

Matter of Purcell v City of New York
2011 NY Slip Op 34278(U)
October 7, 2011
Supreme Court, New York County
Docket Number: 101401/11
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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IN THE MATTER OF THE APPLICATION OF
THOMAS R. PURCELL

Petitioner,

- against-

THE CITY OF NEW YORK,
COMPTROLLER OF THE CITY OF NEW YORK,
ETHEL J. GRIFFIN, INDIVIDUALLY, PUBLIC
ADMINISTRATOR OF NEW YORK COUNTY,

Respondents

-----X
Petitioner, Pro se:
Thomas R. Purcell
263 W. 90th Street
New York, NY 10024

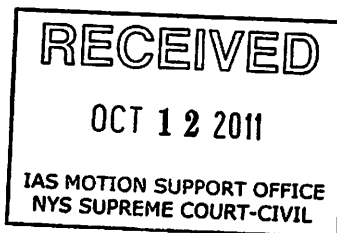
For Respondent:
Michael A. Cardozo, Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

Papers considered in review of this petition:

Notice of Petition 1
Verified Answer 2
Memorandum of Law in Support of
Verified Answer 3
Reply & Mem of Law 4

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Thomas R. Purcell (“Purcell”) challenges the November 1, 2010 decision of respondents The City of New York, Comptroller of the City of New York, Ethel J. Griffin, Individually (“Griffin”), as the Public Administrator of New York County (collectively “City respondents”) denying Purcell’s application for a lump sum payment for alleged unused annual and sick leave. Purcell alleges that he accrued this leave while serving as Deputy Public Administrator for the New York County Office of the Public Administrator.



Purcell has worked in the Office of the Public Administrator for thirty years. Purcell began serving as Deputy Public Administrator for the Office of the Public Administrator on August 4, 1980, and retired from this position on September 3, 2010, effective September 4, 2010. Prior to his retirement, Purcell requested a calculation of his annual leave and sick leave. His September 3, 2010 pay statement showed that he had credited 371 hours of annual leave and 1690 hours of sick leave.

In a letter dated November 1, 2010, Griffin claimed that Purcell did not have any remaining sick or annual leave. Instead, Griffin claimed that the Public Administrator's Office had overpaid Purcell \$5,549.46. Griffin attributed the error "primarily" to the City respondents' basing Purcell's start date as August 4, 1980 instead of August 8, 1980. Other than this alleged four day error in start date, Griffin did not specify any other miscalculations that resulted in his overpayment.

Purcell now commences this Article 78 proceeding requesting that the Court annul the Public Administrator's determination. Purcell alleges that his start date was August 4, 1980, not August 8, 1980. He also claims that the Public Administrator incorrectly charged ten days against his accrued annual leave between 1980 and 1985, incorrectly calculated the excess annual leave credits he received between August 1985 and August 1994, and unfairly recalculated his excess annual leave to sick leave. He maintains that he is entitled to a lump sum payment under either the Pay Plan for Management Employees' Personnel Order 88/5 or the Career and Salary Plan's Leave Regulations.

In their verified answer, the City respondents concede that Purcell's start date was August 4, 1980, but argue that any alleged miscalculations are inconsequential because

the Personnel Order 88/5 does not apply to Deputy Public Administrators. They also maintain that the Career and Salary Plan does not apply to Deputy Public Administrators, and, in any event, the Career and Salary Plan does not provide for managerial lump sum payments. Finally, the City respondents maintain that the Court must dismiss the petition against Ethel Griffin, Individually, because a petitioner in an Article 78 proceeding may not recover damages against an officer acting in her individual capacity.

Discussion

Judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of whether its determination was arbitrary or capricious and has a rational basis in the record. *See* CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002); *Nestor v. New York State Div. of Hous. & Community Renewal*, 257 A.D.2d 395 (1st Dep't 1999). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and without regard to the facts." *Matter of Rohan v. New York City Housing Authority*, 2009 NY Slip Op 30177U, at *6-*7 (Sup. Ct. N.Y. Co. Jan. 23, 2009) (quoting *Matter of Pell v. Board of Education*, 23 N.Y. 2d 222,231 (1974)). Generally, "[j]udicial review of an administrative determination is limited to the grounds invoked by the agency and a reviewing court which finds those grounds insufficient or improper may not sustain the determination by substituting what it deems to be a more appropriate or proper basis." *Parkmed Associates v. New York State Tax Com.*, 60 N.Y.2d 935, 936 (1983).

Here, the City respondents provide a different basis than the Public Administrator did in denying Purcell the lump sum payment. They state that Purcell's position is simply not entitled to a lump sum payment on retirement. However, because the Public Administrator's initial determination did not cite this basis for denying Purcell his retirement payment, it is beyond the scope of this court's review. *See Parkmed Associates*, 60 N.Y.2d at 936.

The only justification the Public Administrator gave in denying Purcell the payment was that Purcell did not have any remaining annual leave days. However, the Public Administrator based that determination on a start date which the City respondents now concede was incorrect. The Public Administrator did not set forth any other reason for denying Purcell payment for more than 2,000 hours of leave he accrued over thirty years of service.

Because the sole rationale the Public Administrator expressed for its decision to deny Purcell his retirement payment was based on an admittedly erroneous calculation, and it failed to give any other explanation for its findings, its decision was arbitrary and capricious. *See Matter of Home Depot, U.S.A. v. Town Board of the Town of Hempstead*, 63 A.D.3d 938, 939 (2d Dep't 2009) (Town Board's decision was arbitrary and capricious where it "offered no findings to support" its conclusion).

The City respondents also argue that the court should dismiss the claim against Ethel Griffin, individually, because Purcell may not recover against Griffin in her individual capacity. Though petitioners in Article 78 proceedings may not bring claims against officers in their individual capacity, *See* 14 Weinstein, Korn & Miller, NY Civ

Prac P 7806.01, courts should not dismiss solely for improper form. *See Phalen v. Theatrical Protective Union etc.*, 22 N.Y.2d 34, 4 (1968).

Form issues aside, however, Purcell does not allege any legal basis for relief from which he may recover against Griffin individually. He alleges no personal wrongdoing by Griffin outside of actions she took in her official capacity. “[W]hen official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice.” *Tango v. Tulevich*, 61 N.Y.2d 34, 40 (1983). Even where the accusation involves a municipal officer’s actions that involve no discretion but are purely ministerial, these actions “may support liability only where a special duty is found.” *McLean v. City of New York*, 12 N.Y.3d 194, 202 (2009). Because Purcell does not claim any special relationship between Griffin and Purcell, he has failed to allege a legal basis for holding Griffith individually liable.

In accordance with the foregoing, it is hereby

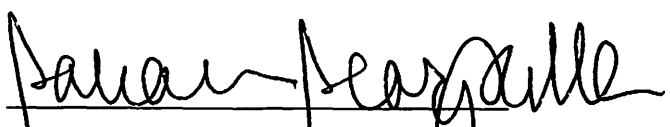
ORDERED and ADJUDGED that the petition of Thomas R. Purcell to vacate the decision of respondent Public Administrator of New York County on November 1, 2010, is granted to the extent that the matter is remanded to the Office of the Public Administrator to issue a revised determination based upon correct information and, in the event payment is again denied, a detailed and supportable explanation for the denial; and it is further

ORDERED and ADJUDGED that the petition against Ethel Griffin, Individually, is denied and the proceeding insofar as asserted against her is dismissed; and it is further ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
October 7, 2011

ENTER:


Saliann Scarpulla, J.S.C.


CLERK

FILED
DEC 14 2011
COUNTY CLERK'S OFFICE
NEW YORK