8/9/16

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO HAGLER J.S.C. PART 17

Justice

Eileen Jordan

-v-

The New York City Housing Authority and the Department of Citywide Administrative Services

INDEX NO. 100893-14

MOTION DATE

MOTION SEQ. NO. 2

The following papers, numbered 1 to 10, were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits 2 Exhibits | No(s).

Answering Affidavits — Exhibits cross-motion + memorandums 3-6 | No(s).

Replying Affidavits 7-8 | No(s).

Reply Memorandum 9-10

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Order.

COUNTY CLERK'S OFFICE NEW YORK AUG 09 2016 FILED

RECEIVED AUG 09 2016 GENERAL CLERK'S OFFICE NYS SUPREME COURT - CIVIL

FILED AUG 09 2016 COUNTY CLERK'S OFFICE NEW YORK

FILED AUG 16 2016 COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 8/3/16

SHLOMO HAGLER J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [X] 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 17

---------- X

In the Matter of the Application of
EILEEN JORDAN and CITY EMPLOYEES UNION
LOCAL 237, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Index No.:
100993/2014

Petitioners,

-against-

THE NEW YORK CITY HOUSING AUTHORITY and
THE DEPARTMENT OF CITYWIDE ADMINISTRATIVE
SERVICES,

Respondents.

DECISION/ORDER

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

---------- X

HON. SHLOMO S. HAGLER, J.S.C.:

In this article 78 proceeding, petitioners Eileen Jordan ("Jordan") and City Employees Union Local 237, International Brotherhood of Teamsters ("Local 237"), among other relief, seek a judgment that respondents the New York City Housing Authority ("NYCHA") and the Department of Citywide Administrative Services ("DCAS") have failed to perform a duty enjoined by law or acted arbitrarily and capriciously in violation of the Civil Service Law by not providing Jordan with a medical examination and subsequent reinstatement or placement on a preferred hire list. Petitioners seek that Jordan be evaluated, and, if reinstated, be

provided with applicable back-pay. NYCHA cross-moves, pursuant to CPLR 3211 (a) (7), (10), for an order dismissing the amended petition for failure to join DCAS as a necessary party and for failure to state a claim. DCAS cross-moves, pursuant to CPLR 3211 (a) (5), 217 and 7804 (f), for an order dismissing the amended petition on the ground that the proceeding is barred as against DCAS by the statute of limitations.

BACKGROUND AND FACTUAL ALLEGATIONS

Jordan began working for NYCHA in 1999 in the Caretaker "J" (Janitorial) position. Most recently, petitioner was working in the Caretaker "X" (truck driver) position. Both of these Caretaker titles are considered labor class positions within the New York classified service. Local 237 is the collective bargaining representative for NYCHA employees who are in the Caretaker position.

On July 27, 2011, Jordan sustained a work-related injury. Jordan spoke to her supervisor and advised him that she was not fit to work and that she would be out of work.

By letter dated June 25, 2012, NYCHA notified Jordan that, as she had almost been absent from work for one year, she could be subject to termination at the end of the 12-month period. The letter advised Jordan that, if she disputed her termination, she could appeal the determination to NYCHA. The letter further encouraged her to contact the staff relations division at NYCHA

if she was a pension member. The letter stated the following, in pertinent part:

> "I am sure you realize that the Housing Authority must follow-up on employees who are absent from work for protracted periods. A review of your current status indicates that you have been absent from work for a total of 11 months. Please be aware that you are subject to the termination of your employment upon a total of 12 months absence from work. Our records indicate that if you have not returned to work by 08/01/2012, you will have been absent from work for more than 12 months."

Van Gendt Affirmation, Exhibit "2."

Pursuant to a letter dated August 8, 2012, NYCHA informed Jordan that she was terminated, effective August 1, 2012 because she had been absent for a total of one year by reason of disability. The letter advised that, within one year after the termination of her disability, she could request reinstatement to her position of Caretaker. The letter explained that she would have to submit a request to DCAS, who would then arrange for a medical examination to see if she was fit for duty.

Pursuant to an email exchange submitted by NYCHA, on December 21, 2012, DCAS notified NYCHA that it was transferring the "responsibility for determining medical fitness to return to work for Labor class Housing Authority Caretakers (title code 90645) from [DCAS] to [NYCHA]. Effectively immediately, NYCHA will be responsible for adjudicating these cases and subsequent appeals. This is consistent with current policy for all other

Labor class titles." Van Gendt Affirmation, Exhibit "1." NYCHA further claims that it was advised by DCAS that DCAS's "processing of requests for reinstatement of NYCHA Caretakers prior to December 2012 was based on a misunderstanding of a prior contractual agreement." Van Gendt Affirmation, ¶ 7.

In September 2012, Jordan had back surgery and told her supervisor that she would need a year to recover. On August 5, 2013, Jordan underwent shoulder surgery. After recovering from the surgery, she spoke to her supervisor about returning to work. Jordan's supervisor advised her to request reinstatement from human resources. On April 17, 2014, petitioner filled out the "application for medical reinstatement" form and submitted it to DCAS's Office of Medical Appeals and Reinstatements.

Pursuant to Civil Service Law § 71, under certain circumstances, after recovering from a disability, an employee may request a medical examination. After this examination, if the employee is found fit to return to work, the employee shall be reinstated if there is a vacant position, or, among other things, if there is not a vacancy, the employee shall be placed on a preferred list for the former position.

On May 22, 2014, pursuant to a letter from the human resources department at NYCHA, Jordan was informed that she had been terminated on August 1, 2012 and that "since you were terminated from a labor Class Caretaker you are not eligible to

be reinstated. These rights are only extended to employees who had civil service status prior to their resignation in accordance with civil service law." Petitioners' Exhibit "A."[1]

Petitioners contend that Civil Service Law § 71 is applicable to Jordan, as she is a member of the labor class and is part of the classified service. As a result, petitioners believe that NYCHA's determination that Jordan was not entitled to a medical examination under Civil Service Law § 71 is arbitrary and capricious. Petitioner states the following, in pertinent part:

> "Following her recovery from her occupational disability, Jordan demanded reinstatement to her former position with NYCHA. By refusing to conduct a medical examination of Jordan, and failing to reinstate Jordan or place her on a preferential hire list, NYCHA deprived Jordan of her rights under Section 71 of the Civil Service Law and Rule 6.2.5 of the Personnel Rules and Regulations of the City of New York."

Amended petition, ¶ 4.

On September 19, 2014, petitioners filed an article 78 petition against NYCHA. NYCHA cross-moved to dismiss the petition, arguing that petitioners failed to join DCAS as a necessary party.

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[1] Jordan claims that, prior to the receipt of this May 22, 2014 letter, she had never been informed that she had been terminated as of August 1, 2012. She states that her supervisor had contacted her in September 2012, after her back surgery, to find out when she would be returning to work.

By decision and order dated April 27, 2015, this Court granted petitioner leave to file an amended petition, including DCAS as a party. On May 21, 2015, petitioners filed the instant amended petition.[2]

NYCHA argues that the amended petition should be dismissed for failing to join DCAS as a necessary party. NYCHA alleges that, when an action is dismissed against a necessary party due to the expiration of the statute of limitations, the entire action must be dismissed. Therefore, if DCAS cannot be a party due to the expiration of the statute of limitations, NYCHA argues that the entire proceeding should be dismissed.

According to NYCHA, DCAS is a necessary party because, among other reasons, it is charged with interpreting the Civil Service Law in the City of New York and it is DCAS's interpretation of Civil Service Law § 71 that is being challenged in the instant proceeding. NYCHA states that it relied on DCAS's expertise in determining whether or not petitioner was an employee who was covered under Civil Service Law § 71. It claims that, given the legislative intent of the Civil Service Law, DCAS's interpretation that Jordan was ineligible for a medical

examination was

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[2] After oral argument on November 30, 2015, this Court denied NYCHA's cross motion on the basis that DCAS initially stated that it is not a necessary party. NYCHA now seeks to renew its cross motion to dismiss the amended petition based on failing to join a necessary party and failure to state a cause of action.

rational and that NYCHA properly relied on DCAS's expertise.

In addition, NYCHA alleges that mandamus is not available here because Jordan has no legal right to compel respondents to either conduct an examination or to reinstate her.

NYCHA further argues that the amended petition should also be dismissed for failure to state a claim. NYCHA alleges that labor class employees are meant to be at-will employees and that the Legislature intended to exclude labor class employees from the protections of Civil Service Law § 71. In support of its contentions, NYCHA provides failed legislative attempts to provide the labor class employees with more tenure rights. For example, a copy of the governor's veto message was included on proposed assembly bill 8074, disapproving extended disciplinary protections to employees in the labor class under Civil Service Law § 75.

In addition, NYCHA cites to other sections of the Civil Service Law, such as Civil Service Law § 75, that specifically exclude labor class employees from protections upon being discharged. As a result, NYCHA claims that the term "employee," although not defined, does not include labor class employees. According to NYCHA, as Jordan is not an "employee" within the meaning of Civil Service Law § 71, she is not entitled to the protection of a medical examination or reinstatement.

Among other things, NYCHA also argues that the concept of a

preferred list is not applicable to labor class employees. Therefore, the Legislature did not intend for labor class employees to be entitled to the protections of applying for reinstatement, as they cannot be placed on a preferred list.

DCAS cross-moves to dismiss the amended petition, on the ground that it is barred by the four-month statute of limitations. DCAS states that NYCHA's decision to terminate petitioner became effective August 1, 2012. According to the amended petition, Jordan did not receive this notification until May 22, 2014. According to DCAS, even accepting petitioners' allegations as true, petitioners should have commenced an article 78 proceeding by September 22, 2014. As DCAS was added as a party on May 21, 2015, this is after the statute of limitations had expired, and the amended petition should be dismissed as untimely as against DCAS.

DCAS also takes the position that Civil Service Law § 71 is inapplicable to employees in the labor class title. During oral argument on November 30, 2015, DCAS argued that it was not a necessary party because NYCHA has the "freedom" to follow various interpretations of the statute. Tr at 9. However, on January 25, 2016, DCAS wrote a letter to this Court stating that it now believes it is a necessary party to the proceeding. In addition, the letter advised that, "because DCAS is a necessary party to this action, the amended petition must then also be dismissed

against NYCHA for failure to timely join a necessary party." Koduru letter dated January 25, 2016.

Petitioners contend that DCAS is a not a necessary party to this proceeding. According to petitioners, DCAS transferred the power and responsibility for administering medical fitness examinations to NYCHA. It was NYCHA that made the decision to refuse to provide Jordan with a medical fitness examination. NYCHA advised Jordan of its determination and did not reference DCAS.

Petitioners argue that the language of Civil Service Law § 71 is clear and unambiguous in that all of the employees in the classified service, including labor class employees, are entitled to its protections. Petitioners allege that Jordan meets the criteria of Civil Service Law § 71 as she was separated from service due a work-related injury and then applied for a medical fitness exam for reinstatement within one year of the termination of the disability. As a result, NYCHA ignored the language of the statute when it did not afford her a medical fitness examination.

DISCUSSION

An article 78 "proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . . or after the respondent's refusal, upon the demand of the petitioner

. . . to perform its duty." CPLR 217 (1). "An agency determination is final - triggering the statute of limitations - when the petitioner is aggrieved by the determination." *Matter of Carter v State of N.Y. Exec. Dept., Div. of Parole*, 95 NY2d 267, 270 (2000).

Dismissal of this article 78 petition is warranted as against DCAS because petitioners did not commence this proceeding as against DCAS within four months of the May 22, 2014 letter. Jordan was "aggrieved" on May 22, 2014 when, after requesting reinstatement, NYCHA refused this request. Although petitioners were able to amend to include DCAS as a respondent after the statute of limitations had run out, DCAS is still able to move to dismiss based on the defense that DCAS was not joined as a respondent until May 21, 2015 and, as a result, the amended petition is untimely. *See e.g. Matter of Alexy v Otte*, 58 AD3d 967, 967-968 (3d Dept 2009) ("the expiration of a limitations period does not deprive the court of jurisdiction over an absent necessary party but, rather, may provide that party with a defense to the action or proceeding").

As set forth in the facts, NYCHA argues that the proceeding must be dismissed because petitioners initially failed to join DCAS as a necessary party. However, DCAS is not a necessary party in this proceeding because it would not be "inequitably affected by a judgment." *See* CPLR 1001 (a) ("Persons who ought

to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants"). Although DCAS interprets the Civil Service Law, NYCHA makes its own determinations and interpretations with respect to its own employees. NYCHA, not DCAS, was the agency to advise petitioner that she was not eligible for reinstatement as she was a labor class employee. This responsibility to determine medical fitness to return to work had been transferred to NYCHA prior to Jordan's application for medical reinstatement.

In addition, as mentioned in the transcript by DCAS during oral argument, NYCHA is independent from the City of New York. *See e.g. Torres v New York City Hous. Auth.*, 261 AD2d 273, 275 (1st Dept 1999) (NYCHA is a "distinct municipal entity not united in interest with" the City of New York).

Interpretation of Civil Service Law § 71:

Petitioners seek an order directing NYCHA to conduct a medical examination, and, if applicable, to reinstate Jordan pursuant to Civil Service Law § 71. In a mandamus to compel the performance of a duty enjoined by law brought pursuant to CPLR 7803 (1), the petitioner must demonstrate a "clear legal right to the relief requested [internal quotation marks and citation omitted])." *Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 388 (2006).

In the context of an article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 (1st Dept 2006); *see also* CPLR 7803 (3). As set forth below, here, whether or not NYCHA relied on either DCAS's or its own interpretation of Civil Service Law § 71 in denying petitioner Jordan a medical evaluation, petitioners have demonstrated that, this interpretation of Civil Service Law § 71 is arbitrary and capricious. By following DCAS's interpretation, NYCHA failed to perform a duty enjoined by law.

Pursuant to Civil Service Law § 40, public employment positions within New York's classified service are grouped into four classes, "to be designated as the exempt class, the non-competitive class, the labor class, and the competitive class." The labor class is made up of all unskilled laborers. Civil Service Law § 43. Labor class employees are not granted tenure rights and are "afforded the least protection" in their continued employment. *Matter of Jones v Carey*, 55 AD2d 260, 263 (3d Dept 1976). According to respondents, there is no additional definition of employee as provided in the Civil Service Law.

The varied retention rights of the employment classes

specifically enumerated in the Civil Service Law. For instance, Civil Service Law § 86 explains in pertinent part, that, if a position in the non-competitive or labor class held by a veteran is abolished, "the honorably discharged veteran or exempt volunteer fireman holding such position shall not be discharged from the public service but shall be transferred to a similar position wherein a vacancy exists, and shall receive the same compensation therein." Civil Service Law § 80 explains that, if positions within the competitive class are abolished, people with the least seniority are terminated first. In addition, Civil Service Law § 81 provides that, any employee terminated in accordance with Civil Service Law § 80 shall be placed on a preferred list.

Civil Service Law § 75 (1) states that five specific types of employees, "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section." The employees entitled to these disciplinary procedures are as follows:

> "(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or
>
> "(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the

public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who was honorably discharged or released under honorable circumstances from the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer firefighter as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or

"(c) an employee holding a position in the non-competitive class other than a position designated in the rules of the state or municipal civil service commission as confidential or requiring the performance of functions influencing policy, who since his last entry into service has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

"(d) an employee in the service of the City of New York holding a position as Homemaker or Home Aide in the non-competitive class, who since his last entry into city service has completed at least three years of continuous service in such position in the non-competitive class, or

"(e) an employee in the service of a police department within the state of New York holding the position of detective for a period of three continuous years or more; provided, however, that a hearing shall not be required when reduction in rank from said position is based solely on reasons of the economy, consolidation or abolition of functions, curtailment of activities or otherwise."

Civil Service Law § 75.

Civil Service Law § 71, reinstatement after separation for

disability, 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. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his or her former position, he or she shall be reinstated to his or her former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he or she was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filling of such vacancy, the name of such person shall be placed upon a preferred list for his or her former position, and he or she shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his or her former position, his or her name shall be placed on the preferred eligible list for his or her former position or any similar position."

Civil Service Law § 71 does not limit or define what class

of civil service employee may take advantage of its protections. Jordan was informed that she was entitled to a one-year leave of absence following her injury. This follows the first section of Civil Service Law § 71 that allows a "leave of absence for at least one year." Close to the end of that year period, petitioner was advised, by NYCHA, that she was eligible, pursuant to Civil Service Law § 71, to reapply for reinstatement within a year of the termination of her disability.

Nonetheless, respondents argue that petitioner is not actually eligible for reinstatement because the statutory framework suggests that labor class employees were meant to be excluded from Civil Service Law § 71. NYCHA cites to Civil Service Law § 75 as an example of the legislative intent, because, in this section, NYCHA alleges that employees of the labor class are specifically excluded from the disciplinary and tenure protections. However, Civil Service Law § 75 goes into great detail to explain which types of employees are included, rather than explain who is excluded. By contrast, in Civil Service Law § 71, there is no distinction made among employees.

"Where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used [internal quotation marks and citation omitted]." *Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 60 (2013). Civil Service

Law § 71 is "clear and unambiguous." In the present situation, if the Legislature meant to exclude labor class employees from Civil Service Law § 71, the text could have specifically excluded them, as it did in Civil Service Law § 75. "In other words, we cannot read into the statute that which was specifically omitted by legislature." *Id.* at 62.

Moreover, as noted by petitioners, Civil Service Law § 71 has been referenced by other courts in their discussions of labor class employees. However, the issue of requesting reinstatement pursuant to this statute appears to never have been subject of the decisions. *See e.g. Amerose v Monroe County Water Auth.*, 2012 WL 5398660, *10, 2012 US Dist LEXIS 157731, *13-*14, (WD NY 2012) (plaintiff was a laborer who had been given a leave of absence due to work-related disability under Civil Service Law § 71, however, he neither requested a medical examination nor applied for reinstatement to his position).

NYCHA claims that legislative attempts to provide labor class employees with more due process and tenure rights under Civil Service Law § 75 have failed. As a result, labor class employees were also meant to be excluded from Civil Service Law § 71. However, this argument is unpersuasive, as "[t]he Legislature is presumed to know the law in existence at the time it enacts legislation." *Brady v Village of Malverne*, 76 AD3d

691, 693 (2d Dept 2010).

In addition, because the Legislature intended the labor class employees to be excluded from the protections of Civil Service Law § 75 does not mean that the Legislature intended to exclude labor class employees from other job protections. For example, as set forth above, Civil Service Law § 86 allows certain employees in the labor class, such as honorably discharged veterans, to be transferred to a different position if their positions become abolished.

Finally, respondents claim that there is no concept of a preferred list for labor class employees. For instance, in Civil Service Law § 81 (1), employees who are suspended or demoted pursuant to Civil Service Law § 80, shall be placed "upon a preferred list, together with others who may have been suspended or demoted from the same or similar positions in the same jurisdictional class." As a result, according to respondents, labor class employees were intended to be excluded from Civil Service Law § 71 as they cannot be placed on a preferred list. NYCHA states, "[n]otably, the 'preferred list' in Section 71 echoes the 'preferred list' in Section 81." NYCHA's mem of law at 7. NYCHA further noted that "preferred list" is a "term of art" specifically applying to competitive class positions. Tr of oral argument Feb 8, 2016 at 10.

However, this Court is not persuaded by this argument.

Civil Service Law § 71 does not explicitly limit this list to the one specified in Civil Service Law § 81 (1).[3] "[I]n attempting to effectuate the intent of the legislature, the best evidence . . . is the plain language of the statute [internal quotation marks and citation omitted]." *Matter of Gandin v Unified Ct. Sys. of State of N.Y.*, 135 AD3d 755, 757 (2d Dept 2016).

In general, "an agency's determination, acting pursuant to legal authority and within its area of expertise, is entitled to deference." *Matter of Tockwotten Assoc. v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 454 (1st Dept 2004). However, where, as here, "when the interpretation of a statute is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and the legal interpretation is ultimately the court's responsibility [internal quotation marks and citations omitted]." *Matter of Gandin v Unified Ct. Sys. of State of N.Y.*,

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[3] In addition, this Court notes that there are other instances where the term "preferred list" is used in connection to the labor class. For instance, in DCAS's Rule 6.5.5, as set forth in Personnel Rules and Regs of the City of NY, RCNY 55 Appendix A, ¶ 6.5.5, under the section of preferred lists, the labor class is addressed and, in certain situations, labor class employees are to be placed on a preferred list in the same manner as the competitive class as provided in Civil Service Law Sections 80 and 81.

135 AD3d at 757.

Although in an email exchange between NYCHA and DCAS, NYCHA claims that labor class employees are excluded from Civil Service Law § 71, neither DCAS nor NYCHA have provided any case law directly supporting their argument that labor class employees, such as Jordan, are not "employees" within the meaning of the statute. This Court holds that respondents' determination that labor class employees are excluded from Civil Service Law § 71 is "contradicted by the plain language of the statute." *Matter of Killian [General Motors Corp., Delco Chassis Div. -- Sweeney]*, 89 NY2d 748, 752 (1997). Moreover, Civil Service Law § 71 does not give discretion to NYCHA or DCAS to exclude labor class employees from its protections.

A mandamus to compel "applies only to acts that are ministerial in nature and not those that involve the exercise of discretion [internal quotation marks and citation omitted]." *Matter of Flosar Realty LLC v New York City Hous. Auth.*, 127 AD3d 147, 152 (1st Dept 2015). Here, under the circumstances presented, NYCHA does not have any discretion to deny the initial medical evaluation request, and, if applicable, subsequent reinstatement, to an employee who meets the criteria of Civil Service Law § 71. Pursuant to NYCHA's initial instructions, Jordan timely applied for reinstatement to her former position pursuant to Civil Service Law § 71, contending that she was fit

to return to work. Therefore, relief in the nature of mandamus is appropriate in that this Court is directing NYCHA to comply with its legal duty as codified in Civil Service Law § 71.

NYCHA's request to answer the amended petition, in the event that its cross motion is denied, is also denied. Generally speaking, when a motion to dismiss is denied, "the court shall permit the respondent to answer, upon such terms as may be just." CPLR 7804 (f). However, "a court need not do so if the *facts are so fully presented* in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer [internal quotation marks and citation omitted]." *Matter of Kickertz v New York Univ.*, 25 NY3d 942, 944 (2015). After oral argument, this Court requested that the parties brief the issue of whether Civil Service Law § 71 applies to labor class employees. Given the circumstances and the submissions of the parties, an answer is not necessary, as it is "clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer." *Id.*

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED and ADJUDGED that the cross motion of the Department of Citywide Administrative Services is granted and the amended petition is dismissed against this respondent based on the expiration of the statute of limitations; and it is further

ORDERED and ADJUDGED that the New York City Housing Authority's cross motion is denied; and it is further

ORDERED and ADJUDGED that the amended petition is granted to the extent that the matter is remitted to the New York City Housing Authority for compliance with Civil Service Law § 71 in accordance with this Decision/Order, and all other requested relief is denied at this time.

Dated: August 3, 2016

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.

Milton A Tingling
Clerk

FILED
AUG 16 2016
COUNTY CLERK'S OFFICE
NEW YORK

Index No. 100993/2014

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

EILEEN JORDAN and CITY EMPLOYEES UNION LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioners,

- against -

THE NEW YORK CITY HOUSING AUTHORITY and THE DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Respondents

JUDGMENT

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Matter No. 2015-027279

Due and timely service is hereby admitted.

New York, New York.....,2016.

....., *Esq.*

Attorney for.....