[*1] SCANNED ON 8/6/2009

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

PRESENT: HON. NICHOLAS FIGUEROA, J.S.C. PART 46

Index Number : 116942/2008

PATROLMEN'S BENEVOLENT

vs

NYC OFFICE OF COLLECTIVE

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	1
Replying Affidavits	1

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion is granted.

See accompanying decision and judgment.

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 141B).

Dated: Aug. 5, 2009

J.S.C.

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

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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In the Matter of the Application of

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioner,

- against -

THE NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, AMRYL JAMES-REID, AND THE CITY OF NEW YORK,

Respondents,

for a Judgment pursuant to Article 78 of the C.P.L.R.

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Index No. 116942/08
DECISION AND JUDGMENT

Nicholas Figueroa, J.S.C.:

The Police Benevolent Association (the PBA), as Article 78 petitioner, seeks to nullify portions of interim and final decisions issued by the New York City Board of Collective Bargaining in an improper-practice proceeding commenced by Amryl James-Reid, a former police officer, against the PBA and the City. In the instant proceeding, the Office of Collective Bargaining (OCB), the City, and Ms. James-Reid were served as respondents, but only the former two have appeared. OCB has filed a motion to dismiss, raising a statute of limitations defense as well as substantive grounds. In opposing, the PBA proposes a novel reading of the applicable statute.

The underlying proceeding before the Board of Collective Bargaining concerned Ms. James-Reid's claims against the City and the PBA in relation to her defense against several misconduct charges by the City Police Department, charges that ultimately ended in the termination of her sixteen-year career on the police force. The nub of Ms. James-Reid's

improper-practice petition was that, over the course of the several years during which she had undergone a series of investigatory and disciplinary hearings, she had been misadvised by a member of a law firm that was on retainer to (and had been referred to her by) the PBA, and that, by leaving her to such lawyer's devices, the PBA had breached a duty of fair representation. In an interim decision on a motion to dismiss, the Board of Collective Bargaining observed that, assuming the truth of Ms. James-Reid's allegations for purposes of the motion, (1) the private lawyer could be deemed the PBA's agent in relation to her defense and (2) on the basis of such agency, any failings by the lawyer in such relation would be attributable to the PBA as a breach of a duty of fair representation. Following an evidentiary hearing, the Board's final decision, dated July 30, 2008, in effect adhered to both such views of the law, but nevertheless dismissed Ms. James-Reid's petition as unsupported by her proofs concerning alleged legal malpractice. In response, the PBA commenced this Article 78 proceeding on December 18, 2008, challenging the jurisdictional basis and merits of the Board's legal rulings on the fair representation issues.

OCB's limitations defense must of course be evaluated as a threshold matter.

As a general rule, timeliness of an Article 78 petition is governed by section 217 of the CPRL, which in relevant part provides that "[u]nless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner ....." As it happens, the law authorizing the instant proceeding, section 12-308(a) of the City's Administrative Code, does provide for "a shorter time." Thus, under section 12-308, "Any order of the board of collective bargaining ... shall be ... reviewable under [Article 78] 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...."

It is undisputed that the PBA was served by a certified mailing on August 1, 2008, which was received by the PBA on August 4, 2008. In other words, in view of the 30-day limitations period, the untimeliness of the PBA Article 78 filing would ordinarily appear patent.

The PBA, however, raises several arguments for the proposition that the appearance of untimeliness is in this case deceptive. Two of such arguments are based upon another undisputed fact, *i.e.*, that service upon Ms. James-Reid pursuant to section 12-308 was not duly made until November 13, 2008.

First, the PBA argues that the limitations period does not begin to run until all parties to the proceeding before the Board have been served. The PBA does not cite any authority for its implicit proposition, *i.e.*, that section 12-308 does not mean exactly what it says. After all, the statute in terms pegs the commencement of the limitations period to service "upon such party." Had the statute's framers actually intended the triggering event to be service "completed upon all of the parties," they could very easily have said as much.

This is not to overlook the PBA's contention that an inequity would result if the statute were applied per its plain meaning. As the PBA describes it, the specter it fears is "that two parties to an action would have widely different time periods in which to appeal." But such result is one that apparently could readily be avoided by the earlier-served party, since the terms of section 12-308 do not suggest that service can be effectuated only by the agency. Thus, where the agency has delayed service on one party, an earlier-served party apparently may venture into the breach by serving the other party in accordance with the statute's requirements. Moreover, given the purpose of a limitations period (to put to rest the claims of a party who has had fair

notice and opportunity to raise those claims), this is not an instance in which the literal application of a statute would be irrational and thus prohibitive.

Second, the PBA argues that OCB should not be allowed to benefit from its own error, which is to say the lag between service on the City and the PBA, on the one hand, and service on Ms. James-Reid, on the other hand. The statute's terms, however, do not suggest that the agency must serve its decision on all parties concurrently and that, if it does not do so, the limitations-period is tolled until all parties have been served. Nor does the PBA cite any other authority as the source of such requirement and such result. This is not to ignore a November 13, 2008, letter in which an OCB lawyer confessed "office error" in having not already served Ms. James-Reid. But this evidence of his office's lack of punctiliousness cannot substitute for the citation of legal authority that might support the PBA's position in this connection.

The PBA further argues that the substance of the OCB lawyer's letter, which was addressed to counsel for all of the parties in the improper practice proceeding, in any event is sufficient ground to defeat OCB's limitations defense. The body of the letter read as follows:

> I write this letter to inform the parties that, due to office error on the part of this Office, the decision in [this]... matter was not properly mailed to counsel for the petitioner, and to enclose the decision to counsel. Counsel should be aware that the time in which to appeal a decision of the Board does not begin to run until service has been effectuated, and in this case, the present mailing constitutes service on the petitioner.
>
> Please feel free to contact me with any questions or concerns you may have; I apologize on behalf of the OCB for the inconvenience caused by the error in service.

It is not clear whether the PBA is proposing that this letter is a basis for an estoppel, a term that it perhaps declines to invoke expressly in view of the precedents to the effect that an

agency cannot as a rule be estopped (*Matter of Parkview Assocs. v City of New York,* 71 NY2d 274, 282). But even if, arguendo, some circumstance might warrant an estoppel against OCB on the basis of a letter from its counsel, there is no such circumstance here. For one thing, a necessary element of estoppel is reliance, and this letter was received by the PBA after its time to file the instant petition had already run. For another thing, even if the letter had been received months earlier, its contents made no misrepresentation upon which the PBA might claim to have relied. To be sure, there can be cases where an agency creates an ambiguity that, for limitations purposes, must be resolved against it (*see Mundy v Nassau County Civil Service Comm'n*, 44 NY2d 352). But, as one legal analyst has observed, "the clarity of a regulation or statute may eliminate what might otherwise be considered an ambiguity in the agency's communications" (Alexander, 2001 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 217:1, at 521). Section 12-308 can rightly claim such clarity.

Finally, the PBA maintains that, despite the clear language of section 12-308, the Board's decision was not reviewable, and thus the limitations period did not begin to run, until service on Ms. James-Reid had been effected, because until such time certain administrative remedies had remained available to her. For the sake of argument, it will be assumed that the administrative remedies to which the PBA adverts remained open to Ms. James-Reid as the PBA would have it (*but see* 61 RCNY § 1-10[k], [l]). The short answer to the PBA's finality argument nevertheless remains that, as witness the above-quoted terms of section 217 of the CPLR, the exhaustion requirement is satisfied when the party whose timeliness is at issue has exhausted its own administrative remedies.

On the basis of the foregoing, it is concluded that the PBA's petition was not timely filed. Accordingly, respondent's motion is granted, and the petition is dismissed.

This constitutes the decision and judgment of the court.

Dated: August 5, 2009

ENTER:

J.S.C.