

Matter of Cherry v Klein
2010 NY Slip Op 31659(U)
June 24, 2010
Supreme Court, New York County
Docket Number: 111215/2009
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. M. Dever
Justice

PART 11

Cherry, Henry

INDEX NO. 111215/09

- v -

MOTION DATE _____

Klein, Joel

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion proceeding is decided in accordance with the aforesaid Memorandum Decision and Order which determines an issue of law and transfers the remainder of the proceeding to the Appellate Division

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 24, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

In the Matter of the Application of
HENRY CHERRY,

Index No.: 111215/2009

Petitioner,

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

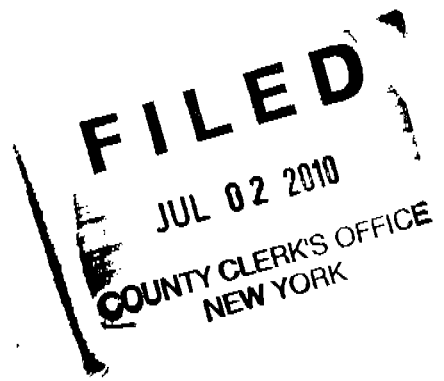
-against-

JOEL I. KLEIN,

Respondent.

-----X

JOAN A. MADDEN, J.:



Petitioner Henry Cherry (“Cherry”) brings this Article 78 proceeding for a judgment reversing the decision of respondent Joel I. Klein, Chancellor of the New York City Department of Education (the “Department”) adopting the findings and conclusion in the report and recommendation of Tynia D. Richard, Administrative Law Judge (“ALJ Richard”) of the City of New York Office of Administrative Trials and Hearings (“OATH”). In its verified answer, the Department opposes the petition and asserts that to the extent that the petition raises an issue of substantial evidence, it should be transferred to the Appellate Division, First Department, pursuant to CPLR §7804(g).

Background

Cherry has served as a custodian engineer with the Department since 2002. He was assigned to be the custodian of P.S. 98 in Queens and then to P.S. 87 in Queens for two months in 2006. On June 1, 2007, Cherry was reassigned to the Queens Borough Office after an allegation that he was incorrectly managing his custodial account. The matter was reported to

the Office of the Special Commissioner of Investigation for the New York City School District (“SCI”). Following SCI’s investigation, the Department charged Cherry with (i) commingling funds, (ii) failing to document expenditures, (iii) paying himself an excessive salary in 2006, (iv) failing to repay over \$14,000 in funds owed the Department, (v) failing to obtain certification to test sprinkler systems, and (vi) submitting a falsified medical note to the Department.

Trial was set for January 27 and 28, 2009, but was adjourned to February 17 and 18, 2009, at Cherry’s request, despite the Department’s opposition. Previously, Cherry’s counsel, Marvin Small Esq. (“Small”), requested and was granted two adjournments of scheduled conferences, on December 3 and 11, 2008, asserting that he was having difficulty in preparing the case with his client. Small represented that Cherry had sustained a head and back injury in October 2008. Although the injury was not disputed, it was noted that Cherry had resumed working by the time of the pretrial conference held on January 14, 2009.

On the first day of trial, February 17, 2009, Small telephoned OATH seeking an adjournment, asserting that Cherry was too ill to attend. The court questioned why Small himself did not appear on that day, and he replied that he had not known whether or not to travel to court when his client did not meet him at the scheduled time. ALJ Richard informed Small that he had not presented adequate grounds for an adjournment and that she would further consider his request upon the submission of medical documentation that established Cherry’s inability to attend trial on that day. ALJ Richard informed Small that she would wait until 10:00 am for him to produce proper documentation.

Shortly after 10 a.m., Small faxed four documents to the court. The first document was an Emergency Department After Care Sheet, dated October 15, 2008. The second contained x-ray findings obtained in November 7, 2008 from New York Rehab Pain Management & Medical

Services (“NY Rehab”). The third was a note that excused Cherry from attending work in December 2008. The fourth document, although the only document contemporaneous in time with the trial, was simply a “Notification of Absence due to Illness” from Valley Stream Urgent Care Center which contained only Cherry’s name and the date of absence, February 16, 2009.

At 10:30 a.m., ALJ Richard proceeded with trial. She denied Small’s request for an adjournment, finding the documentation insufficient to satisfy the good cause requirement because it excused Cherry’s absence for the day prior to trial. Trial continued with the Department presenting all of its evidence through witnesses. At the end of the day, ALJ Richard asked the Department’s advocate to appear on the following date, in the event Cherry and his counsel appeared.

On February 18, Small appeared at trial without Cherry. The Department’s advocate provided him with a copy of all the documents admitted in evidence at the previous day’s trial, and, at the conclusion of the day, both attorneys received copies of the two days’ proceedings on CD. Small argued again, *inter alia*, that trial should be continued because his client was ill. He asserted that Cherry had spent the previous day at New York Eye and Ear Infirmary (“NY Eye and Ear”), and that he sustained chronic headaches which had impaired his ability to assist Small in his trial preparation. Despite that Small offered additional medical documentation to the court, none of the documents supported the assertions that Cherry suffered from chronic headaches or was unable to appear at trial, nor was there a document from NY Eye and Ear.

The documentation did, however, include a letter dated January 12, 2009 from a doctor at NY Rehab stating that Cherry “needs to be escorted for transportation and cannot ride the train due to his medical condition.” ALJ Richard found that while an inability to ride the train might require a more expensive form of transportation, it did not excuse Cherry from appearing at trial.

Another document, dated February 2, 2009, described the results of an MRI. A third document, the "Notification of Absence due to Illness" form from Valley Stream Urgent Care Center, was indistinguishable from the one submitted the previous day, except that it referenced different dates of absence and contained a diagnosis. This form stated that Cherry was treated for sinusitis, and that his dates of absence were February 16, 2009 to February 18, 2009, the days on which trial was scheduled. ALJ Richard found that this document also failed to demonstrate good cause to grant adjournment, as there was no indication from the documents that Cherry was incapable of attending at trial. Furthermore, Small did not submit a note that was from the facility where Cherry claimed to spend the day on February 17, NY Eye and Ear. The Department objected to an adjournment, maintaining that Cherry's claims of illness were fabricated and mere delay tactics. The Department asserted that Cherry was often present at work, except for court dates when he would call in sick.

In light of his ongoing requests for a continuance, the record was kept open until February 25 to give Small an opportunity to produce a credible doctor note in order to show that Cherry was incapable of appearing on the scheduled trial dates. ALJ Richard denied Small further time to get permission from Cherry to speak with his physicians. Due to the Department advocate's scheduling conflict, the trial date was moved to February 27, at which time the record would be closed if no submission or an insufficient submission was made.

Upon receiving additional medical documentation, ALJ Richard asked the Department to validate the contents of the notes, and assigned Investigator Gloria Stratford ("Investigator Stratford") of the Office of the Special Commissioner of Investigations for the New York City School District ("SCI") to investigate. In a conference call on March 10, the Department's advocate provided an initial report of the investigator's findings. By letter dated March 13,

2009, ALJ Richard granted Cherry's request for a trial continuance and ordered counsel to select a date by March 17. On March 17, Small notified OATH via fax that he no longer represented Cherry, as a result of unpaid legal fees. By letter dated March 18, 2009, ALJ Richard informed Small that he was not released from representation and, if desired, he must make the appropriate motion by March 23. However, in the meantime, Small was instructed to select a date for the continuance by March 20. Small did not select a date nor submit a motion by the deadline.

In an affidavit sworn to by Investigator Stratford, she described the interviews she conducted in her investigation of the medical notes. One of the notes investigated was from Dr. Perrone of NY Rehab, dated February 26, which stated that Cherry was seen in the emergency room on February 16, 2009 for a sinus infection, prescribed antibiotics, and put on bedrest from February 16 to February 26. Dr. Perrone revealed to Investigator Stratford that he did not examine Cherry himself, but rather wrote the note based upon information obtained from a note written by another doctor, Dr. Wu. Dr. Wu, of Queens Long Island Medical Group, told the investigator that he treated Cherry for an upper respiratory chest infection on February 19, and that at that point in time, Cherry was capable of traveling. Dr. Wu told the investigator that although he marked down that Cherry was "advised to have bedrest for the condition," he did not initially recommend bedrest, but only did so to placate Cherry who had urged him to make this prescription.

On or about May 26, 2009, Solomon Lowenbraun (Lowenbraun") called Norris Knowles ("Knowles"), counsel to the Department and advised him he had been retained by Cherry. Knowles informed Lowenbraun that he needed to file a Notice of Appearance, but he failed to provide one.

In a Report and Recommendation, dated May 29, 2009, ALJ Richard found Cherry was guilty of negligence and incompetence for mismanagement of his school custodial account by commingling funds, failing to account for expenses, overcompensating himself in 2006, and failing to repay the Department more than \$14,000 in excess. ALJ Richard also found that Cherry submitted a falsified medical note. She found that the conduct by Cherry established, at a minimum, that Cherry was not competent to perform the duties of his position. Thus, ALJ Richard recommended that the Department terminate Cherry's employment. On or about June 2, 2009, ALJ Richard sent the Report and Recommendation to the Department.

In a letter dated June 5, 2009, Knowles informed Small that as Cherry's attorney of record, he had a right to submit comments to the Report and Recommendation on or before June 15, 2009. In addition, by letter dated June 18, 2009, the Deputy Counsel to Chancellor Klein advised Lowenbraun that although he did not submit a Notice of Appearance, she "would extend the courtesy to Mr. Cherry of waiting until the close of business on June 26 before sending [her] recommendation to the Chancellor."

By letter dated June 30, 2009, Lowenbraun provided comments to the Report and Recommendation and contended, *inter alia*, that the continuance of the hearing in Cherry's absence denied him a fair hearing by depriving him of his ability to confront witnesses.

In a decision dated July 6, 2009, Chancellor Klein adopted the finding and conclusions of the Report and Recommendation. In addition, following the receipt of Lowenbraun's comments on the Report and Recommendation, Chancellor Klein amended his decision stating that:

[Cherry] did not appear to participate in the hearing before the ALJ, and he submitted false documentation in an attempt to have his hearing postponed. I find the ALJ proceeded fairly in regard to [Cherry's] failure to attend the hearing and in regard to evaluating the documentation submitted by [Cherry] in his attempt

to delay the hearing. Any difficulties Cherry now claims to have with regard to confronting witnesses were of his own making.

On August 6, 2009, Cherry commenced this Article 78 proceeding challenging ALJ Richard's recommendation for termination of his employment on various grounds, including that ALJ Richard's decision to proceed despite his absence on February 17, 2009, caused a deprivation of his right to a trial where he could confront the witnesses called by the Department and subject such witnesses to cross examination.

The Department opposes the petition and further requests that to the extent that it raises issues of substantial evidence, the proceeding should be transferred to the Appellate Division, First Department.

Discussion

Pursuant to CPLR §7804(g), a case presenting a question of substantial evidence must be transferred to the Appellate Division. Padilla v. Levy, 300 AD2d 62 (1st Dep't 2002), lv denied, 100 NY2d 502 (2003). "That section mandates such a transfer where one of the bases for the challenge to administrative action is that the determination was not supported by substantial evidence." Mason v. Dep't of Bldgs., 307 AD2d 94 (1st Dep't 2003). Here, Cherry challenges the decision ALJ Richard made after a hearing on the record, and such a challenge presents questions of substantial evidence. However, to the extent that the petition raises issues relating to errors of law that could terminate the proceeding without considering the substantial evidence questions, the Supreme Court should consider these issues in the first instance. Robinson v. Finkel, 194 Misc2d 55 (Sup. Ct. NY Co. 2002), aff'd, 308 AD2d 355 (2003).

Here, to the extent Cherry argues that ALJ Richard's refusal to grant an adjournment deprived him of a right to a fair trial and to due process, he raises such an issue.

Both the federal and New York State Constitutions guarantee procedural and substantive due process in a person's dealings with federal, state, and local governments. *See* U.S. Const., Amends. V (“No person shall ... be deprived of life, liberty, or property, without due process of law”) & XIV (“nor shall any State deprive any person of life, liberty, or property, without due process”); N.Y. Const., Art. I, § 6 (“No person shall be deprived of life, liberty or property without due process of law”). Procedural due process protection affords notice (hopefully in advance) of a possible deprivation of life, liberty or property by the government, and a meaningful opportunity to contest the deprivation prior to its imposition (or if not prior to, in a time and manner that itself will afford sufficient redress if the deprivation is found to be unconstitutional). “The essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.” Mathews v. Eldridge, 424 U.S. 319, 349, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (internal citations omitted).

People v. Bell, 3 Misc.3d 773 (N.Y. Sup., 2003). Due process protections have been held to apply to the loss of employment. Lee TT v. Dowling, 87 N.Y.2d 699, 710 (1996).

Based on the record and the decision by ALJ Richard, Cherry's due process rights have not been violated. A review of the evidence indicates that Cherry had notice of the proceeding and an opportunity to be heard. ALJ Richard gave Cherry many opportunities to appear at the hearing, yet Cherry failed to appear. ALJ Richard telephoned Cherry's counsel on February 17, 2009, the first day of trial, directing him to appear and insisting that he would be an valuable advocate for his client by cross-examining witnesses and making relevant objections to evidence. However, Cherry did not appear. Although Cherry asserted that his absences were attributable to illness, these assertions were unsubstantiated and unsupported by sufficient medical documentation.

Therefore, Cherry was not deprived of his right to a fair hearing because the record shows that he was given numerous opportunities to appear and be heard and the medical documentation he submitted to excuse his absences was insufficient to demonstrate that his failure to appear was justified. Any argument that he did not have the opportunity to cross-

examine the Department's witnesses is undermined by since the record show that Cherry could have attended, but decided not to do so.

Since the remaining allegations in the petition raise questions of substantial evidence, the balance of this proceeding must be transferred to the Appellate Division, First Department, pursuant to CPLR §7804(g).

In view of the above, it is

ORDERED that petitioner's request for Article 78 relief on the ground that ALJ Richard's refusal to grant an adjournment violated his due process rights is denied; and it is further

ORDERED that the request to reverse ALJ Richard's recommendation of termination of employment is respectfully transferred for disposition, pursuant to CPLR §7804(g), to the Appellate Division, First Department. This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to a direction at law, is on the entire record, supported by substantial evidence. (CPLR 7803(4)); and it is further

ORDERED that the Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with the notice entry.

Dated: June 24, 2010

J.S.C.

FILED

JUL 02 2010

**COUNTY CLERK'S OFFICE
NEW YORK**