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SCANNED ON 11/5/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 52

Index Number : 102919/2008
HARRIS, STANTON
VS.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 102919/2008
MOTION DATE 9/17/08
MOTION SEQ. NO. 001
MOTION CAL. NO. 3

on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 4
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	5, 6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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

[redacted]

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).

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

Dated: 10/30/08

Paul G. Feinman
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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In the Matter of the Application of
STANTON HARRIS,

Petitioner,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

THE NEW YORK CITY HOUSING AUTHORITY, and THE BOARD OF THE NEW YORK CITY HOUSING AUTHORITY,

Respondents.

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Index Number	102919/2008
Submission Date	Sept. 17, 2008
Mot. Seq. No.	001
Mot. Cal. No.	3

DECISION, ORDER AND JUDGMENT

For the Petitioner:
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For the Respondent:
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Papers considered in review of this petition to reinstate:

Papers	Numbered
Notice of Petition and Exhibits; Memorandum of Law	1
Verified Answer; Memorandum of Law;	2, 3
Petitioner's Memorandum of Law	4
Reply Affidavit, Memorandum of Law	5, 6

PAUL G. FEINMAN, J.:

In this proceeding brought pursuant to CPLR 7803 (3), petitioner seeks reinstatement to his former position as a Caretaker P, back pay and benefits, as well as attorney's fees. Petitioner contends that respondent's failure to reappoint him to his former position was arbitrary and capricious and an abuse of discretion pursuant, and in violation of Civil Service Law § 71. For the reasons which follow, the petition is denied.

Petitioner is employed by respondent New York City Housing Authority (NYCHA) with the civil service title Caretaker. As a city employee, petitioner is a member of the City Employees Union Local 237, I.B.T. (Local 237); the union and NYCHA are parties to a collective bargaining agreement (Ver. Pet. ¶ 8; Ver. Ans. ¶ 8).

In March 2001 petitioner filed a claim with Workers' Compensation, and because he was not able to return to work after one year, he was terminated in April 2002 (Ver. Ans. Ex. B). Prior to this time, petitioner had worked as a Caretaker P which meant that he was assigned to work as a painter helper or plasterer helper, and received a supplement to his salary (Ver. Ans. Ex. G, Marcenik Aff. ¶ 3).

Pursuant to Civil Service Law § 71, he sought reinstatement and underwent a medical examination which, on August 30, 2005, found him fit to return to his former position (Ver. Pet. Ex. 1). He was informed by letter dated October 13, 2005, that there were no vacancies in his title at the time he sought reinstatement, but that his name would be put on a preferred list for his "former title" (Ver. Pet. Ex. 2). In February 2006, he was appointed as a Caretaker J (Ver. Pet. ¶ 17). As such, he performs janitorial work and does not receive a supplement to his salary (Ver. Ans. Ex. G, Marcinek Aff. ¶ 3).[1]

Subsequently, an agreement between NYCHA and Local 237, memorialized in an email dated September 12, 2007, provided that petitioner's name would be placed at the top of a newly created transfer list for persons eligible to be assigned as Caretaker P positions (Ver. Pet. Ex. 3). According to petitioner, the transfer list was a preferred list created pursuant to Civil Service Law

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[1]Certain arguments put forth by petitioner's attorney concerning other workers hired as Caretakers cannot be considered by the court as it relies on hearsay and unverified documents.

§ 71. According to NYCHA's David Marcinek, the Deputy Director of Human Resources for Labor Relations and Classification, whose duties include negotiating agreements between the Housing Authority and Local 237, the transfer list was the result of an "informal agreement" with Local 237 to list the names of former Caretakers P who had been displaced because of the reassignment of provisional Plasterers, and who were to be given preference for Caretaker P positions (Ver. Ans. Ex. G, Marcinek Aff. ¶¶ 4-5). Petitioner's name, according to Marcinek, was added to the head of this list "by way of an oral agreement between" NYCHA and Local 237, although he was not a displaced Caretaker,to settle a grievance filed by petitioner (Ver. Ans. Ex. G, Marcinek Aff. ¶ 5). According to Marcinek, although it was informally agreed that the candidates on the transfer list would be considered for a Caretaker P position in the order in which their names appeared, a candidate with a negative disciplinary record could be disqualified by NYCHA in its discretion (Ver. Ans. Ex. G, Marcinek Aff. ¶¶ 4, 6).

On about November 19, 2007, the eleventh ranked person on the transfer list was appointed to a Caretaker P position, rather than petitioner (Ver. Pet. ¶¶ 22-23). According to NYCHA's Marcinek, petitioner was considered but disqualified from the position based on his disciplinary record and a hearing (Ver. Ans. Ex. G, Marcinek Aff. ¶ 7).[2] Petitioner alleges he made a demand on about November 30, 2007, that NYCHA appoint him as Caretaker P, but this demand was refused (Ver. Pet. ¶¶ 25-26). Petitioner thereafter commenced this special proceeding on February 25, 2008, seeking reinstatement to the Caretaker P position and all back wages and benefits.

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[2]Respondents include copies of documents pertaining to petitioner's work record (Ver. Ans. Ex. B-F).

An Article 78 proceeding must be commenced within four months of the date of the final determination (*Carter v State of New York*, 95 NY2d 267, 270 [2000]; see CPLR 217 [a]). An agency determination is deemed final "when the petitioner is aggrieved by the determination" (*Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). 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 N. Y.*, 98 AD2d 635, 636 [1st Dept. 1983]). The burden is "squarely on the petitioner" to demonstrate entitlement to Article 78 relief (*Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept. 2006]; *see also Miggins v City of N.Y.*, 286 AD2d 258 [1st Dept. 2001]).

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). In addition, the test of whether the punishment is an abuse of discretion is whether it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Pell v Board of Educ.*, at 233).

Section 71 of the Civil Service Law states in part that if a worker separated from service by disability is later found upon medical examination to be fit to perform the duties of the former position, then the worker,

shall be reinstated to his or her former position, if vacant, or to a vacancy in a

> similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he or she was eligible for transfer. If no appropriate vacancy shall exist . . . the name of such person shall be placed upon a preferred list for his or her former position, and he or she shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his or her former position, his or her name shall be placed on the preferred eligible list for his or her former position or any other position.

(Civil Service Law § 71). Petitioner argues that when he was reinstated in February 2006 as a Caretaker J, a lower position than the Caretaker P position, under Civil Service Law § 71, NYCHA was required under the statute to place his name on a preferred list specific to Caretaker P consideration. Respondents argue that there is only one title, Caretaker, and that the Housing Authority assigns its Caretakers to various particular kinds of work, some of which are compensated with a small salary supplement (Marcinek Reply Aff. ¶ 4). Whether or not the Caretaker P and Caretaker J positions are in fact distinct positions, with the "J" position being a lower grade" than a "P" position, such that petitioner's name should have been put on a preferred list for Caretaker P positions, petitioner is now time-barred from challenging NYCHA's action to hire him as a Caretaker J and not also put him on another preferred list at that time. Petitioner was aggrieved on the date he was reinstated as a Caretaker J without also being placed on a preferred lest for a Caretaker P position, and should have commenced this proceeding within four months of that date.

Similarly, were the petition to be understood to be seeking mandamus to compel respondents to place him on a preferred list after he was reinstated as a Caretaker J (CPLR 7803 [1]), petitioner should have made his demand promptly, rather than more than a year and a half later (*see, Matter of Schwartz v Morgenthau*, 23 AD3d 231, 233 [1st Dept. 2005], *aff'd* 7 NY3d

427 [2006]; *Matter of Densmore v Altmar-Parish-Williamstown Centr. Sch. Dist.*, 265 AD2d 838, 839 [4th Dept. 1999], *lv denied* 94 NY2d 758 [2000] [holding that, "demand should be made no more than four months after the right to make the demand arises"]; *Matter of Devens v Gokey*, 12 AD2d 135, 137 [4th Dept.], *aff'd* 10 NY2d 898 [1961]).

Petitioner argues unpersuasively that the September 2007 transfer list was a preferred list under the statute, given that even he agrees with respondents that the list represented names of Caretakers P who were displaced by provisional Plasterers (Pet. Memo of Law, at 3), and not the names of employees who returned from disability and could not be placed into their former positions, which is the subject of a preferred list. The fact that the transfer list cannot be found to be a preferred list under Civil Service Law § 71, means that petitioner bears the burden of establishing that respondents arbitrarily and capriciously overlooked his name when appointing the eleventh-listed person on the list as a Caretaker P (*Miggins v City of N.Y.*, *supra*, 286 AD2d 258). Respondents argue that NYCHA's agreement with the union was that the names on the transfer list would be considered for a Caretaker P but that a candidate with a negative disciplinary record could be disqualified at the discretion of the Housing Authority (Ver. Ans. Ex. G, Marcinek Aff. ¶¶ 4, 6). Although petitioner argues there is no documentary evidence to buttress this claim, respondent has proffered two affidavits by the individual, Marcinek, who negotiates agreements between NYCHA and various unions, and who is knowledgeable to speak about the nature of the agreement. According to Marcinek, petitioner was considered for the Caretaker P position, but his disciplinary record disqualified him from further consideration (Ver. Ans. Ex. G, Marcinek Aff. ¶ 7).

Petitioner argues that the nature of his misconduct was "relatively minor," and that the

matters actually adjudicated resulted only in a written reprimand (Pet. Memo of Law at 8). Nonetheless, the court may not substitute its judgment for that of the agency (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). It has no "discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" (*Featherstone v Franco*, *supra*, 95 NY2d at 554). The decision not to place petitioner in a Caretaker P position based on his disciplinary record does not shock the conscience, nor can be found to be arbitrary and capricious (*Matter of Pell, supra,* 34 NY2d at 232-234).

Accordingly, it is

ORDERED that the petition is denied; and it is further

ORDERED and ADJUDGED that the proceeding is dismissed.

This constitutes the decision, order and judgment of this court.

ENTER:

Dated: October 30, 2008
New York, New York

J.S.C.