

<b>Matter of Fagan v Ward</b>
2011 NY Slip Op 33434(U)
December 21, 2011
Sup Ct, NY County
Docket Number: 106866/11
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN  
J.S.C. Justice

PART 52

FALAN, EDWARD  
- v -  
WARD, CHRISTOPHER

INDEX NO. 106866/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

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

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).

is decided in accordance with the annexed decision.

Dated: 12/21/11

CK  
\_\_\_\_\_  
J.S.C.

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: Part 52

-----X  
In the Matter of the Application of EDWARD FAGAN,

Petitioner,

Index No. 106866/11

For a Judgment Pursuant to Article 78 of the  
Civil Practice Laws and Rules,

-against-

CHRISTOPHER O. WARD, in his capacity as  
Executive Director of the Port Authority of  
New York and New Jersey,

Respondent.

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141B).**

-----X

**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner brings this petition seeking a declaration that the determination of respondent Christopher O. Ward in his capacity as Executive Director of the Port Authority of New York and New Jersey ("Ward") to terminate his retiree health insurance benefits was a violation of law, was arbitrary and capricious and an abuse of discretion, as well as an excessive penalty and a denial of a property right without due process. He also seeks to compel reinstatement of said health benefits. Respondent submits that the petition should be denied on the ground that he acted properly and in a way that was not arbitrary or capricious or an abuse of discretion.

The relevant facts are as follows. Petitioner Fagan was employed as a Staff Accountant at

the Port Authority of New York and New Jersey ("Port Authority") for over 10 years. He had acquired approximately 34 years of credited retirement service credit with New York State because he had been employed by the State in other capacities beginning in or about March 1974. In 2003, petitioner's co-workers complained that they had observed sexually explicit material displayed on his computer. His supervisors met with him at least once in 2003 and informed him that his conduct would not be tolerated. He was told again in 2007 that certain websites should be avoided completely while he was at work. On March 4, 2010, an anonymous caller contacted the Port Authority Office of the Inspector General ("OIG") and complained that petitioner was viewing pornographic material on his computer in his open workspace. The OIG began an investigation. On March 4, 2010, June 14, 2010 and October 14, 2010, detectives from the OIG forensically imaged the hard drive of petitioner's office computer and discovered over 1,300 sexually explicit photographs. They also discovered that petitioner added additional photographs between each imaging. They reported their findings to petitioner's supervisors.

Based on this, petitioner's department director, Anne Marie Mulligan, decided to involuntarily remove petitioner from employment. She sent a memorandum to Ward recommending and requesting that petitioner be terminated and that he be suspended without pay pending the completion of dismissal proceedings. Ward approved the recommendation. On October 14, 2010, petitioner was notified both verbally and in writing that he was suspended immediately, pending the conclusion of his removal proceeding.

The next day, petitioner applied for retirement. Normally, the New York State retirement plan requires 30 days notice before a retirement application is effective. However, at the time petitioner applied for retirement, a statewide retirement incentive program was in place with a shorter notice period. Although petitioner was told that he could not participate in the incentive

program because of his suspension and pending termination, his application was erroneously processed as part of the incentive program. He was notified that his retirement was effective as of October 29, 2010.

On November 3, 2010, Mulligan sent Ward a second memorandum recommending petitioner's termination. Ward approved this memorandum as well. A copy of this memorandum was sent to petitioner, under cover of a letter dated November 4, 2010. That letter also advised petitioner he was entitled to request an appearance before a department director, which he did. That appearance took place on January 18, 2011, before Lillian Valenti, the Director of Procurement. Afterwards, Valenti sent a memorandum to Ward in which she concurred with the decision to terminate petitioner. Ward approved the decision on March 21, 2011 and petitioner was notified of the decision by letter dated March 23, 2011. The letter stated that his termination was effective October 14, 2010, the date of his suspension.

Petitioner then stopped receiving Port Authority issued retiree health benefits. Petitioner now brings this action seeking to have those health benefits reinstated. He argues that because he retired before he was terminated, his health benefits cannot be taken away from him.

The instant petition is dismissed because petitioner cannot make an end-run around the disciplinary and termination proceeding that had been initiated against him by retiring before the process was completed. In *Flood v Monahan*, the court held that a police officer's "right to automatic retirement... does not give [him] immunity from a departmental disciplinary proceeding which was commenced while he was [employed] and which was pending when he retired. 201 Misc. 560, 561 (Sup. Ct. Special Term, 1951). As the First Department said, summarizing this line of cases, "The clear rule of these authorities is that an employee may not forestall the consequences of an adverse determination in properly commenced proceedings by

retiring during their pendency.” *Borges v McGuire*, 107 A.D.2d 492, 497-98 (1<sup>st</sup> Dept 1985) (citing *Flood*, 201 Misc. 560; *Matter of Brooklyn Audit Co. v Dept. of Taxation*, 275 NY 284; *Matter of Baker v Kennedy*, 6 Misc.2d 589); but see *Pierne v Valentine*, 291 N.Y. 333 (1943). Although these cases were all governed by the Civil Service Law, it is clear to this court that the same principle should be applied to the case before us.

Petitioner argues that the cases cited above do not apply as they involved plaintiffs seeking back pay. But the principle established by the cases is that an employee may not avoid a disciplinary proceeding - and the consequences of that proceeding - by retiring while that proceeding is pending. See *Borges*, 107 A.D.2d at 497-98. Therefore, if the consequences of a disciplinary hearing include losing the right to medical benefits, an employee cannot retain those benefits by retiring after the disciplinary proceeding has been commenced.

Moreover, petitioner’s contention that he retired before the “formal” disciplinary proceeding had begun is without basis. By memorandum dated October 14, 2010, petitioner was informed that “[c]ffective immediately” he was suspended without pay, “pending the conclusion of a removal proceeding.” Petitioner was not only notified of a disciplinary proceeding, but he was suspended without pay during its pendency. Moreover, he was informed orally of the reasons for the suspension and the memorandum states that the suspension and removal proceeding arose from the “issues discussed... today.”

Petitioner also states that Port Authority policy does not permit suspensions without pay for more than 2 weeks without the approval of the Executive Director. However, the Executive Director had approved a suspension without pay until the removal proceeding was concluded. This approval was not limited to two weeks. In addition, even if the Executive Director had failed to approve a suspension without pay for more than two weeks, such approval was not

necessary as, at the time, petitioner was officially retired, albeit erroneously.

In addition, petitioner's loss of his health benefits is not a penalty that is shocking to the conscience. Petitioner's reliance on *Matter of McDougall v Scopetta*, 76 A.D.3d 338, is misplaced. In that instance, the petitioner was terminated after a single positive drug test after years of employment without disciplinary problems. The court found that terminating petitioner, and the concomitant loss of pension benefits, was a penalty shocking to the conscience. The instant case is distinguishable. Petitioner committed the same type of disciplinary infraction repeatedly, even after being spoken to about it. Moreover, petitioner will continue to receive his pension. His loss of health benefits, while a serious penalty, is not shocking to the conscience. Moreover, petitioner's termination itself was not arbitrary and capricious given petitioner's repeated infractions and that petitioner was properly notified of the pending termination.


Finally, petitioner did not have a property interest in retiree health benefits and therefore could not have been deprived of them improperly. Respondent submits the affidavit of Mary Lee Hannell, director of Human Resources at the Port Authority. She states that "Terminated employees are not eligible for Port Authority issued health benefits. Therefore, Mr. Fagan is not eligible to receive Port Authority issued health benefits."

Accordingly, the petition in its entirety is dismissed. This constitutes the decision, judgment and order of the court.

Dated: 12/21/11

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J.S.C.

**CYNTHIA S. KERN**  
J.S.C.