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

PRESENT: Salliann Scarpulla PART 19

Index Number : 117847/2009
MAHINDA, JOSEPHINE
vs
NYC LAW DEPT.
Sequence Number : 001
ARTICLE 78

E
10/7/10
ec

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

NYS SUPREME COURT
RECEIVED
OCT 07 2010
MOTION SUPPORT OFFICE

FILED
OCT 14 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/5/10

Salliann Scarpulla J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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JOSEPHINE MAHINDA,

Petitioner,

-against-

CITY OF NEW YORK, BOARD OF COLLECTIVE BARGAINING, ORGANIZATION OF STAFF ANALYSTS,

Respondents.

----------X

Index No.: 117847/09
Submission Date: 7/28/2010

DECISION AND ORDER

For Petitioner, *pro se*:
Josephine Mahinda
87-08 Pitkin Ave., Apt. 2B
Ozone Park, NY 11417

For Respondent Organization of Staff Analysts:
Law Offices of Leonard A. Shrier
217 Broadway, Suite 409
New York, NY 10007

For Respondent Board of Collective Bargaining:
Steven C. Decosta
40 Rector Street, 7th Floor
New York, NY 10006

For Respondent City of New York:
Michael A. Cardozo
100 Church Street, Room 2-183
New York, NY 10007

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Josephine Mahinda ("Mahinda") seeks (1) to annul the determination of respondent Board of Collective Bargaining ("Board") denying her improper practice petition; (2) to compel respondent Organization of Staff Analysts ("OSA") to schedule an arbitration on her behalf; and (3) to review the respondent City of New York's ("City") underlying decision to terminate her and to reinstate her position with back pay, costs and damages.[1]

[1]Mahinda had originally commenced an Article 78 proceeding by notice of petition and petition dated December 21, 2009 against NYC Law Department, OSA General Counsel, and Board of Collective Bargaining. Respondents moved to dismiss that petition. In addition, Mahinda moved for leave to amend her petition to remove certain respondents and add certain respondents. She also moved to add certain new allegations. This Court granted her leave to amend and therefore, it is only the amended

001, 002, 004

Mahinda was hired as a provisional Principal Administrative Associate by the New York City Department of Transportation ("DOT") on November 25, 2002. On August 23, 2004, she received a provisional appointment to the position of Associate Staff Analyst at the DOT. She was represented by the Organization of Staff Analysts union ("OSA").

In or about August 2008, she was served with charges alleging, inter alia, that she neglected or refused to perform her assigned duties and engaged in acts prejudicial to the good order and discipline of the DOT. On September 25, 2008, an informal conference was held at the Office of the Department Advocate, at which charges against her were found to be substantiated and termination was recommended. Mahinda filed a Refusal of Recommended Penalty and appealed the decision. On October 16, 2008, Mahinda and an OSA union representative attended a disciplinary hearing, at which time the DOT's Director of Labor Relations upheld the recommended penalty of termination. DOT terminated Mahinda's position on October 17, 2008.

On October 21, 2008, OSA filed a Request for Arbitration with the Office of Collective Bargaining ("OCB") on Mahinda's behalf alleging that the DOT violated the Collective Bargaining Agreement by terminating her position. Prior to that time, in August 2008, Mahinda had been informed that she would not be able to arbitrate her case because of the Court of Appeals decision in the *Matter of the City Long Beach v. Civil*

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petition and motions and cross motions relating thereto that are the subject of this decision/order.

Service Employees Association, Inc., 8 N.Y.3d 465 (2007) ("Court of Appeals decision") in which the court held that provisional employees did not have disciplinary grievance rights. In response to that decision, the New York State Legislature amended Civil Service Law §65 to permit public employers such as the City to negotiate grievance rights for provisional employees. Those negotiations were ongoing between DC37, the Citywide bargaining representative, and the City. Until the completion of those negotiations, no provisional disciplinary arbitrations were being heard at the OCB.

On February 9, 2009, Mahinda wrote a letter to OCB admitting that she was aware that due to the Court of Appeals ruling, all requests for arbitration were on hold with OCB. She inquired as to whether OSA had filed a request for arbitration in her case and whether OSA had been arbitrating matters pertaining to provisional employees yet. On February 12, 2009, she received a response from OCB, indicating that OSA had filed her request for arbitration on October 23, 2008 and that an arbitrator had been designated on December 5, 2008. She was informed that the City and certain unions agreed that all pending and future grievances concerning disciplinary actions involving provisional employees were to be held in abeyance but that it did not know if her case specifically was being held in abeyance.

She received a letter from her lawyer at the time, Arthur H. Forman, dated April 7, 2009 informing her that OSA would want to proceed to arbitration on her behalf but because of the Court of Appeals decision, the City would not arbitrate.

On April 17, 2009, Mahinda filed an improper practice petition with the OCB, alleging that OSA breached its duty of fair representation in violation of NYCCBL §12-306(b)(3) and that the City wrongfully terminated her employment. On November 23, 2009, OCB denied Mahinda's improper practice petition, finding that it was time barred and, in any event, failed to establish that any agreement for provisional employee disciplinary procedures had been reached, and thus was unable to assert any change of facts or subsequent development to prove any breach of duty of fair representation on the part of the Union. The OCB further found that Mahinda did not sufficiently plead sufficient facts to establish any potentials claims against the City for violations of 12-306(a)(1) and (3).

Mahinda now commences this Article 78 proceeding seeking (1) to annul the Board's decision to deny her improper practice petition; (2) to compel OSA to schedule an arbitration on her behalf; and (3) to review the City's underlying decision to terminate her and to reinstate her position with back pay, costs and damages.

The Board moves to dismiss the amended petition and OSA and the City cross move to dismiss the amended petition. They argue that (1) Mahinda's challenge to the termination of her employment is time barred by the applicable four month statute of limitations and, in any event, as a provisional employee, Mahinda could have been terminated for any reason without a notice or hearing, and she failed to demonstrate that her termination was made in bad faith; (2) her Article 78 proceeding is time barred; and

(3) the Board's determination that her improper practice petition was untimely and also without merit was not arbitrary and capricious.

In opposition to the motion and cross motions, Mahinda first argues that her Article 78 proceeding was not untimely commenced. She maintains that even though the necessary parties were not properly named in her original petition, all necessary parties were made aware of her Article 78 proceeding in a timely manner through that original petition. She further argues that, in any event, the court can and should toll the statute of limitations because she attempted to properly and timely commence her Article 78 proceeding in good faith and there is no prejudice to the respondents. She also claims that the statute of limitations should be tolled as a result of her former attorney's malicious acts of withholding information from her.

She next argues that the negotiations between DC37 and the City have been completed and the 2008-2010 Union contract adopted grievance rights for provisional employees, including arbitration. She maintains that the Board, the City and OSA were aware of this development and as such, OSA breached its duty of fair representation and acted in bad faith by failing to move her case to arbitration.

Discussion

The Board, OSA and the City first argue that the amended petition must be dismissed because it was facially insufficient and/or untimely filed.[2] While they do not

[2]Mahinda offers no legal authority to support her argument that the statute of limitations should be tolled.

dispute that the original petition was timely filed as against the Board individually, in that the Board issued and served its decision in November 2009 and the original petition was filed within the 30 day statute of limitations in December 2009, they explain that the original petition was facially insufficient as that petition failed to include all necessary parties. They further maintain that the amended petition, while naming all necessary parties, was filed in May 2010, clearly outside of the 30 day statute of limitations for this Article 78 proceeding. *See* NYC Administrative Code §12-308. In granting Mahinda leave to amend the pleadings to substitute in the necessary parties, the Court noted that as a *pro se* petitioner, Mahinda perhaps was not aware of the correct parties to name. However, the Court also noted that respondents' rights to bring up any statute of limitations arguments were not waived by the grant of Mahinda's request for leave to amend her petition.

Even if Mahinda's proceeding was to be considered timely commenced and facially sufficient, the Court nevertheless finds that the petition must be denied and the proceeding dismissed. First, there is no basis to grant Mahinda's request to annul the Board's decision to deny her improper practice petition. Under Article 78, judicial review of an administrative determination is limited to the evaluation of whether the determination is consistent with lawful procedures, whether it is arbitrary or capricious, and whether it is a reasonable exercise of the agency's discretion. A court cannot simply substitute its judgment for that of an administrative agency when the agency's

determination is reasonable. *District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO, et al., Appellants, v City of New York, et al.*, 22 A.D.3d 279, 283-284 (1st Dept. 2005). Here, Mahinda fails to submit evidence establishing that the Board's decision was arbitrary and capricious, contrary to the law, without sound basis in reason or in disregard of the facts. Evidence presented establishes that in reaching its determination that Mahinda's improper practice proceeding was untimely and, in any event, without merit, the Board carefully considered the facts and made its determination upon a thorough review of the entire record and upon a proper application of the relevant law. Mahinda's arguments to the contrary are without merit.

Further, there is no basis to grant Mahinda's request to compel OSA to schedule an arbitration on her behalf. She has failed to submit evidence sufficient to prove that OSA breached its duty of fair representation, in violation of NYC Administrative Code §12-306(b)(3), and has failed to submit any other evidence evincing a reason for the court to compel OSA to schedule an arbitration at this time. Mahinda admits that she was made aware of the Court of Appeals decision in August 2008, when she was told that OSA and the City could not proceed with her arbitration of the grievance until after negotiations by DC37 and the City were completed and an agreement was reached. While Mahinda asserts that an agreement has been reached, that arbitration rights for provisional employees have been reinstated, and that her case should now proceed to arbitration, she offers no probative evidence substantiating this assertion.

Finally, there is no basis to grant Mahinda's request for the court to review the City's underlying decision to terminate her and to reinstate her position with back pay, costs and damages. Mahinda argues that her termination was improper because she was investigated prior to being served with charges and because the evidence offered to support her termination was inadequate.

It is well settled that as a provisional employee, Mahinda could be terminated at any time, without a hearing, for almost any reason, or for no reason at all. *See Matter of Preddice v. Callanan*, 69 N.Y.2d 812 (1987); *Matter of Lee v. Albany-Schoharie-Schenectady- Saratoga Bd. of Cooperative Educational Services*, 69 A.D.3d 1289 (3rd Dept. 2010). While courts have noted that "other remedies may be available to provisional employees in the event of statutory or constitutional violations," here, Mahinda fails to demonstrate that, in terminating her employment, the City violated Civil Service Law §65, which governs provisional appointments, or any other constitutional or statutory provision. *Matter of Lee v. Albany-Schoharie-Schenectady- Saratoga Bd. of Cooperative Educational Services*, 69 A.D.3d 1289, 1290 (3rd Dept. 2010)

Further, in the absence of any demonstration that the termination was done in bad faith, the Court will not interfere with the discretion of the agency unless the action complained of was arbitrary and capricious. Petitioner bears the burden of raising and proving such bad faith, and the mere assertion of bad faith without the presentation of evidence demonstrating it does not satisfy the employee's burden. *See Matter of Offong v.*

New York City Department of Education, 2010 NY Slip Op 31529U (Sup. Ct. N.Y. Co., June 7, 2010); *Matter of McDonnell v. Lancaster*, 17 Misc.3d 1101A (Sup. Ct. N.Y. Co., 2007). Here, evidence was presented that DOT served Mahinda with charges alleging, inter alia, that she neglected or refused to perform her assigned duties and engaged in acts prejudicial to the good order and discipline of the DOT. An informal conference was held, at which charges against her were found to be substantiated and termination was recommended. Mahinda filed a Refusal of Recommended Penalty and appealed the decision. Mahinda and an OSA union representative attended a disciplinary hearing, at which time the hearing officer found that the testimony and evidence presented supported the findings of misconduct, and upheld the recommended penalty of termination. No evidence has been presented that Mahinda's employment was terminated in bad faith or that the termination was arbitrary and capricious.

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that petitioner Josephine Mahinda's amended petition is denied and the proceeding is dismissed; and it is further

ORDERED that respondent Board of Collective Bargaining's motion to dismiss the amended petition is granted; and it is further

ORDERED that respondent the City of New York's cross motion to dismiss the amended petition is granted; and it is further

ORDERED that respondent Organization of Staff Analysts' cross motion to dismiss the amended petition is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
October 5, 2010

ENTER:

J.S.C.

Norman Goldman
Clerk

FILED

OCT 14 2010

COUNTY CLERK'S OFFICE
NEW YORK

Index No. 117847/2009

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

JOSEPHINE MAHINDA,

Petitioner

-against-

CITY OF NEW YORK, BOARD OF COLLECTIVE BARGAINING, ORGANIZATION OF STAFF ANALYSTS,

Respondents.

NOTICE OF ENTRY DECISION, ORDER & JUDGMENT

MICHAEL A. CARDOZO
Corporation Counsel
Shakera Khandakar, ACC
Attorney for Respondents
100 Church Street, 2-183
New York, N.Y. 10007
(212) 442-0144

Matter No. 2009-045808

Due and timely service of a copy of the within Notice of Entry is hereby admitted.

New York, N.Y. 2010

.....Esq.

Attorney for.....

PLEASE TAKE NOTICE that a Decision Order and Judgment of which the within is a copy, was duly entered in the office of the Clerk of the Supreme Court, New York County on the 14th day of October 2010.

Michael A. Cardozo
Corporation Counsel
Attorney for Respondents
Dated: New York, New York
October 15, 2010

By: _____
Shakera Khandakar
Assistant Corporation Counsel

To: John Wireniuns
Deputy General Counsel
Office of Collective Bargaining
40 Rector Street 7th Floor
New York, NY 10006