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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 107211/2010
IULIANO, MAURICE
VS.
NYC DEPT. OF TRANSPORTATION
SEQUENCE NUMBER : 001
ARTICLE 78
CAL #56

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

this motion to/for

	PAPERS NUMBERED
Notice of ~~Motion~~/ Order to Show Cause — Affidavits — Exhibits ... Petition	1
Answering Affidavits — Exhibits + memo	2,3
Replying Affidavits	4,5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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)

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

Dated: 12/29/10
DEC 29 2010

BARBARA JAFFE J.S.C.

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 : PART 5

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MAURICE IULIANO,

Petitioner,

-against-

DEPARTMENT OF TRANSPORTATION OF THE CITY OF NEW YORK, ERICA CARAWAY, an individual, DANIEL CARCANA, an individual, MARCIA SIMPSON, an individual, and JEAN FRANKOWSKI, an individual,

Respondents.

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Index No. 107211/10

Motion Date: 11/9/10
Motion Seq. No.: 001

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

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By notice of petition and verified petition dated June 1, 2010, petitioner brings this Article 78 proceeding seeking an order setting aside respondents' decision to terminate his employment, and directing the Department of Transportation of the City of New York (DOT) to reinstate his employment. Respondents oppose the petition.

I. BACKGROUND

On or about July 10, 1995, petitioner was hired by respondent DOT to work as a City Laborer. (Verified Petition, dated June 1, 2010 [Pet.]). In or about 1998, petitioner was promoted to Gasoline Roller Engineer, the position he held until his termination. The general duties and responsibilities of a Gasoline Roller Engineer include the operation of various

machines, and an unrestricted Class B Commercial Driver's License is required and must be maintained during the employment. (*Id.*, Exh. B).

When a DOT employee whose job title requires that a specific license be maintained for the duration of employment loses the license, the employee is no longer qualified to hold the position. (*Id.*, Exh. G). As it is in DOT's "best interests to retain the services of employees who have been trained and whose service has otherwise been satisfactory to the agency," DOT, upon learning that an employee has lost his or her license, must take the following steps, as pertinent here:

> (1) If a permanent employee or other employee with two or more years of service is unable to produce a valid license, (s)he will be given the opportunity to accept a voluntary six (6) month suspension in order to have the license reissued. The acceptance of the [] suspension will be in the form or a written document (stipulation) and signed by the employee. It will NOT be a disciplinary suspension, NOR will it imply disciplinary action. If the employee does not agree to the suspension, (s)he will be terminated;
>
> (2) If the employee is successful in obtaining the requisite license in less than six (6) months, (s)he will contact [DOT] and make an appointment to produce the valid license. After presentation of the valid license [ ], the employee will be returned to duty. If (s)he fails to obtain the license by the end of the six month suspension period, the employee will be terminated.

(*Id.*).

DOT also maintains a grievance procedure, whereby the employee must first present the grievance to his or her supervisor or department within 120 days after the grievance has arisen. (Verified Answer, dated Aug. 24, 2010 [Ans.], Exh. 18). Absent resolution of the grievance within two working days after its presentation, the employee may appeal to the departmental official or agency by filing a written statement of the grievance with the official or agency within seven working days after presentation of the grievance. Step two of the procedure requires that

the appeal be decided in writing within five working days. The employee may then appeal the step two determination (steps three and four), and if the grievance remains unresolved at step four, the employee is entitled to an impartial arbitration. (*Id.*).

In a performance evaluation dated November 18, 2009, petitioner received an overall rating of outstanding, the highest available. (Pet.).

On December 12, 2009, while driving, petitioner was pulled over and charged with Vehicle & Traffic Law (VTL) § 1192.2 (driving while intoxicated *per se*), VTL § 1192.3 (driving while intoxicated), and VTL § 1180 (speeding). (*Id.*, Exh. C).

On December 14, 2009, pursuant to DOT's policies and procedures, petitioner called the New York City Office of the Advocate General (OAG) and advised of his arrest and that his license had been suspended pending his arraignment and sentencing. (Pet.).

By order dated December 23, 2009, petitioner's license was suspended pending prosecution. (Ans., Exh. 8). By letter dated December 23, 2009, DOT informed petitioner that he was removed from his employment as of that day, as he did not possess a valid driver's license in the class required by his job title. (Pet., Exh. D).

On December 28, 2009, petitioner pleaded guilty to VTL § 1192.2, paid a $500 fine, and received a one-year conditional discharge; his license was revoked. (*Id.*). On December 29, 2009, petitioner met with OAG employees and gave them a copy of the court order revoking his license as of January 17, 2010. (Ans., Exh. 12). He denies that he was given an opportunity to accept a six-month suspension during which he could have renewed his license (Pet.), whereas respondents claim that he was given that opportunity (Ans., Affidavit of Marcia Sampson, dated Aug. 20, 2010).

As the revocation of petitioner's license was stayed for 30 days, petitioner returned to work on December 30, 2009. (*Id.*). On January 4, 2010, petitioner sustained an injury at work, never returning to work before his termination. (Pet.).

By letter dated January 4, 2010, DOT directed petitioner to report to OAG on January 19, 2010 along with his union representative. (*Id.*, Exh. H). On January 19, 2010, petitioner appeared for the meeting and informed respondents that his license remained revoked. (Pet.). Respondents claim that after the meeting, they informed petitioner that if he signed a stipulation, he could receive the six-month suspension. (Ans., Affidavit of Erica Caraway, dated Aug. 20, 2010). Petitioner did not sign the stipulation. (*Id.*).

By letter dated February 11, 2010, DOT informed petitioner that as of that day, he had forfeited his position as a Gasoline Roller Engineer due to his failure to maintain a Commercial Driver's License. (*Id.*, Exh. I).

In March 2010, petitioner received a notice of completion of a drunk-driving program, and on or about March 22, 2010, his license was reinstated. (Pet.; Ans., Exh. 16).

By letter dated March 24, 2010, from petitioner's union to DOT, petitioner commenced the first step of the grievance process to address his termination. (Pet., Exh. K). Respondent never responded to it. (Pet.).

II. CONTENTIONS

Petitioner claims that DOT acted arbitrarily and capriciously and abused its discretion in failing to offer him a voluntary six-month suspension before terminating him, thereby failing to perform a duty required by law, and that its determination was not supported by substantial evidence. As a result of respondents' actions, petitioner complains that he can no longer work

and provide for his family, that he has suffered mental anguish and emotional distress, and that his reputation has been tarnished. (Pet.).

Respondents allege that petitioner failed to exhaust his administrative remedies via the grievance process, having failed to appeal the step one grievance, and that he has no clear legal right to his employment. It also alleges that as petitioner's license was suspended as of August 13, 2010, more than six months after it was initially revoked, petitioner would have been terminated even if he had accepted a six-month suspension. They also claim that the individually-named respondents are improperly named as parties to this proceeding. (Ans.).

In reply, petitioner asserts that absent any reason to refuse the six-month suspension, it could not have been offered, and he observes that respondents have failed to offer any documentation in support of their contention that they had offered him the opportunity, that although an audio recording was made of the January 19, 2009 meeting, he was never given a copy of it despite requesting it, and that he never appealed his step one grievance because DOT never responded to it. (Reply Affidavit, dated Sept. 15, 2010).

III. ANALYSIS

Generally, and with certain exceptions not pertaining here, "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." (*Leland Portland Cement Co. v New York State Dept. of Environmental Conservation*, 87 NY2d 136, 140 [1995]; *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *Sumner v Hogan*, 73 AD3d 618, 619 [1st Dept 2010]). The failure to exhaust administrative remedies bars an Article 78 proceeding seeking review of the agency's determination. (*Sumner*, 73 AD3d at 618).

Here, even if petitioner did not receive a determination of his step one grievance and thus had nothing to appeal, the grievance process does not require any determination at step one. Rather, if the step one grievance "is not resolved" within two days, the employee may appeal by filing a written grievance "within seven working days after presentation" of the step one grievance. Thus, the employee's right to appeal commences when the step one grievance is not timely resolved and the time to appeal arises seven days after presentation of the grievance. Consequently, a determination on the step one grievance is not contemplated before the right to appeal attaches. Rather, DOT is required to make a written determination only after the employee appeals following DOT's failure to resolve the step one grievance timely. (*See eg Bargstedt v Cornell Univ.*, 304 AD2d 1035, 1036 [3d Dept 2003] [respondent not estopped from arguing that action time-barred; that it never issued timely determination was immaterial given petitioner's ability under policy to advance to next step of grievance process without awaiting determination as to prior step]).

Thus, having failed to appeal the step one grievance after it remained unresolved for two days after its presentation, petitioner failed to exhaust his administrative remedies and may not seek review of DOT's determination in this proceeding. (*See eg Plummer v Klepak*, 48 NY2d 486, 490 [1979] [petitioner's failure to file grievance within 10 days of termination as required precluded Article 78 relief]; *Matter of Cummings v Bd. of Educ. of Sharon Springs Cent. School Dist.*, 60 AD3d 1138, 1139-1149 [3d Dept 2009] [as petitioner failed to pursue four-step grievance process, proceeding properly dismissed]; *Murray v Downey*, 48 AD3d 817 [2d Dept 2008] [petition dismissed as petitioners failed to take final step of grievance procedure]; *Fluellen v Hanley*, 45 AD3d 350 [1st Dept 2007] [petitioner sought order annulling respondent's

determination to terminate her employment; as petitioner was required to proceed through four-step grievance procedure, her failure to do so precluded her from commencing Article 78 proceeding]; *Feher v John Jay Coll. of Criminal Justice*, 37 AD3d 307 [1st Dept 2007], *lv denied* 9 NY3d 885, *cert denied* 552 US 1187 [2008] [as employee governed by three-step grievance process, her failure to participate in steps two and three precluded relief]; *Cantres v Bd. of Educ. of City of New York*, 145 AD2d 359 [1st Dept 1988] [although petitioner participated in step one hearing and requested step two hearing, he failed to appear for second hearing and never requested step three appeal]).

In light of this result, I need not address the parties' remaining contentions.

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:

Barbara Jaffe, JSC

DATED: December 29, 2010
New York, New York

BARBARA JAFFE
J.S.C.