

SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY****Present:****HON. ANTHONY L. PARGA****Justice****X PART 11**

**BRUCE MEIROWITZ, JAMES DIRICO,
STUART KAPLAN, ROBERT ADLER, ROY
LESTER, JEFF SHIEBLER, EVON ALLEN,
RICK SHALVOY, TOM DONOVAN, and
all persons similarly situated,**

INDEX NO. 16876/07**XXX****Plaintiffs,****MOTION DATE: 3/28/08
SEQUENCE NOS. 001, 002, 003****-against-**

**NEW YORK STATE CORRECTIONAL
OFFICERS AND POLICE BENEVOLENT
ASSOCIATION, INC., the STATE OF NEW
YORK (Office of Parks, Recreation and
Historic Preservation; Long Island State Park,
Recreation and Historic Preservation
Commission; and Governor's Office of
Employee Relations), as a necessary party,**

Defendants.**X**

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Upon the foregoing papers, it is ordered that the motion by defendant State of New York for an order dismissing this action pursuant to CPLR 3211(a)(2) and (a)(10) is granted.

Motion by defendant New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) for an order dismissing this action pursuant to CPLR 3211 is granted.

The motion by plaintiff for an order pursuant to CPLR 902 granting leave to maintain a class action suit is denied.

In this action plaintiffs are members of a labor bargaining unit for which defendant NYSCOPBA is the exclusive bargaining agent. The Complaint seek: a declaratory judgment that defendant NYSCOPBA breached a duty to plaintiffs; directing payment of damages; directing defendant NYSCOPBA and defendant New York State to provide equitable relief to plaintiffs.

Plaintiffs are employed by the New York State Parks' Department as seasonal lifeguards and members of the NYSCOPBA union for purposes of collective bargaining agreements. Plaintiff alleges the class to consist of 1,200 persons seasonally employed in New York State lifeguard titles represented by NYSCOPBA and 500 of them are Long Island lifeguards.

PERB (Public Employees Relations Board) designated NYSCOPBA as the exclusive bargaining unit for the Jones Beach lifeguards. In 2003, the plaintiffs commenced an administrative PERB proceeding seeking to certify them as a bargaining unit for themselves (representation) and decertification from the NYSCOPBA union (fragmentation).

It is undisputed that the fragmentation and representation proceeding are still pending before PERB. Another labor group, Counsel 82 is a party to the PERB

proceeding. The original fragmentation relief was granted in July 2006 without any findings as to NYSCOPBA's breach of the duty of fair representation or the designation of a new labor organization. NYSCOPBA appealed this decision and in November 2006 it was reversed and remanded to the ALJ. The reargument of the November 2006 decision is allegedly still pending.

It would appear that in view of the PERB decisions, the pre-2003 PERB application status quo currently exists - NYSCOPBA is the exclusive bargaining agent for plaintiffs' job titles. The PERB decisions specifically did not reach the issue of whether they would represent the lifeguards if and when PERB granted them decertification from NYSCOPBA.

The support for this application to dismiss for lack of subject matter jurisdiction (CPLR 3211(a)(1)) is two fold. First, NYSCOPBA argues that PERB has exclusive jurisdiction over any unfair labor practices committed by a public employer. This exclusive jurisdiction includes issues relating to the union's duty of fair representation pursuant to Civil Service Law section 209-1(2)(c).

Secondly, NYSCOPBA contends that the Complaint seeks a money judgment in the form of wage, salary and other benefit enrichments as well as declaratory relief. Accordingly, defendant NYSCOPBA concludes that the Court of Claims has exclusive jurisdiction over claims for money damages.

In support of the application to dismiss pursuant to CPLR 3211(a)(10), defendant NYSCOPBA argues that CSEA and Council 82 are necessary parties. Defendants NYSCOPBA argues that they were parties to the 2003 and 2006 PERB proceedings and reasons for inclusion to this case.

In opposition, plaintiff challenges the assertion that PERB has exclusive jurisdiction over their claim of breach of the duty of fair representation.

Plaintiffs acknowledge that the 1990 amendment to Civil Service Law section 205(5)(d) specifically includes in PERB's exclusive jurisdiction claims alleging the breach of the duty of fair representation. The duty of fair representation includes unfair labor practices pursuant to Labor Law §209-a(2).

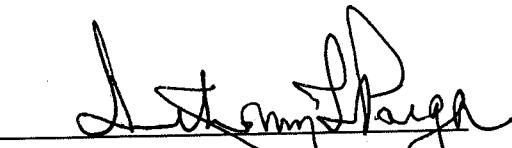
Plaintiffs' reliance on CPLR 217 is not appropriate in this case. Plaintiffs are not seeking to challenge or review a determination of PERB by way of an CPLR Article 78 proceeding (*Davis v. Anderson*, 51 AD2d 528 (1st Dept, 1976)). Hence, motion by defendant NYSCOPBA to dismiss for lack of subject matter jurisdiction pursuant to CPLR 3211(a)(1) is granted.

The motion for summary judgment by defendant NYSCOPBA is supported by a description of the current status of the PERB proceedings with the Jones Beach Lifeguard Corps to which plaintiffs belong.

At the PERB remand hearing, dated March 7, 2007, the State made it clear on the record that it wanted to "preserve the status quo in terms of a bargaining unit makeup". No decision has been rendered on the remand of the lifeguard fragmentation petition before PERB.

Plaintiffs have not met their burden of demonstrating with admissible evidence that there are questions of fact for judicial determination while the Long Beach Lifeguard Corps application is pending before PERB.

Dated: June 3, 2008.


Antonia L. Paugh, J.S.C.**ENTERED**

JUN 05 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**