[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: RAKOWER Justice

PART 15

Index Number : 111310/2011
DEVOLL, ROLAND
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3, 4

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION DECIDED IN ACCORDANCE W/ ATTACHED DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/5/12

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

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER

[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

In the Matter of the Application of
ROLAND DEVOLL,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION, DENNIS M. WALCOTT, as Commissioner for New York City Department of Education, and THE CITY OF NEW YORK, MICHAEL BLOOMBERG, as Mayor of the City of New York, THE CITY OF NEW YORK DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, EDNA WELLS HANDY as Commissioner of The City of New York Department of Citywide Administrative Services

Respondents.

----------X

Index No.
111310/11

DECISION
and ORDER

HON. EILEEN A. RAKOWER:

Roland Devoll ("Petitioner") brings this petition pursuant to *Article 78 of the CPLR* for a judgment to immediately reinstate Petitioner's employment to the New York City Department of Education ("DOE"). Petitioner also seeks damages for lost wages and benefits, compensatory damages for emotional pain and suffering, and punitive damages. Petitioner requests recovery for the cost of the action and reasonable attorneys' fees. The relevant issue is Petitioner's claim that the DOE acted in bad faith in refusing to reinstate him to his former position or a similar or lower level position, and in placing him on a preferred list where he was eligible for reinstatement for four years.

Petitioner was employed at the DOE as a City Laborer, with a permanent civil service classification, from January 1985, until he was terminated pursuant to Civil Service Law § 72 in July 2010. In 2005, Petitioner was promoted to Provisional Supervisor.

In April 2008, Petitioner was told by the Executive Director of Administration Frank Borrowic not to report for a regular weekend overtime assignment. Petitioner was

later informed by Michael Hahn, Executive Director, that he allegedly saw another employee, Mr. Szot, in video camera footage, removing approximately eight computers from the trucking storage area, put them on a dolly, and move them to an unknown area. Petitioner later asked Mr. Szot where he put the computers and he stated that he put them in Mr. Borrowic's personal vehicle. Petitioner believed these actions to be misconduct, and made a report to the Special Commissioner of Investigation ("SCI") for the New York City School District. Mr. Borrowic later explained his actions by stating that he was taking the computers to another Department location in his personal vehicle for the purpose of having them reconfigured.

Petitioner alleges that Mr. Borrowic became extremely hostile and angry towards him when he learned he filed a report with SCI. Petitioner states that when he was in Mr. Borrowic's office, Mr. Borrowic told him that he knew Petitioner had reported him, and became so agitated and angry that he yelled in his face, threatened him, and told Petitioner that he would have him demoted, and fired, and that he was going to make his life a living hell. Petitioner contends that shortly thereafter, Mr. Borrowic called him into a meeting and stated that he was being relieved of his Provisional Supervisor title and that another laborer was taking his position. Petitioner called SCI and informed them that he was being subjected to retaliation as a result of reporting Mr. Borrowic. Petitioner states that SCI intervened and had his demotion rescinded that day.

On December 3, 2008, Petitioner was demoted back to his permanent civil service title, City Laborer, on the grounds that he had unexcused absences or lateness. In July 2009, Petitioner was injured at the workplace and went on workers' compensation leave, and in June 2010, Petitioner received a letter from the Department informing him that he was going to be terminated from his City Laborer position within 30 days because he had not been able to perform his duties due to an occupational injury for more than one year. He was informed that within one year of proposed termination, he would have a right to apply for a medical examination to determine his physical and mental ability to perform the duties of a City Laborer. They stated that if found to be medically fit, then he would be entitled to reinstatement to his former position, if vacant, or to a vacant position for which he was eligible to transfer, and that if no positions were available, then he would be placed on a reinstatement list for a period of four years. Petitioner was also informed that if the Department of Education's Medical Offices deemed him unfit to return to work, he would be given written notice of the determination and the reasons for the determination, a copy of the medical report and other records on which the determination was based, delivered to

Petitioner's address of record.

On June 17, 2010, Petitioner was seen by Doctor Stanley Soren, who stated that Petitioner was fit to return to work on light duty. Michael Hutter from the Department's Human Resources office informed Petitioner that he could only return to work if his doctor stated that he could perform the duties of a City Laborer with no restrictions whatsoever. As a result, Petitioner was terminated in early July 2010.

On June 20 2011, Petitioner was examined by a physician in the DOE's Medical Review Office and was found physically fit to return to duty. Petitioner spoke with Nancy Grillo of Human Resources soon thereafter and informed her that he could return to work with no restrictions, according to a recommendation by the Department doctor. Ms. Grillo spoke with Petitioner and informed him that there were no vacancies in his former position and that there were no titles below that of City Laborer, thus he was being placed upon a preferred list for a period of four years; if and when a City Laborer position became available for hiring, petitioner would be contacted and that he would remain eligible for reinstatement for a period of four years.

The issue presented is whether the DOE acted in a rational and good faith manner in refusing to reinstate the Petitioner to his former position or a similar or lower level position, and in placing him on a preferred list where he was eligible for reinstatement for four years.

Petitioner argues that the decision by the DOE not to reinstate him to his former position is arbitrary and capricious. He contends that Respondent discriminated against him due to his former disability and also retaliated against him in contravention of Civil Service Law §75-b. Specifically, Petitioner states that Respondents' justification for refusing to reinstate him to his former position of City Laborer on the ground that there are no vacancies and/or that the position has been abolished supports Petitioner's bad faith argument. He contends that the Respondent failed to consider appointing him to a vacant position in a similar or lower position in the same occupational field or to a vacant position for which Petitioner was eligible, and that he was discriminated against because the department could have provided him with an accommodation, such as a light duty assignment.

The DOE alleges that there was an objective good faith basis for Petitioner's decision not to rehire Petitioner, in that there was a lack of vacancies and an overall headcount reduction as a result of funding reductions mandated by the DOE and the City's Office

of Management and Budget. Respondent states that it placed Petitioner on a list for reinstatement, where he will remain for four years, affording him the right to be rehired if and when a position in his former title becomes available. Respondent denies that the failure to reinstate Petitioner is in any way related to the complaint made against his supervisor in 2008, and in any event should be denied for failure to file a notice of claim. Respondent further contends that Petitioner's remaining claims should be summarily dismissed as time barred from consideration as well as for failing to comply with applicable notice of claims requirement.

C.P.L.R. § 217 provides that an article 78 proceedings "must be commenced within four months after the determination... received becomes final and binding upon the petitioner. "[F]or a determination to be final it must be clear that the petitioner seeking review has been aggrieved by it." Lubin v. Board of Educ. of the City of N.Y., 60 N.Y.2d 974, 976 (1983). Here, the article 78 proceeding was commenced on October 4, 2011. Thus, the four month statute of limitations commenced running on June 4, 2011. Accordingly, while plaintiff's alleged wrongful denial of reinstatement claim from on or around June 20, 2011 is not time barred, his allegations arising from the alleged wrongful denial of reinstatement in June 2010 and his termination on July 3, 2010 are barred.

Additionally, Education Law § 3813(1) sets out that a notice of claim must be filed before any cause of action can be brought against the DOE or its employee, and that a notice of claim must be filed within three months of the accrual of such claim. As a matter of law, no action or proceeding may be prosecuted or maintained against any school district or board of education unless another claim has been presented to the governing body." Parochial Bus Sys. Inc., v. Bd. of Educ. Of the City of New York, 60 N.Y.2d 539, 549 (1983). Petitioner failed to comply with the notice of claim requirement prior to commencing his proceeding in that he did not file a notice of claim before bringing a cause of action against the DOE.

Had a notice of claim had been filed, Petitioners non-time-barred complaint of wrongful denial of reinstatement would still fail under Civil Service Law § 71. The law states that where a public employee is incapable of performing job duties due to a disability either resulting from an occupational injury or disease under workers' compensation law, s/he is entitled to a leave of absence of up to one year. After a year has passed, the employer may terminate the employee. N.Y. Civil Service Law § 71 (McKinney 2011). Within a year of termination, the civil servant can make an application to the civil service department/commission with jurisdiction over the position for a medical examination designated by the department/commission. If the

medical officer certifies that the civil servant is mentally/physically fit to perform the duties of the civil service position held by the civil servant, then: he or she shall be reinstated to the 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 to transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filling of such vacancy, the name of such person shall be placed upon a preferred list for his or her former position, and he or she shall be eligible for reinstatement from such preferred list for a period of four years.

It should be noted that the scope of judicial review is limited to a determination that the administrative body had a rational basis for its actions. See Hughes v. Doherty, 5 N.Y.3d 100, 107 (2005). Here, the DOE acted rationally in granting petitioner all of the rights afforded under Civil Service Law § 71, which are noted above. On or around June 20, 2011, Petitioner contacted the DOE for possible reinstatement. The DOE referred him for a medical exam and once he was found fit for duty, attempted to reinstate him. The DOE did not have any vacancies at the time in Petitioner's former position or any lower grade position in the same occupational field due to budgetary constraints, so in compliance with Civil Service Law § 71, it placed Petitioner's name on a list for reinstatement to his former position for the next four years. Petitioner has the opportunity to be reinstated if a position becomes available in the future.

Wherefore it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

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

Dated: March 5 2012

EILEEN A. RAKOWER, J.S.C.