

Matter of Aiken v State of New York
2013 NY Slip Op 30165(U)
January 25, 2013
Supreme Court, New York County
Docket Number: 103649/2012
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

Index Number : 103649/2012
AIKEN, RASHAD
vs.
STATE OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 11/30/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 11, were read on this motion to/for challenge determination.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition | No(s) 1-4

Answering Affidavits — Exhibits _____ | No(s) not 5-11

Replying Affidavits _____ | No(s) _____

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

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

FILED
JAN 29 2013
COUNTY CLERK'S OFFICE
NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING DECISION AND DECISION

Order & 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: 1/25/13

JBL, J.S.C.

JOAN B. LOBIS

- 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

FILED
JAN 29 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

-----X
In the Matter of the Application of
RASHAD AIKEN,

Petitioner,

Index No. 103649/2012

-against-

Decision, Order, and Judgment

STATE OF NEW YORK, OFFICE FOR PEOPLE
WITH DEVELOPMENTAL DISABILITIES,

Respondent.

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

Rashad Aiken petitions under Article 78 of the Civil Practice Law and Rules for an order setting aside the arbitrator's determination that Aiken was guilty of the charge of physical abuse and that the State of New York/Office for People with Developmental Disabilities had just cause to terminate Aiken. Respondent cross-moves unopposed to dismiss the petition pursuant to Rule 3211(a)(5) and (a)(7) of the Civil Practice Law and Rules. For the reasons set forth below that motion is granted, and the proceeding is dismissed.

The facts as related are derived from the record in this case, including the arbitrator's opinion and award, and related in the light most favorable to Petitioner as the non-moving party to Respondents' cross-motion to dismiss. On July 25, 2011, Rashad Aiken started his shift as a Direct Support Assistant at Respondent's 59th St. group home for developmentally disabled individuals. He had been employed by Respondent for approximately 9 years. According to the arbitrator, around midnight Aiken approached one of the residents, SF, a 59 year old male who has bipolar disorder and mild mental retardation, in the kitchen of SF's apartment. Aiken teased SF over Shante Moore,

another of the Direct Support Assistants. It is well-known that SF is obsessed with Ms. Moore. The encounter escalated. SF became aggressive, and Aiken punched SF on SF's left chest/breast area. SF did not report the incident at the time.

The next day SF saw his psychologist, Daniele Mazzeo. In discussing other matters she learned that SF and Aiken had fought. SF showed her a bruise on his chest that was 3 inches in diameter. Ms. Mazzeo reported the injury, and the matter was investigated.

Following that investigation, on December 14, 2011, Respondent filed a notice of discipline against Aiken and suspended him. The notice charged him with physically abusing SF by punching him. On April 26, 2012, an expedited arbitration hearing was held pursuant to Article 33 of the collective bargaining agreement between Aiken's union, the Civil Service Employees Association, and the State of New York, Institutional Services Unit. At the hearing Aiken was represented by a labor relations specialist in his union. The arbitrator heard testimony by SF, Ms. Mazzeo, and Aiken, among others, as well as received contemporaneous photos of SF's bruise.

Two days later, on April 28, 2012, the arbitrator issued his decision denying Aiken's grievance and finding that the State had probable cause to suspend Aiken on December 14, 2011. The arbitrator further found that Aiken was guilty of the charge of physical abuse and found that the proposed penalty of termination was appropriate and with just cause. The arbitrator noted that the penalty was especially appropriate given the context of the altercation and Aiken's role in instigating it. On May 2, 2012, an employee with the New York State Governor's Office of Employee

Relations emailed the arbitrator's decision to the parties.

On August 28, 2012, Aiken, who is represented by counsel, filed this petition. He claims that the determination violates due process because the arbitrator refused to consider his witnesses. Petitioner proffered Michael Harrison, the Direct Support Assistant (DSA) who was assigned to the night shift on the 13th floor of the residence on the night of the alleged altercation. Harrison would have testified to several phone calls placed to the 14th floor that were answered by Aiken on the night of the alleged altercation. Aiken also proffered George Roberts as a witness. Roberts was the DSA who had been assigned to the night shift from 11 pm to 7:30 am on the 11th floor, which included SF's apartment. Lastly Petitioner proffered Jason Smith as a witness. Smith had been assigned as DSA to the day shift of the 11th floor. Aiken further challenges the arbitrator's refusal to consider his own testimony in which Aiken related that he was first alerted to the incident after he returned home and got a call from the police. The police indicated that they refused to act because they did not believe SF; they found him evasive and indicated there was no physical evidence of an injury to SF. Aiken further complains that the arbitrator relied on hearsay testimony in finding that Aiken assaulted SF.

Along with his petition, Aiken submits a certificate of service. The certificate, sworn to on September 12, 2012, indicates that on September 7, 2012, a copy of the petition was served on the Respondent by leaving a copy with an individual identified as "Officer Daniels" at 75 Morton Street here in New York City. Respondent now cross-moves for dismissal.

This Court first considers Respondent's claim that the statute of limitations has run in this proceeding. Although Aiken invokes Article 78 in support of his petition, challenges to arbitral determinations are properly raised through Article 75 of the Civil Practice Law and Rules. This Court, in its discretion, however, may treat a misnomered petition as having been raised under the appropriate article. In re Rodriguez v. New York City Transit Auth., 280 A.D. 2d 272 (1st Dep't 2001).

Section 7511 of the Civil Practice Law and Rules provides in pertinent part that "[a]n application to vacate or modify an award may be made by a party within ninety days after its delivery to him." While the term, "delivery," is undefined in the statute, it has been construed as flowing from service. E.g., In re Case v. Monroe Cmty. Coll., 89 N.Y.2d 438, 442 (1997). The parameters of "service," meanwhile, are well-defined under the law at Section 2103 of the Civil Practice Law and Rules. In this case, the affidavit proffered by Respondent indicates that the decision was emailed "to the parties." Affidavit of Linda Ronda at ¶ 5. Nothing under Section 2103 recognizes that conduct as constituting service under the law. Since Respondent has not shown that it properly served the arbitrator's decision and award upon Petitioner, it flows ineluctably that Respondent has not established that delivery under Section 7511 has been accomplished. Accordingly, this Court rejects Respondent's claim that the 90-day statute of limitations has run.

This Court does agree, however, with Respondent's additional contention that Petitioner did not properly serve his petition in this proceeding. Section 307 of the Civil Practice Law and Rules addresses personal service upon the state. That section in pertinent part permits

service by delivering the summons to the officer or chief executive officer of the agency or that officer's designee. Id. § 307(2). Respondent submits the affirmation of Stephen Brickman, an attorney employed by Respondent, who notes at paragraph 5 of his affirmation that the agency's head has designated its counsel's office to accept service of legal documents. In this case, however, the record shows that Aiken served the petition upon a security guard. Accordingly, this Court agrees that Petitioner has not properly served his petition, and the proceeding should be dismissed. E.g., In re Moogan v. New York State Dep't of Health, 8 A.D.3d 68, 68 (1st Dep't 2004); cf. Vargas v. State, 95 A.D.3d 588, 589 (1st Dep't 2012). Accordingly, it is

ORDERED that Respondent' cross-motion to dismiss the petition is granted; it is further

ORDERED that the proceeding is dismissed in its entirety, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 25, 2013

ENTER:



 JOAN B. LOBIS, J.S.C.

FILED
 JAN 29 2013
 COUNTY CLERK'S OFFICE
 NEW YORK