

Matter of Moreno v County of Suffolk

2010 NY Slip Op 31369(U)

May 25, 2010

Supreme Court, Suffolk County

Docket Number: 24709/2009

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 In the Matter of the Application of
 ROLDANDO MORENO,

Petitioner,

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

-against-

COUNTY OF SUFFOLK, TOWN OF
 HUNTINGTON, TOWN OF HUNTINGTON
 HOUSING AUTHORITY,

Respondents.

ORIG. RETURN DATE: JULY 24, 2009
 FINAL SUBMISSION DATE: NOVEMBER 5, 2009
 MTN. SEQ. #: 005 (001)
 MOTION: MD

ORIG. RETURN DATE: SEPTEMBER 9, 2009
 FINAL SUBMISSION DATE: NOVEMBER 5, 2009
 MTN. SEQ. #: 006 (002)
 MOTION: MG

PLTF'S/PET'S ATTORNEYS:
 VALLI KANE & VAGNINI, LLP
 600 OLD COUNTRY ROAD - SUITE 519
 GARDEN CITY, NEW YORK 11530
 516-203-7180

DEFT'S/RESP ATTORNEYS:
 VITALE & LEVITT, P.C.
 445 BROADHOLLOW ROAD - SUITE 124
 MELVILLE, NEW YORK 11747
 631-777-1700

Upon the following papers numbered 1 to 10 read on this petition _____
FOR A JUDGMENT PURSUANT TO ARTICLE 78 AND MOTION TO DISMISS
 Notice of Petition and supporting papers 1-3; Petitioner's Memorandum of Law in Support
4; Return 5; Notice of Motion and supporting papers 6-8; Respondent's Memorandum
 of Law in Support 9; Petitioner's Memorandum of Law in Opposition 10; it is,

ORDERED that this petition by ROLDANO MORENO ("petitioner")
 for a judgment, pursuant to Article 78 of the CPLR, ordering that petitioner be
 restored to his position as a Maintenance Supervisor with full back pay and
 benefits; be compensated for the loss of income and benefits, for his pain and
 suffering, and for his emotional damage; and be awarded attorneys' fees, costs
 and disbursements, is hereby **DENIED** in its entirety for the reasons set forth
 hereinafter and it is further

ORDERED that this motion by respondent TOWN OF HUNTINGTON HOUSING AUTHORITY ("respondent") for an Order, pursuant to CPLR 3211, dismissing the petition herein upon the grounds that the Court lacks subject matter jurisdiction, and granting costs and disbursements, is hereby **GRANTED** for the reasons set forth hereinafter.

This proceeding was commenced pursuant to Article 78 of the CPLR to address the alleged unlawful actions of respondent in terminating petitioner's employment with respondent.

Petitioner informs the Court that respondent is a not-for-profit Section 8 housing agency which is responsible for the upkeep and capital improvements of certain housing units located in Huntington and Melville, New York. Petitioner further informs the Court that petitioner was employed by respondent for approximately eight years as a full-time maintenance worker and maintenance manager of the properties.

On November 6, 2008, Siela Bynoe, executive director of respondent, caused seven disciplinary charges to be filed against petitioner. The seven charges alleged a total of forty-two specifications with respect to claims of misconduct, insubordination and incompetence. Petitioner claims that in his approximately eight years of service, this was the first time that he was charged with any wrongdoing.

On December 8 and 18, 2008, a Civil Service Article 75 hearing was held regarding the charges. The hearing was presided over by Hearing Officer Roger E. Maher. On January 6, 2009, the Hearing Officer issued his determination, which found petitioner not guilty of six of the charges, and guilty of one of the charges. Petitioner was found guilty of Charge 3 Misconduct, Specifications 1 through 2, which related to petitioner's attempt to convert respondent's property for his personal use without authorization from respondent. In particular, the Hearing Officer found that "Charge 3 misconduct is the most serious alleged charge in this proceeding, and [respondent] has proven its case on this point in that [petitioner] involved himself with [respondent's] business regarding an outside contractor by asserting to the outside contractor that he, [petitioner], had permission from the Executive Director and the Deputy Director to take the remnants of the sky lights that the contractor was charged with replacing as part of his bid contract." The Hearing Officer recommended a penalty of a sixty-day suspension without pay as "an appropriate and measured disciplinary response to a first time offense that was not fully executed by

[petitioner]” By correspondence dated February 27, 2008,¹ petitioner was informed that respondent’s Board of Commissioners had passed a resolution on February 17, 2009 terminating petitioner’s employment effective as of February 25, 2009.

Petitioner has now filed the instant application for a judgment restoring petitioner to his position as a Maintenance Supervisor with full back pay in the approximate amount of \$35,000 and benefits in the approximate amount of \$8,500, and awarding petitioner attorneys’ fees, costs and disbursements. Petitioner argues that respondent’s decision to terminate petitioner was arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence. In addition, petitioner alleges that respondent failed to give a reason for not following the recommendations of the Hearing Officer, or for deciding to terminate petitioner. Petitioner contends that the penalty of termination was so disproportionate to his conduct as to render it “shockingly unfair.”

In opposition to the petition, respondent has filed a motion to dismiss. Respondent argues that petitioner failed to serve upon respondent a notice of claim within ninety days after the alleged tort arose in compliance with General Municipal Law § 50-e (1) (a) and 50-i (1) (a), and Public Housing Law § 157 (2). As petitioner has alleged that respondent discriminated against him and seeks damages for pain and suffering, respondent argues that the instant petition sounds in tort, and thus a notice of claim was required to be served upon respondent and petitioner was required to plead such service in his petition. Further, respondent alleges that there was substantial evidence in the record to support the Hearing Officer’s finding of guilt, and that its decision to terminate petitioner was appropriate under the circumstances. Respondent argues that even one incident of misconduct may support dismissal of a public employee, and that the dismissal herein, which was based upon fraudulent statements made to the outside contractor and an attempt to convert respondent’s property, does not shock one’s sense of fairness. Moreover, respondent claims that petitioner’s actions jeopardized respondent’s ability to receive public grants in the future for capital improvements. Finally, respondent argues that petitioner’s cause of action seeking an award of attorneys’ fees must be dismissed in the absence of any statutory authority for such an award.

In opposition to the motion to dismiss, petitioner argues that his claims are not based in tort, and therefore no notice of claim was necessary.

¹ Petitioner indicates that the correspondence was erroneously dated February 27, 2008, as the postmark on the envelope shows it was actually mailed on February 27, 2009.

Petitioner contends that he is not alleging any discriminatory conduct on the part of respondents. Petitioner further contends that he was not engaged in any "habitual or shocking" activity that would warrant termination, and therefore the punishment did not fit the "crime."

In a proceeding under CPLR article 78 when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 2007 NY Slip Op 6681 [2d Dept]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 2007 NY Slip Op 6879 [2d Dept]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*). Where a hearing is held, the determination must be supported by substantial evidence (CPLR 7803 [4]).

Moreover, CPLR 7803 (3) permits a court to review the measure of discipline imposed by administrative agencies, but this statute authorizes the court to set aside a determination by an administrative agency only if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness (*Pell v Board of Education*, 34 NY2d 222, *supra*). However, a reviewing court "may not weigh the evidence or reject the choice made by [the administrative agency] where the evidence is conflicting and room for choice exists" (*Matter of Berenhaus v Ward*, 70 NY2d 436 [1987]; see *Matter of Collins v Codd*, 38 NY2d 269 [1976]; *Matter of Ward v Juettner*, 63 AD3d 748 [2009]).

Initially, the Court finds that a notice of claim was not a condition precedent to the commencement of this special proceeding under Article 78 of the CPLR, as petitioner seeks judicial review of a prior determination of an administrative agency (see *Delle v Kampe*, 296 AD2d 498 [2002]). As discussed, petitioner indicates that he is not alleging any discriminatory conduct on the part

of respondent, but that he is seeking judicial review of the determination of respondent to terminate him. Therefore, a notice of claim was not required herein

In any event, the Court finds that the determination of the Hearing Officer finding petitioner guilty of misconduct was supported by substantial evidence (*see generally Matter of Chiarelly v Watertown City School Dist. Bd. of Educ.*, 34 AD3d 1219 [2006]). Further, as conceded by petitioner, respondent was not bound by the Hearing Officer's recommendation in determining the appropriate penalty (*see Matter of Welch v Weinstein*, 114 AD2d 463 [1985]), and the Court concludes that the penalty of termination was not "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Pell v Board of Education*, 34 NY2d 222, *supra*; *Matter of Taylor v City of Glen Cove*, 71 AD3d 902 [2010]; *Matter of Denardo v Bd. of Educ. of Mamaroneck Union Free Sch. Dist.*, 61 AD3d 864 [2009]). As was noted by the Hearing Officer, petitioner was found guilty of the most serious act of misconduct charged, to wit: attempted conversion of respondent's property, and the Hearing Officer found that respondent proved its case on this issue.

In view of the foregoing, the Court finds that respondent's decision to terminate petitioner was neither arbitrary nor capricious, was supported by the evidence presented, and cannot be deemed an abuse of discretion. Accordingly, the instant petition is **DENIED**, and respondent's motion to dismiss the petition is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: May 25, 2010


HON. JOSEPH FARNETI
Acting Justice Supreme Court