

Matter of Hook v Dinapoli

2008 NY Slip Op 33501(U)

December 22, 2008

Supreme Court, Albany County

Docket Number: 4510-08

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
CARLE PLACE HOOK, LADDER, AND HOSE CO. NO. 1, INC,
Individually, and on behalf of MICHAEL SQUITTIERI, AND
ALL PRESENT AND FUTURE EMPLOYEES,
Petitioners,

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

-against-

THOMAS P. DINAPOLI, in his capacity as the
COMPTROLLER OF THE STATE OF NEW YORK and the
administrative head of the NEW YORK STATE AND LOCAL
EMPLOYEES' RETIREMENT SYSTEM, the OFFICE OF THE
COMPTROLLER OF THE STATE OF NEW YORK and the
NEW YORK STATE AND LOCAL EMPLOYEES'
RETIREMENT SYSTEM,
Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-08-ST8938 Index No. 4510-08

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DECISION and JUDGMENT

George B. Ceresia, Jr., Justice

Petitioner Carle Place Hook, Ladder and Hose Co. No. 1, Inc. (hereinafter the Company) commenced the above-captioned CPLR article 78 proceeding for review of a May 5, 2008 determination by respondent New York State and Local Retirement System (hereinafter the Retirement System) denying its application on behalf of its employee Michael Squittieri and other present or future employees to participate in the Retirement System pursuant to Retirement and Social Security Law § 31.¹ Respondents Thomas P. Dinapoli, in his capacity as the Comptroller of the State of New York and the administrative head of the Retirement System, the Office of the Comptroller of the State of New York and the Retirement System (hereinafter, collectively, the Retirement System) oppose the petition, seeking its dismissal on the merits.

The Company was originally incorporated in 1910 as the Mineola Park Hook and Ladder Company No. 1 with the purpose of “voluntarily aid[ing] in the extinguishing of fires occurring within the unincorporated village hereinafter described, and the preservation of life and property at such fires” (Certificate of Incorporation, Petition, Exhibit A). On October 11, 1910, the Town Board of the Town of North Hempstead resolved to give its consent to

¹ Although the Retirement System also based its denial of the application on Retirement and Social Security Law § 30 in an earlier determination dated February 4, 2008, petitioners are not challenging that basis in the instant proceeding (see Notice of Petition; Verified Petition at ¶ 13).

the formation of the Company “provided that such corporation shall engage in or conduct only such business as properly belongs to a fire, hose or hook and ladder company, and only within the unincorporated Village of Mineola Park” (id.). In 1928, following the name change of the community from Mineola Park to Carle Place, the Company officially changed its name as well (see id.).

Prior to the application at issue in this proceeding, on two separate occasions in 1982 and 2003, the Retirement System denied similar requests by the Company that its employee be allowed to participate in it. Of interest here, in its 2003 determination, the Retirement System noted:

The Carle Place Hook, Ladder & Hose Co. was created in the early 1900's by a group of citizens. Since the Company was not created in whole or part by legislature and does not derive its powers from the state legislature, the Company is not eligible to participate under Section 31 of the Retirement and Social Security Laws (Kutey Letter [dated 9-23-03], Tersago Affirmation, Exhibit D).

In April 2007, the Company sought to become a participating employer in the Retirement System. Specifically, the Company desired to have its one, full-time-paid employee, Michael Squittieri, enrolled in the Retirement System. Mr. Squittieri had been employed with the Company since approximately 2004.² The Retirement System advised Mr. Squittieri in a telephone conversation that the Company was ineligible to participate in

² The record establishes that Mr. Squittieri was already a member of the Retirement System from previous employment.

the Retirement System. In a January 17, 2008 letter, counsel for the Company sought a decision and explanation from the Retirement System regarding such denial.

On February 4, 2008, the Retirement System issued a written determination providing that “pursuant to Retirement and Social Security Law §§ 30 and 31, the Carle Place Fire Department/Carle Place Hook, Ladder & Hose Co. No. 1, Inc. is ineligible to participate in the System” (Tersago Letter [dated 2-4-08], Petition, Exhibit C). The Retirement System noted that the New York State Department of State identifies the Company as a “domestic not-for-profit corporation” (id.). The determination further noted:

The Town of North Hempstead has identified the Carle Place Fire Department as a privately incorporated organization which provides fire protection to fire protection districts.

The Fire Company has held a contract with the Town of North Hempstead to provide for fire protection for years 2004-2008. Portions of the 2004-2008 contract were provided by Mr. Squittieri. The contract states that the Fire Company is an ‘independent contractor’ and states that the employees of the fire department are not considered employees of the Town of North Hempstead. The contract states that the Town provides funds to the fire department on a flat fee basis pursuant to the contract. The funds come from the taxpayers of the Town of North Hempstead (id.).

The Retirement System also observed that, in its previous determinations in 1982 and 2003 regarding the Company’s prior applications, it had determined that the Company “was a private organization which provided a public service pursuant to contract. It was further determined that the Fire Company is not a public or quasi-public organization created by the Legislature thus it is ineligible to participate pursuant to Retirement and Social Security Law § 31” (id.). The Retirement System also explained that the Company

is not a 'fire district.' Rather it is an independent fire company operating under a contract with a fire protection district. The term 'municipality' is defined in the Retirement and Social Security Law § 2 (19) to include a fire district. However, the definition does not extend to an independent fire company operating under a contract with a fire protection district or municipality (id.).

On April 21, 2008, the Company responded to the above determination, explaining why it should be allowed to participate in the Retirement System. The Company maintained that it was "under the control of the Town of North Hempstead, regarding its prevention or extinguishment of fires and it is a volunteer fire company discharging a public function" (Glasser Letter [dated 4-21-08], id., Exhibit E). Further, relying on Retirement and Social Security Law § 31 (a), the Company explained that it comes within the definition of a "quasi-public municipality, thus qualifying for participation in the [Retirement System] because it is an 'organization created wholly or partly or deriving its powers by the legislature of the state' and is 'engaged in service to the public' by providing fire extinguishment services to the Town'" (id.).

On May 5, 2008, the Retirement System, upon review of the arguments posited by the Company, responded to the Company's letter, reiterating its position that the Company is not eligible to participate in the Retirement System. The Retirement System determination provided, in part: "Please be advised that the Carle Place Fire Department is ineligible to participate pursuant to RSSL Section 31 as it is not a public or quasi public agency that is created by or derives its power from the legislature of New York State" (Tersago Letter [dated 5-4-08], id., Exhibit F). Further, the Retirement System noted:

In order to be eligible to participate pursuant to this section an organization must not only be engaged in public service but also be created in whole or part or derive powers from the New York State Legislature.

The [Company] is a private not-for-profit corporation which was created by a group of private citizens in 1910. A review of the documentation submitted by both you and Mr. Squittieri indicates that the Department does not derive its powers from legislature. Additionally, it appears to be organized and controlled by a private group of citizens which contracts with a municipality. The [Retirement] System routinely denies participation to entities that are not-for-profit corporations (*id.*).

The Company commenced this instant proceeding for review of that determination.

In this proceeding, the Company contends that it is entitled to participate in the Retirement System because, pursuant to Retirement and Social Security Law § 31 (a), the Company is a quasi-public municipality. The Company maintains:

Since the [Company] is an organization created wholly or partly or deriving its powers from the legislature of the State and is engaged in service to the public by providing fire extinguishment services to Carle Place, located in the [Town of North Hempstead], it is a quasi-municipality, that should be found to be eligible to participate in the [Retirement System] (Petition at ¶ 14).

As with any CPLR article 78 proceeding seeking review of an administrative determination, such as here, a court's inquiry is "limited to whether the denial of petitioner's application was arbitrary and capricious or affected by an error of law" (Matter of Senior Care Servs., Inc. v New York State Dept. of Health, 46 AD3d 962, 965 [3d Dept 2007] see Matter of Pell v Board of Educ., 34 NY2d 222, 231 [1974]; Matter of Kirmayer v State of N.Y. Civ. Serv. Commn., 42 AD3d 848, 850 [3d Dept 2007], lv dismissed 9 NY3d 955, quoting Matter of Fortune v State of N.Y. Div. of State Police, 293 AD2d 154, 157 [3d Dept

2002]). Further, a 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; Matter of Fortune, 293 AD2d at 157).

As relevant here, Retirement and Social Security Law § 31 (a) provides:

Any public or quasi-public organization created wholly or partly or deriving its powers by the legislature of the state and which organization employs persons engaged in service to the public . . . may elect to have its officers and employees become eligible to participate in the retirement system. Acceptance of the officers and employees of such employer for membership in the retirement system shall be optional with the comptroller (emphasis supplied).

. . .

The Company argues that it derives its power from the legislature, relying, in part, on Not-For-Profit Corporation Law § 1402 (d), (e). The Company contends that, pursuant to section 1402, it is under the control of the Town of North Hempstead. As such, the Company maintains that,

since the Town may adopt rules and regulations for the government and control of a fire corporation such as the [Company], pursuant to Not-for-Profit Corporation Law § 1402 (e), it explicitly derives its powers from the legislature. Clearly it was the legislature’s intent that these entities exist and derive their powers pursuant to the town they were specifically created to serve (Petitioner’s Memorandum of Law at 5-6).

Not-For-Profit Corporation Law § 1402 (d), provides:

Any fire, hose, protective or hook and ladder corporation heretofore organized under any general law with the consent of the town board in the territory served by such corporation is hereby legalized and confirmed, notwithstanding

the omission of any town board to appoint or confirm the members of such corporations as town firemen. Any such corporation shall hereafter be subject to the provisions of this section (emphasis supplied).

Thus, as the Company contends, even though it was originally incorporated in 1910 under then-Member Corporation Law, pursuant to section 1402 (d) the Company now falls under the ambit of that Not-For-Profit Corporation provision.

Further, as pertinent here, Not-For-Profit Corporation Law § 1402 (e) provides:

A fire, hose, protective or hook and ladder corporation heretofore, incorporated under any general law or a fire corporation hereinafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having, by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations. . . .

Therefore, as the Company argues, the above-cited subdivision of section 1402 provides that a Town, such as the Town of North Hempstead, has control over a fire company such as the one at issue here (see Sawyer v Town of Lewis, 11 AD3d 938, 940 [4th Dept 2004]; Miller v Savage, 237 AD2d 695, 696 [3d Dept 1997]; see also Miller v Morania Oil, OCP, 194 AD2d 770, 771 [2d Dpt 1993]). Since section 1402 was enacted by the legislature of the state, arguably a Town derives its power of control over a fire company, such as the Company here, from the legislature. The Town deriving its power of control from the legislature pursuant to section 1402, however, does not necessarily equate to the Company deriving its power from the legislature such that it may avail itself of the benefit of Retirement and Social Security Law § 31 (a).

In any event, even if, pursuant to section 1402, the Company could be viewed as deriving its power from the legislature of the state, Retirement and Social Security Law § 31 (a) affords the respondent Comptroller discretion to accept or not accept an applicant into the Retirement System. The Company has not addressed this issue. Moreover, the Retirement System has demonstrated that respondent Comptroller did not abuse his discretion in denying the application. For instance, the Comptroller's decision here mirrored the two-previous decisions regarding the Company in its prior applications. Furthermore, the Retirement System has provided examples of other similar situations in which it has denied applications to the Retirement System (see generally Matter of Charles A. Field Del. Serv. [Roberts], 66 NY2d 516 [1985]).

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either without merit or unnecessary to reach given the Court's decision. Therefore, for the reasons discussed above, the Court finds that the May 5, 2008 determination denying the Company's application to the Retirement System pursuant to Retirement and Social Security Law § 31 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. The Court concludes that the petition must be dismissed.

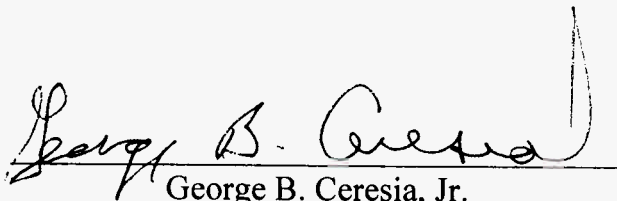
Accordingly, it is

ORDERED and ADJUDGED that the petition is dismissed.

This shall constitute the Decision 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 June 5, 2008;
2. Petition verified June 2, 2008, with accompanying Exhibits A-F;
3. Affidavit of Charles Blum sworn to June 2, 2008;
4. Answer verified August 7, 2008;
5. Affirmation of Tanya G. Tersago, Esq., affirmed August 6, 2008, with accompanying Exhibits A-F;
6. Reply verified September 25, 2008.