Matter of Kobiashvili v Jacobi Med. Ctr.

2009 NY Slip Op 33237(U)

December 22, 2009

Sup Ct, Queens County

Docket Number: 13000/09

Judge: Patricia P. Satterfield

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Short Form Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

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Application of
OLGA KOBIASHVILI,

Petitioner,

Index No.: 13000/09
Motion Date: 9/9/09
Motion Cal. No.: 27
Motion Seq. No.: 1

For a judgment pursuant to CPLR Article 78

-against-

JACOBI MEDICAL CENTER,
NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Respondents.

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The following papers numbered 1 to 12 read on this petition by petitioner Olga Kobiashvili for a judgment, pursuant to CPLR Article 78: a) annulling respondents' determination to terminate the employment of Ms. Kobiashvili as being in violation of lawful procedure, being arbitrary and capricious, and not being supported by substantial evidence and compelling respondents to reinstate Ms. Kobiashvili to her position as a cytotechnologist at the Jacobi Medical Center with back pay plus interest; or, in the alternative b) remitting the matter to Respondents for further review; and on this cross motion by respondents for an order dismissing the petition, pursuant to Rule 3211(a)(7) and Section 7804(f) of the Civil Practice Law and Rules ("CPLR"), on the ground that the petition fails to state a cause of action, and directing the Clerk of the Court to enter judgment for respondents.

	PAPERS NUMBERED
Notice of Petition-Affidavits-Exhibits.....	1 - 3
Notice of Cross Motion-Memorandum of Law in Support-Exhibits.....	4 - 8
Memorandum of Law In Opposition to Cross Motion.....	9 - 10
Reply Memorandum of Law in Further Support.....	11 - 12

Upon the foregoing papers, it is ordered that the petition and cross motion are disposed of as follows:

This is an Article 78 proceeding, in the nature of certiorari, instituted by petitioner Olga Kobiashvili ("petitioner"), a former employee of respondent Jacobi Medical Center ("Jacobi"), against respondent Jacobi and respondent New York City Health and Hospitals Corporation ("HHC"), seeking the annulment of respondents' termination of her employment and her reinstatement to the position as cytotechnologist at Jacobi.

Relevant Facts

Petitioner was hired on January 22, 1996, at Jacobi as a provisional Associate Laboratory Microbiologist in the cytology department, a department in which cytotechnologist, such as petitioner, work with pathologists to detect changes in cellular material from body sites in the early diagnosis of cancer and other diseases. Pursuant to Part 58 of the New York Code of Rules and Regulations, a cytotechnologist may examine no more than 80 one-slide gynecological cases per work day and no more than 100 combined total of gynecological and non-gynecological slides per work day. In 2007, petitioner was permitted to take a second job working part-time as a cytotechnologist at Shiel Medical Laboratory. By letter dated January 30, 2008, Patricia R. Romano, M.D., Director of Shiel Medical Laboratory, was advised by the New York State Department of Health that petitioner was approved to "exceed the New York State cytotechnologist work standard of eighty slides" up to a maximum of 96 slides.

By 2-Year Provisional Employee Notice and Statement of Charges, dated April 11, 2008, HHC served petitioner with notice of charges preferred against her, alleging, inter alia, that she exceeded the number of slides per day in violation of the State Regulations and that she falsified official documents regarding the amount of slides she read on certain dates, which were violations that could compromise Jacobi's state licensing. The specifications, as set forth in the April 11, 2008 Notice, were:

> Specification #1: Falsification of Timesheet.
> During the period of May 4, 2007 to December 13, 2007, you utilized five (5) days and 3.5 hours of sick leave yet, you documented that you worked at another laboratory reading cytology slides.
>
> Specification #2: Falsification of an Official Document
> You documented on November 7, 2007 worksheet that you read forty-four (44) and thirty-three (33) slides respectively on November 15th and November 16th yet, you called in sick on both dates.
>
> Specification #3: Violation of State Regulation
> You documented that you read eighty (80) slides on November 15, 2007, which is in violation of the State Regulation regarding cytology readings.

On May 12, 2008, the Charges were amended, as follows:

> Specification #3: on the Original Notice and Statement of Charges should read as follows:
>
> You documented that you read over eighty (80) slides in a 24 hours period on the following dates which is a violation of the State Regulation regarding cytology readings.
>
> You documented that you read over ninety six (96) slides in a 24 hours period on the following dates which is a violation of the State Regulation regarding cytology readings.
>
> Specification #4: Falsification of Documentation
>
> Specification #5: Poor Work Performance

The April 11, 2008 Notice also notified petitioner of a Step IA Disciplinary Conference, as provided in her collective bargaining agreement, on May 7, 2008;[1] the disciplinary conference was held May 14, 2008. At the Step IA conference, the Labor Relations Specialist presiding over the conference dismissed Charge #1, and found petitioner guilty of Charges ##3-5; Charge #2 was withdrawn. In sustaining Charge #3, the hearing officer, in her June 10, 2008 decision, stated:

> In spite of Management's attempt to have Respondent [Kobiashvili] comply with the State Regulations, the respondent still stated that she has the right to read over eighty (80) slides in a 24 hour period because she received an exception. Even though the Respondent was granted an exception, the exception was effective January 30, 2008, and it is not applicable to Jacobi.
>
> The intent of those who wrote the regulation specifies how many slides can be read in a specific time period. In addition, if Respondent reads ninety-six (96) slides at Shiel Medical Laboratory, then she cannot read any slides at Jacobi. The dates in specification #3 are not

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[1]The July 5, 2007 to August 4, 2009 collective bargaining agreement executed between the New York City Health and Hospitals Corporation and 144 Division of 1199 National Health & Human Service Employees Union/SEIU/AFL/CIO ("the Union"), the Union representing petitioner's title, establishes a four step grievance procedure available to "a provisional employee who has served continuously for two years in the same or similar title" who challenges a "wrongful disciplinary action." Step IV of the Grievance Procedure provides that "If the grievant is not satisfied with the determination of the Commissioner of Labor, the Union with the consent of the grievant may proceed to arbitration.

> covered by her exception. The license of Jacobi laboratory and the morale of the employees are impacted when the respondent chooses to read the number of slides that benefits her the most on any given day.

In sustaining Charge #4, falsification of documentation, which addressed the discrepancy in the number of slides given to petitioner for review and the number of reported slides completed by petitioner, the hearing officer stated:

> The Respondent [Kobiashvili] stated that she does 'excessive work' and that reporting a lesser number of what she is given is because she did not finish her assigned work on a specific day and completed that work another day.
>
> Such manipulation of assignment(s) defeats the purpose of work standards and is potentially harmful to our relationship(s) with the State and Federal agencies responsible for monitoring our laboratories. Based upon the above admission by the Respondent and the documents submitted, the respondent is guilty of the charge.

Lastly, in finding petitioner guilty of Charge #5, poor work performance, the hearing examiner found:

> There was testimony and documents by the department to show that the Respondent [Kobiashvili] failed to input her workload into the [computer] system as protocol and to input the Quality Control slides read as directed. . . The department presented documentation to show that the Respondent had input her workload into the system in the past. However, she has become determined to do her work the way she wants with complete disregard of authority. Even at the end of the conference date, this Hearing Officer was informed that the Respondent had failed to input her workload.
>
> Respondent's arbitrary and capricious decision regarding the number of slides she reads on any given day has the potential to create issues of patient safety. A review of Respondent's work load indicated that she has read as many as 102 slides in a 24 hour period. Respondent's disregard for standards cannot be sanctioned and/or tolerated.

Based upon the findings, the Office of Labor Relations recommended petitioner's termination.

The decision following the Step IA's disciplinary conference was sustained on appeal following petitioner's filing of a Step II grievance and September 3, 2008 conference, at which petitioner's Union representative signed a waiver releasing the Union of any further involvement and the conference proceeded with petitioner being represented by private counsel. Following the Step

II conference, the Review Officer determined that "the facility has substantiated the Charges and determined that the penalty of termination of employment is appropriate in light of the seriousness of the charges herein." Petitioner's counsel, by letter dated November 17, 2008, requested a Step III review, which was held January 29, 2009, and resulted in a March 16, 2009 decision, in which the Review Officer ruled:

> After a careful review of the record in this matter, including the positions of the parties and the documentation and information obtained at the conference, I conclude that the Agency has substantiated the charges against the Grievant. Grievant did not abide by the Agency requirements or established state standards for her position. In light of the circumstances in this matter, I find the penalty of employment termination to be reasonable.

The letter contained the following note to the Union: "Failure by the Union to proceed to arbitration within fifteen (15) workdays shall be deemed a waiver and abandonment by the Union of its right to proceed to arbitration." As binding arbitration, Step 4 of the grievance process, was not requested by petitioner's collective bargaining representative, the matter was not submitted to arbitration.

Petitioner commenced the instant special proceeding, pursuant to Article 78 of the CPLR, for a judgment annulling respondents' determination to terminate her employment, on the ground that the termination was in violation of lawful procedure, arbitrary and capricious, not supported by substantial evidence; and compelling respondents to reinstate her with back pay to her position as a cytotechnologist at Jacobi. Respondents cross move for an order, pursuant to section 3211 of the CPLR, dismissing the petition on the ground that it fails to state a cause of action because of petitioner's provisional status, and directing the Clerk of the Court to enter judgment for respondents.

Discussion

Addressing first the cross motion, respondents move to dismiss the petition, pursuant to CPLR § 3211(a)(7), for failure to state a cause of action. In applying this statutory provision, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Wald v. Berwitz, 62 A.D.3d 786 (2nd Dept. 2009); Reid v. Gateway Sherman, Inc., 60 A.D.3d 836 (2nd Dept. 2009); Edme v. Tanenbaum, 50 A.D.3d 624 (2nd Dept. 2008); Enriquez v. Home Lawn Care and Landscaping, Inc., 49 A.D.3d 496, (2nd Dept. 2008); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2nd Dept.2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2nd Dept.2007); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000). The determination to be made is whether plaintiff has a cause of action, not whether one was stated (see, Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Walker v. Kramer, 63 A.D.3d 723 (2nd Dept. 2009); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd Dept.2000)]

or whether the facts as alleged fit within any cognizable legal theory. Fitzgerald v. Federal Signal Corp., 63 A.D.3d 994 (2nd Dept. 2009); Farber v. Breslin, 47 A.D.3d 873 (2nd Dept. 2008); International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005).

Respondents' motion to dismiss is predicated upon petitioner's status as a provisional employee. It is well-settled that provisional appointments are made pursuant to section 65 of the Civil Service Law, and "provisional employees have no expectation of tenure and rights attendant thereto except under the limited circumstances specified in Civil Service Law § 65(4) (citations omitted) and therefore they may be terminated at any time without charges preferred, a statement of reasons given or a hearing held (citations omitted)." Matter of Preddice v. Callanan, 69 N.Y.2d 812, 814 (1987). A "court's review of a determination to terminate the employment of a [provisional] employee is 'limited to consideration of whether the dismissal was in bad faith, in violation of statutory or decisional law, or for unconstitutional or illegal reasons. Unless a material issue of fact is raised as to one or more of these conditions, a [provisional] employee may be terminated without a hearing or a statement of reasons. Insofar as is relevant here, petitioner had the burden of raising a material issue as to bad faith or illegal reasons, and conclusory allegations of misconduct or unlawfulness are insufficient to meet this burden' (Matter of Cooke v. County of Suffolk, 11 A.D.3d 610, 611, 783 N.Y.S.2d 392 [citations omitted])." Ward v. Metropolitan Transp. Authority, 64 A.D.3d 719 (2nd Dept. 2009); see, City of Long Beach v. Civil Service Employees Ass'n., 8 N.Y.3d 465 (2007); Matter of Cooke v. County of Suffolk, 11 A.D.3d 610, 611 (2nd Dept. 2004). Such a termination is proper no matter how long the employee's provisional status. See, e.g., City of Long Beach v. Civil Service Employees Ass'n, supra [19 years]; Gulati v. New York City Transit Authority, 239 A.D.2d 417 (2nd Dept. 1997)[nine years].

Here, petitioner alleged in the petition that her right to a fair and just hearing during the disciplinary process was violated because of HHC's failure to give her adequate notice of the amended charges brought against her before the Step IA hearing that was held on May 14, 2008, its failure to serve timely the amended charges upon her Union representative prior to the hearing, and its failure to grant an adjournment of the hearing based upon the untimeliness of the service of the amended Charges. She further alleges that the determination by HHC was arbitrary and capricious because, inter alia, it was rendered in violation of lawful procedure because of the absence of sufficient notice of the Amended Charges; of HHC's refusal to put the Step II and Step III hearings on the record; it was based on an erroneous interpretation of New York law; and it was rendered without consideration of allegedly admissible evidence crucial to petitioner's defense. Petitioner further alleges that HHC's decision to suspend her without pay for more than thirty days was arbitrary and capricious. As set forth above, "[j]udicial review of the discharge of a [provisional] employee is limited to whether the determination was made in bad faith or for an improper or impermissible reason (see, Matter of Swinton v. Safir, 93 N.Y.2d 758, 763, 697 N.Y.S.2d 869, 720 N.E.2d 89; Matter of Johnson v. Katz, 68 N.Y.2d 649, 650, 505 N.Y.S.2d 64, 496 N.E.2d 223). Walsh v. New York State Thruway Authority, 24 A.D.3d 755 (2nd Dept. 2005). The petitioner bears the burden of presenting competent proof of the alleged bad faith, the violation of statutory or decisional law, or the unconstitutional or illegal reasons. See, Walsh v. New York State Thruway Authority, supra;

Santoro v. County of Suffolk, 20 A.D.3d 429 (2nd Dept. 2005). Petitioner failed to meet her burden; the petition fails to meet the pleading requirements of alleging either bad faith, a violation of statutory or decisional law, or the unconstitutional or illegal reasons for her termination. Instead, the gravamen of the petition is that the disciplinary proceedings were procedurally flawed.

Nor is petitioner's opposition to the cross motion to dismiss, which raises for the first time her entitlement to a "name clearing" hearing, sufficient to salvage her case. In her memorandum of law in opposition, petitioner argues that "due process requires a fair hearing when a provisional employee is terminated for reasons affecting the individual's good name and character, as is the case here and affects a 'liberty' interest," and cites, inter alia, Board of Regents v. Roth, 408 U.S. 564 (1972), a case in which no hearing was held prior to the decision not to rehire a non-tenured college professor. "In order to establish a Federal claim for a deprivation of liberty without due process of law, plaintiff must allege: (1) that the board made false charges, (2) that the charges impact upon his reputation or stigmatize his future employability, (3) that the charges were made public, and (4) that no hearing or opportunity was given to refute the charges (Board of Regents v. Roth, supra, 408 U.S. p. 573, 92 S.Ct. at p. 2707; Goetz v. Windsor Cent. School Dist., 698 F.2d 606; Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438)." Supan v. Michelfeld, 97 A.D.2d 755 (2nd Dept. 1983). "[N]o hearing is required unless the reasons for the discharge could be said to affect petitioner's 'good name, reputation, honor or integrity' . . . and such reasons are publicly disclosed by respondents (citations omitted)." Cardo v. Murphy, 104 A.D.2d 884 (2nd Dept. 1984) By contrast, although as a provisional employee, petitioner was entitled to no hearing before her termination, she was afforded a hearing and an opportunity to defend herself during three steps of the grievance proceedings that preceded her termination. "The sole purpose of a name-clearing hearing is to afford the employee an opportunity to prove that the stigmatizing material in the personnel file is false (see, Codd v. Velger, 429 U.S. 624, 627-628, 97 S.Ct. 882, 51 L.Ed.2d 92)." Swinton v. Safir, 93 N.Y.2d 758 (1999).

The alleged stigmatization in this case arises from the sustaining of charges, against which petitioner defended, that she was guilty of violating applicable state regulations, falsifying official records and poor work performance. A review of the record indicates that the reasons articulated for petitioner's discharge were not stigmatic within the meaning of Board of Regents v. Roth, a case upon which she relies. In the absence of evidence that false charges were asserted, or that any charges relating to the termination of her employment impacted upon her reputation or stigmatized her future employability, or were publicly disseminated, petitioner failed ed to establish a claim for a deprivation of liberty without due process of law. See, Natalizio v. City of Middletown, 301 A.D.2d 507 (2nd Dept. 2003); Swinton v. Safir, 93 N.Y.2d 758 (1999). "It is well settled that there is no entitlement to a name-clearing hearing where there has been no public disclosure of any allegations affecting the plaintiff's good name or reputation (Matter of Bonacci v. Quinones, 124 A.D.2d 659, 508 N.Y.S.2d 42; Matter of Lentlie v. Egan, 61 N.Y.2d 874, 474 N.Y.S.2d 467, 462 N.E.2d 1185; Matter of Petix v. Connelie, 47 N.Y.2d 457, 418 N.Y.S.2d 385, 391 N.E.2d 1360)." Meyers v. City of New York, 208 A.D.2d 258 (2nd Dept. 1995). Moreover, as the petition neither contains allegations concerning the contents of her personnel file nor suggests that she is entitled to another hearing to clear her name because of a stigma attached to her discharge, petitioner failed to demonstrate her entitlement to a name-clearing hearing. See, Mullen v. County of Suffolk, 43 A.D.3d 934 (2nd Dept. 2007); Rivera

v. Department of Educ., City of New York, 25 A.D.3d 559 (2nd Dept. 2006); Matter of Cardo v. Murphy, supra. See, also, Duncan v. Kelly, 9 N.Y.3d 1024 (2008)[in terminating petitioner, a probationary employee, the Commissioner relied upon his posthiring conduct of giving false and misleading statements to members of the Internal Affairs Bureau]; Browne v. City of New York, 45 A.D.3d 590 (2nd Dept. 2007)["in light of the factual dispute regarding whether there was public dissemination of the stigmatizing statement, the petitioner is entitled to a "name-clearing hearing" to afford her the opportunity to prove that the stigmatizing material purportedly in her personnel file is false"]. In any event, "the appropriate remedy [following a name clearing hearing] is only expungement, not reinstatement (see, Board of Regents of State Colls. v. Roth, 408 U.S. 564, 573, n. 12, 92 S.Ct. 2701, 33 L.Ed.2d 548)." Swinton v. Safir, 93 N.Y.2d 758 (1999). While other remedies may be available to provisional employees terminated in violation of a constitutional provision or some statute, reinstatement and back pay are not available in this case. See, Matter of Preddice v. Callanan, 69 N.Y.2d 812, 814 (1987); Mateo v. Board of Educ. of City of New York, 285 A.D.2d 552 (2nd Dept. 2001); Gulati v. New York City Transit Authority, 239 A.D.2d 417 (2nd Dept. 1997); Iritano v. New York City Transit Authority, 175 A.D.2d 918 (2nd Dept. 1991).

Accordingly, based upon the foregoing, respondents' motion to dismiss the petition for failure to state a cause of action is granted, and the petition hereby is dismissed. Assuming arguendo that the petition stated a cause of action, which this Court finds that it does not, the petition nonetheless would have to be denied. It is well-settled that in a CPLR article 78 proceeding to review a determination of an administrative agency, the court is limited to a review of the record which was before that agency in determining whether the decision was arbitrary and capricious and without a rational basis. IG Second Generation Partners L.P. v. New York State Div. of Housing and Community Renewal,10 N.Y.3d 474 (2008); Gilman v. New York State Div. of Housing and Community Renewal, 99 N.Y.2d 144 (2002); Matter of Nehorayoff v. Mills, 95 N.Y.2d 671, 675 (2001). "In applying the arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was arbitrary, unreasonable, irrational or indicative of bad faith. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Halperin v. City of New Rochelle, 24 A.D.3d 768 (2nd Dept. 2005); see, Rendely v. Town of Huntington, 44 A.D.3d 864 (2nd Dept. 2007); East End Property Co. No. 1, LLC v. Kessel, 46 A.D.3d 817 (2nd Dept. 2007); Gjerlow v. Graap, 43 A.D.3d 1165 (2nd Dept. 2007); Lyons v. Whitehead, 2 A.D.3d 638 (2nd Dept. 2003). "A determination will be deemed rational if it has some objective factual basis." Merlotto v. Town of Patterson Zoning Bd. of Appeals, 43 A.D.3d 926 (2nd Dept. 2007). "The agency's determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result (citation omitted)." Kaplan v. Bratton, 249 A.D.2d 199 (1st Dept. 1998); see, Hughes v. Doherty, 5 N.Y.3d 100 (2005). Here, the record shows a rational basis for the determination that terminating petitioner's employment was an appropriate penalty.

Dated: December 22, 2009

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J.S.C.