Matter of Roberts v New York City Dept. of Parks & Recreation
2014 NY Slip Op 33621(U)
September 30, 2014
Supreme Court, New York County
Docket Number: 100067/2014
Judge: Lillian Roberts

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10/3/14
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100067/2014
ROBERTS, LILLIAN
vs
NYC DEPT. PARKS & RECREATION
Sequence Number : 001
ARTICLE 78

PART _____

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

is decided in accordance with the annexed decision.

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

FILED
OCT 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
OCT 03 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 9/30/14

CK
_____, 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 55

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In the Matter of the Application of

LILLIAN ROBERTS, Executive Director of DISTRICT COUNCIL 37, AFSCME, AFL-CIO, JOE PULEO, President of LOCAL 983, DISTRICT COUNCIL 37, AFSCME, AFL-CIO and PATRICIA DAVIS,

Petitioners,

Index No. 100067/14

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

DECISION/ORDER

-against-

THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Respondent.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for :_____

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioners bring the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") challenging a determination made by respondent New York City Department of Parks and Recreation ("DPR") modifying petitioner's employment status. For the reasons set forth more fully below, the petition is denied.

The relevant facts are as follows. Petitioner Patricia Davis began her employment with DPR on June 11, 1998 as a City Seasonal Aide ("CSA"). CSAs are classified as non-competitive

positions and are used by City agencies for jobs that typically are performed on a seasonal basis. Under the CSA title, seasonal employment is defined as employment for a limited duration, not to exceed six months in a specific seasonal assignment and may be continued beyond a six-month period if there is a continuing need and available funding. A CSA is assigned to work a particular program by a City agency and when the program ends, the individual CSA's employment ends but the CSA may be subsequently re-employed in another program. Under the terms of the collective bargaining agreement ("CBA") between the City and petitioner District Council 37, AFSCME, AFL-CIO ("DC 37") relating to CSAs, any CSA who has completed a season satisfactorily will then have preference for rehiring in the season that follows.

On July 1, 1998, Battery Park City Authority ("BPCA") entered into an agreement with DPR pursuant to which BPCA would provide funding for temporary CSA assignments in Battery Park City and DPR would provide CSA personnel to work in and around the park areas of Battery Park City. In 2001, DPR's Urban Park Services ("UPS") assigned petitioner to Battery Park City as a CSA on a six-month assignment to a grant line that was funded by BPCA, which was renewed every other six-month season until 2006. In early 2007, petitioner briefly participated in a jobs training program as opposed to working as a CSA. From in or around May 2007 until March 2009, petitioner returned to work in Battery Park City as a CSA continuing to work on seasonal assignments that lasted approximately six months at a time. On June 9, 2009, DPR and BPCA entered into an agreement whereby BPCA agreed to provide year-round funding for two CSAs during the 2009 calendar year. Subsequently, BPCA agreed to provide year-round funding for six additional CSAs during 2010. The year-round CSAs in Battery Park City are on twelve-month assignments as opposed to the typical six-month assignments for other CSAs,

which are renewable the following year by DPR based upon available funding.

In 2009, UPS assigned petitioner to one of the two newly created year-round CSA assignments in Battery Park City, which was renewed each year until 2013. On or about June 15, 2013, petitioner worked the night shift at the Battery Park City Front Desk (the "Front Desk"). At approximately 3:15 p.m. on that date, after petitioner's shift was over, Deshay Crabb, BPCA Facilities Manager, was notified by the Front Desk officer that a cell phone was reported missing. Thereafter, Mr. Crabb reviewed the camera footage from the security camera system installed at the Front Desk which revealed that the cell phone at issue went missing at or around 12:30 a.m. that morning and that petitioner had removed the cell phone from the Front Desk. The next day, Mr. Crabb spoke with petitioner to inquire whether she had removed the cell phone from the Front Desk and placed it somewhere else. Mr. Crabb affirms that petitioner responded that she "did not remember [whether] she removed the phone and...that sometimes she sleepwalks and [does not] remember." As a result of the incident, petitioner's employment was terminated by DPR on July 21, 2013.

As a CSA who had completed more than one season and had worked over ninety cumulative days in a seasonal capacity, petitioner had the option to invoke a permissive appeal process under the CBA, which allowed for a review hearing of the termination decision ("Seasonal Review"). On July 29, 2013, petitioner appealed her termination via a request submitted by DC 37 for a Seasonal Review. On August 14, 2013, petitioner's Seasonal Review was held with Fabio Arceyut, Labor Relations Analyst at DPR and Tom Testa, petitioner's representative from DC 37. Mr. Arceyut has affirmed that at the Seasonal Review, petitioner stated that she did not steal the cell phone at issue but that she could not be sure that she did not

take it because she sometimes falls asleep and sleepwalks during her shift. At the completion of the Seasonal Review, Mr. Arceyut reviewed the security camera footage and found that it did not conclusively establish that petitioner stole the cell phone at issue. However, he was concerned about petitioner's admission that she occasionally fell asleep on the job and sleepwalked during her shift. Thus, he modified her termination and placed her on the seniority call-back list for the 2014 CSA hiring list. Respondent asserts that at some point prior to September 25, 2013, Shamese Deveaux, a CSA in Battery Park City, was placed in the open BPCA-funded year-round assignment that had formerly been held by petitioner.

After DC 37 objected to Mr. Arceyut's determination, on or about September 25, 2013, Mr. Arceyut sent an e-mail to DC 37 explaining that, based on the Seasonal Review, petitioner was being placed on the CSA seasonal seniority hiring list for the 2014 season and that the BPCA-funded year-round CSA assignment that petitioner had prior to her termination was no longer available. On or about January 15, 2014, petitioner filed the instant Article 78 proceeding challenging DPR's determination and seeking reinstatement to her former position as a year-round CSA in Battery Park City. On or about June 2, 2014, petitioner was returned to work as a CSA and was assigned to perform seasonal work at Lasker Pool in Manhattan.

As an initial matter, it is unclear to the court whether petitioner's former position is currently filled or has been eliminated due to lack of funding. However, if it is currently filled, the petition must be dismissed on the ground that petitioners have failed to join a necessary party. Pursuant to CPLR § 1001(a), "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Here, if petitioner's former

position is currently held by Ms. Deveaux, she should have been joined as a necessary party to this proceeding as she would be inequitably affected by a judgment in this action. Ms. Deveaux was placed in the year-round BPCA-funded position at issue after petitioner was terminated. If petitioners' petition was decided in their favor, Ms. Deveaux would be removed from her position. Courts have consistently held that replacement employees, like Ms. Deveaux, are necessary parties where, as here, the relief requested runs against his or her rights. *See Mt. Pleasant Cottage School Union Free School District v. Sobol*, 163 A.D.2d 715, 716 (3d Dept 1990)("If petitioner were successful in this proceeding, [the replacement employee] would undoubtedly lose his recently acquired post as [such he is] a person 'who might be inequitably affected by a judgment in the [proceeding]' [and] a necessary party.", *aff'd*, 78 N.Y.2d 935 (1991); *see also Matter of Ogbunugafor v. New York State Educ. Dept.*, 279 A.D.2d 738, 739 (3d Dept 2001)(petitioner's failure to join "the person appointed to the social studies teaching position who would have been displaced if petitioner prevailed and were appointed - or his successor - warranted dismissal of her petition in its entirety for failure to join necessary parties"); *see also Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO v. Pataki*, 259 A.D.2d 826, 828 (3d Dept 1999)("[a]s these [replacement] employees stand to lose their jobs, they fall squarely within the definition of a necessary party.")

Even if petitioner had timely joined Ms. Deveaux to this proceeding, the petition would still be denied on the ground that respondent's determination was made on a rational basis. On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary

and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); *see Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "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 facts." *Pell,* 34 N.Y.2d at 231 (internal citations omitted).

In the instant proceeding, this court finds that respondent's determination to modify petitioner's termination and place her on the CSA seasonal seniority hiring list for the 2014 season was made on a rational basis. It is undisputed that petitioner was a non-competitive employee and her position was not protected by the Civil Service Law. *See Roberts v. City of New York*, 21 A.D.3d 329 (1st Dept 2005)(finding that employees in the noncompetitive class are not protected by the Civil Service Law). As a non-competitive employee without civil service rights, petitioner's employment was "at will" and thus, she could be terminated at any time, absent bad faith. *See Matter of Kaefer v. New York State Off. of Parks, Recreation & Historical Preserv.*, 101 A.D.3d 1007, 1008 (2d Dept 2012)("absent a constitutionally impermissible purpose, under New York law, an employer may terminate an at-will employee at any time, for any reason, or for no reason at all"); *see also Tyson v. Hess*, 109 A.D.2d 1068, 1069-70 (4th Dept 1985)("Public employees in the noncompetitive class...are protected from bad-faith discharge but they remain 'at-will' employees subject to dismissal upon a proper exercise of the appointing

authority's discretion.") Here, Mr. Arceyut rationally modified petitioner's termination and placed her on the CSA seasonal seniority hiring list for the 2014 season after considering the testimony provided by petitioner and the security camera footage provided by DPR in support of the allegation that petitioner stole the cell phone. After reviewing such evidence, Mr. Arceyut found that the video footage did not conclusively establish that petitioner stole the cell phone. However, he was concerned about petitioner's alleged admission at the Seasonal Review that she occasionally fell asleep and sleepwalked during her shift and thus, rationally modified her termination accordingly. Indeed, it was within Mr. Arceyut's discretion, as the reviewing officer, to either affirm, modify or rescind the termination decision pursuant to the CBA.

Petitioner's assertion that she never admitted that she fell asleep or sleepwalked during her shift is immaterial. Although DPR hired petitioner for fifteen consecutive seasons as a CSA, petitioner, as a non-competitive seasonal employee had no guarantee of future employment after the end of each season, including the time petitioner spent assigned to the twelve-month grant line funded by BPCA in Battery Park City, where she continued to be a non-competitive seasonal employee. Thus, even if petitioner had not admitted to falling asleep or sleepwalking during her shift, respondent's determination would not have been arbitrary and capricious as petitioner's employment could be terminated or modified at-will absent bad faith or a constitutionally impermissible purpose.

Accordingly, the petition is denied in its entirety. This constitutes the decision and order of the court.

Dated: 9/30/14

Enter: _____
J.S.C.