

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019

526701

In the Matter of CASSANDRA
ETHINGTON,
Appellant,

v

MEMORANDUM AND ORDER

COUNTY OF SCHOHARIE et al.,
Respondents.

Calendar Date: April 23, 2019

Before: Garry, P.J., Egan Jr., Clark, Mulvey and Pritzker, JJ.

Gleason, Dunn, Walsh & O'Shea, Albany (Ronald G. Dunn of counsel), for appellant.

O'Connell & Aronowitz, Albany (Michael P. McDermott of counsel), for respondents.

Mulvey, J.

Appeal from a judgment of the Supreme Court (Ferreira, J.), entered September 13, 2017 in Schoharie County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to compel respondent Schoharie County Board of Supervisors to, among other things, reinstate petitioner to her prior position.

Petitioner was appointed as the personnel officer of respondent County of Schoharie in 2006. In November 2013, respondent Schoharie County Board of Supervisors (hereinafter respondent) suspended petitioner with pay and, in May 2014,

issued charges against her pursuant to Civil Service Law § 24 (1) to remove her from her position for cause. In September 2014, following a hearing, respondent found that cause existed and removed petitioner from her position. Petitioner commenced a CPLR article 78 proceeding seeking to annul respondent's determination, which Supreme Court transferred to this Court. Having concluded that we could not conduct a meaningful review of respondent's determination because respondent did not make any findings of fact, despite having heard testimony from multiple witnesses and considering the admitted documentary evidence, this Court withheld decision and remitted the matter for respondent to develop appropriate factual findings (144 AD3d 1473, 1474 [2016]).

Asserting that this Court had "essentially nullified" respondent's September 2014 determination, petitioner demanded that respondent reinstate her to her position with back pay and benefits. When respondent refused, petitioner commenced this CPLR article 78 proceeding seeking reinstatement and back pay. Supreme Court treated the petition as one in the nature of mandamus to compel and dismissed the petition, finding that petitioner failed to establish that she had a clear legal right to the relief sought. Petitioner appeals.¹

Supreme Court properly dismissed the petition. A writ of mandamus is "an extraordinary remedy that lies only to compel the performance of acts which are [ministerial and] mandatory, not discretionary, and only when there is a clear legal right to the relief sought" (Matter of Shaw v King, 123 AD3d 1317, 1318-1319 [2014] [internal quotation marks and citation omitted]; see Alliance to End Chickens as Kaporos v New York City Police Dept., 32 NY3d 1091, 1093 [2018], cert denied ___ US ___ [May 28, 2019]; Matter of Johnson v Fischer, 104 AD3d 1004, 1005

¹ Respondent subsequently issued findings of fact and conclusions of law supporting its determination to remove petitioner from her position. Petitioner commenced another proceeding to challenge that determination, and we decide that proceeding herewith (see Matter of Ethington v County of Schoharie, ___ AD3d ___ [appeal No. 526920, decided herewith]).

[2013]). Petitioner demanded that she be reinstated to her position of personnel officer based on her incorrect interpretation of this Court's prior decision. We did not remit the matter to respondent for a new evidentiary hearing, but only for the development of appropriate written factual findings. Supreme Court properly concluded that this Court's prior decision – which withheld a final decision pending our receipt of such factual findings – did not annul, reverse or modify respondent's September 2014 determination to remove petitioner and, because that determination remained intact, petitioner did not have a clear legal right to reinstatement or back pay (see 144 AD3d at 1474; compare Matter of Arthur v Soares, 95 AD3d 1619, 1620-1622 [2012]; Matter of Cantone v DiNapoli, 50 AD3d 1307, 1308 [2008]; Matter of Longton v Village of Corinth, 49 AD3d 995, 995-996 [2008]; Matter of Ernst v Saratoga County, 251 AD2d 866, 867-869 [1998]). Given that petitioner has not demonstrated a clear legal right to the relief sought, Supreme Court properly concluded that petitioner was not entitled to a writ of mandamus and dismissed the petition.

Garry, P.J., Egan Jr., Clark and Pritzker, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court