.

in which the Board refused to entertain the Unions' Request for Arbitration (RFA), by determining that it did not have jurisdiction over the parties against which the grievances were brought. Respondents move to dismiss the petition.

The Unions are both unincorporated membership organizations and public employee organizations within the meaning of the Civil Service Law §201 (5) and the New York City Collective Bargaining Law (NYCCBL), which is contained in the New York Administrative Code § 12-301, *et seq.* (the NYCCBL). The powers of the Board include the power to gauge the arbitrability of grievances brought before it (NYCCBL § 12-309 [a] [3]). The Unions complain that the Board's decision was effected by error of law, evinced an abuse of discretion, as well as a failure to perform a duty enjoined on it by law, all in violation of Article 78 of the Civil Practice Law and Rules.

The Unions maintain that the Board erred in finding that it lacked jurisdiction. Contrary to the findings of the Board, the Unions (and until this proceeding, the respondent City) maintain that the Department of Education (the DOE), and not the Board of Education (the BOE), is the employer of the Union members seeking arbitration, although the parties agree that prior to 2002, the BOE was the employer. The Unions admit that the BOE was not, and presumably is not, subject to collective bargaining, because it is exempt from the definition of "municipal agencies" (*see* NYCCBL

§ 12-303 [d] and [g] [2]). However, as the result of (1) the 2002 changes to the Education Law (which stripped the BOE of most of its power, transferring it to the Chancellor, who became a Mayoral appointee) and, (2) the 2003 creation of the DOE, by the BOE, through its By-Laws, the Unions argue that the DOE became a "mayoral agency" subject to NYCCBL and to arbitration, under Mayoral Executive Order 83 (EO 83),[2] which provides for grievance procedures and arbitration, for employees of mayoral agencies. The Unions' ingenious argument is a product of the BOE's creation of the nebulous entity, the DOE, which has created confusion not only in the case law, but with the DOE and the City themselves-who until this Article 78 proceeding-believed and treated the DOE as the employer of the workers at issue.

**I. Background**

The Unions allege that they represent employees of the DOE in certain job titles. The grievances brought herein by both Unions are essentially the same.

Under Labor Law § 220 (8-d), regarding the negotiation of wages and benefits of union employees, the Unions and the City entered into what are known as "Consent Determinations."[3] The

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[2]EO 83 was issued in 1973, and amended in 1985. The amendments do not affect the issues herein.

[3]The Unions claim that the Consent Determinations are "Collective Bargaining Agreements, because a collective bargaining agreement is referred to on the'General Release and Waiver portion of the Consent Determination in question."

New York City Office of Labor Relations (the OLR) negotiated for the applicable City agencies, including, according to the Unions, DOE. The Consent Determinations in issue (Consent Determinations) cover the period July 2000 through June 2005, but the parties agree that the Consent Determinations remain in full effect until such time as new Consent Determinations are signed. The Unions point out that, according to the Consent Determinations, the members of each Union are paid through the City's operating budget.

The Consent Determinations do not contain any grievance procedures. As such, the Unions claim that the grievance procedures set down in EO 83, which include arbitration, apply to the Unions' grievances.

In 2005, DOE and City, through the OLR, sought to establish a weekday night shift for various job titles represented by each Union. Addressing the issue, the Unions negotiated with DOE, and the OLR, as well as with the Office of Management and Budget, on behalf of the City. The negotiations resulted in the execution of "Night Shift Agreements" for each Union. The only parties to the Night Shift Agreements are the Unions and the DOE. It is noteworthy that the Night Shift Agreements also do not contain

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Petition, Ex. B to Ex. B. However, the language of that paragraph appears to be speaking of a separate agreement already in existence. The issue is not clear.

grievance procedures.

An issue arose under the Night Shift Agreements. Apparently, the Night Shift Agreements required that there be as many supervisors in attendance each night as would be in attendance during any working day. However, no supervisors at all were assigned to the night shifts, even though the DOE had specifically promised that the positions would be assigned.

The Unions sought to grieve the alleged breach of the Night Shift Agreements with the DOE, using the five-step grievance procedure contained in EO 83. The DOE ignored all of the Unions' attempts to commence the initial steps called for under EO 83. The fourth grievance step was made to the Commissioner of the OLR, who also failed to respond. At no time did the DOE or the OLR claim that the grievance procedures contained in EO 83 did not apply; the issue was simply ignored.

The Unions filed Requests for Arbitration and Waiver (RFA) with the Board against the DOE in September 2007, pursuant to EO 83. The City responded with Petitions Challenging Arbitrability (PCA), claiming, among other things, that, due to recent legislative changes (described below), the DOE was not an agency of the City under the NYCCBL, nor had it elected to be covered thereby, voiding the propriety of the arbitration. The Unions faulted this argument, claiming that the DOE was still their proper adversary, despite the legislative changes.

The RFA and PCA were heard by the Board in July 2008. Without reaching the merits of the grievances, the Board held that it lacked jurisdiction over the DOE, and so, denied the RFA. In reaching its determination, the Board found that (1) that the BOE, rather than the DOE, was the employer of the Unions' members, despite the fact that both sides to the arbitrations were in agreement that DOE was the rightful employer (although the City has now changed its position), (2) that the DOE was not a municipal agency bound by the NYCCBL, nor was it subject to the NYCCBL by election or state law; and (3) that the Board had no jurisdiction.

In the present proceeding, the Unions argue that the Board erred in concluding that the BOE is the employer of the Unions' members, and, in concluding that the DOE-who is the employer-is not a mayoral agency, subject to NYCCBL and to arbitration, under Executive Order 83. Thus, the Unions maintain that Board's failure to assert jurisdiction over DOE, and respondents' failure recognize DOE as the employer of the Unions' members and to arbitrate, was (a) a failure to perform a duty enjoined upon it by law, in violation of CPLR 7803 (1); (b) an error of law, in violation of CPLR 7803 (3); and (c) an abuse of discretion, in violation of CPLR 7803 (3).

## II. Statutory Provisions

### A. Education Law

In 2002, the BOE, which used to be the lead agency responsible for the administration of the City School District of the City of New York (District), underwent a sea-change. Prior to 2002, the District was governed by BOE, whose powers included appointment of the Chancellor. However, in 2002, the Legislature amended section 2554 of the Education Law (EL) to eliminate BOE from those state-wide boards of educations having the powers previously within the BOE's provenance. The result was that the Chancellor became a mayoral designee, rather than a person appointed by the BOE.

The 2002 amendments to EL § 2590-g emphasize that, henceforth, BOE:

> shall advise the chancellor on matters of policy affecting the welfare of the city school district and its pupils. Except as otherwise provided by law, the [BOE] shall exercise no executive power and perform no executive or administrative functions.

The statute proceeds to delineate the vastly restricted duties retained by the BOE.

Under EL § 2590-h, the change in the law sufficed "to provide for greater mayoral control of the schools," which effected "a wholesale transfer of power from the [BOE] to a chancellor, hired by and serving at the pleasure of the mayor" (*Perez v City of New York*, 9 Misc 3d 934, 935 [Sup Ct, Bronx

County 2005], *revd on other grounds* 41 AD3d 378 [1st Dept 2007]), and transferred the BOE's powers to the Chancellor (see EL § 2590-h [17]; *see also Matter of P.I. v New York City Board of Education*, 10 Misc 3d 1073 [A], 2006 NY Slip Op 5005 1 [U] [Sup Ct, NY County 2006]). "The [BOE's] only remaining powers relate to citywide educational policy issues" (*Perez*, 9 Misc 3d at 935).

Despite the change in responsibilities effected by the Legislature, the BOE was not eliminated (*see* EL § 2590-b (1) (a); *see Matter of Culotta v City of New York, Department of City Planning*, 5 Misc 3d 583 [Sup Ct, Richmond County 2004]). And, most importantly, BOE remained "for all purposes . . . the government or public employer of all persons appointed by or assigned by the city board or the community districts" (EL § 2590-g [2]). This provision was not altered from its pre-2002 form by the 2002 amendments.

**B. Creation of DOE**

Subsequently, in 2003, BOE issued its "By-Laws of the Panel for Educational Policy of the Department of Education of the City School District of the City of New York" (the 2003 By-Laws), renaming itself the "Panel for Educational Policy." *See* By-Laws Preamble.[4] The Preamble to the 2003 By-Laws continues, as

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[4]BOE's 2003 By-Laws are provided in the Notice of Petitions, Ex. G, and are also available publicly at: http://schools.nyc.gov/NR/rdonlyres/B432D059-6BFE-4198-8453-466FDE2B22D5/69835/PEPBylawsFinal91409.pdf

pertinent:

> The Panel for Educational Policy is part of the governance structure responsible for the City School District of the City of New York, subject to the laws of the State of New York and the regulations of the State Department of Education. Other parts of the structure include the Chancellor, superintendents, community school boards, principals, and school leadership teams. Together this structure shall be designated as the Department of Education of the City of New York.

As this Court reads the foregoing, the BOE created the DOE as, at the vary least, an entity meant to encompass not only itself, but the Chancellor and other school institutions, which it identified in its By-Laws as the District "structure" (*see* By-Laws, Preamble; *see also see Nacipucha v City of New York*, 18 Misc 3d 846, 861 [Sup Ct, Bronx County 2008]). There is no authorizing legislation creating DOE.[5] It is noted that, along with the Legislature, neither the Mayor nor the Chancellor created the DOE. Thus, although the BOE has, by the DOE's enacting language, extended the DOE to encompass the Chancellor and other school entities, there is no reciprocal legislation recognizing any relationship between the Chancellor, the City and the DOE.

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[5]Although some courts have treated the DOE as a mere name change for the BOE, without discussion, this does not appear to be the case according to the BOE By-Laws (*see e.g. Varsity Transit, Inc. v Board of Education of City of New York*, 5 NY3d 532 [2005]).

C. NYCCBL

The NYCCBL states that it is the City's policy, through the NYCCBL, "to favor and encourage the right of municipal employees to organize and be represented" by means of collective bargaining agreements, as well as to provide for "impartial arbitration of grievances between municipal agencies and certified employee organizations" (*see* NYCCBL § 12-302). Section 12-312 of the NYCCBL contains the legislation's grievance procedures, which culminate in arbitration.

Sections 12-304 (a-c) of the NYCCBL state that it will be applicable to, as here pertinent, "[a]ll municipal agencies and to the public employees and public employee organizations thereof"; "any agency or public employer ... which have been made subject to this chapter by state law"; and any other public employer which "elects" to be covered by the NYCCBL, except that "any such election by the New York city board of education shall not include any teacher. . . or any employee who works in that capacity or any paraprofessional employees with teaching functions."

NYCCBL § 12-303 (d) defines "municipal agency" as:

> an administration, department, division, bureau, office, board, or commission, or other agency of the city established under the charter or any other law, the head of which has appointive powers, and whose employees are paid in whole or part from the city treasury, other than the agencies specified in paragraph two of subdivision g of this section."

However, NYCCBL § 12-303 (g) (2) indicates that the BOE is specifically exempt from those entities designated as "municipal agencies."

NYCCBL § 12-303 (f) defines "mayoral agency" as "any municipal agency whose head is appointed by the mayor."

**D. Executive Order 83 (EO 83)**

Executive Order 83 provides for grievance procedures, including arbitration, for employees of mayoral agencies. Specifically, EO 83, section 5 (a) (1), states that it is applicable to mayoral agency employees "who are eligible for collective bargaining under the [NYCCBL]." While EO 83 does not define "mayoral agency employee," it does defer to the definition of mayoral agency now contained in the NYCCBL. EO 83, § 2 (b)

## II. Parties' Positions

**A. The Unions**

The Unions argue that, while the BOE might not be a municipal agency subject to arbitration under the NYCCBL and EO 83, the creation of the DOE resulted in a new entity which is so blessed, as under the EO 83, section 5 (a) (1), the EO is "applicable to all mayoral agency employees who are eligible for collective bargaining" under the NYCCBL. The Unions claim that, because EO 83 § 2 (a) requires that the meaning of "mayoral agency" be taken from the predecessor statute to NYCCBL, the DOE is a "municipal agency" which is a mayoral agency, because its

"head [the Chancellor] is appointed by the mayor" (NYCCBL 12-303 [f]). Thus, the DOE, if found to be a new mayoral agency, would not be affected by the language in the NYCCBL § 12-303, which specifically provides that the BOE is not a municipal agency.

The Unions maintain that DOE is a municipal agency because it satisfies the three prong definition of municipal agency under NYCCBL § 12-303 (d). First, the Unions argue that the DOE was created by law, because BOE's By-Laws had the force of law behind them. Second, the Unions maintain that the head of DOE, the Chancellor, has appointive powers. DOE states, in fact, that "DOE is a new city entity" headed by the Chancellor (Memorandum of Law in Opp. to Respondents, at 16). As an example, the Unions point to the proviso in EL §2590-g (2), stating that the Chancellor has the authority to "appoint staff pursuant to subdivision forty-one of section twenty-five hundred ninety-h of this article" (referring to those employees in non-represented managerial titles). The Unions also rely on EL § 2590 (h) (5) as proof that the Chancellor retains jurisdiction over its non-pedagogical employees, for disciplinary actions, despite any changes to the EL.[6] Third, which is not disputed, the Unions point out that the employees at issue are paid from the City

[6]EL § 2590 (h) (5) provides that the Chancellor "[r]etain[s] jurisdiction over all employees who are required in connection with the performance of duties with respect to the design, construction, operation and maintenance of all school buildings in the city school district."

treasury. Moreover, the Unions' conclusion that the DOE is a municipal agency is buttressed by the fact that the City itself identifies the DOE as a City agency on its website, and because the DOE functions as a City agency (i.e., collective bargaining for the DOE is handled by OLR, and civil service appointments and other personnel changes for the employees at issue are handled by the City's Department of Citywide Administrative Services). Further, the Unions attach a sample employee appointment form, on the letterhead of the DOE, to demonstrate that the DOE, not the BOE, is the relevant employer.

In sum, the Unions claim that the BOE ceased to be the employer of its members after the 2002 amendments to the EL. The Unions seek to escape the exclusion in § 12-303 (g) (2), which explicitly excludes the BOE as a municipal agency, by flatly stating that the DOE is not the BOE, which is the entity clearly excluded.[7]

**B. The Respondents**

As previously noted, contrary to its position before the Board, the City now agrees with the Board, that the BOE, rather than the DOE, is the employer of Unions' members, citing EL §

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[7]The Unions also maintain that the Consent Determinations and the Night Shift Agreements were the result of collective bargaining, because, essentially, they were the product of extensive bargaining. Therefore, as a result of the foregoing, the Unions claim that they are protected by EO 83, despite the lack of grievance procedures in the bargained-for agreements.

2590-g (2). In supporting its new position that the BOE is the employer, the City contends that the fact that the DOE has control over the day to day operations of the schools, is not significant under EL §2590-g (2). Ths argument does not explain how the EL can be interpreted to refer to the BOE as the current employer, when the functions typically performed by an "employer" are apparently performed by the DOE. Although the Chancellor retains jurisdiction over all employees who are required in connection with the performance of duties with respect to the design, construction, operation and maintenance of all school buildings in the city school district, the City argues that this power, with respect to disciplinary actions, does not change the identity of the relevant employer.

The City further argues, as found by the Board, that under NYCCBL §§ 12-303 and 12-304, the BOE and the DOE are not municipal agencies subject to the NYCCBL. Respondents note that the DOE has, on numerous occasions, brought grievances before the New York State Public Employment Relations Board (PERB), rather than the Board, implying that the DOE itself recognizes that it does not fall within the jurisdiction of the Board, by virtue of the NYCCBL. Failing to fall under the NYCCBL means that the Unions have no recourse to the arbitration procedures available in EO 83. The Board's arguments are substantially the same as the City's arguments.

## III. Discussion

### A. Standards for Article 78 Proceedings

Under CPLR 7803 "'judicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record, and once it has been determined that an agency's conclusion has a sound basis in reason the judicial function is at an end'" (*Matter of Mankarious v New York City Taxi and Limousine Commission*, 49 AD3d 316, 317 [1st Dept 2008], quoting *Matter of Partnership 92 LP & Building Management Company, Inc. v State of New York Division of Housing and Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007]), *affd* 11 NY3d859 [2008]). However, where as here, the issue is one of statutory analysis, a court need not grant any deference to the agency entrusted to interpret the statutes or regulations (*see Matter of Suffolk Regional Off-Track Betting Corp. v New York State Racing and Wagering Bd.*, 11 NY3d 559 [2008]). This is the case because legal interpretation is a court's function, which cannot be delegated to the agency charged with the statute's enforcement (*see Roberts v Tishman Speyer Props.*, 52 AD3d 71 [1st Dept 2009]).

### B. Analysis

The Board correctly recognized jurisdiction as the preliminary inquiry. The first concern is whether the BOE or the

DOE is the employer of the Unions' members. That issue is the most difficult, and troubling, to answer.

In its discussion of whether the BOE continues to exist despite the changes made by the EL, the Board spends some time reviewing recent cases concerning whether the BOE, in its present form as a part of a whole called the DOE, has ceased to be responsible for torts committed upon its property, ceding that responsibility to the City. The initial court opinions have been mixed. In *Perez v City of New York* (9 Misc 3d 934, *supra*), *Nasser v Nakhbo* (13 Misc 3d 1223[A], 2006 NY Slip Op 51961 [U] [Sup Ct, Kings County 2006]), and *Ocasio v City of New York*, (2005 NY Misc LEXIS 3511 [Sup Ct, Kings County 2005]), the various courts stripped the BOE of any responsibility for torts occurring on its property, finding instead that the "wholesale transfer of power" from the BOE to the City invested the City with obligations previously held by BOE (*Perez v City of New York*, 9 Misc 3d at 936).

However, in reversing the lower court in *Perez v City of New York*, the Appellate Division, First Department (41 AD3d 378, *supra*), found that BOE was still the proper party upon which to commence a tort action, rather than the City, despite the legislative changes reducing the BOE's responsibilities. In *Perez*, the Court, noting that the amendments had not eliminated the BOE's existence, or all of its functions, reiterated that

"[i]t is a cardinal principle of statutory interpretation that the intention to change a long-established rule or principle is not to be imputed to the legislature in the absence of a clear manifestation [internal quotation marks and citation omitted]" (*Perez*, 41 AD3d at 379). The First Department's decision in *Perez* has been followed by the Appellate Division, Second Department in *Leacock v City of New York* (61 AD3d 827 [2d Dept 2009]), which also, in the tort context, found that the BOE had not been negated as a sueable entity by the amendments to the EL, and remained as the party responsible for the maintenance of school property against whom an action could be brought.

These cases, while persuasive in establishing the continuation of the present the BOE as a viable unit with responsibilities in the tort context, as set forth above, do not deal with the nebulous relationship between the BOE, the DOE, and the City. While one Court has, in the most perfunctory manner, equated the two entities (*see Varsity Transit, Inc. v Board of Education of City of New York*, 5 NY2d 532, 537 n 1 [2005] ["[a]t the start of this litigation, the Department of Education was known as the Board of Education, the original named defendant"]), such an assumption, which did not actually invite discussion of the issue of the identity of the entities, is not useful, or compelling, in the current context.

Prior to the changes in the EL, it was uncontested that the

BOE was not a municipal agency subject to the NYCCBL, or, that the BOE was the employer of the District employees for purposes of that statute. Now, the Unions argue that the DOE is the public employer of District employees, unaffected by the exclusion of the BOE in NYCCBL § 12-303. Although the Board found relevance in the fact that the BOE was specifically continued by statute (EL § 2590-b [1] [a]), and that the Legislature further chose that BOE continue to be the public or government employer of all persons "appointed or assigned by the city board or the community districts" "for all purposes" under EL § 2590-g (2), the Unions correctly note that the BOE is only the employer of those employees *appointed or assigned by it*, or, by the community districts, and, all the evidence points to DOE as the employer (including the City's unexplained, sudden change of position). While this Court is not convinced that the Board was correct in its conclusion that the BOE is the employer, it need not pursue this issue, while has wide ranging implications,[8] because the Board correctly found that it lacked jurisdiction. Neither petitioners nor respondents dispute that if BOE is the employer, the Board lacks jurisdiction. If in fact the Board was

[8]In its memorandum of law, the Board correctly expresses concern for the potential problems associated with "the [ ] consequences of declaring that BOE is no longer the "public employer" except as to employees reporting directly to it." The Board notes that the New York City Teachers Retirement System defines eligible members of various tiers as those "employees of the board of education" (NYC Administrative Code §13-501 [7]).

wrong, and DOE is actually the employer, the Board was nevertheless correct in concluding that it lacked jurisdiction.

Assuming the DOE is the employer, the Board correctly determined that even though the Chancellor is now appointed by the Mayor, and the Chancellor is the head of the District (or its supposed representative, DOE), and the employees at issue are paid with City funds, DOE is not a mayoral agency. The Board correctly found that because NYCCBL § 12-303 (d) excludes from the definition of municipal agency, those agencies specified in NYCCBL § 12-303 (g) (2) (including the BOE), the DOE cannot be a mayoral agency.[9] The Board reasoned that to do so would be to implicitly repeal NYCCBL § 12-303 (d) and (g) (2). Courts frown upon the concept of the repeal of statutes by implication, unless there is a plain "repugnancy between the two statutes [citations

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[9]The Board determined to look at the "plain meaning" in the interpretation of the various statutes, citing, inter alia, *Matter of Orens v Novello* (99 NY2d 180, 185 [2002]) [courts must construe a statute so as to give effect to the plain meaning of the words used]). However, the Board was cognizant of the rule that courts must avoid literal construction of statutes where an absurd result would ensue (*see Matter of Long v Adirondack Park Agency*, 76 NY2d 416 [1990]). Since the NYCCBL was not amended along with the EL, the Board found it reasonable to assume that the Legislature chose not to alter the meaning of "board of education" to include the DOE in that enactment. Its reasoning was thus: since NYCCBL § 12-304 (c) (referring to the right of a public employer to elect to be make the NYCCBL applicable to it), provides that the BOE "shall not include" teachers for purposes of electing coverage under the statute, and such persons are clearly employed by the District, the BOE must still be the employer, rather than the DOE, because any other reading would result in the "absurdity" of the NYCCBL referring to an "employer without employees." Decision, at 18.

omitted])" (*Matter of Natural Resources Defense Council, Inc. v New York City Department of Sanitation*, 83 NY2d 215, 223 [1994]). Whether or not the Board properly characterized the argument as one which would result in a repeal of a statute by implication, the Court agrees that the DOE is not a mayoral agency. This is so because the BOE--admittedly exempt under NYCCBL § 12-303 (d) and (g) (2)--does not have the power to unilaterally create an entity which is not exempt, thereby circumventing a state statute. Accordingly, whether the DOE was "established under the charter or any other law" (NYCCBL § 12-303 [d]), is also an issue which need not be reached.[10]

**IV. Conclusion**

As a result of the foregoing, this Court finds the Board's determination denying the Unions' RFA, and dismissing the petitions, for lack of jurisdiction, was not a failure to perform a duty imposed by law, an error of law, nor an abuse of discretion.

The Board recognizes that its decision leaves the Unions

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[10]As the Board noted, the DOE was not created by charter and was essentially self created, through the issuance of the 2003 By-Laws of the DOE. The question of whether the DOE was effectively created via the BOE's By-Laws, and, whether the DOE is a subdivision of the BOE, will hopefully be answered on remand in *Ximines v George Wingate High School* (516 F3d 156 [2nd Cir 2008]).

with an unclear remedy.[11] However, the BOE's determination to create an agency as nebulous as the DOE, an entity of indeterminate rights and duties, and, by choice, to limit its own duties, which has a decidedly Alice-in-Wonderland like quality and which has created a host of problems, does not create jurisdiction under the NYCCBL.

Accordingly, it is

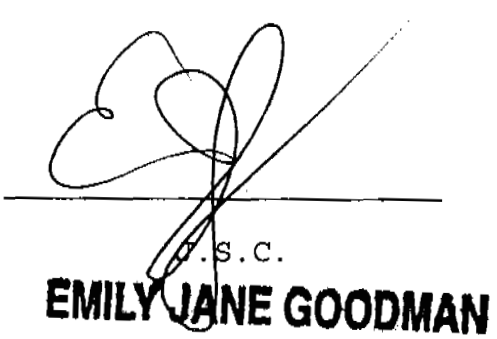
ORDERED that the motion and cross motion brought by respondents to dismiss the petition are granted; and it is further

ORDERED the petitioner submit judgment on notice.

**This Constitutes the Decision and Order of the Court.**

Dated: February 2, 2010

ENTER:



J.S.C.
EMILY JANE GOODMAN

[11]That is, unless PERB is the proper entity which with to appeal.