

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

SHLOMO HAGLER
J.S.C.

Index Number : 101484/2015

HHC PBA, INC.

vs

NYC OFFICE OF COLLECTIVE

Sequence Number : 001

ARTICLE 78

PART 17

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

RU-1587-14

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

Notice of Motion ^{Petition} Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1

Answering Affidavits — Exhibits _____ | No(s) _____

Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ ^{petition} decision is decided in accordance with the attached Decision/Order.

2017 JAN 20 P 1:56
COLLECTOR OF TRAINING

HAND DELIVERED

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

Dated: 1/18/17

[Signature], J.S.C.

SHLOMO HAGLER

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

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SHLOMO HAGLER
J.S.C.
Justice

PART 17

Index Number : 101484/2015
 HHC PBA, INC.
 vs
 NYC OFFICE OF COLLECTIVE
 Sequence Number : 002
 DISMISS

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____


The following papers, numbered 1 to 10, were read on this motion to/for _____

Notice of Motion/Order to Show Cause <u>✓</u> Affidavits — Exhibits <u>+ memorandums</u>	No(s). <u>1-3</u>
Answering Affidavits — Exhibits <u>Cross motion + memorandum</u>	No(s). <u>4-5</u>
Replying Affidavits <u>+ 2 memorandums</u>	No(s). <u>7-10</u>

Upon the foregoing papers, it is ordered that this motion ~~is~~ + cross motion is decided in accordance with the decision/order ~~is~~ attached to motion sequence 001.

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

Dated: 1/18/17


 _____, 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

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

SHLOMO HAGLER
J.S.C.

PRESENT: _____
Justice

PART 17

Index Number : 101484/2015
HHC PBA, INC.
vs.
NYC OFFICE OF COLLECTIVE
SEQUENCE NUMBER : 003
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits <u>Memorandum</u>	No(s). <u>1-2</u>
Answering Affidavits — Exhibits <u>included in motion seq 002</u>	No(s). <u>3</u>
Replying Affidavits _____	No(s). <u>4</u>

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the decision/order attached to motion sequence 001.*

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

Dated: 1/10/17

J.S.C.

SHLOMO HAGLER

- | | | | | | |
|---|---|--|--|--|------------------------------------|
| 1. CHECK ONE: | <input checked="" type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> NON-FINAL DISPOSITION | | | |
| 2. CHECK AS APPROPRIATE: MOTION IS: | <input type="checkbox"/> GRANTED | <input type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART | <input checked="" type="checkbox"/> OTHER | |
| 3. CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER | <input type="checkbox"/> DO NOT POST | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |

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

-----X
In the Matter of the Application of
HHC PBA, INC.,

Petitioner,

Index No.:
101484/2015

-against-

OFFICE OF COLLECTIVE BARGAINING-
BOARD OF CERTIFICATION, THE CITY
EMPLOYEES UNION LOCAL 237-
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, THE NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION,
and THE CITY OF NEW YORK,

DECISION/ORDER

Respondents,

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

-----X
HON. SHLOMO S. HAGLER, J.S.C.:

In this Article 78 proceeding, petitioner HHC PBA, Inc., ("petitioner" or "HHC PBA") seeks a judgment reviewing and annulling the Decision and Order dated July 7, 2015, 8 OCB2d 20 (BOC 2015) ("Decision") of respondent [New York City] Office of Collective Bargaining ("OCB")- [New York City] Board of Certification ("Board" or "BOC"), which denied petitioner's request to fragment certain Health and Hospitals Corporation Special Officer titles ("HHC Special Officers") from their current bargaining unit. Respondents OCB and the Board move for

an order and judgment, pursuant to CPLR 7804(f), dismissing the Article 78 Petition on several grounds, including that the Petition is time-barred. Respondents the City of New York ("the City"), and the New York City Health and Hospitals Corporation ("HHC") cross-move for an order and judgment, pursuant to CPLR 7804(f) and 3211 (a)(7), dismissing the Petition on the ground that the Petition fails to state a cause of action. Respondent the City Employees Union Local 237- International Brotherhood of Teamsters ("Local 237") move for an order and judgment, pursuant to CPLR 7804(f), dismissing the Petition on various grounds. Petitioner opposes the motions and cross-motion.

BACKGROUND AND FACTUAL ALLEGATIONS

In September 2014, HHC PBA filed a Petition to represent HHC Special Officers in a separate bargaining unit. At that time, Local 237 represented said HHC Special Officers. HHC PBA argued that the HHC Special Officers should be fragmented from their current bargaining unit because they perform "police-like functions" and have a conflict of interest with other titles in the same bargaining unit represented by Local 237. HHC and Local 237 argued that the HHC Special Officers are "peace officers" and do not perform functions as "police officers" as defined under New York Criminal Procedure Law ("CPL") 1.20(34). In its Decision, the Board denied the Petition finding that "fragmentation is not warranted in this case because HHC Special

Officers' primary duty is providing hospital security and not the prevention and detection of crime and the enforcement of the general laws of this state." (Exhibit "3" to the Affirmation of Kimberly E. Nosek, Esq. dated October 15, 2015, in support of OCB's and the Board's Motion to Dismiss ["Nosek Aff."], Decision at p. 2).

By email dated July 10, 2015, a representative of OCB informed petitioner's counsel that an "official copy has been served on you today by certified mail pursuant to §12-308(a)(1) of the New York City Collective Bargaining Law ["NYCCBL"] (New York City Admin Code, Title 12, Chapter 3)", and also provided petitioner's counsel with a "courtesy copy" of the Decision which did not "substitute for or in any way alter the requirements and the resultant deadlines established by the NYCCBL." (Exhibit "2" to the Nosek Aff.).

On July 10, 2015, OCB served the Decision on petitioner's counsel, Timothy C. Parlatore, Esq. ("petitioner's counsel" or "Mr. Parlatore"), at 260 Madison Avenue, 22nd Floor, New York, NY 10016 ("Service Address"), by U.S. Postal Service Certified Mail, Return Receipt Requested. (*Id.* at Exhibit "1"). The U.S. Postal Service Return Receipt ("Return Receipt") was signed by Justin Trujillo ("Mr. Trujillo") on July 13, 2015, as the date of delivery ("Delivery Date"). (*Id.*). Petitioner commenced this Article 78 Proceeding on August 13, 2015 ("Commencement Date").

At oral argument of the instant motion and cross-motion on March 3, 2016 ("Oral Argument"), Petitioner's counsel stated that on the Service Date he had a "single office" on the 22nd Floor of the Service Address, which he was subletting from a larger firm, McLaughlin & Stern, which occupied the 15th through 22nd Floors. (Oral Argument at p. 26, l. 9-13). Mr. Parlatore further explained the procedure for processing and receiving mail in his office at the time of the Service Date was as follows: 1) a U.S. Postal employee is directed to deliver the mail at the 17th Floor of his subject building; 2) a designated employee of McLaughlin & Stern receives the mail from the U.S. Postal employee; 3) a designated employee of McLaughlin & Stern sorts the mail to individual boxes, including Mr. Parlatore's box, in the mailroom maintained on the 22nd Floor; and 4) Mr. Parlatore retrieves his mail from a little box in the mailroom on the 22nd Floor. (Oral Argument at p. 26, l. 13-18).

Petitioner's counsel attested that Mr. Trujillo was "an individual who is employed by the law firm of McLaughlin & Stern down on the 17th Floor." (Oral Argument at p. 24, l. 19-22). While Mr. Trujillo received the Decision on the Service Date of July 13, 2105, Mr. Parlatore alleges that he "didn't receive it until the next day [July 14, 2015]." (*Id.*).

THE STATUTE OF LIMITATIONS

It is well settled that the applicable statute of limitations to review a determination by OCB must be commenced within thirty (30) days after service by registered or certified mail of the final adverse order (Civil Service Law ["CSL"] § 213; *Matter of Uniformed Firefighters Assn. of Greater N.Y. v New York City Off. of Collective Bargaining, Bd. of Collective Bargaining*, 163 AD2d 251 [1st Dept 1990]); *Matter of Davis v Anderson*, 51 AD2d 528 [1st Dept 1976]. In the case where petitioner is represented by counsel, the thirty (30) day statute of limitations begins to run from the time petitioner's attorney receives notice of the adverse determination (*Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832 [1983]; *Matter of Singer v New York State & Local Employees' Retirement Sys.*, 69 AD3d 1037 [3d Dept 2010]).

ARGUMENTS

OCB and the Board allege that, on July 10, 2015, they served the Decision on petitioner's counsel at his Service Address, and Mr. Trujillo received it on the Delivery Date of July 13, 2015, as evidenced by the signed Return Receipt. (Exhibit "1" to the Nosek Aff.). Respondents contend that the accrual of the statute of limitations began to run on the Delivery Date of July 13, 2015, the date that Mr. Trujillo acknowledged receipt of the

Decision and duly signed for same on the Return Receipt. (*Id.*). Therefore, respondents conclude that since petitioner commenced this Article 78 proceeding beyond the applicable thirty day (30) statute of limitations, which necessarily accrued on July 13, 2015, the Petition is time-barred.

On the other hand, petitioner argues that the statute of limitations accrual date is not measured from the date Mr. Trujillo acknowledged receipt of the Decision and duly signed for same on the Return Receipt on July 13, 2015, but on the date that Mr. Parlatore physically retrieved and received the Decision on July 14, 2015.

In sum, the accrual date is hotly contested because, if the accrual date is measured from July 14, 2015, the Petition is timely, and if served on July 13, 2015, it is untimely.

ANALYSIS

The "statute of limitations begins to run when the party [or the party's attorney] receives oral or written notice, or when the party knows or should have known, of the adverse determination (see, *Matter of Biondo v. New York State Bd. of Parole*, 60 N.Y.2d 832, 834, 470 N.Y.S.2d 130, 458 N.E.2d 371 [1983]; *Matter of Feldman v. New York State Teachers' Retirement Sys.*, 14 A.D.3d 769, 770, 788 N.Y.S.2d 230 [2005])." *Matter of Singer v New York State & Local Employees' Retirement Sys.*, 69

AD3d 1037, 1038 (3rd Dept 2010). While it is beyond cavil that the accrual of the statute of limitations is measured from the date of delivery, and not service, of the adverse determination, there is a paucity of case-law defining the term "delivery" in this context. The answer to this knotty question rests with the duties and burdens of proof the respective parties bear in the particular case.

Here, respondents must demonstrate that they served the Decision upon petitioner's counsel by registered or certified mail (CSL § 213). In this regard, it is uncontroverted that OCB and the Board served petitioner's counsel with the Decision on July 10, 2015, and Mr. Trujillo acknowledged receipt of the Decision and duly signed for same on the Return Receipt on July 13, 2015. (Exhibit "1" to the Nosek Aff.). Mr. Parlatore also acknowledged that OCB and the Board served him with the Decision at the Service Address, which "would be the correct place for them [OCB and the Board] to serve it." (Oral Argument at p. 26, l. 24-25). However, petitioner seemingly argues that delivery means the date that petitioner's counsel physically takes the Decision from his "little mailbox" on the 22nd Floor of his subject building, after Mr. Trujillo, or another employee of McLaughlin & Stern, had the sorted the mail.

Once respondents mailed the adverse Decision by certified mail to petitioner's counsel at the address he provided to

respondents and it was delivered by the U.S. Postal Service, in the ordinary course of mailing, to the appropriate individual designated by petitioner's counsel to accept said delivery, respondents have satisfied their duty and burden of proof to demonstrate delivery of the Decision. Petitioner's position would in effect add an additional layer of responsibility to respondents, to wit: the internal sorting of mail, and the above-described procedure for processing and receiving mail that petitioner's counsel employed to obtain his mail in the regular course of his business. However, respondents are not required to demonstrate that they adhered to internal controls that petitioner's counsel established to obtain delivery of petitioner's counsel's own mail.

Simply stated, such internal controls are beyond the control of respondents, and are squarely within petitioner's counsel's control, as he must ensure timely notice of delivery of mailings from individuals within his subject building¹. In other words, it is unreasonable to expect that respondents would need to investigate the inner workings of petitioner's counsel's method and mode of delivery of mail in his subject building when respondents were only obligated to mail the Decision by

¹Based on respondents' email to petitioner's counsel on July 10, 2015, petitioner's counsel was clearly on notice that respondents were attempting to deliver the Decision to him by certified mail. Respondents attached a courtesy copy of the Decision to said email, so Mr. Parlatores had the Decision in his physical possession on July 10, 2015.

registered or certified mail to an address that he admittedly provided to the respondents. If, however, respondents failed to satisfy this external requirement of mailing by registered or certified mail to the Service Address, then respondents would not have met their duty and burden of proof.

Based on the above, it is clear that respondents have met their duty and burden of proof that they mailed the Decision by certified mail to petitioner's counsel at the Service Address and it was deemed delivered to petitioner's counsel on July 13, 2015, the date Mr. Trujillo acknowledged receipt of the Decision and duly signed for same on the Return Receipt on July 13, 2105. (Exhibit "1" to the Nosek Aff.). Thus, the thirty (30) day statute of limitations accrued on July 13, 2015, and the Petition is time-barred. Inasmuch as the Petition is time-barred, this Court need not address the remaining arguments of the parties.

CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the motion of respondents OCB and the Board (motion sequence #002) for an order and judgment, pursuant to CPLR 7804(f), dismissing the Article 78 Petition on the ground that the Petition is time-barred, is granted; and it is further

ORDERED and ADJUDGED, that the cross-motion of respondents

the City and HHC for an order and judgment, pursuant to CPLR 7804(f) and 3211 (a) (7), dismissing the Petition on the ground that the Petition fails to state a cause of action, is moot; and it is further


ORDERED and ADJUDGED, that the motion of respondent Local 237 (motion sequence #003) for an order and judgment, pursuant to CPLR 7804(f), dismissing the Petition on various grounds, is moot; and it is further

ORDERED and ADJUDGED, that the Petition (motion sequence #001) is denied as the Petition is time-barred; and it is further

ORDERED and ADJUDGED, that the Clerk shall enter a judgment accordingly.

Dated: January 18, 2017

ENTER:



J.S.C.
SHLOMO HAGLER
J.S.C.