

Wilson v City of New York Police Dept.

2015 NY Slip Op 32038(U)

January 9, 2015

Supreme Court, New York County

Docket Number: 100472/2014

Judge: Joan B. Lobis

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EA
1/14/15
ES

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100472/2014

WILSON, CHRISHAUNA

vs

N.Y.P.D.

Sequence Number : 001

ARTICLE 78

PART _____

INDEX NO. _____
MOTION DATE 9/30/14

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) 1, 2

Answering Affidavits — Exhibits _____ No(s) 3

Replying Affidavits _____ No(s) 4, 5

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION + Order

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

RF = TED
JAN 14 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT CIVIL

FILED

JAN 14 2015

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/9/15

JBA, J.S.C.

- 1. CHECK ONE: 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
NEW YORK COUNTY: IAS PART 6**

-----X
CHRISHAUNA WILSON,

Petitioner,

-against-

Index No. 100472/2014

Decision and Order **FILED**

CITY OF NEW YORK POLICE DEPARTMENT,

Respondent.

JAN 14 2015

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

COUNTY CLERK'S OFFICE
NEW YORK

In this special proceeding, Chrishauna Wilson petitions the Court pursuant to Article 78 of the Civil Practice Law and Rules for an order directing the respondent the City of New York Police Department (NYPD) to, *inter alia*, rescind Ms. Wilson's resignation, reinstate her with the NYPD, and afford her a full hearing to contest the denial of her request for reinstatement. Respondent opposes the petition. For the reasons stated below, the petition is granted.

Ms. Wilson started working at the NYPD as a police communications technician, a competitive civil services title, in April 2006. In October 2010, she suffered a seizure. She had no history of seizures prior to this event. Ms. Wilson continued having seizures over the next three years, and as a result she was absent from work on many occasions. She provided medical documentation of her condition to her supervisors but during each of her three evaluations between September 2010 and March 2012, she received a negative evaluation due to excessive absenteeism.

On August 2, 2012, Ms. Wilson was served with disciplinary charges, which alleged incompetence due to absenteeism. Commencing in December 2012, she was granted "Sick

Leave of Absence without Pay” as a result of her health issues. The leave was extended twice and lasted until December 12, 2013. By letter dated December 13, 2013, the NYPD informed Ms. Wilson that she would be terminated pursuant to Section 73 of the Civil Service Law if she was not physically and mentally fit to return to her position by January 6, 2014.

Petitioner provided a note from her doctor that stated that she was incapacitated from December 2012 until December 2013 but would be able to return to work starting December 16, 2013, with no restrictions. The NYPD scheduled an appointment for Ms. Wilson with the Medical Division, and on December 19, 2013, she had a medical evaluation to evaluate her fitness to return to work. She was found to be unfit for duty due to recent seizures. Ms. Wilson denies that the Medical Division informed her she was unfit, though respondent claims the doctor evaluating her informed her orally. It is uncontested that at no point did Ms. Wilson receive any notice or written explanation of why she was unfit for duty.

A police administrative aide from the NYPD’s Military and Extended Leave Desk called Ms. Wilson on December 26, 2013, to inform her that the Medical Division determined she was not fit for duty. The aide erroneously told Ms. Wilson that her only options were either resignation, which he claimed would require seeking medical clearance within a year to return, or termination because her absence would be considered absence without leave, which he stated would result in disciplinary charges. He further told Ms. Wilson that if she were terminated, she would be required to re-apply for a position if it became available. Ms. Wilson agreed to resign over the phone. The resignation form was not signed and was filled out by the police administrative aide.

Several days later, Ms. Wilson received a phone call from a second police administrative aid, who told her that she had been misinformed that her only options were to resignation or termination. Ms. Wilson was not aware that she could appeal the determination made during the medical evaluation, during which time the NYPD would be required to reinstate her until a determination as to the appeal was made. Ms. Wilson then requested to rescind her resignation but was told it was too late. Ms. Wilson has since called the Military and Extended Leave Desk on several occasions to rescind her resignation or request reinstatement but has been told she could not. She started seeing a new neurologist in early 2014 and as of March 2014 has not had a single seizure.

Ms. Wilson now petitions the Court to order the NYPD to rescind the resignation. Petitioner argues that the NYPD failed to provide her with notice and an opportunity to contest the determination that she is unfit to return to duty. She asserts that this is a violation of Section 72 of the Civil Service Law. She argues that she should have received a hearing pursuant to Section 72.5 of the Civil Service Law, and that she should have been reinstated pending her hearing and final determination. She contends that the resignation form was not valid because she was never informed of her right to contest it, because she was given misinformation, and because she did not sign it. She claims that accepting the resignation was arbitrary and capricious, and, as a result, she should have been reinstated. She also asserts that she should have received a hearing pursuant to Section 75 for disciplinary charges that were on her record at the time of her resignation.

In opposition to the petition, respondent argues that the decision to accept the petitioner's voluntary resignation was not arbitrary and capricious. It claims that the NYPD had

not yet taken any action that required informing the petitioner of any pre or post-termination rights or providing a hearing. It claims that resignation was a complete break in service and that therefore petitioner was no longer an employee who required notice. Respondent contends that employees who are fired for being absent for over a year receive only the protection of Section 73 of the Civil Service Law.

Respondent also argues that the waiver was knowing. It claims that petitioner was fully informed that pursuant to Section 73 of the Civil Service Law she could resign or be terminated and receive reinstatement. The NYPD denies that anyone told Ms. Wilson that if she did not resign she would be brought up on absent without leave charges. It claims that Ms. Wilson resigned due to pending disciplinary action regarding her absenteeism prior to her two year leave of absence. It maintains that petitioner did not need to sign the resignation form. Respondent concedes that New York State Civil Service employees must sign resignations, but argues that New York City employees do not need to sign resignations. It contends there was no mutual mistake when the resignation was signed, and, if there was, the mistake was not substantial.

Respondent claims that there has been no violation of Section 75 of the Civil Service Law. It asserts that the petition has failed to demonstrate that additional relief, in particular reinstatement and back pay, is required by law. Lastly, NYPD argues that it is a non-suable entity, citing Tomlinson v. New York, 2014 N.Y. Slip Op. 31355 (U)(Sup. Ct. Bronx Cnty 2014) and that therefore this case must be dismissed.

In reply, petitioner maintains that Section 72 of the Civil Service Law applies. Petitioner cites to Sheeran v. N.Y. State Dep't. of Transp., 18 N.Y.3d 61 (2011), arguing that the petitioners in the case were similar to Ms. Wilson. In particular, petitioner claims that the Sheeran petitioners were on voluntary leave, both were terminated pursuant to Section 73 of the Civil Service Law for being continuously absent for a year or more, both sought to return to work following the submission of a medical certification attesting to their fitness, and both were denied after being deemed unfit by the employer's physician. In this case, Section 72 applied, even though termination was pursuant to Section 73. In the current matter petitioner claims that even if she were terminated pursuant to Section 73, she would still have rights pursuant to Section 72.

Petitioner asserts that she was misled about her rights because her employment was not subject to automatic expiration as of December 12, 2013, or January 6, 2014. She claims that respondent violated Section 72 of the Civil Service Law by not informing her of her right to a hearing or providing written notice of the reason for the determination. Petitioner contends that respondent cites to no cases where an unsigned resignation or waiver of employee rights was upheld.

In an Article 78 proceeding, the Court reviews agency decisions to determine whether an action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). Where an issue is limited to "pure statutory interpretation," a court is not required to defer to an administrative agency but rather should consider the plain language of the statute. E.g., Dunne v. Kelly, 95 A.D.3d 563, 564 (1st Dep't 2013); see also County of Westchester

v. Bd. of Trustees, 9 N.Y.3d 833, 835-36 (2007) (administrative agency's regulations must not conflict with state statute or that statute's underlying purposes).

The Court first addresses respondent's claim that the NYPD is a non-suable entity. Respondent cites to Tomlinson, a New York Supreme Court tort action in Bronx County where the NYPD was sued for false arrest, false imprisonment, assault, battery, and excessive force. Section 36 of the New York City Charter prohibits suing an agency of New York in "all actions and proceedings for the recovery of penalties for the violation of any law" It does not prohibit petitioners from seeking relief previously obtained by writs of certiorari to review, mandamus, or prohibition, which can be pursued pursuant to Section 7801 of the Civil Practice Law and Rules. The NYPD's reliance on Tomlinson is inapposite. Ms. Wilson is not seeking the recovery for penalties for the violation of any law, and, therefore, dismissal on these grounds is denied.

The Court now turns to Ms. Wilson's claims regarding Section 75 of the Civil Service Law. Any claim regarding petitioner's right to a hearing pursuant to Section 75 of the Civil Service Law is at this point premature. Though she has disciplinary charges pending, there has not yet been a determination or a hearing. Any claims under Section 75 are not yet ripe.

Next, the Court turns to the claim that Section 72 of the Civil Service Law does not apply because Ms. Wilson was on a leave of absence for over a year. Section 72 states that when "in the judgment of an appointing authority an employee is unable to perform the duties of his or her position by reason of a disability . . . the appointing authority may require such employee to

undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction.”

Respondent’s argument that Section 72 of the Civil Service Law does not apply is severely lacking. Respondent cites not a single case or statute that supports the proposition that Section 72 of the Civil Service Law does not apply to employees on a leave of absence for a year or more. Indeed, as petitioner argues, the petitioners in Sheeran both received the procedural safeguards of Section 72 though their terminations resulted from leaves of absence for one year or more. Moreover, the plain language of Section 72(2) states that an employee may make an application for a medical examination “within one year after the date of commencement of such leave of absence, or *thereafter at anytime* until his or her status is terminated.” (emphasis added). The statute gave employees who were not terminated but were absent over a year the same rights as employees absent under a year.

Section 72 of the Civil Service Law sets out the procedural safeguards for civil service employees on voluntary or involuntary leaves of absence. The procedures of the Civil Service Law must be strictly complied with due to the “significant due process implications of the statute [.]” Breen v. Gunn, 137 A.D.2d 685 (2d Dep’t 1988). Section 72.1 of the Civil Service Law requires that when an employee cannot perform his or her duties due a disability, they may be required to undergo a medical examination. Following the examination, if the employee is unfit for duty, he or she may be placed on an involuntary leave of absence. In such cases, the Civil Service Law requires that “the employer provide the employee with written notice.” Sheeran, 18 N.Y.3d at 64.

Under the applicable provisions of Section 72.3 of the Civil Service Law, employees who are certified as not physically fit also have the right to a hearing “to present facts and arguments in support of their positions including medical evidence . . .” Once the hearing is provided, the proposed leave of absence “is held in abeyance pending final determination, unless the employee’s continued presence on the job creates a potential danger.” Sheeran, 18 N.Y.3d at 64. In cases where the involuntary leave was not held in abeyance pending a final determination, the Appellate Division has granted reinstatement with back pay and other employment benefits. See e.g., Breen, 137 A.D.2d at 685. The only exception to this rule, pursuant to Section 72(5) of the Civil Service Law, is if the employer can show that the “employee’s continued presence on the job ‘represents a potential danger to persons or property or would severely interfere with operations.’” Id. at 686, citing Civil Serv. Law. § 72(5).

Because the Civil Service Law requires strict compliance, the threshold question is whether Ms. Wilson had relinquished her rights pursuant to the Civil Service Law by voluntarily resigning without full knowledge of her rights. This situation is reminiscent of Gould v. Board of Education, 81 N.Y.2d 446 (1993), in which a teacher’s resignation was found to be a nullity because she was unaware that she had tenure rights. There, the Court of Appeals held that a “tenured teacher has a protected property interest in her position . . . A teacher may, of course, relinquish her tenured rights in her position voluntarily by resigning” but a “resignation which has been obtained by fraud of which is the result of coercion or duress, however, does not represent a voluntary act and may be nullified.” 81 N.Y.2d at 451. The basis for the decision was the “rule that a person may not knowingly relinquish rights that she does not knowingly possess.” Furthermore, the Court found that as both parties were under a mutual mistake of fact about a

substantial issue when they entered in the agreement, the petitioner's relinquishment of rights was therefore void and subject to rescission. Gould, 81 N.Y.2d at 453 (citing Coffin v. Brooklyn, 116 N.Y. 159 (1889); Schmidt v. Magnetic Head Corp., 97 A.d.2d 151, 159 (2d Dep't 1983)).

In so far as Ms. Wilson tendered her resignation, it seems that, at best, both parties were unaware that Ms. Wilson was guaranteed certain protections by Section 72 of the Civil Service Law. Termination was an option that the NYPD had pursuant to Section 72(4) and Section 73 of the Civil Service Law, which states that an employee who "has been continuously absent from and unable to perform the duties of his position for one year or more by reason of a disability" may be terminated. Following termination, the employee has up to one year after the termination of the disability to apply for a medical examination to certify that they are physically and mentally fit to be reinstated. Id. However, the NYPD did not elect to use this option. Because Ms. Wilson was not terminated prior to her medical examination, she was able to make a request for reinstatement from her leave of absence pursuant to Section 72(2). This prompted the NYPD to schedule, still pursuant to Section 72, a medical examination. The medical examination showed that Ms. Wilson was unfit for duty, and, as a result, she had the right to appeal pursuant to Section 72(3).

Prior to the medical examination and during her initial conversation with an NYPD police administrative aide after the examination, she was never informed that she did not have to resign or be terminated, and that she could request a hearing. Nor was she given written notice explaining why she was unfit. It is clear that Ms. Wilson was incorrectly told that she only could either resign or be terminated, and was incorrectly told that resignation was her best option.

If neither Ms. Wilson nor the police administrative aide she spoke with knew that she had the right to appeal and did not need to resign or be terminated, then it is clear that there was a substantial mutual mistake at the time of the resignation. If, however, the NYPD was aware that she had such rights but deliberately misinformed her, then this can only be described as coercion. In either case, the resignation is voidable and subject to rescission.

Moreover, the resignation itself was not valid pursuant to Section 5.3 of the Civil Service Rules and Regulations, which states that “every resignation shall be in writing.” Ms. Wilson’s resignation was not writing, but, as conceded by respondent, was an oral resignation over telephone. Any acceptance of this resignation or refusal to reinstate would have been arbitrary and capricious considering that her resignation was not in writing, in violation of the Civil Service Rules and Regulation.

If Ms. Wilson had been aware of her rights or if the faulty resignation was not accepted, she could have requested a hearing upon the completion of the medical examination. However, at no point was she provided written notice, nor was she provided an explanation of why she was unfit, nor was she given notice of her rights under this procedure. See Civil Serv. Law. §72. These are not optional procedures, but procedures with which the NYPD must strictly comply. Breen v. Gunn, 137 A.D.2d at 685. The acceptance of her resignation, as well as any determination that she is physically unfit for her position, is arbitrary and capricious in light of the bevy of procedural violations. Had Ms. Wilson received the benefit of the procedural safeguards in Section 72, she could have requested a hearing, at which time she would have been reinstated and her determination held in abeyance until after a hearing. Accordingly, she must be reinstated with full

back pay and benefits, and the determination that she is physically unfit is to be held in abeyance until after a hearing. See Breen, 137 A.D.2d at 685. Accordingly, it is

ORDERED that the petition is granted, with the exception of any claim regarding Section 75 of the Civil Service Law; it is further

ORDERED that Chrishuana Wilson's resignation is null and void, she must be reinstated with full back pay and benefits, and the determination that she is physically unfit is to be held in abeyance until after a hearing.

Dated: January 9, 2015

ENTER:



JOAN B. LOBIS, J.S.C.

FILED

JAN 14 2015

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NEW YORK