Matter of Bigam v Department of Educ. of the City of NY
2012 NY Slip Op 32829(U)
November 13, 2012
Sup Ct, New York County
Docket Number: 103466/12
Judge: Joan B. Lobis

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Lobis Justice

PART 6

IN RE: Kimberly Bigan.
-v-
NYC. Dept. of Ed

INDEX NO. 103466-12

MOTION DATE 001

MOTION SEQ. NO. ____

The following papers, numbered 1 to 13, were read on this motion to/for annul determination

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 1-7
Answering Affidavits — Exhibits	No(s). 8-12
Replying Affidavits	No(s). 13

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM 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: 11/13/12

JOAN B. LOBIS, J.S.C.

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
NEW YORK COUNTY: IAS PART 6

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In the Matter of the Application of
KIMBERLY BIGAM,

Petitioner,

Index No. 103466/12

for Judgment Pursuant to Art. 78 of the C.P.LR.

Decision, Order, and Judgment

-against-

THE DEPARTMENT OF EDUCATION OF
THE CITY OF NEW YORK,

Respondent.

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JOAN B. LOBIS, J.S.C.:

Petitioner Kimberly Bigam brings this petition, under Article 78 of the C.P.L.R., seeking an order annulling the determination of respondent The Department of Education of the City of New York, ("DOE"), which placed petitioner on the ineligible list for hire with DOE for a twelve (12) month period.

Petitioner is a teacher and was employed by DOE since 2004. On or about May 18, 2012, petitioner applied for a security clearance with DOE's Division of Human Resources and Talent/Office of Personnel Investigation ("OPI") to work as a substitute teacher in PS 166Q, a DOE school. As part of the security clearance application, petitioner was required to complete a background questionnaire, which required petitioner to respond to several questions, including whether she had been fired or required to resign from any position. Petitioner responded in the negative to all of the questions. In the comments section of the questionnaire, petitioner stated that she took a leave of absence in 2006, and applied to have that leave extended in 2007; that the

extension application was granted, but that she did not receive any paperwork due to a change in her living arrangements; and that she only later found out that her extension was only for July and August. By letter dated May 30, 2012, OPI informed petitioner that her application for a security clearance was denied, because petitioner "failed to disclose that [she had been] discharged" (the "Determination"). The Determination further stated that petitioner may reapply for the position in the DOE after twelve (12) months.

The discharge to which the Determination referred occurred on August 30, 2007. While employed with DOE, petitioner requested and was granted personal leave for one year from September 1, 2006, until June 30, 2007, citing educational and personal reasons. By letter dated April 26, 2007, DOE informed petitioner that her leave of absence was set to expire on June 30, 2007, and directed petitioner to inform DOE of her intentions for the 2007-2008 school year. In the letter, DOE stated that a failure to respond by May 11, 2007, would result in petitioner being placed on unauthorized leave. By letter dated May 16, 2007, DOE sent a second letter reminding petitioner that her response remained outstanding and that a failure to respond would ultimately result in an action affecting her employment status. Respondent asserts that petitioner did not respond to either letter, nor did she request a second leave of absence or an extension of the leave of absence that had been granted. As a result, petitioner was terminated, effective August 30, 2007.

Petitioner brings this petition seeking an order annulling and reversing the Determination, on the grounds that it was arbitrary and capricious. In support of the motion, petitioner submits her own affidavit stating that after she was granted personal leave for the 2006-

2007 school year, she requested personal leave for 2007-2008. She further states that she believed that her request for personal leave for the 2007-2008 school year had been granted, but later realized that it had only been approved for July and August. As to the background questionnaire, petitioner states that she answered it truthfully and correctly when she indicated that she had never been discharged or fired from any position, and that she fully explained the circumstances in the comments section that she was mistaken as to the length of time her personal leave had been extended. Thus, petitioner argues, the Determination placing her on DOE's ineligibility list for twelve (12) months due to her failure to disclose her termination was irrational. Petitioner adds that as a result of being placed on the ineligibility list, she has been unable to accept two teaching positions, one at PS 166Q and another at Stepping Stone Day School.

In answering the petition, respondent argues that the Determination was neither arbitrary nor capricious. It asserts that petitioner materially misrepresented the circumstances surrounding her termination in her application for security clearance. Specifically, respondent states that petitioner failed to respond to the two letters prompting her to inform DOE of her intentions for the 2007-2008 school year, which resulted in her termination; that DOE never received petitioner's request to extend her personal leave for the 2007-2008 school year; that DOE never informed petitioner, either verbally or in writing, that an extension of her personal leave was granted for 2007-2008; and that the months of July and August, when school is not in regular session, are considered to be "grace periods," such that teachers are not required to submit requests for leave. In addition, respondent states that the Determination bars petitioner from applying to a DOE school or to any vendor that contracts with DOE to provide educational services or that requires DOE security

clearance.

In an Article 78 proceeding, the court may only consider whether an administrative determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or was an abuse of discretion. C.P.L.R. § 7803. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), citing In re Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). The court may not substitute its judgment for that of the agency responsible for making the determination, but rather must ascertain only whether there is a rational basis for the decision. In re Peckham, 12 N.Y.3d at 431. Once it has been determined that an agency's conclusion has a "sound basis in reason," the judicial function is at an end. In re Pell, 34 N.Y.2d at 231.

The court finds that respondent's Determination was neither arbitrary nor capricious. There are two essential issues with petitioner's questionnaire. First, petitioner's negative response to the question of whether she had ever been discharged from any employment contradicts the comments she provided explaining how her discharge occurred. Second, petitioner's explanation of the circumstances surrounding her discharge was inaccurate. For example, petitioner stated that her extension of personal leave was granted; however, respondent asserts that it did not extend her personal leave for a second school year, and that no request for an extension of leave was ever received. Given the above, respondent's Determination that petitioner failed to disclose her discharge from a prior position, thereby prohibiting her from applying to a DOE school or to any vendor that requires DOE security clearance, for twelve (12) months, was not arbitrary or capricious.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied in its entirety and the proceeding is dismissed.

Dated: November 13, 2012

ENTER:

JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

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