

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

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

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In the Matter of the Application of
MEGHAN O'CONNOR,

Petitioner,

DECISION & ORDER
Index No. 1255/2019

-against-

TOWN OF STANFORD and JOSEPH NORTON,
in his capacity as Town Supervisor,
Respondents.

For Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules,

-----X
GREENWALD, J.S.C.

The following papers were considered on this CPLR article 78 proceeding:

- Notice of Petition
- Verified Petition
- O'Connor Affidavit in Support
Exhibits 1 - 15
- Memorandum of Law in Support

- Notice of Motion to Dismiss
- Lee Affirmation in Support
Exhibits A (Norton Affidavit [Exhibits 1 - 4]) - C

- Wong-Pan Reply Affirmation
- O'Connor Supplemental Affidavit
Exhibits 1 - 6

- Lee Reply Affirmation
Exhibits D - E¹

¹Ex E has not been considered by the court as it is improperly introduced for the first time in reply (*see Barouh v Law Offs. of Jason L. Abelove*, 131 AD3d 988 [2d Dept 2015] [improper to submit expert report for first time in reply]).

Petitioner was employed by respondent Town of Stanford (hereinafter "the Town") since 2007. Initially, the Town Board hired petitioner as a Deputy Town Clerk. Shortly thereafter, in July of 2007, the Town Board appointed her as Highway Secretary, a permanent-part-time position she has held through her most recent re-appointment in January of 2019.

By Resolution dated December 20, 2012, the Town Board abolished the positions of Bookkeeper and Confidential Secretary to the Town Supervisor (Petition at Ex 3). Notwithstanding, petitioner alleges that respondent Joseph Norton, the Town Supervisor (hereinafter "the Town Supervisor"), appointed her to the part-time position of his Confidential Secretary on February 17, 2014 (Petition ¶ 16). The petition also alleges that the position of Town Comptroller was created by the Town Board by Resolution also dated December 20, 2012.

Petitioner claims she was appointed Interim Comptroller by the Town Board on August 13, 2014 and, thereafter, as the permanent, part-time Comptroller on September 11, 2014, through her last re-appointment on January 3, 2019 (*id.* at ¶¶ 21-23).

Petitioner maintains that her part-time positions were the equivalent of a full-time position, which entitled her to medical benefits. She claims that in 2014 both the Town Supervisor and the prior Town Comptroller approved payment of monthly health insurance premiums on her behalf (*id.* at ¶¶ 18-20).

The petition alleges that in April 2019, for the first time, the Town Supervisor accused petitioner of improperly receiving health benefits. She claims that thereafter the Town Supervisor "became openly hostile ... and sought to remove her from her positions" (*id.* at ¶ 31).

On May 10, 2019, petitioner complained to the Town Board that she was being harassed, and, on May 28, 2019, the Town Supervisor allegedly signed off on the Town payroll, with the exception of her salary and health benefits (*id.* at ¶¶ 34 -35).

By letter dated June 19, 2019, the Town Supervisor terminated petitioner's employment in all capacities with the Town for insubordination (*id.* at Ex 14).

At a Town Board meeting held on August 8, 2019, a councilman read into the record an email from the auditor which states (Lee Affm at Ex C):

over the past year, the Town put in place policies and procedures designed to discover errors and irregularities in regard ['] to the Town[']s books and records. A report from the town's

independent auditor for this year said: "... To those "interested parties," you can inform them that the report is taking longer than expected due to the disaster that the financial records were in. There were numerous transactions posted in the wrong accounts, bank reconciliations were incomplete with no adjustments made to the accounts, payroll transfers were not done properly as "lump" transfers were made into the new payroll account with no accounting for how much of the transfers belonged to each fund. Furthermore, payroll disbursements were still being posted to the fund checking accounts even though a payroll account was being used. ... When I issue my final audit report, the accompanying management letter will be citing that the refusal for the Comptroller to turn over requested materials is a major issue. The Supervisor is still the chief fiscal officer of a town even if a Comptroller is utilized. Any materials requested by the Supervisor and/or Town Board should be turned over upon request.

Not doing so is a bit of a red flag. As a result of you bringing this to my attention, I will dig even deeper. In addition, the fact that she converted herself to salaried and gave herself health benefits will also be addressed." In addition the comptroller deleted over 5,000 email from the town's computer.

After this email was read into the record, an audience member asked "if there was a possibility of criminal action." The supervisor responded that this was "premature" and the councilman added "Let's see what the auditor discovers" (*id.*).

Petitioner alleges she timely filed a Notice of Claim and, thereafter, on or about September 23, 2019, commenced this article 78 proceeding on the ground that, inter alia, the Town Supervisor did not have the authority to summarily terminate her from her two positions. She seeks annulment of respondents' determination; expungement of her employment records; an award for lost wages and benefits, including accrued vacation time; a name clearing hearing;

costs and attorneys' fees under federal statute.

Respondents move to dismiss the proceeding on the grounds that it fails to state a cause of action and that petitioner has not joined necessary parties.

It is well settled that on a motion to dismiss for failure to state a cause of action, the pleading is to be liberally construed and the facts as alleged be accepted as true (*see e.g. Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Butler v Catinella*, 58 AD3d 145 [2d Dept 2008]). On a motion to dismiss "the sole criteria is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *accord Green v Leibowitz*, 118 AD2d 756 [2d Dept 1986]).

As a threshold matter, the court rejects respondents' contention that the proceeding must be dismissed for failure to join the Town Board and one of its councilmen. Respondents reliance on *Matter of Wright v Town Bd. of Town of Ticonderoga* (170 AD2d 912 [3d Dept], *lv denied* 78 NY2d 857 [1991]) is misplaced. Non only is this case non-binding on this court, it is inapposite to the facts at bar. In *Matter of Wright*, petitioner sought to compel the respondent town to dismiss its police chief. The Third Department found that because the police chief could be deprived of his job without due process, he was a necessary party to the proceeding. Here, in stark contrast, the Second Department has found that suing a Town has the same legal effect as suing the Town Board (*see Dish Realty, LLC v Town of Huntington*, 122 AD3d 665 [2d Dept 2014] [town board cannot and does not exist separately and independently from the town of which it is the governing body]; *cf.* Town Law § 60[1] ["supervisor and town councilmen shall constitute the town board and shall be vested with all the powers of such a town"]). Moreover, the individual who is alleged to have committed the ultra vires act is a named party, i.e., the Town Supervisor. Accordingly, the proceeding should not be dismissed for failure to join the Town Board as a respondent (*see Dish Realty, supra*).

Respondents argue that the position of Comptroller was never properly created by the Town. Town Law § 20(3)(b) provides in relevant part that a town "of the second class having a population of over forty thousand may adopt a resolution establishing the office of town comptroller... ." However, it is undisputed that the town's population as of the last census was fewer than 4,000 people (Norton Afft. ¶12). In this situation, the position of Town Comptroller

may be established by local law, subject to mandatory referendum (*see* 1985 Ops St Comp No. 85-46).² Accordingly, the Town Board had no authority to establish the position of Comptroller by Resolution. And, therefore, contrary to petitioner's contention, Public Officers Law § 36, which governs the removal of Town Officials, does not apply here. Moreover, estoppel is not available against a municipality "even when there are harsh results" (*Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988]).

²Annexed to respondents' reply at Ex D.

Respondents do not address the elimination of the positions of Bookkeeper and Confidential Secretary to the Town Supervisor by the Town Board. Nevertheless, petitioner was clearly an employee of the Town who in addition to serving as Highway Secretary, was tasked with the same duties as a duly appointed Comptroller would perform. As such, respondents contend that petitioner's dual employment was at-will, and therefore, her positions "may be freely terminated by either party at any time for any reason or even for no reason" (*Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 300 [1983]).³ Here, however, as petitioner argues, the statute specifically states that, except as otherwise specified, all town "employees shall hold their respective ... positions at the pleasure of the town board, except as otherwise provided by law" (Town Law § 24). While the Town Employment Manual does provide for summary termination for "gross insubordination or willful refusal to comply with the lawful order or instruction of a ... supervisor" (Hunt Affm. at Ex B 2.7.2), respondents do not cite any local law or regulation authorizing the Town Supervisor to terminate petitioner from her two Town positions. Indeed, Town Law § 29, which defines the powers and duties of a Town Supervisor, does not authorize the Town Supervisor to terminate employees.

The record before the court at this pre-answer, pre-discovery stage is insufficient to determine conclusively whether petitioner was a full-time employee. This is relevant to the issue of petitioner's entitlement to accrued vacation time and health insurance benefits. If she were full-time and not terminated for cause, she would be entitled to unused vacation leave and health benefits (*id.* at 6.2.7). The Employment Manual defines a "full-time" employee as "an employee who is regularly scheduled to work a minimum of forty hours per week throughout the year" (*id.* at 1.4.1). Respondents rely on an e-mail from a county Human Resources Associate who states that "one employee cannot be in more than one title" to support their contention that petitioner could not serve in two part-time positions (Reply Affm. at Ex 1). Neither side establishes to the court's satisfaction that petitioner does not have a cognizable cause of action to recover certain benefits if she were in fact a full-time Town employee. Notably, petitioner

³Respondents maintain that although petitioner could be fired for no reason, the Supervisor had ample justification for terminating her. The Supervisor alleges petitioner was insubordinate, abandoned her position for two months, improperly removed files, and failed to appear for two scheduled meetings regarding her continued employment (Norton Afft. ¶¶ 9-15).

claims that the Town Supervisor and the then-Comptroller approved her receiving health benefits since 2014, a benefit only provided to full-time employees. And, apparently, questions regarding petitioner's employment status did not arise until January 2019, five years later (Norton Afft. ¶ 10).

Petitioner also seeks a name clearing hearing and attorneys' fees on this cause of action. Petitioner and the Town Supervisor sharply dispute the basis for her termination. In the event it is determined that petitioner were properly dismissed from her positions with the Town, she would nevertheless be entitled to a name clearing hearing as all necessary criteria are sufficiently alleged. A name clearing hearing "is a remedy for the deprivation of a person's due process right when an employee is terminated along with a contemporaneous public announcement of stigmatizing factors, including illegality, dishonesty, immorality, or a serious denigration of the employee's competence" (*Aquilone v City of New York*, 262 AD2d 13, 13 [1st Dept 1999]). In order to be entitled to such a hearing, a petitioner must establish "stigma plus" concomitant with loss of employment and public dissemination of false statements (*Matter of Swinton v Safir*, 93 NY2d 758, 764 [1999]). It is unclear from this record whether the Supervisor's termination letter accusing petitioner of abandoning her job and insubordination was publicly disseminated, but the statements made against petitioner at the August 8, 2019 public Town Board meeting attack her moral character, accuse her of wrong doing and possible criminality.⁴ These statements "are stigmatizing in the constitutional sense because of their inevitable effect of foreclosing employment opportunities" (*id.* at 763).

Based on the foregoing, it is hereby

ORDERED that the respondents' motion to dismiss is denied and respondents are to serve and file an answer in accordance with the CPLR; and it is further

⁴Respondents object to petitioner's "unofficial transcript" of the August 8, 2019 Town Board Meeting, not because they claim it is inaccurate, but because it is not properly certified. However, the majority of petitioner's unofficial transcript is contained in respondents' certified submission. Even discounting the additional statements in petitioner's submission that are not contained in respondents' submission does not change the court's finding that petitioner has established that she is entitled to a name clearing hearing in the event the court finds that she were properly terminated from her town positions.

ORDERED that counsel for all parties appear for a preliminary conference on July 8, 2020 at 9:30 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
April 28, 2020

ENTER:



HON. HAL B. GREENWALD, J.S.C.

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