

Matter of Britt v City of New York

2014 NY Slip Op 33931(U)

April 10, 2014

Supreme Court, New York County

Docket Number: 105655/11

Judge: Jr., Alexander W. Hunter

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

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In the Matter of the Application of
Keenan Britt,

Index No.: 105655/11

Petitioner,

Decision and Judgment

-against-

City of New York, New York City Department of
Education, Dennis Walcott, Chancellor of New York
City Department of Education,

Respondents.

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HON. ALEXANDER W. HUNTER, JR.

The application of petitioner for an order pursuant to CPLR Article 78, reversing the determination of respondents that terminated the employment of petitioner, reinstating petitioner to his permanent civil service title of computer aide, expunging any derogatory information in the personnel file of petitioner, and further ordering backpay, interest, and any benefits and emoluments lost, is granted.

On January 24, 2013, the Appellate Division, First Department reversed, on the law, the January 19, 2012 judgment of this court, which denied the application of petitioner and dismissed the Article 78 proceeding. Upon remittal, this court conducted a limited trial pursuant to CPLR 7804(b) to determine whether petitioner voluntarily resigned his permanent civil service title of computer aide.

Petitioner was employed by respondent New York City Department of Education ("DOE") from March 2000 to February 2, 2011. Petitioner worked in the provisional title of computer science technician ("CST") at Bronx Coalition Community High School ("Bronx Coalition") from 2006 to 2009. In 2008, petitioner was permanently appointed to the title of computer aide and passed an open examination for the title of CST. In 2009, Bronx Coalition was phased out and petitioner was terminated from his provisional title. Petitioner, however, maintained permanent rights to his former civil service title of computer aide.

By letter dated October 13, 2009, petitioner was directed to report to Nancy Grillo, director of the administrative employees unit of the DOE, to receive his next assignment. From October 14, 2009 until November 24, 2009, petitioner reported to Ms. Grillo. During this time period, petitioner was notified of a vacancy in the title of CST with the New York City Department of Health and Mental Hygiene. However, petitioner was not interested in transferring agencies. Petitioner was informed that as a result of not attending an interview with the New York City Department of Health and Mental Hygiene, he was ineligible for further

certification in and appointment to the title of CST, as of November 2, 2009. Petitioner was not reinstated to the civil service list for the title of CST until December 31, 2009.

During the same time period, Banana Kelly High School ("Banana Kelly") also had a vacancy in the title of CST. Petitioner admitted that he conducted a "walk-through" with the principal, teachers, and staff of Banana Kelly. Petitioner did not consider the "walk-through" to be an interview. He further testified that he did not want the position due to the low salary.

On November 24, 2009, Ms. Grillo directed petitioner to report to Banana Kelly by the following day. Petitioner inquired of Ms. Grillo whether he had any control or say in his reassignment, to which she replied in the negative. Petitioner was given a canvass letter informing him of the vacancy (the "call letter"). The call letter stated, "THIS IS NOT A NOTICE OF APPOINTMENT....If you do not reply to this notice, the NYC Department of Citywide Personnel Services will be so advised and your name will be removed from the eligible list." Petitioner maintained that he never responded in writing to the call letter and that he neither received nor accepted any offer of appointment for the vacant title. He further asserted that he was neither advised orally nor in writing that he would be abdicating or waiving his rights to the permanent civil service title of computer aide.

As directed by Ms. Grillo, petitioner reported to Banana Kelly on November 25, 2009. Approximately one year later, Ms. Grillo notified petitioner that his employment status was probationary and that his probationary period had been extended by the number of days he was absent. On February 1, 2011, the principal at Banana Kelly informed petitioner that his probationary period had been extended again for an additional six months. Petitioner was encouraged by his union representative to sign the extension of probation with the notation "forced to sign under duress." Petitioner was terminated the following day.

Nora Lee Montemarano testified on behalf of petitioner. Ms. Montemarano is a former DOE employee of 24 years. She was the principal of an information technology high school located in Queens and the director of technology for District 79, Alternative, Adult & Continuing Education, Schools & Programs for the DOE. She retired in 2009. Ms. Montemarano was familiar with computer technology titles and levels. She testified that in the 1960s a person with the title of CST worked on computer hardware, while a person with the title of computer aide worked on computer programming with punch cards. With the passage of time and improvements in technology, the computer aide and CST titles became one in the same with respect to duties and pay.

Ms. Montemarano met petitioner in 1998, while he was a student. Recognizing his talent, Ms. Montemarano hired petitioner in March of 2000. She helped petitioner obtain his first job at Unity High School as a provisional computer aide. She maintained a professional relationship with petitioner over the years. Ms. Montemarano encouraged petitioner to accept the reassignment to Banana Kelly, as he had reversion rights to the title of computer aide.

Ms. Grillo testified that after petitioner was excessed, she searched for a computer aide position for petitioner. She was unsuccessful, as the title is obsolete. However, Ms. Grillo located a vacant CST position at Banana Kelly. She presented a call letter for the title of CST to petitioner on November 24, 2009. She testified that she explained to petitioner that by accepting the vacant position he was relinquishing his permanent rights to the title of computer aide. She asserted that the terms and conditions of employment were reflected in handwritten changes to the call letter. However, a copy of the revised call letter was neither produced nor admitted into evidence.

Rule 4.5 of the Classified Civil Rules provides in pertinent part that "[w]hen a permanent employee is promoted or transferred to a position in which he is required to serve a probationary term, the position thus vacated by him shall not be filled, except on a temporary basis, during such probationary term...If the conduct or performance of the probationer is not satisfactory, he shall be restored to his former position at the end of the probationary term." 4 N.Y.C.R.R. 4.5(e). A transfer is defined as "the change, without further examination, of a permanent employee under the jurisdiction of one appointing authority...to a position in a different title in the same or higher salary grade under the jurisdiction of the same appointing authority." 4 N.Y.C.R.R. 1.2(b)(1).

The court finds the testimony of petitioner to be credible. Despite being ineligible from further certification in the title of CST until December 31, 2009, petitioner was given no choice but to report to Banana Kelly on November 25, 2009. Thus, the court finds that petitioner experienced an involuntary transfer of title, wherein he was required to serve a probationary term. The testimony of Ms. Grillo that petitioner voluntarily resigned the permanent title of computer aide and waived all of his permanent civil service protections is incredible. Accordingly, petitioner is entitled to the benefit of Rule 4.5 of the Classified Civil Rules and he should be reinstated to his prior permanent civil service title of computer aide.

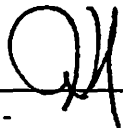
Accordingly, it his hereby

ADJUDGED that the application of petitioner for an order pursuant to CPLR Article 78, reversing the determination of respondents that terminated the employment of petitioner, reinstating petitioner to his permanent civil service title of computer aide, expunging any derogatory information in the personnel file of petitioner, and further ordering the reinstatement, backpay, interest, and any benefits and emoluments lost, is granted.

Dated: April 10, 2014

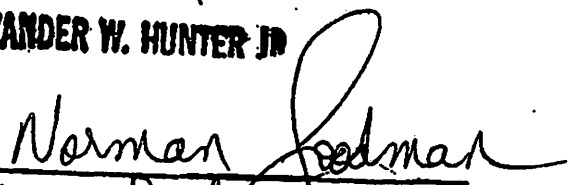
FILED
AUG 12 2014
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR



Norman Feldman