SHORT FORM ORDER INDEX NO. 3999/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, SUFFOLK COUNTY LOCAL 418 PILGRIM PSYCHIATRIC CENTER and LEE PRYCE,

Petitioners,

For an Order and Judgment pursuant to Article 78, CPLR,

-against-

MICHAEL F. HOGAN, as Commissioner of the New York State Office of Mental Health, NEW YORK STATE OFFICE OF MENTAL HEALTH, DEAN WEINSTOCK, Executive Director of the Pilgrim Psychiatric Center, and PILGRIM PSYCHIATRIC CENTER,

Respondents.

ORIG. RETURN DATE: MARCH 28, 2007
FINAL SUBMISSION DATE: AUGUST 9, 2007
MTN. SEQ. #: 001
MOTION: MD CASEDISP

PLTF'S/PET'S ATTORNEY:
VITALE AND LEVITT, P.C.
445 BROAD HOLLOW ROAD - STE. 124
MELVILLE, NEW YORK 11747
631-777-1700

DEFT'S/RESP ATTORNEY:
ANDREW M. CUOMO
ATTORNEY GENERAL
STATE OF NEW YORK
300 MOTOR PARKWAY - STE. 205
HAUPPAUGE, NEW YORK 11788
631-231-2424

Upon the following papers numbered 1 to 10 read on this petition FOR A JUDGMENT PURSUANT TO ARTICLE 78.
Notice of Petition and supporting papers 1-3; Memorandum of Law 4; Affidavit in Support and supporting papers 5; Affidavit in Support and supporting papers 6; Verified Answer 7; Affidavit in Support of Respondents' Answer and supporting papers 8, 9; Respondents' Memorandum of Law 10; it is,

ORDERED that this petition for an Order and judgment, pursuant to Article 78 of the CPLR: (1) declaring that respondents' imposition on petitioner LEE PRYCE ("petitioner"), of an involuntary leave without pay is in violation of Civil Service Law §§ 72 and 73; (2) ordering respondents to restore petitioner to full-pay status as an employee; (3) remitting the matter for a hearing to determine whether petitioner is able to perform the duties of his position; and (4) awarding petitioner back pay, accruals lost, and all other rights and privileges of employment from November 14, 2006, is hereby **DENIED** for the reasons set forth hereinafter.

Petitioner was employed in the New York State Civil Service position of Mental Hygiene Therapy Aide ("MHTA") at respondent PILGRIM PSYCHIATRIC CENTER ("Pilgrim") from October 23, 1997 through December 31, 2006. Prior to October 23, 1997, petitioner was employed in the same civil service title at Kings Park Psychiatric Center, having been hired on January 13, 1977. Petitioner is a member of petitioner union CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. ("CSEA"). MHTAs perform various duties relating to the care and treatment of adults diagnosed with mental illness.

Petitioner alleges that he suffered injuries from a non-work related automobile accident that occurred on December 30, 2005. SHARON GOEBEL, a Director of Pilgrim, avers that petitioner telephoned his supervisor and advised that he had been injured and thus was unable to report to work. Ms. Goebel informs the Court that petitioner was on voluntary leave, and that petitioner initially charged his accrued annual leave credits until they were exhausted. Thereafter, on or about July 16, 2006, Ms. Goebel alleges that Pilgrim placed petitioner on sick leave with half pay, at his request, where he remained until he was terminated on December 31, 2006.

Petitioner alleges that on or about November 9, 2006, he presented a letter from his physician which indicated that petitioner was able to return to work on November 15, 2006. The Court notes that the aforementioned letter indicates that petitioner could return to work with "[zero] restrictions." However, in a telephone conversation on or about November 9, 2006, Ms. Goebel states petitioner informed her that he was unable to return to work the night shift, where he was needed, or to work overtime, because he had diabetes. Ms. Goebel contends that MHTAs must work any shift that they are assigned, and must work overtime, as overtime is considered an "essential function" of the MHTA's job.

Ms. Goebel contends that MHTAs are informed of these requirements during orientation for the position. Petitioner alleges that overtime is not mentioned in the civil service classification specification for the title, and therefore is not one of the required duties attendant thereto. However, Ms. Gobel alerts the Court that the collective bargaining agreement between the State and CSEA contains a provision regarding how overtime may be assigned on a mandatory basis. Moreover, Ms. Goebel alleges that Pilgrim has uniformly denied exemptions from overtime since 2004, including denying a request from petitioner on December 21, 2004, prior to petitioner's accident.

On or about November 14, 2006, petitioner presented a letter to his employer from his endocrinologist, DAVID B. KUGLER, who advised that petitioner could work any eight hour shift, but recommended that petitioner not work any overtime. As a result, Ms. Goebel sent a letter to petitioner, dated November 15, 2006, advising him that based on the November 14, 2006 medical letter, he could not return to work as he was unable to perform the duties of his position. Notably, at this juncture petitioner was not terminated from his position, but rather was continued on sick leave with half pay. Thereafter, Ms. Goebel sent a letter to petitioner, dated November 20, 2006, notifying petitioner that his leave would end and his employment would be terminated on December 31, 2006, pursuant to Civil Service Law § 73, due to a personal illness of one year.

In response, petitioner presented two letters to respondents: one seeking to return to employment, and the other seeking a reasonable accommodation for his diabetic condition, i.e., to not be required to work overtime or be assigned to the evening shift upon returning to work. By letter dated November 30, 2006, respondent DEAN WEINSTOCK, Executive Director of Pilgrim, informed petitioner that his request for a reasonable accommodation was denied. Mr. Weinstock's letter indicated that the denial was based upon the fact that overtime is an "essential function of the job," and that the letter from Dr. Kugler indicated petitioner could work *any* eight hour shift. Petitioner then sought a Commissioner's review of the denial, and on or about January 23, 2007, the denial was upheld.

On or about December 29, 2006, Ms. Goebel sent another letter to petitioner, again notifying petitioner that he would be separated from his position as MHTA, effective December 31, 2006, pursuant to Civil Service Law § 73. Respondents allege that at no time thereafter did petitioner invoke the grievance

process provided for in the collective bargaining agreement between the State and CSEA, but instead filed the instant petition on or about February 22, 2007.

Petitioners argue that respondents failed to follow the procedures set forth in Civil Service Law § 72, alleging that Pilgrim placed him on involuntary leave of absence due to disability on or about November 14, 2006. However, as discussed hereinabove, petitioner was not placed on involuntary leave of absence due to disability, but was continued on sick leave with half pay until his termination on December 31, 2006. Respondents submitted a civil service employee history for petitioner demonstrating that on July 16, 2006, petitioner was placed on sick leave with half pay. Furthermore, Pilgrim did not invoke its authority under Civil Service Law § 72 to require petitioner to undergo a medical examination to determine his ability to perform his duties.

Civil Service Law § 72 requires a finding that the employee is medically incapable to perform his or her job functions. Once such a finding of unfitness has been made, the employee is given a leave of absence. In order for Civil Service Law § 72 to apply, a petitioner is required to demonstrate that he was physically or mentally incapable of performing his duties after a medical examination. Since there was no such finding of unfitness, the statute is not applicable here (*see Matter of Considine v Pirro*, 38 AD3d 773 [2007]; *Matter of Abdalla v Fulton County*, 208 AD2d 1168 [1994]).

Civil Service Law § 73 provides in pertinent part:

> When an employee has been continuously absent from and unable to perform the duties of his position for one year or more by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, his employment status may be terminated and his position may be filled by a permanent appointment

(Civil Service Law § 73).

Here, respondents established that petitioner was continuously absent from and unable to perform the duties of his position for one year or more by reason of a non-work related disability. As such, the Court finds that the decision by respondents to terminate petitioner's employment was neither

arbitrary nor capricious, and with a rational basis in fact and law (*see Hughes v. Doherty*, 5 NY3d 100 [2005]; *Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 2007 NY Slip Op 6879 [2d Dept]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). Accordingly, the instant petition is **DENIED** and this special proceeding is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: December 28, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court