

**Matter of Civil Serv. Empls. Assn., Inc., Local 1000,
AFSCME, AFL-CIO v New York State Dept. of Civil
Serv.**

2014 NY Slip Op 30515(U)

March 5, 2014

Supreme Court, Albany County

Docket Number: 2366-13

Judge: Joseph C. Teresi

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO, SCHOOL
DISTRICT UNIT 7589 and TIMOTHY P. HOWELL,
AS PRESIDENT OF CSEA SCHOOL DISTRICT
UNIT 7589,

Petitioners/Plaintiffs,

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

DECISION and ORDER
RJI NO.: 01-13-ST4603
INDEX NO.: 2366-13

-against-

NEW YORK STATE DEPARTMENT OF CIVIL
SERVICE, NEW YORK STATE HEALTH
INSURANCE PLAN, MASSAPEQUA UNION FREE
SCHOOL DISTRICT, as a necessary party,
MARYANNE FISHER, as the President of the
BOARD OF EDUCATION OF THE MASSAPEQUA
UNION FREE SCHOOL OF THE MASSAPEQUA
UNION FREE SCHOOL DISTRICT, as a necessary
party, and CHARLES V. SULC, as Superintendent of
the MASSAPEQUA UNION FREE SCHOOL
DISTRICT, as a necessary party,

Respondents/Defendants.

Supreme Court Albany County All Purpose Term, January 22, 2014
Assigned to Justice Joseph C. Teresi, Presiding)

APPEARANCES:

Steven A. Crain and Daren J. Rylewicz, Esqs.
Attorneys for Petitioners/Plaintiffs
Brian B. Selchick, Esq.
Legal Department
Civil Service Employees Association, Inc.
P.O. Box 7125, Capitol Station
143 Washington Avenue
Albany, New York 12224

Eric T. Schneiderman, Esq.
 Attorney General of New York State
Attorneys for the Respondents/Defendants New York State Department of Civil Service and New York State Health Insurance Plan,
 Gregory J. Rodriguez, AAG
 Department of Law
 The Capitol
 Albany, New York 12224

Law Offices of Guercio & Guercio, LLP
Attorneys for the District Respondents/Defendants Massapequa Union Free School District, Maryanne Fisher, as the President of the Board of Education of the Massapequa Union Free School of the Massapequa Union Free School District, and Charles V. Sulc, as Superintendent of the Massapequa Union Free School District
 Kathryn J. Maier, Esq.
 77 Conklin Street
 Farmingdale, New York 11735

TERESI, J.:

The State Respondents/Defendants New York State Department of Civil Service and New York State Health Insurance Plan (“NYSHIP”) move to dismiss as time barred Petitioners/Plaintiffs’ hybrid Article 78/Declaratory Judgment action/proceeding challenging the State Respondents’ May 15, 2012 Policy Memo 122r3 (“Policy Memo”). The Policy Memo at issue is a quasi-legislative act or decision clarifying the applicability of the previously issued Policy Memo 122r2. Policy Memo 122r2 restricted the availability of health insurance buyout provisions to only those employees who have other employer-sponsored insurance coverage available to them that is issued by insurers other than NYSHIP. The Policy Memo at issue extended the period during which existing contracts which allowed buyouts for alternative health insurance provided by NYSHIP would be permitted to remain in effect.

State Respondents, as movant, bear the burden of establishing their statute of limitations defense (Richmond Med. Ctr. v Daines, 101 AD3d 1434, 1435 [3d Dept 2012]) and have met their burden. The proper vehicle by which to challenge a quasi-legislative act or decision made

by an administrative agency is a CPLR Article 78 proceeding and CPLR§ 217's four-month statute of limitations applies to both the Article 78 proceeding and the declaratory judgment action because the parties' rights could have been resolved in an Article 78 proceeding (New York City Health & Hosps. Corp. v McBarnette, 84 NY2d 194, 200-201, 204 [1994]; Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d 1044, 1045-46 [3d Dept 2012]; Spinney At Pond View, LLC v Town Bd. of Town of Schodack, 99 AD3d 1088, 1088-1089 [3d Dept 2012]; New York Coalition for Quality Assisted Living, Inc. v Novello, 53 AD3d 914, 916 [3d Dept 2008]).

The applicable limitations period commences when the challenged determination becomes "final and binding" (CPLR § 217 [1]; Walton v New York State Dept., of Correctional Servs., 8 NY3d 186, 194 [2007]; Town of Olive v City of New York, 63 AD3d 1416, 1418 [3d Dept 2009]; Riverkeeper, Inc. v Crotty, 28 AD3d 957 [3d Dept 2006]; Owners Comm. of Elec. Rates, Inc. v Pub. Serv. Com'n of State of N.Y., 76 NY2d 779, 780 [1990], revg. on dissenting op. of Levine, J., 150 AD2d 45 [3d Dept 1989]). When making the determination as to whether an agency determination is final, courts must consider the completeness of the administrative action and make a pragmatic evaluation as to whether a position has been reached that inflicts an actual, concrete injury. Consideration must also be accorded to whether further resort to administrative remedies by the complaining party might serve to ameliorate the injury (Walton v New York State Dept., of Correctional Servs., 8 NY3d 186, 194 [2007]; Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d 1044, 1046 [3d Dept 2012]).

The Court recently faced this same issue in another motion to dismiss an earlier hybrid Article 78/Declaratory Judgment action/proceeding challenging the same Policy Memo (School

Administrators Association of New York State v New York State Department of Civil Service, [Albany Co., Index No. 1423-13, May 13, 2013]). The State Respondents have once again demonstrated that the four-month statute of limitations commenced to run on May 15, 2012, the date when the Policy Memo issued. Issuance of the Policy Memo caused the injury upon which Petitioners base their claims. Petitioners cite the recent decision in Plainview-Old Bethpage Congress of Teachers, [Albany Co., Index No. 6860-12, August 5, 2013] for the proposition that the statute of limitations arguably did not commence to run until the end of the grandfathering period. As the decision of a concurrent court, that decision is not binding on this Court (Siegel, New York Practice 4th Ed. § 449 p. 758). The Court finds that the analysis is not persuasive and declines to follow it. Notwithstanding that the Policy Memo creates a short period during which existing contracts are exempted from Policy Memo 122r2's provisions, the plain language of the Policy Memo is unmistakably "definitive" and the Policy Memo immediately established the termination date of any buyout provisions in existing contract that allowed buyouts where the alternative insurance was also provided by NYSHIP and terminated Petitioners' rights to enter into a new contract that would allow such buyouts.

While the issuance of the Policy Memo clearly started the four-month statute of limitations regardless of whether Petitioners knew about it, the State Respondents have also demonstrated that Petitioners have no legitimate basis for claiming that they were unaware of the Policy Memo and the change in the buyout policy wrought by the Policy Memo. The affidavit of Robert Dubois, Director of Employee Benefits establishes that Civil Service Employees Association ("CSEA") sent Scott Futia, CSEA's Deputy Director of the Local Government & Private Sector, CSEA Health Benefits Department as CSEA's representative to the meeting to discuss Policy Memo 122r2's provisions, and that in the normal course of issuing the Policy

Memo, a copy of the Policy Memo was sent to Mr. Futia. Although Petitioners' opposition asserts in conclusory fashion that there was no communication from the State Respondents to CSEA, Petitioners have failed to provide an affidavit from Mr. Futia denying that he represented CSEA at the meeting or that he received a copy of the Policy Memo. If Petitioners' claim that they did not know about the Policy Memo were relevant to deciding this motion, Petitioners' conclusory statement that there was no communication from the State Respondents would be insufficient to raise a triable issue.

This record contains no further administrative remedy that Petitioners pursued, or could have pursued, to ameliorate the Policy Memos' restriction on health insurance buyout provisions. Rather, the Policy Memos constituted DCS's final quasi-legislative decision which restricted all future NYSHIP buyout policies. With that showing, State Respondents demonstrated that the statute of limitations accrued on Petitioners' claims against them, at the latest, on May 15, 2012 when the Policy Memo was issued (Owners Comm. of Elec. Rates, Inc. v Pub. Serv. Com'n of State of N.Y., 76 NY2d 779, 780 [1990]; Schulz v Town Bd. of Town of Queensbury, 253 AD2d 956 [3d Dept 1998]). Because the applicable limitations period was just four months and began on May 15, 2012, Petitioners' commencement of this action/proceeding more than eleven months later on April 29, 2013 was untimely.

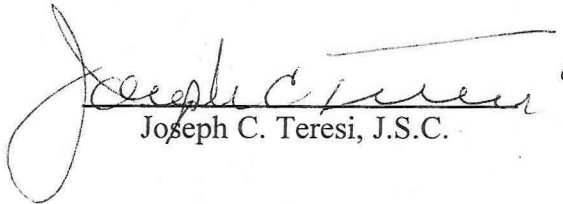
Accordingly, Respondent/Defendant's motion to dismiss this proceeding/action is granted.

This Decision and Order is being returned to the attorneys for the Respondents. 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 Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
March 5, 2014



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition dated April 29, 2013; Petition dated April 29, 2013, with attached exhibits A-F; Memorandum of Law dated May 31, 2013.
2. Answer dated July 24, 2013; Affirmation of Richard J. Guercio, Esq. dated July 24, 2013; Affidavit of Alan Adcock dated July 24, 2013; Affidavit of Charles V. Sulc dated July 24, 2013, with attached exhibits 1-18; Memorandum of Law dated July 29, 2013.
3. Notice of Motion dated August 2, 2013; Affirmation of Gregory J. Rodriguez, Esq. dated August 2, 2013; Affidavit of Robert Dubois dated August 1, 2013, with attached exhibits A-D; Memorandum of Law dated August 2, 2013.
4. Affirmation of Brian B. Selchick, Esq. dated January 15, 2014, with attached exhibit A.
5. Affidavit of Stephanie Teff dated January 15, 2014; Memorandum of Law dated January 15, 2013.
6. Affirmation of Gregory J. Rodriguez, Esq. dated January 22, 2014.