

**Matter of Victory v County of Nassau**

2011 NY Slip Op 31453(U)

May 25, 2011

Sup Ct, Nassau County

Docket Number: 23115/10

Judge: Anthony L. Parga

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**SHORT FORM ORDER**

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA  
Justice

-----X PART 8  
In the Matter of the Application of  
ANNE C. VICTORY,

Petitioner,  
For a Judgment Pursuant to  
CPLR Article 78,

INDEX NO.: 23115/10  
**XXX**

-against-

MOTION DATE: 04/01/11  
MOTION SEQ.: 01

THE COUNTY OF NASSAU and the NEW YORK  
STATE and LOCAL RETIREMENT SYSTEM,

Respondents.

-----X

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Upon the foregoing papers, it is ordered that the application by Petitioner seeking an order pursuant to Article 78, reinstating Petitioner to her position of Clerk Typist III with full back pay is determined as directed below.

It is well settled that in a proceeding brought under Article 78 of the CPLR, the function of this Court is only to see that a determination of an administrative body or officer was made in the manner prescribed by law (*See, Laureano v. Kuhlmann*, 75 N.Y.2d 141; *Voelckers v. Guelli*, 58 N.Y.2d 170). Generally, an administrative agency's determination requires deference in the area of its expertise (*See, Rosen v. Public Empl. Relations Bd.*, 72 NY2d 42, 47-48). The standard of review in an Article 78 proceeding is "whether the agency determination was arbitrary and capricious or affected by an error of law." (*See, Scherbyn v. Wayne Finder Lakes Bd. of Coop. Educ. Services*, 77 N.Y.2d 753 (1991)).

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

In the instant matter, petitioner, Anne C. Victory had been employed by the Nassau County Department of Health as a Clerk Typist III. In 2010, the County announced the State's Early Retirement Incentive for certain County employees, including Petitioner. Petitioner chose to take the Incentive, and on July 29, 2010, she submitted to the County Department of Human Resources a letter of intent to participate in the Incentive and to retire effective August 20, 2010. On or around the same date, Petitioner also submitted an "Application for the 2010 Incentive Service Retirement" to Respondent, New York State and Local Retirement System (hereinafter "NYSLRS"). Thereafter, on August 18, 2010, Petitioner changed her mind and filed a "Withdrawal of Application for Service Retirement" with NYSLRS. Petitioner provided the Respondent, County of Nassau, with a copy of same. The following day, Petitioner again changed her mind and decided that she wanted to retire. Petitioner alleges that on August 19, 2010, she went to the Hauppauge regional office of the NYSLRS and met with a representative who sent an email to the main office in Albany, informing the main office that Petitioner wished to retire on August 20, 2010. Following said email, a representative of the NYSLRS called Human resources and informed a clerk at Human Resources that the NYSLRS was able to allow Petitioner to retire as planned on August 20, 2010.

On August 20, 2010, the Petitioner retired under the Early Retirement Incentive and began receiving payments. Three days later, on August 23, 2010, Petitioner filled out two requests for payment of days that had been "banked." On August 24, 2010, Respondent County of Nassau issued a Report of Personnel Action affirming that Petitioner had retired effective August 19, 2010 (the last day for which she was paid). Also on that day, the Department of Health submitted paperwork instructing the Civil Service Commission as to how Petitioner should be paid for her last five days of work, indicating that she had retired.

On August 27, 2010, Petitioner contacted Debbie Conigliaro, her former supervisor at the Department of Health to ask if she could undo her retirement. Ms. Conigliaro called the County Office of Labor Relations and was told that Petitioner was not able to undo her retirement, but that she should call the NYSLRS for information. She was then advised by NYSLRS that it would be possible to allow Petitioner's restoration to her former position if the County would agree to it.

On December 22, 2010, after the filing of the within petition, the NYSLRS sent the Department of Health a letter stating that "the application for retirement as of August 20, 2010 filed by [Petitioner] has been cancelled. Therefore, she may continue in service." Respondent County of Nassau contends that Robert Coughlin, counsel to NYSLRS, advised the County, by letter, that the NYSLRS's main office did not receive Petitioner's August 18, 2010 withdrawal notice which was filed with the Hauppauge regional office until December 2010, and as such, advanced checks to Petitioner on October 1, 2010, November 1, 2010, and December 1, 2010,

which were never cashed. Mr. Coughlin wrote that since Petitioner withdrew her application on August 18, 2010, prior to her effective date of retirement (August 20, 2010), the NYSLRS cancelled her retirement.

The County argues that the Petitioner’s own actions induced the County to reasonably rely upon the fact that Petitioner had retired, as did the actions of the NYSLRS to the same end. The County argues that the “Intent to Retire” form that the Petitioner submitted to Human Resources on July 29, 2010 satisfied the Nassau County Civil Service Commission Rules and Regulations (hereinafter referred to as the “Rules”) requirement that a resignation be in writing. The Rules provide that “a resignation may not be withdrawn, cancelled or amended after it is delivered to the appointing authority (Rule XXV(3)), and that an “Intent to Retire” form is an effective resignation. (See, *Schmitt v. Hicksville UFSD No. 17*, 200 A.D.2d 661, 606 N.Y.S.2d 761 (2d Dept. 1994)).

The County never consented to the Petitioner’s withdrawal of her resignation, nor do the Rules require that it do so. The decision of whether to accept a withdrawal of resignation is discretionary. (See, *Melber v. New York State Educ. Dept.*, 71 A.D.3d 1216, 896 N.Y.S.2d 228 (3d Dept. 2010); *Lewis v. State University of New York Downstate Med. Ctr.*, 60 A.D.3d 765, 875 N.Y.S.2d 189 (2d Dept. 2009)). Further, under Rule XXIII, a “permanent employee who has resigned from his/her position, may, subject to Civil Service Commission approval, be reinstated without further examination to the position from which he/she resigned....” Because the power to reappoint is permissive, the County’s decision not to exercise will only be disturbed if it constituted an abuse of discretion or was otherwise arbitrary or capricious. (See, *Melber v. New York State Educ. Dept.*, 71 A.D.3d 1216, 896 N.Y.S.2d 228 (3d Dept. 2010); *Pishotti v. New York State Thruway Authority*, 38 A.D.3d 1122, 833 N.Y.S.2d 675 (3d Dept. 2007); *Roche v. Kelly*, 35 Misc.2d 336, 229 N.Y.S.2d 852 (Sup. Ct. Nassau Cty. 1962); *Thompson v. Budd*, 133 Misc.779, 233 N.Y.S. 504 (Sup. Ct. Monroe Cty. 1929)). The Petitioner has not set forth any evidence that the County’s decisions to not permit the withdrawal of Petitioner’s retirement and to not reinstate her to her former position was an abuse of discretion or otherwise arbitrary or capricious. Accordingly, this Court will not disturb the County’s decision not to reinstate the Petitioner to her former position as a Clerk Typist III with the County of Nassau’s Department of Health.

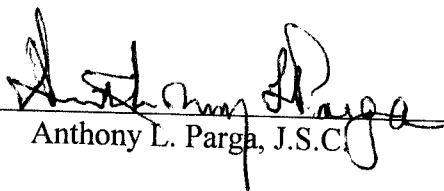
Respondent NYSLRS argues that the Comptroller has exclusive authority to determine all applications for retirement benefits and that the withdrawal of Petitioner’s retirement application evidences Petitioner’s intent to relinquish her retirement and forfeit her benefits. It is evident from the submissions before this Court, however, that at the time of Petitioner’s retirement on August 20, 2010, she had cancelled her “Withdrawal of Application for Service Retirement” with NYSLRS in person at the Hauppauge regional office of the NYSLRS and confirmed that she was

allowed to retire as planned on August 20, 2010. As the NYSLRS had previously paid benefits to Petitioner after her retirement on August 20, 2010 and prior to its receipt of her cancelled "Withdrawal of Application for Service Retirement," her retirement had been initially approved by NYSLRS. As such, Petitioner's Service Retirement should not have been withdrawn resulting in the forfeiture of her benefits. Accordingly, this Court declares the following:

- 1. That Petitioner, Anne C. Victory, is deemed retired.
  - 2. That Petitioner is not entitled to be retroactively reinstated to her position of Clerk Typist III with full back pay plus interest.
  - 3. That Petitioner, Anne C. Victory, is entitled to retroactive retirement benefits from August 20, 2010 and payment of the early retirement incentive.
- And,
- 4. That NYSLRS is Ordered to provide full retroactive retirement benefits to Petitioner, Anne C. Victory, from August 20, 2010, and to provide payment of the early retirement incentive to Petitioner within sixty (60) days.

This constitutes the decision and order of this Court.

Dated: May 25, 2011



Anthony L. Parga, J.S.C.

Cc: Eric T. Schneiderman  
 Attorney General of the State of New York  
 Attn: Derrick J. Robinson, Esq.  
 200 Old Country Road, Suite 240  
 Mineola, NY 11501

**ENTERED**  
**MAY 27 2011**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**

Law Offices of Louis D. Stober, Jr., LLC.  
 Attn: Alyssa F. Bomze, Esq.  
 350 Old Country Road, Suite 205  
 Garden City, NY 11530

John Ciampoli  
 County Attorney of Nassau County  
 One West Street  
 Mineola, NY 11501