

**Feldmesser v New York City Employees' Retirement  
Sys.**

2024 NY Slip Op 30132(U)

January 12, 2024

Supreme Court, New York County

Docket Number: Index No. 150933/2023

Judge: Kathleen Waterman-Marshall

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

**PRESENT:** HON. KATHLEEN WATERMAN-MARSHALL **PART** **09M**

*Justice*

-----X

ANTHONY FELDMESSER, MELANIE MARMER, HELEN  
FERINO, PHILIP STURGES

Plaintiff,

- v -

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,  
NEW YORK CITY TRANSIT AUTHORITY,  
METROPOLITAN TRANSPORTATION AUTHORITY,

Defendant.

-----X

**INDEX NO.** 150933/2023

**MOTION DATE** 01/30/2023,  
05/30/2023

**MOTION SEQ. NO.** 001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 37, 38, 39, 40, 42, 50

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - DEFAULT.

By Interim Decision dated November 27, 2023, the Court declined to consider respondents' untimely cross-motion to dismiss, directed non-answering respondent to file an answer, and permitted petitioners to reply thereto (*see* NYSCEF Doc. No. 56). As discussed in the Interim Decision, petitioners seek an order, by an Article 78 proceeding, declaring that their service as Transit Adjudication Bureau (hereinafter "TAB") per diem hearing officers constitutes credible service for the purposes of pension credit in New York City Employees' Retirement System (hereinafter "NYCERS") and that NYCERS' determination to deny service credit to petitioners for their service as TAB per diem hearing officers was: arbitrary, capricious, unreasonable, irrational, in violation of lawful procedure, affected by an error of law, an abuse of discretion, and/or in excess of lawful authority. Petitioners seek to compel NYCERS to recalculate their pension credit to include the entirety of their service as TAB per diem hearing officers.

A brief recital of the procedural history giving rise to this matter is appropriate. Although the actions of petitioners are discussed collectively here, petitioners separately, and at different times, filed applications to buyback pension service credit for periods they served as TAB per diem hearing officers. The first of these applications was denied upon respondents' determination that TAB per diem hearing officers are independent contractors, not public employees (*see e.g.* NYSCEF Doc. No. 39). However, some years later, the Public Employment

Relations Board (PERB) and Department of Labor (DOL) issued administrative decisions finding that TAB per diem hearing officers are public employees, not independent contractors (NYSCEF Doc. Nos. 2 and 3). Following these decisions, other petitioners filed applications to buyback their pension service credit for periods they served as TAB per diem hearing officers (NYSCEF Doc. No. 5). Notwithstanding the PERB and DOL determinations that TAB per diem hearing officers are public employees, respondents denied the applications upon the same basis as their earlier denials – “Service as a hearing referee for the MTA is not purchasable” (*id.*). Petitioners then brought this Article 78 proceeding.

The standard of review of an agency determination via an Article 78 proceeding is well established. The Court must determine whether there is a rational basis for the agency determination or whether the determination is arbitrary and capricious (*Matter of Gilman v. New York State Div. of Housing and Community Renewal*, 99 NY2d 144 [2002]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Peckham v. Calogero*, 12 NY3d 424 [2009]; *see also Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]). When an agency determination is supported by a rational basis, this Court must sustain the determination, notwithstanding that the Court would reach a different result than that of the agency (*Peckham v. Calogero*, 12 NY2d at 431). Actions brought pursuant to Article 78 of the CPLR must be filed within four months of exhaustion of administrative remedies (*see e.g. Walton v. New York State Dept. of Correctional Servs.*, 8 NY3d 186 [2007]; *see also CPLR* § 217). However, where an administrative practice violates the State Constitution and such violative practices continue, the action is properly maintained while such practices continue (*Cash v. Bates*, 301 NY 258 [1950]).

Here, petitioners essentially allege that respondents’ determination that petitioners are ineligible for NYCERS credit for their service as TAB per diem hearing officers is arbitrary and capricious. Petitioners contend they are entitled to service credit as TAB per diem hearing officers and are entitled to such credit for the entire period they served as TAB per diem hearing officers, not for the lesser period of their service after the PERB and DOL determinations. Respondents concede that petitioners are entitled to service credit for the period of service following the PERB and DOL determinations, subject to their review of new applications by petitioners and calculation of such credit.

However, respondents contend that the issue of service credit for service pre-dating the PERB and DOL determinations remains under reconsideration via their internal review process and that until such time as a decision on retroactivity is final, this Article 78 proceeding is premature. Respondents’ determination that petitioners are not entitled to service credit as TAB per diem hearing officers is predicated upon classifying TAB per diem hearing officers as independent contractors.

As relevant to this proceeding, Public Authorities Law § 1209-a provides that while TAB’s authority includes the ability to enter into contracts with other agencies and outside private organizations to complete certain functions, TAB hearings and appeals “may not be performed by outside contractors” (Pub. Auth. Law § 1209-a[4][h]). It is inescapable, therefore, based upon the plain language of § 1209-a(4)(h), that TAB hearing officers cannot be

independent contractors, as hiring independent contractors to conduct TAB hearings and appeals is flatly prohibited by statute. Argument otherwise, which is violative of the plain meaning of the law, is unreasonable (*see Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583 [1998] [“In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning,” quoting *Tompkins v. Hunter*, 149 NY 117, 122–123]).

While not controlling on this Court, the determinations of the PERB and DOL on the issue underlying this proceeding, namely whether TAB per diem hearing officers are public employees within the meaning of Civil Service Law § 200 and thus entitled to service credit in respondent retirement system, are persuasive and this Court notes that those agencies have reached the same conclusion as this Court. In those proceedings, respondent Transit Authority’s argument that TAB per diem hearing officers were not employees, but rather independent contractors, was likewise rejected based upon Pub. Auth. Law § 1209-a[4][h] (*see* NYSCEF Doc. Nos. 2, 3, and 4).

Nevertheless, the relief sought by petitioners Sturges and Ferino cannot be granted on this petition. While the petition includes respondents’ denials of Feldmesser’s and Marmer’s requests for service credit (NYSCEF Doc. No. 5), Sturges’ and Ferino’s applications for service credit, and the related denials, are neither included in the petition nor annexed thereto. Accordingly, there is insufficient proof of Sturges’ and Ferino’s claims that respondents’ denial of their requests for service credit was arbitrary, capricious, or otherwise erroneous. Indeed, the failure to provide these denials prevents the Court from evaluating whether it has jurisdiction as to Sturges’ and Ferino’s claims, under the four-month statute of limitations for Article 78 proceedings (CPLR § 217; *see e.g. Walton v. New York State Dept. of Correctional Servs.*, 8 NY3d 186 [2007]).

Were the Court to consider respondents’ untimely motion to dismiss, to which the Sturges denial letter is attached, it would find Sturges’ claim time barred. Sturges’ denial letter is dated May 13, 2015, thus an Article 78 challenge to this denial was required to be filed on or about September 13, 2015; however, the instant petition was filed more than seven years later. Notably, a Sturges buyback application following the PERB and DOL decisions, which found TAB per diem hearing officers are employees, has not been submitted on this Article 78. To the extent that Sturges and Ferino contend an email from NYCERS’ General Counsel regarding the status of Feldmesser’s buyback credit request may be construed as a denial of their claim for buyback credits, sufficient to restart the statute of limitations, such contention is without merit (NYSCEF Doc. No. 6). The administrative denials of petitioners Feldmesser’s and Marmer’s requests were by a formal NYCERS letter expressly denying their service credit application (*see* NYSCEF Doc. No. 5); they were not by email from NYCERS’ legal department regarding the status of a separate individuals’ letter (*see* NYSCEF Doc. No. 6).

Finally, the instant petition is not rendered academic by respondents’ consent to process petitioners’ applications for buyback credits, as respondents contend. The petition demands petitioners receive buyback service credit, not that respondents process applications for buyback service credits. Nor is an informal internal administrative re-review a bar to this Article 78

proceeding, as respondents also contend. Respondents' denials of petitioners' applications for buyback pension credit served as a final administrative determination, indeed the denials do not set forth any procedure by which they may be challenged or subject to further review. Thus, these denials represent sufficient exhaustion of petitioners' administrative remedies.

Consequently, petitioners Feldmesser and Marmer are entitled to judgment finding NYCERS' denial of petitioners Feldmesser's and Marmer's applications for service credit was arbitrary and capricious and directing NYCERS to credit the entirety of their time as TAB per diem hearing officers creditable service for the purposes of pension credit with NYCERS.


Accordingly, it is

**ORDERED** that the petition is granted in favor of petitioners Anthony Feldmesser and Melanie Marmer, subject to their purchase/buyback of service credit, and NYCERS shall provide the purchase/buyback amount for the entirety of the period in which Feldmesser and Marmer served as TAB per diem hearing officers; and it is further

**ORDERED** that the claims by petitioners Helen Ferino and Philip Sturges are denied and dismissed for want of evidence establishing the exhaustion of their administrative remedies and evidence establishing that their claims are timely; and it is further

**ORDERED** that the claims by Philip Sturges are also dismissed as time barred; and it is further

**ORDERED** that the petition is otherwise denied.



1/12/2024  
DATE

KATHLEEN WATERMAN-MARSHALL,  
J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE