

Matter of Patel v New York Hous. Auth.

2010 NY Slip Op 32839(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 106172/10

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis
Justice

PART 6

Index Number : 106172/2010
PATEL, BIRUT
vs.
NEW YORK CITY HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 8/19/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-6
7-28
29-31

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

petitor
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Dated: 10/8/10

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X

In the Matter of the Application of
BIRUT PATEL,

Petitioner,

Index No. 106172/10

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

Decision, Order and Judgment

-against-

THE NEW YORK HOUSING AUTHORITY
(JOHN RHEA, as Chariman),

Respondent.

-----X

JOAN B. LOBIS, J.S.C.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Petitioner Birut Patel brings this Article 78 proceeding seeking an order annulling the determination of his former employer the New York City Housing Authority ("NYCHA") to suspend him without pay since January 13, 2010 and awarding petitioner back-pay until his resignation on July 15, 2010. For the reasons discussed below, the petition is denied.

Petitioner began working for NYCHA in December 2005 as a Computer Specialist in its IT Infrastructure Department. A Computer Specialist is required to use a computer and access the Internet. On or about August 20, 2009, petitioner began contacting someone who he believed was a 12 year old female child in an online chatroom. The "child" was actually a law enforcement agent from Passaic County, New Jersey. From August through November 2009, petitioner and the child engaged in sexually explicit conversations. Many of the conversations occurred while petitioner was supposed to be working. On November 18, 2009, petitioner agreed to meet the child in a pizza parlor in Wayne, New Jersey. He skipped work that morning telling his supervisor at NYCHA that he had a personal matter to take care of

that day. When petitioner arrived the pizza parlor, he was arrested by the Passiac County Sheriff's Department and charged with endangering the welfare of a child, attempted sexual assault, and attempted luring and enticing via the Internet.¹ He was released on bail.

NYCHA was not aware of the arrest until a news source posted an online article about petitioner and identified him as a NYCHA employee on or about November 20, 2009. By letter dated November 23, 2009, NYCHA informed petitioner that, effectively immediately, he was suspended without pay. By letter dated December 22, 2009, NYCHA informed petitioner that beginning on December 23, his pay would resume, but he was not to report to work. On or about January 13, 2010, Dawn M. Pinnock, NYCHA's Director of Human Resources, sent petitioner another letter. Ms. Pinnock informed petitioner that since the December 22 letter, she discovered that one of the conditions of his bail proscribed him from "Internet or computer access." Ms. Pinnock informed petitioner that this condition prevented petitioner from performing his duties as a Computer Specialist and he was once again suspended without pay. Ms. Pinnock instructed petitioner to inform her when the condition was removed. In response to the January 13 letter, petitioner's criminal defense counsel, Darren M. Gelber, Esq., informed NYCHA, by letter dated January 19, 2010, that he believed that the judge presiding over the criminal case "may be inclined to consider amending the conditions of [petitioner's] bail to enable him to maintain his employment." Mr. Gelber asked NYCHA to confirm that it would enable petitioner to return to work if he made an application to the judge. Mr. Gelber informed NYCHA that he would not make an application unless he received such confirmation. He also requested information about the duties and qualifications of a

¹ On or about February 9, 2010, petitioner was indicted by a grand jury on the charges of attempted sexual assault, attempted aggravated sexual assault, attempted endangering the welfare of a child, and attempted luring and enticing via the Internet.

Computer Specialist. On February 2, 2010, Ms. Pinnock, by letter, informed Mr. Gerber that “[i]f we are notified that his bail conditions have changed, we will review his status.” Mr. Gelber asserts, in an affirmation attached to the reply papers, that, although he would have preferred a “more definitive statement from NYCHA concerning whether it would permit [petitioner] to return to work”, he filed a motion on about February 18, 2010 to amend the bail conditions. Mr. Gelber maintains that the prosecutor handling the case informed him that he would not consent to amending the bail conditions. Mr. Gelber claims that the prosecutor informed him, via facsimile, that NYCHA would not permit petitioner to return to work under any circumstances. The facsimile is attached to the reply. The cover sheet reads that the prosecutor cannot “consent to any change in the bail conditions based upon the attached info [*sic*] from his employer.” Included with the facsimile is a print-out listing concerns with the proposed amended order. Among the concerns was a worry that petitioner’s “mere presence” at the worksite is problematic given his required access to sensitive data like social security numbers and computer passwords. There was also a concern that petitioner, a computer expert, could manipulate the computer to evade any restrictions on his Internet use. Upon reviewing this information, Mr. Gelber withdrew the motion.

By letter dated April 27, 2010, NYCHA served petitioner with a notice and statement of charges. The alleged misconduct related to his criminal charges in New Jersey. A hearing was scheduled for June 17, 2010. The hearing did not occur on that date and there is no indication that it was rescheduled. On June 28, 2010, petitioner pled guilty to attempted endangering the welfare of a child and attempted luring or enticing of a child. He resigned from his position on July 15, 2010.

Petitioner argues that NYCHA acted arbitrarily and capriciously and in violation of law and

violated his due process rights by suspending him without pay for more than thirty days. Petitioner asserts that NYCHA never intended for him to return to work so it did not matter that petitioner could not perform his duties as a Computer Specialist. Respondent admits that petitioner was suspended for more than thirty days, but asserts that NYCHA had lawful reasons for doing so. Respondent maintains that the suspension for misconduct began on November 23, 2009 and ended on December 23, 2009. The second suspension, which began on January 13, 2010 was not for misconduct. Instead, respondent asserts that petitioner was suspended without pay indefinitely, because his bail conditions made him unqualified for his position as a Computer Specialist. In reply, petitioner argues that NYCHA never had any intention of reinstating petitioner to its payroll. Petitioner submits that NYCHA's position that petitioner was unqualified was a ploy to improperly extend petitioner's suspension for misconduct beyond thirty days. Petitioner points to NYCHA's February 2, 2010 letter and Mr. Gelber's affidavit as support.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "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.' Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

Under New York State Civil Service Law § 75(3), an employee charged with incompetency or misconduct cannot be suspended without pay for more than thirty days. However, the protections

afforded under Section 75 do not apply to civil service employees who are unqualified to perform their jobs. See In re New York State Office of Children & Family Servs. v. Lanterman, 14 N.Y.3d 275, 282 (2010); In re Felix v. New York City Dep't of Citywide Admin. Servs., 3 N.Y.3d 498, 505-06 (2004); In re Stolzman v. New York State Dep't of Transp., 68 A.D.3d 1331, 1333 (3rd Dep't 2009); In re Carr v. New York State Dep't of Transp., 70 A.D.3d 1110, 1111 (3rd Dep't 2010). A qualification is an explicit requirement of a position. See e.g., In re Stolzman, 68 A.D.3d at 1332.

The ability to use a computer and access the Internet was an explicit requirement of petitioner's position with NYCHA. It was not arbitrary and capricious for NYCHA to decide that petitioner's inability to do so rendered him unqualified to be a Computer Specialist. Nor was it arbitrary and capricious for NYCHA to suspend petitioner without pay while he remained unqualified. Furthermore, NYCHA had no obligation to take steps to assist petitioner in amending his bail conditions. NYCHA notified petitioner of the second pay suspension by letter and the reason for it. NYCHA also instructed petitioner to inform it when and if he was allowed to access a computer and the Internet. Thus, it cannot be said that NYCHA deprived petitioner of due process. See In re Carr, 70 A.D.3d at 1112. Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: October 8, 2010



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

(This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).)