

Perez v Baruch Coll.
2009 NY Slip Op 31422(U)
June 26, 2009
Supreme Court, New York County
Docket Number: 112000/08
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JANE S. SOLOMON

PRESENT: _____

PART 55

Index Number : 112000/2008
PEREZ, EDIBERTO
VS.
BARUCH COLLEGE
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3
4
0

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

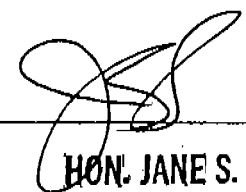
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the annexed Decision and Order.

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

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/26/09


HON. JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
EDIBERTO PEREZ,

Plaintiff,

-against-

BARUCH COLLEGE and THE CITY UNIVERSITY
OF NEW YORK,

Defendants.

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

Index No. 112000/08

Decision and Order

Solomon, J.:

Defendants Baruch College (Baruch) and the City University of New York (CUNY) move, pursuant to CPLR 3211 (a) (2) and (7), to dismiss the complaint on the grounds that plaintiff Ediberto Perez did not exhaust his administrative remedies, and that the statutory provision under which he sues does not include a private right of action.

Background

The following factual allegations are set forth in the complaint, and for the purposes of this motion, are accepted as true.

Plaintiff was the Administrative Superintendent of Campus Facilities and Operation at Baruch. On March 6, 2008, David Boxhill, Baruch's Associate Director of Human Resources, advised the plaintiff that Elizabeth Robinson, Baruch's Director of Human Resources, desired to meet with him at 4:30 P.M. that day. Plaintiff inquired as to the nature of the meeting, and was

advised that "she will explain it to you." Complaint, ¶ 7. Plaintiff attended the meeting with Ms. Robinson and an investigator from CUNY's main office. It is not clear from the complaint or the motion papers as to the nature of the misconduct being investigated. However, at the meeting, plaintiff was shown three documents, a personnel data form, an emergency contact form listing Marilyn Perez as plaintiff's sister, and a memo dated February 22, 2008, stating that Marilyn Perez was not plaintiff's sister and that plaintiff had no relationship to Fernando Villamar.

Plaintiff alleges that he was not notified that this meeting was part of an official investigation into his alleged misconduct, nor was he notified that he had a right to representation. At the end of the meeting, Ms. Robinson informed plaintiff that he was suspended without pay pending an investigation. On March 12, 2008, plaintiff received written notice of his unpaid suspension and the ongoing investigation. On June 26, 2008, plaintiff was notified in writing that disciplinary charges were being preferred against him. This notice characterized the March 6, 2008 meeting as an official college investigation.

Plaintiff brings this action for a declaratory judgment, as well as monetary damages, for the alleged violation of his rights under Section 75 (2) of the New York State Civil

Service Law. This action was not brought pursuant to CPLR Article 78.

Analysis

Plaintiff argues that he was not given advance written notice of his right to have representation during the March 6th meeting, a violation of Section 75 (2) of the New York State Civil Service Law.

Section 75 (2) sets forth procedures for administering disciplinary actions in accordance with due process. Specifically, Section 75 (2) provides that an employee has a right to representation at the time of questioning, when it appears the employee is a potential subject of disciplinary action, and "shall be notified in advance, in writing, of such right." New York State Civil Service Law Section 75 (2). If the employee is unable to obtain representation within a reasonable time period, the employer has the right then to still question the employee. At the disciplinary hearing, the hearing officer has the power to inquire about whether the employee was afforded a reasonable time period to obtain representation. *Id.* If the hearing officer finds that the employee was not, then all statements obtained from the questioning, as well as other evidence or information obtained as a result thereof, shall be excluded. *Id.*

Defendants argue that plaintiff has failed to exhaust his administrative remedies. However, this argument is without merit. It is impossible for plaintiff to exhaust administrative remedies where there has not been a hearing held by the administrative agency, and thus, no determination to challenge. See *Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52, 57 (1978). There is no indication that a hearing has been held with regard to these disciplinary charges.¹

Although defendants' argument fails, plaintiff is not entitled to the relief he seeks. The Court cannot now declare that plaintiff was not given notice, and thus, was not afforded a reasonable time to obtain representation. A hearing officer must first determine whether plaintiff was given a notice and a reasonable opportunity to seek representation. The Court should not interfere with the administrative process, now in a preliminary stage, by making findings and a determination before the hearing officer has had a chance to do so.

At this juncture, the only way for plaintiff to get relief would be to seek a court order directing defendants to

¹ The last action taken in the case at bar was the written notice, received by plaintiff on June 26, 2008, characterizing the March 6, 2008 meeting as part of an investigation, and informing plaintiff that disciplinary charges were being preferred against him. Defendants note in their brief that plaintiff is on paid administrative leave, and has been since April 6, 2008. Defendants also note that plaintiff's suspension without pay was from March 7, 2008 to April 6, 2008.

commence the hearing on the disciplinary charges. At the hearing, plaintiff can raise the representation issue. Once the hearing is held, and there is a final determination by the defendants, then all administrative remedies are exhausted. If plaintiff is dissatisfied with the result, his remedy then lies in review of the administrative determination by an Article 78 proceeding. Notwithstanding this result, the Court trusts that the administrative proceeding will proceed with alacrity. Having an employee on paid leave does not serve any public purpose.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 6/26/09

ENTER:

J.S.
J.S.C.
HON. JANE S. SOLOMON

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK