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
JOHN J. CANNAVO,

Petitioner,

Index No. 159126/2016

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

-against-

Decision, Order and Judgment

SHOLA OLATOYE, Chair and Chief Executive Officer, WENDY ALEXANDER, Assistant Director Human Resources Department, and THE NEW YORK CITY HOUSING AUTHORITY,

Respondents,

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This article 78 proceeding challenges respondents' refusal to reinstate petitioner, a retired New York City Housing Authority (NYCHA) attorney, to his former position. Respondents oppose the proceeding. Earlier in the litigation, the Court denied respondents' pre-answer cross-motion to dismiss. Now, after consideration of all papers, the Court denies the petition.

The facts are as follows: Originally, petitioner worked at the Department of Housing Preservation and Development (HPD). In 1993, while at HPD, he obtained civil service status. Petitioner then worked for NYCHA, from January 1996 until November 2015. When petitioner transferred to NYCHA, he asked that his civil service line be transferred. In response, on August 7, 1996, Madelyn Oliva, who was the director of human services, wrote:

> It has been brought to my attention that you have had several discussions with the Human Resources staff regarding the transfer of your permanent civil service line of Attorney at Law from the

> Department of Housing Preservation Development to the NYC Housing Authority (NYCHA).
>
> Please be advised that requests to transfer permanent civil service lines are considered upon written request from the appropriate Department Director.
>
> As such, consideration will be given to the transfer of your permanent line upon written request from Jeff Schamback, General Counsel.

Petitioner understood this memo to mean that he would have to make a written request for transfer of his status one year after he started at NYCHA, and that this would obligate Mr. Schamback to make a formal written request. See Petition, ¶ 21. On February 3, 1997, petitioner sent the following memo to Winston Samuel, at the time NYCHA's chief of staff:

> Please be advised on January 16, 1997 I completed one (1) year of service with NYCHA. As per the attached memorandum and our conversation(s) I believe the transfer of my permanent line can now be processed.

He signed his initials next to his typed name on the "From" line of the memo. Petitioner states this memo comprises his written request for the transfer. According to petitioner, Mr. Samuel later told him that Mr. Schamback had made the request and petitioner's status had been transferred.

Petitioner states he also relied on other documents indicating his status had been transferred. He submits a copy of his notice of appointment to the NYCHA position, dated January 16, 1996; the notice lists his civil service status as "C," signifying that he had retained his civil service status upon the transfer. He also annexes his July 29, 1996 performance evaluation, which

lists his civil service status as "C." Petitioner does not include any evidence of his status dating after July 29, 1996.

Around November 13, 2015, petitioner retired from his position in order to take care of his ailing mother.[1] On November 19, 2015, his mother passed away. Consequently, on December 4, 2015, petitioner wrote to NYCHA's human resources (HR) department and requested reinstatement. A December 15 letter rejected his request, stating that reappointment was only offered to employees who had civil service status. Petitioner contended that he was a civil service employee and he submitted the materials described above in support of his argument. On August 5, 2016, NYCHA reaffirmed its position. It stated that the documents reflecting petitioner's "C" status were incorrect and in conflict with NYCHA's records, and that NYCHA had no record of that Mr. Schamback had submitted a written request for transfer of petitioner's status.

After respondents' denial, petitioner commenced this proceeding. In the petition, he alleges that NYCHA transferred and never rescinded his civil service status, and that it was arbitrary and capricious for the agency to disregard all evidence to the contrary and ignore petitioner's nineteen years of satisfactory service in reaching its determination. He claims that respondents have no documentation establishing that his status was rescinded once his written request was granted. Alternatively, he argues that under equitable estoppel and laches, and in light of the representations of Mr. Samuels and the "C" markings on his 1996 papers, respondents must deem him a civil service employee and grant his timely application for reinstatement.

[1] Petitioner stopped working in early May, and retired once he had used his all of his vacation days and his retirement bonus.

Respondents argue that the petition lacks merit. They state that in 1995 the Civil Service Law, which applies to NYCHA employees, was amended to change the position of agency attorney to a noncompetitive position that was not eligible for civil service status. Although civil service employees retained their protected status, new hires did not acquire it. When petitioner resigned from HPD, he was not automatically eligible for civil service status in his new job. They state that they erroneously marked his notice of appointment and his initial quarterly ratings with a "C," and these markings bear no weight on petitioner's actual status. They submit petitioner's employment report, which indicates that as of January 16, 1996 petitioner was appointed to NYCHA in a "noncompetitive" position. In addition, they point to the PRISE History Roster for petitioner to support their statements that he worked for NYCHA as a noncompetitive employee and that they have no record of any application by petitioner for transfer of his civil service status.[2]

In support, respondents submit the affidavit of Mr. Samuel, who denies that he informed petitioner his civil service status was being approved. He contends he would have told petitioner this in writing. Respondents also submit affidavits from NYCHA's assistant HR director, the current deputy director of HR, and counsel to the New York City Department of Administrative Services. All attest that the procedure for transferring civil service status was not followed here, petitioner's personnel records do not contain any record of a transfer request, and petitioner served as an attorney at NYCHA in a noncompetitive position throughout his time there.

[2] Respondents also argue that under the applicable rules, they would have had the discretion to reject petitioner's application for reinstatement even if he had civil service status. That argument is inapplicable, however, as respondent did not consider petitioner to have civil service status and therefore did not exercise any discretion when they rejected the application.

Further, respondents argue, laches and equitable estoppel are only available against a government agency in very rare circumstances. Petitioner has not satisfied the elements of estoppel at any rate, they continue, because Mr. Samuel's alleged comments were no more than opinion and petitioner could not reasonably rely on them, and because petitioner's characterization of their conversation is self-serving hearsay. They state that, given petitioner's interest in retaining his civil service status, he should have followed up when he did not receive official notification that it had been transferred. They state petitioner's inquiries in 1996 and 1997 about his status show he did not rely on respondents' representations or the documents listing him as a civil servant.

Petitioner replies that his personnel file does support his contention, in that his notice of appointment and two initial reviews state that he had civil service status. He notes that respondents submit no materials supporting their position that these documents were incorrect or that this status was rescinded. He states that he would not have transferred from HPD to NYCHA if it meant losing his status as a civil service employee, and that he would not have resigned from NYCHA unless he believed he had the right to seek reinstatement. He challenges the credibility of respondents' arguments, stating that they purport to have discovered that he was a noncompetitive employee only now, after he spent twenty years with NYCHA. He states that the HR records which list him as a noncompetitive employee should not be considered conclusive because he did not have access to these records so had no notice. He states that he reasonably relied on representations by respondents that he was a civil service employee and that he has an unblemished record in his nearly nineteen years as a NYCHA employee and that therefore estoppel and laches should be applied. He contends that estoppel should be applied here because respondents made a "gross

error," Pet. Reply Mem., p.16, on which petitioner relied for nearly twenty years. He states that "[t]he case law that NYCHA has presented is but a blunderbuss of irrelevance," Reply Aff., ¶ 12, on the issues of laches and estoppel, and he distinguishes several of them from the situation at hand.

In an Article 78 proceeding, the Court reviews agency decisions to determine whether an action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). The Court must not substitute its judgment for that of the agency. Roberts, 96 A.D.3d at 671. It is petitioner's burden to show that an agency determination should be overturned. In light of this high threshold, the Court is constrained to deny petitioner's application. It was not irrational for respondents to determine that petitioner, who has been deemed a noncompetitive employee throughout his tenure at NYCHA, was not eligible for reinstatement under the prevailing rules. First, they provide a rational explanation as to why his position at NYCHA was noncompetitive – in particular, because his records showed no formal transfer of his status from HPD and because his position normally was a noncompetitive one – and they submit records showing that his status never changed during his employment. Second, they point to 55 RCNY 6.2.1, which states that an applicant is eligible to be considered for reinstatement only if he or she has civil service status. Therefore, once they made the rational decision regarding his status, they had no discretion under the rules to reinstate him.

In addition, petitioner has not set forth an adequate basis for applying either laches or estoppel. Neither doctrine is applicable against an agency which, as here, is "discharging its

statutory duties." Gonzalez v. Division of Housing and Community Renewal of the State of N.Y., 95 A.D.3d 681, 682 (1st Dep't 2012), lv dismissed, 20 N.Y.3d 1003, rearg't denied, 21 N.Y.3d 938 (2013). Even if this were not the case, this is not one of the rare of cases in which estoppel should be applied. See Platinum Towing, Inc. v. New York City Dep't of Consumer Affairs, 128 A.D.3d 469, 470 (1st Dep't 2015). There is no evidence that respondents acted in bad faith or deliberately attempted to mislead petitioner. Further, as respondents correctly note, petitioner's argument that he reasonably relied on the 1996 notice of appointment and evaluation reports in concluding he remained a competitive employee is undercut by the fact that in 1997 petitioner took action to obtain a transfer of his civil service status.

The Court has sympathy for petitioner, who worked for nineteen years at his position, retired for less than one month to take care of his dying mother, and applied for reinstatement in the good faith belief that he had civil service status only to be summarily rejected. The determination that petitioner was not a civil service employee was rational, however, and therefore he had no right to avail himself of the protections of the civil service laws. Because the determination was rational, moreover, respondents performed a nondiscretionary act when they denied petitioner's application, as the provision in question does not apply to those in noncompetitive posts. Accordingly, it is

ORDERED that the petition is dismissed.

Dated: May 22, 2017

ENTER:

JOAN B. LOBIS, J.S.C.