

Matter of Roberts v Gavin

2011 NY Slip Op 30534(U)

February 9, 2011

Supreme Court, New York County

Docket Number: 109438/10

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 5

Roberts, William

INDEX NO. 109438/40

- v -
Harris, Bayle A.
article 78

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. 86

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

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

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 issued based hereon. To appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2-9-11

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

-----X
In the Matter of the Application of

Index No.: 109438/10

LILLIAN ROBERTS as Executive Director of DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; LOCAL 420 of DC 37, AFCSME, AFL-CIO; CARMEN CHARLES as President of Local 420; LOCAL 1549 OF DC 37, AFCSME, AFL-CIO; EDDIE RODRIGUEZ as President of LOCAL 1549; LOCAL 1189 of DC 37, AFSCME, AFL-CIO; DR. LEONARD DAVIDMAN as President of LOCAL 1189; LOCAL 768 of DC 37, AFSCME, AFL-CIO; FITZ REID as President of LOCAL 768; LOCAL 371 of DC 37, AFSCME, AFL-CIO; FAYE MOORE as President of LOCAL 371; LOCAL 299 of DC 37, AFSCME, AFL-CIO; and JACKIE ROWE-ADAMS as President of LOCAL 299,

Argued: 1/11/11
Mot. Seq. No.: 001

DECISION & JUDGMENT

Petitioners,

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

-against-

GAYLE A. GAVIN as Chair of THE PERSONNEL REVIEW BOARD of the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and ALAN D. AVILES as President of the NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

-----X
BARBARA JAFFE, J.:

For petitioner:
Dena Klein, AGC
Mary J. O'Connell, GC
District Counsel 37, AFSCME, AFL-CIO
125 Barclay Street
New York, NY 10007
212-815-1450

For respondents:
Courtney Stein, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street Room 140
New York, NY 10007
212-788-1202

Petitioners bring this special proceeding pursuant to article 78 of the Civil Practice Law

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and no further action should be served based hereon. To obtain a certified copy, a person authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

and Rules to annul a determination of the Personnel Review Board of the New York City Health and Hospitals Corporation (PRB), which upheld a decision of the New York City Health and Hospitals Corporation (HHC) amending Rule 7.6.10 of the HHC's Personnel Rules and Regulations (Personnel Rules) to create additional and smaller layoff units within existing, hospital-based layoff units.

Petitioners, which consist of various District Council 37, AFCSME, AFL-CIO (DC 37) representatives, move for an order and judgment:

- 1) adjudging and declaring that respondents Gayle A. Gavin, as Chair of the PRB, and Alan D. Aviles, as President of the HHC (together, respondents) acted arbitrarily, capriciously and in contravention of Rules 7.6.3, 7.6.5 and 2.3.1 of the Personnel Rules when they amended Rule 7.6.10 and created the smaller, additional layoff units (amendment);
- 2) ordering respondents to rescind the amendment and expand layoff units to hospitals and medical centers, as existed before the amendment;
- 3) ordering respondents to reinstate, with back pay and benefits, and reassign to positions in facilities within their former networks, those affected bargaining unit members of petitioners who were displaced as a result of the amendment; and
- 4) granting such other and further relief as the court deems just and proper, including all reasonable attorney's fees.

Respondents cross-move for an order dismissing the petition.

I. BACKGROUND

Petitioner Lillian Roberts is the Executive Director of DC 37, an amalgam of 55 local labor unions, representing approximately 125,000 employees, some of whom work for the HHC

in its various clinics and facilities. Petitioner Carmen Charles is the President of Local 420, an affiliated local of DC 37 (Local 420) which represents public employees in various health-care related titles, including Patient Care Associate, at the HHC. Petitioner Eddie Rodriguez is the President of Local 1549, an affiliated local of DC 37 (Local 1549), which represents public employees in various clerical titles, including Clerical Associate, working for the City of New York's mayoral agencies and for the HHC. Petitioner Dr. Leonard Davidman is the President of Local 1189, an affiliated local of DC 37 (Local 1189), which represents public employees in the title of Psychologist, working for the City of New York's mayoral agencies and for the HHC. Petitioner Fitz Reid is the President of Local 768, an affiliated local of DC 37 (Local 768), which represents public employees in mental health-related titles, including Social Worker, working for the City of New York's mayoral agencies and for the HHC. Petitioner Faye Moore is the President of Local 371, an affiliated local of DC 37 (Local 371), which represents public employees in social services titles, including Community Liaison Worker, working for the City of New York's mayoral agencies and for the HHC. Petitioner Jackie Rowe-Adams is President of Local 299, an affiliated local of DC 37 (Local 299), which represents public employees in certain titles, including Activity Therapist and Chaplain, working for the City of New York's mayoral agencies and for the HHC. (Pet., July 15, 2010).

HHC, a New York State public benefit corporation, promulgates rules and regulations consistent with civil service law with respect to the policies, practices and procedures relating to its employees' position classifications, title structures, class specifications, examinations, appointments, promotions, voluntary demotions, transfers, and reinstatements, as well as procedures relating to the abolition or reduction of positions. (*Id.*).

Pursuant to Personnel Rule 7.6.3:

Employees in affected titles in the layoff unit shall be laid off or demoted in the following order:

- a) All employees in probationary status in the same or similar titles. Among them, layoff shall be in inverse order to date of original appointment.
- b) All employees in permanent status in the same or similar titles. Among them, layoff shall be in inverse order to date of original appointment.

(Pet., Exh. B). And Personnel Rule 7.6.5 provides, in pertinent part, that:

- a) Employees who are laid off or demoted under the terms of Section 7.6.3 . . . shall have the right to displace (bump) employees with less seniority in the same layoff unit in the next lower title in the promotion line or title series.
- b) If there are no junior employees in the next lower titles in the promotion line or title series laid off or demoted, employees shall have the right to displace (bump) junior employees in the same layoff unit in any title with a lower salary in which they have served satisfactorily on a permanent basis since date of original appointment.
- c) Displacement of employees shall take place in the same order prescribed in Sections 7.6.3 . . . for layoffs.

(Pet., Exh. B). The Personnel Rules also require that the laws prohibiting discrimination on the basis of race, sex, age, and religion be strictly enforced. (Rule 2.3.1).

The identification of HHC units for layoff, demotion, or displacement purposes is set forth in Personnel Rule 7.6.10. Before 1991, HHC was a single, corporate-wide layoff unit, which included all of its facilities in all five New York City boroughs. In 1991, in order to decentralize operations, HHC created layoff networks consisting of groups of hospitals and health care facilities. For example, the North Central Bronx network was composed of Jacobi Medical Center, Gunhill Health Center, North Central Bronx Hospital, Child Health Center at Glebe Avenue, and Health Center at Tremont. (Pet., Exh. B).

On April 21, 2009, HHC provided notice that it was amending Personnel Rule 7.6.10 by creating 18 additional and smaller layoff units within existing HHC hospitals and medical centers, effective on May 3, 2009. Presently, HHC continues to carry out at the network level labor relations and human resources functions, such as hiring, firing, and work assignments. In addition, all HHC facility employees receive their paychecks directly from HHC, as they are considered HHC employees, not employees of the individual networks, hospitals or clinics. (Pet., Exh. A).

The Rules of Practice and Procedure of the PRB of the HHC, Part III, provide that “[a]ny aggrieved employee or employee organization representing an aggrieved employee may file an appeal with the Board.” (Respondents’ Memorandum of Law in Support of Cross Motion [Resp. Mem.], Exh. B). And pursuant to section 7390(8) (b) of the Unconsolidated Laws:

Except for matters which are subject to collective bargaining agreement, the personnel review board shall have the right to review, at the instance of any aggrieved employee of the corporation, or any certified employee organization representing such employee, any by-law, rule or regulation promulgated pursuant to subdivision one of this section nine or any action of the corporation related thereto and upon such review to direct the corporation to take or refrain from such action as the personnel review board shall deem proper.

II. CONTENTIONS

Petitioners commenced this proceeding on or about July 16, 2010, challenging both the HHC’s amendment, as well as the PRB’s decision denying their appeal of the same. They argue that the HHC’s decision to amend Rule 7.6.10 is arbitrary and capricious because it violates the seniority rights and principles set forth in Rules 7.6.3 and 7.6.5, and claim that the decision to carve out smaller layoff units at the clinic or program level subjects older, senior employees working in the closing clinics and programs to termination, while protecting younger, junior

employees employed at the hospital level and occupying the same title, thereby discriminating on the basis of age. They also maintain that since hiring, discipline, and assignments are executed at the network level, layoffs should have been executed at the network or hospital level, as well. (Pet.).

Respondents seek dismissal of the proceeding on the grounds that pursuant to CPLR 217(1) petitioners' claims are untimely, and in any event, the petition fails to state a cause of action absent a showing that the PRB's decision to uphold the HHC's amendment was arbitrary and capricious. (Resp. Mem.).

Although the challenged amendment became effective on May 3, 2009, and the four-month statute of limitations to challenge the decision to amend expired on September 3, 2009, 11 months before they commenced the instant proceeding, petitioners assert that their claims are nonetheless timely, as they had not exhausted all of their administrative remedies before commencing this proceeding. Rather, having appealed the decision with the PRB, they argue, the statute did not begin to run until March 25, 2010 with the decision denying their appeal, relying on section 7390(8) (b) of the Unconsolidated Laws. (Petitioner's Memorandum of Law in Support of the Opposition to the Motion to Dismiss). Respondents disagree. (Respondents' Reply Memorandum of Law in Further Support of their Cross-Motion to Dismiss the Verified Petition).

III. ANALYSIS

An article 78 challenge to a governmental determination must be commenced within four months of the issuance of a final determination. (CPLR 217[1]; *Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]; *Roufaiel v Ithaca Coll.*, 241 AD2d 865, 867 [3d

Dept 1997]; *Matter of Schulman v Bd. of Educ. of City of New York*, 184 AD2d 643, 644 [2d Dept 1992]). Moreover, “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” (*Doe v St. Clare's Hosp. and Health Ctr.*, 194 AD2d 365, 366 [1st Dept 1993] [internal quotation marks and citation omitted]), and pursuant to CPLR 7801(1), an article 78 proceeding may not be used to challenge a determination “which is not final” (*Matter of Shepard v William Inst. of Psychiatry, Psychoanalysis & Psychology*, 44 AD2d 177, 181 [1st Dept 1974]).

However, although the PRB had the right to review petitioners' grievances, petitioners were not required to appeal the determination in order to exhaust their remedies. Thus, absent any requirement that petitioners appeal to the PRB, petitioners had the option of appealing or commencing this proceeding. Consequently, as the limitation period is not “tolled by the invocation of a grievance procedure, which is merely an alternative remedy,” petitioners' appeal to the PRB does not extend or toll the statute of limitations (*Matter of Queensborough Community Coll. of City Univ. of New York v State Human Rights Appeals Bd.*, 41 NY2d 926, 926 [1977] [act of giving complainant notice that she would not be reappointed to employment immediately gave rise to cause of action, and four-month statute of limitations not tolled by invocation of grievance procedure, which was merely an alternative remedy]; *Roufaiel*, 241 AD2d at 868 [plaintiff's invocation of grievance procedure did not toll running of statute of limitations where college's grievance procedure not mandatory, but merely provided plaintiff with alternative forum in which to seek to vindicate her rights]; *Matter of Schulman*, 184 AD2d at 644 [where petition served more than four months after determination to discharge him went into effect, court found meritless petitioner's argument that review of administrative

determination served to extend four-month limitations period]; *Matter of Jones v McGuire*, 92 AD2d 788, 789 [1st Dept 1983] [statutory time limit prescribed by CPLR 217 not tolled by invocation of grievance procedures]).

Consequently, this proceeding is time-barred. (*See Matter of Fiore v Bd. of Educ. Retirement Sys. of the City of New York*, 48 AD2d 850, 850 [2d Dept 1975], *affd* 39 NY2d 1016 [1976] [application to reconsider administrative board's determination does not extend, by making and rejection thereof, four-month statutory period under CPLR 217; article 78 proceeding thus time- barred]).

Given this result, I need not address the merits of the remaining claims advanced by the parties. (*Matter of Jones v McGuire*, 92 AD2d at 789).

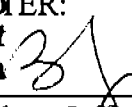
IV. CONCLUSION

For the foregoing reasons, it is hereby

ADJUDGED, that the petition to annul a determination of respondent Personnel Review Board of the New York City Health and Hospitals Corporation, which upheld a decision of respondent New York City Health and Hospitals Corporation amending Rule 7.6.10 of respondents' Personnel Rules and Regulations to create additional, smaller layoff units within existing, hospital-based layoff units is denied as untimely and the proceeding is dismissed; and it is further

ORDERED that respondent's motion to dismiss the verified petition is granted.

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



Barbara Jaffe, J.S.C.
BARBARA JAFFE
J.S.C.

DATED: February 9, 2011
New York, New York