STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Application of

MARSHALL WHITE and MICHAEL DEFURIA,
individually and on behalf of those similarly situated,

Petitioners,

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

-against-

**DECISION and ORDER**
**INDEX NO. 4342-11**
**RJI NO. 01-11-ST2928**

QUEENSBURY UNION FREE SCHOOL DISTRICT,
SECTION II OF THE NEW YORK STATE PUBLIC
HIGH SCHOOL ATHLETIC, DAVID M. STEINER,
NEW YORK STATE DEPARTMENT OF EDUCATION,
TRISH KOCIALSKI and DEBRA MARRIOTT,

Respondents.

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Supreme Court Albany County All Purpose Term, December 9, 2011
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**
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**TERESI, J.:**

Petitioners commenced this CPLR Article 78 proceeding challenging Section II of the New York State Public High School Athletics Association's (hereinafter "Section II") February 22, 2011 grievance determination (hereinafter "Determination") and the New York State Department of Education's (hereinafter "Department of Education") February 19, 2010 Memorandum (hereinafter "Memorandum"). By their respective answers, each Respondent set forth, in pertinent part, an objection in point of law claiming that this proceeding was untimely commenced. Petitioners opposed the objection. Because Respondents demonstrated that this proceeding was untimely commenced, it is dismissed.

A CPLR Article 78 proceeding "is barred by the statute of limitations... [when it is] commenced more than four months after the determination to be reviewed became final and binding upon petitioners." (Matter of McDonald v Board of the Hudson Riv.-Black Riv. Regulating District, 86 AD3d 844, 846 [3d Dept. 2011]; CPLR §217[1]). While the CPLR Article 78 Petitioners need not personally receive the determination for it to be binding upon them, their agent must. (Matter of Case v Monroe Community Coll., 89 NY2d 438 [1997]; McRae v. New York City Transit Authority, 39 AD3d 861 [2d Dept. 2007]; Singer v. New York State and Local Employees' Retirement System, 69 AD3d 1037 [3d Dept. 2010]; Matter of Biondo v. New York State Bd. of Parole, 60 NY2d 832 [1983]).

Here, the Determination was mailed to Petitioners' agent. The Determination constituted

the final decision in a three level grievance process, commenced by Eastern New York Chapter of the National Ice Hockey Officials Association (hereinafter "ENYCNIHOA") against Queensbury Union Free School District (hereinafter "Queensbury"). While neither ENYCNIHOA nor its president commenced this proceeding, two of its admitted members have. All of the grievance documents clearly show that ENYCNIHOA was acting on behalf of its members, without counsel. According to the hearing officer's affidavit, he mailed the Determination to the president of ENYCNIHOA on the same day it was issued (February 22, 2011). Because the record evidence overwhelmingly shows that ENYCNIHOA was pursuing this grievance on behalf of its members, notice to ENYCNIHOA caused the Determination to be binding on its members. "Hence, the [members are] bound by all limitations periods applicable to [ENYCNIHOA]." (Matter of Case v Monroe Community Coll., supra at 443).

Contrary to Petitioners' attorney's unsupported allegation, he did not establish that he was required to receive notice for the statute of limitations to begin to run against Petitioners. Supporting his position, Petitioners' attorney provides no documentary evidence but instead relies solely on his statement that "the notice of decision was never mailed to me even though I had appeared as the petitioners' attorney at the Level III grievance hearing." Accepting this statement as true, even if Petitioners' attorney was present at the Level III grievance hearing, because Petitioners were not themselves parties to the grievance process they were not entitled to notice of its Determination. Rather, notice to their agent (ENYCNIHOA) was sufficient.

Section II also established that the statute of limitations began to run on February 25, 2011. Again, the hearing officer specifically alleged that he mailed the Determination on February 22, 2011. Section II further alleged that the parties to the grievance procedure received

the Determination on February 25, 2011. Petitioners wholly failed to rebut such showing. They provided no documentary evidence nor allegations that ENYCNIHOA did not receive the Determination on February 25, 2011. Instead, Petitioners wrongly cite a lack of proof and CPLR §2103's service by mail extension. (Lester v. New York State Office of Parks, Recreation & Historic, 60 AD3d 680 [2d Dept. 2009]; Matter of Fiedelman v. New York State Dept. of Health, 58 NY2d 80 [1983]). On this record, Section II sufficiently established that ENYCNIHOA received the Determination on February 25, 2011, at which time the statute of limitations began to run against Petitioners.

Due to the foregoing, Petitioners failed to commenced this proceeding within four months of the Determination becoming final and binging on them. This proceeding was commenced on June 28, 2011, the day Petitioners filed their petition and the Albany County Clerk stamped it as received. (CPLR §304[a]). Because such commencement did not occur within four months of February 25, 2011, that portion of this proceeding challenging the Determination is dismissed

The Department of Education similarly established that Petitioners' challenge to their Memorandum was commenced after the applicable statute of limitations expired.[1] This proceeding was clearly commenced more than four months after the Memorandum became final and binding on February 19, 2010. Petitioners only argue that the Memorandum was not binding on them until Queensbury relied upon it. However, Queensbury's reliance on the Memorandum occurred prior to the grievance process, and was considered therein. As such, just as this

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[1] Petitioners' Reply impermissibly introduced entirely new challenges not raised in their petition, which will not be addressed in this proceeding. (Albany County Dept. of Social Services v. Rossi, 62 AD3d 1049 [3d Dept. 2009]; E.W. Tompkins Co., Inc. v. State University of New York, 61 AD3d 1248 [3d Dept. 2009]).

proceeding untimely challenged the grievance process's Determination, it too was untimely commenced against the Memorandum.

Accordingly, Petitioners' challenges to the Determination and the Memorandum are dismissed. Additionally, because the balance of the relief Petitioners seek is wholly depended upon their challenge to the Determination, it too is denied.

This Decision and Order is being returned to the attorneys for Section II. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 10, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Petition, dated June 27, 2011; Amended Notice of Petition, dated July 29, 2011; Petition, dated June 24, 2011.
2. Verified Answer, dated September 1, 2011; Affidavit of Douglas Huntley, dated September 1, 2011; Affidavit of Laurie Anderson, dated August, 2011; Affidavit of Douglas Kenyon, dated September 1, 2011; Record with attached Exhibits 1-18.
3. Answer, dated September 26, 2011; Affirmation of Deborah Glasbrener Marriott, dated Septmber 26, 2011, with attached Exhibits A-H.
4. Reply Affirmation of John Keenan, dated November 17, 2011, with attached Exhibits G-H.
5. Affidavit (Corrected) of Joseph Murphy, dated December 9, 2011, with attached Exhibits A-J.