

Matter of Carter v Board of Educ.

2011 NY Slip Op 31061(U)

April 22, 2011

Supreme Court, New York County

Docket Number: 401498/10

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

In the Matter of the Application of
ANNA CARTER,

INDEX NO. 401498/10

MOTION DATE 2/17/11

Petitioner,

MOTION SEQ. NO. 001

- v -

BOARD OF EDUCATION/LEAVES ADMIN/HR CONNECT,

Respondents.

The following papers, numbered 1 to 10 were read on this Article 78 petition

Order to Show Cause— Verified Petition— Exhibits A, A-1, A-2, A-3, A-4, A-5, A-6, A-7, B-1, B-2, B-3, C, D, D-1, D-2, D-3, D-4, D-5, D-6, E	No(s). <u>1-2</u>
Notice of Cross Motion—Affirmation — Exhibits A-C—Affirmation of Service	No(s). <u>3-5</u>
Affidavit in Opposition—Affidavit of Service — Exhibits A-O	No(s). <u>6-7</u>
Verified Answer – Exhibits A- V [Affidavit]	No(s). <u>8-10</u>


Upon the foregoing papers, it is ADJUDGED that this petition is decided in accordance with the annexed memorandum decision and judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B)

HON. MICHAEL D. STALLMAN

Dated: 4/22/11
New York, New York


_____, J.S.C.

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

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check if appropriate:..... PETITION IS GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
In the Matter of the Application of
ANNA CARTER,

Petitioner,

Index No. 401498/10

- against -

Board of Education/Leaves Admin./HR Connect,

Decision and Judgment

Respondents.

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 interested representative must
appear in person at the County Clerk's Desk (Room
11B)

HON. MICHAEL D. STALLMAN, J.:

Petitioner Anna Carter, a teacher employed by the New York City Department of Education (DOE), challenges respondents' determinations denying her two requests for line of duty injury (LODI) leave and seeks, among other things, to stay respondents from collecting monies that petitioner received from DOE during the period of September 2009 to January 31, 2010.

BACKGROUND

The order to show cause alleges that petitioner was "originally injured in the knees while at work in 8/2007" and that she "was injured again in 6/2009 while at work." The verified petition alleges that "my knees are in bad shape because of that [August 2007] accident and the second accident at work on May 28, 2009."

The verified petition includes a Comprehensive Injury Report for an injury that petitioner allegedly suffered on May 28, 2009 at a Reassignment Center located at 516 West 181st in Manhattan. Verified Answer, Ex B; *see also* Verified Petition, Exs A, A-2, A-3, A-4. In that report, petitioner stated,

"My knees were giving me pain I stood to go to the bathroom, and I tripped over two chair legs that were straddling one another.

This is a reinjury to the August 31st, 2007 injury in the reassignment center at 333 Broadway, Manhattan NY.” *Id.*

Respondents submit a letter dated July 13, 2009 addressed to petitioner, which states,

“The Leaves Office has received your application for the following:

Type of Leave: **LODI-Short Term**
 Leave Dates Requested: **5/29/2009 to**

We cannot review your application at this time as some of the required information is missing. In order for us to process your application, please sending the following information to HR Connect **within 21 business days from the date of this letter.**

Missing Superintendent’s signature with the determination, OP 198, and medical documentation.”

Verified Answer, Ex E.¹

A letter dated January 29, 2010 to petitioner states,

“The Leaves Office has received your application for the following:

Type of Leave: **LODI-Short Term**
 Leave Dates Requested: **5/29/2009 to**

Based on our review, your leave has been denied for the following reason: **Denied – Insufficient Doc. – Documentation Insufficient.”**

Verified Answer, Ex F.

¹ An example of the Form OP 198 is annexed to the Verified Answer as Exhibit C.

It is unclear from the letter whether petitioner had requested leave for a single day, i.e., May 29, 2009, or whether petitioner had requested leave to start from May 29, 2009 until an unspecified end date.

Neither petitioner nor respondents submitted a copy of Form OP 198 for date of May 29, 2009. The three Form OP 198s that respondents submitted appear to cover dates after May 29, 2009, and the first OP 198 appears to request sick leave, not leave based on an alleged line of duty injury. *See* Verified Answer, Ex D.

On March 3, 2010, petitioner submitted a request for "Leave of Absence Without Pay" from September 8, 2009 through February 22, 2010, inclusive, which was signed by Superintendent Elaine Gorman and dated March 5, 2010. Verified Answer, Ex I. Handwriting next to Gorman's signature reads, "pending review by leaves." *Id.* It appears that, on March 5, 2010, Superintendent Gorman also signed a copy of petitioner's Comprehensive Injury Report on line 37 of the report. It also appears that a small box next to "(IF LODI) APPROVED" was checked off in line 37, and handwriting to the right of the mark reads, "pending medical assessment of the application and days requested." Verified Answer, Ex H.

By letter dated April 5, 2010, the Leaves Office acknowledged receipt of petitioner application for "LODI-Long Term" for the dates "9/8/2009 to 2/22/2010." Verified Answer, Ex J. The letter states, "We cannot review your application at this time as some of the require information is missing." *Id.* The letter requests petitioner to send "**Additional medical documentation requested (Medical Request Form attached to applicant's copy).**" *Id.*; see also Carter Opp. Aff., Ex F. According to respondents, petitioner submitted to DOE's Medical Unit a Psychiatric Follow Up Examination Report from Dr. Jingling Tang, a report from Mainstreet Radiology, and Daily Physical Therapy Progress Notes and Pain Therapy S.O.A.P. Progress Notes. Verified Answer, Exs K-M.

Meanwhile, DOE's Billing Unit sent petitioner an invoice dated April 20, 2010, advising petitioner that she had received payroll overpayments total \$33,933.14. Verified Answer, Ex U. Respondents assert that petitioner received her regular salary from September 15, 2009 to January 29, 2010, pending a decision on her request for line of duty injury leave. Verified Answer ¶ 59. Respondents maintain that, given that petitioner's request for line of duty injury leave was denied,

her absence was considered an unauthorized leave or leave of absence without pay. Verified Answer ¶ 60.

According to respondents, Dr. Jean Jeudy performed a medical examination of petitioner on April 29, 2010, and issued a Physical Examination Report dated April 29, 2010. Verified Answer, Ex P. Dr. Jeudy made the following diagnosis and disposition:

“Diagnosis: History of recurrent injuries to her knees (2007 and 5/28/09)
MRI findings of multiple osteochon[-]dromas in the knees and patellar cartilage loss – chondromolacia (patello-femoral)
low back and cervical pain syndro are due to degenerative disc disease.

Disposition: may return to duty.”

Id.

By a letter dated December 2, 2010, the Leaves Office denied petitioner’s “request for absence due to Line of Duty Injury for the period: 9/8/2009 to 2/28/2010.” The letter states, in pertinent part,

“Your request has been denied for the following reason: **Denied – Medically Ineligible - from 9/8/2009 to 2/28/2010**

If you have already been paid for these days, your Payroll Secretary / Timekeeper will take the appropriate action to reduce your CAR balance or payment accordingly.

If you have exhausted all paid leave options, you may apply for Leave of Absence without pay.

If you disagree with the determination described above and there is a possibility that you will be absent without pay for more than one month, you may request an independent evaluation by a medical arbitrator. **You must contact your union to file for medical arbitration.** A request for medical arbitration must be

made in writing to HR Connection within ten school days of receipt of this letter.”

Verified Answer, Ex S. According to respondents, neither petitioner nor her union submitted a written request for independent review before a medical arbitrator of the December 2, 2010 denial.

Verified Answer ¶ 52.

Petitioner commenced this Article 78 proceeding on June 10, 2010. The notice of petition requests that the Court: (1) “restore [her] injury in the line of duty status from September 8, 2009 to present”; (2) “restore injury in line of duty salary payments from February 1st through April 29, 2010; (3) “Restore [her] Equate date to it’s [sic] original status of 2/92, not 9/92.” The verified petition seeks similar, but slight different relief. The verified petition requests (1) “a stay order or stay trying to collect back money for injury in line of duty disability payment given from September to January 31, 2010”; (2) “Injury in line of duty payments to continue from February 1st through September or/and beyond”; and (3) her “Equate time to be restored to it’s [sic] original date of February 1992 instead of it’s [sic] changed time to September 1992.”

Respondents cross-moved to dismiss the petition on the grounds of failure to exhaust administrative and contractual remedies and the expiration of the statute of limitations. By interim decision and order dated November 3, 2010, this Court denied the cross motion and directed respondents to answer the verified petition, without prejudice to asserting both grounds as affirmative defenses in the answer. On January 6, 2011, respondents answer the verified petition, and the matter was fully submitted on February 17, 2011.

DISCUSSION

Review of the Respondents’ Denials of Line of Duty Injury Leave

Preliminarily, the Court notes that petitioner appears to believe that she was granted "line of duty status," because the relief sought in the notice of petition requests that the Court "restore" her to that status. However, the record does not contain any submission from petitioner that would indicate that she was, in fact, granted any leave based on a line of duty injury. From respondents' submissions, it appears that, on March 5, 2010, Superintendent Elaine Gorman signed the Comprehensive Injury Report regarding petitioner's alleged May 28, 2009 injury, and it would appear that Gorman checked off the box, "(IF LODI) APPROVED." Verified Answer, Ex H. However, the handwritten notations read "pending medical assessment of application and days requested." Thus, it does not appear that petitioner's alleged injury on May 28, 2009 was unequivocally approved as a line of duty injury. Accordingly, the Court will consider petitioner's request to "restore" her to "line of duty" status as a request to review respondents' two denials of her applications for leave of absence based on a line of duty injury, i.e., the letter dated January 29, 2010, which denied petitioner's request for "LODI- Short Term" leave due to insufficient documentation, and the letter dated December 2, 2010, which denied petitioner's request for "LODI-Long Term" leave on the ground that petitioner was medically ineligible.

Respondents argue that the first denial of petitioner's request for "LODI-Short Term" leave was neither arbitrary and capricious, and had a rational basis. Respondents argue that petitioner should have appealed the second denial of petitioner's request for "LODI-Long Term" leave to a medical arbitrator.

Petitioner has not demonstrated that the January 29, 2010 letter denying petitioner's request for "LODI-Short Term" for the dates "5/29/2009 to _____", due to "Insufficient Doc. - Documentation Insufficient" was arbitrary and capricious, or lacked a rational basis. A previous

letter dated July 13, 2009 informed petitioner that her leave application was “**Missing Superintendent’s signature with the determination, OP 198, and medical documentation.**”

Verified Answer, Ex E. Nothing in the record indicates that petitioner subsequently supplied the missing documentation. Petitioner does not submit a copy of Form OP 198 requesting leave for May 29, 2009. Superintendent Gorman apparently signed and dated the Comprehensive Injury Report on March 5, 2010. Verified Answer, Ex H. Therefore, the branch of the petition that challenges respondents’ January 29, 2010 denial of short term leave based on a line of duty injury is denied.

Turning to the second denial, respondents argue that petitioner failed to exhaust her administrative remedies because she did not seek an independent evaluation before a medical arbitrator, pursuant to Article 21 (K) (4) of the collective bargaining agreement between petitioner’s union and the DOE. Article 21 (K) (4) states, in pertinent part:

“4. Medical Report and Review

* * *

(c). A regular teacher shall have the right to an independent evaluation by a medical arbitrator selected from rotating panels of doctors to be selected by mutual agreement of the Board and the Union if the finding of the Medical Bureau to the Chancellor has resulted in:

- (1) Placement of the teacher of a leave of absence without pay for more than one month; or
- (2) Termination of the teacher’s services; or
- (3) A recommendation for disability retirement; or
- (4) A denial of a leave with or without pay for more than one month.”

Verified Answer, Ex T.

An independent evaluation before a medical arbitrator was the exclusive method for disputing challenging the Medical Bureau’s determination in this case. The excerpts of the collective bargaining agreement did not explicitly reserve any alternative vehicle for seeking legal redress, such as permitting direct review to the Court. *Carter v Department of Correction of the City of New York*,

92 AD2d 465, 465 (1st Dept 1983); *cf Kornit v Board of Ed., Plainview-Old Bethpage Central School Dist., Plainview*, 54 AD2d 959, 959 (2d Dept 1976) (“The use of the word ‘may’ in the article entitled ‘Grievance Procedure’ should not be construed to mean that arbitration was an optional method. We believe that the intention of the parties to the agreement was that disputes of this type be settled through the grievance procedure as set forth in the collective bargaining agreement”). Thus, petitioner’s failure to participate in the independent evaluation precludes her from seeking relief in an article 78 proceeding. *Feher v John Jay College of Criminal Justice*, 37 AD3d 307, 308 (1st Dept 2007)

Even if the Court were to assume, for the sake of argument, that an independent evaluation before a medical arbitrator was not petitioner’s exclusive remedy, petitioner has not demonstrated that the second denial of petitioner’s request for long term leave from “9/8/2009 to 2/22/2010” either was arbitrary and capricious or lacked a rational basis. Dr. Jeudy concluded after examining petitioner on April 29, 2010 that she “May return to duty.” Verified Answer, Ex P. Dr. Tsilia Sorina, who respondents maintain is one of petitioner’s own doctors,² wrote in a letter dated April 30, 2010 that petitioner could return to work on April 30, 2010, with a few restrictions. Verified Answer, Ex Q. Thus, there is adequate credible evidence to support respondents’ determination that petitioner was “Medically Ineligible” for a long term leave based on a line of duty injury. Although petitioner submitted records to respondents that petitioner sought treatment for her knee (and for shoulder pain) since May 28, 2009 (*see* Verified Answer Exs N, O), the evidence “does not tend to show that respondent[s] ‘acted illegally or capriciously or adopted a professional opinion not founded on a

² Dr. Tsorina completed a report stating that she had evaluated petitioner on “6 12 09,” and that petitioner stated that she was a driver who was involved in a motor vehicle accident on “6 4 09.” Carter Opp. Aff., Ex M.

rational basis.” *Altieri v City of New York Civil Service Commn.*, 57 AD3d 248, 249 (1st Dept 2008) (citation omitted).

Overpayments to Petitioner

The Court notes that petitioner appears to believe that she received line of duty disability pay from DOE, because the relief sought in the notice of petition requests that the Court “restore injury in line of duty salary payments,” and the verified petition seeks a “stay on trying to collect back money for Injury in line of duty disability payment given from September to January 31, 2010.”

However, the record does not contain any submission from petitioner that would indicate that petitioner received disability pay. Respondents state that, during petitioner’s absence, petitioner received her regular DOE salary pending a decision on her request for line of duty injury leave. Verified Answer ¶ 57. DOE maintains that the invoice that petitioner received from DOE’s Billing Unit was “to recoup salary payments that were made to any teacher who takes an unauthorized leave of absence or who was granted a leave of absence without pay.” Verified Answer ¶ 60.

That DOE sent a letter to petitioner dated April 20, 2010, which sought to recoup the salary that petitioner received. According to respondents, petitioner was receiving her regular DOE salary while her request for line of duty injury leave was pending. Verified Answer ¶ 57. Although the Leaves Office denied petitioner’s request for short term leave for a line of duty injury, the Leaves Office acknowledged by letter dated April 5, 2010 that petitioner had submitted another application for long term leave, which was apparently pending when DOE’s Billing Unit sent the April 20, 2010 letter to petitioner. However, given that the Leaves Office ultimately rejected petitioner’s application for long term leave on December 2, 2010, the Court need not address the issue of whether

respondents should not have sought to collect that salary while petitioner's leave request was pending.

Petitioner has not demonstrated that respondents' decision to recoup the monies that petitioner received from DOE was arbitrary and capricious. First, petitioner has not demonstrated to the Court that she received line of duty injury pay, as opposed to her regular DOE salary. Second, even if she received line of duty injury pay, petitioner has not shown that DOE's decision to recoup those purported benefits is either arbitrary and capricious or is a violation of law. Superintendent Gorman approved the accident on May 28, 2009 as a line of duty injury "pending medical assessment of the application and days requested." Verified Answer, Ex H. Petitioner does not cite any law, case, or regulation that, under these circumstances, DOE may not be recoup the monies that petitioner received during her absence, if the petitioner is ultimately found not to qualify for line of duty injury leave.

Although petitioner asserts that she went back to work on March 26, 2010 (Carter Opp. Aff. ¶ 3), the monies that DOE seeks to recoup from petitioner concern a different time period. According to the invoice from DOE's Billing Unit, the collection effort concerns 10 checks to petitioner, commencing with a check dated September 15, 2009, and ending with a check dated January 29, 2010. Verified Answer, Ex U.

Therefore, this branch of the petition is denied.

Equate Date

According to Genevieve M. Aloia, the Administrator of the Office of Salary Services for DOE, "all appointed teachers and appointed school-based-staff are assigned a Salary Step and an Equate Date." Verified Answer, Ex V [Aloia Aff.] ¶ 3. Aloia avers that "[T]he employee's Equate

Date is based on the number of years within the DOE and/or outside previous, paid, full time teaching experience and/or related non-teaching experience." *Id.* ¶ 4. She claims that an appointed employee will advance to a higher Salary Step (thereby receiving a higher salary) twice a year: on his/her Equate Date, and once every March. *Id.* ¶ 5.

Petitioner apparently believes that her equate date was changed, because the notice of petition asks the Court to "restore [her] Equate date to it's original status of 2/92, not 9/92." However, petitioner submits no document evidencing that her Equate Date was originally 2/92, or that DOE changed her Equate Date. According to Aloia, petitioner became an "appointed" teacher on February 3, 1997 (Aloia Aff. ¶ 11), based on a printout of a "Service Inquiry" of petitioner. *See Verified Answer, Ex A.* Aloia states, "Petitioner's Equate Date has not changed since her appointment date." Aloia Aff. ¶ 12.

In any event, petitioner has not demonstrated any clear legal right or entitlement that her Equate Date should be "2/92." Petitioner does not explain why her Equate Date should be "2/92" instead of what DOE apparently computed in 1997 when petitioner became an appointed teacher.

CONCLUSION

Accordingly, it is hereby

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

Dated: April 22, 2011
New York, New York

ENTER:


J.S.C.

FILED 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 11B)

HON. MICHAEL D. STALLMAN