

<b>Seabrook v City of New York</b>
2002 NY Slip Op 30053(U)
May 31, 2002
Supreme Court, New York County
Docket Number: 0110643/2000
Judge: Michael D. Stallman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MICHAEL D. STALLMAN  
Justice

PART 5

Seabrook

INDEX NO. 110643/00

MOTION DATE

MOTION SEQ. NO. C

MOTION CAL. NO.

- v -  
City of NY

The following papers, numbered 1 to 3 were read on this motion to/for 55

TT S/S  
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
~~Notice~~ Motion S/S  
Answering Affidavits — Exhibits  
Replying Affidavits

PAPERS NUMBERED

1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that <sup>these</sup> ~~the~~ motions

ANNEL  
JUN 06 2002

<sup>an</sup>  
"is determined in accordance with the  
annexed memorandum decision and order."

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

Dated: 5/31/02

  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

HON. MICHAEL D. STALLMAN

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
Norman Seabrook, as the President of  
the New York City Correction Officers'  
Benevolent Association, on behalf of  
all correction officers,

Index No. 110643/00

Decision and Order

Plaintiffs,

-against-

The City of New York, the New York  
City Department of Correction, and  
Commissioner Bernard Kerik,

Defendants.

-----X  
HON. MICHAEL D. STALLMAN, J.:

Defendants City of New York (the "City"), the New York City  
Department of Corrections ("DOC"), and former Commissioner Bernard  
Kerik move, for summary judgment dismissing the complaint.  
Plaintiff Norman Seabrook cross-moves for summary judgment.

**The Instant Action**

Plaintiff President of the New York City Correction Officers'  
Benevolent Association (the "Union") sues on behalf of all  
correction officers in the City. The complaint alleges that DOC  
Directive 22583-A (the "Directive"), which superseded Directive  
2258R effective February 14, 2000, violates New York Civil Service  
Law §§ 75 and 76. Plaintiff seeks declaratory and injunctive  
relief.

The Directive's stated purpose is to "establish an Absence  
Control Program to reduce chronic absenteeism among members of the  
uniformed force." Steier Affirm., Exh A, at 1. The Directive  
provides, inter alia, that a correction officer who is out sick

more than 12 days in a 12-month period (excluding absences for certain specified reasons) may be classified as "chronic absent", and may incur the loss of one or more of the following discretionary benefits and privileges: (1) assignment to a steady tour; (2) assignment to a specified post or duties; (3) access to voluntary overtime; (4) promotions; (5) secondary employment; (6) assignment to preferential/special units or commands; and (7) transfers.

Defendants contend that this action is barred by res judicata and the doctrine of comity, and that the complaint fails to state a claim.

#### **Background**

In 1993, plaintiff's predecessor union president sued in federal court (U.S. Dist. Ct., SDNY) to invalidate a prior directive having the same purpose. Directive 2258R (effective April 12, 1993). The complaint there alleged that Directive 2258R violated the Union members' rights to due process and equal protection. That complaint did not allege a violation of state statutory law, although it did refer to Civil Service Law § 75 as the basis for plaintiff's claim that Directive 2258R implicated a constitutionally protected property right. By stipulation dated January 25, 1996, so ordered on January 29, 1996, the federal action was discontinued with prejudice. Israel v. Abate, No. 93 Civ. 3622 (JES).

In 1998, plaintiff Seabrook commenced an action in this court, alleging that Directive 2258R violated Civil Service Law §§ 75 and

76. Seabrook v. NYS Dept. of Correction, N.Y. Cty. Index No. 106695/98. In March 2000, after defendants had promulgated the current Directive, the parties agreed in a written stipulation that the action would be withdrawn and discontinued, as moot, without prejudice to the commencement of a new action, based on the Directive. On March 2, 2000, this Court issued an order that embodied the terms of that stipulation. Plaintiff commenced this action on May 10, 2000.

### I

Defendants assert that this action is barred by the resolution of the prior litigation. A party asserting the doctrine of claim preclusion (res judicata or merger and bar) as an affirmative defense has the burdens of pleading and proof.

The prior litigation must have concluded with a final resolution on the merits. See Siegel, NY Prac.3d ed. § 444. The subject claim must arise from the same nucleus of operative fact as a claim raised in the prior litigation. O'Brien v. City of Syracuse, 54 NY2d 353. The court of the prior litigation must have had jurisdiction over the claim sought to be precluded (i.e., the instant claim either was properly before the prior court or could have been). See Parker v. Blauvelt Volunteer Fire Co., Inc., 93 NY2d 343. The party bringing the instant claim must have had a full and fair opportunity to assert it in the prior litigation. People v. Evans, 94 NY2d 499, 502.

The effect of the prior litigation here must be analyzed by the transactional analysis approach, adopted by the Court of

Appeals in O'Brien v City of Syracuse, supra: "Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." Id. at 357. The doctrine of claim preclusion (res judicata) bars claims that could have been litigated, as well as those that were actually litigated.

The affirmative defense of res judicata may be raised, as here, when the prior litigation was resolved by stipulation. A stipulation of discontinuance with prejudice is final and has the same preclusive effect as a judgment on the merits (Schwartzreich v E.P.C. Carting Co., Inc., 246 AD2d 439, 541 [1st Dept], citing Nottenberg v Walper 985 Co., 160 AD2d 574, 575 [1st Dept]). Judgments of the federal courts are entitled to res judicata effect. Browning Ave. Realty Corp. v Rubin, 207 AD2d 263 (1st Dept); Murray v National Broadcasting Co., 178 AD2d 157 (1st Dept), app dismissed 79 NY2d 1036.

If a federal court dismisses a federal claim, but does not exercise jurisdiction over a state claim even if it might arguably be entertained as a pendent claim, the dismissal of the federal claim does not preclude a separate state action based on the state law claim. Van v Town of Warwick, et al., 249 AD2d 382 (2d Dept); Browning Ave. Realty Corp. v Rubin, 207 AD2d 263, supra; Creative Bath Products, Inc. v Connecticut General Life In. Co., 173 AD2d 400 (1st Dept), lv denied 79 NY2d 751. The rationale for this principle is that, in order for a claim to be barred by res

judicata, the party opposing preclusion must have had a full and fair opportunity to litigate the claim. See, Schwartz v Public Admr. of County of Bronx, 24 NY2d 65; Murray v National Broadcasting Co., 178 AD2d 157, supra. "In properly seeking to deny litigants two 'days in court', courts must be careful not to deprive [them] of one." Matter of Reilly v Reid, 45 NY2d 24, 28.

Thus, where a state law claim is not litigated in a federal action, either because the federal court declines to hear it, or because the federal claim is dismissed or discontinued, res judicata does not bar the state claim. The same reasoning applies to a state law claim that was not brought in the federal action (Lamontagne v Board of Trustees of the United Wire, Metal and Machine Pension Fund (183 AD2d 424 [1st Dept], lv denied 80 NY2d 759), especially where, as here, it would have proven incapable of being litigated, had it been brought.<sup>1</sup>

The instant state statutory claims were not before the federal court. They were not asserted there and, indeed, could not have been brought there, because these purely state statutory claims not concerning federal questions are not subject to federal jurisdiction. Accordingly, the federal stipulation did not affect,

---

<sup>1</sup> But see, LaVigna v Capital Cities/ABC, Inc., 245 AD2d 75 (1st Dept) (state law claim requiring same evidence as discontinued federal claim barred by res judicata). Although the La Vigna court cited Computer Assocs. Intl., Inc. v Altai, Inc., (126 F3d 365, 369 [2d Cir.], cert denied, 523 US 1106), that case did involve any state law claim and adhered to the principle that res judicata is inapplicable to a claim that could not have been litigated in an earlier action. In La Vigna, the first federal court lacked personal jurisdiction over the French defendant who sought to invoke res judicata.

and could not have affected, the instant state claim. The federal stipulation was "with prejudice" and thus has preclusive effect, but only as to the federal claims that were or could have been brought in that litigation.

The "'gravamen of ... wrong'" (Jefferson Towers, Inc. v Public Service Mut. In. Co., 195 AD2d 311, 313 [1st Dept] quoting, Lukowsky v Shalit, 110 AD2d 563, 566 [1st Dept], quoting Matter of Reilly v Reid, supra, 45 NY2d, at 29), at issue here is not the same as in the discontinued federal action. The federal action raised constitutional claims. This state court action raises statutory claims exclusively under New York law. Merely because plaintiff's predecessor cited the same state statute as the basis for the property right allegedly taken without due process, does not mean that the instant alleged state statutory violation was litigated, or could have been litigated, in the federal action.

Moreover, this action is not based on the same "transaction or series of transactions" (O'Brien v City of Syracuse, supra, 54 NY2d, at 357) as the federal action. The Directive differs in significant respects from Directive 2258R, which was at issue in the federal action. For example, under Directive 2258R, absences related to pregnancy were wholly excluded from the absences that could lead to classification as a "chronic absent." Under the Directive, that exclusion is limited by being made "subject to such limitations as the Department imposes." Steier Affirm., Exh. A, at 1.

By stipulating that the previous state action brought in this Court was moot, defendants implicitly acknowledged the significance of the differences between the Directive and its predecessor. Indeed, in negotiating that stipulation, this Court and the parties' counsel specifically discussed those differences, which would have rendered the then-pending prior state action moot. That stipulation was "without prejudice" and accordingly has no preclusive effect.

Respondents have not met their burden of proving entitlement to dismissal based on claim preclusion (res judicata). Neither plaintiff nor his predecessor, neither their union nor its members, had a full and fair opportunity to bring the alleged state statutory violation in the federal action. See Parker v. Blauvelt Volunteer Fire Co., Inc., supra.

The principles of comity have no application here. The claims raised are not peculiarly within the ken of the federal courts (Manufacturers Hanover Trust Co. v. Crossland Savings FSB, 177 AD2d 78); indeed, they are state claims uniquely within this Court's jurisdiction. The federal claims discontinued in the federal action are not raised in this action; plaintiff is not seeking collateral review of the federal court's order here; none of the possible resolutions of this action can interfere with the order or authority of the federal court.

The parties are entitled to analysis of the instant claims on the merits.

## II

Civil Service Law § 75(1) provides, in relevant part, that individuals covered by section 75 "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section." (Emphasis added). Civil Service Law § 75(3) specifies the available penalties, stating, in relevant part, that:

[p]ending the hearing and determinations of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service ... .

Civil Service Law § 75(2) sets forth mandatory procedures regarding a potential subject of such disciplinary action, and provides, inter alia, for written notice of charges, and the employee's right to representation. Civil Service Law § 76 provides for appeals from determinations made in disciplinary hearings.

The employee protections embodied in sections 75 and 76 can be modified by the terms of a collective bargaining agreement. Civil Service Law § 76(4); Matter of Delmage v Mahoney, 224 AD2d 688 (2d Dept), lv denied 88 NY2d 812.

Defendants acknowledge that the Directive was promulgated unilaterally, and that it does not afford certain of the protections that Civil Service Law §§ 75 and 76 provide to

employees.<sup>2</sup> However, defendants assert that those procedural protections are inapplicable, because the provisions of the Directive do not include any of the sanctions specified in CSL § 75(3).

By its terms, CSL § 75 requires the procedural protections that it specifies with regard to "disciplinary penalt[ies] provided in this section." The statute sets forth those substantive penalties with specific limitations, which may not be exceeded. See, Cepeda v Koehler, 159 AD2d 290 (1st Dept) (penalty consisting of forfeiture of 15 vacation days plus payment of \$1,500 fine held illegal); Carlstrom v Hauser, 54 AD2d 705 (2d Dept) (reducing 180-day suspension to two-month suspension). Moreover, no department subject to the Civil Service Law may take any of the actions specified in CSL § 75(3) and deny the employee the protections of CSL §§ 75(1) and (2) by claiming that the action is not one of those specified in the statute. Matter of Bailey v Susquehanna Valley Central School Dist. Bd. of Educ., 276 AD2d 963 (3d Dept 2000) (demotion, purportedly for lack of qualifications, was actually a demotion for misconduct, and subject to CSL § 75); Matter of Campbell v New York City Transit Auth., 253 AD2d 813 (2d Dept), lv denied 93 NY2d 805 (otherwise permissible transfer, if based upon specific misconduct, constitutes demotion subject to CSL § 75); Matter of Civil Serv. Employees Assoc., Inc. v Southhold Union Free School Dist., 204 AD2d 445 (2d Dept) (letter placed in

---

<sup>2</sup> The Union has filed an Improper Practice Petition concerning DOC's failure to bargain, with the New York City Office of Labor Relations.

teacher's file constitutes reprimand, not warning, because placed in file for punitive reasons).

CSL § 75 is not a complete listing of all permissible disciplinary measures. Rather, the enumerated substantive penalties are those which trigger the statute's procedure. Matter of Galatti v. County of Dutchess, 64 NY2d 1163, rearg. denied 65 NY2d 924 (change of a non-civil service "functional" title, without change in civil service title or grade, held not a demotion and thus not subject to CSL § 75). The Court of Appeals in Galatti emphasized the statutory language "provided in this section as limiting the applicability of the statutory hearing procedure, not the permissibility of the job reclassification. Id. at 1165, quoting CSL § 75(1). It therefore follows that other disciplinary measures, not enumerated by CSL § 75, including withdrawal of undisputedly discretionary benefits, are statutorily permitted without resort to the statute's procedural protections.

There is no statutory basis for expanding CSL § 75 beyond the kinds of penalties that are specified in that section. To do so would constitute impermissible judicial legislation — extending the reach of a statute beyond its plain, unambiguous wording, which is the best evidence of the Legislature's intent.

The Directive does not purport to authorize the imposition of any of the penalties set forth in CSL § 75(3) without compliance with the procedural protections mandated by CSL § 75, and plaintiff does not contend that any of the sanctions that the Directive does authorize, is substantively equivalent to any of the penalties

specified in CSL § 75(3). Accordingly, the Directive does not, on its face, violate CSL § 75. Neither does the Directive violate CSL § 76, which applies only to persons "aggrieved by a penalty or punishment ... imposed pursuant to [CSL § 75] ... ."

### III

Facial validity of the Directive does not leave the Union and its members entirely without recourse. The Union has already filed an Improper Practice Petition, administratively challenging DOC's unilateral imposition of the Directive. Implementation of the Directive in a specific individual case may be challenged as arbitrary and capricious. Moreover, if transfers pursuant to the Directive constitute demotions within the meaning of CSL § 75, or if actions pursuant to the Directive otherwise constitute substantive penalties enumerated by CSL § 75, they may be challenged in specific cases where appropriate. Such potential issues are not now before this Court.

### Conclusion

Accordingly, it is hereby

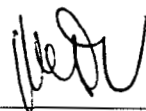
**ORDERED** that plaintiff's cross motion is denied; and it is further

**ORDERED** that defendants' motion for summary judgment is granted and the complaint is dismissed without costs; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Dated: 5/31/02

ENTER:



J.S.C.