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9/23/11

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Clerk, Supreme Court
County of Sullivan
414 Broadway
Monticello, NY 12701

Re: Notice of Entry in Index No. 1389/11 – White v. County of Sullivan

Dear Ms. Katzman,

Kindly find original and one copy of a Notice of Entry with Affirmation of Service and a check to cover the filing.

Respectfully,


Michael Sussman

Enc/

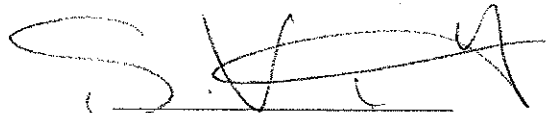
Cc: Couglin and Gerhart, LLP, Counsel for respondent with copy

AFFIRMATION OF SERVICE

STATE OF NEW YORK)
) ss:s
COUNTY OF ORANGE)

Sonnia Van Haaster, an adult of legal age, hereby certifies that on the 23rd of September 2011, she mailed, postage prepaid, a copy of the Notice of Entry and Decision & Order in White v. County of Sullivan to Coughlin & Gerhart, LLP PO Box 2039 Binghamton, NY 13902 ATTN: Lars P. Mead, Esq,

Counsel for the Defendants in the within matter.



Sonnia Van Haaster

Affirmed
Signed and ~~Sworn to~~ before me this 23rd day of Sept. 23, 2011

Mary Jo Whately
NOTARY PUBLIC
Attorney at Law

STATE OF NEW YORK
SUPREME COURT

-----X

In the Matter of EARL WHITE,

Petitioner,

Index No. 1389-11

-against-

NOTICE OF ENTRY

COUNTY OF SULLIVAN,


Respondent.

-----X

PLEASE TAKE NOTICE that the annexed is a true and complete copy of the Decision and Order, dated September 20, 2011, in the enclosed matter.

Dated: Goshen, New York
September 23, 2011

Yours, et al.,


MICHAEL H. SUSSMAN

SUSSMAN & WATKINS
PO BOX 1005
GOSHEN, NEW YORK 10924
(845)-294-3991

Counsel for Petitioner, EARL WHITE

STATE OF NEW YORK
SUPREME COURT

SULLIVAN COUNTY

In the Matter of EARL WHITE,

Petitioner,

-against-

Decision & Order
Index No.: 1389-11

COUNTY OF SULLIVAN,

Respondent.

Supreme Court, Sullivan County
Motion Return Date: June 30, 2011
RJI No.: 52-31770-2011

Present: Christopher E. Cahill, JSC

Appearances:

Sussman & Watkins, Esqs.
Attorneys for Petitioners
55 Main Street, Suite 6
PO Box 1005
Goshen, New York 10924
By: Michael H. Sussman, Esq.

Coughlin & Gerhart, LLP
Attorneys for Respondent
PO Box 2039
Binghamton, New York 13902
By: Lars P. Mead, Esq.

Cahill, J.:

The underlying facts relevant to the present petitions have been fully reviewed in the Decision and Order dated March 16, 2010. Therein, this Court rejected respondent's contention that the petition should be dismissed for the failure to join the Sullivan County

Sheriff as a necessary party. The Court then determined that the basis for the denial of GML § 207-c benefits was arbitrary, capricious and contrary to law. Accordingly, the matter was returned to respondent for a hearing for the purposes of taking testimony to determine whether petitioner could present medical evidence to support his claim for GML § 207-c benefits.

At the conclusion of the hearing held, pursuant to this Court's order, the hearing officer found that petitioner had presented sufficient evidence establishing his entitlement to GML § 207-c benefits commencing on June 16, 2009, yet also found that petitioner was able to resume work in a light-duty capacity as of February 2, 2011. However, he concluded that petitioner had forfeited his entitlement to GML § 207-c benefits, effective July 24, 2009, when he failed to cooperate with respondent's efforts to have the New York State Retirement System declare him permanently disabled. That recommendation was adopted by respondent on February 16, 2011.

After the first hearing was conducted, but prior to the hearing officer rendering his recommendation in the above proceeding, respondent propounded a set of disciplinary charges pursuant to Civil Service Law § 75 alleging, in substance, that petitioner had been insubordinate when he failed to cooperate with the County's directive that he assist in its effort to involuntarily retire him on disability. After a hearing on such charges, respondent adopted the hearing officer's recommendation on January 19, 2011 to terminate petitioner's employment with the County for his refusal to cooperate. Petitioner

appealed both determinations, contending that the actions taken by respondent were arbitrary, capricious and in violation of the law.

Rejecting, once again, respondent's contention that the petition seeking GML § 207-c benefits should be dismissed for the failure to join the Sheriff as a necessary party, this Court notes that with it undisputed that petitioner had presented substantial medical evidence establishing his entitlement to GML § 207-c benefits commencing June 16, 2009, the Court is left, preliminarily to determine the issue of whether petitioner forfeited his entitlement to 207-c benefits by failing to cooperate with respondent's efforts to have him declared permanently disabled.

Having reviewed both the testimonial and documentary evidence submitted in this hearing, which includes the terms of Local Law No. 1 of 1989, Section 210, pertaining to such benefits which is incorporated into the governing Collective Bargaining Agreement, this Court must conclude that with the testimony and documentation clearly evincing that petitioner was not on GML § 207-c status at the time that the requests were made by respondent for him to authorize the release of his medical records, coupled with testimony by the undersheriff that he believed that petitioner was on such status when he propounded these orders to have petitioner sign such authorizations, this Court must conclude that in light of the clear and unambiguous language of the local law and the Collective Bargaining Agreement that such directives can only be given to a person who had already been determined to be eligible for GML § 207-c status, the determination by

the hearing officer that his refusal to cooperate should result in his forfeiture of such benefits must be found to be arbitrary and capricious. This conclusion is buttressed by the position taken by petitioner that there was an ongoing Worker's Compensation proceeding by which his medical bills were being paid and that respondent had already received petitioner's consent to obtain his medical records in connection therewith.

As to the determination that petitioner should report back to work for light-duty, the record reflects that it was based upon the testimony of Dr. Michael Miller, Board Certified in Orthopedic Surgery, whose opinion was directly contrary to that of petitioner's treating physician, Dr. Zoltan Fekete. Although Dr. Miller admitted that petitioner had several herniated discs and needed surgery as of February of 2010, he still made such recommendation knowing that even light-duty status would include contact with inmates. Notably, Dr. Fekete had found him to be 100% disabled before the re-injury on June 16, 2009. With Dr. Miller testifying that total disability can only be demonstrated if someone was "incontinent, unable to walk, have severe spasms, severe limitation of ability to move, and/or [needs to be assisted with all activities]," this Court must conclude that with respondent having knowledge of Dr. Miller's recommendation after his February 2010 examination and the fact that respondent never implemented such recommendation at any point prior to the conclusion of the GML § 207-c hearing by ordering petitioner back to work light-duty, the totality of these circumstances warrant the conclusion that the directive that petitioner report back to work light-duty is arbitrary and

capricious, wholly unsupported by this record.

Finally addressing the determination that petitioner be terminated due to his failure to cooperate with the effort to involuntarily retire him, this Court must conclude that although there is no dispute that petitioner refused to obey a direct order and that such determination has a rational basis, petitioner's long-term employment and positive employment history warrants a conclusion that his termination based upon such refusal 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 Thomas v County of Rockland, Dept. of Hosps., 55 AD3d 745, 746 [2d Dept 2008], quoting Matter of Kreisler v New York City Tr. Auth., 2 NY3d 775 [2004]).

Accordingly, this Court must vacate the final determinations rendered only as to those sections determined herein and declare that the curtailment of benefits effective July 24, 2009 was arbitrary and capricious; that the termination of petitioner's employment was an abuse of discretion; and that the directive that petitioner return to work on light-duty is similarly unsupported, thereby entitling him to continue to receive GML § 207-c benefits and salary until such time that respondent requests that he make an application to file for permanent disability retirement.

This shall constitute the decision and order of the Court. The original decision and order and all motion papers are being returned to the Supreme Court Clerk's Office for filing with the Sullivan County Clerk. The signing of this order shall not constitute entry

under CPLR 2220. Counsel are not relieved from the provisions of that section regarding notice of entry.

Dated: Kingston, New York
September ~~20~~, 2011

ENTER,



CHRISTOPHER E. CAHILL, JSC

Papers considered: Notice of Petition dated May 11, 2011, Verified Petition dated May 13, 2011, Affirmation in Support of Michael H. Sussman, Esq., dated May 11, 2011 with exhibits; Verified Answer dated June 22, 2011 with Affidavit in Opposition of Lars P. Mead, Esq., dated June 22, 2011.