

<b>Marcel v New York City Health and Hosps. Corp.</b>
2007 NY Slip Op 31838(U)
June 19, 2007
Supreme Court, Queens County
Docket Number: 0002895/2007
Judge: David Elliot
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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14  
Justice

PAUL MARCEL x Index  
Number 2895 2007

Petitioner,  
-against- Motion  
Date April 3, 2007

FOR A JUDGMENT PURSUANT TO ARTICLE 78 Motion  
OF THE CIVIL PRACTICE LAW AND RULES, Cal. No. 12  
AND SECTION 75, 76 OF THE CIVIL  
SERVICE LAW,

NEW YORK CITY HEALTH AND HOSPITAL Motion  
CORPORATION AND QUEENS HOSPITAL Seq. No. 1  
CENTER,

Respondents.  
x

The following papers numbered 1 to 13 read on this Article 78 proceeding by Paul Marcel, petitioner pro se, for a judgment restoring him to respondents' payroll retroactive to July 8, 2006, and all days beyond the 30-day suspension which commenced on June 8, 2006, pursuant to CPLR 7803(1)(3) and Civil Service Law § 75(2) and (3).

Papers  
Numbered

Order to Show Cause - Affidavit - Verified Petition - Exhibits (A-B) .....	1-5
Verified Answer - Affidavit -Exhibits (1-12) .....	6-10
Reply Affidavit .....	11
Memorandum of Law .....	12-13

Upon the foregoing papers it is ordered that this Article 78 proceeding is determined as follows:

At the outset, as Mr. Marcel's reply affidavit is neither signed nor notarized, it will not be considered by the court.

Petitioner pro se Paul Marcel was appointed to the non-competitive title of Assistant Coordinating Manager (ACM) on February 17, 2004 by respondent New York City Health and Hospitals Corporation (HHC), and was assigned to Queens Hospital Center as

the Fire Safety Director in the Safety Management Section. The title of Fire Safety Director is an in-house title. Mr. Marcel completed a 12-month probationary period as an ACM and obtained certification from the New York City Fire Department in order to retain his position as Fire Safety Director. On June 7, 2006, Mr. Marcel was arrested and charged with unlawfully dealing with fireworks (Penal Law § 270.00). Following his arrest, Mr. Marcel was suspended without pay effective June 8, 2006. On November 21, 2006, Mr. Marcel entered a guilty plea, was fined \$1,000.00, and received a conditional discharge of one year. On January 8, 2007, the hospital preferred charges of gross misconduct against Mr. Marcel. A Step 1A Informal Conference was held on January 9, 2007, pursuant to a collective bargaining agreement, and on January 11, 2007, the charges against Mr. Marcel were substantiated and his employment was terminated.

Mr. Marcel commenced this proceeding on January 31, 2007, and seeks a judgment directing respondents to restore him to the payroll retroactive to July 8, 2006, pending a final hearing and determination of the administrative charges. Petitioner asserts that Civil Service Law § 75(2) and (3) are applicable here, and that respondents' refusal to restore him to the payroll after a 30-day suspension was unlawful, and arbitrary and capricious.

In 1969, the New York City Health and Hospitals Corporation Act was enacted, creating the HHC, for the purpose of operating the City's municipal hospitals (Unconsol Law § 7385[12] [Health and Hospitals Act § 5(12)]). Section 7385(12) gives HHC power "[t]o employ such other employees as may be necessary and except as otherwise provided herein to promulgate rules and regulations" governing personnel and to "fix their qualifications" and "other terms of employment." Section 7390(1) [Health and Hospitals Act § 9(1)] describes this "except as otherwise provided" limitation as requiring HHC to follow the Civil Service Law and all "other applicable provisions of local or general laws relating to civil service personnel" until such time as HHC adopted its own bylaws, rules and regulations, which it did in 1973 (see N.Y. City Health & Hosps. Corp. v Council of N.Y., 303 AD2d 69, 78 [2003]). Thus, HHC's Personnel Rules and Regulations are controlling here, rather than the provisions of the Civil Service Law.

Mr. Marcel, as an ACM, holds a non-competitive title, pursuant to the HHC's Plan of Title and the relevant collective bargaining agreement. Upon completion of a one-year probationary period, Mr. Marcel became a permanent non-competitive employee, pursuant to the definitions contained in HHC's rules. Employee discipline and

hearing rights are contained in Section 7.5.1 of the HHC's Rules, and provide as follows:

"a person described in paragraphs a), b) or c) of this section shall not be removed or otherwise subjected to disciplinary penalty except for incompetency or misconduct shown after hearing upon stated charges.

a) a person holding a position by permanent appointment in the competitive class, or

b) a person holding a position by permanent appointment in the non-competitive or labor class who is an honorably discharged member of the armed forces and who served on active duty during times of war as defined in Section 85 of the Civil Service Law.

c) an employee holding a position in the non-competitive class other than a position designated as confidential, who since his/her last entry into service has completed at least five (5) years of continuous service in the non-competitive class position."

Section 7.5.2 of HHC's Rules provide that: "Pending the hearing and determination of charges of incompetency or misconduct, the employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days." This provision is consistent with Civil Service Law § 75(3), and is only applicable to employees who are entitled to a hearing.

Neither HHC's Personnel Rules and Regulations, nor the Collective Bargaining Agreement in effect on June 8, 2006, prohibit the HHC from suspending an employee without pay for more than 30 days where the employee is not entitled to a disciplinary hearing. Since Mr. Marcel held a position in a non-competitive class for less than five years and does not claim veteran status, he was not entitled to a disciplinary hearing, and, therefore, he could be suspended without pay for a period greater than 30 days. HHC suspension of Mr. Marcel, without pay, for more than 30 days, therefore, was neither arbitrary nor capricious, or an abuse of discretion, nor contrary to law.

In view of the foregoing, petitioner's request for a judgment directing respondents to restore him to the payroll for the period

of July 8, 2006 to the date of termination on January 11, 2007, is denied, and the petition is dismissed.

This constitutes the judgment of the court.

Dated: June 19, 2007

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J.S.C.