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

PRESENT: YORK PART 2

Justice

Index Number : 104531/2007
HODGE, GWENNETT E.
VS
OFFICE OF COLLECTIVE BARGAIN
Sequence Number : 002
DISMISS

INDEX NO. 104531/2007
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

this motion to/for

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN - 3 2008
COUNTY CLERK'S OFFICE

MOTION IS [illegible]
WITH ACCOMPANYING MEMORANDUM DECISION.

RECEIVED
JAN 29 2008
OCB 2:50p

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

RECEIVED
DEC 05 2007
MOTION SUPPORT OFFICE

Dated: 12/3/07

LOUIS B. YORK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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 2

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In the Matter of the Application of
GWENNETT E. HODGE

Petitioner,

Index No. 104531/07

For a Judgment Pursuant to Article 78
of the CPLR,

-against-

OFFICE OF COLLECTIVE BARGAINING and
BOARD OF COLLECTIVE BARGAINING, MARLENE
GOLD as Chair, GEORGE NICOLAU,
CAROL A. WITTENBERG, M. DAVID ZURNDORFER,
ERNEST F. HART, CHARLES G. MOERDLER and
BRUCE H. SIMON, as members of the Board, SUSAN
PANEPENTO as Deputy Director for Dispute Resolution
and Certification, ADMINISTRATION FOR CHILDREN
SERVICES, and SSEU LOCAL 371,

Respondents.

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YORK, J:

Motion Sequence Nos. 01 and 02 are consolidated for disposition. Petitioner Gwennett E. Hodge commenced this Article 78 (Seq. #01) proceeding seeking a judgment annulling a determination of the City of New York Board of Collective Bargaining (the Board), to wit, Decision No. B-36-2006, dated December 4, 2006 (the Decision). In Seq. 02, respondent moves to dismiss. For the reasons stated infra, the petition is denied and the motion to dismiss is granted. In the Decision, the Board dismissed Hodge's improper practice petition alleging that the Social Services Employee Union Local 371 (the Union) breached its duty of fair representation in the course of representing her in a grievance arbitration and resulting settlement agreement, and that the City of New York and the Administration for Children's Services (ACS) wrongfully terminated her employment. In addition, the petition names the individual chairs and members of the Board, as well as the Deputy Director for Dispute Resolution, as respondents to

this proceeding.

Respondents move for an order, pursuant to CPLR 7804 (f), dismissing the petition and upholding the Decision, on the grounds that: (a) this proceeding is time-barred; and (b) on the merits, no showing has been made that the Decision is arbitrary, capricious or the result of any legal error.

BACKGROUND

Hodge, a caseworker employed by ACS, allegedly suffered personal injuries during the terrorist attack at the World Trade Center on September 11, 2001, when she was pushed and trampled while leaving her office building at 150 William Street, New York, New York. She claims to have suffered neck and back injuries and was later diagnosed with Post Traumatic Stress Disorder.

It is undisputed that, as an employee of the City of New York, Hodge was subject to the New York City Collective Bargaining Law (New York City Administrative Code, title 12, Chapter 3) (NYCCBL), which regulates the conduct of labor relations between the City of New York and its employees. The NYCCBL was enacted by the New York City Council, pursuant to section 212 of the New York State Civil Service Law (CSL), commonly known as the Taylor Law. The New York State Public Employment Relations Board (PERB) administers the Taylor Law. The Taylor Law expressly authorizes the City of New York to enact and maintain its own labor relations law. The Board, and its constituent boards, were created pursuant to Chapter 54 of the New York City Charter. The Board is a neutral tripartite body made up of two City representatives appointed by the Mayor, two Labor representatives designated by the municipal labor unions, and three impartial members, elected by the City and Labor members.

NYCCBL § 12-309 (a) (2) vests the Board with the power "to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306" of the NYCCBL.

Hodge was a member of the Union and was employed by ACS in the civil service title as Caseworker until her employment was terminated on October 3, 2002. The Union is duly certified as the collective bargaining representative for employees in the civil service title of Caseworker.

Hodge, after receiving the previously-described injuries, went on medical leave from October 1, 2001 through July 8, 2002. At her request, medical leave was extended through October 1, 2002. She requested a further extension of medical leave, which was denied. She was instructed in writing that, if she intended to return to work, she should report to ACS Personnel on October 2, 2002, with a doctor's note attesting to her ability to resume her duties. On October 2, 2002, she reported to ACS Personnel without the required medical documentation. On October 3, 2002, Hodge was notified in writing that her employment was "terminated due to your refusal to respond to the various attempts to have your employment status resolved. You have left this agency no recourse but to separate your employment."

In the meantime, on May 14, 2002, Hodge submitted an application for worker's compensation. A preliminary hearing conference was held on September 4, 2002. A hearing was held at the Workers' Compensation Board on November 25, 2002. She was awarded worker's compensation to be paid by the employer for the period from September 12, 2001 through October 2, 2002, but not for any period beyond that date.

On January 27, 2003, the Union filed a "Step II Grievance" claiming that ACS

wrongfully terminated Hodge's employment. ACS denied the grievance. On April 21, 2003, the Union filed a request for arbitration, claiming that ACS's termination of Hodge violated the parties collective bargaining agreement (Agreement), and sought, among other things, reinstatement and back pay and benefits. On December 1, 2005, an arbitration hearing was held. At that time, the City and the Union negotiated a draft Consent Award, allowing Hodge to apply for reinstatement subject to certain requirements - including submission of medical documentation regarding her physical and mental fitness to return to work. The draft Consent Award was revised and finalized. Hodge, however, claims that she did not agree to the Consent Award or its revisions, never signed the Consent Award, and that no one ever explained the basic terms of the Consent Award to her. Respondents dispute this. Hodge thereafter made numerous requests to the arbitrator to retract the Consent Award, all of which were denied. She also contacted her Union, claiming that she wanted a new attorney assigned to her and a new arbitration before a new arbitrator. Additionally, on at least one occasion, Hodge attempted to attain reinstatement, but did not provide the requisite medical documentation.

On February 28, 2006, OCB's Deputy Director of Dispute Resolution sent a letter to Hodge (in response to her February 13, 2006 letter to the arbitrator requesting vacatur of the Consent Award), stating that the arbitrator's award was final and binding.

On March 31, 2006, Hodge commenced the improper practice petition, seeking, inter alia: (a) an investigation into the processing and oversight of the arbitration by the arbitrator and the OCB; (b) an investigation into the procedures followed by the arbitrator regarding the Consent Awards; (3) an investigation of Union's counsel; and (4) exoneration, expungement of charges, restoration of lost pay and benefits, and immediate reinstatement.

In the Decision, the Board rejected Hodge's claims. It held that Hodge "failed to establish a prima facie case that the Union's conduct was arbitrary, discriminatory or founded in bad faith," noting that "[a] union enjoys wide latitude in the handling of grievances as long as it exercises its discretion with good faith and honesty" and that "[a] grievant's disagreement with the union's tactics or discontent with the quality or extent of representation does not constitute a breach of the duty of fair representation." In rejecting Hodge's claim of a breach of the duty of fair representation, the Board noted that "nothing in the record indicates that the Union's agreement with the Consent Award was an arbitrary, discriminatory, or bad faith act." With respect to her claim that the Union acted in bad faith by agreeing to modify the Consent Award without her consent, the Board stated that "[e]ven if the Union did agree to the modification without her consent, Petitioner failed to demonstrate that the Union's actions were perfunctory, prejudicial, or in bad faith under the circumstances of this case."

Additionally, the Board declined Hodge's "request that OCB investigate the procedures followed by the arbitrator regarding the Consent Award," holding that it did not have jurisdiction or appellate review powers over issues decided in arbitration. It likewise refused to address claims under the Workers' Compensation Law or Civil Service Law, stating that "this Board has no jurisdiction over the administration of statutes other than the NYCCBL." Because the case was dismissed against the Union, it was also dismissed against the employer.

DISCUSSION

Respondents contend that the petition is time-barred to the extent that it seeks to challenge the Decision because, pursuant to the NYCCBL, a petitioner must seek review of a Board decision within 30 days after service of the decision. Since the instant petition was filed

on April 3, 2007, well beyond 30 days, it is time-barred. Hodge contends that the petition is meritorious and that it is timely because it is in the nature of a mandamus under CPLR 7803 (1), the statute of limitations for which is four months under CPLR 217.

Pursuant to NYCCBL § 12-308, "[a]ny order of the Board of Collective Bargaining . . . shall be . . . reviewable under article seventy-eight of the civil practice law and rules upon petition filed by an aggrieved party within thirty days after service by registered or certified mail of a copy of such order upon such party." This statutory limitation is consistent with CPLR 217, which requires the filing of an Article 78 petition within four months of the determination to be reviewed "[u]nless a shorter time is provided in the law authorizing the proceeding." The courts have consistently approved statutes shortening the four-month statute of limitations, and have held that the failure to seek review within the prescribed days is a fatal defect mandating dismissal of the petition (see Matter of Uniformed Firefighters Assoc. of Greater New York v New York City Office of Collective Bargaining, 163 AD2d 251 [1st Dept 1990]; Matter of Davis v Anderson, 51 AD2d 528, 528-529 [1st Dept 1976]). As the First Department explained in the Uniformed Firefighters case:

> Review of BCB determinations must be sought within 30 days after service of the final order. (Civil Service Law § 213 [a]; § 212; Matter of Davis v Anderson, 51 AD2d 528 [1st Dept 1976]). . . . Therefore, since this article 78 proceeding was commenced more than 30 days after service of BCB's determinations, it is time barred.

(Id. at 253).

Similarly, in Davis, the First Department stated:

> Review of a determination such as in the case at bar must be sought within 30 days (Civil Service Law, § 213), which time limitation is applicable to proceedings before the Office of Collective Bargaining (Civil Service Law, §

212). This proceeding, having been brought more than 30 days after the determination sought to be reviewed, is therefore time-barred.

(51 AD2d at 528-529).

So too, in Law Enforcement Employees Benevolent Assoc. (LEEBA) v City of New York (Sup Ct, NY County, February 28, 2007, Edmead, J., Index No. 119084/06), the court stated:

> An Article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes final and binding upon the petitioner unless a shorter time is provided in the law authorizing the proceeding (Yarbough v Franco, 95 NY2d 342 [2000]; CPLR 217 [1]; New York State Assn. v Axelrod, 78 NY2d 158, 165 [1991]). And, Administrative Code § 12-308 (a) provides that a challenge to a final order of the Board by an aggrieved party must be filed within 30 days of such order (see NYC Admin Code § 12-308). Thus, [plaintiff's] time within which to challenge the Board's decision dated December 4, 2006, expired January 3, 2007.

Statutes shortening the Article 78 four-month statute of limitations in analogous matters, such as zoning challenges, have likewise been upheld (see e.g. Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards and Appeals, 5 NY3d 452, 460 [2005]). In that case, the Court of Appeals explained:

> Though article 78 challenges generally must be brought within four months, that limitations period may be shortened by law (CPLR 217). In this case, New York City's Administrative Code shortened the limitations period to 30 days. Short limitations periods are not unusual in municipal zoning (see e.g. General City Law 38; Town Law § 195).

Here, the Decision was dated December 4, 2006. According to Hodge, she received a copy of the Decision by certified mail on December 26, 2006. Thus, she was required to commence this proceeding within 30 days, or by January 25, 2007. Since the instant petition was filed on April 3, 2007, the petition is untimely. Hodge's claim that the 30-day provision is

Supreme Court of the State of New York
County of New York

Hodge, Gwennett E.

- against -

Office of Collective Bargaining

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Order + Judgment

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