

Matter of Hemmings-Harrington v City of New York
2013 NY Slip Op 30949(U)
April 30, 2013
Supreme Court, New York County
Docket Number: 103400/12
Judge: Carol E. Huff
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SCANNED ON 5/3/2013

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: **CAROL E. HUFF**
Justice

PART 32

Index Number : 103400/2012
HEMMINGS-HARRINGTON, MICHELLE
vs.
CITY OF NEW YORK
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~~


~~motion~~ is decided in accordance
with accompanying memorandum decision

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).

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

Dated: APR 30 2013

, 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
COUNTY OF NEW YORK: PART 32

-----X

In the Matter of the Application of : Index No. 103400/12
MICHELLE HEMMINGS-HARRINGTON, :
Petitioner, :

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

- against - :

THE CITY OF NEW YORK, Michael R. Bloomberg, as :
Mayor of the City of New York; and THE NEW YORK
CITY DEPARTMENT OF TRANSPORTATION, :
Janette Sadik-Khan as Commissioner of the New York City
Department of Transportation; and THE NEW YORK :
CITY DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES; Edna Wells Handy, as :
Commissioner of the New York City Department of
Citywide Administrative Services, :

Respondents. :

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks to annul respondents' determination that she had no right to reinstatement to her former permanent civil service title of Highway Repairer, pursuant to Civil Service Law § 71 and New York City Personnel Rule (55 RCNY 12, App. A) 6.2.5. Respondent contends that petitioner was not entitled to reinstatement because she was a provisional employee.

Pursuant to Civil Service Law § 71, following a qualifying disabling injury, an employee is entitled to a leave of absence of at least one year. "[W]ithin one year after the termination of

such disability,” the employee may apply for a medical examination to certify that the employee is fit to return to his or her former position. If found fit, the employee “shall be reinstated to his or her former position. . . .”

Petitioner was appointed to the permanent position in 1990. Subsequently she suffered a work-related injury and took a medical leave of absence pursuant to § 71, supra. On April 15, 2005, she was terminated due to her inability to return to work within one year of the beginning of her medical leave (id.). By letter dated March 13, 2006, petitioner notified respondent New York City Department of Citywide Administrative Services (“DCAS”) that she was requesting to return to work. By letter to petitioner dated May 11, 2006, DCAS informed petitioner that she had been determined fit to return to her “former position as a Highway Repairer.” By letter dated October 4, 2007, respondent New York City Department of Transportation (“DOT”) told petitioner to report to DOT on October 15, 2007, “for reinstatement as a Highway Repairer.”

Both petitioner and respondents state that petitioner did report on that date. Petitioner contends, however, that although she completed all necessary medical examinations and paperwork respondents delayed her reinstatement for more than a year through no fault of hers. Respondents contend that petitioner was dissatisfied with her assignment to the Division of Bridges and left the office that day without completing necessary paperwork.

The parties agree that on December 8, 2008, petitioner filled out a “Request for Reinstatement” form. Petitioner contends that this form completed the drawn-out reinstatement process. Respondents contend that the form constituted an entirely new request and, as such, was beyond the one-year limitation period set by § 71. They argue that petitioner effectively withdrew her request on October 15, 2007, by failing to complete the reinstatement process.

* 4]

They submit the affidavit of Jean Frankowski, Director of Personnel at DOT, which states that on that date "Petitioner left the office without having completed the necessary paperwork to process her assignment to the title of Highway Repairer, and without having been reinstated."

Frankowski 11/16/12 Aff., ¶ 10.

This conclusory statement (the DOT Director of Personnel does not specify that she was present or had direct personal knowledge of petitioner's appearance on October 15) is not supported by any indication of what paperwork petitioner failed to fill out. Petitioner, on the other hand, submits copies of documents – all dated October 15, 2007 – including forms titled "Authorization for Release of Information," "New Hire Form - Employee Personal Data" (two pages), "Update Personnel Document," and "Data Sheet: Employment." She also submits a copy of a "Drugs of Abuse Test Request" dated October 17, 2007, as well as copies of DOT letters verifying that she appeared at the DOT personnel offices seeking to have a drug test on June 20, June 27 and September 2, 2008. Finally, she submits a copy of the DOT "Assignment and Transfer Form," dated December 9, 2008, signed by Frankowski, confirming petitioner's reassignment as a "Highway Repairer."

Although respondents claim that the December 8, 2008, "Request for Reinstatement" was the beginning of a new request procedure, they submit no evidence supporting that contention. They have not attached corollary paperwork corresponding to what petitioner filled out in October 2007, above, or evidence of new medical exams or drug testing. There is no evidence that respondents ever notified petitioner of the cancellation of her initial request or the start of a new reinstatement procedure. In connection with the December 9, 2008, "Assignment and Transfer Form" executed by Frankowski, they do not explain why the reinstatement, if it was

indeed new, was processed so quickly, or why that form was marked as a "reinstatement" instead of an "appointment."

A memo from an Office of Management and Budget employee dated January 21, 2009, confirms OMB's approval of petitioner's salary as a "highway repairer." In a New York City Automated Personnel System "Employee Job and Payroll Data" form initialed with a date of February 11, 2009, for the first time on any document the abbreviation "prov." for "provisional" appears. (A Payroll Management System "Record Change History" dated May 31, 2011, also lists petitioner as provisional.)

In April 2010 petitioner suffered another injury and was granted a leave of absence in a DOT "Leave Request Form" that listed her title as "permanent" highway repairer. As was the case previously, by letter dated June 6, 2011, DOT terminated petitioner due to her inability to return to work within one year of the beginning of her medical leave. In the letter DOT stated that she would be able to apply for reinstatement within one year of the end of her disability, pursuant to Civil Service Law § 71. On February 28, 2012, petitioner notified respondent DCAS that she had been medically cleared and was requesting to return to work. She was then told, by letter dated April 24, 2012, that her file had been misread, and that she had been a provisional employee not entitled to reinstatement.

The determination not to reinstate petitioner will be upheld unless it is shown that the determination "was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The test is whether the determination is "without sound basis in reason and is generally taken without regard to the facts." Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974).

Petitioner is not entitled to the relief she seeks on estoppel grounds. See, e.g., Grishman v New York, 183 AD2d 464, 466 (1st Dept 1992), citing Public Improvement, Inc. v Board of Education, 56 NY2d 850, 852 (1982) (“the doctrine of estoppel is unavailable against a public agency . . . and cannot be relied on to create a right where none exists.”). However, respondents’ frequent reference to petitioner’s position as nothing other than permanent is indicative of their own confusion, at least, as to her true status. Petitioner has presented evidence supporting her position that there was one extended reinstatement process. Respondents have failed to present evidence contradicting that position. Accordingly, the determination was made “without sound basis in reason [and] without regard to the facts.” Pell, supra.

Accordingly, it is

ADJUDGED that the petition is granted to the extent that respondents are directed to reinstate petitioner to her former position as a permanent highway repairer or to another position in accordance with Civil Service Law § 71.

Dated: APR 30 2013


CAROLE E. HUFF
J.S.C.