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| Matter of Garcia v New York State Div. of Human Rights |
| 2008 NY Slip Op 32419(U) |
| August 28, 2008 |
| Supreme Court, New York County |
| Docket Number: 0406920/2007 |
| Judge: Paul G. Feinman |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. PAUL G. FEINMAN

PRESENT: _____

PART 52

Index Number : 406920/2007
GARCIA, WILSON RICARDO
VS.
NYS DH RIGHTS NY HOTEL AND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO.

406920/2007

MOTION DATE

6-3-08

MOTION SEQ. NO.

001

MOTION CAL. NO.

37

this motion to/for

Article 78

PAPERS NUMBERED

1

2-4

5

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

NYS DH Transcript

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

PETITION IS DENIED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.

NYS DH to retrieve Transcript of Proceedings
from the Part 52 Clerk.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Dated: 8/28/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

In the Matter of the Application of
WILSON RICARDO GARCIA,

Petitioner,

against

NEW YORK STATE DIVISION OF HUMAN
RIGHTS, NEW YORK HOTEL AND MOTEL
TRADES COUNCIL, AFL-CIO LOCAL 6,
Respondents.

Index Number 406920/2007
Submission Date June 3, 2008
Mot. Seq. No. 001
Mot. Cal. No. 37

**DECISION, ORDER AND
JUDGMENT**

For the Petitioner:
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For Respondent NY State:
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For Respondent Union:
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Papers considered in review of this petition to reverse/vacate decision:

| Papers | Numbered |
|--------------------------------------------|----------|
| Notice of Petition and Affidavits Annexed. | 1 |
| Verified Answer by Union & Memo of Law | 2 |
| Answer by NYSDHR | 3 |
| Transcript of Proceedings NYSDHR | 4 |

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

PAUL G. FEINMAN, J.:

In this Article 78 proceeding, petitioner, who is self-represented, seeks to reverse the administrative determination issued on about September 14, 2007 by respondent New York State Division of Human Rights (DHR) determining that there was no probable cause to find that his labor organization, respondent New York Hotel and Motel Trades Council, AFL-CIO ("union"), had engaged in an unlawful discriminatory practice based on his disability of clinical depression. For the reasons which follow, the petition is denied and the proceeding is dismissed.

Background

[* 3]

Petitioner, now on disability, was an employee of the Peninsula Hotel in New York City where he worked as a houseman beginning in 1998.¹ He suffers from asthma and was diagnosed with clinical depression in about May 2003; both conditions were, according to petitioner, known to his employer. He alleges that beginning in about May 2003, he was singled out by the hotel for different treatment from the other housemen in that: 1) he was made to work more overtime during years when he was ill; 2) his weekly schedule was changed more often and with less notice than the other housemen; 3) he was at one point assigned to the linen chute although this position required him to work in a small room filled with dust; 4) his job description entailed doing certain delineated tasks but he was required to do many others in addition and reprimanded when he was unable to complete all the work; and 5) at one point he was required to report every time he went to the bathroom or the cafeteria. He further alleges that he contacted his union representative on many occasions concerning his job situation and the resulting stress and depression, but that “no body help[ed] me.”

On April 3, 2006, petitioner filed a complaint with the DHR alleging discriminatory practices based on disability, and stating among other things, that from May 2003 onward, the hotel failed to accommodate his disability when it changed his job assignments, exposed him to excessive security, and switched his days off. This complaint was dismissed on May 25, 2006, at the request of petitioner’s then attorney, because petitioner and his attorney had chosen to sue the hotel in State Court.

On July 3, 2006, petitioner filed a second complaint with the DHR. This complaint

¹The facts are culled from the petition and from documents contained in the Record submitted by the respondent State Division of Human Rights.

[* 4]

charged his union with unlawful discriminatory practices relating to employment based on disability in violation of Article 15 of New York Executive Law, the Human Rights Law. After an investigation, the DHR found on March 28, 2007, that there was probable cause to believe that the union had engaged in unlawful discriminatory practice and ordered a public hearing on the matter. Specifically, it found the evidence showed that the union addressed only petitioner's grievance concerning the scheduling changes and not the other complaints; that the record failed to support the union's claim that petitioner did not follow up with his complaints, given that he submitted copies of numerous letters detailing his complaints which he sent certified mail; and found petitioner's challenge to the contents of the union's telephone log to be persuasive, given that petitioner stated he diligently contacted the union but that the union representative generally did not respond.

The union requested, by letter dated May 24, 2007, that the DHR reopen and review its determination pursuant to section 465.8 of the DHR Rules of Practice (Union Memo of Law Ex. A [Pitta & Dreier Letter of May 24, 2007 to DHR]). The union argued that the evidence showed that beginning in October 2005, the union representative had been in touch with petitioner by telephone and had attempted to set up meetings for petitioner with the hotel and the union, that petitioner did not appear for one meeting, that another meeting was canceled due to illness and rescheduled after petitioner returned from vacation but that petitioner failed to attend that meeting, and that there was no record of petitioner contacting the union by telephone or letter after the date of the March meeting, although the union mailed a letter to petitioner date August 22, 2006 asking him to contact the union representative. The union pointed to its successful resolutions of two prior grievances brought by petitioner against the hotel in May and August

2005, one concerning a claim brought by another employee against him, one concerning his schedule, as showing that there was no evidence that the union acted in a discriminatory manner based on petitioner's disability. It also alerted the DHR to the fact that on July 31, 2006, the Region 2 Director of the National Labor Relations Board (NLRB), informed petitioner by letter that his claim filed with the NLRB against the union was dismissed, as there was insufficient proof to establish that the union arbitrarily or capriciously failed and refused to process or pursue his grievances based on his "numerous complaints of harassment and discrimination" (Union Memo of Law, Ex. A, NLRB letter of July 31, 2006). In addition, the NLRB letter indicated that as petitioner was out on disability since about March 1, 2006 and did not know when or if he could return to work, the union's failure to pursue petitioner's grievance concerning the nine times his schedule was changed in a three-month period, was not a breach of fair representation, given that the only remedy it could seek was for petitioner to be returned to his previous work schedule, but that such a resolution was meaningless given that he was not working. The NLRB also did not find evidence to establish that the union violated any other part of the NLRB § 8 (b) (1) (A).

On September 14, 2007, the DHR reversed its earlier determination, and issued a determination and order finding no probable cause to believe the union had engaged in unlawful discrimination. It found nothing in the record "to suggest a nexus between the Respondent's actions and the [petitioner's] disabilities." It referenced the NLRB's dismissal of petitioner's claim for the reasons set forth above (Union Ver. Ans. Ex. A [DHR Memo of Sept. 12, 2007, at 2]).

Petitioner timely filed the instant petition. Although he frames his relief as seeking back

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pay and damages for emotional distress, the court treats the petition as one properly brought pursuant to CPLR Article 78 that seeks to vacate the determination of the State Division of Human Rights on the ground that this governmental body proceeded in a manner that was affected by error of law or was arbitrary and capricious or an abuse of discretion.

Legal Analysis

It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is “determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). An arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232). Once the court has found a rational basis exists for the determination, its review is ended (*Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]).

Here, the DHR reversed its earlier finding of probable cause, having reviewed the record at the request of the union, and finding nothing that suggested the union's actions were in response to or the result of petitioner's disability, and concluding that there was no rational basis to support a finding of probable cause to believe the union engaged in a discriminatory practice. Reviewing courts are “not empowered to substitute their own judgment or discretion for that of


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an administrative agency merely because they are of the opinion that a better solution could thereby be obtained.” (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). The scope of the court’s review does not include “any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority” and that “the sanction must be upheld unless it shocks the judicial conscience” (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell v Board of Educ.*, 34 NY2d 222, 232-234 [1974]).

Although the evidence suggests that petitioner frequently tried to contact the union through telephone and by letter, and that the union representative did not respond to each communication, the finding upon review by the DHR that, in essence, the union did not ignore petitioner’s requests for help but attempted to set up meetings with the hotel to address the problems, is rationally based. Also rationally based is the conclusion by the DHR that there was no connection established between petitioner’s depression and the actions by the union. In sum, the record does not support a determination that respondent DHR acted in a manner that was either arbitrary or capricious. The mere fact that the DHR reversed its earlier determination cannot itself be found irrational. Accordingly, the petition must be denied as against the DHR. To the extent that petitioner seeks relief as against the union, his claim fails to state a cause of action, as there is no basis in the law for him to bring his claim in an Article 78 proceeding. It is therefore,

ADJUDGED and ORDERED that the petition is denied and the proceeding is dismissed.

This shall constitute the decision, order and judgment of the court.

ENTER:



Dated: August 28, 2008
New York, New York

J.S. **UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1413).