

**Matter of Khan v New York City Health & Hosps.
Corp.**

2014 NY Slip Op 31851(U)

July 17, 2014

Supreme Court, New York County

Docket Number: 101284/13

Judge: Cynthia S. Kern

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SCANNED ON 7/18/2014

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: _____
Justice

PART _____

Index Number : 101284/2013
KHAN, SHAWNAWAZ
VS.
N.Y.C.H.H.C.
SEQUENCE NUMBER : 002
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). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

is decided in accordance with the annexed decision.

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

FILED

JUL 18 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/17/14

CR, 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
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

SHAHNAWAZ KHAN,

Petitioner,

Index No. 101284/13

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

THE NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, YVETTE VILLANUEVA, individually
and in her official capacity as Senior Associate Executive
Director of Northern Manhattan Health Network Human
Resources and DENISE C. SOARES, individually and in
her official capacity as Senior Vice President of
Generations+ of the Northern Manhattan Health Network,

FILED

JUL 18 2014

Respondents.

COUNTY CLERK'S OFFICE
NEW YORK

-----x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Shahnawaz Khan commenced the instant proceeding pursuant to Article 78 of
the Civil Practice Law and Rules ("CPLR") seeking to reverse a determination made by
respondents New York City Health and Hospitals Corporation ("HHC"), Yvette Villanueva,
Senior Associate Executive Director of Northern Manhattan Health Network Human Resources

and Denise C. Soares, Senior Vice President of Generations+ of the Northern Manhattan Health Network (hereinafter collectively referred to as "respondents") separating petitioner from his position as Director of Pharmacy Services at Harlem Hospital Center. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner has been employed by HHC since November 3, 1986. Thereafter, petitioner was appointed to the position of Director of Pharmacy Services for Harlem Hospital Center, a Group 11, managerial title, subject to the provision of HHC's Operating Procedure No. 20-39 ("OP No. 20-39"). As Director of Pharmacy Services, petitioner was responsible for managing the entire pharmacy staff of approximately fifty employees, including Pharmacists, Pharmacy Technicians and Clerical Associates. In that capacity, petitioner monitored the details of the employees' work, scheduled their shifts, evaluated their performance and wrote their performance reviews and worked with Personnel and Labor Relations in selecting personnel for vacancies and promotions.

On or about March 4, 2013, having received several complaints regarding petitioner's administration of the Pharmacy Department at Harlem Hospital Center, HHC's Network-Department of Human Resources initiated an investigation into said complaints. The complaints included allegations that petitioner gave staff of Pakistani national origin preferential treatment in scheduling their shifts, in approving their requests for leave and in consideration for promotion and advancement. Pursuant to the investigation, Labor Relations Associate Dwayne Davis ("LRA Davis") sent petitioner a letter in which he asked petitioner to respond to a set of interview questions, including, *inter alia*, whether any of the employees were related to petitioner and whether any employees work a flexible schedule or have been provided special

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accommodations by petitioner. In an e-mail dated March 4, 2013 and a supplemental e-mail dated March 6, 2013, petitioner wrote to both Ms. Villanueva and LRA Davis supplying answers to the interview questions specifically responding that, *inter alia*, he was not related to any employees within the Pharmacy Department and no Pharmacy employees work a flexible schedule or are given any special accommodations. In a memorandum dated March 14, 2013, LRA Davis memorialized the results of the investigation and reported that petitioner had been untruthful in answering a number of the interview questions as he uncovered that petitioner was in fact the brother-in-law of Samad Abdul, an employee in the Pharmacy Department, and that petitioner did in fact allow certain employees of the Pharmacy Department to work a flexible schedule and that those employees were exclusively of Pakistani national origin. Thus, LRA Davis found that petitioner violated both HHC's Nepotism Policy and the employment application certification agreement he had signed and that his "poor management skills have divided staff, lessened staff morale, and has many questioning his leadership." LRA Davis found that based on his investigation, "[t]here is sufficient evidence to conclude misconduct by [petitioner]...."

On or about May 17, 2013, Ms. Villanueva advised petitioner that his services as Director of Pharmacy were no longer required and that he could request a review of the determination by submitting a written request to Ms. Soares within ten working days after receipt of the notice (the "Separation Letter"). Additionally, the Separation Letter advised petitioner of his right to revert to his underlying title of Pharmacist and that, should he elect to revert, his salary would be adjusted accordingly. Via letter dated June 4, 2013, petitioner requested review of the decision and expressed his belief that he was being discriminated against because of his age and because

he had complained “to HR & Labor around October 2012 regarding activities within the facility that are not in accordance with HHC Code of Ethics...” By letter dated June 10, 2013, Ms. Soares advised petitioner that she had reviewed the determination to separate petitioner from service as Director of Pharmacy Services but that the determination remained the same. Thereafter, petitioner commenced the instant Article 78 proceeding seeking to reverse the determination and be reinstated to service in the title of Director of Pharmacy Services at Harlem Hospital Center.

As an initial matter, respondents’ assertion that the petition must be denied on the ground that this court lacks personal jurisdiction over respondents is unavailing as such objection has been waived. Pursuant to CPLR § 3211(e), “an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served, is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.” Here, respondents served their Verified Answer to the petition in which they asserted an affirmative defense of lack of personal jurisdiction based on petitioner’s alleged failure to properly serve them pursuant to CPLR § 312-a. However, respondents failed to move to dismiss the petition on that ground pursuant to CPLR § 3211 within sixty days of serving their Verified Answer. Thus, respondents have waived the objection of lack of personal jurisdiction on the ground that service was improper.

The court now turns to the merits of the petition and finds that respondents’ determination to remove petitioner from his appointment to the position of Director of Pharmacy Services for Harlem Hospital Center and to return him to his underlying position in the title of

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Pharmacist was made on a rational basis. As an appointee to Group 11, managerial title of Director of Pharmacy, petitioner had no tenure in his continued employment but was rather serving as an employee at will and could be removed from his appointment at any time, for any reason, subject to the provisions of OP No. 20-39. In reviewing the termination or discharge of a non-tenured employee pursuant to Article 78, a court may not interfere with the agency's discretion unless the complained-of action was arbitrary and capricious. See *Moran v. Baxter*, 193 A.D.2d 460 (1st Dept 1993). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

Here, respondents' removal of petitioner from his position as Director of Pharmacy Services was made on a rational basis based on the fact that the investigation uncovered evidence that petitioner was untruthful with regard to charges of nepotism and that he favored employees of Pakistani national origin. Respondents received numerous complaints regarding petitioner's direction of the Pharmacy Department. Specifically, employees in the Pharmacy Department complained that petitioner violated the nepotism policy and that petitioner favored the Pakistani employees in scheduling their shifts, in approving their requests for leave and in consideration

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for promotion and advancement. When asked during the investigation of the allegations in the complaints whether he was related to any other employees within the Pharmacy Department, petitioner responded that he was not and also denied any relation when asked as part of the employment application for the position of Director of Pharmacy Services which he signed, certifying "that all facts set forth in this application are true, complete and correct to the best of my knowledge and belief [...] I understand that all statements and information shall be subject to verification and/or investigation, and that false statements, or my failure to qualify for this position, shall be grounds for non-employment or dismissal after employment." However, during the investigation, respondents uncovered evidence affirming that Mr. Abdul, a Pharmacist Level I, whom petitioner supervised and whom petitioner had formally evaluated, was actually petitioner's brother-in-law. It was only after petitioner was confronted with this information that petitioner admitted the relation between himself and Mr. Abdul. Additionally, respondents found that petitioner had in fact engaged in disparate treatment of his employees, giving preferential schedules to employees who were of Pakistani national origin. Respondents based such determination on the schedules of the Pharmacy employees provided by petitioner as well as card access reports run by Harlem Hospital Center Police, which demonstrate that petitioner had permitted certain of his employees, exclusively those of Pakistani national origin, to consistently work a flexible schedule of Saturday, Sunday and Thursday and denied flexible schedules to those employees not of Pakistani national origin. Thus, based on respondents' substantiated investigation, it was rational for respondents to separate petitioner from service in the title of Director of Pharmacy Services.

Petitioner's assertion that respondents' determination was arbitrary and capricious

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because they violated their own regulations and procedures is without merit. Specifically, petitioner's assertion that "[p]rior to receiving the [Separation Letter] from Ms. Villanueva, [he] had not been advised, verbally or in writing, of any conduct, activity or omission that could result in an adverse managerial decision against him" is unavailing as petitioner has not offered any evidence to suggest that such procedure is required. Indeed, OP No. 20-39 imposes no such obligation as it does not afford petitioner a right to be notified of the *reasons* for the determination or the right to receive written documentation from the employer prior to a letter separating him from his position but provides only that "[a] supervisor, wherever possible, should maintain written documentation of any conduct, activity, or omission, by a managerial (Group 11) employee that could result in an adverse managerial decision." Here, respondents have fully complied with OP No. 20-39 as they have maintained said written documentation and have produced said documentation in support of their Verified Answer. Further, in compliance with OP No. 20-39, once respondents determined that petitioner's separation was warranted, they provided petitioner with proper written notice of said determination.

Additionally, petitioner's assertion that he should have been afforded two weeks' notice of the adverse determination is also unavailing as petitioner has not provided any basis for such assertion. OP No. 20-39 provides that "[w]henver practicable the effective date of the adverse action shall not be less than two (2) weeks following the date of issuance of the notice [...] immediate action may be taken if it is determined that a delay would jeopardize the Corporation, employees or clients." As respondents had already determined that petitioner's misconduct had "divided staff, lessened staff morale, and has many questioning his leadership," it was appropriate for respondents to take "immediate action" rather than wait two weeks. To the extent

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petitioner asserts that respondents denied him due process when they separated him from his position, such assertion is also without merit. Respondents' initial Separation Letter properly advised petitioner of his right to request review of the determination within ten workdays after his receipt of the determination pursuant to OP No. 20-39. When respondents received petitioner's request for review of the determination, respondents timely notified petitioner, in writing, that the determination had been reviewed but that the determination remained unchanged pursuant to OP No. 20-39. Accordingly, petitioner was afforded all process to which he was entitled pursuant to OP No. 20-39.

Additionally, petitioner's allegation that respondents discriminated against him because of his age and because he complained about HHC is without merit. This court has found that respondents had a rational basis for separating petitioner from his position as Director of Pharmacy Services based on petitioner's conduct as Director and that such separation was not based on petitioner's age or any complaints made against HHC by petitioner. Thus, to the extent petitioner seeks to assert a discrimination claim against respondents, said claim is more appropriately brought in a separate plenary action and not in the instant Article 78 proceeding. Finally, petitioner's request for compensatory damages, punitive damages, costs and attorney's fees is denied as this court has already determined that respondents' determination to separate petitioner from his position as Director of Pharmacy Services was rational.

Accordingly, the petition is denied in its entirety. This constitutes the decision and order of the court.

Dated: 7/17/14

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