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

PRESENT: O. PETER SHERWOOD PART 61
Justice

In the Matter of the Application of
CLEOPATRA ROSIOREANU,

Petitioner,

-against-

OFFICE OF COLLECTIVE BARGAINING,

Respondent.

INDEX NO. 116796/08

MOTION DATE Jan. 22, 2009

MOTION SEQ. NO. 001

MOTION CAL. NO. 105

The following papers, numbered 1 to 6 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
Replying Affidavits	5, 6

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, the CPLR article 78 petition to annul a determination of the City of New York Board of Collective Bargaining is decided in accordance with the accompanying decision, order and judgment.

Dated: 3/30/09

O. PETER SHERWOOD, *J.S.C.*

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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In the Matter of the Application of
CLEOPATRA ROSIOREANU,

DECISION, ORDER AND JUDGMENT

Petitioner,

Index No. 116796/2008

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

OFFICE OF COLLECTIVE BARGAINING,

Respondent.

----------X

O. PETER SHERWOOD, J.:

In this action pursuant to Article 78 of the Civil Practice Law and Rules (CPLR) (Motion Seq. No.1), petitioner Cleopatra Rosioreanu, *pro se,* challenges as arbitrary, capricious and contrary to law a determination of the City of New York Board of Collective Bargaining ("BCB")[1], to wit, 1OCB2d 39 (BCB 2008), dated November 10, 2008, which dismissed her improper practice petition, finding, *inter alia,* that District Council 37, Local 375 ("the Union" or "DC 37") had not breached its duty of fair representation in the course of representing her during the grievance proceedings leading to petitioner's termination by the New York City Department of Environmental Protection ("DEP") and the grievance arbitration seeking petitioner's reinstatement to her position at DEP, and that her independent claims against the City of New York ("City") and the DEP based upon the insubordination charges proffered against her were untimely. Petitioner seeks a judgment annulling BCB's determination, as well as the decision of the grievance arbitrator, dated June 26, 2008,

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[1]Although the named respondent is the Office of Collective Bargaining (OCB), the challenged determination was made by OCB's constituent Board of Collective Bargaining which is charged under the New York City Collective Bargaining Law ("NYCCBL") (New York City Administrative Law, Title 12, Chapter 3), enacted by the New York City Council pursuant to section 212 of the New York State Civil Service Law commonly known as the "Taylor Law", with the power and duty "to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306" of the NYCCBL (NYCCBL § 12-309 [a] [2]). Petitioner alleged that the Union violated section 12-306 (b) (1) and (3) during the course of its representation of her during the grievance proceedings.

denying petitioner's grievance with respect to her discharge, and also directing that the grievance process be started anew.

Respondent moves for an order pursuant to CPLR § 7804 (f) (Motion Seq. No.2) dismissing the petition and upholding BCB's November 10, 2008 decision on the grounds of (1) the failure to join necessary parties; (2) petitioner's arguments are predicated upon exhibits outside the record before the BCB and raised for the first time in this proceeding; and (3) petitioner's allegations that the challenged determination is arbitrary, capricious and contrary to law are conclusory and facially insufficient to merit vacatur of the decision upon article 78 review.

Motion Sequence Nos. 1 and 2 are consolidated for purposes of disposition. For the reasons that follow, the respondent's motion is granted and the petition is dismissed.

Background

The DEP is the City agency charged with management of the City's water supply and wastewater systems through the Bureau of Water and Sewer Operations ("BWSO"). Petitioner was hired by the DEP as a Civil Engineer Level I in 1997 and served in various capacities in BWSO until her discharge on August 22, 2007. It is undisputed that petitioner was a member of the Union which served as the collective bargaining representative for employees in the civil service title of Civil Engineer Level I. The Union and the City are parties to a collective bargaining agreement ("the Agreement") that sets the terms and conditions of employment, including the grievance procedures applicable to DEP employees.

In October 2006, petitioner was assigned to the in-house title of Flow Test Engineer in the Citywide Flow Test Unit. The Flow Test Unit ("FTU") is a component of the BWSO's Distribution Operations Division. The function of the FTU is to perform tests to determine whether the City's water system has sufficient capacity and volume to service new developments and respond to fires. John Byrne, District Engineer for Queens, was the supervisor of the Citywide FTU. Mr. Byrne reported to Odd Larsen, Chief of Systems Operations (later changed to Chief of Distribution Engineering and Planning), whose responsibilities included supervision of District Engineers Citywide. Mr. Larsen, in turn, reported to Ed Coleman, Director of the Distribution Operations Division.

Hydrant tests are conducted by FTU Field Engineers, who fax the results to FTU headquarters at Lefrak City in Queens. The Flow Test Engineer reviews the test results, comparing them with detailed maps of the relevant area to see whether the results reported by the Field Engineer make sense. Such comparisons can be made by reviewing large paper maps or by using a computer program called "Fast Look".

On October 31, 2006, a meeting was held at which petitioner, Byrne, Larsen and Coleman were present. At this meeting, petitioner's new assignment and job duties were described and the tasks and standards for the position provided. Petitioner considered this new assignment a demotion and deemed it a change of specialty from structural engineer to distribution engineer. Petitioner also apparently believed that her new assignment was in retaliation for "her efforts to clarify an improper work situation" in May 2003 when she was assigned to the Office of Water Permits in the Distribution Operations Division which was under Coleman's supervision. Petitioner stated at the meeting that she did not want to do the assignment, but further stated that "I will start to do what I can, but I will complain because it is a demotion." The DEP managers assured petitioner that she would be given all the support possible to perform her duties and should not have a problem doing the work. Following this meeting, Byrne continued to meet with petitioner, showing her how the flow test process worked and encouraging her to come to him with any problems she might encounter. Byrne described petitioner's attitude during this period as "negative."

On November 20, 2006, Byrne became aware of a backlog in petitioner's work. Petitioner was not present when Byrne went to petitioner's cubicle to address the situation, but he saw several documents for projects which were past due. Byrne took these documents and completed the process himself. According to Byrne, petitioner had been using paper maps instead of Fast Look to complete her assigned tasks, which resulted in her taking longer to finish her work. Byrne then approached petitioner about the status of her work and asked whether she had the Fast Look program loaded on her computer. Petitioner responded by saying: "I don't want to work here, and I don't want to learn Fast Look." She indicated that she would be out of the unit soon. Byrne contacted the Management Information Systems Unit to have Fast Look installed on petitioner's computer.

The next day, November 21, 2006, Byrne asked petitioner to accompany him to a co-worker's computer where the Fast Look program was on the screen. Byrne told her to have a seat and said "This is Fast Look" at which point petitioner got up and walked away. Later that day, petitioner and Larsen approached Byrne. Petitioner was visibly upset and speaking loudly that she did not ask for this assignment, that she was being punished, and that she was a structural not a distribution engineer. Petitioner then made "ethnic remarks" saying to Byrne "the only reason you have your position is because you are Irish - part of the Irish gang." Although Larsen cautioned petitioner that she could not make such remarks, petitioner repeated her remarks about Byrne and said "I refuse to do the assignment."

After the November 21, 2006 incident, Byrne communicated through e-mail the nature of petitioner's responsibilities and the manner in which they were to be performed. Although Fast Look was installed on petitioner's computer, she steadfastly refused to learn how to use it. Because of petitioner's failure to perform her tasks as instructed, Byrne took on more of the work of reviewing flow test paperwork which took time away from his responsibilities as Distribution Engineer. He continued to offer petitioner support, guidance, training or software to assist her, but she consistently responded that she did not want to be trained to do this job.

After receiving an e-mail from petitioner that she did not want to work in FTU because the work was making her ill, Coleman called a meeting on December 13, 2006, attended by himself, petitioner and Larsen. Coleman reminded petitioner of her responsibilities and told her she had to perform the duties of her position. She did not describe the nature of her illness other than to say the assignment was very stressful. Coleman followed up the next day with an e-mail suggesting that petitioner contact the New York City Employee Assistance Program to help her deal with the stress she complained about, but also confirmed what was expected of her in her capacity as a Flow Test Engineer. From December 13, 2006 through December 18, 2006, petitioner was absent from work claiming that she could not work because of stress. In an e-mail dated December 21, 2006, Byrne advised petitioner that he had been doing her job for the past two weeks and inquired whether petitioner was still refusing to perform the flow test assignments. Petitioner replied that she "must

be out of this unhealthy situation as soon as possible before I become irreversibly sick . . . do not take it as a refusal, but as an explanation."

On January 9, 2007, Larsen gave petitioner a document listing the main tasks of Flow Test Engineer and instructed her to indicate whether she refused to perform each of those tasks. Petitioner indicated on the document that she refused to perform her assignment and wrote an explanation which reflected how disgruntled she was with this assignment and claimed that it was in retaliation for an incident with her former supervisor James Roberts on September 13, 2006, in which she claimed Roberts made threatening and demeaning remarks to her.

After repeated unsuccessful attempts were made to convince petitioner to perform her new assignment, on December 18, 2006, disciplinary charges were brought against petitioner, which charges were amended on January 8, 2007. Specifically, petitioner was charged with: (1) insubordination for refusing on November 21, 2006, December 13, 2006, December 18, 2006 and January 2, 2007, directives from superiors to perform her assigned duties; and (2) engaging in conduct prejudicial to good order and discipline by addressing her supervisor in a disrespectful tone on November 21, 2006, and making a disparaging remark to her supervisor on November 21, 2006 (Pet's Exhibit "C").

Even after being served with the charges, petitioner continued to refuse to perform her job. Thus, DEP held an informal conference on January 16, 2007, attended by petitioner, a Union representative, the disciplinary counsel representative, the conference leader and Mr. Coleman. The Union representative advised petitioner not to respond in writing to the disciplinary charges or submit documents unrelated to her grievance. Following the informal conference, DEP's Conference Leader Robert LaGrotta recommended that petitioner be terminated (Pet's Exhibit "C").

On January 19, 2007, the Union filed a "Step II Grievance" challenging the charges, specifications and penalties recommended by DEP's Conference Leader on January 16, 2007, and seeking to have all charges and penalties rescinded and petitioner to be made "whole" (Pet's Exhibit "B"). A Step II hearing was held on August 21, 2007, at which petitioner, Larsen and Coleman testified. The same Union representative as had attended the Informal Conference on January 16, 2007, accompanied petitioner to the Step II hearing. Following the hearing, the Hearing Officer

issued a detailed decision reviewing the testimonial and documentary evidence and concluding based upon such evidence including petitioner's own admissions at the hearing that the charges and specifications be upheld and the recommended penalty of termination be affirmed (Pet's Exhibit "F"). By letter dated August 22, 2007, petitioner was notified that her services as a Civil Engineer Level I with DEP were terminated close of business that same date (Pet's Exhibit "F").

The Union appealed this determination by filing a request for Step III review by which it sought reinstatement of petitioner to her Civil Service title and that she be "made whole in every way" (Pet's Exhibit "B"). Throughout the Step III proceeding, petitioner was represented by the Union's Second Vice President Michelle Keller. In a written decision dated October 9, 2007, the Review Officer stated that she found no contractual violation and deemed the recommended penalty of termination to be appropriate. In reaching her determination, the Review Officer recounted petitioner's statements made before her and indicated that petitioner "provided a voluminous submission containing her narrative response, correspondence with the Union, the Agency and this office concerning the grievance procedure, emails and other documents" (Pet's Exhibit "H"). Ms. Keller thereafter notified petitioner of the Step III determination and advised her that her case was being prepared for arbitration.

The Union assigned attorney Mitchell B. Craner to represent petitioner at the arbitration. He met with petitioner to discuss her case and explained that the remedy that could be obtained through arbitration was reinstatement to the position from which she was terminated. Petitioner responded in an e-mail that regaining the position which she had refused was not an incentive for her. The arbitration hearing was held on May 13, 2008, at which both parties were afforded a full opportunity to examine and cross examine witnesses and present documentary evidence and arguments in support of their respective positions. Following the hearing, the parties were also given an opportunity to submit written closing statements. In an Opinion and Award dated June 26, 2008, the Arbitrator denied petitioner's grievance finding that her discharge "was not a wrongful disciplinary action in violation" of the Agreement. In her determination, the Arbitrator noted that although petitioner had no record of discipline, her insubordination "was egregious and continuing." The Arbitrator further observed that even after she was served with the disciplinary charges and was

on notice that her conduct could have serious consequences, petitioner made no good-faith effort to learn the Fast Look program and perform the duties of Flow Test Engineer. On the basis of the record as developed at the arbitration, the Arbitrator concluded that the penalty of discharge was justified (Pet's Exhibit "I").

On January 25, 2008, petitioner filed an improper practice petition, which was amended on March 18, 2008, alleging that the Union breached its duty of fair representation in violation of NYCCBL § 12-306 (b) (1) and (3). Specifically, petitioner contended that she received improper union representation throughout the grievance proceeding and at her grievance arbitration. She claimed that the Union violated the Agreement by failing to put her grievances in writing, favored the DEP's interests and ignored her claims that her assignment was a demotion, retaliatory and vengeful. She further contended that the Union handled her grievance in bad faith and in an arbitrary manner and interfered with the exercise of her rights. The Union did not challenge the charges having to do with the "ethnic remarks" she made nor the manner in which DEP presented "truncated" documents in the presentation of its case. Petitioner also raised independent claims against the City and the DEP with regard to her allegations that the insubordination charges were brought against her out of revenge and retaliation.

In a decision dated November 10, 2008, BCB rejected petitioner's claims and denied the improper practice petition. BCB held that any claims against the City and DEP were time-barred as such claims were based upon actions occurring before September 25, 2007, and, therefore, were outside the four-month statute of limitations applicable to improper practice claims (NYCCBL § 12-306 [e]). Similarly, any claims related to the Union's representation at Step I and Step II of the grievance procedure were held to be outside the applicable limitations period. With respect to the Union's representation at the other stages of the grievance process, BCB found that the Union's conduct in not addressing matters outside the scope of the grievance was inherently reasonable. Moreover, the BCB did not find the petitioner's allegations established that the Union represented her case in bad faith or treated her grievance in an arbitrary or perfunctory manner. The fact that the outcome did not satisfy petitioner or meet her expectations is not enough to establish a breach of the Union's duty of fair representation.

Discussion

Respondent contends that the petition insofar as it seeks an award of affirmative relief against the Union, DEP and the City of New York must be dismissed for failure to join necessary parties. The respondent further contends that this failure is a fatal defect as proceedings to review a determination of the BCB are governed by a thirty-day statute of limitations (NYCCBL § 12-308) which in this case expired on December 16, 2008. The respondent's position is correct.

Necessary parties, as defined in CPLR § 1001 (a), are those "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action ." Here, the Union is a necessary party to this article 78 review based upon an alleged breach of its duty of fair representation (*see, Matter of Gregg-Mullins v Klein*, 5 Misc3d 1030 [A] [Sup. Ct., N.Y. Co. 2004]). Moreover, petitioner's claims of retaliation in the actions of DEP and the City with respect to the charges proffered against her and the penalty of discharge and the affirmative relief she seeks of restarting of the grievance procedure and vacatur of the arbitrator's decision requires the presence of the City and DEP in this proceeding. However, any article 78 proceeding naming these parties is time-barred because, as respondent correctly contends, review of BCB determinations must be sought within 30 days after service of the final order which occurred here at the latest on November 16, 2008 (*see, Matter of Uniformed Firefighters Assoc. of Greater N.Y. v New York City Office of Collective Bargaining,* 163 AD2d 251, 252 [1st Dept. 1990]). Thus, any action commenced after December 16, 2008 would be untimely.

The petitioner also includes in her submissions in support of the petition exhibits that were not presented to the BCB and raises arguments based upon those exhibits that are being raised for the first time before this court. On a CPLR article 78 proceeding, the record of the reviewing court is limited to evidence and arguments raised at the administrative hearing which will confine its review to the facts adduced before the administrative agency (*see, e.g., Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330; *District Council 37, Am Fedn. of State, County & Mun. Empl., AFL-CIO v City of New York,* 22 AD3d 279, 284 [1st Dept. 2005]). Accordingly, this court will not consider any exhibits not presented to the BCB or arguments that petitioner neglected to raise at the administrative hearing.

Under CPLR article 78, a determination of the BCB "may not be upset, unless it is arbitrary and capricious or an abuse of discretion, as the Board is the neutral adjudicative agency statutorily authorized to make specified determinations" (*New York City Dept. of Sanitation v McDonald,* 87 NY2d 650, 656 [1996]). Generally, "when an administrative agency is charged with implementing and enforcing the provisions of a particular statute, the courts will defer to the agency's expertise and judgment regarding that statute" (*District Council 37, supra* at 283). In this regard, the courts have typically deferred to BCB's expertise in applying and interpreting provisions of the NYCCBL (*id.; City of New York v Intl. Bd. of Teamsters, Local 237,* 301 AD2d 471 [1st Dept. 2003]). As long as the agency's determination is reasonable, the courts will not substitute its judgment for that of the administrative agency (*see, Matter of Med. Malpractice Ins. Assn. v Supt. Of Ins. Of the State of New York,* 72 NY2d 753, 763 [1989]).

Petitioner's arguments do not directly challenge the BCB's determination as lacking a rational basis, but rather address the deficiencies she alleges exist in the entire grievance process including the Union's failure to present her documentary evidence and arguments properly which she contends resulted in a one-sided record, the failure to have a recorded record of the arbitration or of a conference before the BCB on July 24, 2008, the absence of written guidelines of the grievance process, and the failure to properly consider her claims that the entire insubordination charge was prompted in retaliation and revenge for earlier job-related complaints she had made.

Review of the BCB's decision demonstrates that it conducted a careful review of the parties' arguments and the evidence produced at every step of the grievance proceeding before it reached its decision that the Union handled petitioner's case in good faith and that petitioner's improper practice petition should be denied. The BCB cites its earlier decisions in support of the various findings. In discussing the various arguments raised and ruling consistently with its prior decisions, the BCB acted in an entirely reasonable manner. The BCB found that petitioner's Union representatives had properly advised petitioner about the grievance process and properly represented petitioner's arguments at the various stages. The Board noted, citing its decision in *James-Reid* (77 OCB 29, at 16 [BCB 2006]), that "[t]he burden of establishing a breach of duty of fair representation cannot

be carried simply by expressing dissatisfaction with the outcome of the disciplinary proceeding, or questioning the strategic or tactical decisions of the Union." The BCB made no factual errors or unfounded legal conclusions. Accordingly, within this court's limited review in a CPLR article 78 proceeding, the petitioner's arguments are found to be unavailing.

Conclusion

For the aforementioned reasons, it is hereby

ORDERED, that the respondent's motion is granted; and it is further

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

This constitutes the Decision, Order and Judgment of the Court.

DATED: 3/30/09

U N F I L E D J U D G M E N T
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.

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

PRESENT: O. PETER SHERWOOD PART 61
Justice

In the Matter of the Application of
CLEOPATRA ROSIOREANU,

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-against-

OFFICE OF COLLECTIVE BARGAINING,

Respondent.

INDEX NO. 116796/08
MOTION DATE Jan. 22, 2009
MOTION SEQ. NO. 002
MOTION CAL. NO. 104

The following papers, numbered 1 to 6 were read on this motion to dismiss a CPLR article 78 proceeding

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5, 6

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, the respondent's motion to dismiss a CPLR article 78 proceeding is decided in accordance with the decision, order and judgment accompanying Motion Sequence # 001.

FILED
Apr 01 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/30/09

O. PETER SHERWOOD, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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