

Singerman v New York City Council

2014 NY Slip Op 31289(U)

May 13, 2014

Sup Ct, New York County

Docket Number: 116925/2009

Judge: Joan B. Lobis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: LOBIS
Justice

PART 6

SINGERMAN, JOYCE

INDEX NO. 116925/09

MOTION DATE

MOTION SERIAL NO. 02

MOTION CASE NO.

- v -
THE NEW YORK CITY COUNCIL

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

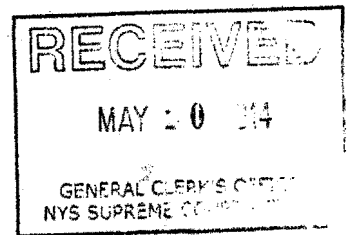
Replying Affidavits _____

PAPERS NUMBERED

1-2
3-4, 6
5, 7, 8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion



THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 5/13/14

JAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST 5/10 REFERENCE

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

EA
5/20/14

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
JOYCE SINGERMAN,

Petitioner,

Index No. 116925/2009

-against-

Decision and Order

THE NEW YORK CITY COUNCIL,

Respondent.

-----X
JOAN B. LOBIS, J.S.C.:

In this Article 78 proceeding, petitioner claims that a determination by her former employer, The New York City Council (“Council”), that petitioner was not entitled to cost-of-living adjustments, seven days of jury duty pay, accruals of two days of annual and one day of sick leave for June 2009, and six paid holidays, while petitioner was on leave at the end of her career, was arbitrary and capricious and an abuse of discretion. Petitioner also contends that petitioner improperly charged sick time against her annual leave time, resulting in petitioner’s loss of a half day of annual leave.

The Council moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor dismissing the petition. The petitioner cross-moves, pursuant to CPLR 3212, for an order granting summary judgment in her favor on the petition.

It is undisputed that petitioner was employed as a fiscal officer for the Council from 1993 until 2009, and was employed by the City of New York for 35 years. The record reflects that petitioner took sick time on June 8, 2009, for a medical appointment and returned to work the next day, June 9, 2009, which was the last day that she worked in the Council’s office. Petitioner did

not then resign, however, and did not begin drawing retirement benefits from the New York City Retirement System (NYCERS) until November 2009. Instead, petitioner was recorded on the Council payroll system as on “active” leave status.¹

Petitioner testified that before June 9, 2009, she informed Council payroll manager, Keavy Ann Gleason, and another Council employee, that she would be going on jury duty, as petitioner had earlier that year postponed serving to complete Council work. Thereafter, commencing on June 10, 2009, petitioner took a few days of annual leave and then served on jury duty for seven working days. There is no dispute that soon after her jury duty service ended, petitioner submitted proof of her service to the Council.

The Council did not afford petitioner jury duty leave, but, instead, on June 10, 2009, began drawing down petitioner’s accrued annual/vacation leave. After the Council deemed that petitioner had exhausted all of her accrued annual leave, it began to pay her for part of the sick time that she had accrued over the many years, even though she was not sick. The testimony of some Council employees reveals that, as of June 10, 2009, they considered petitioner on what Council has conceded is an informal status, coined “terminal leave” (Kim affirmation, ¶ 17), wherein employees, at the end of their career with the Council, take off previously accrued leave time, and then do not return. While out on leave, petitioner received health benefits in the same manner as other Council employees.

¹ Margaret Toro, the Council’s assistant director of the administrative services, testified that the information reflected on the payroll system computer meant that an employee was generating a paycheck.

In August 2009, while petitioner was taking annual leave, the Council gave out retroactive salary adjustments, that were cost-of-living adjustments (COLAs). While the Council gave almost every eligible full-time staff member the COLAs,² it excluded petitioner, and also did not credit her with annual and sick leave accruals for June 2009, when she was on jury duty, or with government holidays while she was on leave. Petitioner testified that she returned to the office once, in October 2009, to hand deliver her retirement papers. As of November 11, 2009, petitioner was transferred onto NYCERS and began drawing NYCERS retirement checks.

Before handing in her retirement papers, petitioner sought payment of the retroactive COLAs and the other benefits from the Council. By letter dated August 24, 2009, the Council notified petitioner that her requests were denied. This proceeding followed with petitioner's filing of a verified petition on December 2, 2009. Respondent interposed a verified answer dated January 15, 2010.

The proceeding was the subject of a previous decision, dated May 24, 2010 (index No. 116925/09, Diamond, J.), familiarity with which is assumed. In brief, in that decision, the Court determined that Council had provided no evidence that petitioner, who was out on leave from June 9, 2009 to November 10, 2009, had been relegated to an employment status of "terminal leave." The Court opined that if petitioner had been out on a paid leave of absence, she would be entitled to the same benefits and retroactive pay increases as other employees with the same status. If, however, petitioner had been assigned to a discrete employment status for employees that had

² Of 230 Council central staff members, 30 did not receive the COLAs. Two were deemed not eligible because they started work after the February 2009 cut-off date, eighteen were hourly paid interns, eight were part-time high school students, and petitioner and another individual on leave were not granted the retroactive adjustments.

ceased working and were drawing down accrued leave, the respondent could reasonably have determined that petitioner was not entitled to the same benefits as active employees on paid leave. To resolve this issue, the Court ordered an evidentiary trial (CPLR 7804 [h]), to determine the petitioner's job status during the June through November 2009 period. Thereafter, the parties engaged in discovery, which included depositions of petitioner and certain employees of the respondent.³ On August 29, 2013, the petitioner filed a note of issue. These motions followed.

Petitioner alleges that the Council's determination denying her the retroactive COLAs and other employment benefits was arbitrary and capricious and an abuse of discretion, as petitioner was out on earned annual leave and the City of New York, Office of Payroll Administration, implementation criteria included petitioner as among those eligible for the COLAs. In moving to dismiss, the Council argues that the implementation criteria document expressly excludes the Council, that the granting of COLAs was discretionary, and that the reason for its decision not to pay petitioner the COLAs was that she was not actually working for the Council when they were announced and paid, but had left and was drawing down accrued leave balances. The Council asserts that the use of accrued time in this manner, or "terminal leave," confers upon an individual a status different from that of a working employee, as demonstrated by petitioner's failure to submit medical documentation for her sick time or to obtain supervisor approval to take annual leave.

³ In the May 24, 2010 decision, the Court stated that respondent's argument that the retroactive pay increase did not apply to employees on leave of absence was unpersuasive, as the argument was based on a City of New York, Office of Payroll Administration memorandum that only excluded employees on unpaid leave. Here, respondent maintains that this memorandum does not apply to the Council.

In opposition, and in moving on the petitioner, petitioner contends that the Council's ground for not paying the COLAs, or other benefits, shifts, and has included that petitioner was retired or a former employee before the time of the COLA distribution, and also that she was out on terminal leave. Petitioner contends that because, as demonstrated by the Council's records, she was in active, paid leave status, and had neither retired nor resigned,⁵ the Council's determination that she was not entitled to earned retroactive COLAs was arbitrary and capricious and an abuse of discretion.

The Council has a document entitled "New York City Council Leave Regulations" (the Leave Regulations), which has been submitted by both parties. The Leave Regulations address employee annual and sick leave and jury duty, and use the word "entitled" when describing the annual and sick leave benefits accorded employees. Petitioner signed an acknowledgment of receipt of this document.

As a threshold issue, the parties dispute the CPLR Article 78 standard to be employed. Petitioner cross-moved pursuant to CPLR 7803(3), but the Council contends that petitioner seeks relief in the nature of mandamus to compel (*see* CPLR 7803 [1] [addressing the question of "whether the body or officer failed to perform a duty enjoined upon it by law"]). Review of the record demonstrates that the gravamen of petitioner's claim is a challenge to the Council's determination denying her the COLAs, and other leave benefits, as arbitrary and capricious and an abuse of discretion (*see* CPLR 7803 [3]).

⁵ Toro testified that an employee cannot retire while on the payroll, and that petitioner did not retire until November 11, 2009, and that petitioner did not resign because she retired.

In an Article 78 proceeding, the Court's review is limited to a determination as to whether the Council's decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). "The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] [internal quotation marks and citation omitted]). An Article 78 proceeding is a special proceeding, and if no triable fact issues exist, then, like a summary judgment motion, it may be summarily determined upon the submissions, and judgment granted for the prevailing party (CPLR §§ 409 [b], 7801, 7804 [a], [h]; *Matter of York v McGuire*, 99 AD2d 1023, 1024 [1st Dept], *aff'd* 63 NY2d 760 [1984]).⁴

The record demonstrates that, after June 9, 2009, petitioner took a few annual leave days, went on jury duty, and then took additional accrued annual leave owed to her by the Council. The Council has conceded that there is no official discrete status of "terminal leave," nor is this term defined in any law or Council rule or regulation submitted. In fact, through the time when the COLAs were announced and paid in August 2009, the record is devoid of any regulation, rule or other writing that would differentiate petitioner's status from that of any other employee on

⁴ The parties engaged in extensive discovery and now seek adjudication of this matter at the culmination of disclosure. It is unnecessary to address Council's argument that petitioner's summary judgment motion is untimely. Even an untimely cross motion may be considered if, as here, it involves issues relating to the timely made motion (*Brill & Meisel v Brown*, 113 AD3d 435, 435 [1st Dept 2014] [cross motion concerning same claims as opponent's timely motion properly considered]).

annual leave or jury duty, or permit respondent to define an individual out on annual leave or jury duty service as no longer an employee, or as having ceased service.⁶ While it is undisputed that petitioner was not working while serving jury duty and on annual leave, the record does not indicate that this, generally, also would not be true of other Council employees on vacation or serving jury duty.

Furthermore, there is no dispute that the COLAs were retroactive salary adjustments, and not merit based, or that they were awarded and given to Council central staff working on February 28, 2009, during which time petitioner worked. Of the staff that met the February 28, 2009 cut off, there is also no dispute that, with the exception of petitioner and one other employee, the COLAs were announced and paid to central staff on the Council payroll, who were not high school students or hourly interns, regardless of whether or not the individual was then out on annual leave.⁷ Petitioner was on annual leave at this time, had not resigned or retired, and was being paid by the Council. Under such circumstances, Council's decision to deem petitioner no longer an employee, and its rationale for treating petitioner differently from others on annual leave, lacks record support.

Even assuming the existence of an informal status of terminal leave, the result does not change. Nothing in the record demonstrates that employees were notified that the use of annual

⁶ The Council does not lay a foundation for the admissibility of the document that it states is an exit interview. In any event, that document appears to indicate that petitioner would resign in the future. The luncheon flyer submitted by the Council is inadmissible hearsay.

⁷ The record does not make clear whether the other employee who was also denied the COLAs had resigned or not. Petitioner's supervisor testified that no employee that took vacation in July was *not* paid the COLA because he or she was on vacation.

leave benefit entitlements would in any way alter their employment status, or serve to deprive them of employment status or benefits afforded to Council employees. Nothing in the record demonstrates that employees were notified that taking annual leave at a specific point in their career would cause a change in their employment status or benefits, or make any difference. The Leave Regulations do not demonstrate support for this, as nothing in them deems an individual using leave benefit entitlements to be no longer employed or no longer an “active” employee, based on when the employee uses annual leave time. Employment status and established benefits are an integral part of the agreement between employee and employer. The Leave Regulations provide the agreement terms, and the Council’s contention that there also exists an unwritten policy or practice that modifies employment status, compensation and benefit entitlements, but that is not mentioned in the regulations, or, apparently, otherwise communicated to employees, does not comport with basic contract law principles.⁸ Consequently, the Council’s determination is also affected by an error of law.

While the Council notes that petitioner did not seek her supervisor’s approval for taking annual leave during summer 2009, this was not the ground upon which respondent denied the COLAs (*Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 NY2d 588, 593 [1982] [Article 78 review limited to the agency’s ground(s) for the determination]). Furthermore, there is no dispute that the Council knew that petitioner was planning to take the leave.⁹

⁸ Had petitioner gone out on jury duty and taken annual leave days, and then returned in late-August, or even called in and quit then, she would have been afforded the adjustments. With its actions, the Council devalued petitioner’s employment terms without notice to her.

⁹ The Council knowingly allowed petitioner to take annual leave and paid out the COLAs while she was on annual leave.

There is also no dispute that the Council had to afford petitioner this leave time at some point in her career, and the record evidence does not indicate a rational basis for the Council's asserted determination that using annual leave at the end of a career is synonymous with ceasing employment. Such a practice would adversely impact older workers that seek to use accumulated annual leave time prior to retirement. Under the circumstances here, petitioner should have been treated as any other employee on annual leave, including with respect to adjustments and benefits, especially as it is undisputed that the COLAs were not for prospective work, but were retroactive, and, consequently, already earned.¹⁰ For these reasons, the Council's determination that petitioner was not entitled to the COLAs is annulled.

Concerning the other benefit payments that petitioner seeks, which Council also denied to her, in support of its motion, the Council provides Toro's averment that a "former employee" who is on terminal leave does not get paid for days served on jury duty "pursuant to Council practice," as the Council's jury duty policy only applies to "active Council employees." No document demonstrating such a practice has been submitted, and Toro's assertion of a practice is conclusory. Toro's assertion also ignores that the record reflects that petitioner notified the Council of her impending jury duty service *prior* to going out on any leave, when, even under the Council's asserted definition, petitioner was a working or active employee entitled to the benefit.

¹⁰ Toro testified that she put petitioner's name in a report listing those who were eligible for the COLAs because petitioner was employed during the period covered by the retroactive increases, but that her name must have been taken off the list. While respondent states that the COLAs were approved by the Council's Speaker, the evidence submitted does not demonstrate that the Speaker changed the list, or was informed that petitioner was to be denied the adjustments, or made this determination as to petitioner, but merely that she approved the COLAs that were distributed, and that Toro believed that she had the discretion to determine whether an employee was eligible. Toro's supplemental affidavit statement that it was the Council's practice not to give COLAs to employees on terminal leave is discounted as conclusory because it lacks facts from which an inference may be drawn that this was an established practice.

In fact, as the Council was then made aware that petitioner was going on jury duty, the record does not reveal a rational basis for the Council's choice of June 10, 2009, as petitioner's work end date. "An administrative agency acts arbitrarily and capriciously when it fails to conform to its own rules and regulations" (*Matter of Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO v State of New York*, 229 AD2d 286, 291 [3d Dept] [internal quotation marks and citation omitted], *lv denied* 90 NY2d 807 [1997]; *Matter of Frick v Bahou*, 56 NY2d 777, 778 [1982]). There is nothing in the Leave Regulations that changes an employee's entitlement to jury duty pay due to terminal leave.¹¹

To the extent that respondent argues that petitioner did not follow the Leave Regulations precisely, it does not demonstrate that this was the Council's ground for denying jury leave pay.¹² Therefore, petitioner is entitled to be paid for the seven days that she served on jury duty, as well as for the accruals of time that she seeks for her Council service in June 2009, and for Council holidays that fell during the period of time that petitioner was using annual leave.¹³

¹¹ Camille Francis, the Council's deputy director of related management, testified that there is no Council rule or regulation that jury duty would not be paid during terminal leave, but that she viewed something from the City of New York that stated otherwise. However, Francis does not specify what it was that she viewed and no copy of it is provided in the record as proof, when obviously a copy would be available to the Council (*see Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Commn.*, 18 NY3d 329, 334 [2011] ("[a]bsent a predicate in the proof to be found in the record, [an] unsupported determination . . . must . . . be set aside as without rational basis and wholly arbitrary" [internal quotation marks and citation omitted])). Furthermore, Francis testified that if there had been a rule or policy against payment of jury duty under petitioner's circumstances, that it would *not* have been announced to the staff at the time.

¹² Petitioner's supervisor testified that he guessed that he made the decision not to afford petitioner the jury duty pay because she was retired and the jury duty came after her retirement date.

¹³ Keavy Ann Gleason testified that it is the Council's unwritten policy that after an employee's last day in office, the employee no longer accrued vacation days while still on the payroll. As discussed, however, there was no rational basis for respondent to choose June 9, 2009 as petitioner's last work day. As petitioner seeks only two days of vacation and one half of a sick day for June 2009 accruals, she is limited to this recovery.

Petitioner also seeks to be paid for holidays during the time that she was afforded extended sick leave time. In support, petitioner provides what she states are her former supervisor's comments that petitioner was entitled to such payments. These statements, apparently made after that supervisor's retirement from the Council, are inadmissible hearsay. In addition, the emails that petitioner submits are not sworn, or from Council employees, and therefore are inadequate to demonstrate Council practices. Toro testified that, prior to retirement or leaving City service, an employee with ten years of service is accorded the use of a portion of her accrued sick time without being sick,¹⁴ but also averred that, since 2000, the Council's practice has been not to pay holidays to employees using time in this manner. In other words, the time is applied five days a week, until the allotted portion of it is used, without regard to holidays or illness. There is no indication that petitioner was singled out as to the benefit's application and, unlike annual leave days, to which petitioner was entitled, the Leave Regulations do not provide for the use of sick time in the manner afforded here, or indicate how such time was to be applied against holidays. Therefore, the Council's motion to dismiss this petition claim is granted.

Also granted is the Council's motion to dismiss petitioner's claim that she is owed \$301.00 because respondent miscalculated a sick day and charged it against annual leave. Furthermore, petitioner demonstrates no statutory or contractual entitlement to attorney's fees, but, as the prevailing party, is entitled to costs and disbursements.

Accordingly, it is hereby

¹⁴ This leave allowance, of taking sick leave in such a manner, affords employees a more lenient and, essentially, a different benefit from that which is provided to them in the Leave Regulations concerning sick leave.


ORDERED that respondent's motion to dismiss the petition is granted to the extent that the petition asserts a claim for payment for June 8, 2009, and holiday pay after August 2009 and is otherwise denied; and it is further

ORDERED that petitioner's cross motion is granted to the extent that petitioner seeks annulment of respondent's determination not to grant petitioner two four-percent cost-of-living adjustments; pay for June 2009 jury duty service and annual leave and sick time accruals for June 2009; pay for the July 4, 2009 holiday; and interest and statutory costs and disbursements, and is otherwise denied; and it is further

ORDERED that within 30 days of service of a copy of this order with notice of entry the parties shall Settle Judgment, including providing appropriate calculations with respect to the recovery, returnable to the Order Department, Room 119A, 60 Centre Street; such Department shall refer this matter to this Part upon full submission of the parties' papers.

Dated: *May* 13, 2014

ENTER:



JOAN B. LOBIS, J.S.C.