

Matter of Pena v Port Auth. of N.Y. & N.J.
2012 NY Slip Op 32817(U)
November 9, 2012
Supreme Court, New York County
Docket Number: 102845/12
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 102845/2012
PENA, FERNANDO
vs.
PORT AUTHORITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE 12-14-12

MOTION SEQ. NO. _____

The following papers, numbered 1 to 59, were read on this motion to/for vacate determination

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition | No(s). 1-36

Answering Affidavits — Exhibits _____ | No(s). 37-57

Replying Affidavits _____ | No(s). 58-59

Upon the foregoing papers, It is ordered that this motion is

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

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
UNFILED JUDGMENT DECISION
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: 11/9/12

JOAN B. LOBIS, J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X

In the Matter of the Application of
FERNANDO PENA,

Petitioner,

Index No. 102845/12

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

Decision, Order, and Judgment

-against-

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY and PATRICK J. FOYE,
IN HIS CAPACITY AS EXECUTIVE DIRECTOR
OF THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,

Respondents.

-----X

JOAN B. LOBIS, J.S.C.:

Petitioner Fernando Pena brings this petition, under Article 78 of the C.P.L.R., seeking, inter alia, an order annulling and vacating the final determination of respondents The Port Authority of New York and New Jersey and Partick J. Foye, in his capacity as Executive Director of the Port Authority of New York and New Jersey (the "Port Authority"), which denied petitioner's eligibility to participate in the Vested Benefits Program and other employee retirement plans.

Petitioner is a professional engineer, licensed to practice in New York and Connecticut. He is also an attorney admitted in New York and Connecticut. Petitioner was employed by the Port Authority for approximately twenty-five (25) years, and throughout his career at the Port Authority, he worked in the Engineering Department, Aviation Department, Law Department, and, most recently, Procurement Department. Petitioner began working in the

Procurement Department on October 2009, and by the time he resigned from the Port Authority, he held a position as Contract Specialist. On or about January 24, 2012, prior to his separation from the Port Authority, petitioner was approved as the Commissioner of Highways and Facilities in Putnam County, with a start date of February 13, 2012. On or about January 26, 2012, petitioner submitted his notice of resignation to the Port Authority, with an effective date of February 10, 2012.

Upon an employee's separation from the Port Authority, he or she may be eligible to participate in the Vested Benefits Program. The Port Authority offers continued health, dental, and life insurance to managerial employees who have completed twenty (20) years of service upon their separation from the Port Authority. To be eligible for the Vested Benefits Program, an employee must also be in "good standing" at the time of his separation from the Port Authority. Section II of the Port Authority's 1974 Information Bulletin No.7 sets forth:

When an employee resigns while there are formal disciplinary charges pending against him, he is not considered to be in "good standing" at the time of his resignation. . . . Formal disciplinary charges are considered to be pending when the employee has been served with "Charges and Specification" or when he has been advised in writing that such charges are being prepared.

When petitioner submitted his notice of resignation on January 26, 2012, he requested participation in the Vested Benefits Program. However, by letter dated February 8, 2012, the Human Resources Department of the Port Authority informed petitioner that he was not in "good standing," claiming that petitioner had been the subject of an administrative action on February 3, 2012, and that petitioner had engaged in unauthorized outside employment (the "Determination").

The Determination also stated that as a result of not being in “good standing,” petitioner is ineligible to participate in the Vested Benefits Program as a “retired” employee, and that should petitioner decide to remain employed at the Port Authority, “formal disciplinary action [would] be taken.”

The February 3, 2012 administrative action to which the Determination referred resulted from petitioner’s performance issues, extended sick leave, and abrupt resignation. Specifically, on September 15, 2011, and on January 12, 2012, the Director of the Procurement Department conducted formal performance meetings with petitioner to discuss issues concerning his work performance; his failure to meet deadlines and attend necessary meetings; and his failure to follow protocol in arranging tours of an active construction site. Additionally, respondents assert that petitioner took sick leave from January 14, 2012, to January 26, 2012, and while on sick leave, attended a Putnam County legislative meeting, where he was publicly appointed the County’s Commissioner of Highway and Facilities and was quoted as saying that he had “already met with [the] department’s 80 employees and [had] begun transitioning into the role.” Respondents state that petitioner’s involvement with another governmental agency while still employed with the Port Authority was never discussed with or approved by the Port Authority. On January 26, 2012, upon return from his sick leave, petitioner submitted his resignation with only two weeks’ notice, and did not attend a meeting on January 30, 2012, which respondents believe was necessary to transfer petitioner’s work load to other employees, given the abrupt notice of his resignation.

On February 3, 2012, the Procurement Department Management notified petitioner that due to his behavior in the recent weeks, administrative action, in the form of seizure of his

vacation days, was being taken against him, and that he would also be placed on paid vacation from February 3, 2012, through his resignation date of February 10, 2012. Petitioner's identification card and office keys were collected, and he was told to make arrangements with his supervisor to collect his personal belongings. Respondents state that, despite this instruction, petitioner attempted to gain access to his office by e-mailing junior staff members and asking them to let him into the building, and that petitioner signed his own property disposition pass and attempted to arrange to remove boxes from his office on Saturday, February 4, 2012, without notifying his supervisor.

As to the unauthorized outside employment referred to in the Determination, respondents state that between February 3, 2012, and February 8, 2012, the Procurement staff discovered documents indicating that petitioner had engaged in outside employment without obtaining permission from the Procurement Department, as mandated under the Port Authority's policies and procedures. Pursuant to the Office of the Executive Director's December 8, 2010 directive ("AI 20-1.04"), an employee who wishes to engage in outside employment must request permission prior to doing so, annually, by completing a "Request For Permission to Engage in Outside Employment" form, and obtaining approval from his or her supervisor. The documents discovered indicated that petitioner was employed as the President of Caliber Construction of New York ("Caliber"), a company that provided residential engineering and design services.¹ Other

¹ Respondents discovered a certification application for the Minority and Women-Owned Business Enterprise submitted in September 2011 for Caliber, which listed petitioner as the company's president. The certification application also stated that petitioner was the individual responsible for preparing bids, negotiating insurance and contracts, marketing and sales, supervising field operations, and purchasing equipment and supplies. Petitioner indicated that he devoted 10-20 hours per week for the operations and development of the company. Additionally, respondents discovered correspondence between petitioner and his clients describing various projects that Caliber

documents indicated that petitioner was associated with SDN Design Group ("SDN"), an engineering and architectural design business, while working for the Port Authority. This information was referred to the Office of Inspector General (the "OIG"), and the OIG found that petitioner utilized Port Authority property, such as his computer, to conduct business for Caliber. All of the abovementioned events influenced the Port Authority's Determination that petitioner was not in "good standing" when he retired from the Port Authority and was therefore ineligible to participate in the Vested Benefits Program.

Petitioner brings this petition seeking, inter alia, an order annulling and reversing respondents' Determination, on the grounds that it was arbitrary and capricious, irrational, made in error of law, an abuse of discretion, and in violation of due process. Petitioner argues that respondents did not comply with their own internal policies and procedures in rendering the Determination.² He argues that he was in good standing, as there were no formal disciplinary charges pending against him at the time he submitted his notice of resignation on January 26, 2012. He further states that respondents were aware of his intention to leave his position in June 2011, when the Human Resource Department gave him extensive guidance on how to complete the necessary paperwork to participate in the Vested Benefits Program. As to the sick days, petitioner

undertook and completed, dating back to 2005.

² Petitioner additionally argues that by letter dated March 1, 2012, respondents falsely claimed that petitioner was "removed" from employment. However, after reviewing the March 1, 2012 letter, the court finds that respondents simply stated that petitioner was "separated" from employment. Because respondents never claimed that petitioner was denied participation in the Vested Benefits Program on the basis of removal, petitioner's argument regarding respondents' failure to follow their own removal procedure is inapplicable.

states that they were legitimate, that he maintained communication with his supervisor while out, and that he returned to work after he was deemed fit to work. As to the January 30, 2012 meeting that he missed, petitioner states that his attendance was voluntary and that the meeting was held in the evening, which conflicted with a prior family engagement. He argues that respondents' revocation of his vacation pay was in violation of their own policy because it was a disciplinary action for which he was never afforded a trial or hearing. Petitioner posits that respondents' decision that he was not in "good standing" was in retaliation for his report of financial irregularities that he observed regarding the World Trade Center construction project.³ Further, petitioner states that he is contractually entitled to participate in the Vested Benefits Program, and that respondents violated his right to due process in denying him participation in the Vested Benefits Program. Petitioner also argues that even if no contractual rights exist, respondents should be estopped from declaring him ineligible to participate in the Vested Benefits Program due to their misconduct in providing him with assistance and advice about his retirement and participation in the program, while at the same time devising punitive and retaliatory action against him.

In answering the petition, respondents argue that they did not act arbitrarily, because the Port Authority complied with its own internal policies and procedures when determining that petitioner was not in "good standing." In support of their position, respondents submit affidavits from Mary Lee Hannell, Director of the Human Resources Department; Lillian D. Valenti, Director

³ Petitioner states that on or about January 29, 2012, he informed Lillian D. Valenti, Director of the Procurement Department, that two different sets of financial records existed: one reflecting actual construction expenses and another reflecting expenses for reporting purposes. Petitioner also states that there were violations in the contract and internal policies regarding funding to rebuild the World Trade Center, and that certain funds were misappropriated without approval or authorization.

of the Procurement Department; and Robert Joyce, Supervising Police Investigator of the OIG. Ms. Hannell's affidavit addresses the resignation procedures of the Port Authority, the Vested Benefits Program, and the procedures concerning outside employment. She states that an employee's resignation is not effective until he or she is "off the payroll," and that he or she is considered to be an employee of the Port Authority until he or she ceases to receive his or her salary. She explains that if an employee has been advised in writing that formal disciplinary charges are pending, the employee is not considered to be in "good standing," and that an employee's voluntary resignation will not change that fact. She further states that for matters that do not warrant removal of an employee, the Port Authority can take administrative action, which only requires the consent of the Human Resources Department, and which allows for suspension and loss of vacation days as permissive penalties. As to the Vested Benefits Program, Ms. Hannell states that an employee's eligibility is contingent not only on his or her years of service and age, but also on the employee's status at the time of their separation from the Port Authority. She states that although the Human Resources Department provided petitioner with guidance on the Vested Benefits Program in June 2011, the benefits to which he was entitled were still contingent upon his status on the date of his separation. As to the procedures concerning outside employment, Ms. Hannell states that an employee who seeks to engage in employment independent of the Port Authority must request permission. Permission, if approved, expires twelve months from the date of approval, and a new request must be made every year for continued outside employment. A new request must also be made if an employee transfers to a different department within the Port Authority. An employee may be subjected to disciplinary action if he or she fails to obtain the necessary approval. Ms. Hannell states that although petitioner received permission to engage in outside employment in 2002 and

2005, he did not seek permission after the respective one-year periods had expired.

Ms. Valenti's affidavit addresses petitioner's poor work performance. She states that on September 15, 2011, and January 12, 2012, she met with petitioner to discuss his inability to meet deadlines, unresponsiveness to e-mails, and absence from meetings. During the January 12, 2012 meeting, she also discussed petitioner's conduct in giving tours of the World Trade Center site with outside organizations without obtaining prior approval and following protocol. She further states that petitioner took an extended sick leave, and while receiving pay for sick leave, petitioner attended a meeting in Putnam County during which he was appointed to his new position.

Mr. Joyce states that he is the Supervising Police Investigator for the OIG and that he is responsible for receiving and investigating all complaints regarding wrongdoing, fraud, waste, and abuse by Port Authority employees. In February 2012, Mr. Joyce investigated petitioner's alleged outside employment in accordance with the Port Authority Computer Resources Policy, which states that the "Port Authority reserves the right to inspect computer resources to ensure the actual use is consistent" with the policy. Mr. Joyce states that he recovered two computers that were used by petitioner, conducted forensic examinations, and located documents relating to Caliber and SDN, indicating that petitioner had been employed by these entities since 2005. With respect to petitioner's claim concerning financial irregularities at the WTC, Mr. Joyce indicates that the OIG has no record of a complaint of this nature being made by petitioner, and that the OIG is charged with investigating such complaints.

In reply, petitioner reiterates his position that respondents' decision that he was not in "good standing" was in violation of law, arbitrarily, and in retaliation, because he was in good standing at the time of his resignation.

In an Article 78 proceeding, the court may only consider whether an administrative determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or was an abuse of discretion. C.P.L.R. § 7803. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), citing In re Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). Here, "[t]he standard of review is whether the employer 'substantially abided by its own policies'" when it rendered its determination. See O'Neill v. New York Univ., 97 A.D.3d 199, 213 (1st Dep't 2012), quoting In re Hanchard v. Facilities Dev. Corp., 85 N.Y.2d 638, 641-42 (1995). The court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision. In re Peckham, 12 N.Y.3d at 431. Once it has been determined that an agency's conclusion has a "sound basis in reason," the judicial function is at an end. In re Pell, 34 N.Y.2d at 231.

The court finds that respondents' Determination rendering petitioner not in "good standing" was not arbitrary and capricious, and was not in violation of their own policies. Pursuant to Section II of the Port Authority's 1974 Information Bulletin No. 7, a written notification that formal charges are pending suffices to deem an employee not in "good standing" at the time of his separation. Although petitioner maintains that his separation occurred on January 26, 2012, Ms.

Hannell's affidavit, setting forth the processes of resignation, establishes that it is the policy of the Port Authority that an employee's resignation is not effective until he is off the payroll. Petitioner submitted his notice of resignation on January 26, 2012, with an effective date of February 10, 2012. Indeed, petitioner informed the Port Authority that his last day would be February 10, 2012, and intended to receive salary from respondents until February 10, 2012. Petitioner's placement on vacation, pursuant to the February 3 administrative action, did not affect his separation date, as he continued to receive payment from respondents until February 10, 2012. Thus, while it is true that petitioner was in good standing on January 26, 2012, this date bears no relevance in calculating the date of his separation. As petitioner was apprised on February 8, 2012, that disciplinary action would be taken against him, he was not in "good standing" as of his separation on February 10, 2012.

Further, respondents' allegation that petitioner engaged in unauthorized employment outside of the Port Authority was not an arbitrary or fabricated reason to deem petitioner not in "good standing." AI 20-1.04 requires Port Authority employees to obtain annual approval from their department prior to engaging in gainful employment independent of the Port Authority. Petitioner does not claim ignorance of this procedure, as he had successfully obtained permission in the past on two separate occasions. Petitioner also does not dispute the authenticity of the documentation that respondents recovered which led them to believe that petitioner engaged in unauthorized outside employment.

In addition, the court finds that respondents did not act arbitrarily or capriciously, because they followed their policy and procedure in undertaking the February 3 administrative

action. Unlike a disciplinary action, which under AI 20-3.11 affords petitioner a right to a trial by a Port Authority Trial Board and hearings before the Department head, administrative actions need only the approval and consent of the Human Resources Department. Ms. Hannell, in her affidavit, states that for matters which do not warrant the removal of an employee, administrative action such as loss of vacation days may be taken. The court notes that the Human Resources Department was a signatory to the letter, dated February 3, 2012, which memorialized the administrative action that was taken against petitioner, which is in compliance with respondents' policies and procedures.

The court also finds that respondents' determination was not arbitrary and capricious or in violation of law, as it was not rendered in retaliation or bad faith. Petitioner states that it was only after the Port Authority received his report of financial irregularities that respondents manufactured the reasons for the February 3 administrative action (i.e., his failure to follow protocol, meet deadlines, and inform and communicate with management of his actions on a consistent basis; his inappropriate behavior during sick leave; and his engaging in behavior that was less than full candor) and the allegations of outside employment. However, nowhere in the record is there a copy of petitioner's report of financial irregularities. Also, Mr. Joyce states that the OIG, the body that is charged with investigating such matters, never received petitioner's report. Thus, petitioner's accusations that respondents acted in retaliation against him are conclusory. Further, regardless of respondents' motive, the allegations against petitioner regarding his work performance and outside employment were based on information gathered from evaluations and investigations and were not lacking in fact or reason.

As to petitioner's argument that he had a vested right to participate in the Vested Benefits Program, the court finds it to be misplaced. The case that petitioner cites (Emerling v. Village of Hamburg, 255 A.D.2d 960 [4th Dep't 1998]) is distinguishable from the case at bar because here, petitioner had not yet begun participation in the Vested Benefits Program. Petitioner had a mere hope or aspiration to participate in the Vested Benefits Program, which is insufficient to create a vested right. See Vogt v. Empire Blue Cross and Blue Shield, 244 A.D.2d 283, 284 (1st Dep't 1997). Additionally, Port Authority guides and handbooks are generally not evidence of an implied contract with any employee. Baron v. Port Authority of New York and New Jersey, 271 F.3d 81, 87 (2d Cir. 2001). With respect to petitioner's argument that respondents should be estopped from denying him participation in the Vested Benefits Program, any assistance that respondents provided to him prior to his separation does not eliminate the requirement that petitioner be in "good standing" at the time of his separation in order to participate in the Vested Benefits Program.

As to petitioner's argument that respondents violated his right to due process, the court finds this argument unpersuasive. It is generally true that an employee or retiree receiving benefits under a program is entitled to due process prior to the program's termination (Giorgio v. Bucci, 246 A.D.2d 711, 713 [3d Dep't], lv. to appeal denied, 91 N.Y.2d 814 [1998]); however, petitioner had not yet been receiving benefits under the Vested Benefits Program. Petitioner states that he was never served with formal "Charges and Specification" or notified in writing that such charges were being prepared. However, petitioner was notified in writing that disciplinary action would be taken should he remain employed. Had petitioner remained employed, he would have had

an opportunity to be heard on the matter. Petitioner's resignation on February 10, 2012, left the allegations unaddressed by petitioner and his employment status endured as not in "good standing." Petitioner has no protectable interest in the Vested Benefits Program, as he failed to satisfy the requirements to participate in the program. See Sush v. New York State Teachers' Retirement Sys., 2 A.D.3d 1127, 1129 (3d Dep't 2003); see also Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 707 F.2d 548, 554 (D.C. Cir. 1983).

In light of the above, petitioner's request for attorneys' fees and costs is denied. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied in its entirety and the proceeding is dismissed.

Dated: November 9, 2012

ENTER:



JOAN B. LOBIS, J.S.C.