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

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 400177/2010

CITY OF NEW YORK

VS

BOARD OF COLLECTIVE BARGAINING

Sequence Number : 003

COUNSEL FEES, EXPENSES

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 by respondent Local 333 is denied insofar as it seeks sanctions in the form of attorney's fees but is granted insofar as it seeks an award of costs pursuant to CPLR Article 81, in accordance with the accompanying memorandum decision.

FILED

JUL 08 2011

NEW YORK COUNTY CLERK'S OFFICE

JUL 05 2011

Dated: July 5, 2011

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 16

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In the Matter of the Application of

Index No. 400177/10
Motion Seq No. 003

THE CITY OF NEW YORK, MICHAEL BLOOMBERG, as Mayor of the City of New York; DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK; JANETTE SADIK-KAHN, as Commissioner of the Department of Transportation of the City of New York, THE OFFICE OF LABOR RELATIONS OF THE CITY OF NEW YORK, JAMES F. HANLEY, as Commissioner Of the Office of Labor Relations of the City of New York,

Petitioners,

-against-

THE BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK, MARLENE A. GOLD, as Chair of The Board of Collective Bargaining of the City of New York; LOCAL 333, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; and, WILLIAM HARRIGAN, as President of Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO.

Respondents,

For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules.

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SCHLESINGER, J.:

Before the Court is a motion brought by the Local 333 Union and the President of the Union, William Harrigan ("Union"), asking the Court to award attorney's fees and costs. The Union bases its claim for fees on 22 NYCRR §130-1.1, which allows the granting of sanctions in the form of attorney's fees upon a finding that the party's conduct was frivolous. The conduct in question here is an Article 78 proceeding brought by the City of New York ("City") on behalf of the Department of Transportation ("DOT"), which

sought the annulment of an improper practice determination made by the Board of Collective Bargaining ("BCB") regarding DOT's failure to bargain in good faith. The movants also requests costs pursuant to CPLR §8101 based on this Court's prior decision granting their motion to dismiss the Article 78 proceeding.

The Collective Bargaining Agreement ("CBA") between the DOT and Union had an effective term from April 27, 2007 to April 26, 2010. Article IV-A §10(b)(4) of the CBA stated that: 1) there is no requirement for a statement from a doctor when an employee is sick two days or less, and 2) for claims of more than two days of sickness, an employee must get a statement from a doctor to verify the claim. The verification statement was required to be submitted as soon as possible after the employee returned to work.

On March 6, 2009, the DOT issued a new sick leave policy in SMS Alert No. 94 ("SMS") that said that employees absent for three days or longer were now required to bring in a doctor's note before returning to work verifying that they were "fit for duty". The Union believed that this was a material change from the words and their clear meaning in the CBA. However, the DOT was unresponsive to the Union's demand to have the SMS rescinded. Therefore, with no place left to go, on June 5 2009 the Union filed an improper practice claim against the City for adopting a new sick leave policy without bargaining in violation of New York City Collective Bargaining Law ("NYCCBL") §12-306(a)(1) and (4). On November 23, 2009, after receiving thorough submissions from the parties, the BCB determined the DOT had violated NYCCBL by failing to bargain in good faith over the new sick leave policy when it unilaterally promulgated the rule (SMS Alert No. 94).

The basis for the motion to award fees is the alleged frivolous nature of the Article 78 petition, which had challenged the BCB determination as arbitrary and capricious. The Article 78 was dismissed on October 7, 2010 because this Court had found that the BCB's determination "was reasonable, supported by law, supported by the policy of collective bargaining, and is entitled to deference". The Court found Coast Guard regulation CG-719K and the Navigation and Vessel Inspection Circular No. 02-98, which the DOT had claimed precluded it from bargaining, "had little to do with the controversy at hand",and that the newly presented Federal Regulations (46 U.S.C. §8101, §10902 and §10908), which were improperly introduced for the first time in the Article 78 petition, were "similar to earlier regulations cited, irrelevant". The argument that the City Charter's delegation of power to the DOT to maintain safe waterways preempted them from bargaining was also found to lack any relevancy with respect to the alteration of sick leave policies.

In order to grant attorney's fees pursuant to 22 NYCRR §130-1.1, this Court must find that the Article 78 was frivolous in that: (1) it was completely lacking in merit and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; (2) it was undertaken primarily for the delay of a resolution or to prolong litigation; or (3) it asserts facts that are false.

22 NYCRR §130-1.1, subd. (c), states additional facts the court should consider when evaluating the conduct, mainly the relevancy of the circumstances under which the conduct took place, including the time available for investigation of the legal or factual basis of the conduct, and whether or not the conduct continued when its lack of legal or factual basis was apparent.

This Court agrees with the movant's claim that the arguments made by the petitioners in the Article 78 proceeding were without support, in other words, that the original Article 78 petition was "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law."22 NYCRR §130-1.1, subd. (c)(1). This Court unambiguously declared that the legal arguments presented by the DOT were irrelevant and weak. However, I believe and find here that the lack of legal merit in the DOT's arguments alone is not a sufficient basis to impose sanctions, as the majority of the cases deny sanctions unless a bad faith element has been present.

Conduct worthy of awarding sanctions in the form of attorney's fees based on frivolous claims has been generally limited to cases where parties bring a "barrage of litigation" as a means or method of delaying or frustrating a court order. *See, e.g., Minister's Elders & Deacons of Reformed Protestant Dutch Church v. Broadway, Inc.*, 76 N.Y.2d 411 (1990) (petitioner's litigious conduct was frivolous because it held no legal merit and was only part of an extended strategy to prolong a holdover tenancy).

Here, it has not been proven that the Article 78 was brought as part of an underlying agenda to delay the recision of SMS Alert No.94 as directed by the Board of Collective Bargaining. Further, there is no evidence to suggest that the Article 78 was brought with the intent to harm the Union or with a malicious motive. Finally, nothing was brought out either in the papers or at oral argument to show that the DOT is in fact operating pursuant to SMS Alert No. 94.

Circumstances that warrant a grant of sanctions for a frivolous action are comparatively rare, because in part, sanctions are used to deter the bringing of frivolous actions in the future. *Citywide Council on High Schools v. Franchise and Concession*

Review Committee of the City of New York, 2010 NY Slip OP 32466U (Sup. Ct., NY Co., Sep. 10, 2010). This Court does not anticipate any future litigation arising from this matter and therefore little would be served by imposing sanctions on the Department of Transportation. Accordingly, the motion is denied insofar as it seeks sanctions in the form of attorney's fees.

However, the analysis differs with respect to the Union's request for costs. In New York, CPLR §8101 governs costs, stating that: "The party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statute or unless the court determines that to so allow costs would not be equitable, under all of the circumstances." Here, the statute entitles the Union to costs based on the fact that it prevailed in the Article 78 proceeding, and the Court also finds that equity would be served by awarding costs to the Union under the circumstances presented here.

Accordingly, it is hereby

ORDERED that the Union's motion for sanctions in the form of attorney's fees pursuant to 22 NYCRR §130-1.1 is denied; and it is further

ORDERED that the Union's motion is granted insofar as it seeks an award of costs and disbursements pursuant to CPLR Article 81, and the Clerk is directed to enter judgment in favor of respondents dismissing this proceeding with an award of costs and disbursements in favor of Local 333, United Marine Division, International Longshoremen's Association, AFL-CIO, upon the presentation of a Bill of Costs to the Clerk of the Court.

Dated: July 5, 2011

J.S.C.
ALICE SCHLESINGER