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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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In the Matter of the Application of
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., A.F.S.C.M.E., LOCAL 1000, A.F.L., -C.I.O, BY ITS NASSAU COUNTY EDUCATIONAL LOCAL 865 and ANASTASIOS DRIVAS,

Petitioners,

for a Judgment pursuant to Article 78 CPLR

-against-

FRANKLIN SQUARE UNION FREE SCHOOL DISTRICT and the BOARD OF EDUCATION OF FRANKLIN SQUARE UNION FREE SCHOOL DISTRICT,

Respondents.

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TRIAL PART: 14

NASSAU COUNTY

INDEX NO: 11-002936

MOTION SEQ. NO: 1, 2

SUBMIT DATE: 04/27/11

The following papers having been read on this motion:

Notice of Petition.....1
Memorandum in Support of Petition.....2
Notice of Motion to Dismiss.....3
Memorandum of Law in Support.....4
Affirmation in Opposition.....5
Amendment to Affirmation.....6
Petitioners Memorandum of Law in Response....7
Reply Affirmation.....8
Reply Memorandum of Law.....9

The petitioner, Anastasios Drivas ("Drivas"), brings this Article 78 proceeding for an order and/or Judgement from this Court: declaring that the respondents' actions, which are the subject matter of the instant proceeding, are unlawful and in violation of Civil Service Law §71; declaring that respondents are in violation of 42 U.S.C. §1983; enjoining respondents from engaging in practices that are in violation of the statutes set forth and from interfering with Drivas' lawful employment with the respondent school district; and ordering respondent to reinstate him with back pay and all other employment benefits he would have received had he not been wrongfully terminated. Petition is granted in part.

Respondents, Franklin Square Union Free School District and the Board of Education of Franklin Square Union Free School District, seek an Order of this Court pursuant to CPLR §3211(a)(7) and CPLR §7804(f) dismissing the instant petition for failure to state a cause of action and failure to join necessary parties. Motion is denied, in part.

Petitioner filed a Verified Petition on February 24, 2011, returnable to this Court on March 30, 2011. Respondents answered by filing a motion seeking dismissal of the petition on March 30, 2011, and alternatively, if the Court denies the motion, granting leave to serve an answer to the petition.

FACTS

In January, 2007, the respondent school district appointed Drivas to the position of Cleaner, a position grouped in the laborer class pursuant to Civil Service Law §43. There were 11 other employees working in that title at the time of hire and were still employed at all times referred to herein. Drivas satisfactorily passed his probationary period and attained permanent status with the respondent school district.

In July, 2008, Drivas injured his shoulders and back while performing his duties, specifically while waxing the floors at one of the district's elementary schools. He filed for and received workers compensation benefits for that injury. He continued working up until the beginning of July, 2010 when he, after receiving approval from the Workers Compensation Board, underwent surgery on his right shoulder. Drivas informed his employer of his pending surgery and the leave of absence following the surgery.

During Drivas' absence, the respondent employer mailed documentation citing his leave entitlements, and correspondence informing him that his paid leave time would expire as of September 20, 2010, to him at his home. On October 18, 2010, Drivas was cleared for duty by his treating physician. He so notified the respondents and provided them with the requisite medical documentation. The respondent school district, through its superintendent Patrick Manley, notified Drivas by letter mailed on or about October 13, 2010, that he was to be examined by the school district physicians prior to reporting for duty.

Drivas made the appointment, and was examined by the physician on October 26, 2010. There is dispute as to whether the physician advised Drivas that he was cleared for duty; however,

Drivas maintains that the doctor and the respondents refused to provide him with the results of the examination. On October 28, 2010, Drivas met with Manley and while the events of this meeting are also in dispute, Manley informed Drivas that his position of Cleaner was no longer available.

In November, 2010, the respondents officially abolished Drivas' position of Cleaner pursuant to a board resolution. The 11 other Cleaners were not terminated and they are still employed as of this date.

PROCEDURE

Petitioner argues that respondents' motion should be denied outright as their papers are procedurally defective in that they filed a motion as opposed to filing an answer containing objections of law. Further, CPLR § 7804 (f) does not permit for a motion to dismiss to be based on documentary evidence. Additionally, the submitted documents do not meet the standard for dismissal under CPLR §3211 (a)(7) as they must be unambiguous and of undisputed authenticity. As such, respondent's documentary evidence is improper, and it should not be considered by this Court.

As to the merits of the instant petition, petitioner argues that he was entitled to due process prior to being terminated, the abolition of his position was in bad faith, he had a vested property right in his public employment and an expectation of continued employment, his position was to be held open for one year while he was on leave for an occupational injury, and he should have placed on a preferred list if his position was no longer available.

Respondents maintain that Drivas' position was abolished for business reasons and as he held a position classified as civil service laborer, he was not entitled to the due process provisions set forth in Civil Service Law. Moreover, Drivas' civil service classification as a laborer does not entitle him to a constitutionally protected property right in his employment as he is an at will employee. Further, the only tangible entitlement Drivas may have is the placement on a preferred list and it is the Nassau County Civil Service Commission's duty to place him on such list. Therefore, petitioner's failure to join the Commission as a party to this action, is fatal. Additionally, as the petitioner is seeking reinstatement to his position, the 11 other cleaners would ultimately be affected and/or displaced by such reinstatement, and his failure to join them as a party to the instant matter, is also fatal.

DISCUSSION

The petitioner brings the instant petition under the arbitrary and capricious standard of CPLR Article 78 review. The respondent school district and/or State agency must examine relevant data and articulate satisfactory explanation for its action including a rational connection between facts found and the choice made. (*Public Citizen, Inc. v. Mineta*, 340 F3d 39, *Cohen v. State of New York*, 2 AD3d 522 [2nd Dept 2003], 770 NYS2d 361, *Tockwotten Associates, LLC v. New York State Div. Of Housing and Community Renewal*, 7 AD3d 453 [1st Dept 2004]).

Before this Court can review the actions taken by the respondents, it must address the procedural issues in this case. Such confusion is attributable to respondents' filing a motion to dismiss the petition for failure to state a cause of action and for failure to join certain necessary parties, instead of answering the petition. CPLR §7804 provides in relevant part that "the respondent may raise an objection in point of law by setting it forth in its answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court shall permit the respondent to answer..."

Courts have interpreted and dealt with this statute in several ways, including invoking §3211(c) and converting the §3211(a)(7) motion to one of Summary Judgment, or deciding the motion on the merits by rendering a judgment particularly when the issues are of law rather than of fact. The rationale is that although the statute does not appear to give Courts discretion by use of the word, "shall" regarding granting the respondent leave to file an answer if the motion is denied, the statute appears to refer to a motion that has addressed only a specific defense without arguing the merits of the action (see Siegel's New York Practice, *Bringing the Proceeding* §567 [April, 2011]).

The courts presumably disapprove a respondent's practice of making a motion on a narrow affirmative defense while at the same time including all the evidence the respondent has on the merits and then requesting leave to serve an answer if the motion is denied. It is not only wasteful but it gives the respondent an opportunity to get "two bites at the apple" (see Siegel's New York Practice, *Bringing the Proceeding*, supra`).

Here, given the depth of the respondents' papers and the attached affidavits and exhibits, it would appear that they may not have much more to offer in their submission of a Verified Answer.

Further, prolonging the proceedings are not only wasteful, but disproportionately unfair to the petitioner given that the underlying issue is the loss of employment. An answer would have been the appropriate response to the petition, so that the matter could have been resolved on the return date in the prompt and efficient manner intended by the statutory framework for CPLR Article 78 proceedings (see, CPLR 7804,CPLR 409 [b], *Kraushar v. Burstein*, 154 AD2d 748[3rd Dept 1989]).

Notwithstanding the foregoing, this Court cannot render a judgment as there are clearly issues of fact which require a hearing. Additionally, the Appellate Division has routinely remanded matters to the Supreme Court when respondents have been denied leave to submit an answer upon a denial of their Motion to Dismiss (see *Marmo v. Department of Environmental Conservation*, 134 AD2d 260[2nd Dept1987], *Matter of Karedes v. Colella,* 306 AD2d 769 [3rd Dept 2003], *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County,* 63 NY2d 100[1984], *Matter of Burgess v. Selsky*, 270 AD2d 736 [3rd Dept 2000]). As such, the respondents will be given leave to file their Verified Answer if their instant motion is denied.

When a motion is based on a failure to state a cause of action, the petition's legal sufficiency is judged solely on the face of the allegations and no consideration of the facts alleged in support of the motion will be permitted. Said another way, the Court's scope of review is narrow and it is limited to ascertaining as to whether the pleading states any cognizable cause of action (see *Hogan v. New York State Office of Mental Health,* 115 AD2d 638 [2nd Dept 1985]) In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (see *Heffez v. L & G General Const., Inc.*, 56 AD3d 526 [2nd Dept 2008]). Further, on a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true (see *Holly v. Pennysaver Corp.*, 98 AD2d 570 [2nd Dept1984], *Wayne S. v County of Nassau, Dept. of Social Servs.*, 83 AD2d 628[2nd Dept 1981]).

In applying the foregoing legal standard to the petitioner's allegation that pursuant to Civil Service Law §71, his position of Cleaner was to be held open for one year while on leave for occupational injury, this Court notes that this is an issue of law which warrants a review on the merits. The relevant section of Civil Service Law §71 sets forth the process by which a employee

can return to work within the one year time period of his leave of absence. The statute specifically provides:

> "...If, upon such medical examination, the medical officer certifies that the person is physically and mentally fit to perform the duties of his or her former position, the person must be reinstated to his or her former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he or she was eligible for transfer. If no appropriate vacancy exists to which reinstatement may be made, or if the work load does not warrant the filling of such vacancy, the name of the person must be placed upon a preferred list for his or her former position..."(see Civil Service Law §71)

Implicit in the foregoing language is the possibility that the job may not be available upon the employee's return from leave and it specifies the action to take in such an event. If the employer was required to leave the job open for one year, it would obviate the need for this language. Further, the petitioner does not cite to any authority requiring the respondent to hold the position open during the time he was on his leave of absence. As to this specific issue, the respondents' motion is granted and the petition is dismissed as to this allegation.

It is noted that petitioner refers to the New York Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR"), specifically, Title 4, § 5.9, to support his contention that he was to receive 30 days notice that his position was to be terminated. While NYCRR cites procedures for restoration to duty from workers' compensation leave, termination of service upon exhaustion or termination of workers' compensation leave, reinstatement to service, or entitlement to placement upon a preferred eligible list, it specifically provides that the section applies to termination of service upon exhaustion or termination of the employees' workers compensation leave. This is not the case at bar as Drivas attempted to return to duty prior to the exhaustion of a one-year leave of absence. The cases cited by petitioner for support are inapplicable to the instant case for this same reason. The respondents' motion as to this issue, is granted and the petition is dismissed as to this allegation.

As to the issue regarding Drivas having a property right in his employment entitling him to certain Civil Service protections, generally, a Cleaner as a permanent employee of school district in

noncompetitive class, falls within none of the enumerated groups of civil service employees afforded protection of section 75 of Civil Service Law. In ordinary circumstances, Drivas would have no right to a hearing under that section prior to his dismissal, and the fact that his Cleaner position with school district was characterized as permanent meant only that he had passed his probationary period(see *Voorhis v. Warwick Valley Central School Dist.*, 92 AD2d 571[2nd Dept 1983])

To establish a constitutionally protected property interest in a public employment position, a person must show more than a mere unilateral expectation of such an interest. He must establish a legitimate claim of entitlement to such position (see *Voorhis v. Warwick Valley Central School Dist.*, supra). Such a property right does not arise out of the Constitution but is established by reference to independent sources, such as State law and regulations, which characterize the relationship between the employee and the State (*Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684; *Board of Regents v. Roth, supra*). Further, petitioner has not identified any provision, statutory or otherwise, which would confer a property interest in continued employment upon him, and based on this, his dismissal without a hearing did not constitute a denial of his right to due process of law (see *Natalizio v. City of Middletown*, 301 AD2d 507, (2nd Dept 2003).

However, it is well settled that a public employer may abolish civil service positions for the purposes of economy or efficiency but it may not act in bad faith in doing so (see *Terrible v. Rockland County,* 81 AD2d 837 [2nd Dept1981]), nor may it abolish positions as a subterfuge to avoid the statutory protection afforded civil servants before they are discharged (see *Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFLCIO v. Rockland County Bd. of Coop. Educ. Servs.*, 39 AD3d 641[2nd Dept 2007], *Matter of Hartman v. Erie 1 BOCES Bd. of Educ.*, 204 AD2d 1037[4th Dept 1994]). The courts of this State have continually held that when there exists a triable issue of fact with regard to bad faith, a full hearing must be held (see, *Paese v. Pilla,* 59 AD2d 701 [2nd Dept 1977], *Matter of Hartman v. Erie 1 BOCES Board of Educ.*, 204 A.D.2d 1037[4th Dept 1994], *Civil Service Employees Ass'n, Inc., Local 1000, AFSCME, AFL-CIO v. Rockland County Bd. of Co-op. Educational Services*, 39 AD3d 641(2nd Dept 2007).

As such, although Drivas, based on the civil service classification of his position, may not be entitled to Civil Service protection per se resulting in a vested property right in his employment, he is protected from a bad faith discharge in contravention of the fundamental purposes of the civil

service system. Civil Service employees in this State have long been protected from certain kinds of dismissals made in bad faith. This protection, however originates in the merit selection provisions of the State Constitution rather than in the Federal Constitution, and the extent of the protection may not be completely defined (see *Gowan v. Tully*, 45 NY2d 32, [1978]).

A petitioner challenging the abolition of his or her position must establish that the employer in question acted in bad faith (see *Hritz–Seifts v. Town of Poughkeepsie*, 22 AD3d 493[2nd Dept 2005], *Johnson v. Board of Educ. of City of Jamestown*, 155 AD2d 896[4th Dept 1989]). Here, however, the school district respondents moved to dismiss the petition against the petitioner and they therefore have the initial burden of establishing that they abolished the position of Cleaner for the purposes of economy or efficiency and acted in good faith in doing so. (see *Arnold v. Erie County Medical Center Corp.*, 59 AD3d 1074 [4th Dept 2009]). In support of their motion, the respondents submitted a copy of the board resolution abolishing the position, and affidavits and affirmations from Manley and the respondents' counsel.

In opposition to the motion, however, petitioner raised a triable issue of fact by submitting affidavits, medical records, and correspondence from the respondents. The evidence details Drivas' attempts to return to work in October, 2010 and Manley's response by sending him for a medical evaluation and then terminating him although he was cleared for duty. Petitioner raises an issue of fact that he was being targeted because of his workers compensation claim, underscored by how he was treated by Manley right before his position was abolished, and the fact that there did not appear to be an urgent need to abolish this one cleaning position at the time he attempted to return to work.

The petitioner has stated a cognizable cause of action that his position was abolished in bad faith (see *Matter of Archer v. Town of Wheatfield,* 300 AD2d 1108 [4th Dept 2002]). As to this issue, respondents' motion is denied.

Finally, respondents' motion that the petition should be dismissed for failure to join the Nassau County Civil Service Commission and the 11 employees holding Cleaner positions in the school district, is unavailing. CPLR 1001(a) provides, in relevant part, that a person is deemed to be a necessary party "if complete relief is to be accorded between the persons who are parties to the action or [those] who might be inequitably affected by a judgment".

The respondents' contention that the 11 other Cleaners would be adversely affected if Drivas

was reinstated to his position is speculative and premature. Respondents would first have to establish that Drivas' loss of employment was motivated by economic or budgetary constraints. An abject failure to do so may result in Drivas' reinstatement to his Cleaner position or to a comparable position elsewhere in the school district without any impact to the other Cleaners. The relief sought in the petition is reinstatement to the position Drivas held-not to challenge a position held by another employee.

Further, the respondent's argument that the Nassau County Civil Service Commission is a necessary party as it charged with the duty of placing employees on preferred lists, is without merit. Even if the Civil Service Commission maintains such a list, its role is merely that of a custodian of record as any information regarding employees' placement would come from the employer (see *Diaz v. New York State Office of Mental Health* ,188 AD2d 903 [3rd Dept.1992] the State employer properly placed civil service employee, who had been on leave of absence for work-related injury, on preferred list for job, rather than reinstating her to her former position, even though there were vacant positions available at time of her request for reinstatement.). Respondents' motion is denied as to this issue.

Accordingly, assuming the accuracy of these allegations of fact, which this Court must do on a CPLR § 7804(f) and 3211(a)(7) motion, the petitioner has stated a cause of action as to the allegation that the termination of his position was due to respondents' bad faith and the respondents are granted leave to file a Verified Answer only as to the this issue and serve the same upon the petitioner and this Court within five days from service of the Order of this Court with Notice of Entry.

This constitutes the decision and order of this Court.

ENTER

DATED: June 21, 2011

HON. ARTHUR M. DIAMOND
J. S.C.

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