

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

In the Matter of the Application of
TEMCO SERVICE INDUSTRIES, INC.,
Petitioner,

INDEX NO. 104133/12
MOTION DATE 05-22-13
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

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

-against-

JOHN C. LIU, as Comptroller of the City of New York,
Respondent.

The following papers, numbered 1 to 13 were read on this motion to/for intervene:

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ... _____
Answering Affidavits -- Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED	
1 - 12	_____
13	_____

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Service
Employees International Union, Local 32BJ's motion to Intervene, filed under
Motion Sequence 003, is decided in accordance with the decision filed under Motion
Sequence 001 herewith.

ENTER:

JUN 18 2013

COUNTY CLERK'S OFFICE
NEW YORK

MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: June 14, 2013

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

FILED

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

In the Matter of the Application of
TEMCO SERVICE INDUSTRIES, INC.,
Petitioner,

INDEX NO. 104133/12
MOTION DATE 05-22-13
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

UNFILED JUDGMENT

~~This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1110).~~

-against-

JOHN C. LIU, as Comptroller of the City of New York,
Respondent.

The following papers, numbered 1 to 5 were read on this petition to/for Art. 78 and Art. 86 relief:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED

1 - 3

4 - 5

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered and adjudged that this Article 78 petition, is denied. The motion filed under Motion Seq. No. 003, by Sevice Employees International Union, Local 32BJ (herein after referred to as "Local 32BJ"), to intervene, is denied.

RELEVANT FACTS

The New York City Department of Education (hereinafter referred to as "DOE") generally uses the "indirect system" of custodial care utilizing civil service employees as Custodians, which are represented by the International Union of Operating Engineers, AFL-CIO (hereinafter referred to as "Local 891"). Local 891, on behalf of the Custodians, negotiates collective bargaining agreements with Local 32BJ, for the hiring of cleaners. Pursuant to Labor Law §230, the Custodians, as civil service employees, are not considered contractors. Cleaners hired by Custodians are not entitled to either a living wage or the prevailing wage rate.

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

DOE, for a limited number of schools, retains the services of private companies to manage custodial care. Private companies are selected by DOE, based on a competitive bid process. Since June of 2007, petitioner has been the only private company retained by DOE to manage public school custodial care. Cleaners hired by the Petitioner, as private contractor, are required to be paid either a living wage or at the prevailing rate, whichever is higher. Petitioner services approximately 10% of the New York City public schools. The cleaners are represented by a union, Local 32BJ, which also enters into collective bargaining agreements on behalf of cleaners with other entities, including the Realty Advisory Board for Labor Relations, Inc. (hereinafter referred to as "RAB"). Petitioner has entered into collective bargaining agreements directly with Local 32BJ. Wage rates have previously been accepted by the Petitioner as determined by collective bargaining agreements entered into between Local 891 and Local 32BJ.

In June of 2012, Respondent requested public comment pertaining to the preparation of the 2012-2013 preliminary prevailing wage schedule. On or about June 15, 2012, Petitioner submitted a memorandum of law, titled, "Comment on Preliminary Schedule of Prevailing Wage and Supplement Rates for the Period July 1, 2012 through June 30, 2013 Pursuant to New York State Labor Law Section 234," (herein after referred to as "the Comment")(Pet. Exh. F). The Comment requested that Respondent create a separate classification in the prevailing wage for petitioner's public school cleaners, even though there is not a separate classification in the living wage. The Comment alleges that the job duties for commercial are not comparable. (Pet. Exh. F).

By letter dated June 22, 2012, addressed to the Respondent, Local 32BJ, responded to the Comment submitted by the Petitioner (hereinafter referred to as "the Letter") (Ans. Exh.2). In the Letter, Local 32BJ states that there is no real distinction between the work performed by commercial cleaners and public school cleaners. Local 32BJ referred the Respondent to Petitioner's website where the job descriptions posted were virtually identical for Commercial Cleaner and School Cleaner. Local 32BJ also claimed in the Letter that the overwhelming majority of cleaners are covered by Local 32BJ collective bargaining agreements with RAB (Ans. Exh. 2).

On July 1, 2012, Respondent published the 2012-2013 prevailing wage schedule, which did not include a separate classification for public school cleaners. Respondent generated a prevailing wage for three classes of "Building Cleaner and Maintainer (Office)." "Office Building Class "A" Cleaner/Porter, Elevator Operator, Exterminator, Fire Safety Director (Over 280,000 square feet gross area)," was assigned a lowest prevailing wage rate of \$22.65 per hour; "Office Building Class "B" Cleaner/Porter Elevator Operator, Exterminator, Fire Safety Director (Between 120,000 and 280,000 square feet gross area)," was assigned a lowest prevailing wage rate of \$22.62 per hour; and Office Building Class "C" Cleaner/Porter Elevator Operator, Exterminator, Fire Safety Director (Less than 120,000 square feet gross area)," was assigned a lowest prevailing wage rate of \$22.57 (Pet. Exh. W). The

determination of which class an office cleaner belongs to is determined by square feet and gross area cleaned, not actual duties.

MOTION TO INTERVENE

Pursuant to a motion filed under Motion Sequence #003, Local 32BJ seeks to intervene in this proceeding claiming that it is an interested party on behalf of their members that will be directly affected by prevailing wage determinations in this proceeding. Local 32BJ contends that it is not seeking a competitive advantage. Intervention is only being sought to ensure the workers it represents are not paid depressed wage and benefit rates. Local 32BJ claims that in seeking to obtain a separate classification for public school cleaners, Petitioner is attempting to: (1) freeze salaries, (2) depress the public school cleaners minimum wages and (3) avoid liability by preventing the Respondent's investigation into pending public school cleaner prevailing wage complaints. Local 32BJ provides affidavits from individual members to establish its interest in the outcome of this proceeding and a memorandum of law in opposition to the petition.

Petitioner opposes the motion to intervene contending that Local 32BJ lacks any substantial or direct interest in the outcome of this proceeding. Petitioner claims that a new prevailing wage schedule is only effective prospectively and has no retroactive effect on the collective bargaining agreements Local 32BJ enters into on behalf of its members. Petitioner also contends that: (1) Local 32BJ's membership is adequately represented by the Comptroller, (2) Local 32BJ is only seeking to maintain its competitive advantage based on Building Cleaner and Maintainer (Office) prevailing wage rates and (3) Local 32BJ is only using this proceeding to obtain higher prevailing wage rates. Respondent does not oppose Local 32BJ's motion to intervene.

CPLR §7802[d], provides that the Court in its discretion, has broad authority to allow an interested party to intervene in an Article 78 proceeding. A successful intervenor will become a party for all purposes and its claims deemed interposed as of the date of filing of the petition. The party allowed to intervene must demonstrate a legally cognizable claim with a "substantial interest" in the outcome of the proceeding. A party may be allowed to intervene in the proceeding if the claims are, "...based on the same transaction or occurrence" (Greater N.Y. Health Care Facilities Ass'n v. DeBuono, 91 N.Y. 2d 716, 697 N.E. 2d 589, 674 N.Y.S. 2d 634 [1998] and Ferguson v. Barrios-Paoli, 279 A.D. 2d 396, 720 N.Y.S. 2d 43 [N.Y.A.D. 1st Dept., 2001]). An interested party is one that is "directly affected by the outcome" (Cleveland Place Neighborhood Assoc. v. New York State Liquor Authority, 268 A.D. 2d 6, 709 N.Y.S. 2d 12 [N.Y.A.D. 1st Dept., 2000]). Leave to intervene may be denied based on prejudicial delay of a determination affecting the petitioner (Meringolo v. Jacobson, 256 A.D. 2d 20, 680 N.Y.S. 2d 521 [N.Y.A.D. 1st Dept., 1998]).

When intervention is denied, a party seeking to intervene may still be granted permission by the Court in its discretion to appear *amicus curiae* (*Kruger v. Bloomberg*, 1 Misc. 3d 192, 766 N.Y.S. 2d 76 [N.Y. Sup. Ct., 2003] citing to *Finkelstein, Maruiello, Kaplan & Levine, P.C. v. McGuirk*, 90 Misc. 2d 649, 385 N.Y.S. 2d 377 [N.Y. Sup. Ct., 1977]). *Amicus curiae* permits a non-party to, "call the court's attention to law or facts or circumstances in a matter that might otherwise escape its consideration; it is a privilege not a right of a party;...he must accept the case before the court with issues made by the parties; and may not control the litigation" (*Kruger v. Bloomberg*, 1 Misc. 3d 192, supra citing *Kemp v. Rubin*, 187 Misc. 707, 64 N.Y.S. 2d 510 [N.Y. Sup. Ct., 1946]). Although the non-party granted *Amicus curiae* status may not raise new issues, the non-party may assist the Court concerning law of the case (*Lezette v. Board of Ed., Hudson City School Dist.*, 35 N.Y. 2d 272, 319 N.E. 2d 189, 360 N.Y.S. 2d 189 [1974]).

Local 32BJ's motion to intervene, is denied. The stated basis for intervention by Local 32BJ is to maintain the 2012-2013 prevailing wage rate set by the Respondent on behalf of its membership. That interest is adequately represented by the Respondent. Local 32BJ has also failed to provide a proposed Answer to the petition and only submitted a memorandum of law. The delay to the Petitioner in allowing Local 32BJ to intervene as a party would be prejudicial. This Court in its discretion shall consider the arguments made in Local 32BJ's memorandum of law opposing the petition, as *amicus curie* and review the relevant arguments raised by Local 32BJ when it addresses the merits of the petition.

ARTICLE 78 PROCEEDING

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious (*Matter of Pell v. Board of Education*, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974]). Deference is generally given to an administrative agency's decision, but a decision that, "runs counter to the clear wording of a statutory provision, should not be given any weight" (*Metropolitan Movers Ass'n, Inc. v. Liu*, 95 A.D. 3d 596, 944 N.Y.S. 2d 529 [N.Y.A.D. 1st Dept., 2012] citing to *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y. 3d 270 918 N.E. 2d 900, 890 N.Y.S. 2d 388 [2009]).

An Article 78 proceeding may not be brought until an agency has rendered a final determination. An exception is when an Article 78 proceeding is brought before a final determination seeking a prohibition, or by way of mandamus to compel performance of an agency's duty enjoined by law involving no discretion (*Hamptons Hospital & Medical Center, Inc. v. Moore*, 52 N.Y. 2d 88, 417 N.E. 2d 533, 436 N.Y.S. 2d 239 [1981]). Mandamus review is available where an agency has a clear duty to act. Administrative review involving a ministerial act mandated by law is also subject to mandamus relief (*Martinez v. State Com'n Judicial Conduct*, 89 A.D. 3d 437, 931 N.Y.S. 2d 315 [N.Y.A.D. 1st Dept., 2011]) and *Blase v. Axelrod*, 67 N.Y. 2d 542, 490 N.E. 2d 534, 499 N.Y.S. 2d 667 [1986]).

Article 9 of the Labor Law (Labor Law § 230, et. seq.) applies to building service employees that perform work in connection with the care or maintenance of a building based on a contract with a public agency. Pursuant to Labor Law 230[1], building service employee includes "...building cleaner, porter, handyman, janitor...and occupations. Pursuant to Labor Law §230[8], the Comptroller in the City of New York is the "fiscal officer." The Comptroller has some discretion but is responsible for determining the "actual prevailing rate." Although he is not precluded from relying on collective bargaining agreements, they cannot be the sole basis for his determination. A comparison with Federal Department of Labor wage schedules and actual survey results can bring about a more appropriate prevailing wage determination (Metropolitan Movers Ass'n, Inc. v. Liu, 95 A.D. 3d 596, supra. [N.Y.A.D. 1st Dept., 2009]). Pursuant to the New York City Administrative Code §6-109, the living wage is currently \$10.00 per hour and the prevailing wage cannot be less than the minimum wage.

Petitioner brought this Article 78 proceeding seeking to have this Court set aside as irrational, arbitrary and capricious, the Respondent's determination that cleaners hired by Tempco Service Industries Inc., to work in public schools, are subject to the prevailing wage rates established for Building Cleaner and Maintainer (Office) or Building Cleaner and Maintainer (Residential). Petitioner also seeks a declaration that Respondent determine the wage rate actually prevailing for the craft or trade of public school cleaners in New York City, which it contends should be equivalent to the rates currently being paid.

Petitioner employs 748 building service employees of which it claims 427 are cleaners represented by Local 32BJ. Petitioner contends that Respondent should have established a separate classification for public school cleaners based on the differences in work performed and the failure to do so was arbitrary, capricious and irrational. The job duties for commercial cleaners are not comparable because they typically begin their shifts at night and perform tasks daily. Public school cleaners perform their tasks during the day and on an "as needed" basis.

Petitioner claims that the wage rate for all cleaners working in the New York City public schools has been \$18.13 per hour, regardless of whether they are employed by Custodians or the Petitioner. Respondent's revised lowest prevailing wage rate for 2012-2013, is \$22.65, \$22.62 or \$22.57, depending on the class, which is too high. Petitioner also contends that Respondent relied heavily on the collective bargaining agreements entered into between RAB and Local 32BJ, and failed to consider other important factors. Respondent's determination of the prevailing wage rate for 2012-2013, was arbitrary, capricious and irrational because it did not include the actual rates paid to cleaners in the locality, or the distinction in actual work performed by the public school cleaners.

Respondent opposes the petition claiming that he had broad discretion in making the 2012-2013 prevailing wage determination for public school cleaners and

his final determination was not arbitrary, capricious or irrational. Respondent contends that he relied on more than just Local 32BJ collective bargaining agreements with RAB for building service workers (Ans. Exh. 4). Items taken under consideration include (1) the Comment, (2) the Letter by Local 32BJ (Ans. Exh. 2) and (3) the U.S. Department of Labor's Occupational definitions and prevailing wage determinations (Ans. Exhs. 9-13). Respondent claims that the descriptions of duties provided by Petitioner were not substantiated.

In the Letter, Local 32BJ referred to Petitioner's website. Upon review of the Petitioner's website, Respondent found the description of public school cleaner's duties were much more similar to commercial office cleaners. Public school cleaners have never had a separate classification for purposes of determining the prevailing wage rate. Respondent has always classified public school cleaners as, "Building Cleaner and Maintainer (Office)." Public school cleaners have not been previously classified as "Building Cleaner and Maintainer (Residential)."

Respondent also claims that in making the prevailing wage determination, he rationally relied on the United States Department of Labor's Occupational Information Network ("O*NET) and Standard Occupational Classifications providing national definitions of occupational titles based on annual surveys. O*NET and Standard Occupational Classifications do not provide a separate classification for public school cleaners, the only classification provided is for all non-residential cleaners.

Respondent looked at the federal prevailing wage rates for New York City. The prevailing wage rate adopted by the Respondent for public school cleaners matches the U.S. Department of Labor's Service Contract Act Wage Determination No. 1977-0225, applying to federal contracts in the five boroughs. There is no basis for the Petitioner's claim that a lower prevailing wage rate should be applied for public school cleaners.

Local 32BJ, claims that the job descriptions on Petitioner's website for "School Cleaners" and "Commercial Cleaners" are virtually identical and the descriptions provided in the Petition differ from the website. Petitioner's contract with the DOE includes office buildings not just schools. The cleaners employed at DOE office buildings are paid at the public school cleaner rates. The classification of Building Cleaner and Maintainer (Office) applies to all manner of non-residential buildings, not just offices. Pursuant to affidavits provided by Local 32BJ's members, Petitioner has provided only a limited description of job duties for public school cleaners. Tasks ascribed by the Petitioner to commercial cleaners, are also performed by public school cleaners. There are public school cleaners retained by Petitioner that have performed their work related duties at night, not just during the day.

Local 32BJ claims that the lower rate sought by Petitioner seeks to maintain the frozen rate provided for Custodian Engineers instead of applying the prevailing

wage rates established for Building Cleaner and Maintainer (Office). Petitioner is in reality seeking to take a small portion of cleaners, specifically those that work in public schools, and examine only their rates, while ignoring the prevailing rates applied to a majority of cleaners that perform the same or similar work, resulting in grossly disproportionate rates.

This Court finds that Article 9 of the Labor Law (Labor Law § 230, et. seq.) applies to public school cleaners employed by the petitioner. Petitioner has failed to establish that Respondent acted arbitrarily, capriciously, or irrationally when he did not create a separate classification for public school cleaners or that there is a basis for mandamus relief. Respondent in his discretion, relied on multiple factors and determined the actual prevailing wage rate. The factors relied on by the Respondent include: (1) the collective bargaining agreements entered into between Local 32BJ and RAB (2) the actual duties of both commercial cleaners and public school cleaners and (3) Federal classifications for prevailing wage rates in New York City.

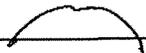
Petitioner has not established that the prevailing wage rate determined by the respondent for 2012-2013 for Building Cleaner and Maintainer (Office), is not the actual rate for public school cleaners. Respondent reviewed multiple factors including current wages as indicated by the Petitioner, collective bargaining agreements and Federal prevailing wage standards. His actions were not arbitrary or capricious.

Accordingly, it is ORDERED that the motion filed under Mot. Seq. 003, by Service Employees International Union, Local 32BJ to intervene, is denied, however, this Court shall considered amicus curie, the arguments made in the memorandum of law opposing the petition, and it is further,

ORDERED and ADJUDGED that that this Article 78 petition, is denied, and it is further,

ORDERED and ADJUDGED that this proceeding is dismissed.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: June 14, 2013

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).