

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

Decided and Entered: June 20, 2019

526920

In the Matter of CASSANDRA
ETHINGTON,
Petitioner,

v

MEMORANDUM AND JUDGMENT

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 petitioner.

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

Mulvey, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Schoharie County) to review a determination of respondent Schoharie County Board of Supervisors removing petitioner from her position as personnel officer.

In 2006, petitioner was appointed as the personnel officer of respondent County of Schoharie. In 2014, respondent Schoharie County Board of Supervisors (hereinafter respondent) issued charges against petitioner pursuant to Civil Service Law § 24 (1) to remove her from her position for cause. After some

charges were withdrawn, the remaining charge alleged that petitioner withheld relevant information and materials from the County's labor attorney that would have been pertinent in prior lawsuits involving the County. Following a hearing, respondent found that cause existed and removed petitioner from her position. In 2015, petitioner commenced a CPLR article 78 proceeding seeking to annul respondent's determination, which Supreme Court (Ferreira, J.) transferred to this Court. We held 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 (144 AD3d 1473, 1474 [2016]). This Court withheld decision and remitted the matter for respondent to develop appropriate factual findings.

Upon remittal, in October 2017, respondent issued findings of fact and conclusions of law in support of its determination, finding that petitioner withheld relevant information and material from the County's labor attorney.¹ Petitioner commenced this CPLR article 78 proceeding seeking, among other things, to review respondent's factual findings and overall determination.²

¹ In March 2017, before respondent issued the findings of fact, petitioner commenced another CPLR article 78 proceeding in Supreme Court seeking reinstatement to her position and back pay. Supreme Court dismissed that petition and petitioner appealed to this Court (Matter of Ethington v County of Schoharie, ___ AD3d ___ [appeal No. 526701, decided herewith]).

² Where this Court remits and withholds decision due to a lack of factual findings, as we did in the prior proceeding, the typical procedure would be for the agency or entity to which the matter is remitted to create written factual findings supporting its determination, then supply that written document directly to this Court for us to render a final determination within that same proceeding. Because we withheld decision, the matter was still pending before this Court and it was unnecessary for any party to commence a new proceeding. Nevertheless, as petitioner has commenced this proceeding and moved to withdraw her petition in the 2015 proceeding, we now address the merits of respondent's determination.

Noting that petitioner had raised a question of substantial evidence, Supreme Court transferred the matter to this Court (see CPLR 7804 [g]).

Respondent's determination to remove petitioner from office is supported by substantial evidence. Civil Service Law § 24 (1) provides that "[t]he officer or body having the power of appointment of . . . a personnel officer may at any time remove any such . . . personnel officer for cause, after a public hearing." When reviewing an administrative determination rendered after a hearing that is required by law, the court's standard is whether the determination "is, on the entire record, supported by substantial evidence" (CPLR 7803 [4]; see Matter of Kuznia v Adams, 106 AD3d 1227, 1229 [2013]). "[T]he substantial evidence standard is a minimal standard[,] . . . demand[ing] only that a given inference is reasonable and plausible, not necessarily the most probable" (Matter of Haug v State Univ. of N.Y. at Potsdam, 32 NY3d 1044, 1045-1046 [2018] [internal quotation marks, brackets and citations omitted]). Credibility determinations rest solely with the hearing panel and, accordingly, this Court may not substitute its judgment for that of the panel nor weigh the evidence presented, beyond assuring that there is substantial evidence (see id. at 1046; Matter of Kuznia v Adams, 106 AD3d at 1229).

The record establishes that two former employees commenced proceedings against the County alleging that they were improperly terminated. An issue raised in each of those proceedings was whether petitioner was interim or acting director of the County health department or held herself out as such. When defending the County in those proceedings, the County and petitioner denied these allegations. Petitioner also submitted sworn affidavits stating that she was never appointed, "officially or unofficially," as acting or interim director of the health department nor did she hold herself out as such. Supreme Court (Devine, J.) dismissed both proceedings, although not based on that issue. At the hearing before respondent, the County's labor attorney testified that petitioner was the main source of information and that the attorney relied primarily upon petitioner for truthful, complete and accurate information

in defending the County in those proceedings. The attorney stated that she had numerous conversations with petitioner regarding whether petitioner was the interim or acting head of the health department. According to the attorney, petitioner affirmed that she had not been appointed to the position either officially or unofficially, that she had never held herself out as such and that she was not in any way acting or interim director of the health department. The attorney also indicated that she expected petitioner to provide any documents in the County's possession that were relevant to any issues in the proceedings.

The record contains numerous documents indicating that petitioner held herself out as interim director of the health department. Indeed, petitioner admitted in her testimony that at times she had done so. Although petitioner provided reasons for her actions and asserted that the attorney was aware of this information during the prior proceedings, respondent specifically discounted petitioner's credibility and truthfulness as a witness. Moreover, even if the attorney obtained these documents at some point from other sources, the record indicated that petitioner had not provided them to the attorney. Hence, substantial evidence supports respondent's determination to remove petitioner for cause because she withheld relevant information and materials from the attorney, which the attorney should have been able to review to determine whether they were necessary or important to the defense of litigated matters (see Matter of Kuznia v Adams, 106 AD3d at 1229).

We reject petitioner's argument that respondent's factual findings are defective due to not being signed by all members of the hearing panel. No statute or regulation requires a unanimous vote of a hearing panel to remove a public official pursuant to Civil Service Law § 24 (1), nor that all of the participating panel members sign a determination.³ Thus, we conclude that the signatures of five of the eight original

³ As a comparison, decisions of this Court are signed by Robert D. Mayberger, Clerk of the Court, and not by the Justices who actually render the decisions.

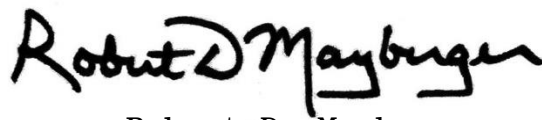
participating panel members constituted sufficient approval of the factual findings.

"A penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a matter of law" (Matter of O'Connor v Cutting, 166 AD3d 1099, 1103 [2018] [internal quotation marks, brackets and citations omitted]; see Matter of Kuznia v Adams, 106 AD3d at 1231). The record reflects that the attorney relied primarily on petitioner for correct information and evidence in defending the County in the two proceedings, as she typically did in all labor proceedings, due to petitioner's position as personnel officer. Notwithstanding the favorable decisions that the County obtained in those two matters, petitioner signed and submitted affidavits that contained false information, primarily because she failed to provide the attorney with relevant documents and accurate information. Notably, Civil Service Law § 24 does not provide any disciplinary remedy other than removal (compare Civil Service Law § 75 [3]). Even assuming that a lesser penalty may have been available, "it is not proper to substitute our judgment for that of [respondent]" (Matter of Bottari v Saratoga Springs City School Dist., 3 AD3d 832, 833 [2004]; see Matter of Castle v Maine-Endwell Cent. Sch. Dist., 111 AD3d 1221, 1222 [2013], lv denied 22 NY3d 862 [2014]). Thus, the penalty of termination was not shocking or disproportionate under the circumstances (see Matter of Kuznia v Adams, 106 AD3d at 1231-1232).

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

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized 'R' and 'M'.

Robert D. Mayberger
Clerk of the Court