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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 112861/2009
CLAY, WILLIAM H.
VS
HEALTH & HOSPITALS
Sequence Number : 002
OTHER

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

... to _____ were read on this motion to/for _____

	PAPERS NUMBERED
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 by respondent for leave to appeal to the Appellate Division is denied in accordance with the accompanying memorandum decision.

FILED
AUG 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 3, 2010 AUG 03 2010

ALICE SCHLESINGER J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of
WILLIAM CLAY,

Petitioner,

Index No. 112861/09
Motion Seq. No. 002

For a Judgment Pursuant to Article 78, C.P.L.R,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORP.,

Respondent.

SCHLESINGER, J.:

Upon reviewing two Article 78 proceedings on two separate dates (this one and one earlier filed under Index No. 115458/08), this Court directed that the controversy be remanded for petitioner William Clay to be given a meaningful opportunity to be heard on what I had found to be three adverse managerial actions. I found that the three managerial actions included the following: reducing Mr. Clay's salary by 10%, failing to give him an 8% salary increase that had been promised, and reassigning him to a position clearly less desirable than the one he held. These adverse managerial actions entitled Mr. Clay, pursuant to HHC's own Operating Procedures, specifically 20-39, to notice and an opportunity to be heard.

My original decision was made on May 13, 2009. Respondent took no appeal, but rather took steps to comply. On July 24, 2009 Caroline M. Jacobs, a Senior Vice President for HHC in charge of Patient Safety, and presumably someone having nothing to do with Mr. Clay or his case, issued a one-page letter decision.[1]

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[1]In the moving papers now before the Court (at ¶30), counsel describes the procedure used by HHC in following my directive: "HHC appointed a reviewer who considered his [Clay's] submissions, and sought additional information from HHC".

Ms. Jacobs considered only one of Mr. Clay's complaints to be an "adverse managerial action," pursuant to Operating Procedure 20-39. This one concerned Mr. Clay's 10% salary reduction. Ms. Jacobs stated in her July 24, 2009 letter to Mr. Clay:

> With regards to concern #2, Operating Procedure #20-39 is applicable. Based on the materials that you have submitted, and I have reviewed, it appears that HHC did not follow Operating Procedure #20-39 Section V, C by failing to provide you with written notification of its decision.[2] I believe, however, that this was an appropriate exercise of managerial discretion.

With regard to the reassignment and the 8% denial of an increase, items 3 and 1 respectively in this letter/decision, Ms. Jacobs found that they were not "adverse managerial actions" and thus not reviewable.

However, that finding was not one for Ms. Jacobs to make because this Court had already made a contrary finding in its May 13, 2009 decision that all three of these actions were "adverse managerial actions." As HHC had not challenged that decision, Ms. Jacobs had no authority to ignore it. I confirmed this point in my March 3, 2010 decision after my review of the written and oral arguments submitted in this second related Article 78 proceeding.[3]

Therefore, I again remanded for a second opportunity for the procedure mandated by HHC's Operating Procedure #20-39 to be followed. Contrary to what respondent's

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[2]Operating Procedure #20-39 goes further than written notifications. It also mandates an opportunity to be heard. See *Moran v. Baxter*, 193 AD2d 460 (1st Dep't 1993), a case cited in my May decision.

[3] It also should be noted that in my March 3, 2010 decision, I granted HHC's motion to dismiss Mr. Clay's complaint of improper employment termination on timeliness grounds. Counsel is not asking to appeal that part of the decision.

counsel argues in the motion now before the Court, I did not agree or disagree with Ms. Jacobs' substantive ruling. Nor did I make any findings with regard to her decision, except to say that she had no authority to make findings contrary to mine. The issue of what constituted an adverse managerial action was not before her. Since I had already ruled that all three actions were in fact covered by Operation Procedure #20-39, neither Ms. Jacobs, nor HHC personnel in response to Ms. Jacob's seeking additional information, had any right to disregard what this Court had already found.

Now pursuant to CPLR §§2221(d) and 5701(c), HHC is seeking permission from this Court to appeal the March 3, 2010 decision to the Appellate Division, First Department. CPLR §2221(d) governs motions to reargue and directs that moving counsel must specifically identify the motion as being one for reargument and must also set forth the matters of fact and/or law allegedly overlooked by the court and now sought to be considered. Since counsel fails to do this in any manner, any request for reargument is denied.

As for permission to appeal the March 3, 2010 decision, it is clear from the moving papers that counsel additionally wants to appeal the May 13, 2009 decision rendered under Index No. 115458/2008 wherein I made my original findings. This request would seem to be untimely. My second decision in the second Article 78 proceeding was a second attempt by this Court to compel HHC to do what I believed was mandated by their own operating procedures. In other words, I simply found in March 2010 that the predicates and terms of the remand directed in May 2009 had not been met. Under all the circumstances, including the delay which would occur with an appeal of my interim order, I find that the interests of justice would not be served if permission to appeal were granted. Therefore, it is denied.

Accordingly, it is hereby

ORDERED that the motion by respondent New York City Health and Hospitals Corporation for reargument and for leave to appeal to the Appellate Division, First Department, is in all respects denied.

This constitutes the decision and order of this Court.

Dated: August 3, 2010

AUG 03 2010

J.S.C.
ALICE SCHLESINGER

FILED
AUG 10 2010
NEW YORK
COUNTY CLERK'S OFFICE