

Matter of Hodge v New York City Tr. Auth.
2019 NY Slip Op 30570(U)
March 6, 2019
Supreme Court, New York County
Docket Number: 159612/2018
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of

MARK HODGE,

Index No.
159612/2018

Petitioner,

**DECISION
and ORDER**

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, Correction Law § 752, Section 296(16) of the New York Executive Law, and New York City Human Rights Law § 8-107(11)(a),

Mot. Seq. #001

- against -

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Mark Hodge (“Petitioner”) brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules (“Article 78”), declaring Respondent New York City Transit Authority’s (“Respondent”) in violation of Correction Law § 752 and New York City Human Rights Law § 8-107(11)(a) by failing to rehire Petitioner. Petitioner also seeks the Court to Order Respondent to rehire Petition to employment as a Road Car Inspector with all lost wages, reinstate all lost pension benefits, and reimburse all health care costs. Respondent opposes.

Background/Factual Allegations

Petitioner was hired by Respondent on April 28, 2008, as a Road Car Inspector. Petitioner contends that from March 1999 to December 2016, he collected Social Security checks and Veterans benefits checks made out to his mother, Lucille Hodge, to be deposited in a joint bank account. Petitioner contends that \$154,104.98 had been deposited by December 2016, but no money had ever been withdrawn. Respondent asserts that Lucille Hodge was interred in March 1999.

On March 29, 2018, Mr. Hodge was arrested and the United States Attorney charged him with grand larceny. Petitioner asserts that he paid the full amount back to the United States. On March 30, 2018, Mr. Hodge notified Respondent of his arrest and he was suspended without pay. Mr. Hodge entered into a plea agreement and plead guilty to a violation of 18 U.S.C. § 641, a misdemeanor punishable by up to 10 years in prison. On June 24, 2018, Mr. Hodge was sentenced to one-year probation and 80 hours of community service.

On May 1, 2018, Mr. Hodge was served a Disciplinary Notification (“DAN”) for “conduct unbecoming a Transit Authority employee, in violation of Rules 4(a), 10(a), and 11(f) of the Rules and Regulations”. On May 1, 2018, a Step I hearing was held and the DAN was sustained. On May 9, 2018, a Step II hearing was held, and again the DAN was sustained. Pursuant to the CBA, Mr. Hodge was provided a “full fair arbitration hearing before a neutral arbitrator”. On August 8, 13 and 16, 2018, Mr. Hodge participated in an Arbitration Hearing, before Arbitrator Pfeffer, disputing Respondent’s termination of Mr. Hodge’s employment. On September 5, 2018, Arbitrator Pfeffer issued Preliminary Opinion and Award, holding Respondent had cause to terminate Mr. Hodge. On November 8, 2018, Arbitrator Pfeffer issued an Opinion and Award, holding Respondent had cause to terminate Mr. Hodge. The Award is being challenged in an Article 75 proceeding, commenced on October 18, 2018.

On September 27, 2018, Petitioner requested reinstatement pursuant to New York City Personnel Rule 6.2.6(a). On October 8, 2018, Respondent denied Petitioner’s reinstatement request, stating that Arbitrator’s Pfeffer’s Decision was final and binding.

Petitioner commenced this action on October 17, 2018 by filing a Verified Petition as an Article 78 special proceeding. Respondent filed its Answer on December 10, 2018.

Parties’ Contentions

Petitioner contends that Respondent has violated Petitioner’s rights under § 752 of the New York State Correction Law, incorporated into Executive Law § 296(15). Petitioner argues that he was employed by Respondent for 10 years and performed his job without any evidence of inappropriate activity or behavior. Petitioner contends that the criminal offense he was terminated for is unrelated to the work he seeks to perform for Respondent.

Furthermore, Petitioner argues that Respondent violated Petitioner's rights pursuant to Section 8-107(11)(a) of the New York City Human Rights Law, by failing to reinstate Petitioner and failing to perform the analysis stated in § 713 of the New York State Correction law. Petitioner asserts that § 753 of the Correction Law lists factors that can be considered under § 752, and specifically states that "the public policy of this state [is] to encourage the licensure and employment of persons previously convicted of one or more criminal offenses", and also requires consideration of a "certificate of relief from disabilities" which shall "create a presumption of rehabilitation in regard to the offense." Petitioner argues that he was allowed to plead guilty to a misdemeanor, so he would not suffer the difficulties that are attached to a felony conviction.

In opposition, Respondent argues that its denial of Petitioner's request for reinstatement was rational. Respondent contends that its decision does not violate the New York City Human Rights Law or the New York State Correction Law. Respondent argues that there is no evidence in the record that Petitioner was denied reinstatement based on his criminal conviction, or that it failed to take into account the factors in § 713 of the New York State Correction law. Respondent contends that the Correction Law only applies when an individual "denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of 'good moral character' when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses", which does not apply here.

Respondent contends that its denial of Petitioner request for reinstatement does not violate New York City Human Rights Law § 8-107(11)(a). Petitioner's criminal conviction occurred during his employment with Respondent and not before he was hired. Respondent argues that there is no evidence in the record to support Petitioner's claim that he was denied reinstatement based on his arrest. Moreover, Respondent argues that it did not violate the Fair Chance Act. Respondent argues that it denied Petitioner's request for reinstatement based on Arbitrator Pfeffer's decision, which was final and binding.

Legal Standard

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of

discretion as to the measure or mode of penalty or discipline imposed.” See CPLR 7803 [3]. “[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious.” *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

Correction Law § 751 specifically states that “[t]he provisions of this article shall apply ... to any ... employment held by any person whose conviction of one or more criminal offenses ... preceded such employment’.” *Martino v. Consol. Edison Co. of New York*, 105 A.D.3d 575 [1st Dept 2013]. There is no unfair discrimination when an individual is convicted of a criminal offense while he was already employed and not before his employment. *Id.*

Discussion

Petitioner has failed to demonstrate that Respondent’s denial of Petitioner’s reinstatement request was arbitrary, capricious and in bad faith. *Matter of Pell*, 34 N.Y.2d at 231. Respondent’s denial of Petitioner’s request for reinstatement was rationally based on Arbitrator Pfeffer’s binding and final decision, which was the process that was collectively bargained by the parties.

Furthermore, Petitioner has not shown unfair discrimination. *Martino*, 105 A.D.3d 575. Petitioner entered into a plea deal for a misdemeanor during his employment with Respondent and not before. Petitioner fails to meet his burden of demonstrating that the Respondent’s denial of Petitioner’s request for reinstatement should be disturbed by the Court.

Wherefore it is hereby

ORDERED and **ADJUDGED** that the Petition is denied and the proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: March 5, 2019

