

Matter of Yu v City of New York
2014 NY Slip Op 31703(U)
July 2, 2014
Supreme Court, New York County
Docket Number: 100143/14
Judge: Jr., Alexander W. Hunter
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

PART 33

INDEX NO. _____
Index Number : 100143/2014
YU, LAURENE
vs
CITY OF NEW YORK
Sequence Number : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision and judgment annexed hereto.

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).

Dated: 7/2/14 _____ *QH* _____

ALEXANDER W. HUNTER, JR. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

-----X
In the Matter of the Application of

LAURENE YU,

Petitioner,

INDEX NO.: 100143/14

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

- against -

CITY OF NEW YORK:
NYC Civil Service Commission, Office of Administrative
Trials and Hearings (OATH), NYC Administration for
Children Services (ACS) Division of Administration,
ACS, Laura Postiglione Employment Law, ACS,
Susan Hochberg,

Respondents.

-----X
ALEXANDER W. HUNTER, JR. J.:

This article 78 proceeding was commenced by self-represented petitioner, Laurene Yu, seeking an annulment of a determination dated December 9, 2013, by the New York City Civil Service Commission (CSC) sustaining the original determination of a 30-day suspension without pay (the CSC Determination), and further seeking a return of all monies and time lost from her employment with respondent NYC Administration of Children Services (ACS). Respondent opposes the application and cross-moves to dismiss the petition.

Background

In 2008, Yu was hired by ACS as a graphic artist, level 1, through the New York City Civil Service system. In 2010, Yu was assigned to report to Laura Postiglione, a marketing director at ACS. Throughout her tenure, Yu filed a number of work grievances, including a

charge of discrimination against Postiglione, approximately one week before the alleged incident.

The Suspension

On May 31, 2012, ACS filed for an emergency suspension after an alleged incident between Yu and her supervisor, Postiglione. Yu was suspended for 10 days without pay. Disciplinary charges were filed against Yu alleging that Yu: “attempted to strike threaten or intimidate a supervisor”; “used disrespectful language toward her supervisor”; “failed to exercise appropriate care of ACS equipment”; “failed to be courteous and considerate to a fellow employee”; “conducted herself in a manner prejudicial to good order and discipline”; and “engaged in conduct detrimental to ACS which would undermine her effectiveness in performing her duties” (*see* Charges and Specifications, petitioner aff, exhibit B). According to the charges, Yu became agitated after Postiglione visited Yu’s workspace and asked Yu to place a design document on a flash drive. Yu questioned Postiglione about receiving credit for her work, became increasingly agitated, lunged toward Postiglione and threw a flash drive at her. Postiglione, allegedly shaken by the incident, reported it immediately. Yu conceded that she threw the flash drive at Postiglione, but disputes the manner, claiming that it was a friendly toss.

The Hearing

On January 28, 2013, pursuant to Civil Service Law § 75, a hearing was held before Administrative Law Judge (ALJ) Kara J. Miller for the Office of Administrative Trials and Hearings (OATH). Yu was represented by counsel at the hearing, opening and closing statements were made, evidence presented and witnesses cross-examined. Likewise, ACS gave opening and closing statements, presented evidence, including the testimony of an employee who was present at the time of the alleged incident.

The ALJ sustained the charges against Yu (*see* report and recommendation dated April 4, 2013, petition, exhibit F at 1). The ALJ, in a 10-page report and recommendation, found, among other things, that Yu “attempted to intimidate her supervisory by lunging and throwing a flash drive at her” and had “used disrespectful language towards her supervisor while complaining about her request to download a document onto a flash drive.” The ALJ recommended that ACS impose a 30-day suspension without pay, but with credit for time served. ACS followed the recommendation.

Pursuant to Civil Service Law § 76, Yu appealed the determination to the CSC. On November 7, 2013, a hearing was held, wherein Yu was again represented by counsel. On December 9, 2013, the CSC held that after a review of the record and testimony given during the departmental hearing, there was “no reversible error” in the ALJ’s report and recommendation and the ACS decision was affirmed. Thereafter, on February 5, 2013, Yu commenced this action seeking to annul the CSC Determination.

Discussion

Civil Service Law § 76 permits a party to file an appeal from a penalty imposed under section 75 of the Civil Service Law by making an application to either the local municipal civil service commission or directly to the court (Civil Service Law § 76 [1]). If an appeal is made to the local civil service commission “[t]he decision of such civil service commission shall be final and conclusive, and not subject to further review in any court” (*id.*, § 76 [3]; *Brannon v Mills*, 89 AD3d 536, 537 [1st Dept 2011] [CSC’s “affirmance of HPD’s determination was “final and conclusive, and not subject to further review in any court”]), unless it is shown that the CSC “acted illegally, unconstitutionally, or in excess of its jurisdiction” (*Matter of New York City*

Dept. of Envtl. Protection v New York City Civ. Serv. Commn., 78 NY2d 318, 323 [1991]; *Uddin v NYC/Human Resources Admin.*, 81 AD3d 656 [2d Dept 2011]; *Matter of Horn v New York City Civ. Serv. Commn.*, 43 AD3d 760, 761 [1st Dept 2007]). For the reasons set forth below, no such showing has been made here.

Here, the CSC Determination cannot be said to be illegal, unconstitutional or in excess of its jurisdiction (*Matter of Centeno v City of New York*, 115 AD3d 537 [1st Dept 2014]). Yu incorrectly petitions using the arbitrary and capricious standard, which would be the standard of review of the underlying determination made by the ALJ, had Yu chosen to appeal to the court rather than the CSC. Yu does, however, claim that the CSC's determination violated New York City Charter § 815 (a), which provides:

“Subject to the civil service law and applicable provisions of this charter, heads of city agencies shall have the following powers and duties essential for the management of their agencies in addition to powers and duties vested in them pursuant to this charter or other applicable law: . . . (12) To make appointments to competitive positions from eligible lists pursuant to subsection one of section sixty-one of the state civil service law, which authority shall not be abridged or modified by local law or in any other manner.”

It is unclear, however, how this provision applies to the CSC Determination, as the affirmation of the ALJ's report and recommendation and penalty imposed by ACS has no effect on the power of the ACS commissioner “[t]o make appointment to competitive positions from eligible lists” (*id.*).

In opposing the cross motion, Yu raises arguments concerning the timeliness of service of the motion papers. The original return date of the article 78 proceeding was March 24, 2014 (*see* notice of petition). Respondent had to serve either an answer or a motion to dismiss the petition within at least five days before the return date of the article 78 proceeding (CPLR 7804 [c], [f]).

On March 18, 2014, respondents mailed a copy of the cross motion to petitioner by overnight mail (aff of service of Ariton Marke, reply aff, exhibit 1). As respondents served its cross motion to dismiss six days before the return date, it is deemed timely.

The only argument petitioner makes in opposition to the cross motion to dismiss is a reliance on two cases, *Cardona v City of N.Y. Civ. Serv. Commn.* (12 Misc 3d 1198[A], 2006 NY Slip Op 51618[U] [Sup Ct, NY County 2006]) and *Matter of Duchinsky v Scopetta* (18 Misc 3d 1141[A], 2008 NY Slip Op 50402[U] [Sup Ct, Kings County 2008]), both of which concern a medical disqualification from employment which were brought after a hearing was held. Here, petitioner appeals not a decision of the disciplinary hearing before an ALJ, but a determination made on appeal from her appeal to the CSC, pursuant to Civil Service Law § 76, which as noted above is final and conclusive absent a showing of illegality, excess of jurisdiction or unconstitutionality. These cases, therefore, do not apply to the circumstances presented herein.

Petitioner also proffers a blanket statement that “CPLR, [a]rticle 57 states, an Appeal as a right taken to Supreme or County Court, as negated by Respondent(s) in their Cross Motion and unverified answers” (aff in opposition). However, petitioner misinterprets that article, which concerns appeals made to the appellate division, not the supreme court. Specifically, it reads “[a]n appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court . . .” (CPLR 5701 *et seq.*). This provision is, therefore, inapplicable.

There is nothing in the record to reflect that the CSC Determination was illegal, unconstitutional or in excess of its jurisdiction (*Matter of Centeno v City of New York*, 115 AD3d at 538). As such, the cross motion to dismiss is granted.

Conclusion

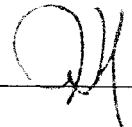
Accordingly, it is

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

This constitutes the decision and judgment of this court.

Dated: July 2, 2014

ENTER:



J.S.C.

ALEXANDER W. HUNTER, JR.

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).