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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 102163/2010

KLEIN, M.D., ANDREI

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

ARTICLE 78

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Petition and cross motions are decided per attached

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

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: 7/1/10

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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ANDREI KLEIN, M.D., Petitioner

Index No. 102163/10

-against-

CITY OF NEW YORK, MICHAEL BLOOMBERG as Mayor of the City of New York; NEW YORK CITY DEPARTMENT OF EDUCATION, JOEL KLEIN, as Chancellor of the New York City Department of Education and Chancellor's Representative JOHN T. CULLEN, Esq., The UNITED FEDERATION OF TEACHERS and Michael Mulgrew as President of the United Federation of Teachers

Respondents,

FOR AN ORDER OF MANDAMUS PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAWS AND RULES.

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Emily Jane Goodman, J.S.C.:

By Decision and Order, dated December 23, 2009, this Court dismissed a proceeding brought by Petitioner, pro se, who alleged that he was effectively a tenured Medical Inspector employed by Respondent New York City Department of Education since 1983, and who sought to compel "Respondents to complete the grievance arbitration procedure under the UFT-DOE contract so that Petitioner can seek judicial review."

Petitioner has apparently brought this proceeding because the Court had noted in its prior decision that a Step 3 grievance, attended by UFT representative, resulted in a decision

adverse to Petitioner, dated 1/18/04 [1] and, because the union did not file a Step 4 grievance as to this adverse decision, Petitioner could not proceed further,[2] absent demonstration that the union breached its duty of fair representation. *See Bd of Ed v Ambach*, 71 NY2d 501, 511 (1987); *Sapadin v Bd of Ed. of the City of NY*, 246 AD2d 359 (1st Dept 1998).

Apparently, in an attempt to cure this deficiency, Petitioner has commenced this proceeding adding Respondents The UNITED FEDERATION OF TEACHERS (UFT) and Michael Mulgrew as President of the United Federation of Teachers (Mulgrew).

The city Respondents cross move to dismiss this proceeding based on res judicata and collateral estoppel, failure to file a notice of claim, the statute of limitations, failure to exhaust

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[1]The Decision concluded that Klein was not entitled to a review of his termination because he was never appointed to a position as a school medical inspector or as an assistant school medical director (apparently, because he was paid hourly and worked reduced hours).

[2]Article 19 of the Collective Bargaining Agreement (Waters' Aff, Ex. 1), provides for grievance procedures, including arbitration. The section states, in relevant part, that

> A grievance which has not been resolved by the Chancellor at Step 3 may be appealed by the Union to arbitration. A grievance may not be appealed to arbitration unless a decision has been rendered by the Chancellor at Step 3, except in cases where the decision on the grievance has not been communicated to the aggrieved employee and his/her Union representative by the Chancellor within the time limit specified for Step 3 appeals. The appeal to arbitration shall be filed within 10 working days after receipt of the decision of the Chancellor.

administrative remedies and commencement against improper parties, as neither the City of New York nor Mayor Bloomberg employed petitioner.

The UFT and Mulgrew also cross move to dismiss, maintaining that an Article 78 proceeding in the nature of mandamus may not be maintained against UFT as an unincorporated association and may not be maintained against Mulgrew as an officer of the UFT, that the proceeding fails to state a claim of the breach of the duty of fair representation, and that the proceeding is time barred. They cite to a March 9, 2004 letter addressed to Petitioner (which Petitioner admits receiving in his "response' papers), notifying him that "your case cannot be successfully pursued to arbitration" and further noting that Petitioner could file an internal appeal with UFT if he disagreed with the UFT's decision. There is no evidence that any such appeal was filed.

As the City Respondents correctly maintain, this proceeding is barred by the res judicata and collateral estoppel. Further, even if the Court were to reach the relevant issue-whether UFT breached its duty of fair representation-as the UFT correctly points out, petitioner has not met that burden to demonstrate that UFT's failure was deliberately invidious, arbitrary or founded in bad faith. *See Sapadin v Bd of Ed. of the City of NY*, 246 AD2d 359 (1st Dept 1998). Thus, Petitioner has failed to demonstrate that he (as opposed to the UFT) could proceed with an

Article 78 proceeding against his relevant employer, on the basis that the union breached its duty of fair representation. Moreover, as noted by Respondents, CPLR 217(2)(a)-(b) provides that an Article 78 proceeding against a body or officer for breach of the union's duty of fair representation (and any claims inextricably intertwined therewith) are subject to a four month statute of limitations. *See* CPLR 217(2)(a)-(b); *Dolce v Bayport-Blue Point Union Free School District*, 286 AD2d 316 (2nd Dept 2001). The period commences from the later of four months of the date that the employee knew or should have know that the breach occurred, or within four months of the date that the employee suffers actual harm. *See* CPLR 217(2)(a). The fact that Petitioner unreasonably believed his case was being processed, despite the March 9, 2004 letter, because he knew of one case that took eight years, does not render this proceeding timely. The Court need not reach the other numerous grounds for dismissal.

ORDERED AND ADJUDGED that the cross motions to dismiss are granted, and the petition is denied and the proceeding is dismissed.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: July 1, 2010

ENTER:

J.S.C.