

Alfaro v Hirst

2011 NY Slip Op 32280(U)

August 22, 2011

Sup Ct, NY County

Docket Number: 108053/2010

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT: _____

PART 35

Justice

Index Number : 108053/2010

ALFARO, REBECCA

VS.

HIRST, MARTHA K.

SEQUENCE NUMBER : 002

ARTICLE 78

INDEX NO. _____

MOTION DATE 6/27/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3

4-6

7-8

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

petition is denied the annexed memoranda, decision, orders and Judgment

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).

Dated: 8/2/11

[Signature]

J.S.C.

JANE S. SOLOMON

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
REBECCA ALFARO,

Index No. 108053/2010

Petitioner,

DECISION, ORDER &
JUDGMENT

-against-

MARTHA K. HIRST, as commissioner of the
DEPARTMENT OF CITYWIDE ADMINISTRATIVE
SERVICES, and THE CITY OF NEW YORK

UNFILED JUDGMENT

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and notice of entry cannot be served hereon. To
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141B).

Respondents.

-----X
SOLOMON, J.:

Petitioner Rebecca Alfaro (Alfaro) challenges the decision of the Department of Citywide Administrative Services (DCAS) not to process her scores for Civil Service Exam No. 6530, and denying her a promotion to the permanent position of Associate Fraud Investigator with the Department of Homeless Services (DHS). She seeks appointment to that position. In the alternative, she seeks reinstatement to her prior position of permanent Fraud Investigator at the annual salary of \$52,000, and a return to the DHS eligible list for promotion to permanent Associate Fraud Investigator. Finally, she seeks \$100,000 in damages for wrongful denial of promotion and wrongful transfer under Civil Service Law § 80.

In 1999, Alfaro was hired as a provisional Fraud Investigator with DHS. In 2001, she applied for a position as a permanent Fraud Investigator. She was "Considered and Not Selected" three times by DHS. This should have resulted in her termination. However, she was never informed of these events,

and was never terminated. In 2004, Alfaro was promoted to the position of provisional Associate Fraud Investigator, a managerial position.

In June of 2005, she took an exam for appointment as a permanent "Investigator," a job title entirely separate from "Fraud Investigator." On September 10, 2007, she was appointed to the position of permanent Investigator. According to Respondents, she was immediately granted a leave of absence from this position to allow her to continue serving as a provisional Associate Fraud Investigator. Her position as Investigator would not have made her eligible for the Associate Fraud Investigator position. On November 16, 2008, Alfaro was appointed to a permanent position of Fraud Investigator pursuant to City Personnel Rule and Regulation 6.1.9.

On March 17, 2007--prior to her appointment as an a permanent Investigator or permanent Fraud Investigator--Alfaro applied for a promotion to permanent Associate Fraud Investigator, under Civil Service Exam No. 6530. In order to be eligible for the promotion, she had to have held a permanent appointment as a Fraud Investigator. DCAS reviewed her record and determined that she was not permanent, because, as of the date of the exam, she was still listed as a provisional Fraud Investigator. She was found ineligible to sit for the exam, and her score was disallowed (Verified Answer, Ex. 13).

Alfaro appealed the determination of ineligibility, but

on December 7, 2008--before a decision was reached--she was terminated from her provisional Associate Fraud Investigator position and was reassigned to the position of permanent Fraud Investigator, with seniority from September of 2007 (the date she became a permanent Investigator). Her salary decreased from \$74,000 to \$45,800.

On September 10, 2009, she was informed that, due to budget cuts, she was scheduled for termination from her position as a Fraud Investigator. On December 25, 2009, in lieu of termination, Alfaro was transferred from DHS to the Human Resources Administration (HRA), with the same job title.

On February 19, 2010, Alfaro's appeal was granted, and DCAS rescinded its determination that she was not eligible for promotion under Exam No. 6530. She was given seniority as of December 17, 2001 (Verified Answer, Ex. 23), and was offered the opportunity to return to DHS as a permanent Fraud Investigator. She declined because all DHS Associate Fraud Investigator positions had been filled, while HRA promotions remained, although her rank on the HRA list has not yet been reached.¹

DISCUSSION

A court may not substitute its judgment for that of an

¹ Her DHS list score placed her within the range of candidates already selected for promotion. When adjusted for the HRA rankings, she is at 190.5 on the eligible list. As of March 18, 2011, HRA has reached 165 on the list (HRA Certification List, attached to Verified Answer, Ex. 31).

agency unless the decision under review is arbitrary, capricious or constitutes an abuse of discretion (*Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 [1974]). The test is whether the action taken is justified or without foundation in fact (*Id.* at 231). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Id.*) If the agency's action is founded on a rational basis, that action should be affirmed, even if the court would have come to a different conclusion (*Mid-City Management Corp. v New York Conciliation and Appeals Board*, 112 AD2d 72 [1st Dept], *aff'd* 66 NY2d 1032 [1985]).

Alfaro argues that her score on the DHS promotion list would have been sufficient to grant her a promotion, had she not been disqualified. Respondents counter that promotions are not guaranteed, and it would be speculative to hold that she would have been promoted.

Respondents are correct. Eligibility does not guarantee promotion (see, *Andriola v. Ortiz*, 82 NY2d 320, 324 [1993] ["a person successfully passing a competitive Civil Service examination does not acquire any 'legally protectable interest' in an appointment to the position for which the examination was given"]; see also, Civil Service Law § 61). The remedy for an improperly considered exam score is crediting the exam score, promulgating a special eligible list, and then giving the

petitioner due consideration for promotions from the new list (*Id.*, at 325). This has been done. Directing the agency to promote Alfaro would award her more than she is entitled to (see, *Id.*). To the extent that Alfaro seeks transfer back to DHS, it was offered to her, and she elected to remain with HRA (Lannigan Affidavit, ¶ 10). Accordingly, Alfaro is not entitled to a promotion, or to be returned to DHS.

Next, Alfaro argues that her transfer from DHS to HRA, made after her demotion to Fraud Investigator violated Civil Service Law § 80, which provides that:

Where, because of economy . . . positions in the competitive class are abolished . . . [abolishment] among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service . . . in which such abolition . . . occurs. . .

She claims that her correct seniority date would have protected her from transfer. However, in 2009, her transfer conformed to the requirements of § 80. Moreover, it is undisputed that she retains the same level of seniority, and salary, with HRA as she would have with DHS.

Finally, Alfaro's request for monetary damages for the diminution in salary due to her demotion is without merit. Provisional appointments carry no expectation, nor right, of tenure (*City of Long Beach v. Civil Service Employees Ass'n, Inc.*, 8 NY3d 465, 471 [2007]). A provisional employee may be terminated "at any time without charges preferred, a statement of

reasons given or a hearing held" (*Id.* [internal quotation marks omitted]). Further, a provisional appointment must end within two months of the establishment of an appropriate eligible list, with a narrowly defined exception not applicable here (Civil Service Law § 65[3]). Alfaro was terminated from her provisional appointment on December 7, 2008, within two months of establishment of the eligible list from Exam No. 6530. Her termination was by operation of statute, and would have occurred in any event except for her obtaining a promotion, which, as discussed above, is a speculative outcome (see, *Andriola*, 82 NY2d 324-5).

In light of the foregoing, it cannot be said that Respondents acted in an arbitrary or capricious manner, and it hereby is

ORDERED and ADJUDGED that the petition is denied and dismissed.

Dated: 8/27/11

ENTER: J.S.

J.S.C.

JANE S. SOLOMON

UNFILED JUDGMENT

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