

**Matter of Ivan v New York City Dept. of Health &
Mental Hygiene**

2009 NY Slip Op 30120(U)

January 20, 2009

Supreme Court, New York County

Docket Number: 108807/08

Judge: Carol R. Edmead

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

Index Number : 108807/2008
IVAN, RICHARD
 vs.
NYC DEPT. OF HLTH & MENTAL
 SEQUENCE NUMBER : 001
 ARTICLE 78

PART 35

INDEX NO. _____
 MOTION DATE 10/24/08
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

FILED
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk / Room

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that the instant application by petitioners for an order (1)

declaring that the denial by respondents of petitioners' membership in the New York City Employees' Retirement System is arbitrary, capricious, and violates petitioners' entitlement to those benefits pursuant to New York City Administrative Code §13-104, and (2) directing respondents to take the necessary actions to provide petitioners with benefits of membership in NYCERS, is denied, and the petition is dismissed; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon petitioners within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 11/20/09

[Signature]

 J.S.C.

HON. CAROL EDMEAD

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: PART 35

-----X

In the Matter of the Application of
RICHARD IVAN AND JOSEPH SWEENEY,

Index No. 108807/08

Petitioners,

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

-against-

NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE
THOMAS FRIEDMAN, as Commissioner
New York City Department of Health and Mental
Hygiene,

Respondents.

-----X

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioners Richard Ivan ("Ivan") and Joseph Sweeney ("Sweeney") (collectively, "petitioners") seek a order (1) declaring that the denial by the New York City Department of Health and Mental Hygiene ("NYCDOH") and Thomas Friedman as Commissioner of NYCDOH (collectively, "respondents") of petitioners' membership in the New York City Employees' Retirement System ("NYCERS") is arbitrary, capricious, and violates petitioners' entitlement to those benefits pursuant to New York City Administrative Code ("Adm. Code") § 13-104; and (2) directing respondents to take the necessary actions to provide petitioners with benefits of membership in NYCERS.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1405).

Petition

According to the petition, Ivan has been employed by NYCDOH in the competitive class position of Associate Staff Analyst, since May 23, 1994. Sweeney worked for NYCDOH as a Graduate Intern from June 1993 through September 2003. In October 2003, he passed the Civil Service examination for Staff Analyst, and was appointed to the Office of Contract Management at 63 Worth Street, New York, New York. Since December 2003, Sweeney's title has been "Coordinator of Agency Preparedness" for NYCDOH's Office of Mental Health Disaster Preparedness and Response; Sweeney also holds the competitive class civil service title of Associate Staff Analyst. Petitioners work on NYCDOH business, report to a NYCDOH supervisor, and are governed by NYCDOH work rules. Petitioners also work at the NYCDOH office at 93Worth Street, New York, New York. In further support, petitioners submit documentation indicating that NYCDOH determines their work schedules, authorizes overtime (on NYCDOH letterhead), authorizes leaves of absences (on NYCDOH letterhead), or handles days taken as floating holidays, handles petitioners' requests for reimbursement for expenses (on NYCDOH letterhead), handles petitioners' requests for travel (on NYCDOH letterhead), and imposes requirements regarding personal appearance and financial disclosure reports (on NYCDOH letterhead, which provides for the signature of an "employee").

Although, until recently, petitioners were paid pursuant to the collective bargaining agreement between the City of New York and the Organization of Staff Analysis ("OSA"), their paychecks were issued by an entity called the Center for Policy Research ("CPR") located in

Washington, D.C., which had one employee, Amitai Etzioni (“Etzioni”).¹ Petitioners had no contact with and performed no work for CPR or Etzioni.

At a mandatory information session on May 20, 2008, NYCDOH informed petitioners and others that an organization called Research Foundation for Mental Hygiene (the “Foundation”)² assumed “the contract with CPR,” and as a result, NYCDOH would no longer offer them benefits guaranteed by the OSA collective bargaining agreement. NYCDOH also stated that petitioners would not be members of NYCERS. No aspect of petitioners’ work has changed, and the Foundation performs the same role of issuing checks and benefits previously carried out by CPR, a third-party shell through which NYCDOH believes it can employ petitioners without offering them the compensation and benefits to which they are entitled.

Respondents’ denial of petitioners’ membership in NYCERS violates petitioners’ rights under Adm. Code § 13-104, which provides that all employees of the City of New York, with certain exceptions inapplicable here, shall be members of NYCERS.

Respondents’ Answer and Opposition

The employment structure in which petitioners perform their work is based on state law, and not on any “determinations” by the respondents. Chapter 620 of the Laws of 1974 and Chapter 660 of the Laws of 1977 authorize state funding to be provided to local governments and permit local governments to contract with private corporations to accomplish state mental health

¹ CPR was formed in 1968 by Dr. Etzioni as a private not-for-profit corporation dedicated to public policy issues (*see Rosen Aff.*, ¶11 annexed to respondents’ Answer). Respondents believe that CPR dissolved in June 2007.

² The Foundation, a non-for-profit organization, was formed in 1952. Although not a State agency, the Foundation’s purpose is to assist and enhance the research and training objectives of the New York State Office of Mental Retardation and Developmental Disabilities and the New York State Office of Alcoholism and Substance Abuse Services (*see Rosen Aff.*, ¶17 annexed to respondents’ Answer).

service mandates. In 1974 and 1977, the New York State Legislature mandated that all persons who are on out-patient status and were discharged after spending 5 continuous years or more in a state facility for the mentally disabled during a specific time period are eligible for life-time rehabilitation services. The New York State Office of Mental Retardation and Developmental Disabilities ("NYSOMRDD") and the New York State Office of Mental Health ("NYSOMH") sought the assistance of the NYCDOH through its predecessor, the New York City Department of Mental Health, Mental Retardation and Alcoholism Services to develop and monitor community-based programs for the mentally disabled ("State Programs"). As a result, the NYSOMRDD, NYSOMH, and the NYCDOH (through its predecessor) reached an agreement, which provided that the State would provide funds to administer the State Programs (the "State Agreement"). The State Agreement required that CPR, as the State's designated provider, be provided the funds to administer the State Programs through a sole source contract with NYCDOH. Thereafter, NYCDOH contracted with CPR to provide CPR with staff to perform the work necessary to administer the State Program (the "CPR Contract"). CPR hired and paid staff that worked out of NYCDOH's Worth Street office and performed the administrative work associated with the State Programs. Although CPR employees were supervised by on-site NYCDOH supervisors, CPR maintained its own employment policies, including disciplinary proceedings, and therefore, NYCDOH could not charge CPR employees with discipline, nor terminate their employment. Salaries and benefits, including health, leave and pension benefits, for NYCDOH-assigned CPR employees were provided by CPR. Paychecks were issued to NYCDOH-assigned CPR employees by Professional Education Services ("PES"), a company with which CPR subcontracted to provide many of its payroll functions. Since CPR had no

formal cost-of-living adjustment ("COLA") structure, to promote harmony between CPR and NYCDOH employees, NYCDOH notified CPR whenever NYCDOH city employees received COLA increases; CPR would then comparably adjust its employees' salaries, based on titles that were similarly afforded to NYCDOH employees, and the CPR budget would be modified to reflect those increases.

NYCDOH's contracts for the State Programs are approved and funded by the NYSOMH. NYCDOH receives a State Aid Letter each year, defining the amount of State aid that NYCDOH receives for each contract and authorizing NYCDOH to renew its contracts with specific providers, such as CPR. Upon receipt of the State Aid Letter, NYCDOH issues its contract renewals and forwards the State funds to the providers.

When CPR sought to terminate its contract with NYCDOH, NYCDOH sought an assignee to assume the CPR Contract so as to enable CPR's staff to avoid unemployment and continue their work for the State Programs. NYCDOH chose the Foundation because it had several successful administrative contracts with NYCDOH and offered its employees benefits that were most similar to those offered by CPR. With the approval of NYCDOH, CPR and the Foundation entered into an Assignment and Assumption Agreement, effective July 1, 2007, whereby the Foundation hired CPR's existing employees and provided them salaries and benefits, including health, leave and pension benefits, similar to that provided by CPR. The Foundation provides COLA increases in line with those granted to similarly situated State employees. Based on the Foundation's assumption of the CPR Contract, NYCDOH contracted with the Foundation to provide the administrative services needed for the State Programs.

As to Ivan, he was appointed as an Associate Staff Analyst/Contract Analyst for CPR and

assigned to perform work at NYCDOH's Worth Street office. At the time Ivan commenced his employment with CPR, the CPR Contract was in effect. In May 1994, Ivan completed a CPR Employee Enrollment Form, which indicated that he was to become eligible for the CPR Pension Plan. The Form asks whether Ivan is employed elsewhere, and his answer on the CPR Form is "No." As part of his employment with CPR, CPR provided Ivan with health insurance and a pension plan. As part of the Foundation's assumption of the CPR Contract, Ivan was offered employment with the Foundation, effective July 1, 2007. Ivan accepted the offer, submitted an application for employment with the Foundation, acknowledged receipt of the Foundation's Employee Handbook, and requested from the Foundation, Retirement Plan Service Credit. The Foundation later requested that Ivan confirm his personal information for W-2 purposes. Ivan signed this letter, confirming the accuracy of the information. To date, Ivan remains a Foundation employee, is paid by the Foundation for his work in the State Programs, and the Foundation provides him with, *inter alia*, health, leave and pension benefits.

As to Sweeney, although he was employed with NYCDOH as a Graduate Intern from June 1993 through September 1993, Sweeney ceased employment with NYCDOH and commenced work with CPR in December 1993. At the time Sweeney commenced work with CPR, the CPR Contract was in effect, and Sweeney was thereafter assigned to perform work associated with the State Programs at NYCDOH.

Also as a part of the Foundation's assumption of the CPR Contract, Sweeney was offered employment with the Foundation, effective July 1, 2007. Sweeney submitted an application for employment with the Foundation, acknowledged receipt of the Foundation Employee Handbook, and requested from the Foundation, Retirement Plan Service Credit for his employment with

CPR. The Foundation requested that Sweeney confirm his personal information for W-2 purposes, and Sweeney signed the letter confirming the accuracy of the information contained in the letter. To date, Sweeney remains a Foundation employee, and is paid by the Foundation for his work in the State Programs. The Foundation provides Sweeney with, *inter alia*, health, leave and pension benefits. Thereafter, Sweeney was assigned to perform assigned to work as an employee of CPR and the Foundation.³

Due to continued complaints regarding employment status and benefits of its employees, the Foundation and not the NYCDOH, held an information session for its employees. Therefore, any “determination” made to deny petitioners membership in NYCERS was not made by NYCDOH, but by CPR and the Foundation.

In their first affirmative defense, the respondents maintain that this Article 78 proceeding is improper, as they did not make any “determination” denying petitioners NYCERS membership. Further, petitioners are not City employees. Any “determination” regarding petitioners’ employment or retirement benefit status was made by their employers, CPR or the Foundation.

In their second affirmation defense, respondents assert that in any event, any such determination was made when NYCDOH agreed to have the Foundation assume the CPR Contract, and when petitioners began their employment with the Foundation in July 2007. Since

³ In December 2007, Sweeney disputed his employment status with the NYCDOH, which in response, reiterated to Sweeney that he was employed by CPR and then by the Foundation. NYCDOH advised Sweeney that he was not employed by NYCDOH and to submit any issues of employment to the Foundation.

In January 2008, Ivan filed a Charge of Discrimination with the Equal Employment Opportunity Commission (“EEOC”) against NYCDOH, alleging inequitable retirement benefits. The Foundation then issued a letter explaining the assumption of the CPR Contract, and the employment and benefit status of its employees. NYCDOH filed a dispute of the charge on the basis that it is not Ivan’s employer. As of the submission of respondent’s Answer, NYCDOH has not received an EEOC determination.

petitioners did not commence this proceeding until June 2008, nearly a year after the alleged “determination,” the claims are barred by the applicable four-month statute of limitations. In support, respondents argue that (1) the statutory period within which to bring a legal proceeding commences when the party is notified of an “unambiguous” decision and thereby aggrieved, and (2) the limitations period is not tolled by subsequent requests, complaints, or negotiations for reconsideration of the determination. Although respondents did not make any “determinations” regarding petitioners’ entitlement to pension benefits, any such determination would have to have occur, at the very latest, in July 2007, when petitioners commenced employment with the Foundation and started participating in the pension plan. Thus, petitioners four-month period to commence this proceeding began when they were notified in July 2007 that they were Foundation employees, not City employees, and would be eligible for pension plans provided by the Foundation, not NYCERS. Further, any determination made at the information session in May 20, 2008 was made by the Foundation, which held the session, not NYCDOH. A request to revisit a determination is merely a request for consideration, and does not revive or toll the statute of limitations.

In their third affirmative defense, respondents allege that petitioners failed to state a cause of action given that they are statutorily ineligible for NYCERS membership pursuant to Adm. Code § 13-104. Petitioners concede that they were and continued to be paid by and receive benefits from CPR and the Foundation, respectively. The funding for CPR and the Foundation is provided by the State and NYCDOH implements the State Programs by contracting and forwarding State funds to private entities like CPR and the Foundation. Since petitioners became CPR employees, CPR and the Foundation have maintained their own employment policies,

provided salaries and benefits, and issued petitioners their paychecks. Thus, since the Adm. Code § 13-101(3) defines “city-service” as an employee of the city, respondents have not violated Adm. Code § 13-104, as alleged.

In their fourth affirmative defense, respondents maintain that their actions were lawful and proper in all respects.

For the reasons set forth above, the petition should be dismissed.

Reply

Petitioners insist that they were employed by and perform work exclusively for NYCDOH. While assigned to NYCDOH’s Office of Fiscal Management, Ivan reviews contracts for accuracy and enters contracts into the database. Sweency’s current responsibilities involve emergency management, evaluation of emergency drills, and development of emergency plans. Petitioners never received any job assignments from either organization, never visited their offices, and have never been supervised by employees from those organizations. No part of petitioners’ job duties has ever been determined by CPR or the Foundation. NYCDOH always has controlled petitioners’ job tasks, schedule, work location, and reporting relationships. Further, respondents’ own document, the Certificate of Procedural Requisites pertaining to CPR indicate that CPR has only one employee.

When NYCDOH advised petitioners to attend the session on May 20, 2008, the session was held at the NYCDOH’s Worth Street office, and was conducted by Assistant Commissioner Patricia Pate, Assistant Commissioner, “Brenda McIntyre, Senior Director for Administration Denise Arthur, and Thomas Jacobs from the Human Resources Department.” At this meeting, NYCDOH denied petitioners’ application for NYCERS membership.

Whether petitioners are employees of NYCDOH can be determined by applying factors used under Unemployment Insurance Law, Human Rights Law, and Workers' Compensation Law, such as, control over work schedule, location, assignments, and training, control over the means used to achieve results, control over the method of payment, the right to discharge, furnishing of equipment, relative nature of the work, and employment rules and regulations to follow. Petitioners assert that according to these factors, they are employees of NYCDOH.

In another context, respondents accept that petitioners are NYCDOH employees. In a document respondent filed with the U.S. Equal Employment Opportunity Commission, NYCDOH asserted that petitioners "were recruited and interviewed by the City agency," worked "side by side with City employees," "historically occupied similar job titles to those held by City employees, and received equivalent salary adjustments for performing similar work as that performed by their City employed counterparts." Respondents further stated that "As an Associate Staff Analyst assigned to these City agencies, [Ivan] performed duties comparable to the other staff analysts in his assigned office."

Petitioners also argue that their services are "paid for by the city" as the Administrative Code requires, when NYCDOH reimburses the Foundation for petitioners' salaries. The ultimate appropriation of State funds, because the State mistakenly believes that the City is spending money on administration of rehabilitation programs for the mentally disabled, is immaterial.

As to the statute of limitations, NYCDOH continued to consider petitioners' request until May 20, 2008, when respondents for the first time definitively rejected petitioners' application. Since the "final and binding" determination did not occur in July 2007 when petitioners were provided with pension plans from the Foundation because petitioners were still City employees.

Further, respondents never expressly notified petitioners that they were ineligible for NYCERS membership until May 20, 2008. And, petitioners never requested NYCERS membership until after July 2007, and the agency's response culminated in a denial in May 2008. None of the documents contain a determination prior to May 2008 that petitioners were ineligible for NYCERS membership. Petitioners' 2007 application was not a "reconsideration" but an initial request taken seriously by respondents. At least four top NYCDOH management officials conducted the May 20th meeting, and advised petitioners of the rejection of their application for NYCERS membership. Therefore, this proceeding, brought on June 25, 2008, is timely.

Analysis

Statute of Limitations

An Article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes "final and binding upon the petitioner" (*Yarbough v Franco*, 95 NY2d 342, 717 NYS2d 79 [2000]; CPLR 217[1]; *New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165, 573 NYS2d 25 [1991]). An administrative determination becomes "final and binding" when the petitioner seeking review has been aggrieved by it (*Rocco v Kelly*, 20 AD3d 364, 799 NYS2d 469 [1st Dept 2005]). An administrative action is not final and binding within the contemplation of CPLR 217 until it "has its impact" upon the petitioner (*Bludson v Popolizio*, 166 AD2d 346, 347, 561 NYS2d 14 [1st Dept 1990], citing *Matter of Edmead v McGuire*, 67 NY2d 714, 716, 499 NYS2d 934). The Statute of Limitations does not begin to run until the petitioner receives notice of the determination (*Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834, 470 NYS2d 130 [1983]).

NYCERS is a City administrative agency that manages retirement and disability benefits for City employees (*Morris v New York City Employees' Retirement Sys.*, 129 FSupp2d 599 [SDNY 2001]). Petitioners applied for NYCERS membership in 2007 by contacting a senior administrator at NYCDOH's Division of Mental Hygiene (Sweeney Affidavit, ¶21). Based on the record before the Court, petitioners did not receive notice of the determination of their applications until the May 2, 2008 meeting (Sweeney Affidavit, ¶24).

The record supports the assertion by petitioners that the May 2, 2008 meeting was conducted by management from NYCDOH, and that it was at this meeting that petitioners were informed of the denial of their NYCERS membership application. Respondents merely state that "Upon information and belief" the Foundation, and not NYCDOH, held the meeting (Answer ¶60), and in support, cite to the Agenda of the meeting. The Agenda appears on "Research Foundation for Mental Hygiene" letterhead. However, the Agenda does not indicate which employees of NYCDOH or of the Foundation appeared at the meeting, conducted the meeting, or directed the meeting. On the other hand, petitioners' affidavits attest to the fact that specific management officials from NYCDOH conducted the meeting and advised them that their application for NYCERS membership were denied. In the absence of any evidence to the contrary, the Court finds that the determination denying petitioners' NYCERS membership became "final and binding upon the petitioner" when petitioners' received notice of this determination at the May 20, 2008 hearing.

There is no evidence in the record to support respondents' contention that petitioners received notice of their ineligibility for NYCERS membership in July 2007, when petitioners commenced employment with the Foundation and started participating in the pension plan.

Although the employment related applications completed by petitioners for work for the Foundation indicate that they were Foundation employees, not one of these documents contains any language expressly indicating that petitioners were ineligible for NYCERS membership. Additionally, that the Foundation's employee handbook received and accepted by petitioners indicates that the pension plan would be offered by the Foundation through TIAA-CREF, the document does not expressly state that petitioners were not eligible for NYCERS membership. Thus, such documents do not constitute unambiguous notifications in July 2007 of ineligibility of NYCERS membership. Instead, the documents are ambiguous on this narrow issue, and "[i]f an agency has created ambiguity or uncertainty as to whether a final and binding decision has been issued, the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court" (*Rocco v Kelly, supra*, citing *Matter of Carter v State of New York*, 95 NY2d 267, 270, 716 NYS2d 364 [2000]).

In light of petitioners' attestations that they were advised of the denial of their request to participate in NYCERS at the May 20, 2008 meeting, the instant proceeding commenced in June 2008 is timely.

Failure to State a Cause of Action Under Article 78

CPLR 7803 states that the court review of a determination of an agency consists of whether the determination 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 *Windsor Place Corp. v New York State DHCR*, 161 AD2d 279 [1st Dept 1990]; *Mazel v DHCR*, 138 AD2d 600 [1st Dept 1988]; *Bambeck v DHCR*, 129 AD2d 51 [1st Dept 1987], *lv. den.* 70 NY2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without

sound basis in reason and ... without regard to the facts" (*Matter of Pell v Board of Education*, 34 NY2d 222, 231 [1974]). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*Matter of Pell v Board of Education*, 34 NY2d at 231). The court's function is completed on finding that a rational basis supports the agency's determination (see *Howard v Wyman*, 28 NY2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (see *Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72 [1st Dept], *aff'd* 66 NY2d 1032 [1985]).

The crux of petitioners' claim to entitlement to NYCERS membership rests plainly on the interpretation of Adm. Code §13-104. Adm. Code § 13-104(1) provides, in pertinent part, that membership in NYCERS "shall consist of ... [a]ll persons in city-service," and Adm. Code § 13-101(3)(a) defines "city-service" as:

service, whether appointive or elective, as an officer or employee of the city or state of New York, of any agency thereof and of any court, *so far as such service is paid for by the city*, or service, by any person, in any county office, *paid for in whole or in part by the city, except service on or after the first day of October, nineteen hundred twenty, on account of which any person is, or may be, entitled to share in the police pension fund, or in the fire department relief fund, or in the teachers' retirement system, or in the Hunter College retirement system, or in the board of education retirement system, or in the department of street cleaning relief and pension fund (but including service as provided for in section 13-614 of this title).*
(Emphasis added)

Where the statute is clear and unambiguous on its face, the legislation must be interpreted as it exists (*Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669 [1988]). Absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute (*id.*). It is fundamental that a court, in interpreting a statute, should

attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used” (*id. citing Patrolmen's Benevolent Assn. v City of New York*, 41 NY2d 205, 208, 391 NYS2d 544]).

Based on the record of the Court, it cannot be said that petitioners’ “service” with the Foundation constitutes “service as an employee of the city or state of New York, of any agency thereof . . . so far as such service is paid for by the city.” It bears noting that NYCERS, “[t]he city retirement system[,] was created to provide ‘a retirement system for officers and employees whose compensation in whole or in part is payable out of the treasury of the city of New York’” (*Bacon v Conway*, 294 NY 245, 62 NE2d 55 [1945] *citing* L.1920, ch. 427).

The 1974 Regular Session provides, in pertinent part, that “The State shall pay one hundred percent of the net operating costs expended by the local government and by voluntary agencies pursuant to contract with such local government or by the state for services. . . .” (Answer, Exh. 1, pp. 916-917). The State required that the funds to be allocated for the administration of the State Programs would be made available only through a contract with CPR (Answer, Exh. 2, p. 2). The Recommendation For Award Cover Sheet indicates that the “Funding Source” was “100%” from the State. Additionally, the Narrative for Recommendation for Award, paragraph E, indicates that “The State has been unwilling to reimburse the City directly for Administration expenses, and, were it not for this contract, these crucial administrative services would have to be paid for with City tax levy funds.” (Answer, Exh. 2)

It is uncontested that state agencies, NYSOMRDD and NYSOMH, reached an agreement with NYCDOH’s predecessor, wherein the State agreed to fund the NYCDOH’s expenses in

administering the State's programs. Notably, the Agreement between NYCDOH and the Foundation that followed includes the following statement: "Through this contract, the State provides 100% reimbursement to the City for the cost of administering this program in New York City. These funds are provided by the State through the State's designated contractor, Research Foundation for Mental Hygiene." (Answer, Exh. 5, Attachment). It was within this context that petitioners were hired, first by CPR, and then by the Foundation.

And, it is uncontested that petitioners' salaries are paid by the Foundation. Thus, this Court finds that petitioners' salaries are directly payable out of the "treasury" of the Foundation (Answer, Exh. 14), which is wholly funded by the New York State, and not New York City. In other words, the City of New York does not finance these State Programs; nor does the City of New York finance the employment of petitioners at the Foundation, an independent contractor (*see Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669 [1988] [noting the statutory protection afforded by Adm. Code §§ 13-104(1) and 13-101(3)(a) to all persons in City-service, designed to exclude persons such as independent contractors, remains as important and relevant as when the statute was passed]).

The documents in the record also provide a rational basis for the conclusion that Ivan and Sweency were employees of CPR and of the Foundation. Ivan completed a form on CPR letterhead entitled "Employee Enrollment Form Center for Policy Research, Inc." The form indicates that his position is "Assoc. Staff Analyst," that his employment began "5/23/94," and that he is not employed elsewhere. The spaces providing for "health/life insurance,"⁴ "key to

⁴

Medical Coverage

Medical coverage is provided through GHI. Employees are eligible for medical coverage after 3 months permanent employment. Coverage becomes effective the first day of the month following

work room,” and eligibility for “CPR Pension Plans” are checked.

Ivan also completed an “Application for Participation in Center for Policy Research, Inc., Pension Plan.” In this document, Ivan “acknowledge[s] that there is no obligation on the part of the Center for Policy Research to make or continue to make any contributions to the trust under the Plan, and that each contribution made *by the Center* at any time is voluntary and not obligatory.” (Emphasis added). Similarly, Ivan’s application for “TIAA and CREF Retirement Annuity Contracts” identifies his employer as “Center for Policy Research,” and his job position as “Associate Staff Analyst.”

Ivan’s application for health insurance, dated May 23, 1994, is completed on a form entitled “Group Insurance Enrollment Application” on “Aetna” letterhead. The form identifies the “employer name” as “Center for Policy Research,” and lists his occupation as “Contract Analyst.”

Sweeney’s application for employment with the Foundation and his application to the Foundation for retirement credit list his former employer as CPR.

Footnote 4 cont’d.

the 3 month waiting period. . . .

* * *

Life Insurance

Life Insurance and Accidental Death & Dismemberment coverage are provided through Aetna/USHealthcare in the amount of \$25,000. Employees are eligible for this coverage after 3 months employment.

* * *

Please complete the attached enrollment forms and return to:

Center for Policy Research
 c/o Professional Examination Svc (Accounting Dept.)
 475 Riverside Drive 6th Floor
New York, NY 10115
 (Emphasis in original).

Such records identify CPR as petitioners' previous direct employer.

After the Foundation assumed the CPR Contract,⁵ Ivan and Sweeney executed a series of documents issued by the Foundation.

By letter dated June 7, 2007, the Foundation extended "an offer of employment with the Research Foundation for Mental Hygiene, Inc. as an Associate Staff Analyst." The letter is on the Foundation's letterhead, and Ivan executed the letter as acceptance of employment.

Ivan also acknowledged receipt on June 25, 2007 of a "RFMH Research Foundation for Mental Hygiene, Inc." employee handbook, which details the Foundation's policies concerning, *inter alia*, dress code, workplace safety, work hours and compensation, and benefits (*see p. 19, infra*). Ivan also completed a "Research Foundation for Mental Health Request for Retirement Credit Based on Prior Service." Further, according to the "Agenda" of the May 2008 meeting, the petitioners were advised that the Foundation was a "Private Non-For-Profit Corporation" and "Not a Gov't Agency"; the Foundation's relationship with NYCDOH is that of a "Contractor Providing Services"; and that petitioners were "at will" employees with the Foundation.

As to Sweeney, he completed an application for employment with the Foundation and also acknowledged receipt of the Foundation employee handbook. Sweeney also completed a "Research Foundation for Mental Health Request for Retirement Credit Based on Prior Service"

⁵ The "Assignment and Assumption Agreement" between CPR, NYCDOH, and the Foundation provides, in pertinent part:

2. Effective July 1, 2007, the Foundation hereby assumes and accepts CPR's assignment and transfer of CPR's right, title, interest and obligation arising under the Contract [between CPR and NYCDOH].
- * * *
4. . . . on July 1, 2007, the Foundation shall commence performing the obligations of CPR under the Contract.

with “Center for Policy Research.”

Thus, in connection with NYCDOH’s agreement with the Foundation in 2007, the Foundation became Ivan’s new, direct employer, replacing CPR as petitioners’ former, direct employer.

Although petitioners perform work at a NYCDOH location on Worth Street, the record supports a finding that they are not “City employees” as that term is defined, nor have their salaries or benefits been provided for by the City of New York. The record indicates that petitioners voluntarily sought and obtained employment with and were hired by CPR, and then the Foundation, both of which are private, not-for-private corporations. Thus, notwithstanding that NYCDOH provides supervision of petitioners’ work, including NYCDOH’s control over petitioners’ time and leave schedules, they are employees of the Foundation.

The Court also notes that Adm. Code § 13-101(3)(a) also includes as “city-service” service, by any person, in any county office, “paid for in whole or in part by the city, *except service . . . on account of which any person is, or may be, entitled to share in . . . the teachers’ retirement system.*”

In this regard, the CPR “Employee Benefits & Policies Summary Sheet” provides:

Employee Pension

Center for Policy Research contributes 12% of employees salary to the Pension Plan administered by TIAA-CREF. Employees are eligible to participate in the pension plan after 3 months permanent employment. Pension contributions are made on a monthly basis to TIAA-CREF. Complete the “Retirement Annuities” sections of the TIAA-CREF

Employee TDA Plan (403b)

Employees have the option of participating in a Tax Deferred Annuity Plan (403b) administered by TIAA-CREF. . . . Employees wishing to participate in the TDA plan should complete . . . the “Group Supplemental Retirement Annuity (GSRA)

sections of the TIAA-CREF enrollment form.

The Foundation’s Employment Handbook similarly provides that “RFMH [the Foundation] provides you with a generous retirement program . . .” and “purchases annuities to provide you with retirement benefits at no cost to you. Premiums . . .are remitted to the Teachers Insurance and Annuity Association/College Retirement Equities Fund (TIAA/CREF) . . .”

Thus, as it appears that petitioners participated or were eligible to participate in the TIAA-CREF pension plan when employed at CPR and the Foundation, they are ineligible for NYCERS membership.

Resort to the various factors utilized in the contexts of Unemployment Insurance Law, Human Rights Law, and Workers’ Compensation Law is improvident given fact that NYCERS serves a different purpose from all such laws, and that Adm. Code § 13-101(3)(a) is clear and unambiguous on its face.

Therefore, in light of the above, petitioners’ claim that the respondents’ denial of petitioners’ membership in the New York City Employees’ Retirement System is arbitrary, capricious, and violates petitioners’ entitlement to those benefits pursuant to New York City Adm. Code§ 13-104 lacks merit. As such, there is no basis for petitioners’ second request for an order directing respondents to take the necessary actions to provide petitioners with benefits of membership in NYCERS.

Conclusion

Based on the foregoing, it is hereby

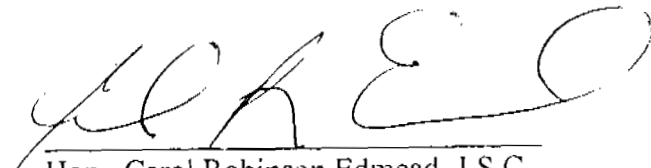
ORDERED and ADJUDGED that the instant application by petitioners for an order (1) declaring that the denial by respondents of petitioners’ membership in the New York City

Employees' Retirement System is arbitrary, capricious, and violates petitioners' entitlement to those benefits pursuant to New York City Administrative Code §13-104, and (2) directing respondents to take the necessary actions to provide petitioners with benefits of membership in NYCERS, is denied, and the petition is dismissed; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon petitioners within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 20, 2009


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1410).