

Britt v City of New York
2016 NY Slip Op 32798(U)
June 9, 2016
Supreme Court, New York County
Docket Number: 105655/2011
Judge: Alexander W. Hunter, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 33

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KEENAN C. BRITT,

Petitioner,

Index No.:
105655/2011

-against-

CITY OF NEW YORK, BOARD OF EDUCATION OF
THE CITY SCHOOL DISTRICT OF THE CITY OF
NEW YORK, and CATHLEEN BLACK, in her
official capacity as the Chancellor of the
City School District of the City of New
York,

Respondents,

For an Order and Judgment Pursuant to
Article 78 of the Civil Practice Law and
Rules.

----- X

ALEXANDER W. HUNTER, JR., J.:

In this motion, pursuant to Judiciary Law §§ 753 and 756,
petitioner Keenan C. Britt seeks to hold respondents the City of
New York, the Board of Education of the City School District of
the City of New York (BOE), and Cathleen Black, in her official
capacity as the Chancellor of the City School District of the
City of New York (collectively, respondents), in civil contempt,
for allegedly failing to comply with the order of this court,
dated April 10, 2014. In the alternative, petitioner seeks a
clarification of the order. Respondents oppose the motion and
state that they have complied with the order.

BACKGROUND AND FACTUAL ALLEGATIONS

In March 2000, petitioner was hired to work for the BOE in a provisional capacity.¹ After taking a civil service exam, petitioner was permanently appointed to the position of computer aide, level I, effective November 13, 2007. Shortly thereafter, in pertinent part, while maintaining his permanent status as computer aide, level I, petitioner worked in the provisional capacity as a computer service technician, level II.

On November 25, 2009, petitioner was assigned to a computer service technician, level II, position, located at Banana Kelly High School (Banana Kelly). At the time of the assignment, the BOE considered petitioner to have accepted a permanent position, thereby triggering a probationary period. As stated by the BOE, "[a]t the time of the transaction, by accepting the permanent appointment in a different civil service title in a different line of promotion, Petitioner was deemed to have resigned from his prior permanent appointment in the civil service title of Computer Aide in order to accept the new permanent appointment." Aff of Lawrence Becker, ¶ 9.

Petitioner had passed an open competitive examination for

¹https://www.goer.ny.gov/Labor_Relations/ManagementConfidential/handbook/appointment.cfm, "Provisional appointments may be made to competitive class positions when there are no preferred list or other reemployment or pre-layoff list eligibles, or when fewer than three persons on the eligible lists are available for appointment Provisional appointments are subject to termination when eligible lists are established."

the title of computer service technician, level II. Evidently, accepting an open and competitive position does not provide employees of the City of New York with the same job security provisions under the civil service law as when they are promoted or transferred. Under Rule 4.5 of the Classified Civil Rules (4 NYCRR Part 4), employees who are promoted or transferred, may be restored to their former positions, instead of terminated, if their probationary periods are not satisfactory.²

To explain, in *Matter of Engoren v County of Nassau* (163 AD2d 520, 522 [2d Dept 1990]), the Court found that the civil service employee had no right to be reinstated to her former permanent position when she accepted an original appointment in another department. The Court held that the job security provisions were not applicable to her because she was not "transferred nor promoted" (*id.* at 524) and also noted that she "took an open-competitive examination and not a promotional examination." *Id.* at 523.

In any event, petitioner did not pass his probationary period, and was terminated on February 3, 2011 from the permanent

² 4 NYCRR 4.5 (e) states the following, in pertinent part: "[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 permanent position at the end of this probationary term."

title of computer service technician, level II. Petitioner was not allowed to revert back to his last prior permanent position held of computer aide, level I.

Petitioner then brought an article 78 proceeding, arguing, among other things, that respondents violated their own rules and regulations by not allowing him to revert back to his position of computer aide, level I, after he did not pass probation into a different position.

By order dated April 10, 2014, upon remittal from the Appellate Division, First Department, this court conducted a limited trial and petitioner's application was granted. The court found that, as petitioner had been involuntarily transferred to his last position of computer service technician, level II, he was entitled to the civil service protections under 4 NYCRR 4.5 (e). The court held that petitioner "experienced an involuntary transfer of title, wherein he was required to serve a probationary term . . . [a]ccordingly, petitioner is entitled to the benefit of Rule 4.5 of the Classified Civil Rules (4 NYCRR). . . ." Petitioner's exhibit A, order dated April 10, 2014 at 4.

This court's order stated that the BOE shall "reinstat[e] petitioner to his permanent civil service title of computer aide, expung[e] any derogatory information in the personnel file of petitioner, and further order[] the reinstatement, backpay, interest, and any benefits and emoluments lost" *Id.*

After receiving the court's April 10, 2014 order, in September 2014, petitioner was reinstated to the position of computer aide, level I, with a base salary of \$41,564.

Petitioner's current motion for contempt alleges that he should be restored to a computer aide, level II position, and with a higher salary. This is, in part, due to the years he spent in the position of computer service technician, level II, and the higher salary he allegedly received while in that position.

Among other things, petitioner also believes that he did attain permanent status as a computer aide, level II. In support of this contention, petitioner states that the principal at the school he was working for had requested that petitioner receive a higher salary and appointment.

In addition, petitioner believes that the respondents are not complying with the court's directive to remove any derogatory material from his personnel file. Petitioner claims that he has been assigned to a "clerical" position and that, although he has applied to multiple school-based positions within the BOE, respondents have prevented him from receiving a comparable position to the one he held prior to his involuntary transfer to Banana Kelly. Petitioner alleges that he interviewed for positions and that these interviews "went well." Britt aff, ¶ 16. As a result, he claims that the "human resources office has

prohibited individual schools from hiring me in retaliation for my bringing this Article 78 proceeding." *Id.*, ¶ 19.

In support of its opposition, respondents provide an affidavit from Lawrence Becker (Becker), chief executive officer for labor strategy and human resources of the BOE. According to Becker, on September 28, 2014, petitioner was reinstated to the title of computer aide, level I. This is the same title that petitioner held prior to his 2009 permanent appointment to the title of computer service technician, level II.

According to the BOE, petitioner's current salary is the same salary, with adjustments made for salary increases, that petitioner would have received had he reverted to the computer aide, level I, position on February 3, 2011, after he did not pass probation and was terminated. Moreover, petitioner's claimed higher salary was the salary received while working in title of computer service technician, level II, not in the only permanent position petitioner had secured, that being, computer aide, level I. Petitioner was never appointed to the title of computer aide, level II.

On January 2, 2015, petitioner received a check in the amount of \$123,063.16 for back pay, that included the time period from February 3, 2011 to September 28, 2014. Petitioner also received a check for the interest amount of \$23,258.94. This back pay amount was calculated using the higher base salary that

petitioner would have received as a computer service technician, level II. According to the BOE, petitioner has been reinstated and in actuality, has received back pay in excess of what he is owed. For example, although petitioner had additional employment during the back pay period, this amount was never deducted from the total amount paid.

The BOE further alleges that it has complied with the court's order and that it has not interfered with any of petitioner's employment opportunities. In order to reinstate petitioner to the position of computer aide, the BOE had to create a new position using the computer aide title, as the title is no longer widely used. Becker states that petitioner has been assigned to the BOE's Division of Instruction and Information Technology "as that is one of the few Divisions in the BOE that continues to have a need for individuals in the Computer Aide title . . . Petitioner's assignment is appropriate with his civil service title, level and experience." BOE's exhibit 3, Becker aff, ¶ 17.

Becker writes that the BOE's division of human resources (DHR) is not involved in the selection process for school-based positions within the BOE. The selection process is conducted by a hiring manager at the school. After the hiring manager has selected an applicant, the applicant is sent to the DHR for applicant processing. According to Becker, although petitioner

may have gone on interviews, no hiring managers have attempted to contact Becker or someone at the Office of Personnel Investigations (OPI) for a position at a BOE school.

The BOE also submits the affidavit of Katherine G. Rodi (Rodi), who, as the director of the office of employee relations for the BOE, oversees the OPI. Rodi states that the OPI is not involved in the nomination process for applicants to school-based positions within the BOE. According to Rodi, petitioner has never been nominated for a position after September 28, 2014.

DISCUSSION

Pursuant to Judiciary Law § 753 (A), the court has the authority to "punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced." In order to prevail on a motion for civil contempt, the movant must establish: "(1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct." *Casler v Casler*, 131 AD3d 664, 665 (2d Dept 2015). The movant bears the burden of proving contempt by clear and convincing evidence. *Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d 944, 946 (2d Dept

2009).

Here, petitioner has not met his burden. The April 10, 2014 order directs respondents to reinstate petitioner to the permanent civil service title of computer aide and provide him with back pay. Petitioner does not dispute that he was reinstated to this position or that he received the back pay that he was owed.

The record reflects that petitioner's only permanent appointment within the BOE was in November 2007, to computer aide, level I, and that the court issued an "unambiguous directive" to reinstate petitioner to this position. *El-Dehdan v El-Dehdan*, 26 NY3d 19, 30 (2015). Respondents have done so. As a result, petitioner's remaining allegations regarding his belief that he is entitled to a higher salary or that he deserved to be re-instated into a level II position, are without merit. Moreover, petitioner did not pass probation into the position of computer service technician, level II, so its salary specifications are irrelevant.

In addition, petitioner has not met his burden of demonstrating that the OPI interfered with his job prospects. Although petitioner has been on interviews, no hiring manager from a BOE school has selected petitioner. The BOE's DHR and OPI do not have any involvement in the hiring process prior to the hiring managers selecting applicants for hire. Petitioner merely

speculates that his interviews went well and, because he did not receive a job offer, either the DHR or OPI must have interfered with his job prospects. Furthermore, although petitioner claims that he has been assigned to a clerical position, the BOE placed him where there was a need for his title and skill level.

In the alternative, petitioner requests that the court clarify its April 10, 2014 order. However, the order is clear. The court found that petitioner was entitled to the benefit of Rule 4.5 (e) of the 4 NYCRR Part 4, and that means that petitioner should be reinstated to the prior permanent civil service title of computer aide. Respondents complied with the order, and are not in contempt.

The court has considered petitioner's remaining contentions and finds them to be without merit.

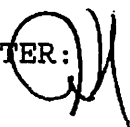
CONCLUSION

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 06/01/2016

FILED
JUN 21 2016
COUNTY CLERK'S OFFICE
NEW YORK

ENTER: 

J.S.C.

Milton A. Tingle
Clerk