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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Kathryn E Freed Justice

PART 5

Gonzalez, George
-v-
The City of New York

cal #34

INDEX NO. 107171/11

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JUL 29 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/25/14

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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GEORGE GONZALEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, MICHAEL BLOOMBERG, in his capacity as Mayor of the City of New York, OFFICE OF THE COMPTROLLER OF THE CITY OF NEW YORK, JOHN LIU, in his capacity as Comptroller of the City of New York, BOARD OF ELECTIONS IN THE CITY OF NEW YORK, JUAN CARLOS POLANCE, in his capacity as President of the Board of Elections in the City of New York,

Defendants.

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DECISION/ORDER
Index No. 107171/11
Seq. No. 002

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1,2(Exs.A-P)
NOTICE OF CROSS-MOTION AND AFFIDAVITS ANNEXED.....	3,4(Exs.A-S)
ANSWERING AFFIDAVITS.....	.....5.....
OTHER.....(Memo of Law).....	.....6.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff George Gonzalez, former Executive Director of the defendant Board of Elections in the City of New York ("the BOE"), claims that he is entitled to payment for compensatory time and sick leave and annual leave time accrued while he worked for the BOE. Defendants The City of New York, Michael Bloomberg, in his capacity as Mayor of the City of New York, Office of the

Comptroller of the City of New York, John Liu, in his capacity as Comptroller of the City of New York, the BOE, and Juan Carlos Polance,[1] in his capacity as President of the BOE (hereinafter collectively "the City"), move for an order, pursuant to CPLR 3212, seeking summary judgment dismissing plaintiff's claims. Plaintiff cross-moves for declaratory relief pursuant to CPLR 5402 and 3017 and for summary judgment awarding him monetary damages pursuant to CPLR 3212. After oral argument, and after consideration of the parties' papers and the relevant case law and statutes, the City's motion is **granted** and plaintiff's cross motion is **denied**.

Factual and Procedural Background:

Plaintiff , the former Executive Director of the BOE, began working for the BOE on a temporary basis in 1988. Ex. G, at 81; Ex. H, at 8, 10.[2] In May of 1992, plaintiff resigned from the BOE. Ex. G, at 80; Ex. H, at 9. In October of 1992, plaintiff returned to work at the BOE, again in a temporary position. Ex. G, at 80; Ex. H, at 9. Thus, he left the service of the BOE for over four months in 1992. Ex. H, at 9. Plaintiff eventually began working full-time for the BOE and, in 2003, he was appointed its Deputy Executive Director. Ex. H, at 9-10.

On November 29, 2005, the BOE adopted a resolution stating, in pertinent part, as follows:

> WHEREAS, the [BOE] is an independent agency mandated by the Constitution of the State of New York (Article II, Section 8) and established as such by Section 3-200, et. seq. of the New York State Election Law; and
>
> WHEREAS, [the BOE] is charged with specific duties and responsibilities to be discharged and administrated in a manner that reflects the Constitutional requirements; and

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[1]This defendants actual name, Juan Carlos Polanco, is misspelled in the caption.

[2]Unless otherwise noted, all references are to the exhibits annexed to the City's motion for summary judgment.

WHEREAS [the BOE] as such is not subject to the control or direction of the Executive Branch of the City of New York (including the Mayor) except as specifically provided in the New York State Election Law; and

WHEREAS, Section 3-300 of the New York State Election Law specifically provides that the [BOE] "shall appoint, and at its pleasure remove, clerks, voting machine technicians, custodians and other employees, fix their number, prescribe their duties, fix their titles and establish their salaries within the amounts appropriated therefore"; and

WHEREAS, [the BOE] has agreed with the City of New York that its employees shall be paid through the City of New York's payroll management system; and

WHEREAS, said payroll management system does not currently provide the [BOE] with the ability to record compensatory time to those holding the positions described herein; and

WHEREAS, [the BOE] in the City of New York has determined that in order to enhance its abilities to perform the duties and responsibilities assigned to it under the New York State Election Law, those [BOE] employees appointed pursuant to the provisions of Section 3-300 and serving in the titles/positions of Executive Director [and] Deputy Executive Director . . . be compensated for the time spent in the performance of their official duties beyond the normal work week; and

WHEREAS, [the BOE] has determined at this time, not to authorize those persons serving in the positions described [above] to receive paid overtime compensation;

NOW, THEREFORE, BE ITS [sic] RESOLVED BY THE COMMISSIONERS OF ELECTIONS CONSTITUTING [THE BOE], PURSUANT TO THE POWERS VESTED IN THEM BY SECTION 3-300 OF THE NEW YORK STATE ELECTION LAW, THAT:

1. Effective January 1, 2006, those persons appointed by the [BOE] to serve as Executive Director [and] Deputy Executive Director . . . Shall be entitled to earn and accumulate as "compensatory time" (as provided for other employees of the [BOE]) the number of hours actually worked in a pay period in excess of the number of hours required of a full time employee (35 hours for a five day work week; 70 hours for a the [sic] ten day payroll period . . .).

2. The Payroll Management System (PMS) of the City of New York be adjusted in accordance with the foregoing determination, enabling the recording of any such compensatory time earned, in a manner similar to that of other [BOE] [e]mployees. Ex. I.

On February 14, 2006, after the foregoing resolution was adopted, Martha Hirst,

Commissioner of the New York City Department of Citywide Administrative Services ("DCAS") wrote to John Ravitz, then Executive Director of the BOE, to admonish him that, "based upon consultations among the [City's] Law Department, the Office of Management and Budget, the Office of Labor Relations and [DCAS], the [BOE's] compensatory time [resolution] cannot be implemented." Ex. J. Hirst cited the City's Leave Regulations for Management Employees (Ex. K), section 6.0 of which states that "[t]here shall be no credit for time worked beyond the regular work week by persons covered hereby or who are otherwise in the management service of the City." Ex. J. Thus, explained Hirst, "no City agency has been authorized to pay its managers over and above their established salaries for time worked over 35 hours per week" and the proposed resolution "cannot be implemented." Ex. J.

In 2010, plaintiff was appointed Executive Director of the BOE. Ex. H, at 10. He was terminated from this position on October 26, 2010. Ex. H, at 6. On November 22, 2010, plaintiff wrote to the BOE requesting that he be paid his compensatory time for the years 2006-2010 based on the resolution adopted by the BOE in 2005.

On January 11, 2011, the BOE repealed the resolution adopted in 2005. Ex. O. The same day, Steven Richman, General Counsel for the BOE, sent plaintiff a letter denying his request to be paid for compensatory time. Ex. P.

On June 20, 2011, plaintiff commenced the captioned action by filing a summons with notice. Ex. A. In the notice, plaintiff alleged that he was entitled to a "managerial lump sum payment for accrued annual and sick leave balances for 542.79 hours" and claimed as his total amount of damages $51,996.22. Ex. A. Although the City served a demand for a complaint (Ex. B), plaintiff did not serve one but, rather, moved for summary judgment in lieu of complaint pursuant to CPLR

3213. Ex. C. In his motion, plaintiff claimed that he was entitled to "compensation for services performed during his employment in the capacity of Executive Director of the [BOE]." Specifically, he sought $51,996.22 for accrued annual and sick leave time and $278,327 for accrued compensatory time. Ex. C.

By order entered September 21, 2011, this Court (Wright, J.) denied plaintiff's motion, reasoning that plaintiff's alleged damages could not be accurately calculated. Ex. F. Justice Wright also stated that, pursuant to CPLR 3213, plaintiff's moving papers and the City's opposition thereto would henceforth be considered as the pleadings herein. Ex. F.[3]

At his deposition on December 1, 2011, plaintiff testified, inter alia, that he was terminated as Executive Director of the BOE on October 26, 2010. Ex. H, at 6. He recalled that John Ward, Chief Financial Officer of the BOE, submitted materials regarding lump sum payment for accrued annual and sick leave to the defendant Office of the City's Comptroller. Ex. H, at 11, 23. Plaintiff conceded that it was proper for Ward to submit to the Comptroller materials relating to the calculation of the lump sum payment for his accrued annual and sick leave. Ex. H, at 12. Plaintiff received a check in the amount of $318.81 for his accrued annual and sick leave and cashed the same, despite testifying that he was entitled to a payment of over $50,000 for such leave. Ex. H, at 15-16.

Plaintiff maintained that, based on the resolution adopted by the BOE, he was entitled to compensatory time accruing after January 1, 2006. Ex. H, at 17. He admitted that he did not know whether his four month break in service from May through October of 1992 could have impacted the amount of annual leave to which he was entitled. Ex. H, at 16. Additionally, he admitted that

[3]Thus, no formal complaint or answer has been served in this action.

he was not aware of any change in the PMS following the passage of the resolution which would have enabled the BOE to accurately record any compensatory time earned. Ex. H, at 20-21. Nor did he know whether the BOE's PMS printouts reflected any compensatory time he earned as a manager at the BOE. Ex. H, at 21.

On December 1 and 14, 2011, Scott Rothman testified at his deposition that he had been employed by City Comptroller's office for 33 years and that he held the title of Director of Lump Sum Management. Ex. G, at 6. In that capacity, it was his responsibility to perform audits of the accrued leave time of all City managerial employees. Ex. G, at 8. After he audited the documents, it was his practice to return them to the agency which had submitted them. Ex. G, at 8-9. He reviewed the documents for time lapses and timekeeping inaccuracies. Ex. G, at 11-12.

Rothman explained that compensatory time was time accrued by non-managers for working in excess of the number of hours in a work week. Ex. G, at 14. Since managers were compensated at a higher rate than non-managers, City regulations prohibited managers from receiving compensatory time. Ex. G, at 15. Since the BOE was a City agency, it was subject to the City's policies regarding compensatory time. Ex. G, at 15.

John Ward, Rothman's contact person at the BOE, sent Rothman a form purportedly containing calculations of plaintiff's accrued leave time. Ex. G, at 8-9, 11. Rothman reviewed the documents submitted by Ward and found that plaintiff was not entitled to any vested or bank leave balances. Ex. G, at 70. He based this conclusion, inter alia, on the fact that the records reflected that there was a lapse in plaintiff's service for the BOE. Ex. G, at 12. Rothman explained that this lapse was important because

> if there is a break in service and the employee returns, they are treated as a new employee as far as leave accrual rates, and if I find that they're accruing at their old rates, then an error has been made. Ex. G, at 12-13.

Rothman stated that, according to City policy, if a break in service exceeded 31 days, an employee was to accrue annual and sick leave at the accrual rate for a new employee, which was 20 days per year. Ex. G, at 68-69. Here, although plaintiff had a break in service from May through October of 1992 (Ex. G, at 80), he "continued to accrue at his preexisting rate, which was 27 days a year." Ex. G, at 69. Thus, Rothman had to make "major adjustments" to plaintiff's vested leave balance and current leave balance based on the correct accrual rate. Ex. G, at 69-73. These changes were reflected by cross-outs on the Managerial Pay Plan Summary sheet provided to him by the BOE. Ex. G, at 68; Ex. M. Thus, the amount of $44,973.37 in accrued annual and sick leave time, to which the DOE said plaintiff was entitled, was incorrect. Ex. G, at 76-77.

In addition, Rothman explained that, once one became a manager, he or she no longer earned longevity pay and was paid strictly by salary. Ex. G, at 13. He noticed that plaintiff received longevity pay despite becoming a manager. Ex. G, at 13. This violated the City's policy, to which the BOE was subject as a City agency. Ex. G, at 13-15. Thus, Rothman deducted $1,094.32 in longevity pay from the amount plaintiff was owed. Ex. G, at 152. Rothman concluded that plaintiff was entitled to a total lump sum payment of $318.81 for his accrued annual and sick leave time. Ex. R to Plaintiff's Cross-Mot., at 145-145.

On July 19, 2012, Steven Richman, General Counsel of the BOE, appeared for deposition. Ex. O to Plaintiff's Cross Mot., at 3, 6. Richman testified that, since the BOE was funded by the City, it was required to follow the City's procurement requirements and time and leave regulations. *Id.*, at 8-9, 14, 62-63. Richman further stated that City managerial employees were not entitled to

receive compensatory time. *Id.*, at 36.

On July 20, 2012, Ward of the BOE appeared for his deposition. Ex. P to Plaintiff's Cross Mot., at 1. Ward stated that he had been a Finance Officer at the BOE for 11 years. *Id.*, at 8. According to Ward, plaintiff was a senior management officer at the BOE. *Id.*, at 38. He further testified that the BOE was an agency of the City of New York. *Id.*, at 51-53. Although plaintiff requested $44,973.37 in accrued leave and sick time, he submitted plaintiff's paperwork to the Comptroller's office, which reduced this amount to $318.81. *Id.*, at 181, 189. Ward believed that this reduction was based on a break in plaintiff's service for the BOE. *Id.*, at 176-177.

The City now moves for summary judgment dismissing plaintiff's claims. Plaintiff cross-moves for a judgment, pursuant to CPLR 5402 and 3017, declaring that:

> a. the BOE is an independent agency created under the New York State Election Law and not subject to home rule or oversight by the City; and
>
> b. the 2005 resolution of the BOE was legally binding on the BOE.

Plaintiff also moves, pursuant to CPLR 3212, for summary judgment awarding him $44,973.37 in vested and unvested leave time, plus statutory interest from October 26, 2010, the date he was last employed by the BOE. Finally, plaintiff seeks summary judgment awarding him $227,237 for accrued compensatory leave from the period of 2005 through 2010 pursuant to the BOE's 2005 resolution.

Positions of the Parties:

In support of its motion for summary judgment, the City asserts that plaintiff's claims that he is entitled to accrued annual and sick leave, as well as compensatory time, are barred by the

statute of limitations. Specifically, the City asserts that, although the BOE advised plaintiff on January 11, 2011 that he was not entitled to accrued compensatory time, he did not commence the captioned action until June 20, 2011, after the expiration of the 4-month statute of limitations set forth in CPLR 217 applying to Article 78 proceedings challenging administrative determinations. The City claims that, since plaintiff failed to challenge the Comptroller's December 28, 2010 determination that he was entitled to only $318.81 for accrued annual and sick leave until he commenced this action, his claim for payment for such leave is similarly barred by CPLR 217.

The City further asserts that, even if plaintiff's challenge regarding his compensatory time were deemed timely, it is without merit since the DOE's 2005 resolution did not create any contractual rights entitling plaintiff to the payment of this amount.

Finally, the City asserts that, even if plaintiff's challenge to his award of $318.81 for accrued sick and annual leave time were timely, plaintiff cannot establish, as required by CPLR Article 78, that the decision of the Comptroller to reduce the amount of compensatory time was arbitrary and capricious.

In opposition to the City's motion and in support of its cross motion, plaintiff asserts that the City is bound by the 2005 resolution of the BOE to pay him $227,237 in compensatory leave time and $44,973.37 in vested and unvested sick and annual leave, for a total of $272,210.37.[4]

In his motion papers, plaintiff primarily address the issue of compensatory leave, asserting that the BOE is bound by its 2005 resolution to award him for compensatory time, i.e., time worked over 35 hours per workweek, for the years 2006-2010. He maintains that the resolution created a

[4]This Court notes that, in his initial motion for summary judgment in lieu of a complaint, plaintiff sought "liability for unpaid wages in the amount of $278,327" and "vested compensatory time" in the amount of $51,996.22. Ex. C to Plaintiff's Aff. In Opp.

contract between himself and the BOE pursuant to which he was to be paid compensatory time and that the repeal of the resolution in January of 2011 had no effect on his entitlement to the payment of this compensatory leave. He further asserts that the City was barred by the doctrine of equitable estoppel from repealing the resolution. In addition, plaintiff maintains that, since the BOE is an agency independent of the City, the City acted improperly by reducing the amount of accrued annual and sick leave owed to him from $44,973.37 to $318.81.

In a reply affirmation in further support of its motion for summary judgment and in opposition to plaintiff's cross motion, the City reiterates its arguments that plaintiff's claims are time-barred. The City further asserts that the resolution did not create a contract between plaintiff and the City and that, in any event, the doctrine of equitable estoppel would not prevent the City from repealing the resolution. Finally, the City asserts that plaintiff is not entitled to the declaratory relief demanded since he did not request such relief until he brought his cross motion.

Conclusions of Law:

The City's Motion for Summary Judgment

Plaintiff's Claim for Accrued Compensatory Leave Time

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1st Dept. 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1989); *People*

v. ex rel Spitzer v. Grasso, 50 A.D.3d 535 (1st Dept. 2008). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation." *Morgan v. New York Telephone*, 220 A.D.2d 728 (2d Dept. 1985). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *See Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978); *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 (1st Dept. 2002).

Here, the City has established its prima facie entitlement to summary judgment dismissing plaintiff's claim that he is entitled to the payment of compensatory time based on the BOE's 2005 resolution and plaintiff has failed to raise an issue of material fact in opposition to the motion.

Initially, the claim is barred by the statute of limitations. It is beyond peradventure that a challenge to an administrative determination must be brought by the commencement of a proceeding pursuant to CPLR Article 78 and that the statute of limitations for such a proceeding is 4 months. CPLR 217. On January 11, 2011, plaintiff was notified by Steven Richman, General Counsel for the BOE, that he would not be paid for any compensatory time he allegedly accrued as a manager at the BOE. Ex. P. However, plaintiff did not commence the instant action seeking the payment of compensatory time until June 20, 2011. Ex. A. Therefore, plaintiffs claim seeking payment for compensatory time is untimely.

Further, plaintiff's claim that he is entitled to damages for breach of contract based on the BOE's refusal to pay him for accrued compensatory time is without merit. As noted above, if plaintiff sought to challenge the finding of an administrative body, such as the BOE, it was incumbent upon him to commence a proceeding pursuant to CPLR Article 78. Since plaintiff did not challenge the BOE in a timely or correct manner, his claim must be dismissed on procedural

grounds.

In any event, plaintiff's claim regarding compensatory time has no merit. Although plaintiff argues that the BOE is an independent agency, and is thus not subject to any control by the City, including the City's time and leave regulations, which prohibit the payment of compensatory time to managerial staff (Exs. J, K), it is clear that the City was directly involved in the manner in which individuals were compensated by the BOE. Rothman testified at his deposition that City regulations prohibited managers from receiving compensatory time and that, since the BOE was a City agency, it was subject to the City's policies regarding compensatory time. Ex. G, at 15. Richman testified that, since the BOE was funded by the City, it was required to follow the City's procurement requirements and time and leave regulations. Ex. O to Plaintiff's Cross Mot., at 8-9, 14, 62-63. Further, Ward testified that the BOE was an agency of the City of New York. Ex. P to Plaintiff's Cross Mot., at 51-53. Thus, the City clearly established that the BOE was required to follow the City's time and leave regulations and plaintiff failed to raise an issue of fact regarding such obligation.

Importantly, almost immediately after the proposed resolution on which plaintiff relies was announced, Martha Hirst, Commissioner of DCAS, wrote to the BOE to advise that the City's Leave Regulations for Management Employees (Ex. K) state that "[t]here shall be no credit for time worked beyond the regular work week by persons covered hereby or who are otherwise in the management service of the City." Ex. J. Thus, explained Hirst, "no City agency has been authorized to pay its managers over and above their established salaries for time worked over 35 hours per week" and the proposed resolution "cannot be implemented." Ex. J. Since the City's regulations prevented the enactment of such a resolution, the resolution was a nullity and did not entitle plaintiff to any

benefits. *See Matter of Madison at Merrick, Inc. v Leonard*, 44 Misc2d 149 (Sup Ct Nassau County 1964).[5]

Finally, plaintiff admitted that he was not aware of any change in the PMS following the passage of the resolution which would have enabled the BOE to accurately record any compensatory time earned. Ex. H, at 20-21. Nor did he know whether the BOE's PMS printouts reflected any compensatory time he earned as a manager at the BOE. Ex. H, at 21. The papers submitted are thus devoid of any indication that the BOE had any intention to, or had been ordered to, calculate compensatory time in the manner envisioned by the purported resolution. Ex. I.

Plaintiff's Claim for Accrued Annual and Sick Leave Time

Plaintiff's argument regarding accrued annual and sick leave time is also without merit. The City has made a prima facie showing that it is entitled to the dismissal of plaintiff's claim, sounding in breach of contract, that he is entitled to $44,973.37 in accrued annual and sick leave time.

As noted above, Ward submitted materials regarding lump sum payment for accrued annual and sick leave to the Comptroller's office. Ex. H, at 11, 23. Despite plaintiff's argument that the City lacked control over the BOE, *plaintiff conceded that it was proper for Ward to submit to the Comptroller's office materials relating to the calculation of the lump sum payment for his accrued annual and sick leave*. Ex. H, at 12. Plaintiff received a check in the amount of $318.81 for his accrued annual and sick leave and cashed the same. Ex. H., at 15. Additionally, he conceded that he did not know whether his four month break in service from May through October of 1992 would

[5]This Court notes that plaintiff's argument is further weakened by the fact that the purported resolution on which he bases his argument was repealed prior to the commencement of his action.

have impacted the amount of annual leave to which he was entitled. Ex. H, at 16.

Rothman testified that he reviewed the documents submitted by Ward on behalf of the Comptroller's office and determined, inter alia, that, in 1992, there was a lapse in plaintiff's service for the BOE exceeding 4 months. Ex. G, at 12-13, 80. He explained that, according to City policy, if a break in service exceeded 31 days, an employee who returned to service was to accrue annual and sick leave at the accrual rate for a new employee, which was 20 days per year. Ex. G, at 68-69. However, when plaintiff returned to service after the 1992 gap in service, he "continued to accrue at his preexisting rate, which was 27 days a year." Ex. G, at 69. Thus, Rothman had to make "major adjustments" to plaintiff's vested leave balance and current leave balance based on the correct accrual rate. Ex. G, at 69-73. These changes were reflected by cross-outs on the Managerial Pay Plan Summary sheet provided to him by the BOE. Ex. G, at 68; Ex. M. Thus, the amount of $44,973.37, to which the DOE said plaintiff was entitled, was incorrect. Ex. G, at 76-77.

Rothman added that, once an employee of the DOE became a manager, he or she no longer earned longevity pay and was paid strictly by salary. Ex. G, at 13. He noticed that plaintiff received longevity pay despite becoming a manager. Ex. G, at 13. This violated the City's policy and the BOE was a City agency. Ex. G, at 13-14. Thus, Rothman deducted $1,094.32 in longevity pay from the amount plaintiff was owed for accrued sick and annual leave time. Ex. G, at 152.

Rothman concluded that, based on his calculations, plaintiff was entitled to a total lump sum payment for accrued annual and sick leave time of $318.81. Ex. R to Plaintiff's Cross-Mot., at 145-145. The foregoing testimony established, as a matter of law, the City's prima facie entitlement to summary judgment dismissing plaintiff's claim that he was entitled to $44,973.37 for such leave. In opposition to the City's motion, plaintiff has failed to raise an issue of fact regarding the figure

reached by Rothman. A review of plaintiff's motion papers reveals not only that plaintiff has focused his argument almost entirely on the issue of compensatory time, but also underscores the glaring omission of any calculations which would call into question the figures set forth by Rothman regarding accrued sick and annual leave time. Indeed, as noted above, plaintiff conceded that he was unaware that a lapse in service could result in a reduction of his accrued sick and annual leave time. Ex. H, at 16.

Additionally, as set forth above, any challenge to an administrative determination must be brought by way of an CPLR Article 78 proceeding. Were this action not to have been time barred, plaintiff would still not have been successful in that it cannot be said that the City's position, based on Rothman's detailed calculations, was either arbitrary or capricious.

In light of the foregoing, plaintiff's claims against the City must be dismissed.

Plaintiff's Cross Motion for Summary Judgment and Declaratory Relief

Given the dismissal of plaintiff's claims, this Court denies plaintiff's cross motion seeking summary judgment granting him $227,237 in compensatory time and $44,973.37 in accrued annual leave and sick leave time. Additionally, given that the City has been awarded summary judgment dismissing plaintiff's claims, that branch of plaintiff's motion seeking a declaration that the City has no control over the function of the BOE and that the purported resolution was binding on the BOE is denied as well.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendants The City of New York,

Michael Bloomberg in his capacity as Mayor of the City of New York, Office of the Comptroller for the City of New York, John Liu, in his capacity as the Comptroller of the City of New York, Board of Elections in the City of New York, and Juan Carlos Polance, in his capacity as President of the Board of Elections in the City of New York, is granted in all respects; and it is further,

ORDERED that plaintiff's cross-motion for summary judgment and for declaratory relief is denied in all respects; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: July 25, 2014

ENTER:

Kathryn E. Freed,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT