ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Application of:

MICHAEL A. COBB,
Petitioner,

DECISION/ORDER
INDEX # 1417/2007

For a Judgment Pursuant to CPLR Article 78

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
TAMMY B. COLLINS, as Administrative Law Judge of the New York State Division of Human Rights,
Respondents.

(Supreme Court, Albany County - Special Term February 23, 2007)
(Justice Eugene P. Devine, presiding)

APPEARANCES:

Matthew P. Ryan, Esq.
NYS Law Enforcement Officers Union
63 Colvin Avenue
Albany, New York 12206
Attorney for the Petitioner

Marilyn Balcacer, Esq.
NYS Division of Human Rights
One Fordham Plaza, 4th Floor
Bronx, New York 10458
Attorney for the Respondents

DEVINE, J.:

The petitioner is a Corrections Lieutenant employed by the New York State Department

of Corrections (NYSDOC). In 2005, two verified complaints filed with the New York State Division of Human Rights (respondents) against NYSDOC and petitioner, alleging unlawful discrimination practices. Respondents scheduled a hearing for February 27, 28 and March 1, 2007 during a phone conference on January 19, 2007. At that conference, Petitioner was not present, represented and allegedly not even notified at said conference. Petitioner brought this Article 78 proceeding on February 16, 2007 to 1) annul a determination by the New York State Division of Human Rights (NYSDHR), Administrative Law Judge Tammy Collins which required NYSDOC to disclose petitioner's official personnel file and 2) stay or prohibit respondents from having the underlying administrative hearing.

An Article 78 proceeding is not appropriate when the petitioner seeks to review a decision or determination that is not final.[1] One who objects to an act of an administrative agency must exhaust all administrative remedies except when an agency's action is challenged as unconstitutional, or resorting to an administrative remedy would be futile or pursuit of the administrative remedy would cause irreparable harm.[2]

Respondent Administrative Law Judge Tammy Collin's decision to require NYSDOC to disclose the petitioner's personnel file is not a final order as required by CPLR Article 78. In fact, Petitioner's own Attorney Affirmation reveals that the NYSDOC through its Senior Attorney, Benjamin H. Rondeau, denied the complainants "Request for Discovery and Inspection" and requested that the Administrative Law Judge convert her oral order, regarding

---

[1] N.Y. CPLR 7801 (1)

[2] Matter of Ford v. Snashall 275 AD 2d 493 (3d Dept.) see also Watergate II Apts. v. Buffalo Sewer Auth., 46 NY2d 52, 57

the release of the personnel file, to a written order before NYDOC would comply. This Court, in the papers before it, does not have a written copy of Administrative Law Judge Tammy Collin's order, if any.

Petitioner has not exhausted his administrative remedies, has failed to prove that the "purported" decision of Administrative Law Judge Tammy Collin's falls within the exceptions listed above and that the decision is a final determination as defined by CPLR Article 78, therefore this Court holds and determines that petitioner's request to annul the determination of the respondent as to the disclosure of his personnel file is premature and hereby dismissed.

Petitioner's second request under Article 78 was for a stay or to prohibit respondents from having the underlying administrative hearing. Petitioner has a right to put forth a defense at the pending hearing. Courts have determined that the failure to adjourn a proceeding to be arbitrary, capricious and without a rational basis when there appears to be a reasonable basis for such an adjournment and the agency fails to articulate a countervailing reason to deny an adjournment or otherwise express that it would incur some prejudice if the hearing was adjourned.[3]

This Court finds it disconcerting that the hearing date was not adjourned so as to afford Mr. Cobb more time to acquire an attorney and prepare a defense. Complainants in the underlying action did not object to an adjournment and would prefer the case go forward on its merits and not have issues confused with potential due process arguments. Furthermore, this Court sees no prejudice to the NYSDHR or to the complainants (and none is alleged) and can

---

[3] Messina v. Bellmore Fire Dist. Comm, 242 AD 2d 631 (2d Dept. 1997); Matter of Milrad, 44 AD 2d 287 (3d Dept. 1974)

find no rationale, in the papers before it, as to why an adjournment was not granted.

Therefore this Court holds and determines that the petitioner's request to stay or prohibit the hearing is hereby granted. It is ORDERED that the matter be remanded to NYSDHR for a hearing upon proper notice and with a reasonable amount of time for Mr. Cobb to obtain counsel and prepare a defense in the underlying unlawful discrimination practices proceeding.

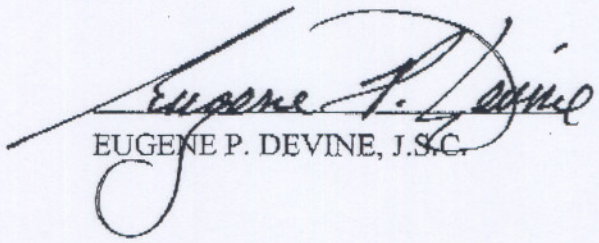
Those arguments not specifically addressed herein are found to be without merit.

This Memorandum shall constitute both the Decision and Order of the Court. This Original DECISION/ORDER is being sent to petitioner's attorney. The signing of this DECISION/ORDER shall not constitute entry or filing under CPLR § 2220. Counsel for the petitioner is not relieved from the applicable provisions of that section with respect to filing, entry and notice of entry.

SO ORDERED

ENTER

2/28/07



EUGENE P. DEVINE, J.S.C.

Papers considered:

1. Petitioner's Verified Petition (with exhibits) entered February 16, 2007
2. Petitioner's Attorney Affirmation (with exhibits) stamped by Albany Co. February 21, 2007
3. Petitioner's Memorandum of Law dated February 14, 2007
4. Respondent's Answer dated February 21, 2007
5. Respondent's Affirmation in Opposition to Petition dated February 21, 2007
6. Petitioner's Reply dated February 22, 2007

Courtesy Duplicate Original to NYSDHR