Matter of Kravitz v DiNapoli
2013 NY Slip Op 34096(U)
August 30, 2013
Supreme Court, Albany County
Docket Number: 69-13
Judge: George B. Ceresia, Jr.
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
JAY A. KRAVITZ,

Petitioner,

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

-against-

THOMAS P. DINAPOLI, in his capacities as the COMPTROLLER OF THE STATE OF NEW YORK and administrative head of the NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM, the OFFICE OF THE COMPTROLLER OF THE STATE OF NEW YORK, the NEW YORK STATE AND LOCAL EMPLOYEE'S RETIREMENT SYSTEM, and KRISTEE IACOBUCCI, in her capacity as DIRECTOR OF THE PENSION INTEGRITY BUREAU,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-13-ST4262 Index No. 69-13

Appearances:

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner is a physician who, since 1985, has been licensed to practice medicine in the State of New York. He has commenced the above-captioned CPLR Article 78 proceeding with regard to his pension rights in the New York State and Local Retirement System ("respondent").

From 1985 to approximately 1997 he practiced primary care medicine as a solo practitioner. In 1997 he became affiliated with and a principal of CapitalCare Medical Group, LLC. This affiliation continued until December 2012. From July 1985 or 1986 through approximately 2008 he served as school physician for the Mohonasen Central School District on a part time basis. The petitioner received his compensation from the School District through its regular payroll system. In 1989 he was enrolled in the Retirement System. Since that time he has received an annual statement from the respondent with regard to his membership. In 1998-1999 he was hired to serve as a part time school physician for the Albany City School District. He served in this capacity from approximately 1999 to 2002, and then again from approximately 2004 through 2012. Petitioner's service with the Albany City School District was reported to the respondent. The petitioner also served as part time school physician for the Schenectady City School District from July 1, 2003 through 2012, and served for three years, commencing in 1997, as part time school physician for the Duanesburg Central School District.

On July 9, 2009 the petitioner received subpoenas from Public Integrity Bureau of the office of the New York State Attorney General. One of them, a subpoena duces tecum,

sought records of petitioner's part time employment with the above school districts. Thereafter, by letter dated September 13, 2011, the New York State Comptroller[1] advised him that he was not entitled to retirement credit with regard to service provided to the various school districts by reason that he had not been an employee of the school districts, but rather had been an independent contractor, for which no service credit could be given. The letter indicated that such service was not creditable for purposes of his retirement, and that he would lose twenty years of service credit in the Retirement System. The letter further indicated that this was a final agency determination, but that the petitioner had a right to request a hearing and redetermination within four months. On October 11, 2011 the petitioner requested a hearing pursuant to Retirement and Social Security Law ("RSSL") § 74. No hearing was scheduled. Thereafter on October 2, 2013 the petitioner submitted to the Retirement System an application for retirement effective December 31, 2012. By letter dated October 22, 2012, Kristee Iacobucci, Director of Pension Integrity Bureau, advised the petitioner that because he had only 1.55 years of service credit in the Retirement System that he was not eligible for a pension benefit, and that a hearing pursuant to his request dated November 1, 2011[2] "is currently in the process of being scheduled".

In an letter dated November 13, 2012 petitioner's attorney proposed that the respondent accept and process petitioner's retirement application in the usual manner, utilizing all of petitioner's claimed service credits, but that the respondent hold all payments

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[1]See letter of Mark P. Pattison, Deputy Comptroller, dated September 13, 2011.

[2]The letter from petitioner's attorney dated October 31, 2011 which requested the hearing, was apparently received by the respondent on November 1, 2011.

in abeyance until a final determination was made, either administrative or judicial, with regard to his entitlement to a retirement allowance. The respondent did not submit a direct response to this letter. Instead, on December 13, 2012, the Benefit Calculations Bureau of the Retirement System issued a determination stating in part "[s]ince you are not eligible for retirement benefits from this System at the present time, we have cancelled your retirement application."

On January 4, 2013 the petitioner commenced the above-captioned CPLR Article 78 proceeding for a judgment declaring that respondent's action in determining that petitioner is not entitled to service credit for his part time employment with the school districts is invalid. He requests reinstatement of twenty years of service credit , together with attorneys fees. He maintains that the October 22, 2012 determination is arbitrary and capricious; that it violates article V, § 7 of the New York State Constitution[3]; and that he has been denied due process of law.

The respondent has made a motion to dismiss the petition on grounds that the petitioner failed to exhaust his administrative remedies, and that the matter is not ripe for adjudication.

Turning to a threshold issue, the petitioner maintains that the respondent's motion to dismiss is untimely. The adjourned return date of the instant proceeding was March 8, 2013. Respondents' motion papers were served on March 5, 2013, less than five days before the

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[3]NY Const Art V § 7 recites: "After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired".

return date, in violation of CPLR 7804 (f) and CPLR 7804 (c). Thus, it appears that the motion was untimely served by one day (see Harvey v New York State Department of Environmental Conservation, 235 AD2d 625 [3d Dept., 1997]). The Court observes that CPLR 7804 (e) provides in pertinent part:

> (e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a t rial of any issue of fact. *The court may order the body or officer to supply any defect or omission in the answer, transcript, or an answering affidavit.* Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. *Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted* (emphasis supplied).

Professor Vincent C. Alexander in his commentary on this section has stated:

> "Provision is made in the last sentence of CPLR 7804 (e) for entry of a default judgment against the respondent for failure to serve an answer. Such entry is not mandatory, however, and courts are likely to exercise their discretion to permit service of an untimely pleading." (Alexander, McKinney's Consolidated Laws, Practice Commentary C7804:6, Main Volume, p. 656.).

Elsewhere it has been stated:

> "As would be expected, however, the sanction of default is not favored, and the court will generally either direct that an answer be served or issue an order directing that a default judgment will be entered unless the answer and a complete record is filed." (8 Weinstein-Korn-Miller, New York Civil Practice, Para. 7804.05).

The petitioner has submitted an attorney affirmation and memorandum of law in opposition

to the motion to dismiss. In this respect, the petitioner does not appear to have been prejudiced by the delay. While the petitioner requests that the Court deny the motion as procedurally defective this, in the Court's view, would serve no useful purpose. Under all of the circumstances, the Court will relieve the respondents of their default pursuant to CPLR 7804 (e), and proceed to consider the motion, which appears to be fully addressed by the petitioner..

The determination with regard to whether a matter is ripe for judicial review involves application of a two-part analysis: "first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied" (see Church of St. Paul & St. Andrew v Barwick, 67 NY2d 510, 519 [1986] cert denied 479 US 985, citation omitted). "The appropriateness inquiry looks to whether the administrative action being reviewed is final and whether the controversy may be determined as a purely legal question" (id., quotations omitted). "[T]he controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. []" (id, at 520); Matter of Gordon v Rush, 100 NY2d 236, 242-243 [2003]; Matter of Guido v Town of Ulster Town Board, 74 AD3d 1536, 1536-1538 [3rd Dept., 2010]).

With respect to the alleged failure of the petitioner to exhaust its administrative remedies, "it is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375; see also Town of Oyster Bay v

Kirkland, 19 NY3d 1035, 1038 [2012]; Matter of East Lake George House Marina v Lake George Park Commission, 69 AD3d 1069, 1070 [3rd Dept., 2010]; Matter of Connor v Town of Niskayuna, 82 AD3d 1329, 1330-1331 [3d Dept., 2011]; Matter of Connerton v Ryan, 86 AD3d 698, 699-700 [3d Dept., 2011]). "This doctrine furthers the salutory goals of relieving the courts of the burden of deciding questions entrusted to an agency (see, 1 NY Jur, Administrative Law, §5 pp 303-304), preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgement'" (Watergate v Buffalo Sewer, supra, citing, Matter of Fisher [Levine], 36 NY2d 146, 150, and 24 Carmody-Wait 2d, NY Prac, §145:346). As stated in Watergate v Buffalo Sewer (supra), the exhaustion rule need not be followed in certain limited circumstances, such as where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, where resort to an administrative remedy would be futile, or where its pursuit would cause irreparable injury (see id.).

In determining whether there has been a due process deprivation, "claims predicated upon an established state procedure must be distinguished from those arising from 'random, unauthorized acts by state employees'"(Hughes Vil. Rest., Inc. v Village of Castleton-on-Hudson, 46 AD3d 1044, 1046 [2007) quoting Hellenic Am. Neighborhood Action Comm. v City of New York, 101 F3d 877, 880 [1996], cert dismissed 521 US 1140 [1997], and citing, Hudson v Palmer, 468 US 517, 533 [1984). "If they result from an established state procedure, predeprivation hearings are necessary to satisfy due process, whereas

postdeprivation remedies will be sufficient if the claims are based on random, unauthorized acts by state employees" (Hughes Vil. Rest., Inc. v Village of Castleton-on-Hudson, supra, at 1046, citing Hudson v Palmer, 468 US at 532-533). In this instance, because this matter involves an established state procedure, a predeprivation hearing appears to be necessary.

The letter dated September 13, 2011 from Mark P. Pattison, Deputy Comptroller to the petitioner recites as follows:

> "Please take notice that based upon a review of your relationship with Duangeburg CSD, Schenectady CSD, Albany City Schools, and Rotterdam Mohonasen CSD we have determined that you were reported to the Retirement System as an employee when, in fact, you were an independent contractor. The reasons for this determination are detailed in the enclosed Explanation of Determination.
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> "Service rendered to a public employer as an independent contractor is not creditable with the Retirement System. Accordingly, any salary and days worked (credited service) that were previously reported to us by the Duanesburg CSD, Schenectady CSD, Albany City Schools, and Rotterdam Mohonasen CSD will be removed from our records and the associated contributions refunded. This will result in the loss of approximately 20 years of service.
>
> "The above constitutes a final agency determination of this matter. Pursuant to Section 74 or 374 of the Retirement and Social Security Law, you have a right to an administrative hearing. A request for a hearing and redetermination must be made within four (4) months of the date of this determination and must be made in writing. Such request should be directed to Deborah Richards, Esq. director of the Bureau of Hearing Administration, New York State and Local Retirement System, 110 State Street, Albany, NY 12244. Please be advised that, pursuant to the State Administrative Procedure Act, the applicant bears the burden of proof.
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> "In the event you do not intend to contest this determination and wish an immediate refund of your contributions, with interest,

please so advise in writing Kristee Iacobucci, Pension Integrity Bureau Director, New York State and Local Retirement System, 110 State Street, Albany, NY 12244. If you do not request either (1) a refund or (2) a hearing and redetermination within the four month time period to do so, the salary and service will be removed and any contributions due to you will be refunded at the end of that time. We will then advise the Duanesburg CSD, Schenectady CSD, Albany City Schools and Rotterdam Mohonasen CSD of this determination.

"Since your current membership was based on your relationship with the Duanesburg CSD that membership would be invalid. Your service with the Town of Rotterdam from August 13, 1990 to April 30, 1991 would have qualified you for membership; however, it would have been ultimately withdrawn due to inactivity in May 1998. Your employment with Schenectady County Community College beginning in February 2005 qualifies you to become a member and tier reinstate to the withdrawn membership effective February 23, 2005. Your date of membership would be August 13, 1990 and you would remain a Tier 4 member. At this time you would have approximately 1.5 years of service credit."

The letter dated October 22, 2012 of Kristee Iacobucci, Director of the Pension Integrity Bureau, recites as follows:

"We have received your application for service retirement to be effective December 31, 2012.

"As we communicated to you in a letter dated September 13, 2011, the New York State and Local Retirement System's (Retirement System) review of your relationship with the Duanesburg CSC, Schenectady CSD, Albany City Schools, and Rotterdam Mohonasen CSD has determined that you were reported to the Retirement System as an employee when, in fact, yo were an independent contractor. This resulted in the removal of approximately 20 years of service credit.

"At this time you have approximately 1.55 years of service credit and therefore, do not have sufficient years of service to be eligible for a pension benefit. Your application for retirement will be rejected. The Retirement System's Benefit Calculations

> and Disbursement Services Bureau will be contacting you with details regarding your retirement application.
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> "Your November 1, 2011 request for an administrative hearing has been received, and your hearing is currently in the process of being scheduled. Should the Retirement System's determination be overturned as a result of that hearing, you will be provided with written notice and a full explanation of the benefits available to you at that time." (Letter of Kristee Iacobucci, Director of New York State and Local Retirement System, dated October 22, 2012).

In this instance, the petitioner argues that the language of the October 22, 2012 letter of Director Iacobucci establishes (1) that petitioner's retirement service credits have already been removed; and (2) that his retirement application has been denied, all without the benefit of a hearing. The petitioner maintains that there are no factual issues left to be determined.

The determination dated September 13, 2011 was made by Mark P. Pattison, Deputy Comptroller. The letter dated October 22, 2012 is from Kristee Iacobucci, as noted, the Director of the Pension Integrity Bureau. The Iacobucci letter does not appear to be a new determination, but rather a restatement of the provisions of the September 13, 2011 determination. Moreover, consistent with the September 13, 2011 determination and Retirement and Social Security Law ("RSSL") 74 (d), Director Iacobucci indicated that a hearing would be scheduled with regard to the removal of service credit. This carries with it the inference that the respondents were still treating the September 13, 2011 determination as being subject to the outcome of the redetermination hearing. In the Court's view, the Iacobucci letter, while constituting an acknowledgment of receipt of petitioner's retirement application was not a formal determination and did not purport to overrule or modify the September 13, 2011 determination of Deputy Comptroller Pattison (which expressly

indicated that it was subject to a hearing and redetermination, if one was timely requested).

The December 13, 2012 determination of the Benefit Calculations Bureau does not mandate a different result. Even if that determination could have served as an independent basis for relief, had it been included in the petition filed on January 15, 2013, it was not. The Court will confine itself to the to the allegations set forth in the petition. In the Court's view, the September 13, 2011 determination remains subject to petitioner's request for a hearing and redetermination.

From all the foregoing, it appears that the petitioner's administrative remedies have not been exhausted, inasmuch as the hearing has not yet been held.

The petitioner advances an argument that he is the victim of disparate treatment in comparison to what happened to the plaintiffs in Swergold v Cuomo (70 AD3d 1290 [3d Dept., 2010]). In Swergold, the Retirement System, after commencement of the action, agreed to restore all the plaintiffs' service credits pending the outcome of a hearing. No such agreement has been reached in the instant case. There is no evidence presented here to demonstrate that the agreement reached in Swergold was the result of a broadly-applied policy adopted by the Retirement System.[4] Nor have sufficient facts been presented on the instant motion to enable the Court to draw any conclusion with regard to the relative equities

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[4]The petitioner relies, in part, upon an affidavit dated October 14, 2009 of Kevin Murray, then Deputy Comptroller of the Retirement System. The affidavit was submitted in connection with the appeal taken to the Third Department Appellate Division in Swergold v DiNapoli (supra). Mr. Murray indicates that "[n]o credits will be revoked unless and until the plaintiffs have an adequate opportunity to be heard in a formal administrative hearing held pursuant to Retirement and Social Security Law § 74." Mr. Murray indicated in the same affidavit that the Retirement System had revised its review process and would conduct a new review regarding the plaintiffs' retirement credits and membership. The quoted sentence appears to relate only to the plaintiffs in that action, and has not been shown to have a broader application.

involved in Swergold (supra) as compared to those present here. The Court finds that the argument has no merit.

With respect to a violation of NY Constitution art V, § 7, the respondent points out that under RSSL § 111, the Comptroller is charged with the responsibility of correcting any change or error in Retirement System records which causes a member to receive more or less than the amount to which the member is entitled (see RSSL 111 [c][5]). This has been construed to permit the Retirement System to correct the record even after the award of benefits (see Graham v New York State Police & Fire Retirement Sys., 188 AD2d 826 [3d Dept., 1992]). RSSL § 111 (c) (formerly RSSL § 111 [b]) has been in existence since 1955 (see L 1955, ch 687, eff July 1, 1956). Thus the contractual relationship existing between the petitioner and the Retirement System arising under NY Constitution art V, § 7 would, in the Court's view, be subject to the provisions of RSSL 111 (c), which was in existence well before the commencement of petitioner's employment with the various school districts. In this respect, this is not a situation where the contractual relationship between the petitioner and the respondent (with regard to the petitioner's retirement benefits) are being "diminished or impaired" within the meaning of the New York Constitution art V, § 7. Rather the respondent Comptroller is attempting to discharge his obligation under RSSL § 111 (c). For this reason, the Court finds that the petition fails to state a cause of action for a violation of

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[5] RSSL 111 (c) recites: "In the event that any change or error in any record of the retirement system causes a member or beneficiary of such system to receive more or less than he would have been entitled to receive had such record been correct, the comptroller, upon the discovery of any such change or error, shall correct such record. As far as practicable, the comptroller shall adjust payments in such a manner that the actuarial equivalent of any benefit rightly due shall be paid." (RSSL § 111 [c])

New York Constitution art V, § 7.

Moreover, and apart from the foregoing, it is well settled that "'[] merely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief'" (Town of Oyster Bay v Kirkland, 19 NY3d 1035, 1038-1039 [2012], quoting Matter of Schulz v State of New York, 86 NY2d 225, 232 [1995]; Matter of Sabino v DiNapoli, 90 AD3d 1392, 1393-1394 [3d Dept., 2011]; Matter of Connerton v Ryan, 86 AD3d 698, 699-700 [3d Dept., 2011]). Because petitioner's administrative remedies have not yet exhausted, the petitioner is precluded from advancing his constitutional arguments at this time.

Notably, a review of the petition reveals that the petitioner does not seek an order in the nature of mandamus to compel the respondents to schedule of a redetermination hearing. As such, the Court has no reason to address that issue.

In summary the Court finds that the letter of Kristee Iacobucci dated October 22, 2012 does not constitute a final determination within the meaning of RSSL § 74. The September 13, 2011 determination Deputy Commissioner Pattison remains nonfinal, subject to a hearing and redetermination. As such the Court finds that the petition fails to state a cause of action with respect to a due process violation. With regard to the determination dated September 13, 2011 of Deputy Comptroller Mark P. Pattison, and the constitutional issues raised herein, the Court finds that the petitioner failed to exhaust his administrative remedies, and they are not ripe for review. In addition, the Court finds that the petition fails to set forth a cause of action predicated upon a violation of New York Constitution art V, § 7.

The Court concludes that the motion must be granted, and the petition dismissed.

Because the petitioner is not the prevailing party, his request for attorneys fees under 42 USC 1988 must be denied (see 42 USC 1988 [b]).

Accordingly, it is

ORDERED, that the respondents are relieved of their default under the provisions of CPLR 7804 (e); and it is

ORDERED, that respondents' motion to dismiss is granted; and it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondent. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: August 30, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

9-18-13

Papers Considered:

1. Notice of Petition dated January
2. Affirmation of James W. Roem 31, 2012 and Exhibit
3. Respondent's Notice of Motion
4. Affirmation of Earl T. Redding, Esq., dated March 7, 2013 in Opposition To Respondents' Motion To Dismiss