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

PRESENT: Hon Joan A. Madden Justice

PART 11

Index Number : 112594/2009
GRAY, SIMPSON DR.
VS.
FIFLOMENA, PATRICIA
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 112594-09

MOTION DATE 2/11/10

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

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

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition and cross-motion are decided in accordance with the annexed Memorandum Decision, Order + 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).

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

Dated: May 18, 2010

J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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DR. SIMPSON GRAY,

Petitioner,

-against- Index No. 112594/09

PATRICIA FILOMENA DISTRICT 7 REPRESENTATIVE UNITED FEDERATION OF TEACHERS/AFL-CIO, ROBERT WILSON, DIRECTOR MANHATTAN INTEGRATED SERVICE CENTER, JOHN MULLIGAN, DEPUTY DIRECTOR SPECIAL EDUCATION, AND GERARD DONEGAN, CHAIR SPECIAL EDUCATION, ISC 9. [INDIVIDUAL RESPONDENTS IN THEIR CAPACITIES AS EMPLOYEES OF THE UNITED FEDERATION OF TEACHERS AND THE NEW YORK CITY DEPARTMENT OF EDUCATION], Joint[ly] and Severally,

Respondents.

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Joan A. Madden, J.:

Motion sequence numbers 001 and 002 are consolidated for purposes of disposition.

In sequence number 001, petitioner Dr. Simpson Gray applies, pursuant to CPLR article 78, for an order annulling and vacating the decision by the Public Employment Relations Board (PERB) dismissing petitioner's charges, remanding this proceeding to PERB for rehearing, and directing PERB to reimburse petitioner for his costs incurred in prosecuting this proceeding. Respondent Patricia Filomena, District 7 representative, United Federation of Teachers/AFL-CIO (the UFT) cross-moves, pursuant to CPLR 7804 (f), for an order dismissing the petition as asserted against the UFT as untimely filed, pursuant to Civil Service Law § 213 (a) (i).

Respondents Robert Wilson, director, Manhattan Integrated Service Center, John Mulligan, deputy director, Special Education, and Gerard Donegan, chair, Special Education, ISC 9 (collectively, the DOE) cross-move for an order dismissing the petition as asserted against them as untimely. In sequence number 002, PERB moves for an order dismissing the petition as untimely.

In April 2008, petitioner, a tenured teacher with the DOE, filed a complaint, later amended, with PERB, charging his union, the UFT, local 2, and the DOE with improper practice in violation of Civil Service Law § 209-a (2) (c) in connection with the UFT's handling of several of his grievances filed against the DOE.

Following an almost two-month adjournment granted at petitioner's request, a hearing was held on November 25, 2008 before the PERB administrative law judge (ALJ). During the hearing, petitioner made an opening statement addressing only the ALJ's denial of his recusal motion and request for witness subpoenas, and the ALJ's refusal to adjourn the hearing a second time. Petitioner then closed his case, without arguing the merits of his charge and without introducing any evidence into the record. By decision dated January 20, 2009, the ALJ granted the joint motion by the UFT and the DOE to dismiss the charge for failure to prosecute on the ground that petitioner had blatantly disregarded PERB's rules and defiantly refused to comply with the ALJ's clear instructions to proceed with the merits of his charge and to present evidence, including his own testimony.

By final decision dated June 9, 2009, PERB denied petitioner's appeal and affirmed the ALJ's decision in all respects. PERB found that the ALJ properly exercised her discretion in denying petitioner's requests for a further adjournment of the hearing, and in dismissing

petitioner's amended charge of improper practice on the ground that, during the hearing, petitioner failed to prosecute the charge by choosing not to present any evidence in his own behalf.

Petitioner now seeks to vacate the decision on the ground that the ALJ acted in abuse of her discretion and in violation of petitioner's due process rights and denied him notice and an opportunity to be heard by directing him to proceed with the hearing on November 25, 2008.

In opposition, the UFT, the DOE, and PERB move to dismiss the petition on the ground that the proceeding is untimely.

This proceeding is untimely commenced. Section 213 (a) of the Civil Service Law provides, in relevant part, that final orders issued by PERB:

> shall be conclusive against all parties to its proceedings . . . unless reversed or modified in proceedings for enforcement or judicial review as hereinafter provided. Final orders shall be (i) reviewable under [CPLR 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

(Civil Service Law § 213 [a] [i] [emphasis added]; *Matter of New York State Pub. Empl. Relations Bd. v Board of Educ. of City of Buffalo*, 39 NY2d 86, 90 [1976]; *see* CPLR 217 [1] ["*(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"] [emphasis added]).

Petitions for review of PERB's final orders filed more than 30 days after service of the order are routinely dismissed (*see e.g. Sinicropi v New York State Pub. Empl. Relations Bd.*, 125 AD2d 386, 387 [2d Dept 1986], *appeal dismissed* 69 NY2d 822, *appeal denied* 70 NY2d 606

[1987]; *Amaker v New York State Pub. Empl. Relations Bd.*, 32 NYPER ¶ 7012 [Sup Ct, NY County 1999]; *New York Convention Ctr. Operation Corp. v New York State Pub. Empl. Relations Bd.*, 29 NYPER ¶ 7023 [Sup Ct, NY County 1996]; *see also Matter of Davis v Anderson*, 51 AD2d 528, 528-529 [1st Dept], *appeal denied* 39 NY2d 707 [1976]).

Thus, pursuant to statute, petitioner was required to commence this article 78 proceeding within 30 days after service of a copy of the final decision, or will be held to have waived his right to judicial review. Inasmuch as Civil Service Law § 213 (a) is silent as to when service is complete, CPLR Rule 2103 must be applied (*see State Div. of Human Rights v Xerox Corp.*, 57 AD2d 1069, 1069 [4th Dept 1977]). The rule provides that, when service is effectuated by mail, service is deemed complete upon mailing, not upon receipt (*see Fowler v Marks*, 241 AD2d 928, 929 [4th Dept], *lv denied* 91 NY2d 801 [1997]; *State Div. of Human Rights v Xerox Corp.*, 57 AD2d at 1069; CPLR Rule 2103 [b] [2], [c]) .

The documentary evidence demonstrates that PERB mailed the decision to petitioner, counsel for the UFT, and counsel for the New York City Department of Education (DOE) by certified mail on June 11, 2009. PERB has produced a copy of a properly executed affidavit of service evidencing service on petitioner on June 11, 2009. It is well established that "[a] properly executed affidavit of service raises a presumption that proper mailing occurred" (*Ortega v Trefz*, 44 AD3d 916, 917 [2d Dept 2007]). PERB has also produced a copy of the PERB envelope addressed to petitioner bearing a certified mail sticker and a metered postage stamp in the amount of $5.54 and dated June 11, 2009.

The affidavit of service and the envelope demonstrate that PERB mailed the decision to petitioner at his current address by certified mail, as required by statute. The envelope also

demonstrates that the United States Postal Service (the USPS) returned the mailing to PERB, stamped "return to sender," and bearing a handwritten notation reading "NL 6/14." The relevant USPS track and confirm search result demonstrates that the USPS received the PERB mailing addressed to petitioner on June 13, 2009, that the USPS left a notice for petitioner later that same day, that the mailing was unclaimed as of July 15, 2008, and that the USPS returned the letter to the sender on that date "because it was not claimed by the addressee."

Where, as here, the mailing is returned to sender as "unclaimed," rather than "undeliverable," the Court of Appeals has held that it is reasonable to conclude that the addressee had abandoned or failed to call for the mail and was attempting to avoid notice by ignoring the certified mailing (*Matter of Harner v County of Tioga*, 5 NY3d 136, 140-141 [2005], citing USPS Domestic Mail Manual part 507, ex 1.4.1; *Cadle Co. v Tri-Angle Assocs.*, 18 AD3d 100, 104-105 [1st Dept 2005]).

Petitioner commenced this proceeding on September 3, 2009, 84 days after PERB's initial certified mailing to petitioner of a copy of the decision. Therefore, this proceeding was commenced well after expiration of the 30-day limitations period, and must be dismissed as untimely.

This outcome does not offend the court's notions of fair play and justice. The record demonstrates that petitioner received a copy of the final decision and notification that a statute of limitations governed his right to appeal approximately one week prior to the expiration of the limitations period. In response to petitioner's July 2, 2009 inquiry, by letter dated July 2, 2009, PERB advised petitioner that it was forwarding to him "another copy of the Board's decision dated June 9, 2009, which was mailed to you on June 11, 2009." In the letter, PERB also advised

that, "[o]ur compliance with your request today for a second copy shall not be deemed as constituting an extension of the statute of limitations set forth in Civ Serv Law 213 (a)."

Petitioner admittedly received PERB's facsimile transmission of the cover letter and final decision on July 2, 2009, and, subsequently, a copy by regular mail (*see* Petition, ¶ 6; Petitioner's Memorandum in Opposition, at 4). However, petitioner chose to wait 63 days after such receipt before commencing this proceeding.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED and ADJUDGED that the cross motion to dismiss by respondent Patricia Filomena, District 7 representative, United Federation of Teachers/AFL-CIO is granted in its entirety; and it is further

ORDERED and ADJUDGED that the cross-motion to dismiss by respondents Robert Wilson, director, Manhattan Integrated Service Center, John Mulligan, deputy director, Special Education, and Gerard Donegan, chair, Special Education, ISC 9 is granted in its entirety; and it is further

ORDERED and ADJUDGED that motion sequence number 002 to dismiss by the Public Employment Relations Board is granted in its entirety.

This constitutes the decision, order, and judgment of the court.

Dated: May 18, 2010

ENTER:

J.S.C.