SCANNED ON 6/27/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR PART 33
Justice

Ralph Vanacore

INDEX NO. 101315/13

-v-

MOTION DATE

City of New York and New York City Administration for Children's Services

MOTION SEQ. NO. 01

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

decided in accordance with the memorandum order and judgment annexed hereto.

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

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).

Dated: 6/23/14

____, J.S.C.
ALEXANDER W. HUNTER JR

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: IAS PART 33

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In the Matter of the Application of,

RALPH VANACORE,

Petitioner,

Index No.: 101315/2013

-against-

CITY OF NEW YORK and NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

For a Judgment and Order Under Article 78 of the Civil Practice Law and Rules.

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ALEXANDER W. HUNTER, JR., J.:

In this Article 78 proceeding, petitioner Ralph Vanacore seeks a judgment vacating the determination of respondent New York City Administration for Children's Services (ACS), dated June 14, 2013, discharging petitioner from employment, effective on that date. Petitioner also seeks to be reinstated to his former position, with back pay and benefits. In addition, petitioner requests that ACS reimburse him for all medical expenses that he incurred as a result of being wrongfully terminated. ACS and the City of New York (collectively, respondents) cross-move to dismiss the petition, pursuant to CPLR 3211 (a) (7) and 7804 (f).

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to being discharged from his employment, petitioner had been employed by ACS since 1989 as a caseworker. Due to being injured at work, on April 16, 2012, petitioner commenced an approved medical leave. While out on leave, petitioner received a letter dated March 11, 2013, updating him on his options regarding his employment. The letter indicates that, since petitioner had been out on a worker's compensation leave for a period approaching a year, he "must resolve" his employment status.

In the letter, petitioner was advised that, if he was fit to return to work, he should report to the personnel office on April 15, 2013. He would be required to provide a doctor's statement advising ACS that he can return to work, either at full capacity, or with some restrictions. The letter then explains that, if petitioner is not able to return to work, he should consider filing for social security, disability retirement or other benefits.

Petitioner was advised, pursuant to the March 11, 2013 letter, that he could also resign. However, if petitioner does not "wish to resolve" his employment status, the letter states that ACS has no choice but to terminate him, pursuant to section 71 of the Civil Services Law. The letter then provides the following, in pertinent part:

> Section 71 provides that an employee who has been continuously or cumulatively due to a

> work-related injury absent for one year or more, may be separated from staff. It also provides that, within one year of the date of termination due to Sect. 71, you can make an application . . . for a medical examination. If you are found fit to perform your duties, you may be reinstated."

Petitioner's exhibit A.[1]

The letter concluded by providing petitioner with two telephone numbers to contact if he had any questions.

Petitioner returned to work on April 15, 2013. Shortly thereafter, petitioner was absent from work from May 1, 2013 through May 7, 2013. When he returned, he provided a doctor's note which states that he can return to work without any restriction. However, on May 10, 2013, petitioner started another medical leave due to the same work-related injury which he sustained on April 16, 2012. Petitioner's doctor sent ACS a letter informing them that petitioner was totally disabled from duty as of May 10, 2013 and was expected to be reevaluated on June 28, 2013.

On June 24, 2013, petitioner was admitted to the hospital where he stayed for two days. On June 25, 2013, the hospital informed petitioner that he no longer had insurance coverage through ACS and, therefore, petitioner would be personally

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[1] The letter states that petitioner may reapply for his position within one year of the date of termination. This is incorrect and should state that petitioner may, within one year of the termination of such disability, reapply for his position.

responsible for paying all of his hospital bills. The petition then states, "[u]pon investigation, petitioner discovered that his loss of medical coverage from the City was due to the fact previously unknown to him, that he had been discharged from his position of employment as a Caseworker at ACS effective June 14, 2013, without written or verbal notice to him of such discharge." Petition, ¶ 11.

On or around August 5, 2013, petitioner received a letter from ACS informing him that he was being terminated effective June 14, 2013. The letter had been dated on June 14, 2013, but the date stamp on the letter indicates that it was not mailed to petitioner until at least July 19, 2013. In any event, the letter advised petitioner that ACS had received medical documentation about his absence from work. As such, petitioner had been out of work, due to a work-related injury, for a cumulative period of over one year. "As a result, effective immediately, your employment with this agency is hereby terminated in accordance with Civil Service Law 71." Petitioner's exhibit C at 1.

The letter informed petitioner that he may, within one year from the date of the end of his disability, apply to be reinstated to his position. He would have to submit to a medical examination and then, if found fit, be reinstated to his position based on availability. The letter then advised him about options

that petitioner might be entitled to with the New York City Employees' Retirement System.

After receipt of the letter, petitioner brought this Article 78 petition. Petitioner is seeking to vacate the June 14, 2013 discharge notice. He contends that the June 14, 2013 letter "effected an immediate termination of petitioner's employment without any due process rights." Petition, ¶ 16. This letter was mailed to him at least one month after the date upon which he was terminated. As a result, while he was in the hospital, petitioner was unaware that he no longer had insurance coverage. Petitioner alleges that was deprived of the opportunity to apply for retirement benefits, which he would have been eligible for, and which would have provided him with medical coverage. Petitioner states that he was also deprived of the opportunity to timely apply for COBRA, which also would have covered his medical costs.

Petitioner cites to a section in the rules of classified service, which states that an employee's termination is not effective until thirty days after the service of notice by the agency of its intention to terminate the employee pursuant to section 71 of the Civil Service Law. He also maintains that he had no opportunity to respond to the allegations about his disability, and that ACS should have offered him a hearing to contest his fitness.

In addition, the letter received by petitioner on March 11, 2013 provided the petitioner with wrong information about when he could reapply for reinstatement pursuant to the Civil Service Law.

In their cross motion, respondents maintain that, since petitioner was out of work cumulatively for over one year, his termination was lawful. As such, petitioner cannot dispute his termination. Further, petitioner allegedly did not exhaust all of his administrative remedies, since he had not yet reapplied for reinstatement. In addition, petitioner would not be entitled to a hearing, since such a hearing would "pointless," as petitioner does not dispute that he is disabled.

With respect to notice, respondents rely on the March 11, 2013 letter as "ample" notice of any pending termination. They argue that petitioner knew that he would be terminated after a cumulative year of not working. The June letter, even though late, was just a letter informing him of the date of termination. As such, the March letter was enough notice to petitioner. Respondents contend that the rules of classified service do not apply to ACS since it is a City, not a State, agency.

In response, petitioner claims that ACS should not have been able to effectuate a retroactive discharge, pursuant to a letter mailed to him almost a month after his discharge date. Petitioner insists that, even if he is presently unable to work,

this should not affect his right for due process regarding a notice of discharge. Petitioner also reiterates that, while he provides State regulations for notice requirements in his petition, he realizes that these are not binding on respondents, but are used as an example.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen,* 37 AD3d 670, 671 (2d Dept 2007); *see also P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 (1st Dept 2003). Under CPLR 3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one [internal quotation marks and citations omitted]." *Leon v Martinez*, 84 NY2d 83, 88 (1994). The petitioner's "ultimate ability to prove those allegations is not relevant." *See e.g. Hae Sheng Wang v Pao-Mei Wang*, 96 AD3d 1005, 1008 (2d Dept 2012).

According to Civil Service Law § 71, a public employee who is injured on the job is entitled to take a leave of absence for at least one year. After that year, the employer may terminate

the employee. *Matter of Waite v Coombe*, 247 AD2d 663, 663-664 (3d Dept 1998). This one-year period is calculated as a cumulative total, rather than a continuous year. *Matter of Allen v Howe*, 84 NY2d 665, 671 (1994). Civil Service Law § 71, states the following, in pertinent part:

> "Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her for the performance of the duties of his or her position . . . Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission."

Respondents believe that petitioner's termination was proper under Civil Service Law § 71, and that the petition should be dismissed. However, as set forth below, considering the petition in the light most favorable to petitioner, the petition has adequately stated a cause of action that petitioner was wrongfully terminated.

By way of example, due process requires that public employees who are discharged pursuant to Civil Service Law § 73 "be given pretermination notice and some minimal opportunity to be heard . . . [i]t is not necessary that the opportunity to be

heard be formal or procedurally elaborate [internal citation omitted]." *Matter of Hurwitz v Perales*, 81 NY2d 182, 187 (1993), *cert denied* 510 US 992 (1993).[2] In addition, with respect to discharge under Civil Service Law § 73, at the pretermination stage, the procedure is explained as follows:

> "[T]he the procedure must only be sufficient to serve as 'an initial check against mistaken decisions' and it 'need not definitively resolve the propriety of the discharge.' In the context of section 73 discharges, this amounts to no more than an opportunity for the employee to present opposing views as to whether she had been absent for one year or more and whether she was able to return to her position [internal citation omitted]."

Matter of Hurwitz v Perales, 81 NY2d at 187.

The Court of Appeals has held that section 71 of the Civil Service Law "affords greater procedural protections and opportunities for reinstatement" than section 73 of the Civil Service Law. *Matter of Allen v Howe*, 84 NY2d at 673. Since, as set forth above, pursuant to Civil Service Law § 73, prior to discharge, employees are given an explanation for the discharge and an opportunity to respond, under Civil Service Law § 71, petitioner should have been provided with at least the same pretermination notice. Here, petitioner was not provided with notice about the date of his termination until after his

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[2] Civil Service Law § 73 governs the separation and reinstatement of public employees who are out on disability due to a non-occupational injury.

termination had already occurred. As such, there was no way for petitioner to respond to this notice.

Petitioner is not disputing the subject matter of Civil Service Law § 71, nor that he was out on leave due to a work related injury. His main contention is that was not afforded due process in the form of advance notice of his termination. While the March 2013 letter advised petitioner that he would be terminated if his medical leave extends beyond the cumulative year, petitioner was not given a future date for such termination. The letter also advised that, pursuant to Civil Service Law § 71, petitioner "may" be discharged from employment.

Petitioner did indeed return to work April 15, 2013 and worked for a little while. After he went out again due to his previous disability, he should have not have had to guess when and if ACS would cut off medical coverage for him. It is unsettling that ACS would advise petitioner of his termination over a month after he was terminated, and effectuate a retroactive termination. Petitioner had been working for the agency for over 20 years and certainly could have applied for alternative medical insurance coverage, had he been given ample notice to do so.

Accordingly, the court finds that respondents failed to demonstrate that the March 2013 letter to petitioner was sufficient to provide him with due process about his pending

termination.[3] *See e.g. Matter of Allen v City of New York*, 39 Misc 3d 1223 (A), *3, 2013 NY Slip Op 50717 (U) (Sup Ct, NY County 2013) ("This court finds that due process requires notice and some opportunity to respond before an employee is terminated from civil service employment under Civil Service Law 71").

Upon receipt of the petition, respondents submitted a notice of objection pursuant to CPLR 7804 (f). As such, respondents are entitled to an opportunity to respond to the allegations and are granted leave to file an answer. *See e.g. Matter of Miller v Regan*, 80 AD2d 968, 969 (3d Dept 1981) ("Special Term erred in awarding petitioner affirmative relief without allowing respondents to interpose an answer").

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[3] Respondents' contentions regarding exhausting administrative remedies and no requirement for a hearing, are irrelevant. The only pertinent issue is whether or not petitioner received sufficient due process with respect to his pending termination.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED that the respondents' cross motion is denied; and it if further

ORDERED that respondents must serve and file an answer within ten days after receipt of the order with notice of entry.

Dated: June 23, 2014

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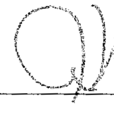

J.S.C.

ALEXANDER W. HUNTER JR.

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