Matter of Cofield v City of New York
2014 NY Slip Op 30796(U)
March 31, 2014
Sup Ct, New York County
Docket Number: 100535/13
Judge: Alice Schlesinger

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100535/2013
COFIELD, TREVOR
VS
CITY OF NEW YORK
Sequence Number : 001
ARTICLE 78

PART IA PART 16

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 cross- granted and the proceeding is dismissed in accordance with the 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: MAR 31 2014

ALICE SCHLESINGER, 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

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In the Matter of the Application of

TREVOR COFIELD,

Petitioner,

-against-

Index No. 100535/13
Motion Seq. No. 001

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, and NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Respondents.

For a Judgment and Order Under Article 78
Of the Civil Practice Law and Rules.

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SCHLESINGER, J:

Petitioner Trevor Cofield commenced this Article 78 proceeding regarding his eligibility for a promotion at the New York City Department of Homeless Services (DHS) after passing Civil Service Exam 6530. Respondents City of New York, DHS, and New York City Department of Administrative Services (DCAS) have moved to dismiss pursuant to Section 7803 and Rule 3211(a), subd. (7), (5) and (3), of the Civil Practice Law and Rules (CPLR) on the grounds that the petition fails to state a cause of action, the proceeding is barred by the statute of limitations, and petitioner has failed to exhaust his administrative remedies. Petitioner has opposed the motion.

Background Facts and Procedural History

In 2007 Trevor Cofield passed Civil Service Promotional Examination 6530 for the position of Associate Fraud Investigator (AFI) with the DHS, the hiring agency. Pet. ¶ 9. At the time, he was employed by DHS in the position of Fraud Investigator Level I. The

exam was administered by DCAS, and Mr. Cofield was ranked 15 on the eligibility list for appointment to the position. On November 17, 2008 he was interviewed by DHS for the AFI position. Shortly thereafter, Mr. Cofield received a letter from DHS dated November 25, 2008 (Exh. A)[1], stating the following:

> This is to notify you that you were considered but not selected for a position of Associate Fraud Investigator for which you were interviewed on November 17, 2008.
> The disposition for the certified list is being returned to the Department of Citywide Administrative Services (DCAS).
> Since this is an agency specific promotional list, your name will only be certified to us for future appointment if we specifically request it. You cannot activate your name on the list.
> Should you be offered a position in this title at a later date and your name is reachable on the list while it is in existence, we will request that DCAS certify your name to this agency for permanent appointment.

About four years later, in December 2012, Mr. Cofield contacted DCAS and spoke with the Deputy Director of the Certification Unit, Jerez Hue, to inquire about reinstatement on the AFI eligibility list for a possible future appointment. Pet. ¶ 12. Ms. Hue told Mr. Cofield that DCAS records showed that he had, in fact, been appointed to the AFI position four years earlier on November 16, 2008, with a reporting date of December 8, 2008. At Mr. Cofield's request, Ms. Hue sent him a letter dated December 5, 2012 confirming her statements. (Exh B).

After receiving this letter, Mr. Cofield contacted Yvette Pilgrim, Deputy Director of Employment Services for DHS, to confirm his status as AFI according to DCAS records. Pet. ¶ 14. However, after reviewing DHS records, Ms. Pilgrim notified Mr. Cofield that

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[1] All Exhibits are appended to the Petition, unless otherwise noted.

DCAS had been mistaken. Specifically, Ms. Pilgrim sent Mr. Cofield a December 10, 2012 letter (Exh. C) stating the following:

> The attached letter dated November 25, 2008 was sent to you regarding your status on the civil service list for Associate Fraud Investigator. You were disposed as Considered Not Selected. Please note that due to clerical oversight, this information was not transferred to DCAS, the information has not been forwarded to DCAS in order to update your record and the disposition referenced is still standing. Your records at this agency continue to reflect Fraud Investigator.

Mr. Cofield commenced this proceeding in April 2013 seeking: 1) a declaration by the Court that he was appointed to the position of AFI in the DHS effective November 16, 2008, with a reporting date of December 8, 2008; 2) payment for the difference in his salary that he would have received based on the promotion, retroactive to December 8, 2008; 3) pre-judgment interest on the salary differential; and 4) costs and attorney's fees. As noted above, respondents moved to dismiss pursuant to CPLR §§ 7803 and 3211(a), subd. (7),(5), and (3), on the grounds that the petition fails to state a cause of action, the proceeding is barred by the statute of limitations, and petitioner has failed to exhaust his administrative remedies.

Discussion

A. The Petition Fails to State a Cause of Action

A party may move to dismiss a proceeding pursuant to CPLR § 3211(a)(7) if the claims asserted against the party fail to state a cause of action. When assessing such a motion, the Court must "accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994), *citing Monroe v Monroe*, 50 NY2d 481, 484; *Rovello v Orofino Realty Co.*, 40

NY2d 633, 634. The role of the Court is to determine "whether the proponent of the pleading has a cause of action, not whether he has stated one." 84 NY2d at 88, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

Mr. Cofield here claims that he is entitled to a declaration that he was promoted to the AFI position on November 16, 2008 with a starting date of December 8, 2008 and that he is entitled to the difference in salary between the pay of an AFI and his stated position of Fraud Investigator I from December 2008 to the present. He bases his claims solely on the statements made in December 2012 by Ms. Hue of DCAS, the agency that administered the civil service exam. However, as respondents correctly note in their moving papers, Mr. Cofield's claim overlooks the letter he received from Ms. Pilgrim of DHS, the hiring state agency, informing him that DCAS was mistaken and that he had not, in fact, been selected for a promotion after his interview in November 2008.

As highlighted by respondents in their moving papers, the broad scope of an agency's discretion in appointing civil servants is defined by the New York City Charter §815 and Civil Service Law §61. Charter §815 allows City agencies wide discretion in dealing with the processes involving the recruitment and appointment of civil servants in regards to their eligibility, with virtually the only limitation being compliance with the Civil Service Law. An agency has the right to promote or appoint from an eligibility list as set out by Civil Service Law §61(1).

Consistent with Civil Service Law §61(3), DHS here determined that Mr. Cofield was eligible for the AFI position based on the exam, and they considered him but chose not to appoint him to the position. As the authorized appointing authority, DHS sent Mr. Cofield written notice of such non-selection within 60 days of the decision. Any statement

to the contrary by DCAS was a clerical error, with no binding effect on DHS as the ultimate decision maker.

As further pointed out by respondents, Civil Service Law §61 states the manner in which City agencies can appoint and promote recruited personnel. The Court of Appeals interpreted Civil Service Law §61 in a *Matter of Andriola v Ortiz* and found that "a person successfully passing a competitive Civil Service examination does *not* acquire any 'legally protectable interest' in an appointment to the position for which the examination was given ...." *Matter of Andriola v Ortiz,* 82 NY2d 320, 324 (1993)(emphasis in original, citations omitted). The Court thus held in *Andriola* that City firefighters, who had successfully petitioned for the re-grading of a civil service exam and were thereafter promoted based on the corrected test results, did not have a legally protectable interest in receiving back pay relating to the delay in promotions because they did not have a vested right to the promotion on a date certain.

Based on these laws and the cited cases, this Court agrees with respondents that the clerical error made by DCAS does not entitle Mr. Cofield to the retroactive appointment to the AFI position, when DHS, as the appointing authority, timely notified Cofield that he had not, in fact, been selected. Thus, Mr. Cofield has failed to state a legally cognizable cause of action.

The Court's holding is consistent with the strong policy behind Civil Service Law §61, which emphasizes the importance of the discretionary governmental appointive power. It also finds support in New York City Charter §815(12), which states that an agency's ability "to make appointments to competitive positions from eligible lists pursuant to subsection one of section sixty-one of the state civil service law ... shall not be abridged or modified by local law or in any other manner."

Here, Mr. Cofield does not have a right to be appointed simply because he passed his examination and was put on the eligibility list for the AFI position with DHS. As required by Civil Service Law §61(3), Mr. Cofield received notice by letter dated November 25, 2008 informing him that he had been considered but not selected for appointment to the AFI position with DHS,. Mr. Cofield does not have a legally protectable interest in a promotion and backpay, just as the petitioners in *Matter of Andriola* did not have a legally protectable interest in a promotion and back pay, even though they were eventually promoted when the exam errors were corrected.

Mr. Cofield has even less of a claim than the petitioners in *Matter of Andriola* because those petitioners were actually appointed to their promotions, while Mr. Cofield's petition is based on a clerical error. Mr. Cofield's conversation in December 2012 with Ms. Hue from DCAS, four years after he received notice from the hiring agency DHS that he was not selected from the eligibility list, does not create a legally cognizable interest. Holding otherwise would be inconsistent with the policy of broad discretionary governmental appointive power emphasized by the court in *Matter of Andriola v Ortiz*, 82 NY2d 320, 324 (1993). Respondents' motion to dismiss is thus granted for failure to state a cause of action.

B. The Proceeding is Barred by the Statute of Limitations

Pursuant to CPLR §217, Article 78 proceedings must be commenced within four months of the agency's final and binding decision. A decision is final and binding if the agency "reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be ... significantly ameliorated by further administrative action or by steps available to the complaining party." *Walton v New York*

State Dept. of Correctional Servs., 8 NY3d 186, 194 (2007), quoting *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 (2005).

Mr. Cofield argues here that the statute of limitations should run from December 5, 2012 when Ms. Hue sent him the letter stating that DCAS records showed that he had been appointed to the AFI position with DHS because "It was at that time that ...[he] was on notice that he had a claim against respondents for failing to recognize and pay him as an AFI instead of as a Fraud Investigator from November 2008 to the present." (Pet. Mem. in Opp. to Resp. Mot. to Dismiss, p 7). Mr. Cofield's argument is unpersuasive and incorrect.

Here, Mr. Cofield argues that his injury is the failure of DHS to recognize his appointment to the position of AFI. However, there is no failure of recognition because Mr. Cofield was never appointed to the AFI position; the December 5, 2012 DCAS letter was a clerical error and not an administrative determination in Mr. Cofield's favor.

Mr. Cofield 's true injury is that he was not appointed to the AFI position. He received a letter dated November 25, 2008 from the DHS notifying him of that fact: "This is to notify you that you were considered but not selected for a position of Associate Fraud Investigator..." (Exh. A). Mr. Cofield knew the decision was final and that there were no alternatives for him to receive the promotion because DHS's letter explicitly said that his name would "only be certified to us [DHS] for future appointment if we [DHS] specifically request it. You cannot activate your name on the list." *Id.*

The letter sent by DHS to Mr. Cofield does not leave room for Mr. Cofield to claim that DHS was still considering appointing him to the AFI position. DHS's letter on

November 25, 2008 encapsulates the final and binding decision of the administrative agency regarding Mr. Cofield's injury of not being selected for the AFI position. Mr. Cofield makes no claim that he attempted to contact the agency within those four months, nor that he attempted to bring suit within the four months after he received the letter. Thus, Mr. Cofield's petition is barred by the statute of limitations in CPLR §217, and respondents' motion to dismiss is granted on that ground.

C. The Petition is Not Barred by a Failure to Exhaust Administrative Remedies

Respondents contend that Mr. Cofield lacks legal capacity to sue because he did not exhaust his administrative remedies and file a grievance under his Union's collective bargaining agreement before commencing this suit. "The doctrine of exhaustion of administrative remedies requires 'litigants to address their complaints initially to administrative tribunals, rather than to the courts, and ... to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts." *Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375 (1975), *quoting* 2 Cooper, State Administrative Law, p 561. A collective bargaining agreement (CBA) may set forth remedies, and a party's failure to follow those procedures can bar him from bringing suit for failure to exhaust the remedies set forth in a CBA. *Plummer v. Klepak*, 48 NY2d 486, 489 (1979).

Respondents here argue that Mr. Cofield is barred by a provision in his CBA from bringing suit for an out-of-title work claim without first going through the grievance process. However, this argument misconstrues Mr. Cofield's claim. Mr. Cofield is not making an out-of-title work claim; he is not claiming that he should be paid retroactively because he has been performing the duties of an AFI. Rather, he is claiming that he

should be paid because he was, in fact, appointed to the position of AFI in November 2008, even though the appointment was not recognized until he received the 2012 letter from DCAS. Since the Court finds that Mr. Cofield was never awarded the AFI position because the DCAS letter was a mere clerical error, he had no basis to grieve any salary issue. Therefore, no basis for dismissal exists under CPLR §3211(a)(3), but the dismissal on the two grounds previously discussed nevertheless disposes of this matter.

Accordingly, it is hereby

ORDERED that respondents' motion to dismiss is granted to the extent of dismissing all claims pursuant to CPLR §3211(a)(7) for failure to state a cause of action and pursuant to CPLR §3211(a)(5) as barred by the statute of limitations; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: March 31, 2014

MAR 31 2014

J.S.C.

ALICE SCHLESINGER