

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH P. DORSA IA Part 12
Justice

	<u>x</u>	Index
Matter of Application of		Number <u>11005</u> 2004
BETHCO Corporation, et al.		
- against -		Motion
		Date <u>September 8,</u> 2004
DAVID B. TWEEDY, etc., et al.		Motion
		Cal. Number <u>6</u>
	<u>x</u>	

The following papers numbered 1 to 10 read on this petition in an Article 78 proceeding to annul determinations issued by The New York City Water Board on January 16, 2004.

	<u>Papers</u> <u>Numbered</u>
Notice of Petition - Petition - Exhibits	1-4
Answer Affidavits - Exhibits	5-7
Reply Affidavits	8-10

Upon the foregoing papers it is ordered and adjudged that the petition is determined as follows:

Petitioners Bethco Corporation (Bethco) and Staten Island University Hospital (Hospital) each retained petitioner Utilisave, LLC, to audit their respective billing from the New York City Water Board (Water Board) and to seek refunds from the Water Board for overcharges on the water bills. By letter to the Department of Environmental Protection (DEP) dated August 25, 2003, Utilisave requested an adjustment to the water bill issued to Bethco on April 27, 1998. Utilisave also sought an adjustment from DEP, by letter dated July 31, 2003, of a bill issued to Hospital on December 5, 1997. Each of these complaints was denied by DEP based upon a provision in the Water Board's Water and Wastewater Rate Schedule (Rate Schedule) that a disputed bill will not be adjusted unless the written complaint is filed within four years of the bill date. The appeal of these DEP decisions by Utilisave on behalf of Bethco and Hospital resulted in the determinations of the Water Board sought to be reviewed herein. The Water Board denied

each appeal, affirming the determinations of DEP, on the ground that the original complaints had not been timely filed within four years of the bill in question.

Contrary to respondents' assertion, the record herein establishes that prior to July 1, 1999, customers were afforded six years from the date of billing to file a water bill overcharge complaint. An amendment to the Rate Schedule, effective July 1, 1999, provided that for all bills issued after July 1, 1999, a written complaint regarding a disputed bill had to be filed within two years of the date of the bill. The Water Board at that time continued the existing six-year filing limitation for bills issued prior to July 1, 1999. These filing requirements remained through June 30, 2002. The Rate Schedule effective July 1, 2002, however, required that a customer file a written complaint of a disputed water bill within four years of the bill date. The four-year period was instituted in response to an amendment to Public Authorities Law § 1045-g, the statutory provision setting forth the powers of the Water Board, that prohibits the Water Board from establishing a limit of less than four years from the date of the bill to challenge the charge. (Public Authorities Law § 1045-g[4], as amended by L 2001, ch 467.) The 2003 Rate Schedule in effect at the time petitioners' complaints were filed contains the same four-year period of limitations. Petitioners contend that respondents improperly applied the four-year limitation period to their complaints rather than the six-year limit being followed at the time the challenged bills were issued and their claims accrued. Respondents' application of the four-year limit to claims already accrued when it was adopted in July 2002 immediately rendered petitioners' claims time-barred.

In this Article 78 proceeding, the standard of review is whether the agency's determinations were arbitrary and capricious or affected by an error of law. (See, Matter of Scherbryn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753 [1991].) In addition, respondents' interpretation of the statutes they administer, unless unreasonable or irrational, is entitled to deference. (See, Matter of Salvati v Eimicke, 72 NY2d 784, 791 [1988].)

It is clear that periods of limitation can be enacted or shortened provided a reasonable time is allowed for suits upon claims previously existing. (See, Brothers v Florence, 95 NY2d 290 [2000]; Gilbert v Ackerman, 159 NY 118 [1899]; McKinney's Cons Laws of NY, Book 1, Statutes, § 59.) Where, as here, the statute or governing rule shortening a prior limitation period does not expressly address whether it applies to claims which accrued prior to, but were not filed until after, the effective date of the

amendment, legislative intent must be ascertained to determine this answer. (See, Brothers v Florence, supra.) The available legislative history in this matter indicates that the amendment to Public Authorities Law § 1045-g(4) was a reaction to the Water Board's institution of the two-year period of limitations for post-July 1, 2002 bills. (See, Assembly's Mem in Support, L 2001, ch 375.) Although the Assembly's memorandum also noted approval of the six-year filing period then in effect for bills issued prior to July 1, 1999, a first version of the amended section 1045-g(4) (L 2001, ch 375) fixing the minimum time limit the Water Board could impose at six years was in effect for only 16 days before being amended to the current four-year provision by chapter 467 of the Laws of 2001, which was deemed to have been effective on October 23, 2001, the effective date of chapter 375. This almost immediate substitution of the four-year period for the six-year period originally enacted together with the manifest disapproval of the two-year period tends to support a finding that the legislature intended the four-year minimum limitation to be applied retrospectively. In addition, as noted in Matter of Amalgamated Warbasse Houses v Tweedy (Sup Ct, Queens County, August 17, 2004, Price, J., Index No. 13114/04) and Matter of 38 Park Ave. Assn. v Tweedy (Sup Ct, Queens County, June 7, 2004, Price, J., Index No. 829/04), the amendment to the Rate Schedule effective July 1, 2002 eliminated the distinction between bills issued prior to and after July 1, 1999, pointing to an intent for the retroactivity of the four-year provision. Considering the deference to be shown respondents' interpretation of the statute and Rate Schedule together with these indicia, the court finds that the amended limitations period was intended to apply retrospectively to claims accrued but not yet interposed by the effective date of the amendment. (Accord, Matter of Amalgamated Warbasse Houses v Tweedy, supra; Matter of 38 Park Ave. Assn. v Tweedy, supra.)

However, the inquiry concerning the determinations under review does not end here. As noted above, the application of the shortened limitations period to petitioners' complaints resulted in an immediate time bar as of the effective date of the Rate Schedule amendment. In this situation, due process required petitioners to have been afforded a reasonable time to file their complaints before the bar took effect. (See, Brothers v Florence, supra; Gilbert v Ackerman, supra.) Since the Rate Schedule provision did not expressly set a reasonable grace period for filing after the effective date of the reduced limitations period, to preserve the validity of the retrospective application of the amendment, it must be interpreted as authorizing the filing of otherwise time-barred complaints within a reasonable time after the effective date. (See, Brothers v Florence, supra.) The determinations of

respondent Tweedy denying petitioners' appeals and affirming DEP's determinations because the complaints had not been filed within four years of the disputed billings, without acknowledging the right to bring the complaints within a reasonable time after the effective date of the amended Rate Schedule and considering whether petitioners had done so, lacks a reasonable basis in law and cannot be sustained. (But see, Matter of Amalgamated Warbasse Houses v Tweedy, supra; Matter of 38 Park Ave. Assn. v Tweedy, supra.) The issue of what constituted a reasonable time to file the complaints after the effective date of the amendment is best determined, in the first instance, by respondents.

Accordingly, the petition is granted to the extent that the January 16, 2004 determinations of the Water Board under review herein are vacated and the matter is remitted to the Water Board for further proceedings consistent herewith.

Dated: December 15, 2004

J.S.C.