Williams v New York State Dept. of Corr. & Community Supervision
2021 NY Slip Op 33709(U)
October 22, 2021
Supreme Court, Albany County
Docket Number: Index No. 904501-20
Judge: James H. Ferreira
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MICHAEL WILLIAMS,

Plaintiff,

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Defendant.

DECISION AND ORDER AND JUDGMENT
Index No.: 904501-20
RJI No.: 01-20-136054

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Thomas D. Latin, Esq.
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HON. JAMES H. FERREIRA, Acting Justice:

Plaintiff commenced this action on July 10, 2020 by filing a summons and complaint with the County Clerk. Plaintiff thereafter filed an amended complaint. Plaintiff raises three causes of action related to defendant's denial of his application to be reinstated to his position as a correction officer with defendant New York State Department of Corrections and Community Supervision (hereinafter defendant or DOCCS) pursuant to Civil Service Law § 71. By Decision and Order dated January 19, 2021, the Court denied defendant's pre-answer motion to dismiss, converted the

amended complaint to a CPLR article 78 proceeding, with the exception of one aspect of plaintiff's declaratory judgment cause of action, and ordered that defendant file and serve an answer. Defendant thereafter served an answer, along with a motion for an order granting summary judgment dismissing the amended complaint. Plaintiff opposes the motion and defendant has submitted a reply.

The following facts are undisputed. Plaintiff was employed by defendant as a correction officer from November 11, 2013 through August 4, 2018. Effective August 4, 2018, his employment was terminated pursuant to Civil Service Law § 71 because, as a result of an injury sustained during an inmate restraint, he had been out of work on workers' compensation leave for a cumulative period in excess of two years. Upon the cessation of his disability, plaintiff applied for reinstatement to his position as a correction officer pursuant to Civil Service Law § 71. Plaintiff underwent a "reinstatement evaluation" on February 7, 2019 at the Employee Health Services office of the New York State Department of Civil Service (Amended Complaint, Exhibit B). By letter dated February 22, 2019, Anantapur Panduranga, M.D., advised: "Based on that evaluation, it is my considered medical opinion that you are fit to perform the full duties of a Correction Officer" (id.).

Plaintiff thereafter underwent a psychological screening administered by Law Enforcement Psychological Services (hereinafter LEPS), a company that DOCCS has contracted with to conduct the psychological screening process for correction officers. As part of that process, plaintiff executed a document entitled "Notice of Psychological Examination, Disclosure, Informed Consent and Release Statement After a Conditional Offer of Employment" (hereinafter Consent and Release) (see Dawson Affidavit in Support of Motion, Exhibit B). By letter dated May 22, 2019, defendant's Psychological Screening Unit (hereinafter PSU) informed plaintiff that he was found not psychologically suited for the position of New York State Correction Officer Trainee and had been

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disqualified from that position. Plaintiff appealed the disqualification to defendant's Independent Advisory Board (hereinafter IAB). By letter dated March 18, 2020, plaintiff was advised that the IAB recommended his continued psychological disqualification.

By letter dated March 31, 2020, plaintiff requested a copy of the records relied on by the IAB and advised that he was not told the reason for his disqualification. By letter dated April 14, 2020, defendant advised: "Department policy prohibits the release of psychological test results, a copy of the evaluation report, interpretations made, or access to the original data from which final recommendations have been made" (Dawson Affidavit in Support of Motion, Exhibit H). By letter dated April 15, 2020, plaintiff, through counsel, sent defendant a request for plaintiff's records and an executed medical authorization. Plaintiff specifically requested:

> "all records, including all tests administered to [plaintiff], considered by the PSU or the IAB in reaching their determinations regarding the psychological suitability of [plaintiff], any reports prepared by these entities, and copies of all communications by and between the PSU, the IAB, and any other employees of [DOCCS]" (Ranieri Affidavit in Support of Motion, Exhibit A).

Plaintiff asserted that, pursuant to Correction Law § 8 (6), he has an absolute right to the records and that he also has a right to the records pursuant to Public Health Law § 18 (2)(a), (d) and (e) and Mental Hygiene Law § 33.1 (b)(1). Defendant treated this letter as a request for records pursuant to the Freedom of Information Law (hereinafter FOIL) and sent a letter to plaintiff's counsel to that effect. By letter dated April 30, 2020, plaintiff's counsel responded to defendant and advised that plaintiff was not making a FOIL request but has a right to the records pursuant to Correction Law § 8 (6), Public Health Law § 18 (2)(a), (d) and (e) and Mental Hygiene Law § 33.1 (b)(1).

By letter dated May 13, 2020, defendant's FOIL Appeals Officer found that Correction Law § 8 (6) "only applies to the results of the exam and does not apply to any tests administered, reports generated or communications between the Psychological Screening Unit and Independent Advisory

Board or any other DOCCS employee" and also noted that plaintiff had signed a release waiving any right he had to the records (Ranieri Affidavit in Support of Motion, Exhibit D). The FOIL Appeals Officer provided some documents despite the waiver, including a copy of the signed waiver, the decision issued by the IAB and letters from DOCCS to plaintiff. The FOIL Appeals Officer denied, however, plaintiff's requests for copies of tests administered to plaintiff and for communications between the PSU and the IAB or any DOCCS employee, finding that those records are exempt from disclosure pursuant to Public Officers Law § 87(2)(g) as inter-agency or intra-agency materials. She also denied plaintiff's request for copies of the tests pursuant to Public Officers Law § 87(2)(d) on the ground that they are trade secrets or submitted to DOCCS by a commercial enterprise and which, if disclosed would cause substantial injury to the enterprise's competitive position.

Plaintiff thereafter commenced this action/proceeding. Plaintiff seeks review of the determination denying his application for reinstatement, as well as the determination partially denying his request for records. He also seeks a declaratory judgment that defendant's alleged policy and/or rule which requires all candidates applying for the position of correction officer trainee to sign a document waiving their rights to information concerning the psychological testing, or they will not be offered employment, is violative of plaintiff's right to due process, Executive Law §102 and Article VI §8 of the New York State Constitution and is void.

Denial of Application for Reinstatement

Where, as here, a petitioner challenges an administrative determination made where a hearing is not required, judicial review is limited to the issues of whether the challenged determination is rationally based, and whether it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Ward v City of Long Beach, 20 NY3d 1042, 1043 [2013]; Matter of Scherbyn v Wayne-Finger Lakes Bd.

of Coop. Educ. Servs., 77 NY2d 753, 758 [1991]; Matter of Bais Sarah Sch. for Girls v New York State Educ. Dept., 99 AD3d 1148, 1150 [3d Dept 2012], lv denied 20 NY3d 857 [2013]). "[A] court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (Matter of Arrocha v Board of Educ. of City of N.Y., 93 NY2d 361, 363-364 [1999] [internal citations and quotations omitted]; see Matter of Boatman v New York State Dept. of Educ., 72 AD3d 1467, 1468 [3d Dept 2010]). Said another way, "[i]f the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009]; see Matter of Wooley v New York State Dept. of Correctional Servs., 15 NY3d 275, 280 [2010]).

Civil Service Law § 71, entitled "Reinstatement after separation for disability," provides, in relevant part:

> "[W]here 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. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his or her former position, he or she shall be reinstated to his or her former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he or she was eligible for transfer"

(See 4 NYCRR 5.9). In turn, Correction Law § 8 provides that "[a]ny applicant for employment with the department as a correction officer at a facility of the department, shall be tested in

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accordance with the requirements of this section" and authorizes defendant to "conduct, or to enter into agreements necessary for conducting tests for psychological screening of applicants covered by this section" (Correction Law § 8 [1], [2]). The statute further provides that "[p]ersons who have been determined by a psychologist licensed under the laws of this state as suffering from psychotic disorders, serious character disorders, or other disorders which could hinder performance on the job may be deemed ineligible for appointment" (Correction Law § 8 [2]).

Plaintiff first argues that, pursuant to Civil Service Law § 71, he has a protected property right to reinstatement and defendant was required to reinstate him to his former position upon the certification of Dr. Panduranga that he was "fit to perform the full duties of a Correction Officer" (Amended Complaint, Exhibit B). He asserts that defendant committed an error of law and violated his due process rights by applying Correction Law § 8 to his reinstatement application and requiring him to submit to psychological testing. The Court finds this argument to be without merit. Defendant has submitted evidence that, in January 2004, "DOCCS changed the medical evaluation processing of Correction Officer reinstatements to mirror the processing of Correction Officer trainee candidates" and that DOCCS requires all former correction officers seeking reinstatement to pass the same physical and psychological examinations administered to correction officer trainee candidates (Dawson Affidavit in Support of Motion ¶¶ 6, 26). Given that Correction Law § 8 specifically requires defendant to conduct psychological testing for "*[a]ny applicant* for employment with the department as a correction officer" (Correction Law § 8 [1] [emphasis added]), and that Civil Service Law § 71 requires an applicant for reinstatement to be found mentally fit to perform the duties of his or her former position, the Court finds DOCCS' application of Correction Law § 8 with respect to plaintiff's application for reinstatement to be rational and declines to disturb it. Importantly, the Appellate Division, Third Department, has held that it is proper for DOCCS to use

"the psychological standards detailed in Correction Law § 8" to determine whether an applicant for reinstatement was mentally fit to return to her position as a correction officer pursuant to Civil Service Law § 73 (see Matter of Coleman v State of New York, 38 AD3d 1044, 1046 [3d Dept 2007]). The Court finds that the holding in Matter of Coleman v State of New York is equally applicable to plaintiff's application for reinstatement under Civil Service Law § 71, a statute which is substantively similar to Civil Service Law § 73. Therefore, the Court denies the petition inasmuch as plaintiff alleges that his due process rights were violated because DOCCS applied an incorrect statutory standard.

Plaintiff also argues that defendant's determination that plaintiff was not psychologically suited for the position of correction officer is arbitrary and capricious because there is no finding that he is suffering from a psychotic disorder, serious character disorder or any other disorder which could hinder his performance as a correction officer; plaintiff asserts that, to the contrary, he "had been performing the job duties of a correction officer prior to his inmate-related injury, and there had been no change to his psychiatric condition since his initial appointment" (Amended Complaint ¶ 65). He also argues that the determination is arbitrary and capricious because he was not provided any basis for the finding that he was psychologically unsuited for the position of correction officer.

The Court, upon review, declines to disturb defendant's determination that plaintiff was not psychologically suited for the position of correction officer and its denial of plaintiff's application for reinstatement. The Court has reviewed, in camera, the report of the licensed psychologist who performed the psychological assessment and finds that it provides a rational basis for the determination. The Court notes that the psychologist specifically found that plaintiff had psychological traits which are expected to significantly interfere with the performance of essential job functions and noted that the screening had revealed "moderate adaptability concerns,"

"significant alcohol and substance abuse concerns" and "moderate concerns regarding impulse control." The Court is also unpersuaded by plaintiff's argument that defendant's determination is arbitrary and capricious because defendant did not provide plaintiff with more specific reasons for its determination. Defendant informed plaintiff that he had been found not psychologically suited to the position of Correction Officer Trainee; plaintiff has pointed to no statute, regulation, policy or other requirement that a more detailed statement by defendant was required. Indeed, Correction Law § 8 provides only that "[t]he commissioner or his or her designee shall advise those candidates who have been deemed ineligible for appointment through psychological screening and shall notify such persons of their right to appeal their disqualification" (Correction Law § 8 [3]).

Denial of Request for Records

Plaintiff argues that, pursuant to the plain language of Correction Law §8 (6), he has a right to the records of his examination and that defendant's decision to treat his record request as a FOIL request was arbitrary, capricious and affected by an error of law. Plaintiff further argues that, even assuming that the request was properly treated as a FOIL request, defendant's response was arbitrary, capricious and affected by an error because defendant "failed to itemize the responsive documents and failed to set forth which alleged exemptions applied to which responsive documents" (Amended Complaint ¶ 56).

Correction Law § 8 (6) provides:

> "Notwithstanding any other provision of law, the results of the tests administered pursuant to this section shall be used solely for the qualification of a candidate for correction officer and the validation of the psychological instruments utilized. For all other purposes, the results of the examination shall be confidential and the records sealed by the department of corrections and community supervision, and not be available to any other agency or person except by authorization of the applicant or, upon written notice by order of a court of this state or the United States."

This statute provides for the confidentiality of records and does not, as plaintiff asserts, affirmatively

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require DOCCS to release records to an applicant upon request. Therefore, the Court discerns no error in DOCCS' consideration of the request for records under the framework of FOIL rather than Correction Law § 8 (6). The Court notes that defendant has submitted evidence that petitioner's record request was treated as a FOIL request because, pursuant to DOCCS' policy, "all requests for copies of departmental records that are not accompanied by a court order" are processed as FOIL requests (Ranieri Affidavit in Support of Motion ¶¶ 20-21).

The Court is also unpersuaded by plaintiff's contention that defendant erred by partially denying the request pursuant to FOIL. The Court notes that, pursuant to the Consent and Release signed by plaintiff, he expressly waived "any right [he] may have to know the test results, interpretations made, access to the original data from which final recommendations have been made, or to a copy of the evaluation report" (Dawson Affidavit in Support of Motion, Exhibit B). Plaintiff does not dispute that he signed this waiver prior to participating in the psychological screening. Therefore, the Court is not persuaded by plaintiff's contention that he is entitled to the records sought pursuant to Correction Law § 8 (6). To the contrary, plaintiff waived any right he may have had to the records. Therefore, to the extent that defendant denied plaintiff's record request based upon this waiver, no error is apparent. Moreover, inasmuch as defendant denied plaintiff's request for records pursuant to Public Officers Law § 87 (2) (d) and (g), the Court declines to disturb that determination, as defendant has articulated a particularized and specific justification for denying access to those records, and plaintiff has not demonstrated that the records should have been released.

Legality of Consent and Release

As to his declaratory judgment claim, plaintiff alleges that DOCCS requires all candidates for the position of correction officer trainee to sign the Consent and Release waiving their right to the results of the psychological evaluation, or they will not be offered employment. Plaintiff asserts

that the policy effectively takes away any right of an applicant to bring a CPLR article 78 proceeding or any other appeal from a finding that he or she is not psychologically suited to be a correction officer because the candidate is not told the basis for the determination; plaintiff urges that this policy violates an applicant's due process rights. Plaintiff further alleges that DOCCS' policy is a "rule" which was not enacted pursuant to the requirements of the State Administrative Procedure Act and violates Executive Law §102 (1)(a) and Article VI §8 of the New York State Constitution.

"[U]nder appropriate circumstances, summary judgment may lie within the confines of a declaratory judgment action [and] the test of its applicability is no different than in any civil action" Subdivisions, Inc. v Town of Sullivan, 75 AD3d 978, 980 [3d Dept 2010] [internal citation omitted]). Here, defendant argues that plaintiff's declaratory judgment claim is without merit as a matter of law because plaintiff does not have a property right to reinstatement pursuant to Civil Service Law § 71 and because DOCCS' requirement that applicants sign the Consent and Release does not, in fact, prevent an applicant from challenging a determination that the applicant was not psychologically suited to be a correction officer. Defendant also argues that DOCCS' Consent and Release policy is a general policy and does not constitute a "rule" within the meaning of the State Administrative Procedure Act.

As to plaintiff's due process challenge to the policy, "[i]t is well established that procedural due process guarantees notice and an opportunity to be heard before a claimant is deprived of liberty or a recognized property interest" (Matter of County of Chemung v Shah, 28 NY3d 244, 264 [2016]; see Portofino Realty Corp. v New York State Div. of Hous. & Community Renewal, 193 AD3d 773, 777 [2d Dept 2021]). At least one court has held that "due process requires notice and some opportunity to respond before an employee is terminated from civil service employment under Civil Service Law § 71" (Matter of Allen v City of New York, 39 Misc 3d 1223 [A] [Sup Ct, New York

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County 2013], affd 123 AD3d 411 [1st Dept 2014]; see e.g. Matter of Richie v Coughlin, 148 AD2d 178, 183 [3d Dept 1989], appeal dismissed 75 NY2d 765 [1989], lv denied 75 NY2d707 [1990], cert denied 498 US 824 [1990]). Here, the record establishes that plaintiff was afforded notice and an opportunity to contest the determination that he was not psychologically suited for the position, and the Court is not persuaded that his execution of the Consent and Release effectively prevented him from doing so. Rather, despite his waiver of any right to the test results or evaluation report, plaintiff was able to challenge the determination via an administrative appeal and via this proceeding/action. Importantly, there is no support in either Civil Service Law § 71 or Correction Law § 8 for plaintiff's position that he is entitled to more detailed findings with respect to the determination. As such, the Court finds that plaintiff's due process challenge to the requirement that he sign the Consent and Release is without merit.

The Court also finds plaintiff's claim that DOCCS' policy requiring applicants to sign the Consent and Release violates Executive Law §102 (1)(a) and Article VI §8 of the New York State Constitution to be without merit as a matter of law. Article VI §8 of the New York State Constitution states: "No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state." Similarly, Executive Law §102 (1)(a) provides: "No code, rule or regulation shall become effective until it is filed with the secretary of state, unless a later date is required by statute or is specified by such code, rule or regulation." "A 'rule or regulation' has long been defined as 'a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers' " Matter of Plainview-Old Bethpage Congress of Teachers v New York State Health Ins. Plan, 140

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AD3d 1329, 1331 [3d Dept 2016], appeal dismissed 28 NY3d 1168 [2017], lv denied 29 NY3d 910 [2017], quoting Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health, 66 NY2d 948, 951 [1985]; see Matter of SLS Residential, Inc. v New York State Off. of Mental Health, 67 AD3d 813, 815-816 [2d Dept 2009], lv denied 14 NY3d 713 [2010]). By contrast, "interpretive statements and guidelines assist agency officials in exercising some aspect of their discretionary authority granted by existing statutes and regulations" (Matter of Plainview-Old Bethpage Congress of Teachers v New York State Health Ins. Plan, 140 AD3d at 1331). The State Administrative Procedure Act excludes from the definition of "rule" "forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" (State Administrative Procedure Act § 102 [2] [b] [iv]). "The primary difference between a rule or regulation and an interpretive statement or guideline is that the former set standards that substantially alter or, in fact, can determine the result of future agency adjudications while the latter simply provide additional detail and clarification as to how such standards are met by the public and upheld by the agency" (Matter of Plainview-Old Bethpage Congress of Teachers v New York State Health Ins. Plan, 140 AD3d at 1331 [internal citations and quotation marks omitted]).

Here, the Consent and Release is a form document used by DOCCS in administering the psychological examinations required by Correction Law § 8. In signing the Consent and Release, the applicant consents to participating in a psychological examination, acknowledges that "all data collected and the psychological evaluation report are the property of [DOCCS]" and "in consideration of the services rendered, . . . waive[s] any right [her or she] may have to know the test results, interpretations made, access to the original data from which final recommendations have

been made, or to a copy of the evaluation report" (Dawson Affidavit in Support of Motion, Exhibit B). In support of its motion, defendant has submitted the affidavit of Jerome Dawson, who is employed by DOCCS as Coordinator of DOCCS Investigator Employee Investigations Unit (hereinafter EIU) and Associate Director of Personnel. Therein, Mr. Dawson affirms that all correction officer trainee applicants and former correction officers seeking reinstatement are required to sign the Consent and Release. He states:

> "Release of the underlying test results, reports generated by LEPS, communications between LEPS and DOCCS, and testing instruments would result in the release of proprietary information maintained by LEPS, including exam questions and grading scales and criteria. In addition, release of such documentation has the potential to frustrate the purpose of psychological screening by making it possible for candidates who have yet to undergo DOCCS' psychological testing to obtain guidance or insight . . . into the exam questions being asked and the information or answers that are taken into consideration by psychologists determining whether an applicant is psychologically suitable for the position of Correction Officer. Possession of such information could facilitate cheating and/or invalidate the testing instrument" (Dawson Affidavit in Support of Motion ¶¶ 43-44).

The Court finds that the foregoing, along with the Court's review of the Consent and Release document, demonstrates that the Consent and Release policy is not a rule or regulation which is required to be filed with the Secretary of State. The Consent and Release document is a form which essentially provides statements of general policy with respect to psychological testing conducted by DOCCS pursuant to Correction Law § 8, and the requirement that applicants for correction officer positions sign the document ensures that the applicant is aware of and consents to the parameters of the psychological testing. Importantly, the applicant's signing of the Consent and Release does not have a substantive impact on the outcome or course of the psychological examination so as to create "a quasi-legislative norm or prescription . . . that carves out a course of conduct for the future" (Matter of Connell v Regan, 114 AD2d 273, 275 [3d Dept 1986]). The Court is not persuaded by

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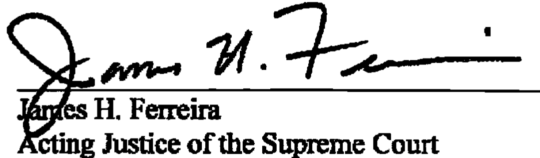
plaintiff's argument that the Consent and Release policy is a "rule or regulation" simply because, as plaintiff contends, an applicant does not get the job unless he or she signs it. As such, the Court finds that plaintiff's claim that the policy should be declared void because it was not filed with the Secretary of State must be dismissed.

As such, based upon the foregoing, it is

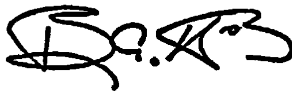
ORDERED that defendant's motion is granted, plaintiff's CPLR article 78 proceeding is denied and the amended complaint is dismissed in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: Albany, New York
October 22, 2021



James H. Ferreira
Acting Justice of the Supreme Court



Papers Considered:

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1. Amended Complaint, verified September 22, 2020, with attached exhibits;
2. Memorandum of Law in Support by Thomas D. Latin, Esq., dated October 4, 2020;
3. Verified Answer, dated April 16, 2021;
4. Notice of Motion, dated April 16, 2021;
5. Memorandum of Law in Support of Motion by Denise P. Buckley, Esq., dated April 16, 2021;
6. Affirmation in Support by Denise P. Buckley, Esq., dated April 16, 2021, with attached exhibits;
7. Affidavit in Support by Jerome Dawson, sworn to April 16, 2021, with attached exhibits;
8. Affidavit in Support by Michael Ranieri, sworn to April 16, 2021, with attached exhibits;
9. Defendant's Statement of Material Facts, dated April 16, 2021;
10. Affidavit in Opposition by Thomas D. Latin, Esq., sworn to April 27, 2021;
11. Plaintiff's Response to Statement of Material Facts, dated April 27, 2021;
12. Memorandum of Law in Opposition by Thomas D. Latin, Esq., dated April 27, 2021; and
13. Memorandum of Law in Reply by Denise P. Buckley, Esq., dated May 24, 2021.