SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHLEEN WATERMAN-MARSHALL** **PART** **09M**

Justice

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THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, THE NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Petitioners,

- v -

THE BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK, SUSAN J. PANEPENTO, MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL-CIO,

Respondents.

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INDEX NO. 452449/2022

MOTION DATE 05/08/2023, 05/08/2023

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 39

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 40, 41, 42, 43, 44

were read on this motion to/for DISMISSAL.

On September 2, 2022, the City of New York ("the City"), New York City Department of Transportation ("DOT"), and New York City Department of Citywide Administrative Services ("DCAS") (collectively, "Petitioners") commenced this Article 78 proceeding against the Board of Collective Bargaining of the City of New York ("the Board"), Susan J. Panepento, as Chair of the Board and Director of the Office of Collective Bargaining Director, and Marine Engineers' Beneficial Association, AFL-CIO ("MEBA") (collectively, "Respondents"), for an order annulling the Board's Decision and Order dated August 3, 2022 (the "Decision").[1] On February 24, 2023, Respondents opposed and moved to dismiss the petition, for failure to state a cause of action. The matter was recently re-assigned to Part 9.

Background

MEBA represents certain DOT employees, including Christian Ferraro ("Mr. Ferraro"), who has been employed with the Staten Island Ferry since 2009. As is here relevant, Mr. Ferraro was appointed to the permanent civil service title of Mate in May 2015, but has worked in

[1] Namely, *In the Matter of the Improper Practice Petition between Marine Engineers' Beneficial Association, AFL-CIO and The City of New York, The New York City Department of Transportation, and The New York City Department of Citywide Administrative Services*, Docket No. BCB-4355-19, 15 OCB2d 25 (BCB 2022).

various positions, including Assistant Captain and Captain on provisional bases, since his initial employment. Mr. Ferraro was elected to be an MEBA Union Shop Steward in 2016. In this position, Mr. Ferraro, *inter alia,* raised alleged violations of the Collective Bargaining Agreement and filed and pursued contract grievances on behalf of MEBA members directly with DOT.

On September 9, 2019, DOT suspended Mr. Ferraro from his position as provisional Captain without pay and without explanation. On October 3, 2019, DOT notified Mr. Ferraro that, *inter alia*, he was being demoted to his permanent civil service position of Mate, effective October 6, 2019. On October 11, 2019, MEBA commenced an Improper Practice Proceeding with the Board and alleged, in relevant part, that DOT impermissibly retaliated against Mr. Ferraro for engaging in protected union activity by demoting and suspending him without pay (the "Improper Practice Proceeding"). MEBA also claimed that Mr. Ferraro's union activity motivated DOT's refusal to pay MEBA Bargaining Unit Members for attending a radar training course on their day off on February 15, 2019 (the "Affected MEBA Members"). The City opposed the petition and claimed that DOT's decisions respecting Mr. Ferraro were based upon his performance and cellphone use at work.[2]

After a seven-day hearing, the Board issued the Decision and granted MEBA's petition by majority opinion. As is here relevant, the Board found that DOT retaliated against Mr. Ferraro and the Affected MEBA Members in violation of New York City Collective Bargaining Law ("NYCCBL"), codified under Administrative Code of City of New York, § 12-306 (a) (1) and (3), and directed DOT to: (1) "appoint [Mr. Ferraro] to the next available provisional appointment to Captain when it can lawfully make provisional appointments under the Civil Service Law" ("CSL"); (2) "make [Mr. Ferraro] whole for lost wages, benefits, and seniority resulting from its retaliatory demotion from the date of his demotion…until such time as he is appointed to provisional Captain"; and (3) pay the Affected MEBA Members for attending the radar training course on February 15, 2019.

Petitioners now claim that the determinations and remedial remedies set forth in the Decision are arbitrary and capricious, in light of the evidence before the Board at the hearing, public policy considerations, and the limitations contained in related precedent. Thus, on September 2, 2022, Petitioners commenced this Article 78 proceeding, seeking to annul those portions of the Decision. Respondents opposed and moved to dismiss the petition, for failure to state a cause of action.

Discussion

It is well-settled that, in reviewing an agency determination by way of an Article 78 proceeding, the court must ascertain whether the action in question "was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]; *see Matter of Gilman v. New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 146 [2002]). A petitioner meets its heavy burden of establishing that an action is arbitrary and capricious where it proves, beyond "conclusory

[2] Petitioners did not address MEBA's claim that DOT retaliated against the Affected MEBA Members, except to mistakenly assert that the claim was withdrawn.

allegations and speculative assertions" (*Cashin v Cassano*, 129 AD3d 953, 954 [2d Dept 2015]), that the action was "taken without sound basis in reason or regard to the facts" (*Matter of Peckham v. Calogero*, 12 NY3d 424, 431 [2009]; *see Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974])."If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Peckham v. Calogero*, 12 NY3d at 431).

Additionally, Courts "typically [defer] to the Board's expertise in applying and interpreting the provisions of the NYCCBL… [and] cannot simply substitute judgment for that of an administrative agency when the agency's determination is reasonable" (*District Counsil 37, Am. Fedn. Of State, County & Mun. Employees, AFL-CIO v City of New York*, 22 AD3d 279, 284 [1st Dept 2005] [internal citations omitted]; *see Matter of City of New York v New York State Nurses Assn*, 130 AD3d 28, 34 [1st Dept 2015] [construction given to statutes and regulations by agency responsible for administration should be upheld if not irrational or unreasonable, thus, court to afford broad deference to determinations of Board, which is body charged with interpreting and implementing NYCCBL and determining rights and duties of labor management in New York City], *affd* 29 NY3d 546 [2017]).

Here, the Board's determination that DOT retaliated against Mr. Ferraro and the Affected MEBA Members in violation of NYCCBL § 12-306 (a) (1) and (3) is supported by a rational basis and is not arbitrary and capricious. NYCCBL § 12-306 (a) (1) and (3) provide that "[i]t shall be improper practice for a public employer or its agents… to interfere with, restrain or coerce public employees in the exercise of their rights granted in [NYCCBL § 12-305]… [or] to discriminate against any employee for the purpose of encouraging or discouraging membership in, or the participation in the activities of, any public employee organization." The Board finds that an employer violated these provisions where a petitioner establishes that "the employer's agent responsible for the allegedly discriminatory act had knowledge of the employee's union activity… and the employee's union activity was a motivating factor in the employer's decision" (*Matter of Bowman*, 39 OCB 51, at 18-19 [BCB 1987]; *City of Salamanca*, 18 PERB ¶ 3012 [1985])

The Board rationally found that DOT violated NYCCBL § 12-306 (a) (1) and (3) and retaliated against Mr. Ferraro and the Affected MEBA Members. Petitioners no not dispute that Mr. Ferraro, as an MEBA Union Shop Steward, was engaged in union activities when he raised concerns that DOT was violating the Collective Bargaining Agreement and filed at least one grievance on behalf of MEBA members. Nor do they contend that DOT lacked knowledge of these union activities. While Petitioners challenge the Board's determination that Mr. Ferraro's union activities were a motivating factor in DOT's decision to not pay the Affected MEBA Members, they failed to address or oppose this claim before the Board except to mistakenly assert that the claim was withdrawn. Additionally, the Board's determination that Mr. Ferraro's union activities, and not a legitimate businesses reason, improperly motivated DOT to demote and suspend him without pay is reasonable given the record before it at the hearing, which included, *inter alia*, the temporally proximity between Mr. Ferraro's demotion and union activities, testimony and documentary evidence of frequent cellphone use by DOT employees, and evidence of disparate treatment between similarly-situated employees (*see Matter of Correction Officers' Benevolent Assn. v New York City Bd. of Collective Bargaining*, 182 AD3d

522, 522-523 [1st Dept 2020] [Board determination, made after discretionary hearing, supported by witness testimony and not arbitrary and capricious]). Accordingly, the Court "cannot simply substitute judgment for that of the [Board]" (*District Counsil 37, Am. Fedn. Of State, County & Mun. Employees, AFL-CIO v City of New York*, 22 AD3d at 284) and Petitioners' request to annul these determinations, is denied.

Petitioners also failed to establish a basis, under CPLR 7803 (3), for this Court to annul the Board's direction that DOT "appoint [Mr. Ferraro] to the next available provisional appointment to Captain when it can lawfully make provisional appointments under the [CSL]" and "make [Mr. Ferraro] whole for lost wages, benefits, and seniority resulting from its retaliatory demotion from the date of his demotion to Mate until such time as he is appointed to provisional Captain[.]" NYCCBL § 12-309 (a) (4) empowers the Board "to prevent and remedy improper public employer and public employee organizational practices… [and] establish procedures, make final determinations, and issue appropriate remedial orders" for such purposes. The Board interprets this provision as to authorize awards of reinstatement and back-pay to employees who have been subjected to improper practice. This interpretation is rational, supported by the Board's own precedent (*e.g. Matter of City of New York v New York State Nurses Assn.*, 130 AD3d 28, 34 [Board's determination not arbitrary and capricious, notwithstanding "relatively expansive" interpretation of NYCCBL provision where, *inter alia*, interpretation based on own precedents and related jurisprudence, and interpretation sufficiently reasonable to preclude court substituting another interpretation]; *Local 1549, DC 37*, 51 OCB 2, at 23 [BCB 1993] [Board, *inter alia*, found that selection for layoff motivated by employee's union activity and directed reinstatement to provisional position with backpay]), consistent with related New York Public Employment Relations Board authority (*e.g. County of Wyoming*, 34 PERB ¶ 3042 [2001] [where termination violated Public Employee's Fair Employment Act, proper remedy was to reinstate employee and make whole for lost pay and benefits]), and is entitled to deference (*see District Counsil 37, Am. Fedn. Of State, County & Mun. Employees, AFL-CIO v City of New York*, 22 AD3d at 284; *Matter of City of New York v New York State Nurses Assn*, 130 AD3d at 34). Accordingly, the Court rejects Petitioners' arguments that the Board lacked authority to direct reinstatement of Mr. Ferraro under, *inter alia*, maritime law.

Additionally, the Board expressly recognized and tailored its direction that DOT reinstate Mr. Ferraro to the limitations to provisional employment contained in CSL § 65 and relevant caselaw (*see generally City of Rome v State Pub. Empl. Relations Bd.*, 283 AD2d 817 [3d Dept 2001] [PERB exceeded authority by directing reinstatement where employee's continued service in temporary appointment position beyond period permitted by CSL § 64 violated NY Constitution, article V, §6]; *County of Suffolk*, 11 PERB ¶ 3105 [1978] [directing, *inter alia*, reinstatement of provisional employee if ascertained, in course of compliance investigation, that reinstatement not barred under CSL § 65 [3]). Notably, Petitioners do not claim that Mr. Ferraro's continued provisional employment as Captain violates a specific provision of CLS § 65 or the New York State Constitution and, indeed, the record reveals that it does not, as the eligible list established for Captain after Mr. Ferraro's demotion was inadequate to fill all positions then held on a provisional basis and was immediately exhausted following its establishment (*see* CLS § 65 [4] [successive provisional appointments authorized where examination for position fails to produce adequate list to fill all positions then held on provisional basis, or where list is exhausted immediately following its establishment]).

The Court finds Petitioners' remaining contentions to be without merit. As Petitioners failed to establish that the determinations and remedial remedies made by the Board and set forth in the Decision were arbitrary and capricious, the petition is denied and Respondent's motion to dismiss is granted.

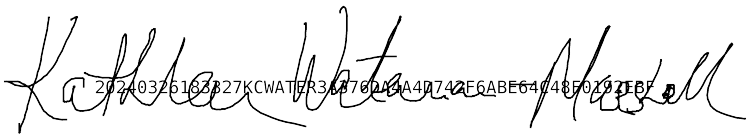
Accordingly, it is hereby

ORDERED that the petition is denied; and it is further

ORDERED that Respondent's cross-motion to dismiss is granted; and it is further

ORDERED that this matter is dismissed; and it is further

ORDERED that any requested relief that was not expressly addressed and granted herein was considered by the Court and is denied.



3/26/2024
DATE

KATHLEEN WATERMAN-MARSHALL, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**