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

PRESENT: O. PETER SHERWOOD Justice — PART 61

In the Matter of the Application of,
STACEY MORIATES and BRENDA GILL,

Petitioner,

-against-

NYC OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING, *et al.*,

Respondents.

INDEX NO. 114094/2008
MOTION DATE Dec. 4, 2009
MOTION SEQ. NO. 001
MOTION CAL. NO. 78

The following papers, numbered 1 to 2 were read on this petition pursuant to CPLR Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, the CPLR Article 78 petition is decided in accordance with the accompanying decision, order and judgment.

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

Dated: 3/15/10

O. PETER SHERWOOD, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

PRESENT: O. PETER SHERWOOD Justice — PART 61

In the Matter of the Application of,
STACEY MORIATES and BRENDA GILL,

Petitioner,

-against-

NYC OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING, *et al.*,

Respondents.

INDEX NO. 114094/2008
MOTION DATE Dec. 4, 2009
MOTION SEQ. NO. 003
MOTION CAL. NO. ____

The following papers, numbered 1 to 9 were read on this petition pursuant to CPLR Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4 5-6
Replying Affidavits	7-8
Sur-Reply Affidavits	9

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, the CPLR Article 78 amended petition and the cross motion of the City respondents are decided in accordance with the decision, order and judgment accompanying motion sequence no. 001.

Dated: 3/15/10

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

----------X

In the Matter of the Application of
STACEY MORIATES and BRENDA GILL,

Petitioners,

For a Judgment under Article 78 of the
Civil Practice Law and Rules

-against-

NYC OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING, NYC
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, CITY OF NEW YORK,

Respondents.

----------X

DECISION, ORDER
AND JUDGMENT

Index No.: 114094/08

O. PETER SHERWOOD, J.:

In this CPLR Article 78 proceeding, *pro se* petitioners Stacey Moriates ("Moriates") and Brenda Gill ("Gill") seek a judgment vacating and annulling the September 24, 2008 determination of respondents the Board of Collective Bargaining of the City of New York ("Board" or "BCB") and the New York City Office of Collective Bargaining ("OCB") which denied petitioners' amended improper practice petition ("IPP"). Petitioners brought the IPP against city respondents the City of New York and the New York City Department of Environmental Protection ("DEP") (collectively "the City respondents"), claiming that DEP acted inappropriately and ineffectively when it was notified of potential improper union campaigning through e-mail.

Petitioners filed a motion (motion sequence no. 001) and an amended motion (motion sequence no. 003) requesting the annulment of the Board's decision, as well as additional relief including, but not limited to, identification of the individuals and the computers linked to the campaign-related e-mails, a judicial hearing, a requirement that DEP not prejudice petitioners with regards to any upcoming promotions or job opportunities, and a statement of the disciplinary charges of the alleged e-mail perpetrator. Their amended petition seeks the same relief as the original petition, plus an order declaring that the DEP should send e-mails to its employees, in essence,

explaining what allegedly transpired and apologizing for any alleged violations or defamations which may have occurred.

Motion sequence nos. 001 and 003 are hereby consolidated for disposition.[1] City respondents cross-move pursuant to section 12-308 of the Administrative Code of the City of New York ("Administrative Code") and CPLR §§ 217, 7804 (f) and 3211 (a) (2), (a) (5), (a) (7), and (10), for an order dismissing the petition on the ground that the petition fails to state a cause of action. The Board and OCB essentially agree with City respondents in all of their claims and also seek dismissal of the Article 78 petition. For the reasons that follow, the petition is denied, the City respondents' cross motion for an order dismissing the petition is granted and the petition is dismissed.

BACKGROUND

Petitioners work for DEP and are members of the Civil Service Technical Guild Union ("Union"). In 2007, the Union was holding elections for various positions. Steve Awad ("Awad") and Richard Stadnycki ("Stadnycki") were both running for Chapter President on different slates. Petitioners were candidates on Stadnycki's slate. Between November 2007 and June 2008, Awad allegedly sent at least four e-mails concerning the election to DEP employees from his DEP address. DEP prohibits employees from using DEP e-mail for lobbying or political purposes. Gill e-mailed the Director of Labor Relations, Denise Dyce ("Dyce"), and asked her if she could use an outside, private e-mail address to respond to one of Awad's messages, which purportedly contained disparaging remarks against petitioners. Dyce informed Gill that she could not use an outside e-mail for campaign-related material because then the petitioner would still be using the DEP system to distribute campaign information.

On December 6, 2007, DEP employees allegedly received two campaign e-mails from the then-current Union president, Claude Fort ("Fort"), urging them to vote for Awad's slate. Petitioners believed that these e-mails were sent by Awad. Fort denied sending these e-mails, and stated that they were sent from another person's e-mail address. Moriates then requested that Fort send an e-mail to DEP employees stating that he did not sanction the subject e-mails, and also allow Stadnycki to use DEP e-mail to respond. Dyce was alerted to this matter, and, among other things, responded

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[1]Motion sequence no. 002 has already been disposed of and is explained below.

that, since it had no proof as to who sent the e-mails, DEP could not take action. At the same time, the DEP's legal counsel also e-mailed all employees to remind them that e-mail should only be used for business purposes.

Dyce also informed Moriates to contact the New York City Department of Investigation ("DOI") if Moriates wished to pursue the matter. Petitioners subsequently filed a complaint with the DOI. According to petitioners, DOI would not share its findings or final report with petitioners.

The Union election was held in December 2007 and Stadnycki won the election. For reasons undisclosed, the Union re-ran the election and, in July 2008, it was announced that Stadnycki had won again.

On March 24, 2008, petitioners filed an IPP with the Board against the City respondents alleging that they violated the NYCCBL § 12-306 (a) (1), (2), and (3), when they failed to take sufficient action in response to campaign-related e-mails.[2] Petitioners then amended their IPP on July 3, 2008. Petitioners alleged that DEP showed favoritism by taking no meaningful action against Awad, thereby interfering in a Union election. Improper practices and good faith bargaining, as set forth in NYCCBL § 12-306 (a) (1), (2) and (3), are defined as:

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> (2) to dominate or interfere with the formation or administration of any public employee organization;
>
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization.

Administrative Code § 12-306.

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[2]Administrative Code § 12-301, Chapter 3, is cited as the "New York City Collective Bargaining Law (NYCCBL)."

After reviewing the record, the Board found that the "uncontroverted facts are insufficient to support a finding that DEP violated NYCCBL § 12-306 (a) (2) and derivatively § 12-306" (Petitioners' Amended Petition, Exhibit "A", at 10). The Board held that a violation of section 12-306 (a) (2) occurs under the following circumstances:

> A labor organization may be considered "dominated" within the meaning of this section if the employer has interfered with its formation or has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Interference that is less than complete domination is found where an employer tries to help a union that it favors by various kinds of conduct, such as giving the favored union improper privilege, or recognizing a favored union when another union has raised a real representation claim concerning the employees involved (*Id.*).

In its discussion, the Board cited to prior case history, including the case, *Seabrook* (55 OCB 7 [BCB 1995]). The Board concluded that "there is no allegation that DEP ever granted Awad permission to use the e-mail system while denying such opportunity to Petitioners" (*Id.* at 11). The OCB further noted that DEP took steps to address the situation when notified, including disciplinary proceedings against Awad. The OCB comments that, although petitioners may be unsatisfied with the pace and the extent of DEP's response, there is no basis to conclude that DEP's course of conduct violated NYCCBL § 12-306 (a) (2), and derivatively, NYCCBL § 12-306 (a) (1).

To determine whether an employer violated NYCCBL § 12-306 (a) (3), the Board discussed prior case history and applied the *Salamanca/Bowman* standard, derived from *City of Salamanca* (18 PERB ¶ 3012 [1985]) and *Bowman* (39 OCB 51 [BCB 1987]), in which a petitioner has to demonstrate that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
>
> 2. the employee's union activity was a motivating factor in the employer's decision. (*Id.* at 12-13).

The Board concluded that although DEP was aware that petitioners were candidates in an upcoming election, it did not discriminate against petitioners because of protected Union activity. The Board also assessed that DEP did not adversely affect petitioners' employment by refusing to

allow petitioners to use DEP e-mail for campaigning purposes. Even if, assuming arguendo, petitioners' campaign was adversely affected by DEP's actions, the Board stated that petitioners have not alleged facts which would show that DEP was motivated by a desire to punish or interfere with Union activity. In conclusion, the Board determined that the facts set forth in the pleadings were not sufficient to prove that DEP violated NYCCBL § 12-306 (a) (1), (2) and (3), and the IPP filed by petitioners was denied.

As a result of that decision, petitioners filed a CPLR Article 78 proceeding on October 16, 2008 (motion sequence no. 001) seeking to dismiss the decision of the Board on the grounds that it was arbitrary and capricious. OCB and the Board filed a motion to dismiss, alleging that the petitioners failed to join necessary parties and that the statute of limitations had eliminated the possibility of joining these necessary parties. As such, the petitioners' action should not be allowed to proceed. On April 30, 2009, as part of motion sequence 002, New York Supreme Court Justice Nicholas Figueroa issued a decision and order in which he denied the respondents' motion to dismiss. He further ordered that "the City of New York and the New York City Department of Environmental Protection be joined as respondents and that petitioners serve them with a notice of amended petition and amended petition within 30 days of the date of this Court's decision" (Petitioners' Amended Petition, Exhibit "M").

On May 22, 2009, petitioners filed motion sequence 003, which was the amended petition as per Justice Figueroa's order. Their amended petition seeks the same relief as the original petition, plus the additional relief of requiring DEP to send e-mails to its employees to explain what happened and also to apologize.

The City respondents cross-move for a judgment dismissing the petition in its entirety. City respondents argue that this court lacks the subject matter jurisdiction to hear the instant petition, the petitioners failed to join the necessary parties and missed the statute of limitations, and that the petition fails to state a cause of action against City respondents. City respondents also seek costs, fees and disbursements. The Board and OCB agree with City respondents in all of their claims and also seek dismissal of the Article 78 petition.

DISCUSSION

In the context of a CPLR Article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious" (*Matter of Soho Alliance v New York State Liquor Authority*, 32 AD3d 363, 363 [1st Dept 2006], citing to *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 [1974]; *see* CPLR 7803 [3]). An agency's decision is considered arbitrary if it is "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d at 231).

Petitioners continue to allege that DEP created an inequity during an election and this favored one candidate over another. They claim that fraud occurred because DEP had been notified of the e-mails, yet did not address them adequately. The Board, after reviewing the undisputed facts and the documents submitted, concluded that DEP's actions did not violate any collective bargaining laws. In summary, the Board concluded that DEP never granted Awad permission to use DEP e-mail while denying the petitioners the same right. It noted that DEP did act to address the situation and took progressive actions. Although petitioners may be unsatisfied at the type of action taken, the Board found that the DEP's conduct did not violate any collective bargaining statutes. The Board noted that DEP did not interfere with any protected activity or take any adverse employment-related action against petitioners. The Board issued a detailed analysis of the petitioners' situation and applied the relevant law. The Board's determination was not irrational, arbitrary or capricious. Accordingly, the court will not disturb the Board's decision to deny the IPP, and petitioners' motion is denied.

Additionally, in the context of an Article 78 proceeding "an agency's determination, acting pursuant to legal authority and within its area of expertise, is entitled to deference" (*Matter of Tockwotten Associates, LLC v New York State Div. of Housing and Community Renewal*, 7 AD3d 453, 454 [1st Dept 2004]). Section 12-309 (a) (2) of the NYCCBL outlines the Board's power to prevent and remedy improper public employer and public employee organization practices. The Board is a neutral party made up of City, Union and labor representatives. Specifically, in the realm

of interpreting the NYCCBL, the court has relied on the Board and its expertise. As the Court held in *Matter of City of New York v Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO* (95 NY2d 273, 284 [2000]), "[t]he determination of the BCB, the statutorily authorized neutral adjudicative agency charged with making determinations under the New York City Collective Bargaining Law, will not be disturbed unless it is arbitrary and capricious or an abuse of discretion, or unless arbitration of the dispute offends public policy." Petitioners' statements alleging that the Board's decision is arbitrary and capricious are unfounded. Accordingly, the petition is denied.

Petitioners' Request for a Judicial Hearing on the IPP:

Petitioners request a judicial hearing in their amended petition. The courts have held that the Board "has exclusive non-delegable jurisdiction to hear improper labor practice claims over which Supreme Court lacks original subject matter jurisdiction [internal citation omitted]" (*Matter of Patrolmen's Benevolent Association of City of N.Y. v City of New York*, 293 AD2d 253, 253 [1st Dept 2002]). Accordingly, petitioners are not entitled to a judicial hearing. For purposes of this Article 78 proceeding, even if petitioners were successful, they would be entitled to no more than a de novo hearing in front of the Board.

Statute of Limitations and Necessary Parties:

The Board and OCB argue that, pursuant to the NYCCBL, petitioners are allowed 30 days after the Board's decision to challenge a decision. They claim that the City respondents are necessary parties, and that they were never named in a timely manner for this proceeding. The court determined that, although the City respondents are necessary parties, petitioners were allowed to serve them an amended petition within 30 days of the date of that order. At the time of the order, the court was aware of the relevant statute of limitations and of the petitioners' failure to join necessary parties. Petitioners served city respondents within 30 days with an amended petition, as per the court's order. Accordingly, any claims made by all respondents regarding petitioners' failure to join necessary parties and the applicable statute of limitations, have already been addressed by the court, are currently irrelevant, and will not be considered at this time.

Other Forms of Relief Requested by Petitioners:

Petitioners request several declaratory judgments from the court, including compelling DEP to send e-mails to its employees, ordering respondents to provide equal employment opportunities

for petitioners in the future, among other things. It is well settled that, "[t]he courts of New York do not issue advisory opinions for the fundamental reason that in this State, [t]he giving of such opinions is not the exercise of the judicial function [internal quotation marks and citations omitted]" (*Matter of Joint Queensview Housing Enterprise, Inc. v Grayson*, 179 AD2d 434, 436 [1st Dept 1992]). This court will not issue an advisory opinion as a preventive measure for petitioners. Accordingly, there is no basis for these forms of relief at this time, and they are denied. To the extent that the petitioners are seeking some sort of prospective injunctive relief, they have offered no basis for such a remedy.

The court has considered petitioners' other contentions and finds them without merit.

CONCLUSION

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the cross motion of the respondents New York City Department of Environmental Protection and City of New York is granted in its entirety.

DATED: March 15, 2010

ENTER,

O. PETER SHERWOOD
J.S.C.