Matter of Kaefer v New York State Off. of Parks, Recreation & Historical Preserv.

2008 NY Slip Op 30036(U)

January 8, 2008

Supreme Court, Nassau County

Docket Number: 6657-06/

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

TRIAL/IAS PART 9

In the Matter of the Application of
ROBERT KAEFER,

INDEX NO. 16657/06

Petitioner,

For a Judgment pursuant to Article 78 of the CPLR

- against -

THE NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORICAL PRESERVATION,

Respondents.

DECISION AFTER HEARING

By Order dated March 15, 2007, this matter was set down for a hearing to determine the events in May 2006 relative to the petitioner's employment as a lifeguard. The hearing was adjourned from April 11, 2007 to May 9, 2007 and, thereafter, until June 7, 2007 when the presentation of testimony and evidence was commenced. Petitioner appeared by counsel. The respondent was represented by the Office of the New York State Attorney General. The hearing was continued until July 2, 2007 and concluded on July 9, 2007. Post-hearing memoranda were submitted by both sides on September 7, 2007.

After hearing, the Court now makes the following findings of fact and conclusions of law.

Petitioner's first witness was the petitioner Robert Kaefer. He testified that he is employed as a teacher and has been employed as a seasonal lifeguard for the respondent for 18 years with his last summer season employment occurring on the year 2005. According to the Petitioner, he was expecting to receive an application from the Respondent to be re-hired as a seasonal lifeguard for 2006. When his application did not arrive, the Petitioner learned that approximately 100 seasonal lifeguards were not to be re-hired because of prior criminal histories.

On June 10, 2006, the Petitioner presented himself, not as a former lifeguard seeking re-employment, but as a candidate seeking employment as a lifeguard through a competitive process with other candidates. At this time, he was asked by the examination administrators to remove himself from consideration.

Mr. Kaefer related that in 2001, he had been criminally charged for acts arising out of filing a false doctor's note with the respondent in connection with his fitness for service as a lifeguard and for failing to make disclosures in connection with is applications for employment. In connection with clarifying his status, Mr. Kaefer retained the legal services of Roy Lester Esq. who is himself a lifeguard with the Respondent and familiar with employment issues regarding seasonal lifeguards. As the summer of 2006 progressed Mr. Kaefer discharged Mr. Lester and hired his present counsel to pursue the issue of his employment status with the Respondent which yielded a notification in August 2006 that the Petitioner would be ineligible for either re-hiring or competitive application for the position of seasonal lifeguard.

Cross-examination revealed that the Petitioner believed that his employment status was still under review by the respondent during the summer of 2006 and that he did not appear for the re-hiring test because paper work was not forwarded to him which would enable him to do so.

On re-direct examination, the Petitioner stated he received no information regarding his employment status from his attorney, Mr. Lester.

Petitioner's second witness was Roy Lester, Esq., former counsel to the Petitioner. He testified that he has been an attorney licensed to practice law in New York State since 1978 and has also served as a lifeguard for New York State, assigned to Jones Beach State Park. Additionally, he has acted as chief negotiator for the Jones Beach lifeguard union in its dealings with the Respondent.

According to Mr. Lester, he was retained by the Petitioner in May, 2006 when the Petitioner did not receive his application for re-hiring. Thereafter, Mr. Lester had discussions with Mr. Chip Gorman, a high level employee of the Respondent, as well as Ms. Kathryn McKee, director of labor relations for the Respondent and Elaine Bartley, Esq. associate counsel for the Respondent, regarding the status of a number of seasonal lifeguards who were not being re-hired because of prior legal difficulties.

Mr. Lester described a three-step hearing procedure employed by the Respondent with employees against whom discipline or sanction is sought. The first step involves a hearing with the administrative head of the park where the employee is assigned. A step 2 hearing is taken to the Respondent's regional office. A step 3 hearing is thereafter taken to the Respondent's officials in Albany, NY. Mr. Kaefer was notified of a step 1 hearing to be conducted on August 5, 2005, but, according to Mr. Lester, was adjourned without further date and has not yet been held.

Following a conversation he had with Ms. McKee on May 17, 2006 regarding Mr. Kaefer's employment status, Mr. Lester indicated that made an entry into Mr. Kaefer's case file which indicated that the Respondent was, as of May 17, 2006, still undecided regarding the Petitioner's employment status (*see Petitioner's #5 in evidence).* Again, according to Mr. Lester, had he been told that the Respondent had decided to exclude the petitioner from re-hiring or competitive appointment, he would have made an entry reflecting the determination in his case file, written to the Respondent, and apprised his client of the determination. Such a letter was generated by the witness in a similar instance involving another lifeguard-client engaged in a dispute with the Respondent (*see Petitioner's #6 in Evidence).*

Mr. Lester stated that he was unable to procure a determination from the respondent regarding Mr. Kaefer's status and continued to press Ms. Bartley for a decision. However, he was unsuccessful in his attempts to speak with her. Mr. Lester indicated that he was unfamiliar with any rules, regulations, and procedure which rendered the Petitioner ineligible to take the competitive test for appointment as a newly-hired lifeguard and, to his knowledge, has never received a final decision regarding Mr. Kaefer's employment status. Additionally, an exit interview customarily afforded discharged employees was never afforded the Petitioner. Ultimately, Mr. Lester was discharged and present counsel retained.

Cross-examination of Mr. Lester revealed that over the course of his career, he has had professional disagreements with the Respondent and has never been promoted to management within the New York State park system.

Additionally, Mr. Lester publishes a newsletter entitled the "Bucket and Buoy" in which articles regarding the Petitioner and other lifeguards not re-hired by the Respondent.

After Mr. Lester's testimony, the Petitioner rested his case. The Respondent moved orally to dismiss the petition on the grounds that it is barred by the expiration of the statute of limitations four months pursuant to CPLR §217. The Respondent similarly moved to dismiss claims made by the Petitioner on grounds that no complaint alleging these claims have been filed in the New York State Court of Claims. The Petitioner opposed these motions. The Court reserved decision.

The Respondent elected to present a case and called as its first witness, out of usual order due to scheduling conflicts Ms. Kathyrn McKee, director of labor relations for the Respondent. She testified that she was employed with the respondent since January 2006. While she never spoke directly with the petitioner, she did speak with his attorney, Mr. Roy Lester on three separate occasions. On May 12, 2006, she told Mr. Lester that the Petitioner was ineligible for employment with the Respondent. According to Ms. McKee she learned earlier from Ms. Bartley, associate counsel for the Respondent, that the Respondent had determined that the Petitioner was ineligible for employment, but was unable to supply a specific time for when the conversation with Ms. Bartley occurred. In the May 12, 2006 conversation with Mr. Lester, she indicated she believes that Mr. Kaefer's submission of false medical documentation was the reason he would not be re-employed and in response to Mr. Lester's request to discuss this further, asked Mr. Lester for further documentation.

Ms. McKee indicated that she received further documentation from Mr. Lester at a later time. In the May 12, 2006 conversation with Mr. Lester, she also discussed the employment status of other lifeguards who were similarly determined to be unsuitable for re-hiring or employment. Notes of her conversation were admitted into evidence (*see Respondent's B in Evidence).*

On May 17, 2006, Ms. McKee spoke again with Mr. Lester and after receiving the further documentation requested indicated firmly to Mr. Lester that Mr. Kaefer would not be re-hired. She then went on to discuss with Mr. Lester the employment status of some of the 17 other lifeguards who were ineligible for re-hiring or employment.

On May 20, 2006, at the site of the re-hiring test at Nassau Community College, Ms. McKee recalled another conversation with Mr. Lester regarding Ms. Kaefer. She again indicated that the Respondent would not consider Mr. Kaefer eligible for further employment because his submission of false medical documentation regarding his physical condition was a severe act of misconduct rendering him untrustworthy for the Respondent's purposes.

Upon cross-examination, Ms. McKee stated that there are 200 full-time and approximately 6000 seasonal employees of the respondent. According to Ms. McKee, there is no rule or procedure whereby the respondent notifies individuals that they are no longer eligible to serve as a lifeguard. While her notes did not expressly reflect that the Petitioner was ineligible for further employment with the Respondent, they did indicate he would not be receiving an application for re-employment, which to Ms. McKee, was equivalent notice (*see Respondent's B in Evidence).* Ms. McKee testified that she did not state to Mr. Lester that Mr. Kaefer's ineligibility for employment would be permanent, or that it would be for a definite term. Rather, Ms. McKee interpreted the decision to be a hiatus lasting at least longer than one year. The witness did not know the date of the decision which was communicated to her through Ms. Bartley on behalf of policy

matters concerned with employment decisions, but believed the decision had been reached prior to her employment with the respondent in January 2006. Ms. McKee stated that this decision was never transmitted in writing either to Mr. Lester or the Petitioner, and that she knew of no rule or regulation barring the Petitioner from further employment with the Respondent. No discussions were had with Mr. Lester expressly about the Petitioner's eligibility for taking the test for a newly hired employee.

Respondent's second witness was Elaine Bartley, Esq. She testified that she has been admitted to the New York State bar since 1994 and employed with the Respondent since September 2003. She is currently employed with the Respondent in the capacity of associate counsel. According to Ms. Bartley, after receiving written notice Mr. Lester was representing the Petitioner, she discussed Petitioner's employment status during the week of May 17, 2006 (*see Respondent's F in Evidence)*. In this conversation, she stated she told Mr. Lester that Mr. Kaefer would not be re-hired because of his submission of falsified documents relative to his employment in the past. No formal letter would be sent to either Mr. Lester or the petitioner because of the respondent's practice of not memorializing such notices in writing.

Letters were sent by the Respondent to 17 other lifeguards not being re-hired. These 17 other lifeguards were afforded the opportunity to offer explanations about their criminal histories and why they were omitted from their applications for employment. Mr. Kaefer was not among these 17 other lifeguards receiving this notice. Ms. Bartley went on to say that the decision not to re-hire Mr. Kaefer had been made in the winter of 2005-2006. In 2005, when she learned that a step 1 disciplinary hearing had been scheduled for Mr. Kaefer, the witness contacted Susan Giuliani, head of the Jones Beach office, with instructions to cancel the hearing because of the criminal nature of Mr. Kaefer's prior misconduct and referred the matter to the office of the New York State Inspector General, an independent state office charged with the responsibility of investigating employee wrong doing.

During cross-examination, the witness stated that it is the Respondent's practice not to notify employees of their ineligibility for re-hiring in writing. This practice is not memorialized in writing, however, In her conversation with Mr. Lester, Ms. Bartley stated she did not discuss Mr. Kaefer's eligibility for the new-hire test. She conceded that the step 1 hearing for Mr. Kaefer had been postponed but not cancelled. She never told Mr. Lester that she needed 30 days more to consider Mr. Kaefer's status. According to Ms. Bartley, Mr. Kaefer was never terminated but simply not re-hired which accounted for the absence of an exit interview. Of the 17 other lifeguards initially denied re-employment, 12 were eventually re-hired.

Respondent thereafter rested its case.

A brief rebuttal case was offered by the Petitioner. The parties stipulated that the executive board of the lifeguard union had no authority to bind the Respondent to any decision to hire or fire any lifeguard. Bartley testified that Mr. Lester never inquired about Mr. Kaefer's eligibility for the new-hire test. Mr. Kaefer testified as his second rebuttal witness and stated he was never informed of his ineligibility for the re-hire test and took the new hire test when he was not-rehired by the respondent.

After Mr. Kaefer's testimony, Petitioner rested its case. The Respondent declined to offer a sur-rebuttan case and renewed its earlier motions. The Court similarly reserved decision on these renewed motions.

As noted at the outset and by Order of this Court dated March 15, 2007, this hearing was set down to determine the events which transpired in May 2006 relative to petitioner's employment as lifeguard and their relevance to the alleged expiration of the statute of limitations for the instant action.

An administrative determination become "final and binding" when two requirements are met (1)

completeness (finality) of the determination and (2) exhaustion of administrative remedies (see, **Walton v New York State Department of Correctional Services**, 8 NY3d 186, 831 NYS2d 749 (2007); **Payphones Inc. v Department Information and Technology and Telecommunications**, 5 NY3d 30, 799 NYS2d 182 (2005).

A petitioner seeking Article 78 review of a determination must commence the proceeding within four months after the determination to be reviewed becomes final and binding upon the petitioner (*see CPLR 217(1)*.

It is axiomatic that before an administrative decision can become final, the decision must be unequivocal and effectively communicated to the party to be charged with the knowledge thereof. To require less would infringe upon the party's right to notice and opportunity to be heard.

In the instant case, it is uncontraverted that the only communication between the Respondent and Mr. Kaefer personally regarding his employment status with the Respondent was his exclusion from a group of seasonal lifeguards who received applications for re-hiring for the 2006 summer season. No oral or written communication was made by the Respondent directly to the petitioner. Verbal discussions were held between Ms. Kathryn McKee, director of labor relations for the Respondent and Ms. Elaine Bartley, associate counsel for the respondent and Mr. Roy Lester, attorney for the Petitioner. Notice to Mr. Lester, acting as the Petitioner's attorney, would serve to put the Petitioner on notice of the Respondent's determination, again, if unequivocal and effectively communicated.

The testimony and evidence adduced at the hearing establishes that on May 12, 2006, May 17, 2006 and May 20, 2006, Ms. Kathryn McKee spoke with Mr. Lester and informed him of the Respondent's decision not to re-hire Mr. Kaefer. However, by her own testimony elicited during cross-examination it was established that she was uncertain of the date this decision was made, the duration for which the period of the Petitioner's ineligibility for employment would last and whether the ineligibility included only his re-employment as a seasonal lifeguard or included ineligibility to apply for and undertake a test as a "newly-hired" lifeguard. No express mention of the Petitioner's ineligibility for the "newly-hired" lifeguard test was made, according to Ms. McKee. Similarly, sometime during the week of May 17, 2006, Ms. Elaine Bartley spoke with Mr. Lester and informed him that Mr. Kaefer would not be re-hired because of the Respondent's concerns regarding the precise nature of his misconduct leading to the filing of criminal charges. Again, no inquiry on mention was made ineligibility for the test for "newly-hired" lifeguards or for how long the impediment to re-hiring as a seasonal lifeguard would last.

Mr. Lester, in his testimony disputes the substance of these conversations. However, clearly dialogue was on-going between Mr. Lester, the employees' union and the Respondent regarding not only Mr. Kaefer, but the other somewhat similarly situated seasonal lifeguards. Eventually, a significant number of seasonal lifeguards initially denied re-employment, some with felonious criminal convictions, were re-hired by the Respondent as discussion progressed.

Given the fact that no step 1 disciplinary hearing had been held or even scheduled by May 2006, that no written or verbal communication of any kind was transmitted to Mr. Kaefer personally before his exclusion from receiving a re-employment application for 2006 or the refusal to afford him the opportunity to apply for "newly-hired" employment in June 2006, the roughly contemporaneous verbal communications between Mr. Lester and Ms. McKee and Ms. Bartley in May 2006, admittedly indefinite, as to the work for which the Petitioner deemed ineligible and the term of said ineligibility, the absence of any writing between the Respondent and Mr. Lester explicating or delineating the Petitioner's impediment to employment, and the on-going discussions between Mr. Lester, the employee's union and the Respondent ultimately leading

to the reconsideration and re-employment of a number of somewhat similarly situated seasonal employees, the Court is compelled to conclude that it was not until June 11, 2006 when the Petitioner was refused the opportunity to apply and test for the position of a "newly-hired" lifeguard that speculation about his employment status ended and his ineligibility for re-employment as a seasonal lifeguard or employment as a "new" lifeguard became certain, manifest and "final".

Accordingly, the Respondent's motion to dismiss the instant action filed October 11, 2006 on the ground that it is barred by the four month statute of limitations, is **denied**. Respondent's motion to dismiss those claims which were the subject on a notice of claim filed with the Court of Claims is **denied** without prejudice to renew in writing and on notice to the Petitioner.

This constitutes the decision and Order of the Court.

DATED: 1/8/2008

Roy S. Mahon
J.S.C.

ENTERED

JAN 11 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE