No. 189

In the Matter of Richard Lazzari,
Respondent,
v.
Town of Eastchester, et al.,
Appellants,
Paula Redd Zeman, &c., et al.,
Respondents.

Vincent Toomey, for appellants.
James M. Rose, for respondent Lazzari.
Thomas G. Gardiner, for respondents Zeman, et al.
New York State Conference of Mayors and Municipal Officials, amicus curiae.

LIPPMAN, Chief Judge:

The Town of Eastchester and Westchester County have squabbled in and out of court for five years over whether the County's Department of Human Resources was required to provide the Town with documentation of an employee's fitness to resume work before the Town reinstated him to his position under Civil

Service Law § 71. Without condoning the County's conduct in this dispute, we hold that when a civil service commission or department directs a municipal employer to reinstate an employee pursuant to a medical officer's determination of fitness under Civil Service Law § 71, the municipal employer must immediately reinstate the employee, and a challenge to such a determination must take the form of an article 78 petition.

In October 2006, Mr. Lazzari injured his neck, back, and both arms while performing his job duties. On previous occasions, he had injured his lower back, causing him to miss several days of work. Mr. Lazzari did not perform any work for the Town after suffering these most recent injuries.

Throughout Mr. Lazzari's absence, he was periodically examined by the Town's physician, at the Town's request. Approximately one year after the latest injuries, the doctor reported that he "[could] not authorize [his] return to full duty . . . if the employee will require continued ongoing treatment with prescription pain medications that were noted to me by Mr. Lazzari." That month, at the Town's request, Mr. Lazzari also underwent an independent medical examination by an orthopedic surgeon. After examining him, the surgeon reported that Mr. Lazzari "is currently not fit to perform the responsibilities of an assistant building inspector and it is unlikely that any dramatic change will allow him to return to this occupation in the near or distant future."

Based upon these two medical reports, the Town Comptroller notified Mr. Lazzari that pursuant to Civil Service Law § 71, his employment with the Town would be terminated effective November 16, 2007. Mr. Lazzari was further advised that he possessed certain reinstatement rights under Civil Service Law § 71 and was provided with a copy of the statute.

Soon thereafter, based on the required procedure in Civil Service Law § 71, Mr. Lazzari requested and obtained a review of his medical condition by the Westchester County Department of Human Resources (DHR).[1] DHR directed Mr. Lazzari to a physician selected by the department to make an independent determination as to whether Mr. Lazzari was medically able to perform the duties of his job.

On December 18, 2007, the Deputy Commissioner of DHR notified the Town Supervisor that it had completed Mr. Lazzari's § 71 application for reinstatement as Assistant Building Inspector, including an independent medical evaluation to determine his fitness to perform the duties of that job. The Deputy Commissioner advised the Town that "[t]he examining physician has concluded in his written report provided to this department that Mr. Lazzari is able to perform [his job] duties" and "should be immediately restored to his position."

[1] The DHR was acting as a local municipal Civil Service Commission pursuant to Civil Service Law §§ 15 and 17.

In response, the Town Supervisor requested from DHR a copy of the medical report, claiming that "[i]n light of the apparently conflicting medical opinions, we are concerned about Mr. Lazzari's safety and that the interests of the Town and its residents will be imperiled if [he] cannot effectively perform the essential functions of his position." In response, the County, by its Deputy Commissioner of Human Resources, advised the Town that it would not provide a copy of the requested report and reiterated that the Town should immediately reinstate Mr. Lazzari to his job as Assistant Building Inspector.

The Town Supervisor again wrote to DHR asserting that the Town was entitled to the medical report. The Deputy County Attorney communicated to the Eastchester Town Attorney that nothing in Civil Service Law § 71 required DHR to disclose the medical report, but the very words of Civil Service Law § 71 directly and clearly mandated that the Town immediately reinstate Mr. Lazzari in accordance with the County's direction.

In response, the Town's Special Counsel for labor and employment law matters wrote to the Deputy County Attorney, admitting that Civil Service Law § 71 "does not specifically require the release of the [medical] report" but asking for the Civil Service Commission to articulate the evidentiary basis for its determination and to turn over the medical report to demonstrate that basis. The County continued its refusal to turn over any documentation to the Town.

The Town neither reinstated Mr. Lazzari, nor brought a Freedom of Information Law (FOIL) or article 78 proceeding against the County to procure the medical documentation and/or challenge the County's determination under Civil Service Law § 71. Mr. Lazzari was forced to take the initiative, commencing this article 78 proceeding seeking to compel the Town to reinstate him. In April 2008, Supreme Court granted the petition and ordered the Town to reinstate Mr. Lazzari, reasoning that "[i]gnoring the mandate of Civil Service Law § 71 is not the appropriate mechanism for questioning his condition or challenging the determination of [DHR]." The Town appealed.

In May 2009, the Appellate Division reversed for failure to join DHR as a necessary party and remitted for determination with DHR's participation (62 AD3d 1002 [2d Dept 2009]). Upon remittal to Supreme Court, the Town moved for discovery of the medical report. Supreme Court denied the Town's motion in December 2009, explaining that "[t]o order the discovery requested by the Town would only serve to invite argument in an area not authorized by law." The court reasoned that Civil Service Law § 71 does not provide for a challenge to the determination of the medical officer selected by the civil service commission or department and the only available remedy was for the Town to institute its own article 78 proceeding against DHR, which the Town failed to bring within the statutorily mandated time frame of four months. Thereafter, in

an April 2010 judgment, the court granted the petition, reinstating Mr. Lazzari to his former position, this time also ordering the Town to compensate him with back pay in accordance with Civil Service Law § 77 calculated from December 18, 2007, the date of DHR's initial letter directing reinstatement. The Court criticized the Town again, with the same words it used in its initial decision in 2008, stating that "[i]gnoring the mandate of Civil Service Law § 71 is not the appropriate mechanism for questioning his condition or challenging the determination of [DHR]." The Town appealed, still refusing to reinstate Mr. Lazzari.

On Mr. Lazzari's second visit to the Appellate Division, more than two years later, the Court affirmed the judgment, concluding that Civil Service Law § 71 did not require DHR to provide it with medical certification or the underlying medical report (87 AD3d 534, 535 [2d Dept 2011]). In addition, the Appellate Division agreed that Mr. Lazzari was entitled to back pay, retroactive to December 18, 2007, pursuant to Civil Service Law § 77. We granted the Town leave to appeal and now affirm.

Civil Service Law § 71 states that an employee terminated for a job-related incident can apply for reinstatement if the disability should cease. The employee can apply to the civil service commission or department having jurisdiction over his last position "for a medical examination to be conducted by a

medical officer selected for that purpose by such department or commission" (Civil Service Law § 71). The employee "shall be reinstated" if "such medical officer shall certify that such person is physically and mentally fit to perform the duties" of the job (Civil Service Law § 71).

The Town argues that medical certification of fitness can only come from the examining physician and a mere statement by a non-doctor advising the municipal employer that the disabled employee has been found medically fit without the accompanying written medical certification and/or report, does not satisfy Civil Service Law § 71. As the Appellate Division has recognized, it is the medical officer who certifies, and not the Civil Service Commission (see Matter of Sarto v Whittemore, 43 AD3d 1343 [4th Dept 2007] [holding that a local Civil Service Commission who relied upon past medical records, rather than an independent medical examination, failed to comply with § 71 because the medical examiner, not the Commission, certifies fitness]).

Although Civil Service Law § 71 does not indicate to whom the certification must be made, read in context, it is clear that the certification is made to the Department of Human Resources acting as a Civil Service Commission, the body that arranges for the examination and to whom the results of such an examination are reported. Indeed, the purpose of § 71 is to involve a neutral agency and a physician, independent of both the

employee and the employer, with appropriate oversight. Accordingly, the letter from the Civil Service Commission, informing the Town that a medical officer had "certified" Mr. Lazzari fit to return to work, was sufficient under Civil Service Law § 71.

Nothing in the plain language of the statute suggests, much less requires, that a medical certification be in writing, or take any particular form. The Town attempts to invent such a requirement by pointing to other state and federal statutes and regulations regarding disability or fitness for duty that have been interpreted to require written medical certification from the examining physician consisting of the doctor's signed medical report. However, the Town undermines its own argument. In each statute or regulation cited by the Town (i.e., Workers' Compensation Law, the Family and Medical Leave Act and the Department of Transportation's Drug Testing Regulations), it has been provided that a certification is a signed document by a medical examiner, and the reasons for requiring such an executed writing are explicated in each provision. For example, in Workers' Compensation Law § 13-a, the certification is made so that it becomes "admissible medical evidence" at a hearing.[2] The

[2]The Town also makes vague reference to CPLR 2106, but it is inapt. The statement of a physician authorized under CPLR 2106 is an affirmation (to have the same effect as an affidavit), not a certification. CPLR 2105 does refer to a certification, but it is made by an attorney, not a physician.

Legislature has included no such provision in Civil Service Law § 71.

The Town's choice to ignore the County's directive was also not an option contemplated by the Legislature. The Legislature intended for the determination of the medical officer to be final. There is no statutory construct for an administrative challenge, a hearing, or other means of protest, as both Supreme Court and the Appellate Division found. The Town has neither moved to obtain a copy of the medical officer's report of fitness pursuant to the FOIL, nor, as Supreme Court noted, had it attempted to obtain it in the course of a timely article 78 proceeding brought to challenge DHR's directive as arbitrary and capricious.

The Town makes the untenable argument that because the medical report has been withheld from the Town in an arbitrary and capricious manner and in violation of § 71, the Town does not need to reinstate Mr. Lazzari. It also contends that without the certification, it does not yet have any obligation to challenge the County's determination in an article 78 proceeding. The Town relies on Matter of Stitt v McMahon (244 AD2d 811 [3d Dept 1997]), in which the Third Department upheld the Superintendent of State Police's refusal to reinstate an injured officer based upon the Superintendent's determination that the officer was not fit for duty because there were conflicting medical reports about the officer's medical fitness. The Town argues that this case is

similar because it had two medical opinions about Lazzari which stated that he was unfit, and one conflicting medical opinion from the DHR to which the Town had no access.

This argument demonstrates the Town's misunderstanding of its role with respect to Mr. Lazzari and the County. Stitt does not apply. The Town's position is not analogous to that of the Superintendent of the State Police who, pursuant to law and regulation, "has wide discretion in all employment matters" (see Matter of Grossman v McMahon, 261 AD2d 54, 58 [3d Dept 1999]; Executive Law § 215 [3]; 9 NYCRR 488.1 [g]). This is not the case for the Town, a municipal employer, which does not have discretion regarding reinstatement determinations when a Civil Service Department, pursuant to Civil Service Law § 71, has determined that a medical official has certified that the employee is fit to return to work and orders reinstatement. Civil Service Law § 71 does not give the Town the responsibility or power to police the performance of the County's statutorily mandated duties.

After five years of litigation, the County's refusal to give the Town a copy of the medical report, and the Town's refusal to ask for it under FOIL, remain unexplained. The County does not suggest that it would have any ground for rejecting a FOIL request. It seems that a bit more common sense and less stubbornness on either side could have avoided years of trouble and expense. Since the parties have chosen to litigate, however,

we must resolve the dispute, and we do so in the County's favor.

On the issue of back pay, Civil Service Law § 77 provides that an "employee who is removed . . . and who thereafter is restored to such position by order of the supreme court, shall be entitled to . . . the salary or compensation which he would have been entitled by law to have received in such position but for such unlawful removal...." The Town argues that because Mr. Lazzari was lawfully terminated and not unlawfully removed, and does not even challenge his initial termination, Civil Service Law § 77 does not apply. However, within the context of the statute there is no meaningful distinction between an unlawful removal and an unlawful refusal to reinstate, so Mr. Lazzari is entitled to back pay retroactive to the time the County directed the Town to reinstate him on December 18, 2007.[3]

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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[3]As additional authorization for the award of back pay under Civil Service Law § 77, Civil Service Law § 100 (1) (c) provides:

> Any person entitled to be [on the certified payroll] and refused such certificate, or from whom salary or compensation is otherwise unlawfully withheld, may maintain a proceeding under article seventy-eight of the civil practice law and rules to compel the issuance of such certificate or the payment of such salary, or both, as the case may be.

Mr. Lazzari has been entitled to be on the certified payroll since the County directed his reinstatement and a back pay award could be based on this statutory provision as well.

Matter of Lazzari v Town of Eastchester et al.

No. 189

PIGOTT, J.(dissenting):

I dissent and decline the majority's invitation to go "through the looking glass" to a world where a municipal employer must, in blind faith, reinstate an employee under Civil Service Law § 71 without first receiving a certification from a medical officer that the employee is fit for duty. The majority berates the parties for "squabb[ling] in and out of court," (deservedly so), but, instead of interpreting § 71 in a manner that would lead to less litigation, it offers a solution that invites more by requiring a municipal employer to commence an article 78 proceeding against another municipality that should be assisting it to obtain the certification. Although § 71 does not state to whom the certification must be given, the only practical interpretation is that it should be given to the municipal employer, the entity ultimately responsible for the consequences of an imprudent reinstatement.

As relevant here, Civil Service Law § 71 provides that an:

> "employee may, within one year after termination of [a disability resulting from an occupational injury or disease], make application to the . . . municipal commission having jurisdiction over the position last held by such employee for a medical

> examination to be conducted by a medical officer selected for that purpose by such . . . commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his or her former position, he or she shall be reinstated to his or her former position . . ." (emphasis supplied).

According to the majority, the Westchester County Department of Human Resources (DHR) letter apprising the Town of Eastchester that the DHR-selected physician "evaluated" Mr. Lazzari and concluded he was fit for duty was sufficient for purposes of § 71. This is so notwithstanding the fact that the Town had two medical opinions in its possession indicating that Mr. Lazzari was not fit for duty.

The majority finds in favor of the DHR and Mr. Lazzari despite the fact that the County refused to provide the Town with medical certification as to Mr. Lazzari's fitness. In my view, submission of the certification to the Town by the DHR was a condition precedent to the Town's reinstatement of Mr. Lazzari. The only rational interpretation of § 71 is that the Town, as employer, is entitled to that certification. It is the Town that does the reinstating, and it is the Town that will bear the liability should such reinstatement prove erroneous and result in injury to either Mr. Lazzari or others. As such, because DHR never provided such certification, it never fulfilled its duty under § 71 and, therefore, there was no reason for the Town to either reinstate Mr. Lazzari or commence an article 78 proceeding

to obtain that certification. To that extent, I also disagree with the majority's conclusion that the Town "ignore[d] the County's directive" by not reinstating Mr. Lazzari (majority op at 8); DHR never sent the Town the certification, had no authority to issue a "directive" to the Town and therefore the Town had no obligation to reinstate him.

Although the majority correctly points out that § 71's purpose "is to involve a neutral agency and physician, independent of both the employee and the employer, with appropriate oversight" (majority op at 7), that hardly justifies keeping the results of the examination secret from – and placing the onus of actually obtaining the certification on – the Town, whose interest in ensuring that its employees are fit for duty is just as great as an employee's interest returning to his position.

It is well settled that § 71 "strike[s] a balance between the recognized substantial State interest in an efficient civil service and the interest in the civil servant in continued employment in the event of a disability" (Matter of Allen v Howe, 84 NY2d 665, 672 [1994] [citations omitted]). But the majority's interpretation of § 71 places the employee's interest in continued employment before that of the State's substantial interest in an efficient civil service by ordering the employee's reinstatement without the submission of any proof of the employee's fitness to serve. The only reasonable interpretation

of the statute, and the only rational approach consistent with policy approach delineated in Allen, is that the civil service department (or the appropriate civil service commission) select the medical officer to examine the employee, and, should that medical officer certify that the employee is fit to perform his or her duties, the municipal employer must reinstate that employee upon receipt of that certification. Under the majority's holding, the Town must commence an article 78 proceeding without knowing DHR's basis for reinstatement. On its face, then, a blanket demand by the DHR that the Town reinstate Mr. Lazzari without any basis for doing so is the textbook definition of arbitrary and capricious.

Finally, the majority posits that, in addition to bringing an article 78 proceeding, the Town could have filed a FOIL request seeking a copy of the medical officer's report (majority op at 8-9). In another trip down the rabbit hole, the County does not suggest that it would have any ground for rejecting a FOIL request by the Town (majority op at 10). By applying for a medical examination and seeking reinstatement, however, Mr. Lazzari has placed his physical condition in issue (see e.g. Dillenbeck v Hess, 73 NY2d 278, 287-288 [1989]), and, in my view, the Town was entitled to a copy of the medical officer's report and, and the very least, a certification, without having to commence a proceeding. Mr. Lazzari had no incentive to provide the Town with the medical officer's report

or demand that the DHR provide the Town with the certification, as evidenced by the fact that he is now being handsomely rewarded with several years' back pay simply because neither party in control of the medical information thought it important that the Town be provided any basis for reinstatement other than a letter from a non-medical bureaucratic agency stating, in sum and substance, that Mr. Lazzari must be reinstated because some unknown medical officer who may or may not have examined Mr. Lazzari concluded that he was fit to return to work. This, to me, is not compliance with § 71.

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Order affirmed, with costs. Opinion by Chief Judge Lippman. Judges Ciparick, Graffeo, Read and Smith concur. Judge Pigott dissents in an opinion.

Decided November 27, 2012