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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CAROL E. HUFF Justice

PART 32

Index Number : 100890/2013
GITTNES, DARREN
VS.
STATE UNIVERSITY 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 [redacted]

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 08 2014

CAROL E. HUFF, J.S.C.

1. CHECK ONE: ..... [X] 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

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In the Matter of the Application of : Index No. 100890/13

DARREN GITTENS, :

Petitioner, :

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

- against - :

STATE UNIVERSITY OF NEW YORK, NANCY L. ZIMPHER, as Chancellor, SUNY DOWNSTATE MEDIAL CENTER, DR. JOHN F. WILLIAMS, as President, SHARON CHAMBLISS-ALVAREZ, as Director of Labor Relations, :

Respondents. :

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CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks an order annulling the Determination of respondent SUNY Downstate Medical Center, dated February 22, 2013, terminating him from his position as a Cleaner in the Department of Environmental Services at SUNY Downstate. Respondents cross move to dismiss the petition on the ground, among others, that petitioner waived his right to challenge his termination in a "last-chance" settlement agreement entered into by petitioner dated January 23, 2012 (the "2012 Agreement").

Petitioner had entered into two prior settlement agreements with SUNY Downstate relating to disciplinary issues. The first, dated September 15, 2004, provided that, "in lieu of [petitioner] being terminated for verbally abusing and threatening his supervisor" petitioner

would pay a fine, change his shift and be placed on probation. The second, dated May 4, 2011, provided that in lieu of petitioner being served a Notice of Discipline for leaving his work location without authorization, petitioner would be placed on probation and his salary held in abeyance pending his successful completion of probation. In both of the proceedings leading to these prior agreements, petitioner was represented by counsel provided by his union, the Civil Service Employees Association, Inc. ("CSEA").

Petitioner was also represented by CSEA counsel when he entered into the 2012 Agreement. That agreement provides that in lieu of petitioner being terminated for violating the 2011 agreement for selling a cd to a patient visitor and for not "follow[ing] departmental rules and procedures," petitioner agreed to pay a fine and be placed on probation for eighteen months. Further:

> Should [petitioner] engage in any misconduct that is the same or similar to that referenced [above] as determined by the Director of Labor Relations, or her designee for that purpose, he shall be terminated from State service. Prior to implementing the penalty, [petitioner] and his Union representatives shall be afforded the opportunity to explain to Management why the penalty should not be implemented. The Director of Labor Relations and/or her designee's decision to impose the penalty cannot be appealed in any legal or administrative forum by [petitioner], CSEA or anyone on his behalf.

Paragraph 3 provides: "Effective immediately, [petitioner] agrees to adhere to Departmental policies and procedures. Failure to adhere will be considered a violation of this agreement and the penalty of termination will be imposed." Paragraph 4 provides: "The parties agree that this settlement is final and binding and neither party will seek, in any way, to vacate or overturn its provisions."

Petitioner failed to report to work between January 30, 2013 and February 21, 2013,

without obtaining the permission of SUNY Downstate. After his initial vacation request had been turned down, he sought leave pursuant to the federal Family Medical Leave Act of 1993 ("FMLA"). Respondents state that he failed to provide medical documentation to substantiate his request for FMLA leave and the request was denied, but petitioner took three weeks leave nevertheless. He was terminated on February 22.

Pursuant to the 2012 Agreement, on February 19, 2013, the SUNY Downstate Director of Labor Relations sent a certified letter to petitioner setting February 21 as the date for petitioner and his union representative to explain why the penalty should not be imposed. SUNY Downstate states that since later it appeared that petitioner did not receive the letter in time, it set another date, August 14, 2013, for the meeting but petitioner declined to participate.

A public employee's waiver of the right to appeal his termination will be upheld. See Presti v Farrell, 23 AD3d 211, 211 (1st Dept 2005) (dismissing Article 78 proceeding on the ground that the petitioner knowingly relinquished the right to appeal or otherwise challenge" drug test results leading to his termination); Montiel v Kiley, 147 AD2d 402, 403 (1st Dept 1989) (dismissing Article 78 proceeding on same ground, finding, "The law is settled that public policy does not prohibit a tenured public employee . . . from waiving procedural due process protections, including the right to a disciplinary hearing, where the waiver is 'freely, knowingly and openly arrived at, without taint of coercion or duress' (Abramovich v Board of Education, 46 NY2d 450, 455 [1979], cert. den., 444 US 845 [1979])".

Petitioner does not dispute that he took extended leave without the approval of SUNY Downstate, thus violating its rules and procedures and the terms of the 2012 Agreement. Rather he argues that he should have been given approval. In the petition, he does not allege that he was

under coercion or duress when he, represented by counsel, entered into the 2012 Agreement where he waived the right to appeal or challenge a decision to terminate him. Although SUNY Downtown failed to provide petitioner an opportunity to explain his conduct at the time of the Determination, that "opportunity to explain" offered minimal protections in any event, and its lateness does not affect the enforceability of petitioner's waiver.

Accordingly, it is

ADJUDGED that the cross motion is granted, the petition is denied and the proceeding is dismissed.

Dated: APR 08 2014
APR 08 2014

CAROL E. HUFF
J.S.C.

UNFILED JUDGMENT
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