

Matter of Maldarelli v Doherty
2002 NY Slip Op 30068(U)
October 29, 2002
Supreme Court, New York County
Docket Number:
Judge: Jonathan Lippman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ROBERT D. LIPPMANN
J.S.C. J.S.C.
Justice

PART 21

Maddarelli, Louis

- v -

John Roberts

INDEX NO. 104667/02

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. 2 57

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
SCANNED
NOV 14 2002

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Proceeding pursuant to article 76 and cross-motion decided in accordance with the accompanying decision, order & judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 10/29/02

Robert D. Lippmann

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
HON. ROBERT D. LIPPMANN J.S.C.

OCT 29 2002

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 21

-----X

In the Matter of the Application of
LOUIS MALDARELLI

Index No.104667/02

Petitioner,

For a Judgment pursuant to Article 78
of the Civil Practice Law and Rules

- against -

JOHN DOHERTY, as Commissioner of the
Department of Sanitation of the City of
New York,

DECISION, ORDER &
JUDGMENT

Respondent.

-----X

ROBERT D. LIPPMANN, J.

Proceeding pursuant to CPLR article 78 to vacate a determination of the Department of Sanitation, dated October 9, 2001, which terminated petitioner's employment on the ground that, upon his entry of a plea of guilty to the crime of Insurance Fraud in the Third Degree, he forfeited his position as a Sanitation worker pursuant to New York City Charter § 1116(a).

Facts

In May of 2000, Petitioner Louis Maldarelli was arrested on charges of Insurance Fraud in the Third Degree and Attempted Grand Larceny in the Third Degree. It was alleged that Petitioner, after being injured on the job in an "automobile-pedestrian accident", filed a claim for lost wages with the American Transit Insurance Company, even though he had received sick leave benefits during the time he was out of work as result of his injuries. Petitioner was subsequently indicted on charges of Insurance Fraud

in the Third Degree, Attempted Grand Larceny in the Third Degree, and four counts of Criminal Possession of a Forged Instrument in the Second Degree. On July 18, 2001, Petitioner entered a plea of guilty to the crime of Insurance Fraud in the Third Degree and was remanded to jail. It is undisputed that on that date he was a tenured Sanitation worker. On August 31, 2001, Petitioner was sentenced to a term of imprisonment of six months and to five years probation.

By letter dated October 9, 2001, addressed to Petitioner's home address, the Department of Sanitation ("DOS") notified Petitioner, in relevant part, as follows:

On July 18, 2001, your position as a New York City Sanitation Worker became vacant by operation of law upon entry of a plea of guilty to the crime of Insurance Fraud in the Third Degree, New York State Penal Law § 176.20, a D Felony, in the Supreme court of the State of New York, New York County. Your conviction of a crime involving a violation of your oath of office created the forfeiture of your position under New York City Charter § 1116(a).

"Accordingly, you ceased to hold the position of New York City Sanitation Worker on July 18, 2001 * * * ."

DOS records show that the letter was sent certified and registered mail on October 10, 2001. On that date, however, Petitioner was incarcerated at Rikers Island. Petitioner contends that he was not served with the notice of his termination until November 9, 2001. Petitioner was released from jail on November 16, 2001. He commenced this article 78 proceeding on March 6, 2002.

Petitioner argues that he could not be terminated from his employment without a hearing upon stated charges pursuant to Civil Service Law § 75. He contends that New York City Charter § 1116(a) is inapplicable to his conduct and that he is entitled to a hearing pursuant to Administrative Code § 16-106.

DOS cross-moved for a judgment to dismiss the proceeding as time barred. This court reserved decision on the cross-motion and allowed DOS to file a verified answer.

Discussion

A. Statute of Limitations

It is well settled that the Statute of Limitations period does not begin to run until petitioner receives notice of the final Administrative determination, and not upon the issuance thereof. Matter of Biondo v New York State Bd of Parole, 60 NY2d 832, 834 (1983) ; Matter of Warburton v Department of Correctional Servs., 251 AD2d 831, 832 (3rd Dept 1998). Notably, DOS does not deny that it was aware of Petitioner's incarceration on October 10, 2001, nor does it challenge Petitioner's assertion that he did not receive notice until November 9, 2001. Accordingly, the court declines to dismiss the proceeding on the ground that it is untimely.

B. City Charter § 1116(a)

New York City Charter § 1116, entitled "Fraud; neglect of duty; willful violation of law relative to office" provides in relevant part as follows:

a. Any council member or other officer or employee of the city who shall wilfully violate or evade any provision of law relating to such officer's office or employment, or commit any fraud upon the city, or convert any of the public property to such officer's own use, or knowingly permit any other person so to convert it or by gross or culpable neglect of duty to allow the same to be lost to the city, shall be deemed guilty of a misdemeanor and in addition to the penalties imposed by law and on conviction shall forfeit such office or employment, and be excluded forever after from receiving or holding any office or employment under the city government.

DOS maintains that upon entering a plea of guilty to the felony of Insurance Fraud in the Third Degree, Petitioner forfeited his position pursuant to City Charter § 1116. This argument appears to assume that the facts underlying Petitioner's conviction for insurance fraud also support a determination by DOS that Petitioner wilfully violated or evaded a provision of law relating to his employment and/or committed a fraud upon the City. It is noted that a copy of Petitioner's plea allocution has not been supplied to this court.

Petitioner argues that City Charter § 1116(a), enacted in 1976, cannot be read to deprive him of his right to a hearing pursuant to Civil Service Law § 75, which was enacted in 1958. Petitioner relies on Meringolo v Jacobson, 173 Misc2d 650 (Supreme Ct, NY County, affd, 256 AD2d 20 (1st Dept 1998), which found that Administrative Code § 9-112, by permitting the suspension without pay of a member of the uniformed forces (other than a police

officer) pending determination of criminal charges violated the previously enacted Civil Service Law § 75(3), which limits such suspensions to a period not to exceed 30 days. Petitioner also maintains that Administrative Code § 16-106, relating to removal and suspension of Department of Sanitation employees, mandates that there be a hearing prior to imposition of a disciplinary penalty.

As the IAS Court observed in Meringolo, the issue before that court was not the merits of the challenged Administrative Code provision, but rather the validity of a local law that sought to circumvent the protections of the Civil Service Law. Thus, the subsequently enacted local law was invalid because it violated Civil Service Law § 75. Similarly, DOS may not to invoke the subsequently enacted City Charter § 1116(a) to deprive Petitioner of a hearing pursuant to Civil Service Law § 75. Petitioner's termination was therefore improper because it violated his right to a hearing under Civil Service Law.

It should be noted, however, that City Charter § 1116(a) as does not authorize DOS to terminate petitioner based on his conviction for insurance fraud.. Rather, City Charter § 1116(a) plainly states that an officer or employee who commits any of the specific acts prohibited therein shall be deemed guilty of a misdemeanor, and, in addition to any other penalties that may be imposed by law, a conviction will result in the forfeiture of the officer's or employee's position. There is no indication that DOS

ever brought criminal charges against the petitioner for violating City Charter § 1116(a), and it is plain that a violation of City Charter § 1116(a) constitutes a separate crime. Thus, petitioner cannot be found to have forfeited his employment pursuant to City Charter § 1116(a), without having been charged and convicted thereunder.

C. Public Officers Law § 30

DOS further maintains that Petitioner's position became automatically vacant upon his being convicted of a felony pursuant to Public Officers Law § 30(1)(e). Notably, DOS did not, in the notice it sent to Petitioner advising him of the forfeiture of his position state that Public Officers Law § 30(1)(e) was the basis for his termination.

It has long been the rule that Sanitation workers are not public officers but public employees. Tepidino v City of New York, 50 Misc 324 (App Term 1906); see also, 18A NY Jur2d Civil Servants § 20. More recent case law distinguishes public officers from subordinate public employees by defining a public officer as "a person whose position is created, and whose powers and duties are prescribed, by statute and who exercises a high degree of initiative and independent judgment * * * The creation and filing of the position must be mandatory (citations omitted)." Matter of County of Suffolk v State of New York, 138 AD2d 815, 816 (3rd Dept 1988), affd,

73 NY2d 838 (1988.) Clearly, it cannot be said that the position of a Sanitation worker falls within that definition.

The question before this Court is not whether DOS had a basis for terminating Petitioner but whether DOS complied with the proper procedure for doing so. It does not appear that DOS ever brought charges or commenced disciplinary proceedings against Petitioner based on the conduct underlying his conviction for Insurance Fraud in the Third Degree, and there is no indication that DOS ever sought to have criminal charges brought against Petitioner for the alleged violation of City Charter § 1116(a).

There remains, however, an issue not adequately addressed or documented by the parties, that is, whether Petitioner is entitled to back pay from the date of his termination in light of his incarceration during the period from July 18, 2001 to November 16, 2001, the date petitioner states he was released from prison. The parties are directed to submit memorandum of law on the issue and any supporting documentation and to appear before this court for a hearing on the date and time indicated below.

Accordingly, it is

ADJUDGED that the petition is granted as follows: .

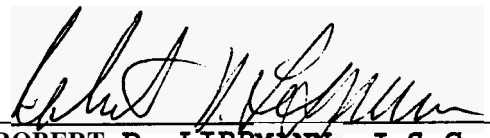
The determination of respondent New York City Department of Sanitation, dated October 9, 2001, made without a hearing, terminating petitioner effective July 18, 2001, is vacated and

annulled, and petitioner is reinstated to his position as of July 18, 2001, and it is further

ORDERED that the parties are directed to appear for oral argument and a hearing on November 22, 2002 at 10 a.m. at 80 Centre Street, Room 280, to determine the amount of back pay to which petitioner is entitled, with memoranda of law and supporting documentation, if any, to be submitted by November 15, 2002.

This constitutes the decision, order and judgment of the court.

Dated: Oct 29, 2002
OCT 29 2002


ROBERT D. LIPPMANN, J.S.C.
HON. ROBERT D. LIPPMANN
J.S.C.