

**Matter of Cacciuttolo v Port Authority of NY & NJ**

2012 NY Slip Op 30834(U)

March 30, 2012

Sup Ct, New York County

Docket Number: 107365/11

Judge: Doris Ling-Cohan

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# SUPREME COURT OF THE STATE OF NEW YORK

*Hon. Doris Ling-Cohan* NEW YORK COUNTY

Index Number : 107365/2011

**CACCIUTTOLO, LOUIS**

vs.

**PORT AUTHORITY OF NEW YORK & NJ**

SEQUENCE NUMBER : 001

ARTICLE 78

\_\_\_\_\_ *stice* \_\_\_\_\_

PART 36

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

Motion to/for Article 78 proceeding

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

Answering Affidavits — Exhibits 1 memo | No(s). 3, 4

Replying Affidavits \_\_\_\_\_ | No(s). 5

Upon the foregoing papers, it is ordered that this motion is Article 78 proceeding  
is dismissed in accordance with the attached  
memorandum decision.

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

### 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).

Dated: 3/30/12

 \_\_\_\_\_, J.S.C.

JUDGE DORIS LING-COHAN

1. CHECK ONE: .....  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: IAS PART 36

-----X

In the Matter of the Application of  
LOUIS CACCIUTTOLO,

Petitioner,

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules  
directing the Respondent to comply with  
PANYNJ A1 20-1.18 and to provide the  
Petitioner with the appropriate remedial  
action based upon Petitioner's allegations

Index No.: 107365/11

DECISION/ORDER

Motion Seq. No.: 001

-against-

THE PORT AUTHORITY OF NEW YORK &  
NEW JERSEY,

Respondent.  
-----X

**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).**

**HON. DORIS LING-COHAN, JSC:**

In this Article 78 proceeding, petitioner Louis Cacciuttolo (Cacciuttolo) seeks a judgment (motion sequence number 001). For the following reasons, this petition is denied.

**FACTS**

Petitioner Louis Cacciuttolo (Cacciuttolo), a resident of Sullivan County, New York, is a former employee of the respondent Port Authority of New York & New Jersey (the PA). See Petition, ¶¶ 1-3. Cacciuttolo was first hired on March 1, 1982, and eventually accepted a buy-out offer and voluntarily retired from the PA on November 18, 2010. *Id.*, ¶ 14.

In 1996, Cacciuttolo had been promoted to the position of General Manager - Supervisor, and he ultimately retired from the job title of Construction Coordinator. *Id.*, ¶ 3. During his tenure with the PA, however, Cacciuttolo was the subject of disciplinary charges on several occasions, mostly as a result of disputes with his fellow supervisors and repeated failures to

attend required meetings. Those charges were set forth in memoranda that the PA filed on August 17, 2005, April 4, 2007, July 30, 2007 and June 19, 2008. *See* Banks Affirmation in Support of Answer; Exhibits 6, 15, 16, 21. All of the charges were submitted to arbitration. The August 17, 2005 charges were upheld in a decision, dated July 8, 2006, in which a five-day job suspension was imposed on Cacciuttolo that was satisfied by “time served.” *Id.*; Exhibit 12. The April 4 and July 30, 2007 charges were also upheld in separate arbitrators’ decisions, both dated December 6, 2007, that imposed job suspensions on Cacciuttolo of 15 days and 25 days (with an additional 35 days held in abeyance), respectively. *Id.*; Exhibits 17, 18. Finally, the June 19, 2008 charges were resolved via stipulation, on the record before a hearing officer, on July 28, 2009, in which Cacciuttolo agreed to a job suspension of 65 days, consisting of 30 days relating to those charges, and the 35 days that had been held in abeyance in the prior decision, with the suspension to be served at management’s discretion. *Id.*; Exhibit 24.

On March 25, 2010, Cacciuttolo’s attorney sent the PA a letter in which it was claimed that management had filed the June 19, 2008 charges against him improperly, and in violation of the PA’s “whistleblower protection” rule, as a result of a complaint that he had filed earlier that month against his supervisors regarding their alleged improper disposal of asbestos at a work site. *See* Petition, Exhibit A. On February 22, 2011, after conducting a hearing and investigation, the PA’s Office of Investigations (OIG) sent Cacciuttolo a letter decision that included the following findings:

Based on this investigation, it was determined that the disciplinary action and other events experienced by Mr. Cacciuttolo were not taken in retaliation for Mr. Cacciuttolo’s having made a report to the OIG, as is required by [the “whistleblower protection” rule] for a finding of adverse personnel action against an employee. The process of commencing disciplinary action against Mr.

Cacciuttolo began immediately after he missed the meeting in April 2008 and involved the participation and scrutiny of several disparate individuals. Mr. Cacciuttolo's prior disciplinary record was a factor in commencing this disciplinary action. Mr. Cacciuttolo made his report regarding an asbestos matter to the OIG months after the start of the process of disciplinary action. Individuals involved in the disciplinary process against Mr. Cacciuttolo were not aware that he had made a report to the OIG. Additionally, the investigation revealed no evidence that the disciplinary action and other events experienced by Mr. Cacciuttolo took place for any reason, other than on their merits.

As a result, the investigation demonstrated that Mr. Cacciuttolo's claim of retaliation did not make out a violation of [the "whistleblower protection" rule], and therefore, this Office's investigation has been completed.

*Id.*; Exhibit D.

Thereafter, on June 23, 2011, Cacciuttolo commenced this special proceeding for an order, pursuant to CPLR Article 78, "directing the [PA] to comply with [the "whistleblower protection" rule] and to provide the petitioner with the appropriate remedial action based upon petitioner's allegations." Notice of Petition. The PA served a verified answer on September 7, 2011.

#### DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1<sup>st</sup> Dept 1996). Further, "[t]he interpretations of respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1<sup>st</sup>

Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). After a review of the within record, the court rules in favor of the PA.

The PA's "whistleblower protection" rule is an executive order, issued by the agency's director and designated as "PANYNJ A1 20-1.18," that provides, in pertinent part, as follows:

No officer or employee of the Port Authority shall take an adverse personnel action with respect to another officer or employee solely as a result of, or in retaliation for, his or her: (i) making a truthful report of information concerning conduct which he or she knows or reasonably believes to involve ... gross mismanagement ... or abuse of authority by another Port Authority officer employee ... .

*See* Petition, Exhibit B. The "whistleblower protection" rule also requires the OIG acknowledge complaints in writing, conduct an investigation, hold a hearing, and issue a written determination as to whether an "adverse personnel action" was taken. *Id.* The OIG's February 22, 2011 letter decision appears to comply with all of these requirements. Nevertheless, in his memorandum of law, Cacciuttolo raises the conclusory argument that "[f]or the inspector general to dismiss the factual justification for the whistleblower charge is certainly arbitrary, capricious, and counter to the facts produced by the petitioner." *See* Memorandum of Law in Support of Motion, at 4. However, nowhere does Cacciuttolo explain a factual or legal basis for such conclusion.

In opposition, the PA responds that the administrative record supports the OIG's findings, since it clearly discloses that the last round of disciplinary charges were prepared and signed *before* Cacciuttolo even made his complaint about the asbestos disposal. *See* Memorandum of Law in Opposition to Motion, at 12. The PA has presented documentary evidence to support this allegation. *See* Banks Affirmation in Opposition to Petition, Exhibit 21. Cacciuttolo's reply papers contain no additional legal argument. Because the disciplinary charges were commenced

before Cacciuttolo made his complaint about the asbestos removal, there are no grounds for finding that those charges were retaliatory, as required for a claim under the PA's "whistleblower protection" rule. Therefore, Cacciuttolo failed to demonstrate that the OIG's decision to dismiss his whistleblower complaint was arbitrary or capricious. Accordingly, the court finds that Cacciuttolo's petition is denied.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED and ADJUDGED that the petition of for relief, pursuant to CPLR Article 78, of petitioner Louis Cacciuttolo is denied and this petition is dismissed; and it is further

ORDERED that within 30 days of entry of this order, respondent shall serve a copy upon petitioner, with notice of entry.

**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).*

Dated: New York, New York  
March 30, 2012

  
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Hon. Doris Ling-Cohan, JSC