2017 IL App (1st) 160843-U

No. 1-16-0843

FIFTH DIVISION
June 23, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT MICHAELS, Plaintiff-Appellant, v. CITY OF CHICAGO, and SOO CHOI, in Her Official Capacity as Commissioner of the Department of Human Resources for the City of Chicago, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 02391 Honorable Rita M. Novak, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

O R D E R

¶1 *Held*: Because it was not clearly apparent that no set of facts could be proved that would have entitled plaintiff to *mandamus* relief, the circuit court erred by dismissing with prejudice plaintiff's amended complaint seeking a writ of *mandamus* to order a commissioner of the city's human resources department to award plaintiff a veteran's preference in accordance with the

city's personnel rules concerning the referral of candidates for further processing toward admission into an academy class for firefighter training.

¶2 Plaintiff Robert Michaels brought a *mandamus* action against defendants, the City of Chicago (City) and Soo Choi, in her official capacity as Commissioner of the Department of Human Resources for the City, seeking, *inter alia*, an order requiring Commissioner Choi to award plaintiff a one-time veteran's preference and refer him to the City's fire department as an academy candidate for further processing and training as a firefighter.

¶3 The circuit court granted defendants' motion to dismiss the amended complaint with prejudice, finding that plaintiff could not plead sufficient facts to show (1) he had a clear affirmative right to be awarded a one-time veteran's preference in the referral process, and (2) Commissioner Choi had a clear affirmative duty to ensure that the referral process complied with the City's personnel rules concerning the veteran's preference.

¶4 On appeal, plaintiff argues the trial court failed to properly apply the law and misunderstood plaintiff's positions and arguments when the trial court determined his amended complaint failed to sufficiently plead a cause of action for *mandamus* relief.

¶5 For the reasons that follow, we reverse the judgment of the circuit court.

¶6 I. BACKGROUND

¶7 In accordance with the City's personnel rules, the duties of Commissioner Choi include the referral of qualified candidates to various city departments for open positions. To carry out this duty, referral lists were created from general employment lists, commonly known as eligibility lists. The eligibility lists contained the names of applicants who had passed examinations to qualify for appointment to the class of positions covered by the lists. The instant dispute involves a referral list of firefighter/emergency medical technician (EMT) candidates for

further processing and admission into the Chicago Fire Department Academy. Specifically, the parties disagree on whether Commissioner Choi was required to update or revise the referral list that was created in September 2009 to ensure that it complied with amendments to the City's personnel rules, which became effective in December 2009 and November 2010 and required referrals of candidates to consist of a specified percentage of veterans.

¶8 The allegations of fact in the parties' pleadings and filings indicate that the City's fire department asked the City's human resources department to create a referral list in September 2009 of candidates for further processing and academy training from the eligibility list of 17,063 applicants who had passed the 2006 firefighter/EMT examination. Those 17,063 applicants had been randomly assigned a lottery number between 1 and 17,063, which had been used to place them on the eligibility list in numerical order. Furthermore, veterans who were not able to take the 2006 exam because they were in the military at the time were allowed to take military make-up exams. A veteran who passed a military make-up exam was added to the eligibility list by being assigned a random lottery number between 1 and 17,063 (or the last, *i.e.*, highest number on the eligibility list) with a ".5" added to the number. Thus, a make-up exam veteran assigned the lottery number 5 would appear on the eligibility list as number 5.5, in numerical order between the applicants who had been assigned lottery numbers 5 and 6. Applicants generally were placed on the referral list based on their numerical order in the eligibility list unless an applicant was entitled under the personnel rules to a preference in processing.

¶9 After the referral list at issue here was created in September 2009, the City's personnel rules were amended effective December 10, 2009, to give a preference to veterans by ensuring that a minimum of 10% of those referred would be veterans, provided a sufficient number of veterans had applied. The rules were amended again, effective November 18, 2010, to increase

that minimum percentage of veterans to 20%. As an illustration, pursuant to the November 2010 amendment, if 100 candidates were referred for further processing and admission to the academy for firefighter/EMT training, a minimum of 20% of those candidates had to be veterans. Accordingly, if the human resources department's initial list of candidates based on numerical order resulted in a referral list that included only 15 veterans, then the human resources department was required to remove from the referral list the 5 non-veterans with the highest eligibility list lottery numbers and add to the referral list the 5 veterans with the lowest eligibility list lottery numbers. This would ensure that the referral list included 20% of candidates who were veterans.

¶10 In February 2015, plaintiff filed a complaint against defendants, seeking a writ of *mandamus* requiring Commissioner Choi to comply with her mandatory duty to ensure that a minimum of 20% of eligible veterans were referred for further processing and to the academy for firefighter/EMT training. Plaintiff alleged he served on active duty in the United States Marine Corps from 2004 to 2006, received an honorable discharge in 2006, and served on active reserve duty until 2011. In October 2013, he took and passed the military make-up exam for the 2006 firefighter/EMT examination. In November 2013, he received a letter informing him that his randomly assigned lottery number on the eligibility list was 4,480.5 out of 16,375 candidates. Plaintiff alleged that in November 2014 certain candidates who were directed to report to the academy for firefighter training had higher eligibility list numbers than plaintiff's number of 4,480.5. Plaintiff alleged that he was part of the group of the 20% minimum of veterans defendants had failed to refer to the fire department.

¶11 In May 2015, defendants moved to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). First, defendants argued

the complaint should be dismissed under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)), wherein the movant admits the legal sufficiency of the complaint but asserts the existence of an external defect or defense that defeats the cause of action. Defendants argued dismissal under 2-619(a)(9) was proper because the veteran preference is granted at the time that a referral list is created and plaintiff, who did not take the military make-up exam until 2013, did not have a vested right to be placed either on the referral list created in 2009 or in the 2014 academy class that was created primarily by using the 2009 referral list. Defendants alleged the fire department was still using the 2009 referral list, which had 86 remaining candidates, to fill available firefighter and EMT positions and argued no authority supported the notion that Commissioner Choi had the authority to retroactively place plaintiff on the 2009 referral list once the fire department began using that list.

¶12 Second, defendants argued the complaint should be dismissed under section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)), because plaintiff's "conclusory allegations" failed to show that he had a clear affirmative right to relief and defendants had a clear duty to act and authority to comply with a writ of *mandamus* for the requested relief. Defendants argued the method and manner Commissioner Choi used to execute her duty to grant the 20% veteran preference was discretionary; the personnel rules did not limit her discretion to determine when the referral list was created, the size of that list, or how long that list was used.

¶13 Defendants attached to the motion the May 2015 affidavit of Christopher Owen, the first deputy commissioner of the City's human resources department. His affidavit explained the procedures and relevant facts concerning the 2006 exam, the random assignment of lottery numbers for placement on the eligibility list, and the process to create referral lists under the

City's personnel rules effective as of November 18, 2010. See *supra* ¶¶ 8-9. In item 11 of his affidavit, Owen stated:

> "Regardless of the application of other preferences, each Referral List currently contains at least 20 percent of veterans. The City of Chicago Personnel Rules required that a 'minimum of ten (10) percent of those referred will be veterans provided there is a sufficient number of veterans who applied,' prior to November 18, 2010."

Furthermore, Owen averred that the commissioner did not have the authority to retroactively place an applicant on a referral list once the referral list was submitted to the fire department and the fire department had begun processing applicants from that list.

¶14 Defendants' motion to dismiss also included the May 2015 affidavit of Adrianne Bryant, the deputy commissioner and director of human resources of the City's fire department. She averred that in September 2009 the fire department requested and received from the City's human resources department a referral list containing 1,500 applicant names. Due to the fire department's lack of need and budget constraints, the fire department did not have as many academy classes and available positions as it initially had anticipated in 2009, so Bryant was still using the 2009 referral list to process firefighter candidates for placement in academy classes. Bryant averred that 86 individuals who had completed all other pre-employment process steps still remained on the 2009 referral list, awaiting an available spot in a future academy class. Bryant averred that the November 2014 academy class consisted primarily of applicants from the 2009 referral list; the other candidates who were not from the 2009 referral list obtained their positions in the academy through court settlement orders and had taken an earlier 1995 firefighter/EMT exam. Bryant averred that candidates in the November 2014 academy class with

a higher eligibility list number than plaintiff's number of 4,480.5 "were either veterans referred in the 2009 Referral List, or individuals who were given Line of Duty Preference." Bryant explained that line of duty preferences were given to applicants who were the immediate family members of sworn police, fire department or armed forces personnel who had died in the line of duty. Applicants who received line of duty preferences were given consideration for vacant positions before other qualified applicants.

¶15 In September 2015, the trial court denied defendants' 2-619(a)(9) motion to dismiss because the arguments presented by defendants required the resolution of facts which would be appropriate only in the context of a motion for summary judgment or a trial. However, the trial court granted defendants' 2-615 motion to dismiss and gave plaintiff leave to file an amended complaint. The court stated the complaint failed to plead a claim for *mandamus* relief because it did not sufficiently indicate either the mandatory action Commissioner Choi failed to perform or the basis for her alleged duty to act.

¶16 On September 25, 2015, plaintiff filed an amended complaint, alleging that the City and Commissioner Choi were obligated to follow the City's personnel rules. Those rules provided that veterans would be awarded a preference in the referral process and the preference could be awarded only once. An amendment to the City's Personnel Rule VI, section 3(a), effective December 10, 2009, required Commissioner Choi to award a preference in processing to veteran applicants who passed an examination by ensuring that a minimum of 10% of those referred were veterans, provided there were a sufficient number of veterans who had applied. Another amendment to Rule VI, section 3(a), effective November 18, 2010, increased the veteran's preference in processing to a minimum of 20% of those referred. Plaintiff alleged that he was a veteran eligible for referral as of November 2013 but defendant Commissioner Choi failed to

perform her clear, nondiscretionary legal duty to give effect to the 2010 amendment and ensure that a minimum of 20% of eligible veterans were referred to the November 2014 academy class. Plaintiff alleged that the 2014 academy class primarily consisted of candidates from the 2009 referral list, which was created before the 2010 amendment established the 20% veteran's preference. Plaintiff alleged he did not receive any response to his January 2015 letter to Commissioner Choi demanding that she comply with the 20% veteran's preference in the personnel rules. Plaintiff alleged he had a clear right to the award of the veteran's preference in the referral process, Commissioner Choi had a clear, nondiscretionary legal duty to give effect to the 2010 amendment, and her duty to give plaintiff his due preference was not ministerial or discretionary.

¶17 Plaintiff's amended complaint asked the court to issue a writ of *mandamus* compelling Commissioner Choi to carry out her duties by placing plaintiff in his proper position either on the 2009 referral list and directing that he be called before any other higher lottery number from the 2009 referral list, or, in the alternative, as the first candidate to be called in any new process. Plaintiff also requested leave to propound discovery to obtain additional information in the exclusive control of defendants. Plaintiff attached the May 2015 affidavits of City officials Owen and Bryant as exhibits to and part of his amended complaint. Plaintiff also attached the September 2015 affidavit of John Joyce, Jr., who stated that he took the 2006 exam, was assigned the lottery number of 5,005, and was invited to participate in the November 2014 academy class.

¶18 In October 2015, defendants moved to dismiss the amended complaint under section 2-615 of the Code for failure to state specific facts demonstrating plaintiff was entitled to *mandamus* relief. Defendants argued plaintiff failed to cite any statute or regulation that dictated

the method and manner by which Commissioner Choi was required to either retroactively place plaintiff on the 2009 referral list or in the 2014 academy class after he took the military make-up exam in 2013. Defendants argued the City's Personnel Rule VI, section 3(a) does not provide any such directive, plaintiff's amended complaint consisted of conclusory allegations, and the Bryant and Owen affidavits demonstrated that plaintiff could not plead any set of facts entitling him to the extraordinary relief of *mandamus*.

¶19 In November 2015, the trial court denied plaintiff's emergency motion for a temporary restraining order and preliminary injunction, which had sought to prevent the fire department from training a new academy class of firefighters and EMTs in November 2015. In January 2016, plaintiff filed a motion to compel defendants to produce documents.

¶20 On February 3, 2015, the trial court granted defendants' 2-615 motion to dismiss the amended complaint with prejudice. The trial court found that plaintiff's allegations failed to show a clear affirmative right to placement on any referral list where he admitted that the City was still using the 2009 referral list to fill positions in the academy, he did not take the make-up exam until 2013, and he cited no authority to show defendants were required to create a new referral list after the 2013 make-up exam. The trial court also found that plaintiff's allegations failed to show Commissioner Choi had a clear nondiscretionary duty to refer him to the academy. The trial court stated plaintiff's allegation that defendants had failed to comply with the 20% veteran preference was contradicted by the affidavits of City officials Owen and Bryant, whom the court believed had averred "that the referral list was comprised of at least 20 percent veterans, which would be in compliance with the [City's personnel] rules." The trial court noted that plaintiff had attached affidavits of Owen and Bryant as exhibits to the amended complaint. Accordingly, the trial court concluded that the factual assertions in the affidavits controlled over

plaintiff's alleged contradictory assertion in his amended complaint about defendants' failure to comply with the 20% veteran preference. The court held that the dismissal was with prejudice because the amended complaint, as a matter of law, could not go forward as a cause of action for *mandamus* relief. The trial court also held that plaintiff's motion to compel discovery was moot.

¶21 Thereafter, the trial court denied plaintiff's motion to reconsider the dismissal with prejudice, and plaintiff timely appealed.

¶22 II. ANALYSIS

¶23 On appeal, plaintiff argues the trial court failed to properly apply the law and misunderstood plaintiff's positions and arguments when the trial court determined his amended complaint failed to sufficiently plead a cause of action for *mandamus* relief. Plaintiff contends the facts alleged in his amended complaint were sufficient to show that (1) he had a clear affirmative right to demand that Commissioner Choi award him the veteran's preference in the referral process, and (2) Commissioner Choi had a clear affirmative duty to ensure that the referral process complied with the City's personnel rules concerning the veteran's preference.

¶24 In a section 2–615 motion, the movant denies the legal sufficiency of the complaint. *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 278 (2004); 735 ILCS 5/2–615 (West 2014). In granting defendants' 2-615 motion to dismiss, the trial court found plaintiff failed to allege facts in his amended complaint that showed he had a clear affirmative right to the requested referral and defendants had a clear nondiscretionary duty to give him that referral under the City's personnel rules.

¶25 A section 2–615 motion to dismiss presents the question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, are sufficient to entitle the plaintiff to relief as a matter of law. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348

(2003). When reviewing a section 2–615 motion, the trial court must presume that the motion admits all well-pleaded facts and all reasonable inferences that reasonably flow therefrom. *Napleton v. Village of Hinsdale,* 229 Ill. 2d 296, 320 (2008). When ruling on a section 2–615 motion, the trial court may consider only the allegations in the pleadings. *Hadley v. Ryan,* 345 Ill. App. 3d 297, 300–01 (2003). Further, the trial court should dismiss a cause of action only when it is clearly apparent that no set of facts can be proved that will entitle a plaintiff to recovery. *Id*. Because a section 2–615 motion raises issues of law, we review orders granting section 2–615 dismissals *de novo*. *Heastie v. Roberts,* 226 Ill. 2d 515, 530–31 (2007).

¶26 "*Mandamus* is an extraordinary remedy appropriate to enforce as a matter of public right the performance of official duties by a public officer where no exercise of discretion on his part is involved." *Madden v. Cronson*, 114 Ill. 2d 504, 514 (1986). "A writ of *mandamus* will not be granted unless the plaintiff can show a clear, affirmative right to relief, a clear duty of the defendant to act, and clear authority in the defendant to comply with the writ." *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 229 (1999). "The writ will not lie when its effect is to substitute the court's judgment or discretion for that of the body which is commanded to act." (Internal quotation marks omitted.) *Id*. The court must evaluate whether the elements of the writ are satisfied for each statutory duty the plaintiff seeks to enforce through *mandamus*. *Id*. at 230. Here, plaintiff seeks to force Commissioner Choi to comply with the City's personnel rule, effective since November 2010, that required a one-time award to veterans on the eligibility list of the preference that a minimum of 20% of the referred candidates had to be veterans.

¶27 We find that plaintiff's amended complaint pled factually sufficient allegations necessary for a *mandamus* action. First, plaintiff contends the trial court erred by finding he failed to allege that he had a clear affirmative right to placement on a referral list. Specifically, plaintiff claims

that he included sufficient facts to show that he was entitled under the City's personnel rules to a one-time veteran preference award, which would have resulted in a referral for further processing and inclusion in an academy class by November 2014. We agree. Second, plaintiff contends the trial court erred by finding he failed to allege that defendants had a clear nondiscretionary duty to award him the veteran's preference, which would have resulted in his referral for further processing and inclusion in an academy class by November 2014. Again, we agree.

¶28 Rule VI of the City's personnel rules, effective November 2010, addresses the use of examinations in the hiring process. This rule provides that exams are prepared and conducted under the direction of the commissioner of the human resources department, may be held at one time or on an open and continuous basis, and may result in single or multiple eligible lists. Section 3(a) of Rule VI, which addresses the veteran's preference, provides in pertinent part:

> "Qualified applicants who have served on active duty in the Armed Forces of the United States *** or any reserve component of the armed forces of the United States for a cumulative period of 180 days, and who have received an honorable or general discharge, may be awarded veteran's preference when application is submitted with proof of veteran status, unless superseded by a collective bargaining agreement. Veteran's preference can be awarded only once during employment with the City of Chicago. To qualify for the preference, the applicant must be otherwise qualified for the job and must be eligible for the position.
>
> The preference granted under this section shall be in the form of five (5) percent added to the final score of those applicants with a passing score for ranked examinations. *For all other selection methods, applicants who meet all*

> *qualifications will be given preference in processing. A minimum of twenty (20) percent of those referred will be veterans provided there are a sufficient number of qualified veterans who applied*." (Emphasis added.) City of Chicago Personnel Rules, Rule VI, §3(a) (Revised Nov. 18, 2010).

Section 3(b) of Rule VI addresses the line of duty preference for the immediate family members of police, fire department or United States military personnel who died in the line of duty. The line of duty reference is "in the form of preference in processing. Applicants who qualify [for a line of duty preference] will receive consideration before other qualified applicants for approved, vacant positions unless superseded by a collective bargaining agreement." City of Chicago Personnel Rules, Rule VI, §3(b) (Revised Nov. 18, 2010).

¶29 In the amended complaint, plaintiff alleged that: he was a veteran; the City's personnel rules required since November 2010 that defendants had to ensure that candidate referrals consisted of a minimum of 20% of veterans; in October 2013, plaintiff passed the 2006 firefighter/EMT make-up exam; in November 2013, he received lottery number 4,480.5 when he was placed on the eligibility list; and he apparently was passed over during the referral process because an individual with a higher lottery number than plaintiff's number obtained a referral to the November 2014 academy class whereas plaintiff did not. These allegations show plaintiff was qualified to receive the veteran's preference in processing for his non-ranked examination selection method; *i.e.*, plaintiff had an affirmative right to be given a one-time preference in processing, which, under the circumstances alleged, would have caused him to be included among the 20% veteran minimum of those referred for further processing and admission to the academy by November 2014.

¶30 Plaintiff also alleged defendants continued to use the referral list created in 2009 despite the November 2010 amendment to the personnel rules that required referrals to consist of a minimum of 20% veterans. Plaintiff alleged that the continued use of the 2009 referral list after November 2010 was a violation of defendants' nondiscretionary duty after November 2010 to ensure that the eligible candidates referred for further processing and admission to the academy consisted of a minimum of 20% veterans. These allegations show defendants had a clear duty to act. Furthermore, the affidavit of City official Bryant submitted by defendants and incorporated into plaintiff's amended complaint shows defendants have clear authority to comply with the writ because they admitted that they have revised or modified the 2009 referral list over the years to comply with their duty under Rule VI, section 3(b) to award line of duty preferences.

¶31 Finally, the record refutes the trial court's determination that plaintiff's inclusion of City official Owen's affidavit as an exhibit to the amended complaint conceded the fact that defendants' 2009 referral list complied with the 2010 amendment, which increased the veteran's preference from 10% to 20%. The trial court erroneously believed that Owen swore in his affidavit that the 2009 referral list contained a minimum of 20% veterans. However, to the contrary, Owen's affidavit misleadingly averred merely that referral lists "currently," *i.e.*, created as of the date of Owen's May 2015 affidavit, contained a minimum of 20% veterans.

¶32 We conclude that plaintiff's amended complaint pleaded sufficient facts to show his clear affirmative right to the 20% veteran's preference in the referral process and defendants' clear duty to award him that preference and clear authority to comply with the writ. Accordingly, plaintiff's amended complaint is sufficient to establish that *mandamus* relief may be awarded and, therefore, survives a section 2–615 motion to dismiss.

¶33 III. CONCLUSION

¶34 For the foregoing reasons, we reverse the judgment of the trial court.

¶35 Reversed and remanded.