

Matter of Fusina v State Univ. of N.Y.

2007 NY Slip Op 31958(U)

July 5, 2007

Supreme Court, Albany County

Docket Number: 0040707/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of
CAROL A. FUSINA,

Petitioner,

-against-

THE STATE UNIVERSITY OF NEW YORK,
THE BOARD OF TRUSTEES OF THE STATE
UNIVERSITY OF NEW YORK, James M. Mancuso
as Director of Employee Relations at the State
University of New York at Albany, and J. Frank
Wiley as Chief of University Police at the State
University of New York at Albany,

Respondents,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7383 Index No. 407-07

Appearances: Ennio J. Corsi, Esq.
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 District Council 82, AFSCME, AFL-CIO
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 (Matthew P. Ryan, Esq. of Counsel)

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Attorney General
State of New York
Attorney For Respondent
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Albany, New York 12224

(Richard Lombardo,
Assistant Attorney General of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner commenced the instant CPLR Article 78 proceeding to review a determination which terminated her probationary period of employment as a University Police Officer. Respondent has moved to dismiss on objections in point of law on the grounds that the petitioner failed to exhaust her administrative remedies and that the proceeding is barred by the statute of limitations.

By letter dated September 8, 2006 petitioner was informed that her probationary period of employment as a University Police Officer at SUNY at Albany was being terminated effective September 18, 2006. Petitioner thereafter submitted a grievance challenging the termination on the grounds that she was terminated without due process and that she had been discriminated against on the basis of age and gender. The grievance was denied on the ground that petitioner was no longer an employee and had no right to file a grievance. Petitioner made requests for determinations at steps two and three of the grievance process and ultimately requested arbitration.

The instant proceeding is based upon a claim that respondents improperly imposed a probationary period notwithstanding the fact that petitioner had a permanent position as a University Police Officer. Respondents contend that petitioner failed to exhaust her

administrative remedies because she did not grieve the issue of the imposition of a probationary period and commenced the instant proceeding prior to issuance of the step three determination and prior to a determination in the arbitration proceeding. However, in order to warrant dismissal for failure to exhaust administrative remedies, respondents must show that petitioner had an appropriate administrative remedy available. It has been held that termination from a probationary position is not grievable (see Matter of Kurey v New York State School for Deaf, 227 AD2d 829, 832-833 [3d Dept 1996]). As such, the fact that petitioner did not grieve the issue of the imposition of a probationary period and commenced the instant proceeding before the grievance process completed does not constitute a failure to exhaust available administrative remedies.

The instant proceeding was commenced by filing the notice of petition and petition on January 18, 2007. Respondents contend that because petitioner did not commence the instant proceeding within four months of the date of the letter advising her that she was being terminated the proceeding is untimely. However, the time within which to commence an Article 78 proceeding challenging termination of a probationary position runs from the notice of termination, or the effective date of termination, whichever is later (see Matter of Rakiiecki v State Univ. of N. Y., 31 AD3d 1015 [3d Dept 2006]). In the instant proceeding, the effective date of petitioner's termination was September 18, 2006, several days after the date of the letter. The instant proceeding was commenced within four months of the effective date of the termination.

In the alternative, respondent contends that the statute of limitations should run from October 12, 2005, the date of the letter which notified petitioner that she must serve a probationary period. However, in order to commence running of the statute of limitations, the administrative determination must be final and binding.

“First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be ... significantly ameliorated by further administrative action or by steps available to the complaining party” (Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30, 34 [2005]; see also Matter of Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 194 [2007]).

Clearly the imposition of a probationary period did not have any actual, concrete impact upon petitioner. Moreover, any possible future impact could have been ameliorated by expiration of the probationary period without termination. As such, the statute of limitations defense is without merit.

Accordingly it is

ORDERED, that the motion to dismiss is hereby denied, and it is further

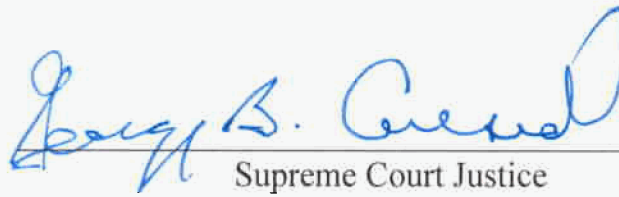
ORDERED, that respondent shall serve an answer within 30 days of the date hereof.

The proceeding shall thereafter be renoticed for August 17, 2007.

This shall constitute the decision and order of the Court. All papers are returned to the attorneys for the petitioner who are directed to enter this Decision/Order without notice and to serve respondents with a copy of this Decision/Order with notice of entry.

ENTER

Dated: July 5, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition dated January 18, 2007; Petition verified January 18, 2007 with Exhibits A and B annexed;
2. Memorandum of Law dated January 23, 2007;
3. Notice of Motion dated April 5, 2007; Affidavit of James Mancuso sworn to April 5, 2007 with Exhibits A-M annexed;
4. Memorandum of Law dated April 5, 2007;
5. Affirmation of Matthew P. Ryan, Esq. dated April 11, 2007 with Exhibits A and B annexed;
6. Memorandum of Law dated April 11, 2007;
7. Reply Affirmation of Richard Lombardo dated April 20, 2007.