



Office of Executive Inspector General
for the Agencies of the Illinois Governor
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Memorandum

To: All Interested Persons
From: Ricardo Meza, Executive Inspector General
Subject: *Lasker v. Executive Ethics Commission, et al.*, 12 CH 14264
Date: April 23, 2013

On March 29, 2013, the Cook County Circuit Court dismissed a lawsuit April Lasker filed against the Executive Ethics Commission (Commission) and other state agencies. Ms. Lasker, a former employee of the Illinois Housing Development Authority (Illinois Housing Authority), challenged the Commission's March 15, 2012 decision that she would violate the revolving door prohibition if she accepted an offer of employment by the DuPage Housing Authority. Following is a brief history and explanation of the case.

I. Office of Executive Inspector General Issues a Non-Restricted Determination

On February 24, 2012, the Office of Executive Inspector General (OEIG) issued a determination under the revolving door prohibition of the Ethics Act (5 ILCS 430/5-45) that Ms. Lasker was not restricted from accepting employment by the DuPage Housing Authority. The OEIG was required to make that determination within 10 days after Ms. Lasker notified the OEIG of the offer of employment. (5 ILCS 430/5-45(f).) The OEIG concluded, based on its 10-day investigation, that Ms. Lasker's participation in the Illinois Housing Authority's decision to issue a grant to the DuPage Housing Authority was not "substantial" within the meaning of the revolving door prohibition.

II. Office of the Attorney General Appeals the OEIG's Determination

On March 5, 2012, the Office of the Attorney General (OAG) appealed the OEIG's determination to the Commission. The OAG argued, based on the factual record developed by the OEIG, that Ms. Lasker's participation in the grant award to the DuPage Housing Authority was "substantial," and therefore that she should be barred from accepting employment with the DuPage Housing Authority.

III. The Commission Vacates the OEIG's Determination

On March 15, 2012, the Commission issued a decision granting the OAG's appeal and vacating the OEIG's February 24, 2012 determination. The Commission ruled that Ms. Lasker's "proposed employment with the DuPage Housing Authority would violate the [Ethics] Act's revolving door prohibition." *In re: April Lasker*, 12-EEC-006. The Commission concluded, based on the factual record developed by the OEIG's investigation, that Ms. Lasker had "participated personally and substantially in the award of a State contract ... to her prospective employer[.]" *Id.*

IV. April Lasker Challenges the Commission's Ruling in Circuit Court

On May 25, 2012, Ms. Lasker filed a complaint in the Cook County Circuit Court. Among other things, the complaint sought a declaration that: (1) the administrative regulations governing proceedings before the Commission are unconstitutional because they fail to provide due process; and (2) the revolving door prohibition of the Ethics Act is void for vagueness because it does not define "participated personally and substantially in the award of State contracts"

V. The Cook County Circuit Court Ruling

On October 23, 2012, the Circuit Court dismissed Ms. Lasker's complaint with leave to amend, and on November 14, 2012, Ms. Lasker filed an amended complaint. Among other things, the amended complaint sought a declaration that: (1) the administrative regulations governing proceedings before the Commission and the revolving door prohibition of the Ethics Act violate procedural due process standards; and (2) the administrative regulations governing proceedings before the Commission, as well as the Commission itself, violated substantive due process standards by permitting or issuing an advisory opinion.

On March 29, 2013, the Circuit Court issued a decision dismissing Ms. Lasker's amended complaint. With regard to Ms. Lasker's procedural due process claim, the court held that Ms. Lasker did not have a protectable property interest in her employment by the DuPage Housing Authority sufficient to confer standing upon her to bring a procedural due process claim. With regard to Ms. Lasker's substantive due process claim, the court held that the revolving door prohibition and related regulations did not authorize the Commission or any other entity to issue advisory opinions. Rather, according to the Court, the Commission's decisions "guide[] a former public employee in [his or] her decision whether or not to accept a position." Decision, 12 CH 14264.

In holding that Ms. Lasker did not have a protectable property interest in her employment with the DuPage Housing Authority, the court found that Ms. Lasker had not alleged any facts that would render her prospective employment anything other than at the will of the employer.

VI. OEIG's Comments/Observations Regarding the *Lasker* Ruling

Because the Circuit Court found that Ms. Lasker did not have a protectable property interest in her prospective employment sufficient to give her standing to raise her due process claims, it did not reach the issue of whether, where a plaintiff has established a protectable property interest in prospective employment, the administrative rules governing proceedings before the Commission violate procedural due process standards. The court also left open the question of whether the revolving door prohibition is void for vagueness.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

April Lasker

v.

No. 12 CH 14264

Executive Ethics Commission, et al.

ORDER

This matter coming before the Court for ruling on Defendants' Section 2-619.1 Motion to Dismiss the First Amended Complaint; the Court being fully advised in the premises; IT IS HEREBY ORDERED:

The Court issued the attached written ruling granting Defendants' Motion to Dismiss for the reasons stated therein. This is a final and appealable order.

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Atty. for: Defendants

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ENTERED:

Dated: MAR 29 2013 0162

ENTERED

MAR 29 2013

Judge CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY

Judge's No. _____

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

APRIL LASKER,)

Plaintiff,)

v.)

EXECUTIVE ETHICS COMMISSION,)
MARYNIC U. FOSTER, CHAIR)
EXECUTIVE ETHICS COMMISSION,)
GAYL S. PYATT, VICE-CHAIR-)
EXECUTIVE ETHICS COMMISSION,)
JAMES FAUGHT, COMMISSIONER-)
EXECUTIVE ETHICS COMMISSION,)
SHAWN W. DENNEY, COMMISSIONER-))
EXECUTIVE ETHICS COMMISSION,)
MARIA KUZAS- COMMISSIONER-)
EXECUTIVE ETHICS COMMISSION,)
GIL SOFFER, COMMISSIONNER-)
EXECUTIVE ETHICS COMMISSION,)
LISA MADIGAN, ATTORNEY)
GENERAL OF THE STATE OF ILLINOIS,))
CHAD D. FORNOFF, EXECUTIVE)
DIRECTOR OF THE EXECUTIVE)
ETHICS COMMISSION,)
PATRICK QUINN,)
GOVERNOR OF THE STATE OF)
ILLINOIS, DUPAGE COUNTY)
HOUSING AUTHORITY, A)
STATUTORILY CREATED)
GOVERNMENTAL UNIT PURSUANT)
TO THE LAWS OF THE STATE OF)
ILLINOIS.)

Defendants.)

No. 12 CH 14264

Hon. Sophia H. Hall

DECISION

This matter came on to be heard on the motion of all defendants, except the Dupage County Housing Authority, to dismiss plaintiff April Lasker's First Amended Complaint pursuant to § 2-619 and § 2-615 of the Illinois Code of Civil Procedure. The First Amended Complaint, filed on November 14, 2012, contains 3 Counts.

Plaintiff alleges she was employed as the Manager of the Rental Housing Support Program in the Illinois Housing Development Authority ("IHDA") from January 2007 until August 5, 2011. On February 10, 2012, she received a job offer from the DuPage Housing Authority ("DHA") to become its Director of Finance. On February 15, 2012, plaintiff notified the Office of the Executive Inspector General ("OEIG") of the offer, pursuant to the State Officials and Employees Ethics Act, 5 ILCS 430/5-45(f) ("Revolving Door Statute").

On February 24, 2012, the OEIG issued a determination that plaintiff was "not restricted" by the Revolving Door Statute from accepting the DHA job. On February 27, 2012, plaintiff began working at the DHA. On March 5, 2012, the Office of the Attorney General ("OAG") filed an appeal of the OEIG's decision to the Executive Ethics Commission ("EEC"), as it was entitled to do under Section 45(g) of the Revolving Door Statute.

On March 19, 2012, plaintiff learned the EEC issued a decision finding that her employment with the DHA would violate the statute. Plaintiff was then terminated by the DHA on March 20, 2012.

The Revolving Door Statute provides:

No former officer, member, or State employee . . . shall, within a period of one year immediately after termination of State employment, knowingly accept employment or receive compensation or fees for services from a person or entity if the officer, member, or State employee, during the year immediately preceding termination of State employment, participated personally and substantially in the award of State contracts, or the issuance of State contract change orders, with a cumulative value of \$25,000 or more to the person or entity, or its parent or subsidiary.

5 ILCS 430/5-45(a).

Section 5-45(g) provides:

On appeal, [the EEC] shall seek, accept, and consider written public comments regarding a determination. In deciding whether to uphold an Inspector General's determination, the appropriate Ethics Commission or Auditor General shall assess, in addition to any other relevant information, the effect of the prospective employment or relationship upon the decisions referred to in subsections (a) and (b), based on the totality of the participation by the former officer, member, or State employee in those decisions. The Ethics Commission shall decide whether to uphold an Inspector General's determination within 10 calendar days or the person is deemed eligible for the employment opportunity.

In addition, the following administrative regulation governs the procedures for the EEC's resolution of Revolving Door appeals, and states, in relevant part:

1) The appeal filed with the Commission shall contain a copy of the Executive

Inspector General's written determination and a verified statement that explains the basis for arguing that the determination was in error. Copies of the appeal shall be sent to the relevant Executive Inspector General and shall also be sent to the subject of the determination, if filed by the Attorney General, or the Attorney General, if filed by the subject of the determination.

2) Any objection to the appeal by the subject of the determination or by the Attorney General shall be filed with the Commission within 5 calendar days after the filing, unless the Commission grants an extension of time.

3) The Commission shall seek, accept and consider written public comments regarding a determination. A copy of the appeal will be posted on the Commission's web site and be posted at the Commission's offices, with instructions on how written public comments may be forwarded to the Commission for consideration. The Commission shall assess, in addition to any other relevant information, the effect of the prospective employment or relationship upon the decisions referred to in Section 5-45(a) or (b) of the Act, based upon the totality of the participation by the former officer or employee in those decisions.

2 Ill. Adm. Code 1620.610(f) (emphasis added) (hereinafter, "EEC Regulation").

In sum, an objection to an appeal can be filed within 5 calendar days, or longer if the EEC grants an extension of time. Further, the appeals procedure does not include a hearing.

Plaintiff filed the instant case challenging the constitutionality of the Revolving Door Statute and the EEC Regulation.

Count I, for declaratory judgment, alleges that the Revolving Door Statute and EEC Regulation violated plaintiff's due process rights because: (1) the 5-day time limit to object to the appeal was not fair notice, (2) there was no meaningful hearing, and (3) plaintiff could not cross-examine hearsay statements. Plaintiff also alleges the Revolving Door Statute is "void for vagueness" because it does not define "participated personally and substantially in the award of state contracts," and contains no standards for interpretation. Plaintiff seeks a declaration that: (1) the EEC Regulation fails to comport with due process standards and has denied plaintiff both procedural and substantive due process; (2) the EEC exceeded its statutory authority by not making rules for a "contested" hearing under the Administrative Procedures Act; (3) the Revolving Door Statute is void for vagueness; (4) the EEC decision in Lasker's case is void ab initio and is to be removed from its website; and (5) attorney's fees.

Count II alleges a procedural due process claim under 42 U.S.C. § 1983 and Article I, Section 2 of the Illinois Constitution.

Count III alleges a substantive due process claim, pled in the alternative to Count II, and additionally alleges that the Revolving Door statute authorizes the OEIG and EEC to issue "advisory opinions" in excess of their constitutional authority.

Defendants first argue that plaintiff's complaint should be dismissed under § 2-619(a)(9) because it is moot, and also because plaintiff waived her due process arguments by not raising them before the OEIG and EEC. Alternatively, defendants argue that plaintiff's complaint should be dismissed under § 2-615 because she has failed to allege a protectable property or liberty interest in her job with the DHA, and because her pleadings are insufficient to establish procedural or substantive due process infirmities.

A.
Mootness

Defendants argue that plaintiff's claims are moot because no controversy exists at the present time, and it would be impossible at this point to grant plaintiff effectual relief as to her employment with the DHA, because on May 17, 2012, the OEIG issued a determination that plaintiff was not restricted from accepting a job with Mercy Housing Lakefront, and that she has since accepted that position, which plaintiff does not dispute. Defendants further argue that since a year has passed since plaintiff left the IHDA, the statute can no longer bar her acceptance of any future employment going forward. Therefore, defendants argue, there is no longer a "case or controversy" that the Court can resolve.

Plaintiff argues the "public interest" exception to the mootness doctrine applies in this case. For that exception to apply, there must be a clear showing that: (1) the question is of a substantial public nature; (2) an authoritative determination is needed for future guidance of public officers; and (3) the circumstances are likely to recur. *Fisch v. Loews Cineplex Theatres, Inc.*, 365 Ill. App. 3d 537, 542 (1st Dist. 2005).

The Court believes that the public interest exception to the mootness doctrine likely applies in the instant case, because the allegations in the complaint seem sufficient to support it. The Court, however, need not conclusively decide the issue, because, for the reasons stated below, plaintiff has not established a constitutionally protected property or liberty interest or a substantive due process claim, and her Amended Complaint is dismissed on those grounds.

B.
Waiver

Defendants also argue that plaintiff has waived her due process arguments because she did not raise them with the OEIG or in a response to the OAG's appeal to the EEC. Plaintiff received a copy of the OAG's appeal and had the opportunity to respond within five days or seek an extension of time, but she did not file a response, nor did she request an extension from the EEC.

Plaintiff responds that she was not given a chance to raise due process arguments because there was no hearing in which she could do so, and further that the five-day period did not provide a "meaningful" opportunity in which to respond to the OAG's appeal. Plaintiff further responds that her claims are, in part, a facial challenge to the constitutionality of the statute and

regulation, which do not need to be raised before an administrative agency to be preserved. *See Arvia v. Madigan*, 209 Ill. 2d 520 (2004).

The Court believes that plaintiff's complaint appears to allege facial challenges to the constitutionality of the Revolving Door Statute and the EEC Regulation, and at least on that basis, it would be inappropriate to dismiss her complaint on waiver grounds. The Court need not conclusively decide the issue, however, because, for the reasons stated below, plaintiff has not established a constitutionally protected property or liberty interest or a substantive due process claim, and her Amended Complaint is dismissed on those grounds.

C. Procedural Due Process

Procedural due process protections apply only to the state's deprivation of life, liberty, or property. *Wroblewski v. Washburn*, 965 F.2d 452, 455 (7th Cir. 1992). A party has standing to challenge the constitutionality of a statute only insofar as it adversely impacts her own rights. *Polyvend, Inc. v. Puckorius*, 77 Ill. 2d 287, 293-94 (Ill. 1979). A due process analysis must, therefore, first begin with a determination of whether a protectable interest (life, liberty, or property) exists. *Bartlow v. Shannon*, 399 Ill. App. 3d 560, 571 (5th Dist. 2010).¹

Defendants argue that plaintiff has not alleged sufficient facts to show that she had a constitutionally protected interest in her employment with the DHA that would give her standing to challenge the Revolving Door Statute and EEC Regulation. First, defendants argue plaintiff has not established a property interest in the job she held with the DHA. To establish a property interest in a particular job, a party must show a "legitimate expectation of continued employment." *Ertl v. City of DeKalb*, 303 Ill. App. 3d 524, 526 (2d Dist. 1999). To show that legitimate expectation, a plaintiff must point to "a specific ordinance, State law, contract or understanding" limiting the ability of the employer to discharge the employee. *Fastrum v. Bd. of Fire & Police Comm.*, 240 Ill. App. 3d 947, 949 (2d Dist. 1993); *see also Phelan v. City of Chicago*, 347 F.3d 679, 681 (7th Cir. 2003) (under federal law, property interest in job created either 1) by an independent source such as state law securing certain benefits; or 2) by a clearly implied promise of continued employment).

Here, plaintiff has not pled facts to establish that she had a legitimate expectation of continued employment with the DHA. Plaintiff's First Amended Complaint does not include any allegations supporting the application of an ordinance, law, or contract securing her job, or allegations of fact from which to infer an understanding between herself and the DHA that would give rise to such an expectation. At-will employment, which is presumed in the absence of evidence to the contrary, does not give rise to a property interest. *Fastrum*, 240 Ill. App. 3d at

¹ The Court notes that plaintiff has pointed to no reason, and the Court has not independently identified one, not to apply the "limited lockstep analysis" adopted by the Illinois Supreme Court to plaintiff's due process claims under both the federal and Illinois Constitutions. *See People v. Caballes*, 221 Ill. 2d 282, 313 (2006). This Court's analysis, therefore, considers Fourteenth Amendment precedent as applicable to both plaintiff's state and federal due process claims.

951; *Phelan*, 347 F.3d at 682 (plaintiff must show more than a “unilateral expectation” of continued employment).

Second, defendants argue plaintiff cannot show a liberty interest in her job with the DHA. A liberty interest protected by the due process clause includes occupational liberty, or “the liberty to follow a trade, profession, or other calling.” *Wroblewski*, 965 F.2d at 455. “The cases have consistently drawn a distinction, however, between occupational liberty and the right to any one specific job.” *Id.* Rather, an occupational liberty claim arises when, “after an adverse employment action, a public employer stigmatizes the employee by making public comments impugning his good name, honor, or reputation or imposes a stigma that forecloses other employment opportunities.” *Palka v. Shelton*, 623 F.3d 447 (7th Cir. 2010).

In the instant case, the allegations in plaintiff’s First Amended Complaint challenge the EEC decision as it relates to her particular job with the DHA. Plaintiff does not allege any facts from which it can be inferred that defendants impacted her ability to pursue her occupation. Therefore, she has not shown she had a liberty interest in her employment with the DHA.

Plaintiff, additionally, argues that the OEIG’s initial determination in her case that she was not restricted from accepting the DHA position was akin to a state agency’s decision “issuing a permit or a license to engage in a particular trade or occupation.” Thus, plaintiff asserts that the OEIG determination itself conferred a liberty and property interest and that, in order to revoke that “license,” the state is required to provide minimal due process protections.

This Court is not persuaded. The OEIG’s decision only decided whether plaintiff would violate the Revolving Door Statute by accepting certain employment. It did not confer upon plaintiff a continued expectation of employment with the DHA, a third-party employer. Nor did it give her a “license” or “permit” to engage in her occupation generally, or limit her from engaging in her occupation generally.

Since plaintiff has not alleged facts sufficient to establish a property interest in her employment with the DHA, she has not established a protectable interest that would confer standing to bring her procedural due process claim.

Plaintiff, finally, argues that, even in the absence of a protected liberty or property interest, the EEC Regulation is invalid because it violates the Administrative Procedure Act (“APA”). The APA provides that “In a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice.” 5 ILCS 100/10-25. The APA specifically defines a “contested case” as “an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.” 5 ILCS 100/1-30. Plaintiff argues that the EEC proceeding is a “contested case.”

Defendant argues, and the Court agrees, that this was not a “contested case” as defined by the APA. A “contested case” subject to the APA’s procedural requirements is one where a hearing is required by the applicable law (here, the Revolving Door Statute). 5 ILCS 100/1-30;

Munoz v. Dept. of Registration and Education, 101 Ill. App. 3d 827, 829-30 (1st Dist. 1981). The APA does not, as plaintiff argues, mandate a hearing where not otherwise provided for by law.

D.
Substantive Due Process

The scope of the liberty guaranteed under the substantive due process clause of the Fourteenth Amendment has been defined somewhat more broadly than the occupational liberty interest protected by procedural due process. Historically, the due process clause has been held to “forbid arbitrary infringements of certain personal immunities that are implicit in the concept of ordered liberty, and infringements that shock the conscience.” *Wroblewski*, 965 F.2d at 457 (citation and quotation omitted). This concept of “implicit” liberty may apply even when not explicit in the Bill of Rights or carved out by the courts for special protection. *Swank v. Smart*, 898 F.2d 1247, 1252 (7th Cir. 1990). Such implicit liberty protects against “substantial arbitrary impositions and purposeless restraints.” *Wroblewski*, 965 F.2d at 457.

A restriction on such a form of liberty only violates due process if it is truly arbitrary; that is, if it is “utterly unreasonable.” *Id.* Courts are to use “caution and restraint” in its application. *Id.* If the law at issue has a rational justification, then it passes the test. *Wroblewski*, 965 F.2d at 457. This test is analogous to a “rational basis” review in the context of an equal protection analysis. *Id.*

Defendants argue that the allegations in the complaint do not support a substantive due process claim because the Revolving Door Statute and EEC Regulation have a rational basis. Construing the facts in plaintiff’s favor, this Court finds that the Revolving Door Statute and corresponding EEC Regulation are not “utterly unreasonable.” Rather, they operate to prevent State employees and officers who have control over State contracts involving large sums of money from misusing that authority to obtain outside employment or compensation for themselves and their family members. This is a valid exercise of the state’s power to “promote the economic welfare of the State, its communities and its citizens.” *Sherman-Reynolds, Inc. v. Mahin*, 47 Ill. 2d 323, 326 (1970). The Statute is limited to a one-year time period, and so does not act as a permanent bar. Thus, it is not an “arbitrary” imposition on state and former state employees. *See Swank*, 898 F.2d at 1252-53. The Court notes that similar laws in other states have survived due process challenges. *See, e.g., In re Advisory from the Governor*, 633 A.2d 664, 672 (R.I. 1993); *Forti v. New York State Ethics Com’n*, 75 N.Y.2d 596, 614-15 (1990).

In her First Amended Complaint, plaintiff appears to allege that the EEC Decision in the present case violated her substantive due process rights because, she says, it was an “advisory opinion” issued “in excess of [the OEIG and EEC’s] Constitutional Authority.” Plaintiff cites *Stein v. Howlett*, 52 Ill. 2d 570, 585-86 (Ill. 1972), in which the court held that the Illinois Attorney General has the inherent authority under the Illinois Constitution to issue “advisory opinions” in its capacity as “the ‘sole adviser of the executive officers, and of all boards, commissions and departments of the state government.’”

Defendants argue, and the Court agrees, that the decisions of the OEIG and EEC are not analogous to advisory opinions issued by the Attorney General. The Revolving Door Statute and

EEC Regulation do not confer to these entities any of the inherent authority of the Attorney General to issue advisory opinions to state officers and entities. The EEC's decision, instead, guides a former public employee in her decision whether or not to accept a position. Accordingly, the *Stein* case does not apply to the Revolving Door Statute's procedures. See *Board of Education v. Bakalis*, 54 Ill. 2d 448, 469 (Ill. 1973).

Conclusion

For the foregoing reasons, plaintiff's First Amended Complaint is dismissed.

Entered: _____

Date: _____

ENTERED
JUDGE SOPHIA H. HALL
Judge Sophia H. Hall
MAR 29 2013
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY
DEPUTY CLERK