

**Matter of Truglio v Board of Mgrs. of Pensions of the
Metro. Transp. Auth.**

2020 NY Slip Op 32537(U)

August 3, 2020

Supreme Court, New York County

Docket Number: 153201/2019

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

**In the Matter of the Application of
SALVATORE TRUGLIO,**

**INDEX NO. 153201/2019
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.**

Petitioner,

For an Order Pursuant to CPLR Article 78

- against-

**THE BOARD OF MANAGERS OF PENSIONS OF
THE METROPOLITAN TRANSPORTATION AUTHORITY
DEFINED BENEFIT PENSION PLAN,**

Respondent.

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: x Yes No

Petitioner Salvatore Truglio (“Petitioner”) brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules (“Article 78”), seeking the Court to annul and reverse the Metropolitan Transportation Authority (“MTA”) Defined Benefit Pension Plan (“DBPP”) Board of Managers of Pensions’ (“Respondent”) decision denying Petitioner’s appeal to receive the appropriate amount of service credit he earned as a participant in the DBPP during a two-year leave of absence following an injury sustained on the job. Respondent opposes.

Background/Factual Allegations

Petitioner is a bus operator hired by New York Bus Service (“New York Bus”) on August 25, 2003. Petitioner is represented by Transport Workers Union of America, AFL-CIO, Local 100 (“TWU Local 100”). Petitioner began employment with MTA Bus after it was created as a public benefit corporation and subsidiary of the MTA in 2004 for the purpose of providing bus services in areas formerly served by seven private franchise bus companies, including New York Bus. Petitioner is a

Participant in the DBPP, with a date of plan participation of October 25, 2003, which is the date of his initial participation in the New York Bus pension plan.

On June 20, 2010, Petitioner took leave from work due to injury and thereafter was on workers' compensation. Respondent contends that when Petitioner did not resume work within one year of the last day worked, he was terminated by MTA Bus effective June 21, 2011, as provided for under the terms of the collective bargaining agreement between MTA Bus and TWU Local 100.

Respondent avers that Petitioner was rehired by MTA Bus on October 15, 2012, more than two years after the last day he worked for the company. Petitioner remains an employee of MTA Bus to this date, and he also has continued as a participant in the DBPP up to the present time.

Respondent contends that in response to inquiries received from Petitioner on May 30, 2018 and June 20, 2018 regarding his service under the DBPP, Petitioner was twice provided with an estimate of his Uninterrupted Seniority, which is the service used to determine his benefit under the DBPP. Respondent contends that as of May 31, 2018, Petitioner's Uninterrupted Seniority was estimated to be 12.2904 years, which was based on the following employment history: a date of hire of August 25, 2003 based on the date he began employment with New York Bus; a date of plan participation of October 25, 2003, which reflects a waiting period from the date of hire; a last day worked of June 20, 2010; a date of termination of June 21, 2011; and a rehire date of October 15, 2012.

Respondent contends that Petitioner had two Periods of Service under the DBPP, with the first running from the date of plan participation of October 25, 2003 and ending on his last day worked on June 20, 2010. Respondent contends that the Severance from Service Date was arrived at through application of § 14.3, because Petitioner did not resume work at the end of any period of absence and, in fact, was terminated from employment. Respondent contends that § 14.3.03 provides that service will be considered to have terminated as of the date to which absence from employment began, i.e., June 21, 2010 for Petitioner, and thereafter directs that the analysis under § 14.3.02 applies. Respondent avers that the total number of days from the date of participation in the DBPP to the Severance from Service Date, June 20, 2010, is 2431 days, which was divided by 365 to arrive at a total Period of Service of 6.603 years.

Petitioner's second Period of Service commenced on October 15, 2012 when he was reemployed by MTA Bus. As of the May 31, 2018 date used in the letters

from David Loudis, Deputy Director, MTA Consolidated Pensions, to Petitioner dated June 14, 2018 and June 29, 2018, Petitioner had another 2055 days of Uninterrupted Seniority, which was divided by 365 to arrive at a total period of service of 5.6301 years.

Respondent contends that Petitioner was not given credit for the period of more than two-years that he did not work between June 20, 2010 and October 15, 2012, because this period is a non-creditable Period of Severance. Respondent contends that Petitioner's Periods of Service are not modified by either: (1) the provision under the collective bargaining agreement pertaining to reinstatement; or (2) the Stipulation between MTA Bus and TWU Local 100, to which the DBPP was not a party, and which provides that MTA Bus shall consider Petitioner's petition to be reinstated to his former position to have been made within one year of his administrative termination. Respondent avers that "reinstatement," a term not found in Article 14 of the DBPP, has no impact on the return to-work rules in the DBPP, under these rules, Petitioner did not return to work as required under § 14.3 and had a Severance from Service Date of June 21, 2010, the result of which was the end to his first Period of Service on the last day worked of June 20, 2010.

Petitioner was sent a letter dated July 25, 2018, which advised him that he may submit a written appeal of the determination of the DBPP. On or about September 25, 2018, Petitioner submitted an appeal. Respondent met over the course of two days, September 25, 2018 and October 30, 2018, to consider Petitioner's appeal. These meetings were attended by Peter Rosconi of TWU Local 100. At the meeting on October 30, 2018, Respondent voted to deny Petitioner's appeal to receive service credit in the DBPP for the period of June 21, 2010 through October 14, 2012. On October 31, 2018, TWU Local 100 filed a First Level grievance on behalf of Petitioner with MTA Bus, attached the written recommendation that was presented at the October 30, 2018 meeting, and argued that the determination of Respondent denying Petitioner's appeal was made in error.

On November 5, 2018, the Union's grievance filed on behalf of Petitioner was denied. On November 6, 2018, TWU Local 100 filed a Second Level grievance on Petitioner's behalf requesting an immediate hearing so that the grievance could be added to the November 16, 2018 Grievance arbitration calendar. Respondent contends that pursuant to its usual practice, the Acting Secretary of the DBPP Board of Respondent sent a letter to Petitioner on November 27, 2018 advising him that his appeal was denied.

Oral argument was held on March 10, 2020. The case was marked fully submitted on June 30, 2020 after the receipt of the minutes from oral argument.

Parties' Contentions

Petitioner argues that his absence was authorized by MTA Bus, and such absence was unpaid, temporary cessation from active employment caused by an at work injury on June 20, 2010. Petitioner asserts that his absence fits “squarely” within the definition of Authorized Leave of Absence. Petitioner argues that because he was on Authorized Leave of Absence, Respondent should have credited Petitioner with a “Period of Service” as required by the Plan. Petitioner argues that under the terms of the Plan:

“Uninterrupted Seniority for Benefit Accrual and Eligibility to Commence Receiving Benefits” means that “[f]or purposes of determining the amount of a Participant’s Accrued Benefit and eligibility to commence receiving benefits under the Plan, the Uninterrupted Seniority of such Participant, as of the date the benefits are to be determined under the Plan, shall include all Periods of Service with [MTA Bus] during which time the Participant was a Participant in the Plan [...] In no event shall an Employee receive Uninterrupted Seniority for such purposes for any period of employment during which the Employee elected not to or was not permitted to make Employee Contributions.” (Verified Petition at 8).

Petitioner further argues that the Plan provides that an “Uninsured Seniority Following a Break in Service” means that the “[f]ailure of a Participant to make payments required under this Plan for any period when the Participant was absent because of illness [...] or because of [an] Authorized Leave of Absence shall not interrupt his service,” provided that the Participant makes the required employee contributions under the Plan.” (Verified Petition at 8-9). Petitioner argues that Respondent failed to adhere to the terms of the DBPP.

In opposition, Respondent argues that the Verified Petition is time-barred pursuant to CPLR § 217. Respondent asserts that the statute of limitations began to run on October 30, 2018, when Respondent made its “final and binding determination.” Respondent asserts that on October 31, 2018, one day after

Respondent's determination, a written grievance was filed on Petitioners' behalf by TWU Local 100 challenging Respondent's determination as having been in error.

Moreover, Respondent argues that the decision was neither arbitrary nor capricious because DBPP contains "clear rules for calculating a Participant's Uninterrupted Seniority." (Respondent's Verified Answer at 15). Respondent contends that the DBPP contains "clear rules for calculating" Uninterrupted Seniority. Respondent argues that the rules pursuant to DBPP were applied and Petitioner's Uninterrupted Seniority came out to 12.2904 years, which included two separate periods of service. Respondent asserts that the first period of service ran from October 25, 2003 until June 20, 2010, and the second period of service ran from October 15, 2012 and continued through May 31, 2018. Respondent argues that Petitioner was not given credit for the more than two years he did not work, June 20, 2010 until October 15, 2012 because that period was a non-creditable period of severance. Respondent asserts that on June 21, 2010, Petitioner was injured on the job and did not return within one year, he was administratively terminated on June 21, 2011.

Respondent argues that Petitioner was not entitled to an extension of Service pursuant to § 14.3.03, which states "if employment is not resumed at the end of any period of absence from employment stated above, service will be considered to have terminated as of the date to which absence from employment began ..." (Respondent's Verified Answer at 15) (emphasis omitted). Respondent argues that the Stipulation concerning Petitioner's reinstatement does not "alter or modify" DBPP's rules and does not address any issues regarding Petitioner's pension benefits. Additionally, Respondent argues that Petitioner's contention that his absence was an "Authorized Leave of Absence" is without merit because Petitioner was put on workers' compensation after sustaining the injury and was terminated under the terms of the collective bargaining agreement. Respondent contends that Authorized Leave of Absence is "unpaid, temporary cessation from active employment with the Employer..." pursuant to § 14.1.07(b). (Respondent's Verified Answer at 17). Respondent argues that Authorized Leave of Absence only refers to Periods of Severance that are restored back to the employee, which requires reference to specific provisions of the Plan to determine the circumstances under which it applies. Respondent asserts that because Petitioner had a severance from June 21, 2010 after being terminated from his employment when he did not return to work within one year of being out due to an injury, Petitioner's service credit under DBPP does not include the period from June 21, 2010 through October 14, 2012.

In reply, Petitioner argues that the Petition is timely. Petitioner asserts that “[w]here the Petitioner is entitled to receive written notice of the agency’s determination, the four-month statute of limitations does not begin to run until notice is received in that form.” Petitioner argues that he “did not receive the final, official, written notice from [Respondent] that his appeal was denied until November 27, 2018, and such notice even advised Petitioner of his right to challenge the decision set forth therein by filing an Article 78 proceeding.” Therefore, Petitioner asserts that the statute of limitations pursuant to CPLR §217 did not begin to run until November 27, 2018.

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].

An Article 78 proceeding must be brought “within four months after the determination to be reviewed becomes final and binding upon the petitioner.” CPLR 217[1]. “For a determination to be final it must be clear that the petitioner seeking review has been aggrieved by it.” *Lubin v. Bd. of Educ. of City of New York*, 60 N.Y.2d 974, 976 [1983].

Discussion

Here, the application is time-barred. Respondent issued a decision on October 30, 2018, denying Petitioner’s appeal to receive the appropriate amount of service

credit he earned as a participant in the DBPP during a two-year leave of absence following an injury sustained on the job. On October 31, 2018, TWU Local 100 filed a written grievance on Petitioners' behalf challenging Respondent's determination as having been in error. Therefore, Respondent's decision was final and binding on October 30, 2018 and Petitioner had until February 30, 2019 to commence an Article 78 proceeding pursuant to CPLR § 217[1] and failed to do so. Instead, Petitioner commenced an Article 78 proceeding almost a month after the statute of limitations expired. Therefore, the Petitioner is dismissed.

Even if the application was brought within the four month statute of limitations, Petitioner has failed to demonstrate that Respondent's decision was arbitrary and capricious. *Flacke*, 69 NY2d at 363. Respondent's denial of Petitioner's appeal to receive the appropriate amount of service credit he earned as a participant in the DBPP during a two-year leave of absence following an injury sustained on the job was based on the DBPP's rules for calculating a Participant's Uninterrupted seniority. Section 14.3 of the DBPP specifically states that "if employment is not resumed at the end of any period of absence from employment stated above, service will be considered to have terminated as of the date to which absence from employment began ..." Petitioner was "administratively terminated" on June 21, 2011 because he did not return to work within one year. Respondent determined that Petitioner's Uninterrupted Seniority was based on two separate periods of service. The first period of service ran from October 25, 2003 until June 20, 2010, and the second period of service ran from October 15, 2012 and continued through May 31, 2018. Petitioner fails to meet his burden of demonstrating that Respondent's denial of Petitioner's appeal should be disturbed by the Court.

Wherefore it is hereby

ORDERED that the Petition is denied; and it is further

ORDERED that the Petition 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: August 3, 2020

ENTER: 
J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION