

**Matter of Marine Engrs. Beneficial Assn. v City of
New York**

2020 NY Slip Op 32426(U)

July 23, 2020

Supreme Court, New York County

Docket Number: 161033/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 6

In the Matter of the Application of

INDEX NO. 161033/2019

**MARINE ENGINEERS BENEFICIAL ASSOCIATION,
AFL-CIO, EARLE FERENCZY and JOSHUA
ANDRUSKIEWICZ, CHRISTIAN FERRARO,**

**MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL NO.**

Petitioners,

**For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules,**

-against-

**CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF TRANSPORTATION,**

Respondents.

The following papers, numbered 1 to _____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____

Replying Affidavits

PAPERS NUMBERED



Cross-Motion: Yes No

Petitioners Earle Ferenczy (“Ferenczy”), Joshua Andruskiewicz (“Andruskiewicz”), and Christian Ferraro (“Ferraro”) (collectively, “Petitioners”) bring this Article 78 proceeding against the City of New York (“the City”) and New York City Department of Transportation (“DOT”) (collectively, “Respondents”), alleging that DOT’s suspension of Petitioners without having issued disciplinary charges against them is a violation of Civil Service Law (“CSL”) § 75 and N.Y.C. Admin. Code § 12-105. Ferenczy and Andruszkiewicz are seeking a judgment reinstating them to active duty and awarding them “an amount equal to what they have been paid while suspended and what they would have been paid had they been working during the time of their suspensions.” Ferraro is seeking back pay for the 30-day period of his unpaid suspension.

Respondents filed an answer and opposition to the Petition. Respondents contend that the Petition fails to state a cause of action because disciplinary charges have since been brought against Petitioners in accordance with CSL §75, the determination to suspend Petitioners was rational, Petitioners have failed to exhaust all administrative remedies, and Petitioners have no constitutionally protected interest in overtime pay or a particular position.

Oral argument was scheduled for this matter but could not proceed due to the pandemic, and the decision will now be rendered on the papers. Petitioner and Respondents e-filed letters to the Court after the motion was submitted. The letters will not be considered in rendering the decision in accordance with this Part’s Rules. No request for a sur-reply was made.

Background

Ferenczy, Andruszkiewicz and Ferraro are employed by the City in the City's DOT's Staten Island Ferry division. (Verified Amended Petition [Petition] at ¶2). Ferenczy commenced his provisional employment with the DOT on December 31, 1995 in the civil service title of Ferry Captain. Ferenczy was permanently appointed to Ferry Captain on March 21, 2006 and continues to hold this title. (Verified Answer [Answer] at ¶31-32). Andruszkiewicz commenced his provisional employment with DOT on February 24, 2013 in the civil service title of Deckhand and was provisionally appointed to the title of Assistant Captain on October 14, 2018. (Petition at ¶14; Answer at ¶ 42-43; Exhibit "F"). Ferraro began his provisional employment in the civil service title of Deckhand with DOT on March 16, 2009 and was provisionally appointed to the title of Captain on December 22, 2014. (Petition at ¶10; Answer at ¶54-55; Exhibit "G").

On August 19, 2019, John Garvey, the Director of Ferry Operations of DOT, prepared a "Memo to File" with the subject line, "Observation of Noble New York Pilothouse this morning." Mr. Garvey described that morning he had observed a Mate of the Ferry Boat John Noble sleeping while on duty. Review of video surveillance of that trip revealed misconduct by five employees, including Ferenczy and Andruszkiewicz. The five employees, including Ferenczy, Andruszkiewicz, were removed from duty immediately. Mr. Garvey directed a further review of other trips. (Answer at ¶30; Exhibit "S").

Ferenczy and Andruszkiewicz were suspended without pay for 30 days "pending the outcome of an official investigation" on August 21, 2019. (Answer; Exhibits "H", "I"). Ferenczy and Andruszkiewicz remain suspended but were reinstated to DOT's payroll after thirty days. (Petition at ¶19). Ferenczy is presently receiving his base salary for his permanent civil service title of Captain. (Petition at ¶19; Answer at ¶35).

Andruszkiewicz's provisional employment as an Assistant Captain was terminated on September 14, 2019 and he was reassigned to the permanent civil service title of Deckhand on September 15, 2019. (Petition at ¶15; Answer ¶45; Exhibit "J"). Andruszkiewicz has not been reinstated to active duty and is currently receiving his base salary for his permanent civil service title of Deckhand. (Petition at ¶19; Answer at ¶47).

Ferraro was suspended without pay for 30 days on September 6, 2019. (Petition at ¶17; Answer at ¶56, Exhibit "M"). On October 6, 2019, Ferraro's provisional employment as Captain was terminated and Ferraro was reassigned to the permanent civil service title of Mate. (Petition at ¶4; Answer at ¶57). Ferraro's unpaid suspension ended after thirty days at which time he was reinstated to payroll by DOT. Ferraro returned to work on October 9, 2019 as a Mate. (Petition at ¶4; Answer at ¶58).

Ferenczy and Andruszkiewicz commenced this Article 78 proceeding on November 12, 2019, claiming that Respondents had failed to bring disciplinary charges against them, and thus, they should be reinstated to their positions and awarded back pay for Respondents' violation of CSL § 75. Ferenczy and Andruszkiewicz, along with Ferraro, filed an Amended Verified Petition on December 13, 2019. Ferraro claims that Respondents suspended him in violation of CSL 75 and seeks back pay for the period of unpaid suspension.

Ferenczy was served with disciplinary charges on December 19, 2019, alleging failure to perform his duties between July 22, 2019 and August 21, 2019. The specifications included Ferenczy sleeping while on duty and failing to supervise his Assistant Captain and Mates.

Ferenczy was also “charged with a violation of failing to use and maintain all appropriate safety measures and/or equipment for the protection of life and property while in performance of duty, including the use of seat belts; failing to use reasonable care in the operation, use and maintenance of DOT vehicles or other DOT or City property; engaging in conduct prejudicial to the good order and discipline of DOT; and engaging in conduct tending to bring the City of New York, DOT or any other City agency into disrepute.” (Answer at ¶33-38, Exhibit “B”).

Andruszkiewicz was served with disciplinary charges on December 18, 2019, alleging failure to perform his duties between July 22, 2019 and August 21, 2019. The specifications included Andruszkiewicz “sleeping while on duty on three occasions; failing to properly ensure that the employees assigned to perform lookout duties were properly performing their assigned lookout duties; using his cell phone during arrival and/or departure of the boat while on duty; and failing to supervise Mates when they were sleeping while on duty.” Andruszkiewicz was also “charged with a violation of failing to use and maintain all appropriate safety measures and/or equipment for the protection of life and property while in performance of duty, including the use of seat belts; failing to use reasonable care in the operation, use and maintenance of DOT vehicles or other DOT or City property; violating the smoking policy by using an e-cigarette while on duty on five occasions; engaging in conduct prejudicial to the good order and discipline of DOT; and engaging in conduct tending to bring the City of New York, DOT or any other City agency into disrepute.” (Answer at ¶48-50, Exhibit “A”).

Ferraro was served with disciplinary charges on January 15, 2020, alleging failure to perform his duties on August 7, 2019. Ferraro was charged with a violation of performing assigned duties on August 7, 2019. The specifications included Ferraro “using, his cell phone during arrival and/or departure of the boat while on duty at five separate times during his shift.” Ferraro was “additionally charged with a violation of failing to use and maintain all appropriate safety measures and/or equipment for the protection of life and property while in performance of duty, including the use of seat belts; failing to use reasonable care in the operation, use and maintenance of DOT vehicles or other DOT or City property; engaging in conduct prejudicial to the good order and discipline of DOT; and engaging in conduct tending to bring the City of New York, DOT or any other City agency into disrepute.” (Answer at ¶59-61; Exhibit “C”).

Respondents submit the affidavit of Janice Stroughter (“Ms. Stroughter”), an employee of the DOT who serves as the Deputy Commissioner of Human Resources and Facilities Management, in support of Respondents’ cross motion to dismiss. (Answer, Exhibit “E”). Ms. Stroughter states that her “affidavit is based upon my own personal knowledge, a review of the books and records of DOT, and conversations with DOT and City employees.” Ms. Stroughter attests to the circumstances surrounding the investigation that Mr. Garvey initiated after the August 19, 2019 incident on the Ferry Boat John Noble. Ms. Stroughter states, “According to the documentation supplied to me by the DOT Advocate’s Office, upon information and belief, a review of the voluminous amount of 152 hours of video surveillance by the DOT’s Advocate’s Office began on 8/27/2019 and ended on 12/13/2019.” Ms. Stroughter states, “At the close of the 17th week of investigation, charges were served upon Earle Ferenczy on December 19, 2019; upon Joshua Andruszkiewicz December 18, 2019, and upon Christopher Ferraro on January 15, 2020.”

On January 14, 2020, Ferenczy attend an Informal Conference regarding the charges and specifications brought against him. The Conference Leader substantiated the charges against Ferenczy and recommended termination. (Answer at ¶40-41, Exhibit “P”). On January 16, 2020, Ferenczy refused to accept the recommended penalty and elected “to proceed in accordance with

the Grievance Procedure set forth in its contract with the City of New York, including the right to proceed to binding arbitration,” and waived “the right to utilize the procedure available to me pursuant to Section 75 and 76 of the Civil Service Law or any other administrative or judicial tribunal, except for the purpose of enforcing an arbitration award, if any.” (Answer, Exhibit “T”).

On January 8, 2020, Andruskiewicz attended an Informal Conference regarding the charges and specifications brought against him. The Conference Leader substantiated the charges against Andruskiewicz and recommended termination. (Answer at ¶¶52-53; Exhibit “Q”). On January 14, 2020, Andruskiewicz refused to accept the recommended penalty and elected “to proceed in accordance with the Grievance Procedure set forth in its contract with the City of New York, including the right to proceed to binding arbitration,” and waived “the right to utilize the procedure available to me pursuant to Section 75 and 76 of the Civil Service Law or any other administrative or judicial tribunal, except for the purpose of enforcing an arbitration award, if any.” (Answer, Exhibit “U”).

Ferraro’s Informal Conference was scheduled for February 13, 2020.

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).

CSL §75 governs disciplinary actions against civil service employees. CSL §75(1) provides that “[a] person holding a position by permanent appointment in the competitive class of the classified civil service” “shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.” CSL §75(3) provides, “Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days.” CSL §75(3) further states:

If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during

which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of any unemployment insurance benefits he may have received during such period...

Substantial compliance with CSL §75(3) has been held to exist in cases where charges were brought within a reasonable amount of time after a suspension. Courts have considered the circumstances surrounding the delay in order to decide if the amount of time between suspension and charges was reasonable. *See Morris v Reid*, 210 N.Y.S.2d 868, 869 (Sup. Ct., N.Y. Cty. 1960); *Coogan v. Dunning*, 78 A.D.2d 580, 581 (4th Dept. 1980); *McElroy v. Trojak*, 21 Misc.2d 145, 147 (Sup. Ct., Westchester Cty. 1959).

Discussion

There is no basis to disturb Respondents' decision to suspend Petitioners Ferenczy, Andruszkiewicz and Ferraro. Respondents' decision was not made in violation of lawful procedure and was rational and not arbitrary or capricious.

Respondents suspended Petitioners based on allegations that they were not performing their job responsibilities while on duty, reinstated them on the payroll after 30 days, and brought disciplinary charges against them thereafter. Petitioners claim that Respondents' delay in bringing formal charges against them violated Civil Service Law § 75 and they should be reinstated to their previous positions and awarded damages in the form of back pay. However, the Court finds that timing was reasonable under the circumstances. Respondents have demonstrated through the affidavit of Ms. Stroughter and Mr. Garvey's memo that the investigation concerning Petitioners included the viewing of 152 hours of surveillance of footage of the ferry boats and spanned the period of August 21, 2019 through December 13, 2019, with charges served upon Ferenczy, Andruszkiewicz and Ferraro on December 18, 2019, December 19, 2019 and January 15, 2020, respectively, at the close of the investigation. Petitioners' claim for back pay and other damages are to be decided in the forum that they choose – whether that be the Grievance route or a hearing before OATH.

Nevertheless, Ferenczy and Andruszkiewicz have elected “to proceed in accordance with the Grievance Procedure set forth in its contract with the City of New York, including the right to proceed to binding arbitration,” and waived “the right to utilize the procedure available to me pursuant to Section 75 and 76 of the Civil Service Law or any other administrative or judicial tribunal, except for the purpose of enforcing an arbitration award, if any.” Ferraro was still engaged in the administrative process when this motion was brought. Thus, none have exhausted their remedies prior to bringing this Petition, which is fatal to the Article 78 proceeding.

Wherefore it is hereby

ORDERED that the Petition is denied and the special proceeding is dismissed in its entirety 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: JULY 23, 2020

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION