SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** 37

Justice

----------X

NEQUAN C. MCLEAN,

Petitioner,

- v -

NEW YORK STATE PUBLIC EMPLOYMENT REVIEW BOARD, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondents.

----------X

INDEX NO. 158714/2022

MOTION DATE 10/11/2022, 12/08/2022, 12/08/2022

MOTION SEQ. NO. 001, 002, 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 16, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 56, 57, 58, 60, 62, 65, 66

were read on this motion for CPLR ARTICLE 78 RELIEF.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 61

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 23, 24, 25, 26, 55, 59, 63, 64

were read on this motion to DISMISS.

Upon the foregoing documents, it is hereby ordered that the petition is denied and the cross-motions to dismiss are granted.

Petitioner commenced this CPLR Article 78 special proceeding seeking to overturn a determination by respondent New York State Public Employment Review Board ("PERB"), dated July 12, 2022, which determined, *inter alia*, that respondent the Board of Education of the City School District of the City of New York/New York City Department of Education ("DOE") was the sole and exclusive employer of Administrative Assistants ("AAs") assigned to work for each of the Community District Education Councils ("CECs") established pursuant to New York Education Law §§ 2590-b(b)(b) and 2590-c(4). Petitioner alleges that the decision must be overturned because his due process rights were denied as he was not a party to the administrative proceeding; petitioner further asserts that the determination is arbitrary, capricious, and unlawful.

Respondents all move to dismiss, asserting that (1) petitioner does not have capacity or standing to bring this special proceeding; (2) petitioner failed to exhaust his administrative remedies; and (3) that the decision was not arbitrary or capricious and was rationally based upon the evidence.

Capacity to Sue

Petitioner, Nequan C. McLean, is President of CEC District 16, located in Bedford-Stuyvesant, Brooklyn. Petitioner purports to bring the petition "on behalf of himself, all other Presidents of the CECs, and all the other 31 CECs and four CCECs, who are all similarly situated." NYSCEF Doc. No. 1 at 4.

Respondents assert that petitioner has offered no evidence that CEC District 16 authorized him to commence this litigation, nor has he shown that any of the other 35 SECs have authorized him to commence this litigation on their behalf. They further assert that, pursuant to Education Law § 2590-d(2), petitioner, as a CEC President acting alone, would not have capacity to bring this lawsuit without the authorization of the Council.

In response, petitioner asserts that because of his position in CEC District 16, he is in the "zone of interest to be protected," citing Silver v Pataki, 96 NY2d 532, 537-539 ("power to bring a particular claim may be inferred when the agency in question has functional responsibility within the zone of interest to be protected"). Petitioner further asserts that capacity to sue is inferred by the duties and responsibilities of CECs, stating "it stands to reason that where the employee has a property interest in her employment, a reciprocal right must exist for the employer." NYSCEF Doc. No. 56 at 22. Petitioner additionally argues that Education Law § 2590-e(9), which references CECs right to retain counsel, implies that it was assumed that that CECs would have "affirmative litigation authority." NYSCEF Doc. No. 56 at 13.

Petitioner's arguments are unavailing. "Governmental entities created by legislative enactment present... capacity problems. Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate." Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148, 155-56 (1994). Petitioner brings this special proceeding "in his official capacity as President of CEC 16 and the four Citywide CECs, all of which are similarly situated." NYSCEF Doc. No. 1 at 1. However, as CECs are governmental entities created by legislative enactment, their right to sue must be specifically authorized by such legislation.

Education Law § 2590-e(9), upon which petitioner relies, does not authorize affirmative litigation; rather, it anticipates the need for the use of corporation counsel in the event of having to defend a lawsuit. As petitioner has failed to identify a statutory authority for his action on behalf of a governmental entity created by legislative enactment, petitioner has not demonstrated that he has the legal capacity to bring this special proceeding.

Standing

Respondents argue that petitioner has no standing because he cannot demonstrate a concrete injury resulting from the July 12, 2022 PERB decision.

> [I]f the issue of standing is raised, a party challenging governmental action must meet the threshold burden of establishing that it has suffered an 'injury in fact' and that the injury it asserts 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted.' The injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered a cognizable harm that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention.

Festa v Town of Oyster Bay, 210 AD3d 678, 679–80 (1st Dept 2022) (internal citations omitted).

Petitioner has not demonstrated that he has the authority to bring this suit on behalf of anyone other than himself. Accordingly, petitioner must demonstrate that he personally suffered a cognizable harm.

Petitioner argues that he has been damaged because he has an injury "within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted," citing New York State Ass'n of Nurse Anesthetists v Novello, 2 NY3d 207, 211 (2004). However, in Nurse Anesthetists, the Court went to clarify that "the injury must be more than conjectural." Id.

In an attempt to satisfy this burden, petitioner refers back to the argument raised in "capacity to sue" *supra*, that "it stands to reason that where the employee has a property interest in her employment, a reciprocal right must exist for the employer." NYSCEF Doc. No. 56 at 22. However, employees do not have an inherent property interest in the collective bargaining of employment contracts. Pfau v Pub. Emp. Rels. Bd., 89 AD3d 1205, 1206 (3rd Dept 2011) ("any failure to notify or afford the [employees] an opportunity to participate in this proceeding would not render respondent's determination jurisdictionally infirm."). If employees do not have an inherent due process right to be heard on employment contracts, it stands to reason that they do not have a right to sue PERB on their own behalf. As this "property interest" argument is the only one petitioner cites to support standing, petitioner's "reciprocal right" argument is misplaced.

As petitioner cannot demonstrate that he has property interest in the employment of the AAs, he has not demonstrated a cognizable harm sufficient to establish legal standing.

ALJ's Interpretation of Taylor Law

As petitioner can demonstrate neither capacity to sue nor standing, the Court need not reach the merits. However, even assuming, *arguendo*, that petitioner has overcome his capacity and standing hurdles, the petition must still be denied, as the July 12, 2022 determination was not irrational, arbitrary or capricious.

The scope of this Article 78 review is limited. "'[S]o long as PERB's interpretation is legally permissible and so long as there is no breach of constitutional rights and protections, the courts have no power to substitute another interpretation.' As the agency charged with implementing the fundamental policies of the Taylor Law, the board is presumed to have developed an expertise and judgment that requires us to accept its construction if not unreasonable." Inc. Vill. of Lynbrook v New York State Pub. Emp. Rels. Bd., 48 NY2d 398, 404 (1979).

In reaching its final decision, the ALJ determined that CECs "do not have sufficient control over the terms and conditions of employment of the Administrative Assistants to be a joint employer. Although the [CEC] has direct supervision over the Administrative Assistants and assigns duties to them, the duties that they are able to assign to the Administrative Assistants are limited and regulated by statute." NYSCEF Doc. No. 4 at 20. The ALJ further determined that "[s]ince [CECs] have no executive authority, they are unable to engage in negotiations regarding terms and conditions of employment as required under the Act to be considered an employer." Id. at 21.

This interpretation is not unreasonable and is entitled to deference. Poughkeepsie Pro. Firefighters' Ass'n, Loc. 596 v New York State Pub. Emp. Rels. Rd., 6 NY3d 514, 522 (2006) ("Because these matters are consigned to PERB's discretion, we may not disturb its determination unless irrational").

The Court has considered the parties' remaining arguments and finds them to be unavailing and/or non-dispositive. Accordingly, the petition is dismissed.

Conclusion

For the reasons stated herein, the Clerk is hereby directed to enter judgement denying the petition and granting the cross-motions to dismiss.

6/28/2023
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE