STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
NEW YORK STATE CORRECTIONAL OFFICERS
AND POLICE BENEVOLENT ASSOCIATION, INC. and
BONNIE PAWLAK,

Petitioners,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

THE NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES, BRIAN FISCHER, in his
capacity as Commissioner of the New York State Department
of Correctional Services and the STATE OF NEW YORK,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-08-ST9075 Index No. 5628-08

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DECISION AND JUDGMENT

George B. Ceresia, Jr., Justice

Petitioners New York State Correctional Officers and Police Benevolent Association, Inc. (hereinafter NYSCOPBA) and Bonnie Pawlak (hereinafter petitioner Pawlak) commenced the above-captioned CPLR article 78 proceeding for review of a determination by respondent New York Department of Correctional Services (DOCS) terminating petitioner Pawlak's employment with DOCS pursuant to Civil Service Law § 71. Respondents DOCS; Brian Fischer, Commissioner of DOCS; and the State of New York oppose the petition, seeking its dismissal for failure to exhaust administrative remedies and on the merits.

Until the time of her termination, petitioner Pawlak served as a Correctional Officer for DOCS at the Wende Correctional Facility. In March 2003, petitioner Pawlak suffered a back injury as a result of an automobile accident, which required surgery. She returned to work as a Correctional Officer in July 2004. On October 18, 2006, while engaged with a combative inmate in the course of her employment with DOCS, petitioner was injured. According to the Employee Accident/Injury Report from that incident, petitioner Pawlak scraped her hands (see Employee Accident/Injury Report [10-18-06], Answer, Exhibit A). A report following an independent medical examination by Charles C. Heck, M.D., an Orthopaedic Surgeon, states that, following the October 18, 2006 incident, petitioner Pawlak reported having intermittent lower back pain with some occasional resultant numbness in her left foot (see Practitioner's Report of Independent Medical Examination [dated 4-16-07], id.,

Exhibit O). Petitioner Pawlak returned to work on November 21, 2006.

On February 21, 2007 while working at the Wende Correctional Facility, petitioner Pawlak slipped on some water on the floor and fell in front of a shower area, landing on her left side. According to the accident report, petitioner Pawlak's lower back was "very painful to touch" following the fall (see Employee Accident/Injury Report [dated 2-207], id., Exhibit C). After the fall, petitioner Pawlak complained of numbness in her left foot and "shooting pain" down her leg (see id.). After the February 21, 2007 fall, petitioner Pawlak never returned to work. Petitioner Pawlak applied for and received Workers' Compensation benefits.

On January 31, 2008, DOCS notified petitioner Pawlak that, pursuant to Civil Service Law § 71, her Workers' Compensation Leave would end and her employment would be terminated on March 2, 2008 since her absence from her position with DOCS had exceeded one cumulative year (see Martuscello Letter [dated 1-31-08], id., Exhibit Q). Further, that notification provided:

> You have the right to apply to me for reinstatement to duty if you are medically fit prior to the effective date of your termination. If you so apply, you may be required to submit to a medical examination to determine your fitness to perform the duties of your position. Should you be found unfit, you have the right to a hearing to contest that finding.
>
> After the termination of your employment, you have the right to apply to the Civil Service Department within one year of the end of your disability for reinstatement to your position, if vacant; to a similar position; or to a preferred list, pursuant to Section 71 of the Civil Service Law, and subdivision (e) of Rule 5.9 of the Rules for the Classified Service" (id.).

According to the petition, in response to that notification, NYSCOPBA contacted DOCS to request that petitioner Pawlak's termination date be extended by a year since she was entitled to a two-year leave of absence pursuant to Civil Service Law § 71. Also according to the petition, petitioners offered DOCS further medical documentation to support the request, maintaining that the back problems restricting petitioner Pawlak from returning to work were causally related to the October 18, 2006 assault by an inmate. After DOCS apparently denied this request, petitioners commenced the instant CPLR article 78 proceeding effectively for review of DOCS' determination terminating her employment as of March 2, 2008.

As a threshold matter, respondents contend that the petition should be dismissed since petitioners failed to exhaust the available administrative remedies prior to commencing this proceeding. Respondents contend that petitioner Pawlak failed to avail herself of post-termination remedies pursuant to Civil Service regulations and that this failure precludes review pursuant to a CPLR article 78 proceeding.

"'It is hornbook law that one who objects to the acts of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law'" (Matter of Brunjes v Nocella, 40 AD3d 1088, 1088-1089 [2d Dept 2007], quoting Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57 [1978]; see Matter of Georgiou v Daniel, 21 AD3d 1230, 1231 [3d Dept 2005]; Matter of New York State Correctional Officers and Police Benevolent Assn. v State of New York, 301 AD2d 845, 846 [3d Dept

2003]; Matter of Town of Bellmont v New York State Dept. of Envt. Conservation, 284 AD2d 761, 763 [3d Dept 2001]). Moreover, this "doctrine furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency" (Watergate II Apts., 46 NY2d at 57). "The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be enforced, for example, when an agency's action is challenged as either unconstitutional or wholly beyond the grant of power, or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury" (id.; see Matter of Georgiou, 21 AD3d at 1231; Matter of New York State Correctional Officers and Police Benevolent Assn., 301 AD2d at 846; Matter of Town of Bellmont, 284 AD2d at 763).

Here, the regulation at issue provides, inter alia, for steps to be taken by both the agency and the employee upon termination of service upon exhaustion or termination of a Workers' Compensation leave (see generally 4 NYCRR 5.9). In part, the regulation provides that an employee shall be given notice of termination and an opportunity to apply to be reinstated to duty if medically fit (see 4 NYCRR 5.9 [c] [2]). Further, the regulation provides that, upon such application, an employee is entitled to a hearing if, after a provided-for review of medical information, the agency does not reinstate the employee (see 4 NYCRR 5.9 [d] [1-6]). Thereafter, the agency's determination following such a hearing is subject to review pursuant to a CPLR article 78 proceeding.

Petitioners do not dispute that petitioner Pawlak did not request a hearing before the agency prior to commencing this proceeding. Rather, petitioners argue that, because she is

not asserting her right to be reinstated but, instead, is arguing that her leave period should have been extended to a two-year period, the above-discussed regulation is not applicable. Moreover, petitioners maintain that the regulation does not provide for a procedure of review at the agency level for an extension request. Petitioners also note that, after petitioner Pawlak received the termination notice, her representative contacted DOCS and presented further medical information to DOCS to substantiate her claim that she should be afforded a two-year leave period to no avail.[1]

The Court agrees with petitioners that a plain reading of the regulation establishes that the post-termination procedures provided for in that regulation are not applicable to the situation presented here (see 4 NYCRR 5.9; cf Matter of Stewart v County of Albany, 300 AD2d 984, 984-985 [3d Dept 2002]). Here, petitioner Pawlak was not attempting to gain reinstatement and a question of her fitness or unfitness to resume a position as a Correctional Officer was not present. As illustrative of this point, the regulation at issue provides for the subject matter of any hearing as follows:

> The employee may apply in writing to the appointing authority within 10 working days of the personal service or service by mail of the notice of refusal, for a hearing before a hearing officer who, except as specified herein, shall be appointed and shall conduct the proceedings in accord with article 3 of the State Administrative Procedure Act. The employee may be represented or assisted by an attorney or by a representative of the labor organization, if any,

[1] Petitioners have neither supplied the Court with any written documentation of this contact nor an affidavit or affirmation from the representative who made such contact. Also, it is unclear in the record what medical documentation was supplied to DOCS to substantiate this claim.

> certified or recognized to represent the employee's bargaining unit. The hearing officer shall receive documents and testimony as well as written and oral argument on the issues of the medical condition of the employee, the duties of the position, and the ability of the employee to perform those duties, and shall submit the record of the proceeding, together with recommendations, to the appointing authority (4 NYCRR 5.9 [d] [4]).

Therefore, the post-termination remedies provided for in the regulation do not appear to apply to the instant matter (see e.g. Matter of Walker v State Univ. of New York (Upstate Med. Univ., 19 AD3d 1058 [4th Dept 2005] [CPLR article 78 proceeding challenging termination after one-year of leave on the basis of two-year leave provision in Civil Service Law § 71, where no mention was made with regard to prior administrative proceedings]).[2] As a final note, although Civil Service § 71 was amended in 2003 to provide for a two year leave period under certain circumstances, as discussed below, the regulation at issue here has not been amended since April 1, 1992. Accordingly, it appears to provides no procedure for challenging the length of time of a Workers' Compensation leave.

As to the merits, "[i]t is well established that 'judicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis'" (id. at 1059, quoting Matter of Cerame Irrevocable Family Trust v Town of Perinton Zoning Bd. of Appeals, 6 AD3d 1091, 1092 [2004]; see Matter of Pell v

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[2]The Court observes that the regulation directs that an employee be given written notice of the beginning date of a workers' compensation leave period and "the right to leave of absence from the position during continued disability for one year unless extended" (4 NYCRR 5.9 [b] [emphasis supplied]). Presumably, petitioner Pawlak received such a notice. However, the record does not contain that notice or any information whether she was informed at that point her leave would only be for a one-year period (see e.g. Matter of La Joie v County of Niagara, 239 AD2d 908 [4th Dept 1997]).

Board of Educ., 34 NY2d 222, 231 [1974]). Further, a reviewing court "may not substitute its judgment for that of the agency or second guess its determination where such a determination is neither irrational nor arbitrary and capricious" (Matter of Sacandaga Park Civic Assn. v Zoning Bd. of Appeals of Town of Northampton, 296 AD2d 807, 809 [3d Dept 2002]; see Matter of Anderson v Lenz, 27 AD3d 942, 943-955 [3d Dept 2006], lv denied 7 NY3d 702).

Civil Service Law § 71, in relevant part, provides:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's [sic] compensation law, he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position. Notwithstanding the foregoing, where an employee has been separated from the service by reason a disability resulting from an assault sustained in the course of his or her employment, he or she shall be entitled to a leave of absence for at least two years, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position (emphasis supplied). . . .

Petitioners contend that petitioner Pawlak should be afforded the two-year leave period since her injuries can be traced to the October 18, 2006 assault she sustained during the course of her employment. In support of this argument, petitioners discuss various submissions to the agency including medical evidence relating her current back problems to that assault. In spite of this evidence, DOCS determination to terminate petitioner Pawlak's employment after only a one-year leave of absence is neither arbitrary nor capricious and has a rational basis in the record (see Matter of Walker, 19 AD3d at 1059-1060).

The record establishes that petitioner Pawlak first began having back problems as a result of an automobile accident in 2003. Although she was assaulted by an inmate while on duty as a Correctional Officer for DOCS in 2006, her accident/injury report from that incident lists injuries to her hands. Moreover, petitioner Pawlak returned to work approximately 35 days after the 2006 assault. Significantly, her current leave began after her fall of February 21, 2007, which she characterized as new injury on her accident/injury report. Moreover, documentation from the Workers' Compensation Board shows that entity treated petitioner Pawlak's February 21, 2007 injuries as distinct from the injuries of October 18, 2006. Accordingly, based on the record before the agency, a rational basis existed for DOCS to conclude that petitioner Pawlak's disability arose from her February 21, 2007 accident, which was not as a result of an assault, affording her only a year's leave period pursuant to Civil Service Law § 71 (see id.).

Finally, to the extent that petitioners submit a new decision from the Workers' Compensation Board that was issued following the commencement of this proceeding, this is not relevant evidence in this proceeding. "The review of an administrative determination is limited to the 'facts and record adduced before the agency'" (Matter of Kelly v Safir, 96 NY2d 32, 39 [2001], quoting Matter of Featherstone v Franco, 95 NY2d 550, 554 [2000]). Thus, the Court may not rely on this new submission (see id.; Matter of World Buddhist Ch'An Jing Ctr. v Schoeberl, 45 AD3d 947, 951 [3d Dept 2007]).

The Court has considered the parties' remaining arguments and finds them unpersuasive. The Court concludes that the determination was not made in violation of

lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. Thus, the petition must be dismissed.

Accordingly, it is

ORDERED and ADJUDGED that the petition is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondents who is directed to enter this Decision and Judgment without notice and to serve all attorneys of record with a copy of this Decision and Judgment with notice of entry.

ENTER

Dated: December 22, 2008
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated July 2, 2008;
2. Petition verified July 2, 2008, with accompanying Exhibits A-J;
3. Answer verified August 14, 2008, with accompanying Exhibits A-Q;
4. Affidavit of Darren Ayotte sworn to August 14, 2008;
5. Affirmation of Edward J. Green, Jr., Esq., affirmed August 21, 2008, with accompanying Exhibit A.