

**Matter of Ofori v New York City Admin. for Children  
Servs.**

2020 NY Slip Op 34369(U)

November 16, 2020

Supreme Court, Bronx County

Docket Number: 260442/2019

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA-5

In the Matter of the Application of

INDEX NUMBER: 260442/2019

SAMUEL OFORI,

Petitioner,

-against-

Present:  
HON. ALISON Y. TUITT

NEW YORK CITY ADMINISTRATION FOR  
CHILDREN SERVICES and NEW YORK STATE  
DIVISION OF HUMAN RIGHTS,

Respondent

For a Judgment Pursuant CPLR Article 78.

The following papers numbered 1-3,

Read on this Article 78 Petition and Cross-Motion to Dismiss

On Calendar of 10/27/2020

Notice of Petition, Exhibits, Affidavit 1

Notice of Cross-Motion/Verified Answer/Administrative Record 2

Reply Memorandum 3

Upon the foregoing papers, the Petition pursuant to Article 78 of the CPLR and respondents' cross-motion to dismiss the Petition are consolidated for purposes of this decision. For the reasons set forth herein, the cross-motion to dismiss the Petition is granted, and the Petition is dismissed.

Petitioner brings this Article 78 petition seeking a judgment reversing the respondent's Determination and Order after Investigation dated April 16, 2019 which issued a "No Probable Cause" finding, and determined that there was no evidence to support the petitioner's claim of disability discrimination and to

award him alleged missing pension time and pension arrears.

Petitioner, a former juvenile counselor with respondent New York City Administration for Children Services (“ACS”) since 2005, sustained physical and psychological injuries, in the course of his employment, as a result of an assault by a juvenile resident on January 24, 2015. Following the incident, petitioner took a leave of absence under Workers’ Compensation. After petitioner exhausted the two years of leave permitted by Workers’ Compensation, ACS terminated petitioner pursuant to Civil Service Law (“CSL”) §71 on the grounds that ACS could not accommodate petitioner because he submitted medical documentation evidencing that he was totally disabled, was unable to return to work, and thus was unable to perform his job duties and responsibilities with or without accommodation.

Petitioner contends that ACS discriminated against him on the basis of his disability when he was terminated, and he was not afforded a reasonable accommodation in violation of the New York State Human Rights Law (“NYSHRL”), Article 15, §296, and the Americans with Disabilities Act. Petitioner seeks the Court to order a recalculation of pension time, and a distribution of pension arrears for the two year period for which he received Workers’ Compensation benefits and was on a leave of absence.

Petitioner, appearing pro-se, states in an affidavit that he was severely injured about the head and body as a result of the assault, and started to experience “panic attacks”, “excessive anxiety disorder”, “[s]tress and nightmares”. He continued under his doctor’s care during his time on Workers’ Compensation leave. On December 29, 2016, petitioner states he was sent a letter from ACS notifying him that he had exhausted his Worker’s Compensation leave. He was further advised that his employment would terminate at the end of the business day on January 30, 2017, should he did not return to work.

Petitioner states that on January 24, 2017, he reported to the ACS’ Human Resources Department with a medical note requesting an assignment with reasonable accommodation. Petitioner was referred to the ACS Equal Employment Opportunity Office (“EEOC”) to assist him regarding his request for a reasonable accommodation due to his alleged disability. Petitioner argues that while his application regarding his request for reasonable accommodation was pending with the EEOC, and before the EEOC issued a decision on his request, petitioner received a letter notifying him that his leave expired on January 24, 2017, and that his employment was terminated effective close of business on September 17, 2017. Petitioner argues that the ACS EEOC took no action on his request. He states that “[s]hockingly a termination letter followed on September

27, 2017. Apparently, it was the ACS/EEO that failed to provide me with an outcome for a special accommodation or a replacement... Due to the above disappointments and frustration, it shows clear evidence of discrimination because of Disability leave. Denial of Reasonable Accommodation, and Unfair Termination.”

Petitioner states that once his position was terminated, he was left with no alternative but to apply for early retirement. Petitioner further contends that as his retirement papers were being processed, he was “informed by the New York City Employee Retirement System (NYCERS) that the length of time with the agency did not reflect ten years due to the fact that [his] Employer did not report some of [his] time incurred during [his] disability leave, and should cause [him] to get much less pension payments. Petitioner was referred to “the union” attorney, Jefferey Kriesberg, Esq... to assist in this matter. NYCERS were sent letters by Attorney Kreisberg to redress this problem by installing all [his] Disability leave time, which would make me exceed ten years of service.” Thus, petitioner is requesting that the Court “settle these issues: a. Add all [his]lost time during Disability leave; 2. Recalculate [his] Pension Benefit payment; 3. My record marked terminated employee should be changed to retired employee; 4. Pending back pay to employees should also apply to [him].”

New York Civil Service Law §71 provides, in pertinent part, “where an employee has been separated from the service by reason of a disability resulting from an assault sustained in the course of his or her employment, he or she shall be entitled to a leave of absence for at least two years, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position.” On January 25, 2017, petitioner exhausted the two year leave of absence for which he received Workers’ Compensation benefits. Prior to the expiration of the leave of absence, ACS sent numerous letter to petitioner notifying him that he exhausted the maximum two year leave of absence, and was requested to return to work on or before January 30, 2017, or his employment would be terminated.

On April 16, 2019, the New York State Division of Human Rights (“SDHR”) in its Determination and Order after Investigation issued a “No Probable Cause” finding, determining there was no evidence to support petitioner’s claim of disability discrimination. The SDHR found that reason for petitioner’s termination was not pretextual because petitioner was unable to return to work, either with or without a reasonable accommodation. The SDHR noted that ACS delayed the petitioner’s termination for almost eight months in order to work with petitioner to identify reasonable accommodations that would enable petitioner to

return to work.

Administrative agencies enjoy broad discretionary power when making determinations of matters they are empowered to decide. Section 7803 provides in relevant part that “[t]he only questions that may be raised in a proceeding under this article are... (3) 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; or (4) whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.”

In deciding whether an agency’s determination was supported by substantial evidence or was arbitrary, capricious or an abuse of discretion, the reviewing court is limited to assessing whether the agency had a rational basis for its determination and may overturn the agency’s decision only if the record reveals that the agency acted without having a rational basis for its decision. See, Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992) citing Pell v. Board of Education, 34 N.Y.2d 222, 230-31 (1974); Sullivan County Harness Racing Association v. Glasser, 30 N.Y.2d 269, 277 (1972). The arbitrary and capricious test “chiefly ‘related to whether a particular action should have been taken or is justified... and whether the administrative action is without foundation in fact.’” Pell, supra. The reviewing Court does not examine the facts *de novo* to reach an independent determination. Marsh v. Hanley, 375 N.Y.S.2d 409 (3d Dept. 1975). Furthermore, a Court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary, unreasonable and an abuse of discretion. Pell, supra.

Where the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. See, Matter of Medical Malpractice Insurance Association. v. Superintendent of Insurance of State of New York, 72 N.Y.2d 753 (1988), cert. denied 490 U.S. 1080 (1989); Flacke v. Onondaga Landfill System, Inc., 69 N.Y.2d 355 (1987). Thus, this case must be reviewed in light of the well-settled proposition that the determination of an agency, acting pursuant to its authority and within its area of expertise, is entitled to great deference. See, Shuman v. New York State Racing and Wagering Board, 835 N.Y.S.2d 569 (1<sup>st</sup> Dept. 2007) citing Matter of Finger Lakes Racing Association, Inc. v. State of New York Racing & Wagering Board., 823 N.Y.S.2d 586 (2006); Matter of Tockwotten Association v. New York State Division of Housing & Community

Renewal, 777 N.Y.S.2d 465 (1<sup>st</sup> Dept. 2004); Matter of Nelson v. Roberts, 757 N.Y.S.2d 41 (1<sup>st</sup> Dept. 2003). “Determinations of the New York State Division of Human Rights ... are accorded ‘considerable deference due to its expertise in evaluating discrimination claims’ [and] may not be set aside ‘merely because the opposite decision would have been reasonable and also sustainable’”. Matter of Hilal v. New York State Division of Human Rights, 869 N.Y.S.2d 613 (2d Dept. 2008), quoting Matter of Matteo v. New York State Division of Human Rights, 761 N.Y.S.2d 517 (2d Dept. 2003).

In the instant matter, the SDHR appropriately concluded that petitioner’s complaint for discrimination was barred by the NYSHRL’s one year statute of limitations. Executive Law §297(5) provides that “[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.” Here, petitioner’s termination occurred on September 27, 2017. Therefore, petitioner had until September 28, 2018 to file the complaint. Petitioner did not file his SDHR complaint until October 11, 2018, thus, it was untimely.

Moreover, the SDHR’s determination of No Probable Cause was not arbitrary and capricious, and was rationally based on the administrative record submitted. The lack of evidence to substantiate petitioner’s allegation of disability discrimination and failure to accommodate, and ACS’s legitimate, non-discriminatory reason for terminating petitioner, was based on a rational and appropriate basis for the SDHR’s determination. The SDHR determined that petitioner’s termination was based on the non-discriminatory reason of exhausting his two year leave of absence and his inability to work with or without an accommodation. Petitioner was unable to return to work, in any capacity, which was supported by the “copious medical documentation that [petitioner] submitted”. Petitioner rebutted, every time, the Independent Medical Examinations that found him only partially disabled, by submitting his own physician’s letters which concluded that he was unable to return to work and found him to be 100% disabled.

The SDHR lacks jurisdiction to consider petitioner’s claim involving the calculation of his pension. Petitioner alleges that the period of time that he was out on Workers’ Compensation leave of absence, two years, was excluded from his pension calculation. Petitioner seeks a recalculation of his pension time and an award for pension arrears covering such period. The SDHR’s jurisdiction, however, is limited to matters arising out of a discrimination allegation. The SDHR, created by Section 293 of the Executive Law, is empowered to receive, investigate, and pass upon complaints alleging violations of the Human Rights Law

(Executive Law §295, subd. 6). Thus, there is no relief to be granted to the petitioner.

Accordingly, the cross-motion to dismiss the Petition is granted and the Petition is dismissed.

This constitutes the decision and Order of this Court.

Dated: 11/16/20

A handwritten signature in black ink, appearing to read "A. Y. Tuitt", is written over a horizontal line.

Hon. Alison Y. Tuitt