[* 1]

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

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

Index Number : 112869/2008

MAYE, CATHERINE

VS.

DEPARTMENT OF EDUCATION

SEQUENCE NUMBER : 002

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion

See accompanying decision and order.

FILED
AUG 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 12, 2009

J.S.C.

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

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 46

----------X

In the Matter of the Petition of CATHERINE MAYE,

Petitioner,

Index No. 112869/08

- against -

DECISION AND ORDER

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent,

pursuant to Article 75 of the Civil Practice Law and Rules..

----------X

Nicholas Figueroa, J.:

This Article 75 proceeding challenges an arbitration award terminating petitioner's employment as a New York City public school teacher. Petitioner moves for leave to reargue or renew this court's decision dated February 5, 2009, which granted respondent's motion to dismiss the petition as time-barred.

Section 3020-a(5) of the Education Law provides the standard for timeliness in the instant case. In relevant part, that section required petitioner to begin this proceeding "[n]ot later than ten days after receipt of the hearing officer's decision." Respondent's motion was based on the proposition that petitioner had failed to file her pleading within the ten-day period. Respondent supported its position with an affidavit (the "Service Affidavit") from an employee in the State bureau responsible for serving copies of arbitration awards (the "Service Affidavit") involving the City and its teachers. The affiant had attested that, "[o]n August 29, 2008, [I] mailed copies of [the arbitration award] ... via first class mail" to petitioner and her union attorney, as well as to two of respondent's representatives. The affiant further attested to having "sent the [arbitration award] to the Petitioner and [respondent's counsel] via certified mail, return receipt requested,

that same day." Petitioner filed her petition on September 22, 2008. Petitioner did not file any papers opposing respondent's limitations position or, for that, matter, contesting the alternative branch of the motion, which argued for dismissal for failure to state a cause of action.

On a motion to reargue, the movant must show that the court had overlooked or misperceived fact or misapplied law and that such misstep had led to a result that would not have otherwise been reached (*see Matter of Beiny v Wynyard*, 132 AD2d 190, 191). Petitioner proposes that there were three independent errors reflected in the court's prior decision.

One of such errors, according to petitioner, was the court's observation that, "Petitioner does not dispute that her application to this court was not made timely." This is not to say that petitioner now claims to have filed responsive papers on the motion to dismiss. Instead, petitioner asserts that she had been content to rest on the following averments contained in page 10 of her petition:

> 23. Petitioner was served with a copy of the Hearing Officer's "Findings and Recommendations" on or about September 11 or 12, 2008. This article 75 proceeding is commenced within the ten-10 day requirement for filing pursuant to Education Law §3020-a(5).

Petitioner proposes that, in the face of respondent's motion to dismiss, the court should have looked past petitioner's silence and scoured her pleading, from which it would have discovered the foregoing averments. For purposes of the motion to dismiss, however, there are two reasons that such averments would have been deemed wholly unavailing.

First, the date on which petitioner personally received a copy of the hearing officer's decision was irrelevant. Petitioner had been represented by union counsel during the proceeding before the hearing officer. Accordingly, for purposes of section 3020-a(5), her time to file the

petition was measurable from the date such counsel received a copy of the hearing officer's decision (*Matter of Case v Monroe Community College*, 89 NY2d 438, 443; *Matter of Awaraka v Bd. of Educ. of City of New York,* 59 AD3d 442, 443; *Matter of Robinson v City of New York*, 237 AD2d 127).

Second, the petition's declaration of its own timeliness was, in a word, meaningless. After all, no petition can be said to be "timely" unless it has been filed. The claim of "timeliness" as expressed in the petition necessarily preceded any such filing and was therefore, in effect, a prediction couched as fact.

Petitioner also makes much of the fact that the filing date of the petition, *i.e.*, September 22, 2008, had been misstated in the decision as "October 3, 2008." In view of petitioner's seeming concession as to the untimeliness of the proceeding, the misstatement was immaterial to the court's ruling on the motion to dismiss. In other words, the seemingly uncontroverted motion to dismiss was enough to support the conclusion that the deadline for bringing this proceeding had been passed by September 22, 2008.

Nevertheless, the present motion makes it clear that petitioner does not concede the facts on which respondent based its proposition that her petition was filed too late. In this new light, the averments in the Service Affidavit must be evaluated in terms of whether respondent has carried its burden of proof on the affirmative defense that it has raised.

In this connection, it should first be noted, the court is constrained to reject petitioner's bid for renewal (under CPLR 2221) based on documentation that she now offers for the record.

The document in question – a photocopy of the face of the post-marked envelope that had

been sent to petitioner by certified mail – would tend to discredit at least a portion if not all of the Service Affidavit and thus would undercut the mainstay of respondent's untimeliness argument. The envelope, however, had been in petitioner's possession when the motion to dismiss was made. Accordingly, it cannot serve to "draw [the court's] attention to material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court" (*Matter of Beiny v Wynyard*, *supra*, 132 AD2d at 209-10). In other words, such evidence cannot be considered as a basis for renewal (*id.*).

Thus, in assessing whether respondent has shown that petitioner failed to meet the requirement of section 3020-a, we must accept the Service Affidavit at its face value. As already observed, that statute obliged petitioner to commence this proceeding within ten days of union counsel's "receipt" of a copy of the arbitration award. The Service Affidavit, however, speaks to when the award was mailed, but it is silent as to the pivotal matter of when it was "received." In other words, it appears that respondent has failed to prove that this proceeding was untimely.

This is not to overlook arguments raised by respondent on its original motion and now in opposition to petitioner's. The first is the proposition that union counsel must be deemed to have received the mailed copy within five days of the date on which it had been mailed. Respondent proposes that section 2103(b) of the CPLR requires such a calculus. The portion of section 2103(b) to which respondent adverts provides that,

> ... papers to be served upon a party in a pending action shall be served upon the party's attorney. ... Service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period ....

But, as earlier courts have observed, that statute applies only to papers served in a "pending action" (or special proceeding, CPRL 105[b]) and thus does not apply to service of papers in an administrative proceeding (*Matter of Fiedelman v New York State Department of Health*, 58 NY2d 80, 82) or to the timeliness of a new special proceeding (*id.*, at 82-83).

Indeed, there is good reason to refuse to entertain the type of presumption that underlies section 2103(b) – that a mailing will be received within five days – when the timeliness of a complaint or petition depends upon the date of "receipt" or "delivery." After all, in the context of a pending action, the statutory five-day presumption is a useful housekeeping device and thus makes sense. In such a context, moreover, the statutory presumption's consequences to the deemed recipient are modest and are subject to some flexibility on the part of the court. By contrast, if applied as respondent suggests, such a presumption would be far more draconian, since it would in effect cut off the deemed recipient's right to appeal on the merits. It is thus understandable that the especially narrow limitations period afforded by section 3020-a(5) would not be made subject to a broad-brush fiction. In other words, section 3020-a(5) must be taken to intend that actual receipt be the starting point of the limitations period (*see Matter of Lowe v Erie Ins. Co.*, 56 AD3d 130, *and cases cited therein*).

Nor is respondent aided by its citation of authority to the effect that proof of proper service by mailing presumptively establishes receipt (*see Kihl v Pfeffer*, 94 NY2d 118; *Matter of Gonzalez v Ross*, 47 NY2d 922, 923). Such precedent does not help respondent to show what it must if it is to prove that the instant petition was untimely, *i.e.*, the date on which union counsel received a copy of the arbitration award.

Finally, the Service Affidavit itself discloses the source of the difficulty of proof that respondent now faces. On the one hand, the State office had taken pains to send regular and certified mailings of the arbitration award to each of the parties and to the counsel of one of them. By what appears to have been simple oversight, however, the State office apparently had served union counsel – the only addressee whose date of receipt would be critical – only by regular mail. This is not to say that section 3020-a in terms required that a certified mailing be made (*compare* 3020-a[5] *with* 3020-a[2][a]). But, even though not strictly necessary under the statute, a certified mailing, return receipt requested, would have furnished respondent what it critically lacks here -- a document evidencing the actual date of receipt by union counsel. In the absence of such a document, or of alternative forms of proof (*see, e.g.*, *Matter of Novillo v Bd. of Educ. of Madison Cent. School Dist.*, 17 AD3d 907 [proof of actual notice on particular date, when petitioner attended Board meeting at which challenged action was taken]; *Matter of Werner Enter. Co. v New York City Law Dept.*, 281 AD2d 253 [petitioner's counsel sent arbitrators letter acknowledging receipt of a copy of the award]), respondent has not borne its burden on its limitations defense.

For the foregoing reasons, petitioner's motion for leave to renew is denied, and her motion for leave to reargue is granted. The court's decision and order dated February 5, 2009, is vacated, and respondent's motion to dismiss for untimeliness is denied. The other prong of respondent's

motion to dismiss, for failure to state a cause of action, shall be addressed in a separate decision.

This constitutes the decision and order of the court.

Dated: August 11, 2009

ENTER:

J.S.C.