

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

INTERIM ORDER

Index Number : 101755/2016

LOCAL 376, D.C. 37

NYC BOARD OF COLLECTIVE

Sequence Number : 001

ARTICLE 78

PART 34

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1-12</u>
Answering Affidavits — Exhibits <u>Cross-mo + Reply</u>	No(s). <u>13-14, 16</u>
Replying Affidavits _____	No(s). <u>15</u>

Upon the foregoing papers, it is ordered that this ~~motion is~~ cross-motion is denied in accordance with the accompanying decision.

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

OFFICE OF  
COLLECTIVE BARGAINING  
2017 DEC -4 A 11:43

900B2d 21

**FILED**  
NOV 28 2017  
NEW YORK COUNTY  
COUNTY CLERK

Dated: 11/28/2017

  
\_\_\_\_\_  
J.S.C.  
**HON. CARMEN VICTORIA ST. GEORGE**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

EA  
11/29/17  
E  
c-1

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

HON. CARMEN VICTORIA ST. GEORGE  
J.S.C.  
Justice

PRESENT: \_\_\_\_\_

PART 34

Index Number : 101755/2016  
LOCAL 376, D.C. 37  
vs.  
NYC BOARD OF COLLECTIVE  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1-2</u>
Answering Affidavits — Exhibits _____	No(s). <u>(filed w/001,002,003)</u>
Replying Affidavits _____	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the accompanying decision.


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

## FILED

NOV 29 2017

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 11/28/2017

  
\_\_\_\_\_  
J.S.C.  
HON. CARMEN VICTORIA ST. GEORGE  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

EA  
11/29/17  
E  
C-1

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 34**

-----X  
In the Matter of the Application of

LOCAL 376, DISTRICT COUNCIL 37, AMERICAN  
FEDERATION OF STATE, COUNTY AND  
MUNICIPAL EMPLOYEES, AFL-CIO,

Petitioner,

Index No. 101755/016  
Motion Sequence Nos. 001 & ✓  
002

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

-against-

NEW YORK CITY BOARD OF COLLECTIVE  
BARGAINING and CITY OF NEW YORK,

Respondents,

Interim Order 001 ✓  
Final Order 002

**FILED**

NOV 29 2017

COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
*ST. GEORGE, J.S.C.*

Motion sequence numbers 001 and 002 are consolidated for disposition and resolved as follows:

In this proceeding, petitioner challenges respondent New York City Board of Collective Bargaining's (the Board) decision which upheld a decision terminating claimant Nicolas Del Ponte from his job as an apprentice construction laborer (ACL) with the New York City Department of Environmental Protection (DEP), following his provisional promotion to the position of Construction Laborer (CL). According to the petition, the DEP's Bureau of Water and Sewage Operations (BWSO), Mr. DelPonte's direct employer, deviated from accepted practice by failing to hire Mr. DelPonte when permanent positions became available. Upon review of Mr. DelPonte's

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 34**

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NEW YORK CITY BOARD OF COLLECTIVE  
BARGAINING and CITY OF NEW YORK,

Respondents,

Interim Order 001  
Final Order 002 ✓

**FILED**

**NOV 29 2017**

COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
*ST. GEORGE, J.S.C.*

Motion sequence numbers 001 and 002 are consolidated for disposition and resolved as follows:

In this proceeding, petitioner challenges respondent New York City Board of Collective Bargaining's (the Board) decision which upheld a decision terminating claimant Nicolas Del Ponte from his job as an apprentice construction laborer (ACL) with the New York City Department of Environmental Protection (DEP), following his provisional promotion to the position of Construction Laborer (CL). According to the petition, the DEP's Bureau of Water and Sewage Operations (BWSO), Mr. DelPonte's direct employer, deviated from accepted practice by failing to hire Mr. DelPonte when permanent positions became available. Upon review of Mr. DelPonte's

termination, in response to petitioner's challenge, the Board found that the BWSO's decision to add a layer of review to its hiring decisions, considering the disciplinary history of applicants, was in retaliation for Mr. DelPonte's protected union activities.<sup>1</sup> It nonetheless concluded that the decision should stand because the individuals who reviewed the disciplinary history – which was part of the record due to anti-union bias – were not themselves tainted with anti-union bias. According to petitioner, the Board reached this conclusion despite its finding that the reviewing agency added an additional layer of review due to a commissioner's bias against petitioner due to his protected union activities. Petitioner contends the decision was affected by an error of law, it incorrectly interpreted the governing statute, deviated from Board precedent, it was arbitrary and capricious, it violated public policy, and it exceeded the Board's authority.

In addition, petitioner states that the Board violated the Open Meetings Law (Public Officers Law § 100 *et. seq.*) when "it announced its decision in a secret hearing" (Pet., Introduction ¶ 1). The Board held four days of hearings in response to petitioner's challenge to Mr. DelPonte's termination. The Board was to announce its decision at a meeting on October 6, 2016. In two emails petitioner requested permission to attend the meeting. The Board denied the request by email on September 30 because, it stated, it was a Board meeting and hence it was closed to the public. According to the petition, which this Court accepts as true for the purposes of the motions currently before it, the Board's reason was pretextual, as the meeting involved public business and thus should have been open to the public under the Open Meetings Law.

Respondent City of New York (the City) cross-moves to dismiss the petition in lieu of an answer, and alleges that the petition does not state a cause of action. In a separate motion, the

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<sup>1</sup> The finding also related to the rest of the 2011 ACL class, but that is not relevant for the purposes of this motion.

Board moves, pre-answer, to dismiss the petition because 1) its decision is rational and reasonable, and it does not violate the law, and 2) the proceeding, which was a judicial or quasi-judicial executive session, is exempt from the requirements of the Open Meetings Law and therefore there was no violation.

The Court accepts the facts alleged in the petition as true in response to these pre-answer motions to dismiss (*See Duverney v City of New York*, 57 Misc. 3d 537, 539 [Sup Ct NY County 2017]). Both the Board and the City state that they also accept petitioner's version of the facts as true in this context. Despite this contention, both parties challenge petitioner's contentions as to motive. In addition, they argue the rationality of the decision based on the evidence (*see, e.g.*, Board's Mem. of Law in Support, at p 24) and attack petitioner's claims as speculative. Moreover, they are incorrect in their contention that petitioner is not arguing the decision was arbitrary and capricious. The contention is part of petitioner's first cause of action although not the primary focus, and petitioner has alleged the argument sufficiently in its papers and at oral arguments on the record. In this respect, too, their arguments supporting the decision as rational relies in part on their contention that petitioner's factual allegations are incorrect. The Board's argument that the October 6, 2016 meeting was a judicial or quasi-judicial meeting exempt from the requirements of the Open Meetings Law partially relies on factual matters, such as the scope of activities which took place at the meeting, and as such this issue cannot be resolved by way of a pre-answer motion.

In light of the above and of the general reluctance of the judiciary to deprive litigants of their day in court (*cf. Rocco v Kelly*, 20 AD3d 364, 366 [1st Dept 2005] [with respect to issue of whether a final determination has been reached, courts must resolve ambiguities against respondent due to importance of providing petitioner his or her day in court]), it is

ORDERED that the cross-motion to sequence number 1 and motion sequence number 2 are denied; and it is further

ORDERED that petitioner shall serve a copy of this interim decision and order upon respondents with notice of entry; and it is further

ORDERED that respondents have 30 days from notice of entry of this order to serve and file their answers; and it is further

ORDERED that oral argument on the petition shall take place on February 22, 2018 at 11:00 a.m.

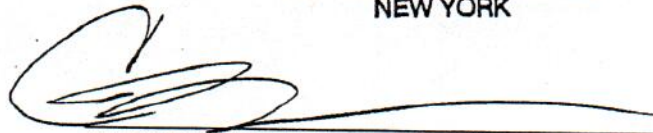
Dated: 11/28, 2017

ENTER:

**FILED**

NOV 29 2017

COUNTY CLERK'S OFFICE  
NEW YORK



CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE  
J.S.C.