

**Matter of Eldaghar v New York City Housing
Authority**

2006 NY Slip Op 30516(U)

February 9, 2006

Supreme Court, New York County

Docket Number: 103837/05

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN, J.S.C.

Justice

PART 57

Index Number : 103837/2005

ELDAGHAR, ASEM

vs

N.Y.C. HOUSING AUTHORITY

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Art 78
Is motion to/for _____

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

Notice of Cross-Motion

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *cross-motion* is denied
as per accompanying decision/order dated 2/9/06.

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

FILED

FEB 22 2006

NEW YORK COUNTY CLERK'S OFFICE

Dated: _____

2/9/06

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
In the Matter of the Application of
ASEM ELDAGHAR,

Index No.: 103837/05

Petitioner,

DECISION/ORDER

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules,

- against -

NEW YORK CITY HOUSING AUTHORITY
And Chairman of New York City Housing
Authority,

Respondents.

FILED
FEB 22 2006
NEW YORK
COUNTY CLERK'S OFFICE

_____ x
In this Article 78 proceeding, petitioner Asem Eldaghar challenges the determination of respondent New York City Housing Authority (“NYCHA”) denying petitioner’s request for reinstatement to employment with NYCHA. NYCHA moves to dismiss the petition on the ground that it is barred by the statute of limitations or, alternatively, fails to state a cause of action.

It is undisputed that petitioner was employed as an Assistant Architect with NYCHA from February 21, 1990 until he resigned, effective February 5, 2001, in order to transfer to a position as City Planner with the City of New York Department of Citywide Administrative Services (“DCAS”). Petitioner was terminated from his position with DCAS during his probationary period. By letter dated December 6, 2001, petitioner requested reinstatement to

NYCHA. By letter dated March 19, 2002, NYCHA denied this request for reinstatement. This letter did not state any basis for the denial. By letter dated July 29, 2004, petitioner again requested reinstatement to NYCHA. By letter dated August 12, 2004, NYCHA responded to the request, stating: "As you were previously notified by our letter dated March 19, 2002 (copy enclosed), the New York City Housing Authority denied your request for reinstatement." By letter dated December 16, 2004, petitioner made a further request for reinstatement to NYCHA. By letter dated December 22, 2004, NYCHA responded to the request, stating: "As you were previously notified by our letters dated March 19, 2002 and August 12, 2004 (copies enclosed), the New York City Housing Authority denied your request for reinstatement." This proceeding was commenced within four months of the December 22, 2004 denial.

NYCHA claims that the proceeding was required to have been commenced within four months of its March 19, 2002 denial of petitioner's request for reinstatement; that the subsequent denials were denials of requests for reconsideration; and that a denial of a request for reconsideration does not revive the statute of limitations. In opposition, petitioner contends that NYCHA regulations permit an employee who has resigned to request reinstatement for up to four years from the date of resignation, do not limit the number of requests for reinstatement, and should be considered under changed conditions as of the time of the request. He thus contends that his two requests for reinstatement in 2004 were new requests, not requests for reconsideration.

It is well settled that a request for reconsideration of an administrative determination does not extend the applicable four-month statute of limitations for commencement of an Article 78 proceeding to review the determination. (See Matter of DeMilio v Borghard, 55 NY2d 216

[1982]. Accord Matter of Lubin v Board of Educ., 60 NY2d 974 [1983], cert denied 469 US 823 [1984]; Raykowski v New York City Dept. of Transp., 259 AD2d 367 [1st Dept 1999].)

However, this rule is not without exceptions. The statute of limitations is revived where the agency undertakes a “fresh, complete and unlimited examination into the merits.” (Camperlengo v State Liquor Auth., 16 AD2d 342, 344 [1st Dept 1962]; Chisholm v Martinez, 277 AD2d 166, 167 [1st Dept 2000].) The statute of limitations also recommences “where the second hearing is mandated or where a different factual presentation is invited by the authority in question or entertained by it.” (Matter of Davis v Kingsbury, 30 AD2d 944, 945 [1st Dept 1968] [internal citations omitted], affd 27 NY2d 567 for reasons stated below [1970].)

“A motion to reconsider generally seeks the same relief, and advances factual and legal issues that were previously litigated at the administrative level.” (Matter of Yarbough v Franco, 95 NY2d 342, 347 [2000].) Thus, where an employee’s request for reconsideration of an agency decision to terminate his or her employment has not been found to toll the statute of limitations, the termination decision was based on a particular set of facts that existed as of the date of the termination, and the employee merely sought reconsideration based on the same facts. (See DeMilio v Borghard, 55 NY2d 216, supra [and authorities cited above].) As the Court of Appeals has explained, “[t]he rule that the four-month limitations period begins to run on the date that the determination to be reviewed becomes final and binding would be completely emasculated if the petitioner could extend the commencement of this period by merely requesting that reconsideration be given to a prior decision because it is asserted that the earlier decision was based upon facts which were misconstrued.” (DeMilio, 55 NY2d at 222.)

Applying these principles, the court finds, based on NYCHA’s own rules as well as the

nature of petitioner's requests for reinstatement, that the statute of limitations is not a bar to this proceeding. As NYCHA concedes, the Personnel Rules and Regulations of the City of New York ("Personnel Rules") governed its reinstatement decision. Section 6.2.1 of the Personnel Rules provides that an employee may be reinstated to a position from which the employee has resigned, if vacant, or to a similar vacant position within the same agency, subject to the willingness of the head of the agency to which the employee has applied for reinstatement. Under Section 6.2.3, the reinstatement must be accomplished within four years of the date of resignation, provided that, as here, the employee has served in the civil service for at least four years.¹

These Personnel Rules permit an employee to apply for reinstatement for up to four years, and do not by their terms limit the number of times an employee may apply for reinstatement. They permit reinstatement only to a vacancy, and therefore are consistent with more than one application for reinstatement where there is no vacancy at the time of the initial application.

¹Section 6.2.1 provides as follows:

(a) An employee who has completed a probationary term in a permanent position in the competitive or labor class, and who has resigned or retired therefrom may be reinstated with the approval of the commissioner of citywide administrative services to:

(1) the position from which the employee has resigned or retired, if vacant, or to any similar vacant position in the agency in which the employee was employed; or
(2) to a position in another agency to which the employee would have been eligible for transfer.

(b) Such reinstatement may be made only if the separation from employment was without fault or delinquency on the employee's part and the head of the agency to whom the employee has applied for such reinstatement is willing to reinstate the employee.

Section 6.2.3 provides in pertinent part:

(a) Such reinstatement must be accomplished within a period of time equivalent to the time the employee has actually served in the civil service of New York City, but in no event shall such period for reinstatement be less than one year nor more than four years from the date of resignation or retirement [subject to exceptions not here relevant].

Even if there is a vacancy at the time of the initial application and the head of the agency is not willing to reinstate the employee to that vacancy, the Rules are consistent with subsequent applications, within the four-year period, in order to obtain reinstatement to a vacancy in another position which may have become available and to which the head of the agency may be willing to reinstate the employee.

While NYCHA characterizes petitioner's 2004 requests as requests for reconsideration, this characterization is not supported by either the Personnel Rules or the language of the requests. Significantly, NYCHA does not take the position, even in the instant proceeding, that the Personnel Rules prohibit an employee from re-applying for reinstatement in order to determine whether circumstances may have changed and a vacancy may have become available for which the head of the agency may find the employee suitable.² Moreover, there is no evidence in this record that petitioner's 2004 requests were not requests made for such purpose. The requests did not purport to seek reconsideration, and petitioner did not reargue the facts underlying NYCHA's initial denial in March 2002. Nor did he have any basis on which to do so, as the March 2002 denial did not state NYCHA's reasons for its refusal to reinstate petitioner. The March 2002 denial also did not determine that petitioner was ineligible to re-apply, and did not make any factual finding that poor performance or any other conduct on petitioner's part would have barred his reinstatement even if a vacancy had existed in the position (assistant architect) for which petitioner had applied. Under these circumstances, the court holds that

²NYCHA's 2004 denials of petitioner's 2004 requests for reinstatement in effect declined to entertain petitioner's new requests based on the existence of the March 2002 denial. Tellingly, however, NYCHA does not assert in the instant proceeding that the Personnel Rules prohibit new requests for reinstatement brought in the hopes of new vacancies, or that NYCHA, in declining to consider petitioner's 2004 requests, was following general agency practice.

petitioner's 2004 requests for reinstatement were permissible under the Personnel Rules as new requests based on potentially changed circumstances as to vacancies at NYCHA, rather than requests for reconsideration.³

This case is therefore distinguishable from cases in which there was no evidence that there was any contract or rule in existence which permitted the employee to re-apply for reinstatement, and in which the employee's subsequent requests for reinstatement were therefore treated as requests for reconsideration that did not recommence the statute of limitations.

(Compare Aranoff v Fordham Univ., 171 AD2d 434 [1st Dept 1991], lv denied 78 NY2d 858; Matter of Seidner v Town of Colonie, Bd. of Zoning Appeals, 79 AD2d 751 [3d Dept 1980], affd 55 NY2d 613 [1981] [mere negotiations attempting to reopen a matter for further proceedings do not extend time within which to seek review].) Rather, the case is one in which a new application for reinstatement is invited by the agency's procedures based on potentially new circumstances at the agency (here, vacancies), and in which the new application is neither conditioned upon any requirement that the employee show any new or additional qualifications on the employee's part, nor based on any reargument of the facts underlying the initial denial. (Compare Davis v Kingsbury, 30 AD2d 944, affd 27 NY2d 567, supra.)

Finally, this case does not implicate the policy against permitting an employee to extend

³The court's holding is not that the Personnel Rules would permit an employee to make a subsequent request for reinstatement if the initial request had been denied based on the employee's conduct or qualifications. If NYCHA had, for example, made a finding that it would not reinstate an employee to a particular position based on the employee's poor performance prior to resignation, the subsequent request for reinstatement would appear as a request for reconsideration, at least as to the particular position to which the head of the agency had declined to reinstate the employee. That, however, is not the case here, as NYCHA made no finding denying petitioner's initial request based on his conduct.

the statute of limitations indefinitely merely by seeking reconsideration of an agency's prior decision. (DeMilio, 55 NY2d at 222.) The Personnel Rules impose a cut-off date as they do not permit applications for reinstatement more than four years after the date of resignation.

As NYCHA thus fails to show that petitioner's December 2004 application was a request for reconsideration, it fails in its burden of demonstrating that the statute of limitations bars this Article 78 proceeding.

Turning to the merits, NYCHA argues that the petition fails to state a cause of action because petitioner's reinstatement to NYCHA, after his resignation, was a matter within the sole discretion of the appointing officer. NYCHA cites settled authority that resignation severs the employment relationship, and that reinstatement therefore requires the voluntary exercise of executive discretion by the appointing officer. (Doering v Hinriches, 289 NY 29 [1942]; Spurling v Police Dept. of the City of New York, 49 AD2d 823 [1st Dept 1975], appeal dismissed 38 NY2d 826; Matter of McGill v D'Ambrose, 58 AD2d 604 [2d Dept 1977].)

NYCHA ignores, however, that the fact that an act is discretionary does not mean that it is unreviewable pursuant to CPLR 7803(3). (Matter of Anonymous v Commissioner of Health, 21 AD3d 841, 843 [1st Dept 2005]; Matter of Valle v Buscemi, 233 AD2d 334 [2d Dept 1996][reviewing denial of reinstatement to civil service position under arbitrary and capricious standard].)

Moreover, the precept that reinstatement is discretionary presupposes that the resignation was "a voluntary act." (See McGill, 58 AD2d at 604.) Petitioner contends that his resignation was not voluntary and that he was required to resign from his position at NYCHA in order to transfer to a better position at DCAS. (Petition, ¶ 8; Aff. In Opp., ¶ 3.) Petitioner also

* 9]

details inquiries he made about his right to reinstatement before he went ahead with the transfer. He attests that on or about January 27, 2001, Kenneth Eisenstat, Assistant Director for Personnel at the Design Department of NYCHA, "told petitioner that he must resign in order to take a position at DCAS," and "further told petitioner that he is entitled to reinstatement in case he wants to come back regardless of the reason. Eisenstat did not mention that reinstatement is discretionary." (Aff. In Opp. ¶ 16.) Petitioner further attests that he called his Union representative about a leave of absence in lieu of resignation and she informed him that Linda Jaffet, an employee at NYCHA Human Resources, stated that petitioner must resign in order to work at DCAS, but would be eligible for reinstatement to his former position at NYCHA within four years, and would be reinstated with full seniority if he requested reinstatement within one year. (Id., ¶ 17-18.) Petitioner attests that based on these understandings, he signed a NYCHA form entitled "Resignation Letter." (Id., ¶ 19.) He also in effect asserts that the resignation letter was misleading, as it referred to reinstatement, without any mention that reinstatement was discretionary.

The petition, as supplemented by the affidavit submitted in opposition to NYCHA's cross-motion, thus alleges an equitable estoppel, although the claim is not expressly denominated as such. While it is settled that an estoppel may not ordinarily be invoked against a municipal agency acting in a governmental capacity (Matter of New York State Med. Transporters Assn. v Perales, 77 NY2d 126 [1990]; Matter of Parkview Assocs. v City of New York, 71 NY2d 274 [1988], appeal dismissed and cert denied 488 US 801), "[a] municipal agency can be equitably estopped from taking actions within its realm of discretion, as opposed to actions that are legally mandated." (Matter of Brady Props., Ltd. v New York City Loft Bd., 269 AD2d 137, 139-140 [1st

Dept 2000]; Walter v City of New York Police Dept., 256 AD2d 8 [1st Dept 1998].)

It is undisputed that reinstatement of an employee who has resigned is a matter within the agency's discretion. Further, the petition pleads the elements of an estoppel, as it alleges a misrepresentation by the agency upon which petitioner relied to his detriment. (See Simcuski v Sacli, 44 NY2d 442, 449 [1978]; Kaufman v Cohen, 307 AD2d 113 [1st Dept 2003].)

The petition presents a picture of an employee who was concerned about the loss of his tenure and seniority and transferred from one City agency to another only after receiving false and misleading representations from a high level officer and other employees at NYCHA that he would have a right to reinstatement in the event the new position did not work out. Petitioner does not rely on conclusory assertions but supplies evidentiary details as to the names of the NYCHA employees who allegedly made such representations and the dates and substance of the conversations. There is also an issue as to whether the Resignation Letter (Ex. A to Petition) that petitioner signed, viewed against the alleged representations, created a false impression that reinstatement was a matter of right. The Resignation Letter contained a blank, which petitioner checked, showing that the resignation was due to acceptance of appointment in another City agency, and included the following pre-printed statement: "It is my understanding that in accordance with Rule 6.2.3 of the Rules and Regulations of the City Personnel Director, reinstatement must be accomplished within a period of time equivalent to the time an employee has actually served in the civil service of New York City, but in no event shall such period be less than one year nor more than four years from the date of resignation." The Resignation Letter thus makes no reference to Personnel Rule 6.2.1 which clearly indicates that reinstatement is discretionary, and instead refers only to Rule 6.2.3 which states that reinstatement "must" be accomplished within four years.

Under the rare circumstances of this case, the court concludes that petitioner raises a triable issue of fact as to whether NYCHA is equitably estopped to deny reinstatement to petitioner.


It is accordingly hereby ORDERED that respondents' cross-motion to dismiss the petition is denied; and it is further

ORDERED that NYCHA shall serve an answer to the petition within twenty days of the date of entry of this order; and it is further

ORDERED that the parties shall appear for a status conference in Part 57 of this Court, Room 328, at 80 Centre Street, New York, New York, on March 16, 2006, at 11:30 a.m..

This constitutes the decision and order of the court.

Dated: New York, New York
February 9, 2006


MARCY FRIEDMAN, J.S.C.

FILED
FEB 22 2006
NEW YORK
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