2010 WL 2897842 (N.Y.Sup.), 2010 N.Y. Slip Op. 31810(U) (Trial Order)
Supreme Court of New York.
New York County

In the Matter of the Application of LAW ENFORCEMENT
EMPLOYEES BENEVOLENT ASSOCIATION (LEEBA), Petitioner,
v.
NEW YORK CITY AND NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, Respondents.

No. 116478/09.
July 12, 2010.

Seq. No.: 001, 002

West Headnotes (1)

[1] **Labor and Employment** Right to Election

Letter sent by director of representation for city's office of collective bargaining to union that sought to represent taxi and limousine inspectors, which explained why union was not being granted an immediate representational vote, was not a final decision of the office and, thus, could not be directly challenged by Article 78 petition; letter was not sent or signed by office's board or any one of its members. McKinney's CPLR 7801 et seq.

Decision/ Order

[This opinion is uncorrected and not selected for official publication.]

Present: Hon. Judith J. Gische, J.S.C.

?? motion to/for .....

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ... .

Answering Affidavits - Exhibits ....

Replying Affidavits ....

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this motion MOTION AND PETITION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: July 12 2010

<<signature>>

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	**NUMBERED**
Seq #001	
Notice of Pet, Pet (Art 78), exhs.....	1
Seq #002	
NYOCB's n/m (dismiss) w/JFW affirm, exhs.....	2
NYC's cross-motion (dismiss), exhs.....	3
Petitioner's opp.....	4
NYC's reply w/JH affirm.....	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is a petition by the Law Enforcement Employees Benevolent Association ("LEEBA") for a judgment in its favor, ordering the City of New York ("City") and the Board ("Board") of the New York City Office of Collective Bargaining ("OCB") to hold an election among employees in the titles "Taxi and Limousine Inspector" and "Associate Taxi and Limousine Inspector" ("taxi officers") so they can elect the collective bargaining unit or union who will represent them in contract negotiations with their employer, the City. LEEBA contends that the Board has improperly refused to hold a hearing on this matter and has rejected LEEBA's request to let the taxi officers vote.

OCB has moved and the City has cross moved for the preanswer dismissal of this proceeding pursuant to CPLR §§ 7804 [f], 217, 3211 [a][2], [3], [5], [7]. Though separately moving, the OCB and City (collectively "respondents") present similar arguments about why the petition should be denied. Petitioner opposes both motions.

Where a motion to dismiss is premised upon CPLR § 7804 [f], only the petition and the exhibits attached thereto may be considered and all the allegations contained therein are deemed to be true (*Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board,* 1 A.D.3d 744 [3rd Dept 2003]). Similarly, on a motion to dismiss brought pursuant to CPLR § 3211, the court is required to presume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant (*Cron v. Harro Fabrics. Inc.,* 91 N.Y.2d 362 [1998]; *Sanders v. Winship,* 57 N.Y.2d 391 [1982]). Thus, the court's inquiry on the motion to dismiss is whether the petitioner has a cause of action, not whether it has stated one (*Guggenheimer v. Ginzberg,* 43 N.Y.2d 268 [1977]; *DePaoli v. Board of Educ., Somers Cent. School Dist.,* 92 A.D.2d 894 [2nd Dept 1983]).

Underlying Facts

The New York City Collective Bargaining Law ("NYCCBL") was amended in 2005 by Local Law 56. NYCCBL provides for different levels of bargaining. The amendment expanded the scope of the "uniformed" level of bargaining (NYCCBL § 307 [a] [4]) to include "persons employed by the taxi and limousine commission of the City of New York as taxi and limousine inspectors, senior taxi and limousine inspectors and associate taxi and limousine inspectors" (NYCCBL § [a][4][vi]). This expansion resulted in a number of unions bringing administrative petitions before the OCB, seeking to represent these newly identified uniformed works. There are approximately 200 members in the taxi officer title; they are presently represented by Local 237. Although the taxi officers have peace keeping duties, they do not carry firearms.

LEEBA is a collective bargaining unit or union. According to LEEBA, a majority of the taxi officers (112 of them) have signed a certification petition to have LEEBA certified as their exclusive collective bargaining representative. On April 14, 2008, LEEBA filed an administrative representation petition ("representation petition") with OCB to be certified as the taxi officers' union representative and for the Board of OCB to order a representational vote.

In the year preceding LEEBA's representation petition, there was a flurry of so-called "Local Law 56" filings by other unions seeking removal of other uniformed titles (for example, park rangers, park supervisors, deputy sheriffs) to create new or separate bargaining units. The City brought its own administrative petition to have all these uniformed titles consolidated into a single "Public Health, Safety and Enforcement" bargaining unit. The Board of OCB decided it would be best to consolidate all these petitions because they had common issues and facts, to wit: what is the appropriate placement of all Local 56 titles for purposes of collective bargaining? This decision was made *In the Matter of the Certification Proceeding between the City of New York and District Council 37, et al and LEEBA* (Docket No. RE-178-07, RU-1249-05, RU-1255-08 and AC-36-07) (hereinafter the "DC 37 administrative action"). The decision to consolidate is dated April 22, 2009 ("consolidation decision"). In the consolidation decision, the Board of OCB also granted LEEBA's motion to intervene, although it was brought a year after the DC37 action was commenced. The Board, however, denied LEEBA's motion for an immediate vote to determine representation: "LEEBA's request to appear on the ballot of any election this Board may order.." because "the Board has yet to determine the appropriate bargaining unit or units [for the officers LEEBA seeks to represent]..."

After LEEBA was allowed to intervene, the OCB permitted a vote with respect to a representation petition brought by Council 82 *[I/M/O Council 82, NYS Law Enforcement Officers Union,* 2 OCB 22 [BOC 2009]), a rival and much larger union. After that happened, Kenneth Wynder, LEEBA's president, sent OCB a letter dated November 13, 2009 [1] , demanding that OCB allow the taxi officers vote to decide which bargaining unit would represent them. OCB's Director of Representation, Katherine Spence ("Spencer"), sent Wynder the following response, dated November 16, 2009 ("letter"):

> "[LEEBA] seeks to separate the Taxi and Limousine Inspector and Associate Taxi and Limousine Inspector Titles from the existing bargaining unit and represent them in a new unit containing only those two titles. Local Law 56, an amendment to the New York City Collective Bargaining Law ('NYCCBL'), was enacted in 2005 and added certain titles that were previously covered under the Citywide level of bargaining to the uniformed level of bargaining...In other words, Local Law 56...created a new § 12-307 [a][5] of the NYCCBL and these titles that were previously covered by the Citywide level of bargaining were moved to a new level of bargaining..."

In her letter, Spencer proceeds to describe why the Local Law 56 cases were consolidated for consideration and hearing. She also states that Wynder knows about the hearing since it is part of the consolidation decision and Wynder attended the pre-hearing conference. In conclusion, Spencer states that the Council 82 petition has no bearing on LEEBA's representation petition and Wynder is aware that "the Board cannot rule on LEEBA's petition and/or order an election" until there is a decision about whether all the Local Law 56 titles should be part of large unit, remain in their current units, or allowed to be in separate units.

It is this letter dated November 16, 2009, that LEEBA is challenging because, according to LEEBA, the board's "decision" is that the taxi officers cannot yet hold a representational vote. Furthermore, LEEBA contends OCB is delaying the hearing on the Local Law 56 representational petitions.

Both respondents argue that the November 16, 2009 correspondence is not a final determination, but merely correspondence responding to Wynder's complaint letter and demand for an immediate vote.

Both respondents argue, alternatively, that even if the November 16, 2009 correspondence is a determination, the decision is that LEEBA's petition has yet to be heard and it will be heard in due course, along with the other Local Law 56 representational petitions that were filed, and that it is within OCB's discretion to consolidate cases so as to uniformly deal with issues and prevent inconsistent decisions.

The respondents also argue that because NYCCBL § 12-308 [a] shortens the statute of limitations for an Article 78 review of a Board decision from four (4) months to just thirty (30) days, this petition is untimely. According to respondents, the decision that LEEBA is actually seeking a review of is not the November 16, 2009 "decision," but the consolidation decision made April 22, 2009 when the voting issue was first raised and decied.

The City separately argues that since LEEBA is looking to replace Local 237 as the taxi officer's bargaining representative, Local 237 is a necessary and indispensable party who must be joined (CPLR 1001) and, failure to join a necessary party is a basis for the dismissal of this action.

In response to these arguments, LEEBA claims that OCB and the City have worked together for many years to "suppress the rights of" smaller unions and the respondents are unnecessarily delaying hearings to deny individual members the benefits of Local Law 56. Petitioner argues further that the right to vote is a fundamental right protected under the First Amendment and also reiterated in the NYCCBL at section 12-305 which provides that employees have a right to "bargain collectively through certified employee organization of their own choosing...

Discussion

As more fully addressed below, this petition must be dismissed not only because it is untimely, but also because it is challenging a non-final determination by OCB and petitioner must pursue its available administrative remedies before coming to court.

Although LEEBA contends this Article 78 petition challenges the "decision" by the board made November 16, 2009, the letter that Spencer sent is not a final determination, but a response to Wynder's letter asking, once again, for a representational vote. The Board consists of three persons. The letter is not sent by or signed by the Board or any one of its members, but from Spencer who is a director of OCB. LEEBA presents no legal authority that Spencer's letter has the force of a determination or order by the Board, let alone a "final" determination on the issue of voting (*Walton v. NYS Dept. of Corr Svcs.,* 8 N.Y.3d 186 [2007]). Therefore, the November 16, 2009 letter cannot be the basis for LEEBA's petition.

Since petitioner is challenging OCB's determination, that the time is not right for a representation vote, he is really challenging the consolidation order made in the DC 37 proceeding dated April 22, 2008. It was in that decision that OCB allowed LEEBA to intervene, but denied its motion to let the taxi officers immediately hold a vote on which union will represent them.

Pursuant to Article 78, the statute of limitations to commence a special proceeding challenging any action coming within its ambit is four (4) months (*Yarbough v. Franco,* 95 N.Y.2d 342 [2000]). However, NYCAC § 12-308 [a] has shortened the statute and the time in which to file a petition is thirty (30) days after the order. Thus, the petition challenging the Board's refusal to let the taxi officers hold an immediate vote is brought well beyond this time period which is marked by the April 22, 2009 decision.

Notably, Local 237 is a party to the DC37 action, but not a named respondent in this action. Respondents have aptly raised the issue of whether Local 237 should have been a named respondent in this proceeding. CPLR § 1001 [a] mandates that a necessary party who is subject to the court's jurisdiction must be joined and failure to join the necessary party is grounds for the dismissal of the action (CPLR §§ 1003; 3211 [a][10]). A necessary party is someone who must be brought into the case 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. The court agrees that Local 237 should have been named in this action because LEEBA seeks to represent taxi officers presently represented by Local 237. Given the very short statute of limitations to challenge the Board's determination, and the possibility that LEEBA could have prevailed in having the determination vacated had the petition been successful, Local 237's absence in this case is also fatal (*Solid Waste Services, Inc. v. NYC Dept. Env Protection,* 29 A.D.3d 318 [1st Dept 2006)].

To the extent that petitioner is also challenging the Board's decision that a hearing is necessary, but no hearing date has yet been scheduled, that determination was also contained in the April 22, 2009 decision and this challenge fails for all the reasons already stated. Although the respondents present in great detail all the reasons why they have the right to hold a hearing on the representation issues raised by LEEBA (and the 25 other collective bargaining units), it is unnecessary for the court to delve into those issues not only because this petition is untimely and defective, but also because LEEBA does not directly challenge the Board's decision to hold a hearing. Petitioner's only argument is that a delayed vote and hearing are “tactics” of the respondents who collaborate each time to hold back the smaller unions in favor of dealing with larger unions. In any event, the Board's decision to consolidate cases and hold a hearing for the reasons articulated in Board's April 22, 2009 order, is well within the OCB's discretion and the court cannot substitute its own judgment (*Matter of Incorporated Village of Lynbrook v. New York State Public Employment Relations* Board, 48 N.Y.2d 398 [1979]).

Conclusion

Respondents' motion and cross motion for the denial of the petition and preanswer dismissal of this proceeding is granted in all respects for the foregoing reasons.

Accordingly,

IT IS HEREBY:

ORDERED ADJUDGED AND DECLARED that the petition is denied and this proceeding is dismissed; and it is further

ORDERED ADJUDGED AND DECLARED that this is the order, decision and Judgment of the court.

Dated: New York, New York

July 12, 2010

ENTER:

<<signature>>

Hon. Judith J. Gische, JSC

Footnotes

1 Neither side has provided a copy of this letter to the court.