Matter of Subway Surface Supervisors Assoc. v New York City Transit Auth.
2010 NY Slip Op 33912(U)
April 14, 2010
Sup Ct, New York County
Docket Number: 105285/09
Judge: Emily Jane Goodman
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[* 1]
SCANNED ON 4/23/2010

e 4/23/10

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 105385/2009
SUBWAY SURFACE
VS
NYC TANSIT AUTHORITY
Sequence Number : 001
ARTICLE 78

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

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

FILED
APR 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/14/10

EJG
EMILY JANE GOODMAN

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
--X

In the Matter of the Application of
SUBWAY SURFACE SUPERVISORS ASSOCIATION,

Petitioner,

Index No. 105285/09

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

Pursuant to Article 78 of the Civil
Practice Law and Rules.

--X

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APR 23 2010
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Emily Jane Goodman, J.S.C.:

Petitioner Subway Surface Supervisors Authority, a labor organization, brings this petition, pursuant to CPLR Art. 78, against respondent New York City Transit Authority (NYCTA), claiming unfair treatment of the NYCTA employees it represents in the matter of wages and job duties, under Civil Service Law (CSL) § 61 (2). NYCTA cross-moves to dismiss the petition.

I. Background

Petitioner represents NYCTA employees employed in the title and rank of "station supervisor level 1" (SS1) in matters of collective bargaining. Employees of a second job title, "station supervisor level 2" (SS2), are represented by the Transit Supervisors Organization (TSO).

SS1 is a position which evolved from a prior position called

assistant supervisor. The position of SS2 was originally a supervisor. The current titles apparently came into existence in 1985, when SS2 employees ceased to be represented by petitioner pursuant to a memorandum of understanding.

CSL § 61 (2) applies to "Prohibition against out-of-title work." It states, in pertinent part, that:

> [n]o person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed, and ... no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder.

SS1 employees are paid approximately $69,000 per year, while SS2 employees are paid $83,000 per year. In the petition, petitioner argued that the duties of the two levels of supervisors had been combined since 1985, despite the pay differential. As a result, in the petition, petitioner claimed that SS1 employees are working outside of their assigned duties (by performing SS2 duties), in violation of CSL § 61 (2), and asked this court to rule that NYCTA must cease requiring SS1 employees to perform SS2 duties.

In response, NYCTA cross-moves to dismiss the petition based on the alleged passage of the statute of limitations; that the petition is barred by the doctrine of laches; that this court does not have subject matter jurisdiction over the issue, as the matter should be heard before the Public Employment Relations

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Board (PERB); and that the petition lacks merit.

NYCTA claimed, in opposition to the petition, that the duties of the two levels in the SS title "overlapped." NYCTA explained that:

> The difference between the two levels in that title is not functional but, rather, based on the need for supervisors who could become managers (Superintendent). Historically, the SS II position was intended as a pool from which employees were promoted to the Station Superintendent title. As such, employees in that title were required, from time to time, to assist Station Superintendents and were expected to be available 24 hours a day. This is the reason for the difference between the two levels in that title.

Aff. of Charles Glascow (Glasgow), at 4.

Glascow maintains that the skills requirement for the two levels in the SS title are the same, and that SS1 and SS2 employees receive the same training. NYCTA has not stepped up any SS1 employee to the position of SS2 since 1997, and has not hired anyone to the level of SS2 since that time, allowing the number of these employees to dwindle due to attrition. As a result of this policy, the amount of overlapping work taken on by SS1 employees has increased.

In response to the cross motion, petitioner abandons its arguments based on CSL § 61 (2) entirely, raising the wholly new argument that NYCTA is in breach of CSL § 115, which requires that employees be paid equally for equal work. Petitioner also now claims that NYCTA has run afoul of the Equal Protection Clause of the New York and United States Constitutions by failing

to pay SS1 employees the same salary as SS2 employees.

As a result of the foregoing, petitioner has altered both its theory of liability and the remedy it is seeking. While NYCTA claims that the petition should be dismissed on the grounds that petitioner has essentially abandoned its petition, this court has afforded NYCTA ample opportunity to respond to the new claims by means of sur-reply, and NYCTA has taken full advantage of that opportunity. Therefore, the proceeding will continue as a discussion of the applicability of CSL § 115 and the Constitutional Equal Protection Clause, the CSL § 61 (2) argument having been abandoned.

CSL § 115 reads:

> In order to attract unusual merit and ability to the service of the state of New York, to stimulate higher efficiency among the personnel, to provide skilled leadership in administrative departments, to reward merit and to insure to the people and the taxpayers of the state of New York the highest return in services for the necessary costs of government, it is hereby declared to be the policy of the state to provide equal pay for equal work, and regular increases in pay in proper proportion to increase of ability, increase of output and increase of equality of work demonstrated in service.

Petitioner believes that NYCTA has admitted that SS1 and SS2 employees have the same employment duties, and thus, that the pay disparity between the titles is, without question, a violation of CSL § 115. NYCTA, on the other hand, insists that SS2 employees do perform "additional assignments" (Supplemental Reply Affirmation, ¶4 at 1), such as assisting higher-level supervisors

(designated superintendents), and other duties beyond those imposed on SS1 employees.

II. Discussion

NYCTA initially argues that this proceeding is improper because this court has no subject matter jurisdiction over the dispute, which should, instead, be heard by Public Employment Relations Board (PERB). This is not the case.

PERB has jurisdiction over claims of unfair labor practices under CSL § 209-a. *See Matter of Palumbo v Board of Education of City of New York*, 60 AD2d 858 (2d Dept 1978). However, "PERB's sphere of exclusive jurisdiction is limited and does not preclude judicial relief in matters outside its range of jurisdiction. *DeCherro v Civil Service Employees Association Inc.*, 60 AD2d 743. 744 (3d Dept 1977).

CSL § 209-a is concerned with complaints regarding "interference with the right of public employees to organize, interference with the formation of an employee organization, discrimination against an employee for the purpose of discouraging the activities of an employee organization, or refusal to negotiate in good faith with the duly recognized representatives of public employees." *Matter of Zuckerman v Board of Education of City School District of City of New York*, 44 NY2d 336, 342 (1978); *see e.g. Matter of Professional Staff Congress-City University of New York v New York State Public*

Employment Relations Board, 7 NY3d 458 (2006)(complaint concerning refusal to negotiate in good faith within jurisdiction of PERB); *Matter of Rosen v Public Employment Relations Board*, 72 NY2d 42 (1988)(PERB has jurisdiction over question of employees' right to organize under CSL § 209-a [1]). The present dispute does not involve an unfair labor practice under CSL § 209-a (1), and so, the matter is properly in this court.

This proceeding is not barred by the statute of limitation in CPLR 217. "Where the claim is that a public official has failed to perform a continuing statutory duty, the right to relief will not be barred by the four-month Statute of Limitations." *Matter of Janke v Community School Board of Community School District No. 19*, 186 AD2d 190, 193 (2d Dept 1992); *see also Matter of Yris v Comsewogue Union Free School District No. 3, Port Jefferson Station*, 63 AD2d 648 (2d Dept 1978), *affd* 55 NY2d 840 (1982). NYCTA's alleged failure to abide by CLS § 115 is a continuing one, and the statute of limitations does not apply.

Nor is the proceeding barred by the doctrine of laches. Laches requires a showing of "significant prejudice," which is absent here. *Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 (1983); *see also Public Administrator of Kings County v Hossain Construction Corp.*, 27 AD3d 714 (2d Dept 2006).

The remaining issue is whether CSL § 115 can be applied to

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NYCTA at all. NYCTA argues that CSL § 115 is applicable only to employees of the State of New York (*see* Article VIII title, "Classification and Compensation of State Employees"), and that, as a public authority, it is not a civil division of the State subject to CSL § 115. Petitioner, in contrast, argues that NYCTA is a State authority governed by CSL § 115 because it is a subsidiary of the Metropolitan Transportation Authority (MTA), which petitioner characterizes as a State authority by virtue of the fact that the MTA's members are appointed by the governor, pursuant to Public Authorities Law (PAL) § 2 (1).

Despite NYCTA's intricate discussion as to why it is not governed by the CSL, its enabling legislation indicates otherwise. NYCTA was created pursuant to PAL § 1201 as a public benefit corporation. *See Matter of Subway-Surface Supervisors Association v New York City Transit Authority*, 44 NY2d 101 (1978). Section 1210 deals with NYCTA employees. Section 1210 (2) states, in relevant part "[t]he appointment, promotion and continuance of employment of all employees of the authority shall be governed by the civil service law and the rules of the municipal civil service commission of the city." NYCTA attempts to distinguish this language by emphasizing the words "rules of the municipal civil service commission of the city," arguing that this addition to the statute makes NYCTA employees something other than State employees governed by the CSL.

This argument is futile. While it is settled that a petitioner must be employed by the State of New York in order to gain the benefit of CSL § 115 (*Ryan v Adler*, 51 Misc 2d 816 [Sup Ct, Westchester County 1966], *affd* 28 AD2d 920 [2d Dept 1967], *affd* 21 NY2d 815 [1968]), PAL § 1210 (2) clearly indicates that the manner of employment of NYCTA employees will be governed by the CSL "and" the rules of the municipal civil service commission; and the applicability of the municipal civil service commission rules does not trump the applicability of the CSL. And, if that were not enough, NYCTA fails to point to the conclusion of PAL § 1210 (2), which states, in case there is any doubt about it, that "[e]mployees of the authority shall be subject to the provisions of the civil service law."

This holding has already been made at the appellate level. In *Margolis v New York City Transit Authority* (157 AD2d 238, 241-242 [1st Dept 1990]), the Court, while finding that NYCTA was undoubtedly "not a division of the State," and a "separate entity" from the City of New York, nevertheless found that CSL § 115 applied to NYCTA employees via PAL § 1210 (2). Thus, petitioner herein may rely on the statutory promise of equal pay for equal work. This being the case, there is no need to discuss petitioner's equal protection arguments.

Under CSL § 115, SS1 employees are entitled to the same pay as SS2 employees if they perform the same work. However, there

is a factual dispute as to whether SS1 employees perform the same duties as SS2 employees which cannot be resolved at this time. A hearing pursuant to CPLR 7804 (h) is appropriate in this circumstance. *See e.g. Margolis v New York City Transit Authority*, 157 AD2d 238, *supra*.

Accordingly, it is

ORDERED that the issue as to whether NYCTA station supervisor level 1 employees perform the same duties as NYCTA station supervisor level 2 employees is referred, pursuant to CPLR 7804 (h), to a Special Referee to hear and report with recommendations, and said report shall include findings as to the duties performed by both level 1 and 2 employees; however, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the petition is held in abeyance pending decision on a motion to confirm or reject the Referee's Report.

This Constitutes the Decision and Order of the Court.

Dated: April 14, 2010

FILED
APR 23 2010
NEW YORK
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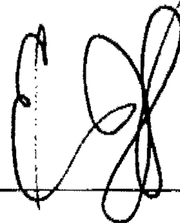

J.S.C.

EMILY JANE GOODMAN