

Sabatino v Suffolk County

2009 NY Slip Op 31538(U)

July 10, 2009

Supreme Court, Suffolk County

Docket Number: 2008-28029

Judge: Jeffrey Arlen Spinner

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SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER

Justice of the Supreme Court

PAUL SABATINO II

Petitioner,

-- against --

SUFFOLK COUNTY and **JOSEPH SAWICKI**, in his
 capacity as the Suffolk County Comptroller,

Respondents.

INDEX NO.: **2008-28029**

MOTION SEQ. NO.: 001 - CASEDISP

ORIG. MOTION DATE: 08/21/08

FINAL SUBMIT DATE: 07/01/09

UPON the following papers numbered 1 to 13 read on this Petition:

- Petition (Papers 1-2);
- Respondents' Opposition (Papers 3-5);
- Petitioner's Reply (Papers 6-13);

it is,

ORDERED, that the application of Petitioner is hereby granted to the extent set forth below.

Petitioner requests a judgment, pursuant to Article 78 of the Civil Practice Law and Rules, directing Respondents to make an additional severance payment based upon his 1,074 hours of accrued and approved vacation hours less the 630 hours of vacation time already paid, awarding him the sum of \$40,221.97 as incidental damages, plus interest as of December 19, 2007, with costs and disbursements.

In 1988, Suffolk County lawmakers enacted Resolution 659, entitled "Establishing a Policy of Affordable Fringe Benefits for Exempt Employees." Its objective was to address the exorbitant payouts collected by many outgoing government officials and bring compensation for unused accrued time down to reasonable and prudent levels.

Petitioner Paul Sabatino II was employed by the County in various positions and capacities from 1977 until his retirement in 2007. At all of these times, he was an exempt employee. In 1988, Petitioner served as Legal Counsel to the Legislature--the same year that the reform legislation for exempt employees was being proposed and considered by the Legislature and County Executive.

Petitioner was assigned the task of reviewing and drafting the proposed resolutions. He formally disclosed his status as an exempt employee and his economic interest in the subject matter of the proposed resolution three times: (1) in a memorandum dated March 4, 1988; (2) at a meeting of the Legislative and Personnel Committee of the Suffolk County Legislature on March 8, 1988; and (3) at a meeting of the Suffolk County Legislature on July 12, 1988. Resolution 659 was signed into law by the Suffolk County Executive on July

27, 1988.

The status quo had been that exempt employees were allowed to accrue vacation time on an annual basis. Vacation hours in excess of 630 hours, however, were allowed to be accrued only if they were approved in writing by the County Executive, the Presiding Officer, or the Director of Labor Relations. The severance payment an exempt employee was to receive (upon retirement, termination, resignation or death) was based, in part, upon the total amount of accrued vacation hours multiplied by the hourly rate of pay earned by that employee at the time he or she left employment.

Resolution 659, a copy of which is attached to the Petition herein as an exhibit, limited the carry over of any unused vacation days accrued on or after January 1, 1989. It provided, in pertinent part, that

[u]pon separation from County service by retirement, resignation, termination or death, an exempt employee shall be granted payment by the County for unused vacation time for all unused vacation time accrued prior to December 31, 1988, which has vested in such exempt employee as of that date and remains unused at the time of separation subject to pre-existing limitations of only a certain number of days being permitted to be carried over to a succeeding year unless previously approved in writing by the County Executive for administrative personnel or the Presiding Officer of the County Legislature for legislative personnel

[n]othing contained herein shall be construed or applied so as to impair, reduce, eliminate, terminate, or affect any such fringe benefits, including . . . vacation time, as may have been accrued or earned by such exempt employees . . . prior to January 1, 1989 and which fringe benefits or the value thereof shall have been vested via this Resolution in such exempt employees

By letter dated November 27, 1985 to Daniel A. Bahr, who was then the Director of the Department of Labor Relations, Lou Howard, who was then the Presiding Officer of the Legislature, requested permission for Petitioner to carry over his excess vacation time from 1985 into 1986. By memorandum from Bahr dated December 18, 1985 the request was approved.

By letter dated December 15, 1986 to Bahr, Gregory J. Blass, who was then the Presiding Officer of the Legislature, requested permission for Petitioner to carry over his excess vacation time from 1986 into 1987. By Memorandum dated December 24, 1986, Bahr advised Blass that all requests to carry over excess vacation time were to be directed to the County Executive. By letter dated January 8, 1987, Michael A. LoGrande, who was then the Acting County Executive, approved the request.

The record does not contain Petitioner's request to carry over his excess vacation time from 1987 into 1988. The record does show that on April 29, 1988, Presiding Officer of the Legislature Sandra Bachety, who came into that Office on February 1, 1988, approved Petitioner's carry over of 315.25 hours of unused vacation time that had accrued as of December 31, 1987.

In a letter dated May 25, 1988, Chief Deputy Comptroller Joseph Poerio, on behalf of County Comptroller Joseph R. Caputo, wrote a letter to Bachety "to respond to [her] letter approving the carry-over." The letter

stated that "we must deny this request and ask that Mr. Sabatino deduct 315.25 hours of accrued vacation time." The reasons given were that: (1) he failed to request the carry over "during 1987"; (2) Sandra Bachety was without the authority to approve the carry over because she was not the Presiding Officer of the Legislature during that period of time; and (3) Mr. Sabatino had "always" had his vacation accruals carried over by a letter from the County Executive, a "precedent" he had "set" and failed to follow for the year 1987.

In a letter dated June 2, 1988, Bachety responded to Caputo and requested that his office carry out and implement the approval that she granted on April 29, 1988. It states that she "knew of no legal opinion that prohibits the Presiding Officer from exercising the fundamental power of that office to address the personnel needs of the Suffolk County Legislature, including approvals or disapprovals of accrued vacation time." The letter also states that Mr. Sabatino had "in fact" requested an approval of accrued vacation time in 1987, and that the request was not acted upon because of the transitions in both branches of government. In an Affidavit attached to the instant action, Bachety states that Petitioner's request for that year had been pending before the former Presiding Officer, Gregory Blass.

In said Bachety Affidavit, she states that neither County Comptroller Caputo nor Poerio responded to this letter, and that no one in the County Comptroller's office, County Attorney's office, or County Executive's office ever rejected or challenged her position. On December 28, 1988 Bachety approved the carry over of 1,076 hours of accrued vacation time as the vested amount of Petitioner to be carried over into 1989. In her Affidavit, Bachety writes she insisted upon the provision found in the Resolution "making it clear that the County Executive signs off for administrative personnel and the Presiding Officer signs off for legislative personnel. The COUNTY EXECUTIVE signed that legislation. Pursuant to that very clause, I then signed a December 28, 1988 catchall approval for all of the Petitioner's carry over vacation time to be vested as of December 31, 1988 "

The written approval of December 28, 1988 included the carry over of 446 hours above the 630-hour cap. Petitioner alleges that, after taking into account two hours of used time, the remaining 1,074 hours of approved time became known as "frozen time," in recognition of the new policies to take effect as if January 1, 1989. Petitioner further alleges that, beginning with the first payroll period of January 1989, his secretary inserted a notation of "Frozen Time/Vacation Hours:1,074" in every one of his time sheets, up until his retirement in December 19, 2007.

On December 19, 2007, Petitioner retired as Chief Deputy Suffolk County Executive. On February 4, 2008, he applied for a severance payment in the amount of \$194, 220.13. This figure was based, in part, upon Petitioner's claim of 1,074 hours of unused accrued vacation time. The Suffolk County Comptroller approved the payment only in part. He determined that Petitioner had only validly accrued 630 hours, and the 444 hours in excess of that amount claimed by Petitioner were forfeited. Under the formula for severance packages, these 444 hours had a value of \$40, 221.97. The Comptroller subtracted this sum from the \$194, 220.13 claimed, arriving at a severance figure for Petitioner of \$153, 998.16.

There not being an extensive citation of case law by either party herein, the Court is drawn to the conclusion that there exists an absence of precedent, and that this matter must be decided on the facts as presented.

Respondents contend that Petitioner is not entitled to any additional compensation. They argue that no request was made on Petitioner's behalf during the calendar year 1987 for permission to carry over all of his excess vacation time from 1987 into 1988. Additionally, they argue Bachety's letter of April 29, 1988 does not serve as the required written approval for two reasons. First, it was not obtained prior to the end of 1987, the year for which the carryover was sought. Second, they argue Bachety was not the Presiding Officer of the Legislature in 1987, was not the Petitioner's supervisor that year, and did not have the authority to approve the 1987 carry over of Petitioner's excess hours. Without having obtained an approval for 1987, Respondents argue, all excess vacation hours were "lost" by Petitioner.

The conclusion Respondents urge on the Court cannot be reconciled with the facts. Although the request for approval of the carry over of accrued vacation time for the calendar year 1987 is not before the Court on the record, Petitioner and Bachety both swear that such request was made during that year. Furthermore, the Resolution does not prescribe a deadline for the submission of a request for approval of the carry over of accrued vacation time from one year to the next.

Additionally, Respondents' assertion that a presiding officer holding office in one year is not authorized to approve the carry over of accrued time earned in a prior year and during the tenure of a predecessor presiding officer is unsupported. The Resolution clearly states that the Presiding Officer of the Legislature had the authority to approve such requests. Furthermore, nothing in the record of the policies or practices in the County with respect to the accrual of vacation time indicates otherwise. The Memorandum dated December 24, 1986, advising that all requests to carry over excess vacation time be directed to the County Executive is irrelevant, as it was superseded by the plain language of Resolution 659 (and never binding upon the Presiding Officer of the Legislature under the doctrine of separation of powers).

Finally, the Court finds Respondents' claim that Petitioner is not entitled to further compensation because he did not properly disclose his personal interest in Resolution 659 at the time it was developed and adopted a bit tortured. It is undisputed that Petitioner made public disclosures regarding his interest in pending legislation that would affect his interest in accrued vacation and other time. These public disclosures brought him into proper compliance with the previous determination of the courts of the State of New York as set forth in **Stettine v. County of Suffolk** (105AD2d 109, 482 NYS2d 818, *aff'd* 66 NY2d 354, 497 NYS2d 329 [1985]).

The facts clearly support the application of Petitioner for relief. Respondents had a ministerial, non-discretionary obligation to pay \$40,221.97 in severance payments, in addition to \$153,998.16 already paid, and notwithstanding that such a payment concerned accrued and approved vacation time in excess of 630 hours, as Petitioner had a clear, legal right to be paid for these hours. The Court finds Respondents' claims that Petitioner did not properly disclose himself completely unsupported by the facts herein. Therefore, the Petition must be granted.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is therefore,

ORDERED, that the above referenced application of Petitioner is hereby granted to the extent that, it is hereby directed that Respondents make an additional severance payment based upon his 1,074 hours of

accrued and approved vacation hours, less the 630 hours of vacation time already paid, and awarding him the additional sum of \$40,221.97 as incidental damages, plus interest as of December 19, 2007, with costs and disbursements.

Dated: **Riverhead, New York**
 July 10, 2009



HON. JEFFREY ARLEN SPINNER, JSC

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

Anton J. Borovina <i>Attorney for Petitioner</i> 445 Broad Hollow Road, Ste. 334 Melville, NY 11747	
Christine Malafi, Suffolk County Attorney <i>Attorney for Respondents</i> H. Lee Dennison Bldg. 100 Veterans Memorial Highway, PO Box 6100 Hauppauge, New York 11787-4311	