SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8
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In The Matter of James C. Russell,

Index No. 155344/2016

Petitioner,

- against-

THE NEW YORK STATE INSURANCE FUND, and ERIC MADOFF, in his official capacity as the Executive Director of the New York State Insurance Fund,

DECISION AND ORDER

Respondents.

For an Order and Judgment pursuant to Article 78 of the New York Civil Practice Law and Rules
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LYNN R. KOTLER, J.S.C.:

This is an Article 78 proceeding brought by petitioner *pro se*, James C. Russell (Russell), for an order declaring that petitioner had attained tenure prior to February 12, 2016 and annulling administrative determinations by the respondent The New York State Insurance Fund (the "State Fund"), including negative evaluations and the termination of his probationary position as a State Fund hearing representative, at a civil service grade of 22. Russell reverted to his current title, Claims Representative 1, which is a grade of 18. Russell further seeks an order reinstating him to his former probationary title.

The State Fund is "a State agency within the Department of Labor (Workers' Compensation Law § 76 [1])" (*Methodist Hosp. of Brooklyn v State Ins. Fund*, 64 NY2d 365, 375 [1985]). While the general rule is that a cause of action for money damages against the State

Fund is only cognizable in the Court of Claims (*see D'Angelo v State Ins. Fund*, 48 AD3d 400, 402 [2d Dept 2008]; *Commissioners of the State Ins. Fund v J.D.G.S. Corp.*, 253 AD2d 368, 369 [1st Dept 1998]), claims for damages, equitable relief and reinstatement based on employment discrimination under Executive Law § 290 *et seq*, may be fully adjudicated in Supreme Court, rather than the Court of Claims (*Koerner v State*, 62 NY2d 442, 445–46, 467 N.E.2d 232 (1984).

Respondents, the State Fund and its executive director, cross-move, pursuant to CPLR 3211 (a) (7), to dismiss the Petition for failure to state a cause of action.

On a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (CPLR 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]).

The Petition, which annexes extensive documents, states that, by letter dated September 16, 2014 (Petition, exhibit B), Russell was appointed to the permanent civil service position of Insurance Fund Hearing Representative, effective August 28, 2014, subject to a 52-week probationary period; the letter further stated: "you will be immediately placed on unpaid leave, continuing in your current position, until you report to work on September 25, 2014" (*id.*).

Russell attended a September 1, 2015 meeting with Ryan McGrath, his direct supervisor during the probationary period, and Daniel Budensick (Budensick), a supervisor who reported to McGrath, during which, according to Russell, McGrath informed him that he had passed probation. McGrath, Budensick and Russell all signed a September 1, 2015 performance program form (Petition, exhibit I), which states that a new performance evaluation period would be

September 15, 2015 through September 24, 2016, for the title Insurance Fund Hearing Representative.

Russell contends that the effective date of his appointment is August 28, 2014, and that, therefore, his probationary period ended on August 28, 2015, entitling him to tenure and civil service protection. Exhibit I is consistent with Russell's contention.

On September 14, 2015, Budensick informed Russell that he had some late hearing reports. Russell responded, saying that his caseload had recently been particularly heavy, and that he had also had computer problems. By email dated September 16, 2015 (Petition, exhibit J), Budensick advised Russell that

> "As of yesterday when we spoke, you had 27 late reports, and 2 calendars last week that are not yet beyond 7 days. . . . Looking now, you currently have 23 late reports, and still none of the ones from last week have been written"

(*id.*).

On September 23, 2015, Russell attended a meeting with Lorraine Mirabella, a more senior supervisor, who informed Russell of a new probationary report (Petition, exhibit A) that rated his "quality of work, quantity of work, and work habits" as marginal, allegedly because reports due on September 1 were not completed on time. McGrath informed Russell that his probationary period was being extended by six months. When Russell told McGrath that McGrath had informed Russell on September 1 that he had successfully completed probation, McGrath allegedly said that he did not deny it, and changed the unsatisfactory rating on "quality of work" to satisfactory, and initialed the change (*id.*, exhibit M). Russell refused to sign the secondary probation agreement, which so indicates, although it states that he agreed to the

extension (*id.*, exhibit N).

During Russell's service as a probationary hearing representative, he received positive feedback, including a March 2, 2015 email from McGrath to Russell (Petition, exhibit G), stating that Russell's "memo is expertly written & quite detailed" (*id.*). Workers' Compensation Judge Arthur Levy wrote an email dated February 22, 2016 (Petition, exhibit X), praising Russell's performance in the numerous times that Russell appeared before him. Supervisor Mirabella also wrote Russell a January 29, 2016 email (Petition, exhibit Z), congratulating him on a reversal he obtained, and stating, "good work, James" (*id.*).

Upon completion of the second probationary period, the State Fund denied Russell tenure and reverted him to his current title, based on a February 12, 2016 "Report on Probationary Services" (Campbell affirmation, ¶ 8), which found deficiencies in some of his internal reports. Specifically, the report found that Russell

> "consistently used a deceptive practice to avoid the appearance of late reports on the pending list. Reports were initially timely completed but were virtually blank. An amendment to those reports was later made. That amendment was done on an untimely basis. That practice shows an inability to timely complete the assigned tasks of Insurance Fund Hearing Representative"

(*id.*).

Russell alleges that his denial of permanent status was an act of bad faith, because he was treated differently from others similarly situated with respect to late reports, while another probationary hearing representative was merely told to stop amending reports (Petition, ¶ 231). The Petition states that the only differences between himself and this other probationer are that she is much younger, African-American, and not a veteran. Russell alleges that he was

discriminated against on the basis of his age, race, gender and veteran status. Russell alleges that hearing representative Attracta Roche "told petitioner that she had personally observed and heard Ryan McGrath state that a Fund employee should retire because he was older than fifty-five years of age" (Petition, ¶ 237).

Russell is a member of the Public Employees Federation's Professional, Scientific & Technical Services Unit union (PEF, or the Union). By letter dated November 4, 2015 (Petition, exhibit P), Milena Pisano McNally (McNally), the Union field representative of the Union, wrote to the State Fund director of human resources, requesting that Russell's extended probationary status be revoked and that he be placed into permanent status. McNally recounted the course of Russell's service as alleged in the Petition, raising numerous issues involving Russell's alleged lack of coaching and training, including an allegedly false September 16, 2015 document stating that "coaching sessions have been held" (Campbell affirmation, exhibit B). McNally states the State Fund's director of Human Services told her "that McGrath had no authority to tell Russell that he had passed probation" (*id.*).

McNally states that, between September 1, 2015 and September 16, 2015, the date on which Russell was informed of the late reports, Russell received 80 cases over 16 days, "the highest caseload of any SIF NYC hearing rep (permanent or probationary)" (*id.*).

On March 13, 2016, Russell commenced a formal grievance through the Union. The State Fund's director of the claims department denied Russell's grievance, on April 14, 2016. On April 27, 2016, Russell mailed an appeal by certified mail to Joseph Mullins, the State Fund's director of administration. The Petition states that there has been no response to the appeal, and that the time to respond has expired (Petition, ¶ 243).

The Petition also alleges that the State Fund did not comply with numerous provisions prescribing procedures for evaluation, supervision and training during probation, including that Russell was not given the scheduled certifications required under the Union collective bargaining agreement, as required by the New York State Governor's Office of Employee Relations (GOER). Russell also alleges that he did not receive the benefit of the five-step Union performance evaluation program (Petition, exhibit D), section 220 of the State personnel manual (Pettition exhibit BB), or the Union performance evaluation program required by 9 NYCRR 148.8.

Russell also appealed respondents' determinations to the Department of Civil Service (the Department), which, by letter dated May 31, 2016 (the Determination), denied the appeal, stating that Russell's probationary period commenced on September 25, 2014, as stated in his New York State Electronic Personnel Records, while specifically acknowledging that the effective date of his appointment was August 28, 2014.

The Department upheld the action by the State Fund, and rejected petitioner's argument that he had been denied tenure improperly.

The Determination stated:

> "[p]er your New York State Electronic Personnel (NYSTEP) records, your probationary period commenced on September 26, 2014, the date you reported to work for IFHR [insurance fund hearing representative] position. Therefore, your probationary period end date was September 24, 2015"

(Campbell affirmation, exhibit D).

The Determination also stated:

> "[t]he determination to retain or terminate the employment of a probationer, or to impose a secondary probationary term in lieu of termination, resides exclusively with the appointing authority. The

> [Department] does not review the merits of an agency's decision to retain or terminate a probationary employee"

(*id.*).

The Determination further held that the civil services rules governing supervision do not require a formal meeting, only periodic advice, which can be oral, and that the reporting requirements of the supervisor under Civil Service Rule 4.5 (b) (iii) "are procedural directions that provide no specific rights to the probationary employee" (*id.*). The Determination further states, "if there are issues beyond the agency's conformance with the rules for probationary periods and notification of termination, we do not comment on them" (*id.*).

Thus, the Department did not address Russell's claims that he did not receive the supervision, evaluation and training under the Union collective bargaining agreement, GOERS or the state personnel handbook. The Determination only addressed civil service regulations.

The Petition contains three causes of action. The first is based on Russell's contention that he attained tenure by estoppel as of August 28, 2015, inasmuch as that is the one-year anniversary of the effective date of his appointment, and because he had been given no probation review by that date. The second cause of action alleges tenure by estoppel based upon Russell's contention that respondents did not follow Civil Service Rule 4.5 (a) (5) (iii), prescribing the procedures for probation, and that respondents' determinations were arbitrary and capricious, discriminatory, and lacked a rational basis. The third cause of action alleges that "[t]he decision to allegedly terminate petitioner's alleged extended probation was discriminatory... based upon age, race, gender and veteran status of the petitioner."

The Petition seeks an order directing respondents to annul and reverse petitioner's

unsatisfactory "Report on Probationary Services," changing the finding from "unsatisfactory" to "satisfactory," and declaring that the reversion determination violated the State Fund's internal procedures, and was both discriminatory and made in bad faith.

DISCUSSION

The Petition does not address the Determination. Russell complied with the requirement of exhausting administrative remedies by appealing to the Department (*see* CPLR 7801). Therefore, this court will review the Determination, rather than the administrative actions of respondents.

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[Tlhe proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck. Westchester County*, 34 NY2d 222, 231 [1974]) (emphasis removed); *see also Matter of Colton v. Berman*, 21 NY2d 322, 329 (1967).

Part 4 of the Rules and Regulations of the Department of Civil Service, captioned "Appointment and Promotion," provides, as pertinent:

> (a) It is the intent of the Civil Service Commission that permanent appointments, promotions or transfers shall require, as provided herein, satisfactory completion of a probationary term which shall include a minimum and a maximum period of probation. Such probationary term shall commence on the effective date designated

> by the appointing authority *and approved by the Civil Service Department for the appointment, promotion or transfer on a permanent basis.* Such appointments, promotions or transfers shall not become permanent prior to satisfactory completion of at least the minimum period and may require satisfactory completion of the maximum period of probation. If the conduct or performance of a probationer is not satisfactory, his or her employment may be terminated at any time after eight weeks and before completion of the maximum period of probation"

(4 NYCRR § 4.5 [a] [emphasis supplied]).

The parties do not address the meaning of the emphasized language quoted above, requiring approval by the Department for the promotion to be effective on a permanent basis.

Russell argues that the Administration Department of the State Fund is the appointing authority, which set the effective date of his probationary appointment as August 28, 2014, and that his probationary period began on that date. Russell argues that more than a year had elapsed from his appointment, and, therefore he had already attained tenure when he was required to undergo an additional six months of probation, and his appointment had already ripened into a permanent one (*see Matter of Albano v Kirby*, 36 NY2d 526, 532 [1975]).

Russell relies upon *Matter of Reis v New York State Hous. Fin. Agency* (74 NY2d 724, 726 [1989]), which held that a civil servant's probationary period commences on the date of appointment as a permanent employee, rather than from the date of passing the qualifying examination, as the petitioner in that case had argued. The *Reis* court stated that "the date of permanent appointment controls for purposes of measuring the probationary period" (*id.*).

The Determination stated that August 28, 2014 was the effective date of Russell's probationary appointment, but measured his probationary period from the date he began working as a hearing representative. This is consistent with the purpose of probation, and not irrational or

arbitrary. "The period should be measured by the number of days a probationer is actually working at the job" (*Tomlinson v Ward*, 110 AD2d 537, 538 [1st Dept 1985] *affd* 66 NY2d 771 [1985]). It was neither arbitrary nor irrational for the Department to exclude the period prior to Russell's assumption of duties as a hearing representative from the probationary period.

The purpose of probation, which is rooted in the New York Constitution article V, § 6, which .

> "mandates that appointments in the civil service of the State and all of its civil divisions shall be made according to merit and fitness, to be ascertained, as far as practicable by competitive examination (NY Const., art V, § 6). It was pointed out by the Court of Appeals, in 1898, that both Federal and State statutes embodied the principle of probationary trials as a means of determining the merit and fitness of candidates . . ."

(*Matter of Albano v Kirby*, 36 NY2d at 531).

"In analyzing a statute or rule, courts look to their spirit and purpose, and the objectives of the enactors must be kept in mind" (*id.* at 531).

In *Matter of Albano*, the Court of Appeals held that courts generally "defer to the construction given statutes and regulations by the agencies responsible for their administration, if said construction is not irrational or unreasonable" (*id.* at 532). Also, deference to an agency's construction of a statute is warranted "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices]" (*Matter of New York State Assn. of Life Underwriters v New York State Banking Dept.*, 83 NY2d 353 [1994][internal quotation marks and citation omitted]).

As noted above, the Determination stated that the Department "does not review the merits of an agency's decision to retain or terminate a probationary employee" (Campbell affirmation,

exhibit D). This court will defer to this policy judgment by the Department, concerning the application of regulations under its jurisdiction, absent a showing of arbitrary or irrational actions by the Department.

To the extent that the Petition seeks reinstatement pursuant to CPLR Article 78, it is denied in its entirety. Mandamus, an extraordinary remedy, is available "only to enforce a clear legal right where [a] public [agency or] official has failed to perform a duty enjoined by law" (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]).

Civil Service Law § 61, captioned "Appointment and Promotion,"

> "embodies a discretionary governmental appointive power, the reasonable exercise of which should not be limited by courts. Accordingly, the only remedy to which the petitioner was entitled for defects in the appointive process was not appointment or promotion, but a judicial direction for reconsideration after the prior defect has been corrected. The petitioner already received that remedy from the Commission by virtue of his reinstatement to the eligible list, from which he will be considered for a position should one become available again"

(*Matter of Imburgia v Procopio*, 98 AD3d 617, 619 [2d Dept 2012][internal quotation marks and citations omitted]). Russell has not made a sufficient showing of a clear legal right to the appointment that is "'so clear as not to admit of reasonable doubt or controversy'" (*Matter of Grisi v Shainswit*, 119 AD2d 418, 420 [1st Dept 1986]). Even if such a showing had been made, the Department has made it clear that probationary appointments are the exclusive province of the appointing authority, and it will not review the merits of a denial.

As noted above, the Determination was neither arbitrary nor irrational, inasmuch as it has warrant in the record, and a reasonable basis in law (*see McGowan v Burstein*, 71 NY2d 729, 735 [1988]).

Russell has not made a sufficient showing of bad faith inasmuch as "'[e]vidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith'" (*Matter of Kolmel v City of New York*, 88 AD3d 527, 528 [1st Dept 2011]; quoting *Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]).

In the exercise of discretion, the court declines to grant declaratory relief (*see McLaughlin v D'Elia*, 115 AD2d 595 [2d Dept 1985]).

Finally, Russell's third cause of action for employment discrimination alleges disparate treatment. Russell alleges that a fellow probationary hearing officer "utilized the same process of hearing report completion as petitioner" (Petition, ¶ 275), with the knowledge of her supervisors, and she attained permanent status. Russell alleges that the only difference between them is that she is younger, female, African-American, and not a veteran.

The issue is whether the allegations of the petition, taken as true, state a *prima facie* case for discrimination:

> A plaintiff alleging racial discrimination in employment has the initial burden to establish a prima facie case of discrimination. To meet this burden, plaintiff must show that (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. The burden then shifts to the employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision" (id. [citations omitted]). In order to nevertheless succeed on her claim, the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason.

(*Forrest v Jewish Guild for the Blind*, 3 N.Y3d 295, 305 [2004] [citations omitted]; *Woodie v Azteca Int'l Corp.*, 60 AD3d 535 [1st Dept 2009]). [T]he burden of persuasion of the ultimate issue

of discrimination always remains with the plaintiff" (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL–CIO*, 6 NY3d 265, 271 [2006]).

This motion is solely addressed to the sufficiency of the pleading. The petition does not specify whether the third cause of action is pleaded under state, federal, or New York City anti-discrimination laws. Here, the court finds that the facts pleaded in the petition do not meet the "'*de minimis* burden of showing a *prima facie* case of age discrimination'" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 115 [1st Dept 2012][citations omitted]).

Russell's inclusion in a protected class is not contestable. His allegations of numerous plaudits and successes as a hearing representative, considering his allegation that he was given the largest workload of any hearing representative, adequately pleads qualification. To the extent that his qualifications are challenged based on quantity and timeliness of hearing reports, Russell has sufficiently pleaded disparate treatment.

However, Russell has wholly failed to allege any facts that would establish that the alleged disparate treatment occurred under circumstances giving rise to an inference of discrimination. Petitioner does not claim that a supervisor or other State Fund employee ever even mentioned his age, race, gender, or veteran status in connection with whether he had successfully completed his probationary period. The hearsay claim that a fellow coworker told petitioner that she heard a Fund supervisor state "that a Fund employee should retire because he was older than fifty-five years of age" is unavailing since it has no bearing on the extension of petitioner's probationary period or the denial of tenure.

Similarly unavailing is petitioner's claim that a coworker, a younger, African American, non-veteran female, was "reprimanded for the identical issue of amending reports" but did not

have her probation terminated, is insufficient to save the discrimination claim. This allegation is devoid of sufficient facts which would establish that this coworker was similarly situated to petitioner.

Accordingly, based upon the foregoing, the petition must be denied in its entirety.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the cross-motion to dismiss is granted in its entirety and the petition is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the decision and order of the court.

Dated: New York, New York
12/20/17

SO ORDERED:

HON. LYNN R. KOTLER, J.S.C.