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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON
SUPREME COURT JUSTICE
Justice

PART 40B

Index Number : 102980/2012
O'NEILL, MARIA
vs.
N.Y.C.H.H.C.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion is~~ Petition and cross motion decided per attached

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

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).

RECEIVED
APR 24 2013

Dated: 4/19/13

_____, J.S.C.
HON. PETER H. MOULTON

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
COUNTY OF NEW YORK: PART 40B

----------X

In the Matter of the Application of

MARIA O'NEILL,

Petitioner,

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

-against-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; PRESIDENT OF THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION PERSONNEL REVIEW BOARD; CHAIR OF THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION PERSONNEL REVIEW BOARD,

Respondents.

Index No. 102980/12

----------X

Peter H. Moulton, J.S.C.:

In this Article 78 petition, petitioner Maria O'Neill, a former employee of respondents, seeks a judgment finding that respondents' failure to afford her a hearing before her request for a reinstatement to her job was denied, was in violation of the New York Civil Service law, and was arbitrary and capricious, and that she should be entitled to a full hearing to contest the denial of her reinstatement. She also seeks a judgment finding that respondents' alleged failure to promulgate rules and regulations entitling persons terminated from respondents' employ

to a posttermination hearing is in violation of Civil Service Law, and arbitrary and capricious, and that respondents should be required by a judgment of this court to promulgate rules and regulations entitling a terminated employee to have a posttermination hearing. Respondents cross-move for a judgment dismissing the complaint.

I. Background

Petitioner was employed by respondent New York City Health and Hospitals Corporation (HHC) in the title of Patient Care Associate, at the Bronx Healthcare Network, Jacobi Medical Center, at 1400 Pelham Parkway South, Bronx, New York, commencing her employment in March 2007. HHC provides an array of medical and mental health services throughout the City. Respondent New York City Health and Hospitals Corporation Personnel Review Board (PRB) is the administrative agency created by HHC to review HHC personnel matters.

Petitioner was injured on the job on July 16, 2009, when she tripped on a cable. She suffered injuries to her right leg, knee, head and back.

Pursuant to HHC Personnel Rules and Regulations Rule 7.3.4, petitioner was entitled to a year's leave of absence, having sustained an on-the-job injury. Petitioner commenced her leave of absence in August 2009. By letter dated August 9, 2010, HHC informed petitioner that she would be terminated from her

position as of September 9, 2010, pursuant to Section 7.3.4, "unless you submit medical documentation prior to that date stating that you are fit to return to full duty." Petition, Ex. B.

On August 12, 2010, petitioner filed a Notice of Appeal to PRB. *Id.*, Ex C. On September 1, 2011, petitioner forwarded a medical record to PRB, which consisted of a letter from petitioner's physician, Dr. Paul Kubiak, recording an impression of "[l]ow back pain with right knee pain." Regardless, Dr. Kubiak stated in the letter that petitioner was "currently able to perform regular work duties based on exam, diagnostic testing and medical experience." *Id.*, Ex. D.

Petitioner submitted more medical records on November 9, 2011, as requested by PRB. The submission consisted of Dr. Kubiak's records starting in March 2011. Following his initial examination, Dr. Kubiak remarked that petitioner was "currently unable to perform regular work duties based on exam, diagnostic testing and medical experience." *Id.*, Ex. E. He recommended physical therapy. However, by a final, undated letter incorporated into the records, Dr. Kubiak reported, as above, that after a course of physical therapy, petitioner was able to return to work. *Id.*

In a letter dated December 14, 2011, PRB requested that petitioner be examined by a physician from PRB's panel. *Id.*, Ex.

F. Petitioner complied.

PRB provided a copy of its physician's report to petitioner in a letter dated February 10, 2012. In the report, PRB's physician, Dr. Benjamin A. Nachamie, described his examination of petitioner, and noted that, when asked to squat, petitioner "complained of severe pain in her back," which was "inconsistent" with the rest of her examination, which had been largely normal. Dr. Nachamie concluded that petitioner, "despite a long period of therapy, has not resolved to the point where she could perform all the duties of her occupation and that is on the basis of the above findings which include severe back pain on a simple knee bend." *Id.*

In a decision dated February 14, 2012, PRB denied petitioner's appeal to be reinstated, based on petitioner's doctor's reports, and the report of Dr. Nachamie. Complaint, Ex. H. Petitioner responded with a letter dated February 27, 2012, demanding a hearing, pursuant to New York Unconsolidated Laws Chapter 214-A, § 9 (1) (HHC's enabling statute) and New York Civil Service Law § 71.[1] Complaint, Ex. I. In a letter dated June 1, 2012, PRB denied petitioner's request for a hearing, disagreeing with petitioner's claim that the Unconsolidated Laws, Civil Service Law, or HHC's Personnel Rules and Regulations

[1]Petitioner's attorney, in that letter, purports to quote language from Civil Service Law § 71 calling for a hearing, which language is not actually located in Civil Service Law § 71.

required a hearing in petitioner's case. *Id.*, Ex. J.

II. Discussion

> In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency. Further, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise [internal quotation marks and citations omitted].

Peckham v Calogero, 12 NY3d 424, 431 (2009). Where

> "the question is one of pure statutory reading and analysis, dependant only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations ... And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight."

Roberts v Tishman Speyer Properties, L.P., 13 NY3d 270, 285 (2009), quoting *Kurcsics v Merchants Mutual Insurance Co.*, 49 NY2d 451, 459 (1980).

The outcome of the present proceeding depends on the interpretation of both New York statutory law, and HHC's own regulations. New York Unconsolidated Laws, Chapter 214-A, § 9 states, as pertinent, that HHC "shall ... promulgate rules and regulations consistent with civil service law with respect to policies, practices, procedures relating to ... re-instatements

... ." HHC Rule 7.3.4 (a) entitled "Reinstatement following Separation for Work-Related Disability or Disease," states that

> i. A permanent employee who has been separated from service because of a job connected disability or disease as defined in the Worker's Compensation Law shall be entitled to a leave of absence for at least one year unless permanently incapacitated from performing the duties of the position.
>
> ii. If, upon appeal to the Personnel Review Board within one year following termination of the disability, the PRB medical officer certifies that such person is physically, medically and mentally fit to perform the essential duties of his/her former title with or without a reasonable accommodation, he/she shall be reinstated to his/her former title if there is a vacancy or to a similar or lower title in the same occupational field or to a vacant position for which he/she is eligible for transfer.

Notice of Cross Motion, Ex. 1. HHC Rule 7.3.4 does not on its face contain any right to a posttermination hearing.

Civil Service Law § 71 is concerned with "Reinstatements after separation for disability," and similarly states that:

> [w]here an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the [workers'] compensation law, he or she shall be entitled to a leave absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position.

The statute continues, as pertinent,

> [s]uch employee may, within one year after the termination of such disability, make application to the civil service department ... for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall

> certify that such person is physically and mentally fit to perform the duties of his or her former position, he or she shall be reinstated to his or her former position ... .

Civil Service Law § 71 similarly contains no express language calling for a posttermination hearing.

Petitioner believes that she is entitled, under Civil Service Law § 71, to a hearing to review the medical evidence for and against her. She argues that HHC's regulations should be reformed to include the right to a hearing.

The question of whether, despite its language, Civil Service Law § 71 contains the right to a posttermination hearing has been squarely addressed by the Appellate Division, Third Department, in *Matter of House v New York State Office of Mental Health* (262 AD2d 929 [3d Dept 1999] [*House*]). In *House*, the Court dealt with a civil servant who was disabled for over a year, was terminated, and was then informed that she could apply for reinstatement. The petitioner in *House* provided medical records, and submitted herself to a medical examination by an agency physician. She was found to be "too symptomatic" to return to work. *Id.* at 929.

The lower court in *House* remitted the matter to the agency for a hearing. Both sides appealed. Without fanfare, the Court in *House* stated that "[p]etitioner was entitled to a posttermination hearing ..." (*id.*), and upheld the decision of the lower court to remit the matter for a hearing.

Similarly, courts have interpreted a similar statute, Civil

Service Law § 73, which deals with "Separation for ordinary disability; reinstatement," to provide for a posttermination hearing for an civil servant separated for more than one year from his or her position due to non-employment related disability. *See Matter of Hurwitz v Perales*, 81 NY2d 182, 187 (1993), *cert denied* 510 US 992 (1993)(while finding that employee was not entitled to a pretermination hearing, the Court noted that "employees discharged under section 73 are entitled to a full *posttermination* hearing ..."); *Matter of Gaines v New York State Division for Youth*, 213 AD2d 894, 896 (3d Dept 1995)(under *Hurwitz*, 81 NY2d at 187, employees who are discharged under Civil Service Law § 73 "are entitled to a full *posttermination* hearing"). Like Civil Service Law § 71, section 73 does not, on its face, call for a posttermination hearing.

Respondents cite to the recent case of *Matter of Brady v New York City Health and Hospitals Corporation* (36 Misc 3d 1221[A], 2012 NY Slip Op 51419[U][Sup Ct, NY County 2012][*Brady*]), in which the lower court distinguished these and other cases in finding that no hearing was required for civil servants separated from their positions due to work-related disabilities under Civil Service Law § 71, and HHC Rule 7.3.4.

The court in *Brady* distinguished *House* by noting that the petitioner in *House* "did not receive adequate notice of her right to an administrative appeal and was, therefore, deprived of her

right to such process." *Brady*, at *3. The court in *Brady* felt this was enough to distinguish *House*, as the petitioner in *Brady* received adequate notice of her right to an administrative appeal. However, in *House*, the notice that petitioner did not receive was not notice of her right to an initial appeal, but, specifically, "notice of the procedure for requesting a posttermination hearing." *House*, 262 AD2d at 929. The Court in *House* did not limit the right to a posttermination hearing to occasions when the employee did not have notice of her initial right to appeal. The *House* Court's wording that a party relying on Civil Service Law § 71 is entitled to a posttermination hearing appears as a flat statement of the law. *Brady* fails to persuasively distinguish *House*.

As with *House*, *Brady* distinguishes *Matter of Gaines* (213 AD2d 894) because, in *Gaines*, "the examining physician sent contradictory letters to the petitioner and respondent, thereby depriving petitioner of fair notice." *Brady*, at *4. Regardless, this court does not agree that *House* and *Gaines* stand for the proposition that a hearing is only required posttermination when there are due process problems with the underlying administrative actions. These cases clearly call for an administrative hearing posttermination for employees separated from their positions based on disabilities.

While petitioner relies on, and *Brady* attempts to

distinguish, several other cases, the above cases are sufficient to show that, at the appellate level, Civil Service Law § 71, and its sister statute, section 73, have been recognized mandatory posttermination hearings. Therefore, it was arbitrary and capricious to deny such a hearing to petitioner. The matter must be remitted to the agency to allow petitioner to present her medical evidence at an evidentiary hearing.

This court does not find the failure of HHC to include the right to a hearing in its regulations to be arbitrary and capricious, since the regulations are facially compliant with Civil Service Law § 71. Unconsolidated Laws, Chapter 214-A, § 9 only states that the regulations must be "consistent with" the statute, as they are.

Accordingly, it is

ADJUDGED that the petition is granted to the extent of remitting the matter of petitioner Maria O'Neill's reinstatement for a posttermination hearing before respondent New York City Health and Hospitals Corporation Personnel Review Board, and is otherwise denied; and it is further

ORDERED that the respondents' cross motion is denied.

Dated: April 19, 2013

ENTER:

J.S.C.

HON. PETER H. MOSKOWITZ