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

PRESENT: **HON.** JOAN A. MADDEN **PART** 11
Justice

Roberts

INDEX NO.: 114962/09

Plaintiff,

MOTION DATE:

- v -

MOTION SEQ. NO.: 001

New York City Office of Collective Bargaining **Defendant.**

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 _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [X] Yes [ ] No

This proceeding + cross-motion is 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).

Dated: October 15, 2010

_____
J.S.C.

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

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

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In the Matter of the Application of
LILLIAN ROBERTS, as Executive Director of District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO,
Petitioner,

-against-

Index No. 114962/09

NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, BOARD OF COLLECTIVE BARGAINING, Marlene Gold, as Chairperson; and THE CITY OF NEW YORK, Michael R. Bloomberg, as Mayor; THE MAYOR'S OFFICE OF LABOR RELATIONS, James F. Hanley as Commissioner,
Respondents.

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Joan A. Madden, J.

In this Article 78 proceeding, Petitioner Lillian Roberts, as Executive Director of District Council 37, American Federation of State County and Municipal Employees, AFL-CIO ("DC 37") seeks an order compelling Respondent Board of Collective Bargaining ("BCB") to take jurisdiction over DC 37's Verified Improper Practice Petition. Respondents the City of New York, Michael R. Bloomberg, as Mayor (the "City") and the Mayor's Office of Labor Relations ("OLR"), James Hanley, as Commissioner (together with the City, the "City" or "City Respondent") oppose the petition and cross move to dismiss it for failure to state a cause of action (motion seq. no. 001). Respondents the New York City Office of Collective Bargaining ("OCB") and BCB, Marlene A. Gold, as chairperson (together, the "BCB Respondent") separately move to dismiss the petition (motion seq. no. 002).[1]

[1]Motion seq. nos. 001 and 002 are consolidated for disposition.

Background

This action arises out of a longstanding dispute as to the wages and benefits afforded by the City to certain Supervisor Highway Repairers ("SHRs") who are members of municipal labor union Local 1157 ("Local 1157"), which is a constituent part of DC 37 (together, the "Union"). SHRs are "prevailing rate" employees, which means that these employees serve in titles that are covered by New York Labor Law §220. Accordingly, these employees are paid wage rates and supplemental benefits that are dictated by the City Comptroller ("the Comptroller") and mimic the wage rates and supplemental benefits received by comparable employees in the private sector. Since 1984, §220.8(d) has provided that a public employer and employee organization "shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements..." of the employees covered by the statute ("§220 employees"). When an agreement is reached, with respect to wages and supplements, the terms of that agreement are reflected in a "Consent Determination," which is issued by the local fiscal officer, which in the City is the Comptroller. Section 220.7 provides that if the public employer and the employee organization "fail to achieve an agreement," the employee organization can file a complaint that initiates a statutory process for obtaining an independent determination by the Comptroller. Once the Comptroller makes a determination, that determination may be appealed.

The last negotiated agreement covering the SHRs represented by Local 1157 (the "1157 SHRs") was memorialized in a Consent Determination covering the period of April 1, 1995 through March 31, 2000. As the expiration date of the Consent Determination drew near, the City and the Union met but were unable to reach a voluntary settlement for a successor agreement on wages and supplements. Local 1157 then commenced the statutory process for determining the prevailing wage rate and supplemental rate for SHRs for the period commencing

April 1, 2000. On August 19, 2004, the Comptroller's Bureau of Labor Law ("the Comptroller's Bureau") issued a preliminary decision in which prevailing wage and supplement rates applicable to SHRs were determined based on those of comparable workers in the private sector (the "comparable workers"). The Comptroller's Bureau provided the parties with a preliminary prevailing wage and supplements schedule for the period of April 1, 2000 through June 30, 2005, and instructed them to have negotiations pursuant to §220.8(d). The parties were unable to reach an agreement and sought a hearing pursuant to §220 before the New York City Office of Administrative Trials and Hearings ("OATH"). Following the hearing, Administrative Law Judge Kevin F. Casey issued a report and recommendation (the "OATH Recommendation") affirming the Comptroller's preliminary decision.

On March 2, 2006, the Comptroller issued an order and determination adopting the OATH Recommendation (the "Comptroller's Order"). The Comptroller's Order required the City to substantially increase the hourly wage paid to SHRs (paying an hourly wage of $35.73 rather than $24.43) and to make substantial back payments for the period between April 1, 2000 and June 30, 2005. The City subsequently initiated an Article 78 proceeding before the Appellate Division, First Department, where it was held that the Comptroller's Order must be implemented.

Following the issuance of the Appellate Division decision, the Union and the City met to negotiate the implementation of the Comptroller's Order. In a meeting on September 6, 2007 , the City provided the Union with a costing which matched the wage and supplement rates for the comparable workers with those of the 1157 SHRs for the period between April 1, 2000 and June 30, 2005. The City maintained that its costing calculations showed that the SHRs' prevailing wages ordered by the Comptroller plus existing supplemental benefits exceeded the

Comptroller's total. OLR, by letter dated September 26, 2007 (the "Recalculation Letter"), advised DC 37 that the City would be paying the increase in wages retroactive to April 1, 2000 per the Comptroller's Order, but that it would be implementing leave accrual recalculations both prospectively and retroactively to recoup the deemed excess paid leave. The paid leave benefits that were affected include, among others, sick leave, bereavement leave, and jury duty leave.

On October 10, 2007, DC 37, the certified collective bargaining representative for the 1157 SHRs, filed an improper practice petition ("IPP") with BCB addressed to the City's unilateral determination of the *retroactive* leave recalculations, which was consolidated for disposition with an improper practice petition filed by Local 1157 (together, the "October IPP"). The October IPP alleged that the City's unilateral determination as to how the Comptroller's determination would be effectuated –i.e. which leave banks would be charged and the amount of time to be taken from the respective leave banks –was a violation of New York City Collective Bargaining Law ("NYCCBL") §12-306(a)(4) and (5) which respectively require a public employer to bargain in good faith on matters within the scope of collective bargaining and prohibit a public employer from making unilateral determinations on any mandatory subject of collective bargaining. The October IPP also alleged that the City's actions violated §12-306(a)(1)-(3) as they were taken with the purpose of discouraging union members from exercising their rights and interfered, restrained, or coerced employees represented by a union in the exercise of their rights.

On November 30, 2007, DC 37 filed a related improper practice petition (the "November IPP") addressed to the unilateral determination of *prospective* changes in the leave accrual recalculations based on alleged violations of NYCCBL §12-306(a)(1) -(5). The November IPP is the subject of this proceeding.

In January 2008, Local 1157 and certain of its top officers (the "McFarland Petitioners") initiated an Article 78 proceeding against the City, entitled McFarland v. City of New York. The proceeding was assigned to Justice O. Peter Sherwood ("Justice Sherwood"). The McFarland Petitioners challenged both the prospective and retroactive leave reductions set forth in the Recalculation Letter from OLR. The McFarland Petitioners alleged that the City's action in unilaterally reducing the SHRs' benefits was arbitrary and capricious and beyond the scope of its authority, in violation of the Taylor Law, Labor Law, and Federal and State constitutions. DC 37 was not a named party to this proceeding.

The City cross moved to dismiss the petition on the ground that the court lacked subject matter jurisdiction as the petition set forth was an IPP which is within the jurisdiction of the BCB, and that if the petition is distinguishable from an IPP, the petition cannot be entertained as the McFarland Petitioners had not followed the administrative process provided under §220, and there had been no final determination issued by the Comptroller.

In reply, the McFarland Petitioners argued that the rights at issue in the Article 78 proceeding are not predicated on rights that may exist by virtue of the NYCCBL and that no administrative remedy is provided to resolve this dispute under §220. They also argued that their claims in the Article 78 proceeding were not predicated on rights that exist by virtue of the NYCCBL, but instead were grounded on alleged violations of the Taylor Law, Labor Law and state and federal constitutions which the BCB has no jurisdiction to enforce, and that the administrative remedies doctrine did not apply since the proceeding alleged that their constitutional rights had been violated.

On March 9, 2009, while McFarland was pending, BCB issued a split decision and order ("BCB Order 1") dismissing the Union's October IPP regarding the retroactive changes in the

leave accrural. The majority ruled that BCB lacked jurisdiction over the claimed violations of §12-306(a)(4) and (5). The majority found that, under NYCCBL §12-307(a), public employers and certified employee organizations have the duty to bargain in good faith on wage rates, benefits and other identified subjects, but an employer's duty to bargain with respect to §220 employees (such as the 1157 SHRs) was governed by §220 and was to be resolved by the Comptroller.

By decision and order dated April 1, 2009 ("McFarland"), Justice Sherwood granted the City's cross motion in part and denied it in part. Justice Sherwood wrote that while the McFarland Petitioners relied on the Taylor Law, the Labor Law and the state and federal constitutions, they did not identify any provisions of either the Taylor Law or the Labor Law on which their claims were based, and did not cite any cases confirming the constitutional rights being asserted.

With respect to the unilateral prospective leave recalculations, Justice Sherwood held that §220 was applicable and that although §220 does not expressly prohibit unilateral changes and set forth a procedure for redress, the law authorizes the Comptroller to adjudicate complaints of aggrieved employee organizations and does not, by its terms, proscribe the ability of the Comptroller from providing relief. Justice Sherwood also found that since the McFarland Petitioners had not attempted to seek redress before the Comptroller pursuant to §220.7 and had not cited any authority barring an aggrieved person from pursuing such a claim before the Comptroller, the McFarland Petitioners failed to exhaust their administrative remedies. The court thus granted the cross motion to the extent of dismissing the portion of the petition seeking to enjoin the City from unilaterally changing leave benefits prospectively.[2]

[2] DC 37 submits a letter, dated May 14, 2009, in which the Deputy Comptroller for Legal Affairs informs the City that with respect to the prospective supplemental benefits, the Comptroller's Order "does not, in any way, mandate that the City unilaterally reduce the benefits previously

In contrast, with respect to the retroactive leave recalculations, Justice Sherwood found that the Recalculation Letter was a final determination and that the petition stated a claim based on precedent holding that an employer may not use earned excess supplemental benefits to offset wage underpayments" (See e.g. Matter of Georgakis Painters Corp. v. Hartnett, 170 A.D.2d 726 (3rd Dep't 1991)) and that a public employer may not cancel vested rights to employment benefits without due process (See e.g. Gruen v. Suffolk County, 187 A.D.2d 560, 562 (2nd Dep't 1993)). Accordingly, the court denied the portion of the cross motion seeking to dismiss that part of the petition seeking to enjoin the City from unilaterally changing leave benefits retroactively.

On September 24, 2009, BCB issued an order ("BCB Order 2") finding that it did not have jurisdiction over DC 37's November IPP with respect to claimed violations of 12-306(a)(4) and (5) to the effect that the City failed to bargain in good faith. BCB explained, as it did in connection with BCB Order 1 concerning the retroactive leave recalculations, that it was constrained to find that the matter was outside its jurisdiction. BCB again based its determination on the language of NYCCBL §12-307(a) which provides that public employers and certified employee organizations have the duty to bargain in good faith on wage rates, benefits and other identified subjects, but an employer's duty to bargain with respect to employees subject to § 220 (such as the 1157 SHRs) is an exception to the general rule and is to be determined under § 220. Specifically, BCB again pointed out that under NYCCBL § 12-

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provided to [the 1157 SHRs]." The Deputy Comptroller further states that "to [his] knowledge, this office has never ordered an employer to reduce its employees' benefits in connection with any other Order and Determination that has been issued. In this regard, the [Comptroller's Order] establishes the minimum rates of wages and benefits for the relevant title, and not the maximum [and that] [t]his construction is fully consistent with all other Orders and Determinations this office has issued, the Labor Law, and case law."

307(a)(1); "with respect to those employees whose wages are determined under [§220], the duty to bargain in good faith over wages and supplements shall be governed by said section."

BCB further explained that an examination of the language of §220.8-d establishes a duty to bargain in good faith as to wages and supplements for subject employees, and BCB stated that paid leave qualifies as a supplement under §220.5-b. BCB further found that under §220.8-d, if the parties fail to achieve an agreement, the Union may file a complaint with the Comptroller under §220.7. BCB also referenced McFarland and quoted language to the effect that although §220, unlike NYCCBL §12-306(a)(5), does not by its terms prohibit unilateral changes allegedly made by the City here, §220 authorizes the Comptroller to render an order, determination or other disposition of a verified complaint, and §220 expresses a strong policy in favor of adjudication before the Comptroller where the collective bargaining process has failed.

On or about October 23, 2009, DC 37 commenced this Article 78 proceeding seeking a judgment declaring that BCB committed an error of law in ruling that it did not have jurisdiction to determine claims of improper practice under NYCCBL §12-306(a) (4) and (5) and ordering BCB to take jurisdiction over the November IPP. DC 37 argues that a review of relevant statutes in relation to their history, and the strong public policy in favor of collective bargaining, reveals that NYCCBL and §220 grant BCB jurisdiction over improper practice petitions involving §220 employee wages and supplements.

City Respondent and BCB Respondent (together, "Respondents") each seek to dismiss DC 37's petition for failure to state a cause of action. Respondents argue that the court should defer to BCB based on its agency's expertise and judgment regarding the interpretation of its own regulations and the statutes under which it functions. As such, Respondents argue that the court should give deference to BCB's interpretation of the NYCCBL, since it is consistent with

relevant statutory language and case law, particularly Justice Sherwood's decision in McFarland. BCB Respondent also argues that since DC 37 is in privity with Local 1157, the petition which litigated issues regarding the same transaction in McFarland, is barred by res judicata and DC 37 is judicially estopped from taking the position that BCB has jurisdiction to rule on the November IPP since Local 1157 secured a favorable determination in McFarland by adopting the opposite position.[3]

In reply, DC 37 asserts that it is not barred from pursuing its petition as it is not in privity with Local 1157. Moreover, DC 37 argues that the doctrine of res judicata does not bar this petition because McFarland did not involve an adjudication of the claim at issue on its merits or otherwise. DC 37 further argues that the doctrine of judicial estoppel is inapplicable because McFarland did not reach the issue in this petition and Local 1157 did not assume a position on this issue that resulted in judgment in its favor. DC 37 also argues that BCB has exclusive non-delegable jurisdiction over matters of good faith bargaining between public employers and public employee organization in New York City, and that once the §220 process is complete, which it was here, BCB has the responsibility to defend the integrity of the collective bargaining process.

Discussion

The court will first address the threshold issues of whether the petition is barred under the doctrines of judicial estoppel and res judicata.

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[3] BCB Respondent also claims that Local 1157's affirmative acknowledgment that BCB lacks jurisdiction over the transaction at issue, as recited in McFarland, should be deemed a judicial admission which also binds DC 37; however, a judicial admission regards a statement of fact, and the alleged admission here is one of law. See e.g. Addo v. Melnick, 61 A.D.3d 453, 457 (1st Dep't 2009). Thus, such an acknowledgment, even if affirmatively made, does not constitute a judicial admission.

The doctrine of judicial estoppel precludes a party who secured judgment in its favor in a prior proceeding by assuming a certain position from assuming the contrary position in a subsequent litigation simply because his interests have changed. See Gale P. Elson, P.C. v. Dubois, 18 A.D.3d 301, 303 (1st Dep't 2005). Here, even assuming privity between Local 1157 and DC 37, the doctrine of judicial estoppel is inapplicable because Local 1157 did not secure a judgment in McFarland by adopting the position that BCB lacked jurisdiction to rule on the IPP at issue here. Specifically, Local 1157 did not successfully challenge the prospective leave recalculations in McFarland and appears to have only succeeded in defeating the cross motion with respect to the retroactive leave recalculations on the basis that the SHRs' due process rights may have been violated. Moreover, a review of the decision in McFarland reveals that Local 1157 did not argue that BCB lacks jurisdiction to hear claims arising under §12-306(a), but only that the relief sought in McFarland was not predicated on rights that exist by virtue of the NYCCBL.

Next, even assuming Local 1157 and DC 37 are in privity, the legal arguments presented by the City with respect to this cross motion are insufficient to establish that this petition is barred by the doctrine of res judicata. Under the doctrine of res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 (1981). Here, at the time of the decision in McFarland, the BCB had not yet determined whether it had jurisdiction over the prospective leave recalculations, but had only ruled with respect to the retroactive leave recalculations. Thus, BCB's determination could not have been challenged in the prior proceeding and the petition is not barred by res judicata.

The remaining issue concerns the merits of the petition.[4] In general, "an administrative agency's construction and interpretation of its own regulations and the statute under which it functions is entitled to the greatest weight." Matter of Herzog v. Joy, 76 A.D.2d 372, 375 (1st Dep't 1980) aff'd 53 N.Y.2d 821 (1981). Additionally, "[w]hen an administrative agency is charged with implementing and enforcing the provisions of a particular statute, the courts will generally defer to the agency's expertise and judgment regarding that statute." District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO et al. v. City of New York, 22 A.D.3d 279, 284 (1st Dep't 2005). In keeping with these principles, the courts will defer to BCB's expertise in applying and interpreting the NYCCBL. On the other hand, when an agency's decision involves pure questions of law dependant on statutory analysis and legislative intent, courts decide the issue de novo. See Matter of Gruber (New York City Dept. of Personnel-Sweeney), 89 N.Y.2d 225, 231 (1996).

Here, the legal standard to apply creates a close question since BCB's determination called upon its expertise in interpretation of the regulations and statute under which it functions, but also involves questions of statutory analysis and legislative intent. For example, BCB relied on the statutory history of NYCCBL §12-307(a)(1) in concluding that it had no jurisdiction over disputes over wages and supplements of §220 employees.

In any event, even if the court reviews BCB's determination under a de novo standard, there is no basis for overturning such determination. Specifically, as found by BCB, the express language of §12-307(a)(1) provides that the parties' duties regarding wages and supplements for §220 employees, like the 1157 SHRs, are governed by the Labor Law, and as such BCB lacks jurisdiction over such disputes. Moreover, while the Labor Law, unlike NYCCBL §12-

[4] As the issues raised in the petition and opposition and cross motion concern the interpretation of statutes and regulations, they can be resolved based on the allegations in the petition. See e.g. Mary Chamberlain Trust v. Litke, 135 A.D.2d 714, 714-5 (2nd Dep't 1987).

306(a)(5), does not expressly prohibit unilateral action with respect to wages and supplements like that challenged in this case, this omission does not leave §220 employees without a remedy. Section 220.8(d) requires that a public employer and an employee organization "shall in good faith negotiate and enter into [written agreements] with respect to the wages and supplements of [covered employees]." In addition, as found by Justice Sherwood in McFarland, §220 employees have a remedy under §220.7 which authorizes the Comptroller to adjudicate complaints of aggrieved employee agencies and does not limit his ability to address purported unilateral determinations by an employer.

As §220.7 provides a remedy for the failure to bargain in good faith, DC 37's argument that BCB's interpretation is contrary to the intent of the state legislature in amending §220 to include §220.8(d) is without merit, as is DC 37's argument that BCB's interpretation is contrary to §12-307(a)(1) which was amended to indicate that §220 employees have a right to good faith negotiations under the Labor Law.[5] Moreover, the legislative history relied on by DC 37 is not to the contrary since such history expresses the significance of giving employee organizations representing §220 employees the right to bargain in good faith, but does not state that the BCB, as opposed to the Comptroller, would be required to enforce this right.

As BCB's determination that it lacked jurisdiction over the November IPP is not contrary to the language or intent of the relevant provisions of the Labor Law and the NYCCBL, the petition must be dismissed.

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[5] According to DC 37, §220.8(d) was enacted to (1) give employee organizations the sole right to file a complaint under §220 (previously an individual member could also file a complaint under §220 resulting in various inefficiencies) and (2) to require public employers and employee organizations to bargain in good faith regarding the wages and supplements of §220 employees. In support of its position, DC 37 attached letters to Governor Mario Cuomo in support of the amendment and explaining its purpose. DC 37 also asserts that NYCCBL §12-307(a)(1) was amended in 1998 to harmonize the NYCCBL with §220.8(d), such that it no longer expressly prohibits bargaining regarding the wages and supplements of §220 employees.

Conclusion

In view of the above, it is

ORDERED that the motion and cross motion to dismiss the petition for failure to state a cause of action are granted; and it is further

ORDERED and ADJUDGED that the petition is denied and dismissed.

Dated: October 15, 2010

J.S.C.