

<b>Jiminez v City of N.Y. (Dept. of Transp.)</b>
2020 NY Slip Op 32380(U)
July 20, 2020
Supreme Court, New York County
Docket Number: 150792/2020
Judge: Arthur F. Engoron
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

*Justice*

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GEORGE JIMINEZ,

Petitioner,

- v -

CITY OF NEW YORK (DEPARTMENT OF  
TRANSPORTATION),

Respondent.

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INDEX NO. 150792/2020

MOTION DATE 01/29/2020

MOTION SEQ. NO. 001

## DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion for

CPLR ARTICLE 78 RELIEF

Upon the forgoing documents, it is hereby ordered that the instant petition is denied, and the cross-motion to dismiss is granted.

This proceeding arises out of an employee termination and alleged violation of a former employee's right to due process under the collective bargaining agreement ("the CBA") that governed the parties. Petitioner, George Jiminez, seeks to compel respondent, City of New York (Department of Transportation), to reinstate petitioner to the position of Apprentice Inspector (Highway and Sewer), with back pay, seniority, and reinstatement benefits; or, alternatively, to have a post-termination hearing on the merits.

Respondent now cross-move to dismiss, pursuant to CPLR 3211(a)(5) and (7), on the grounds that that the petition fails to state a cause of action for deprivation of due process; the proceeding is time-barred, pursuant to CPLR 217; and petitioner has not exhausted all of his administrative remedies under the CBA.

The facts are as follows. On or about May 11, 2015, respondent appointed petitioner to the non-competitive position of Apprentice Inspector. Petitioner completed the probationary period of his employment and ultimately worked in this position for approximately 3.5 years. On September 14, 2018, petitioner was given notice of termination, which did not state the reason and was told by the Highway Inspection and Quality Assurance Director that he was being terminated because of allegations that he had issued several fraudulent summonses against a private carting company. Petitioner alleges that this was the first time he was informed of the fraud allegations made against him and that no formal charges were ever made against him, either prior to or after his termination. On or about October 26, 2018, petitioner's union, the Law Enforcement Employee Benevolent Association ("the Union"), instituted grievance

procedures by filing a Step I grievance, pursuant to the CBA, challenging petitioner's termination and alleging that respondent wrongfully disciplined petitioner in violation of Article XVI of the "Citywide Agreement" and Article VI, § 1(g) of the CBA (this Court notes that the Article XVI of the Citywide Agreement and Article VI of the CBA are identical). Although no formal response was issued to the Step I grievance, Petitioner alleges that a preliminary conference was held between the Union and respondent, at which time respondent reiterated that petitioner was terminated because of the allegations of issuing fraudulent summonses. Petitioner further alleges that on November 14, 2018, pursuant to the CBA, the Union commenced a Step II grievance. However, respondent points out that there is no evidence in the record that the Union filed such a grievance, as required under the CBA.

Petitioner attaches as an exhibit to his petition an email from the Union dated November 26, 2018, in which the Union references a Step I and Step II grievance response, asserting that respondent gave the following response "[h]owever, having now looked at what you sent on the 7<sup>th</sup> – Apprentice Inspector, a non-competitive title, has no disciplinary appeal rights under the contractual grievance process - therefore this is not a valid grievance." In the November 26, 2018 email, the Union also stated its intention to proceed to Step III under the grievance procedures. On April 30, 2019, a Step III hearing was held and on September 24, 2019, a Step III Decision was issued. According to the Step III Decision, it was respondent's position at the April 30, 2019 conference that petitioner had no disciplinary appeal rights under the CBA grievance process, as his position was a non-competitive one. Thus, respondent sought to uphold petitioner's termination, as it was not a valid grievance under the CBA. At the hearing it was undisputed that petitioner held a non-competitive position; however, petitioner argued that there should be some due process rights afforded to him, because he had passed the probationary period for his position.

The Step III Decision found that the grievance was procedurally defective as there was no evidence in the record illustrating that the Union had filed the Step II grievance. The decision also found that both Article XVI of the Citywide Agreement and Article VI, § 1(g) of the CBA were inapplicable to petitioner, as both provisions address disciplining provisional employees, not non-competitive employees. Ultimately, because the Step III Decision found that the grievance failed to meet the definition of a grievance under either the Citywide Agreement or under the CBA, there could be no finding of a violation, as petitioner lacked contractual due process rights.

Subsequently, petitioner commenced the instant proceeding, arguing that the process by which he was terminated was arbitrary and capricious as it violated his due process rights, as he was not given notice of the alleged charges of fraud (which petitioner argues are completely meritless) or the opportunity to confront those allegations prior to his termination. Petitioner also argues that a biased adjudicator issued the Step III Decision.

Respondent contends that the petition must be dismissed, as it fails to state a cause of action for deprivation of due process. Respondent argues that petitioner is not entitled to the due process rights set forth in New York Civil Service Law § 75 or under Article VI, § 1(g) of the CBA because petitioner was not a provisional employee and because he had only held his position for 3.5 years, not the five years specified. Respondent also argues that even if petitioner was entitled

to contractual due process rights pursuant to the grievance procedures set forth under the CBA, the petition must be dismissed because petitioner failed to exhaust all available administrative remedies under the CBA, and in any event, the petition is time-barred.

In reply, petitioner argues that his due process rights are derived from the CBA, specifically Article VI, § 1(b) and (g), and pursuant to Article I, § 6 of the New York State Constitution.

#### Discussion

It is well-settled that in an Article 78 proceeding, the scope of judicial review is limited to the issue of whether the administrative action is rational. Pell v Board of Educ., 34 NY2d 222, 230-231 (1974). This Court may not disturb respondents' determination unless there is no rational basis for the exercise of discretion or it was arbitrary and capricious. Id. at 231. "The arbitrary or capricious test chiefly relates to ... whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id.

#### DUE PROCESS PURSUANT TO THE CIVIL SERVICE LAW

Petitioner states that he is not seeking to invoke New York Civil Service Law § 75; indeed, it is uncontested that Civil Service Law § 75 does not apply to petitioner because he was not employed as a non-competitive employee for at least five years of continuous service. See N.Y. Civ. Serv. L. § 75.

#### DUE PROCESS PURSUANT TO THE CBA

Article VI of the CBA sets forth the seven definitions of possible disputes or claimed contract violations that may qualify as a "grievance." Section 1(g) of Article VI states, in pertinent part, "The term 'Grievance' shall mean: g. A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency." It is uncontested that petitioner was not a provisional employee, and, therefore, petitioner and/or the Union were not entitled to bring a grievance under this section of the CBA.

Section 1(b) of Article VI states, in pertinent part, "The term 'Grievance' shall mean: b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment ..." However, petitioner fails to state, much less explain, how his termination constituted a violation, misinterpretation, or misapplication of respondent's rules, regulations, written policies, or orders. Furthermore, the Union did not invoke this provision during the grievance process; what is before the Court is a Step III Decision pursuant to Article VI, § 1(g). This Court agrees with respondent that if petitioner is now disputing the application or terms of the CBA and how they apply to him, he must have made that challenge pursuant to Article VI, § 1(a) of the CBA.

#### DUE PROCESS PURSUANT TO THE NYS CONSTITUTION

As stated above, petitioner also argues that he is entitled to due process pursuant to Article I, § 6 of the New York State Constitution. However, "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or

understandings that stem from an independent source such as state law.” Cleveland Bd. Of Educ. v Loudermill, 470 US 532, 538 (1985) (quoting Bd. of Regents v Roth, 408 US 564, 577 (1972)).

Here, petitioner has failed sufficiently to plead that he has a protectable property interest in the non-competitive job; he has failed to set forth a source of his due process rights outside of the CBA. As such, this Court cannot create a source for petitioner’s alleged protectable property interest when there is none to be found in any independent source, such as the CBA.

Petitioner cites to Allen v City of New York, 39 Misc 3d 1223(A) (Sup Ct, New York County 2013) for the general proposition that “a non-probationary public employee possesses a constitutional property interest in his employment.” However, in that case the petitioner/employee had specific statutory due process rights under the Civil Service Law. Here, neither the CBA nor the New York State Constitution provides petitioner with a protectable property interest in his job.

In sum, this Court finds that petitioner has failed to state a cause of action for deprivation of due process rights. This Court further finds that the Step III Decision was rational in finding that the grievance procedure was procedurally defective due to the Union’s failure to file a Step II grievance, and due to the fact that petitioner did not fit into the definition found in Article VI, § 1(g) of the CBA. Thus, the Step III Decision had a rational basis in finding no violations pursuant to CBA Article VI, § 1(g). Furthermore, the burden is on petitioner to establish that he was not just an at-will employee. Petitioner has failed to meet this burden by failing to cite to any valid source that would provide him with a property interest in his former position.

In light of the foregoing, this Court need not and does not reach respondent’s other arguments, in particular that the Statute of Limitations and/or the doctrine of Exhaustion of Remedies (which are somewhat and arguably mutually exclusive) bar the instant proceeding.

### Conclusion

The petition is hereby denied, and respondent’s cross-motion is hereby granted. The Clerk is hereby directed to enter judgment denying and dismissing this proceeding and awarding respondent costs and disbursements.



<u>7/20/2020</u>		<u>ARTHUR F. ENGORON, J.S.C.</u>	
DATE			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE