Matter of Wiggins v Southampton Union Free School Dist.
2007 NY Slip Op 32886(U)
September 12, 2007
Supreme Court, Suffolk County
Docket Number: 0024517/2006
Judge: Peter Fox Cohalan

SHORT FORM ORDER

INDEX # 24517-06
RETURN DATE: 9-28-06
MOT. SEQ. # **001**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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In the matter of the Application of RONNIE WIGGINS, Petitioner for an Order, pursuant to CPLR Article 78, reviewing, and upon such review, reversing the decision of The Board of Education of the Southampton Union Free School District dated May 23, 2006, which terminated Petitioner's employment,

Petitioner,

-against-

SOUTHAMPTON UNION FREE SCHOOL DISTRICT,

Respondent.
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CALENDAR DATE: March 28, 2007
MNEMONIC: MG

PLTF'S/PET'S ATTORNEY:

McGIFF & ZUKOWSKI
440 W. Main St.
Patchogue NY 11772

DEFT'S/RESP ATTORNEY:

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Upon the following papers numbered 1 to 18 read on this Article 78 proceeding ; Notice of Motion/Order to Show Cause and supporting papers 1-8 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 9-18 ; Replying Affidavits and supporting papers ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this Article 78 proceeding brought by the petitioner, Ronnie Wiggins, to annul, vacate and reverse a determination by the respondent, Southampton Union Free School District, which decision terminated the petitioner's employment with the respondent is hereby granted, the determination of the respondent is vacated and annulled as the penalty is disproportionate to the offense proved and the matter is remanded back to the respondent to determine an appropriate punishment consistent with the decision of this Court.

The petitioner was employed by the respondent, Southampton Union Free School District (hereinafter "School District"), as a groundsman and had worked for the School District for approximately seventeen (17) years. The disciplinary proceeding resulting in the dismissal of the petitioner arose from charges by the School District that the petitioner failed to fill out a MV-104 form when directed to do so by his superior, Randall Dobler (hereinafter Dobler), the Director of Operations at the School District.

The facts indicate that on Sunday, February 12, 2006, the petitioner was called to work (not his normal working day) to help remove snow from the grounds of the School District. The petitioner was operating a school owned dump truck and during the snow removal operation, the petitioner's vehicle came into contact with the private truck of another employee, Eugene Jacobs' (hereinafter Jacobs), which was parked in the parking lot being cleared of snow. The petitioner claims it was a minor tap or bump resulting in a small dent in the tailgate, described by Dobler as "a squarish looking impact point that had gone in fairly

deeply..". However, Jacobs testified at the disciplinary hearing that he told the petitioner, "It's not really that bad, you know...." but Jacobs did report the incident the next day to Dobler. The petitioner testified at the same hearing that Jacobs said "its just a scratch... no big deal." and in a statement said he believed that the matter would be resolved between them without a report.

However, the next day, Monday, February 13, 2006, Jacobs informed Dobler of the accident and on Tuesday, February 14, 2006, Dobler directed the petitioner to fill out a New York State MV-104 accident form. Benjamin L. Herzweig, Esq., the hearing officer, at the disciplinary hearing took judicial notice that the form is required to be completed and filed within ten (10) days of the incident. The petitioner did not fill out the form on Wednesday, February 15th and on Thursday, February 16, 2006, the petitioner was reassigned to his home with pay pending an investigation by the respondent. The petitioner filled out a completed MV-104 and submitted it on Friday, February 17, 2006.

The School District brought disciplinary charges against the petitioner on March 15, 2006 for allegedly refusing to complete paperwork in a timely manner when directed to do so, for denying the incident occurred and for responding untruthfully and was suspended without pay for thirty (30) days. A disciplinary hearing was commenced on April 28, 2006 (however, the minute's first page reflects a date of March 28, 2006) and the hearing officer, Benjamin L. Herzweig, Esq., sustained the majority of the charges dealing with petitioner's alleged refusal to file the MV-104 and his denial of the incident when confronted by Dobler. The hearing officer indicated that he would review the petitioner's record and issue a formal written decision and decide on the appropriate punishment (hearing transcript p.145). However, the record is absent with regard to a written decision. The School District's Board of Education met on May 23, 2006 and passed a resolution terminating the petitioner's employment with the School District, yet here again, the record is devoid of the resolution terminating the petitioner.

The petitioner thereafter instituted this Article 78 proceeding claiming that the petitioner's termination was arbitrary and capricious. When an Article 78 petition seeks review of an administrative determination and raises an issue as to whether or not an administrative hearing determination is supported by substantial evidence, the Court in which the action is commenced must transfer the proceeding to the Appellate Division. CPLR §7803(4) & 7804(g); ***Agnew v. North Colonie Central School District***, 14 AD3rd 830, 787 NYS2d 521 (3rd Dept. 2005); ***Wynne v. Town of Ramapo***, 286 AD2d 338, 728 NYS2d 785 (2nd Dept. 2001); ***Memol v. Toia***, 68 AD2d 889, 414 NYS2d 24 (2nd Dept. 1979). However, the petition before the Court does not raise an issue referable to whether the specifications are supported by "substantial evidence" but instead concern whether or not the petitioner's termination was an appropriate sanction or punishment for the petitioner's conduct.

CPLR §7803 (3) provides that the Court may review the imposition of a sanction or punishment imposed by an administrative agency "including abuse of discretion as to the measure or mode of penalty or discipline imposed." In an Article 78 proceeding of this nature,

settled law provides that the Court may not interfere with the sanction or punishment imposed by an administrative agency, such as the School District, unless the penalty or punishment imposed is so disproportionate to the offense claimed as to shock the Court's sense of fairness. ***Matter of Pell v. Board of Education , et al.***, 34 NY2d 222, 356 NYS2d 833 (1974); As the New York Court of Appeals so succinctly stated in ***Kelly v. Safir***, 96 NY2d 32, 724 NYS2d 680 (2001):

> "Judicial Review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law."

Here, in the case at bar, the Court must review the determination of the School District's Board of Education to dismiss a seventeen (17) year employee/groundskeeper with the School District because of his failure to file an MV-104 immediately at the time his superior told him to do so, notwithstanding New York's requirements that such filing should be made within ten (10) days of the incident to be reported. Coupled with this determination is the knowledge that the petitioner did file the MV-104 three (3) days later and whether petitioner's dismissal and loss of employment with the School District is "**so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct**." See, ***Rob Tess Restaurant Corp. v. New York State Liquor Auth.***, 49 NY2d 874, 427 NYS2d 936 (1980) citing to ***Matter of Pell***, supra.

The Court finds the penalty of dismissal of the petitioner so disproportionate to the offense charged and sustained as to violate the fundamental fairness doctrine and to constitute an abuse of discretion. While the Court has reviewed the record and noted the alleged claims of the School District that the petitioner was a "troublesome" employee, many of the claims involved his abuse of personal leave or calling in sick without enough accrued sick days and one claim in March 2004 that the grounds were unsatisfactory. There was also one charge that he would stare at the female students in the lunchroom and make them feel uncomfortable but the petitioner in his defense noted that he is a married father of three (3) children and an ordained preacher in charge of his church's youth group.

As to the present charge before the Court upon which the petitioner's termination rests, the evidence shows that the damage to Jacobs' truck was covered by insurance and amounted to $83.32 in parts, $58.00 in paint, and labor costs of $306.00 for a total of $582.32 plus tax. However, the crux of the charges rests on Dobler's testimony at the disciplinary hearing (pgs. 51 & 52) wherein he was asked the question:

> "Q. How is it that you're seeking termination when by the 17th the form had been submitted completed?
>
> A. Well, the form was completed only after I had to reassign him to home with pay and proceed with

> possible disciplinary action. I don't feel that when I ask an employee to carry out an assignment, a task, that I should expect that I'm gonna have to reassign him to home pending Board action every time I want something done in the district. It's just not conducive to any efficient operation of the district and its not conducive to the maintenance of good morale in the district."

In his defense the petitioner points out that initially he believed that the damage was minor and only a scratch and that Jacobs was not going to report it. Petitioner's initial denials could have resulted from what he perceived as Jacobs' agreement not to report a scratch to his vehicle. In fact, petitioner testified at p. 93 of the hearing transcript that:

> "When I got out, I said to Mr. Jacobs, I said, 'Did I hit your truck?' and he said, 'Yes.' And I said, 'What happened?' and he never pointed to anything. He never made a stink of anything. And he said 'Oh, its just a scratch. No big deal.' And I got back in the truck and pursued pushing snow.
>
> Q. Did he (Mr. Jacobs) indicate that he was going to file a claim?
>
> A. Not at all. Not at all.

The next day Monday, February 13, 2006, late in the afternoon, the petitioner was then nformed that Jacobs filed a claim and the petitioner took the MV-104 and went to talk to him about the damage and about his reporting of the incident. The petitioner set forth the facts (as stated in the hearing transcript) for the delay in reporting the incident by testifying at p. 96:

> "Well, when she presented this to me, I asked her, I said 'What is this for?' She said the accident that you were involved in with Eugene Jacobs. And like she said, I said, 'Well he shouldn't had been here and he shouldn't had been parked there.'
>
> And I thought about it and all of these thoughts were running through my mind pertaining to what he said and what I was doing. I'm like wait a minute, this doesn't make sense. Then I took the report, and I went into the intermediate school to look for Gene to ask him what was going on, or what was this all about, pertaining to what he said to me. I didn't see him. So then I came back to Kathy and I said to her,

> I says, 'I don't see no need to fill this out. I'm not filling this out,' I said, 'because he said he wasn't gonna make a issue of this.'"

Clearly, the petitioner originally believed the incident would not be reported. This does not excuse his behavior or provide justification to ignore Dobler, his superior's direction to fill out the MV-104 report but it does explain the petitioner's confusion to understand the necessity of the report in light of Jacob's statements and also suggests why he was originally not forthcoming and forthright about this minor accident. Even Dobler, in his report, dated February 17, 2006, to Geri Schwab noted "He (petitioner) explained that at the time he was angry at Eugene because Eugene had said he wasn't going to file a report. When my secretary had given him the form to fill out he was surprised and upset."

It appears that the basis for the disciplinary action is not the accident but, as Dobler stated, " I don't feel that when I ask an employee to carry out an assignment... I'm gonna have to reassign him to home pending Board action every time I want something done in the district." Thus it was the petitioner's failure to file an MV-104 immediately, upon being told to do so, which resulted in the disciplinary charges. Admittedly, the petitioner should be disciplined for failing to promptly do as instructed by Dobler, but the question is "does the penalty fit the crime." Here, the petitioner was asked to file the form late Monday, February 13, 2006, and was suspended on Wednesday, February 15, 2006, and the MV-104 form was filled out and filed on Friday, February 17th. The penalty of dismissal of the petitioner, a seventeen (17) year employee, because of his failure to, under the circumstances, promptly file an MV-104 when directed to do so seems extreme and disproportionate to the offense charged and constitutes an abuse of discretion as a matter of law. Additionally, the petitioner's less than stellar employment history fails to show dismissal is warranted, especially since a simple reading demonstrates most of his difficulties were about unexcused absences and lateness to work.

The mere fact that the petitioner is an "alleged troublesome employee" should not form the basis to look at every action, no matter how small, as a reason to impose the most extreme penalty of dismissal for even the slightest of disciplinary matters. If the petitioner is, as alleged, a "troublesome employee" then the School District should prove it and use his employment history as the basis for removal or dismissal and not impose the most extreme sanction for a minor failure to file an MV-104 immediately as directed by his superior, (notwithstanding the legal requirements of ten (10) days to file an MV-104). While this Court recognizes that the petitioner's employment file may be reviewed in the determination of an appropriate punishment, as set forth in ***Bigelow v. Board of Trustees of the Inc. Village of Gouverneur***, 63 NY2d 470, 483 NYS2d 173 (1984), the question of the fundamental fairness of the penalty imposed for the specific charges against the petitioner is paramount. The petitioner, under these facts, was entitled to question whether Jacobs was filing a report when the petitioner was led to believe that Jacobs had no such intention. While it is not this Court's place to look at the issue of substantial evidence which has not been raised in this proceeding, the evidentiary material and findings must support the penalty imposed as a matter of law. In the instant case, it does not and therefore it constitutes an abuse of discretion as a matter of law.

While this Court may find petitioner's conduct less than stellar and the petitioner should draw no comfort from this Court's decision, fundamental fairness and punishment fitting the actions charged should be the ultimate guideline in determining the question of abuse of discretion by the administrative agency. It appears to the Court that the penalty imposed is "so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct" (***Rob Tess Restaurant Corp. v. New York State Liquor Auth.***, supra.) and is an appropriate finding to support the Court's determination that there is an abuse of discretion as a matter of law. A review of the charges and a thorough review of the petitioner's personnel file fail to substantiate the imposition of the extreme sanction of dismissal after seventeen (17) years of employment with the School District. See, ***Segrue v. City of Schenectady***,132 AD2d 270, 522 NYS2d 692 (3rd Dept. 1987). In a similar case dealing with misconduct of an employee, the Court in ***Torrance v. Stout***, 38 AD3d 910, 834 NYS2d 213 (2nd Dept. 2007) noted that

> "...the penalty of demotion from the position of Park Foreman to the position of Maintenance Laborer after 21 years of unblemished service, and **its long-term financial implications for the petitioner, was so disproportionate to the offense committed as to be shocking to one's sense of fairness**" (emphasis added).

By the same token, in spite of the petitioner's alleged troublesome employment record, the long term financial implications to the petitioner and his family from dismissal after seventeen (17) years seems extreme to the point of being "**disproportionate to the offense committed**" and shocks one's sense of fairness and proportionality.

Accordingly, the Court finds the penalty of dismissal of the petitioner is so disproportionate to the offenses charged and sustained as to violate the fundamental fairness doctrine and constitute an abuse of discretion. The penalty of dismissal is reversed and annulled and the matter is remitted to the School District, to impose a more reasonable penalty for the charges found to be valid.

Settle Judgment

The foregoing constitutes the decision of the Court.

Dated: SEP 12 2007

J.S.C.