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United States District Court,
S.D. New York.

Harry M. STOKES, Plaintiff,

v.

CITY OF MOUNT VERNON, NEW YORK; J. Yuhanna Edwards, individually and in his official capacity; Nichelle A. Johnson, individually and in her official capacity; Maureen Walker, individually and in her official capacity; Diane Munro–Morris, individually and in her official capacity; and Roberta Apuzzo, individually and in her official capacity, Defendants.

No. 11 CV 7675(VB).
|
Signed Aug. 4, 2015.

MEMORANDUM DECISION

BRICCETTI, District Judge.

***1** Plaintiff Harry M. Stokes brings this Section 1983 action against defendant City of Mount Vernon (the "City")[1] for violation of his procedural and substantive due process rights.

Pending before the Court is the City's motion for summary judgment. (Doc. # 130). For the following reasons, the motion is DENIED.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

BACKGROUND

The parties have submitted briefs, statements of facts, and declarations with supporting exhibits, which reflect the following factual background.

I. *Establishment of the Office of the Inspector General*

In January 2008, the City Council passed Local Law 1–2008, which amended the City Charter to add Article VI–B, creating the Office of the Inspector General. Article VI–B provides:

Section 69. OFFICE ESTABLISHED; INSPECTOR GENERAL.

> There is hereby created an Office of the Inspector General. The head of the office shall be an 'Inspector General' who shall be appointed by the Mayor to hold office until the end of the term of the mayor by whom he or she was appointed and until his or her successor is appointed. The Inspector General shall receive an annual salary to be fixed by the Board of Estimate and Contract.
>
> (Cossu Decl. Ex. F).

The Inspector General was tasked with, among other duties, investigating complaints; informing heads of departments of the progress of investigations; determining the necessity of disciplinary action, prosecution, or further investigation; preparing and providing the Mayor, Comptroller, and City Council written reports of investigations; and preparing and releasing public written reports of investigations.

Once the position of Inspector General was created, the City Council voted to fund the position at an annual salary of $110,000. The Board of Estimate (the "BOE"), comprised of the Mayor, Comptroller, and President of the City Council and which is authorized under the City Charter to fix salaries, approved the City Council's budget transfer.

In February 2008, Mayor Clinton I. Young appointed plaintiff to the newly-created position of Inspector General. His salary, as approved by the BOE, was $110,000 a year.

II. *Allegations Against Comptroller Walker*

Early in his tenure, while investigating another matter, plaintiff became aware of "multiple allegations against [Comptroller Maureen Walker] from different sources." (Pl.'s Dep. at 141). Specifically, plaintiff heard from an outside law firm that Comptroller Walker "had abused her power by not paying her bills." (*Id.*). Plaintiff thus began an investigation into whether Comptroller Walker abused her authority by not paying certain invoices for legal work done on behalf of the City by the outside law firm.

On January 13, 2009, plaintiff released his report regarding the allegations against Comptroller Walker, entitled: "Inspector General's Investigative Report Regarding Allegations of Abuse of Authority." (Cossu Decl. Ex. P). The report stated, in the opinion of plaintiff, "the Comptroller exceeded her authority when she failed to issue payment to the law firm representing the City Council." (*Id.*).

***2** That same day, Comptroller Walker wrote Mayor Young, the City Council, Corporation Counsel for the City's law department, and plaintiff, stating the report was a "cheap political witch hunt." (Beranbaum Decl. Ex. 24). At a press conference held shortly thereafter to address the allegations in the report, representatives for Comptroller Walker stated plaintiff was unqualified, politically motivated, and should be removed from his position immediately.

III. *Amendment to Section VI–B*

On July 6, 2009, the City Council approved an amendment to Section VI–B. Mayor Young approved the amendment on August 20, 2009, and the City filed it with the New York State Secretary of State on October 1, 2009.

Pertinent to the instant action, the amendment added Section 69–g to Section VI–B, and eliminated the language stating the Inspector General's term of office was coterminous with that of the Mayor. Section 69–g provides: "The Inspector General shall be subject to removal from office only for cause by the Mayor and upon at least 14 days written notice to the incumbent Inspector General." (Beranbaum Decl. Ex. 55). The amendment also states it was to "take effect upon its filing with the New York State Secretary of State." (*Id.*).

IV. *Iona College Investigation*

From August through November 2009, plaintiff conducted an investigation relating to alleged ethics violations arising from Comptroller Walker's position at Iona College. The resulting report found Comptroller Walker had taught at Iona College during work hours in violation of Section 24–3 of the City Charter.[2] The report recommended the City Council conduct a hearing regarding Comptroller Walker's activity at the college.

The November 2009 municipal elections resulted in a change of the City Council's composition. Three newly elected members ran on a slate with Comptroller Walker, and were political opponents of Mayor Young. The newly formulated City Council held a hearing regarding Comptroller Walker's position at Iona College, but no action was ever taken against her.

V. *Ordinances Regarding the Inspector General*

At a January 19, 2010, BOE meeting, Comptroller Walker introduced a sealed ordinance abolishing the position of the Inspector General. At that time, and at all times relevant to the events at issue, the BOE was comprised of Mayor Young, Comptroller Walker, and J. Yuhanna Edwards, the President of the City Council.

Mayor Young was surprised by the ordinance, and the BOE elected to table the proposed legislation until further notice.

On February 24, 2010, the City Council passed Local Law No. 1–2010, which repealed Local Law 1–2008 establishing the Office of the Inspector General. On March 25, 2010, Mayor Young vetoed Local Law 1–2010. On April 14, 2010, the City Council overrode the Mayor's veto.

Believing Local Law 1–2010 had been improperly enacted because it was not subject to a public referendum, as is required by Municipal Home Rule Law Section 23, Corporation Counsel for the City's law department, Loretta Hottinger, refused to certify it. Nichelle Johnson, a Legislative Assistant, thus signed Local Law 1–2010 in Hottinger's stead.

***3** On May 7, 2010, Hottinger brought an action in Supreme Court, Westchester County, by order to show cause, on behalf of Mayor Young against the City Council and certain individual defendants. The order sought a declaratory judgment that Local Law 1–2010 was invalid, and sought to enjoin the defendants from any actions operating to abolish the Office of the Inspector General (the "State Court Action"). On May 10, 2010, Justice Joan B. Lefkowitz granted a temporary restraining order ("TRO") enjoining the City Council from acting on any legislation that "unconstitutionally or illegally abolishes the Office of the Inspector General." (Beranbaum Decl. Ex. 33).

On June 1, 2010, President Edwards introduced a resolution at a BOE meeting that reduced the salary of the Inspector General to $0.00. Hottinger advised President Edwards the resolution violated the TRO, and the resolution was withdrawn.

On June 15, 2010, President Edwards and Comptroller Walker introduced another resolution to the BOE, this time seeking to reduce the Inspector General's salary to $1.00. Again,

Hottinger advised the BOE the resolution violated the TRO. In spite of this advice, President Edwards and Comptroller Walker introduced the legislation, and the BOE voted 2–1 to pass the resolution, with Mayor Young voting no.

On August 2, 2010, Justice Lefkowitz rendered a decision in the State Court Action. The court held Local Law 1–2010 was invalid, and also found the resolution which reduced the annual salary of the Inspector General from $110,000 to $1.00 violated Municipal Home Rule Law Section 23(2)(f). That decision was affirmed on appeal.

VI. *2011 Budget*[3]

On December 17, 2010, the BOE rejected Mayor Young's proposed budget and sent an alternative budget to the City Council. This alternative budget reduced the Inspector General's salary to $35,000.

On December 28, 2010, the City Council held a public hearing on the alternative budget and elected not to adopt it at that time.

On December 29, 2010, Comptroller Walker called a special BOE meeting to be held the following day. Because Comptroller Walker, and not Mayor Young, called the meeting, as is provided for in the BOE rules and procedures, Mayor Young did not attend. At the December 30, 2010, meeting, President Edwards and Comptroller Walker approved the alternative budget. That same day, the City Council voted to adopt the alternative budget. The 2011 adopted budget reduced plaintiff's salary from $110,000 to $35,000. Plaintiff's secretary's salary remained at $55,000. On January 7, 2011, Mayor Young vetoed the adopted budget. The City Council overrode the Mayor's veto.

On January 6, 2011, plaintiff wrote Mayor Young, complaining about the reduction in his salary and demanding that the Corporation Counsel file an order to show cause to prevent the reduction. On January 18, 2011, plaintiff's lawyer, John A. Beranbaum, Esq., wrote Corporation Counsel Hottinger and reiterated plaintiff's position.

***4** Between the passage of the 2011 budget and July 2011, Mayor Young told plaintiff he would fight the salary reduction and assured him he was "with the position all the way [ ] if we [are] able to just hold on." (Young Dep. at 83–85). But, Mayor Young failed to take any further action because he didn't know "what else [he could] do." (*Id.* at 88).

On July 27, 2011, plaintiff resigned because of the reduction in his salary; his salary was "barely sufficient" to cover rent on his apartment in New Rochelle. (Cossu Decl. Ex. HH). Plaintiff worked as Inspector General until August 12, 2011, and continued to his collect his $35,000 salary until his last day.

On October 26, 2011, Mayor Young appointed Linda Morris to succeed plaintiff as the Inspector General at an annual salary of $35,000. Morris remained Inspector General until December 31, 2011, Mayor Young's last day in office. Since December 31, 2011, the position of the Inspector General has remained unfilled.

DISCUSSION

I. *Legal Standard*

The Court must grant a motion for summary judgment if the pleadings, discovery materials before the Court, and any affidavits show there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A dispute regarding a material fact is genuine if there is sufficient evidence upon which a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." *Wilson v. Nw. Mut. Ins. Co.,* 625 F.3d 54, 60 (2d Cir.2010). It is the moving party's burden to establish the absence of any genuine issue of material fact. *Zalaski v. City of Bridgeport Police Dep't,* 613 F.3d 336, 340 (2d Cir.2010).

If the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof, then summary judgment is appropriate. *Celotex Corp. v. Catrett,* 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 249–50. The mere existence of a scintilla of evidence in support of the nonmoving party's position is likewise insufficient; there must be evidence on which the jury could reasonably find for him. *Dawson v. Cnty. of Westchester,* 373 F.3d 265, 272 (2d Cir.2004).

On summary judgment, the Court resolves all ambiguities and draws all permissible factual inferences in favor of the nonmoving party. *Nagle v. Marron,* 663 F.3d 100, 105 (2d Cir.2011). If there is any evidence from which a reasonable inference could be drawn in favor of the opposing party on the issue on which summary judgment is sought, summary judgment is improper. *See Roe v. City of Waterbury,* 542 F.3d 31, 36 (2d Cir.2008).

II. *Justiciability*

***5** The City argues this Court may not substitute its judgment for that of the BOE and City Council, and so, plaintiff's due process claims are non-justiciable. Because this argument addresses the jurisdiction of this Court to hear the instant action, the Court will consider it first.

The City primarily relies on *Roberts v. Health & Hospitals Corporation,* 87 A.D.3d 311, 928 N.Y.S.2d 236 (1st Dep't 2011), to support its proposition that review of decisions of the BOE and City Council are barred by the political question doctrine. In its well-reasoned opinion, the Appellate Division, First Department, recognized the "doctrine of separation of powers generally will preclude a court from intruding upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches." *Roberts v. Health & Hosps. Corp.,* 87 A.D.3d at 324, 928 N.Y.S.2d 236 (internal quotation marks omitted). However, the court also recognized "it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." *Id.* (internal quotation marks omitted). In *Roberts,* the Appellate Division found the court below had improperly substituted its judgment for that of the respondent's regarding staffing at the respondent's health facility. Notably, however, the petitioners' claims were not for violation of their individual liberties.[4]

Here, plaintiff has alleged violations of his constitutional rights. "If a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political question." Howard Fink & Mark V. Tushnet, Federal Jurisdiction: Policy and Practice 214 (1st ed.1984); *see also* The Harvard Law Review Association, *The Political Question Doctrine, Executive Deference, and Foreign Relations,* 122 Harv. L.Rev. 1193, 1200 (2009) (*"Marbury v. Madison* distinguished political questions ... which the courts could not hear, from those involving individual rights, which they emphatically should. The distinction is intuitively sound —no one would doubt that courts are expert at remedying individual wrongs, and it is scarcely more controversial to point out that judicial review makes the judiciary a natural agent to protect constitutional guarantees against the tyranny of the majority."). "Since [*Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)], the Court has generally refused to hold that an individual's claims of personal injury present nonjusticiable political questions ." *In re Agent Orange Prod. Liab. Litig.,* 373 F.Supp.2d 7, 67 (E.D.N.Y.2005) (collecting cases), *aff'd* 517 F.3d 104 (2d Cir.2008); *see also Baker v. Carr,* 369 U.S. at 217 ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority .").

Therefore, considering the nature of plaintiff's claims against the City, he has presented a justiciable controversy, and the Court may consider the merits of plaintiff's claims.

I. *Constructive Discharge*

***6** "[C]ourts have recognized that Fourteenth Amendment deprivations can be constructive as well as actual." *Goldfarb v. Town of W. Harford,* 474 F.Supp.2d 356, 373 (D.Conn.2007). Because plaintiff's due process rights cannot have been violated if he was not deprived of a constitutional right, the Court will first consider whether plaintiff's allegation of constructive discharge fails as a matter of law. *See Riedinger v. D'Amicantino,* 974 F.Supp. 322, 330 (S.D.N.Y.1997).

"[A] claim of constructive discharge must be dismissed as a matter of law unless the evidence is sufficient to permit a rational trier of fact to infer that the employer deliberately created working conditions that were 'so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' " *Stetson v. Nynex Serv. Co.,* 995 F.2d 355, 361 (2d Cir.1993) (quoting *Pena v. Brattleboro Retreat,* 702 F.2d 322, 325 (2d Cir.1983)). To prove constructive discharge, plaintiff must show that a reasonable person subjected to the working conditions experienced by plaintiff would have felt compelled to resign. *Pena v. Brattleboro Retreat,* 702 F.2d at 325.

The City makes several arguments regarding the insufficiency of plaintiff's claim, which the Court will address in turn.

A. *Temporal Proximity*

First, the City argues plaintiff's claim of constructive discharge fails as a matter of law because plaintiff remained Inspector General for seven months following his salary reduction.

The Court disagrees.

"The question of whether the temporal relationship between the forced resignation and the harassment is too distant is a matter properly left to the trier of fact." *Gonzalez v. Bratton,* 147 F.Supp.2d 180, 198 (S.D.N.Y.2001) (citing *Dortz v. City of New York,* 904 F.Supp. 127, 160 (S.D.N.Y.1995) (finding that whether the passage of time precluded a finding of constructive discharge was "left to the finder of fact")). In fact,

> [n]ot every employee whose work environment is rendered utterly intolerable by ... purposeful actions of the employer —motivated to force a resignation—may be in a position to walk out immediately upon the first major incident or even following an accumulation of incidents. People vary in their resilience to humiliation and thresholds of pain. Moreover, multiple pushes and pulls may come to bear upon a person's choice of whether or when to resign from employment. Financial constraints, protection of professional standing, the time it may require to line up other employment, institutional loyalties, and even deeply personal, emotional reasons may operate to render an immediate departure inopportune, even against the pressure of unpleasant working conditions.

Id. at 198–99; *see also Barbetta v. Chemlawn Servs. Corp.,* 669 F.Supp. 569, 572 (W.D.N.Y.1987) ("[C]onstructive discharge need not follow immediately upon the heels of an offensive incident."); *contra Butts v. N.Y.C. Dep't of Hous. Pres. & Dev.,* 2007 WL 259937, at *21 (S.D.N.Y. Jan.29, 2007) (finding "a six month passage of time is sufficient to undermine a claim that working conditions were intolerable").[5]

***7** Drawing all permissible inferences in plaintiff's favor, plaintiff had good reasons to delay his departure.

First, plaintiff attempted to render his employment tolerable, and only after exhausting the options available to him did he resign. *See Petrosino v. Bell Atl.,* 385 F.3d 210, 232–33 (2d Cir.2004) ("[W]here an employee has within her power the means to eliminate the added condition that purportedly renders her employment intolerable and fails to pursue that option, she cannot demonstrate that she was compelled to resign."). On January 6, 2011, plaintiff wrote Mayor Young and demanded that Corporation Counsel Hottinger bring another order to show cause to enjoin his salary reduction. When neither Young nor Hottinger responded, plaintiff retained his own counsel, who also encouraged Hottinger to take action. When plaintiff discussed his salary decrease with Mayor Young in 2011, Young made clear he would fight the salary reduction because of his passion for the Office of the Inspector General. Plaintiff was not sitting by idly, and only after it became apparent neither the Mayor's office nor the City's law department intended to take further action did he tender his resignation.

Second, plaintiff was able, at least temporarily, to afford his apartment in New Rochelle, even at the reduced compensation level. But by July 27, 2011, he was no longer able to maintain the apartment at his reduced salary.

These circumstances are sufficient to create material questions of fact as to whether plaintiff was constructively discharged. Even though plaintiff maintained his position for seven months after his salary was reduced by more than two-thirds, this fact does not resolve the issue of his constructive discharge as a matter of law.

B. *Salary Reduction*

The City also argues a salary reduction, standing alone, cannot constitute constructive discharge. However, plaintiff has submitted evidence of more than just his salary reduction to support the claim that he was constructively discharged.

Again drawing all permissible inferences in plaintiff's favor, the evidence in the record shows Mayor Young's political opponents attempted to force plaintiff's resignation well before they were able to orchestrate the passage of 2011 budget, including the following:

- Comptroller Walker called for plaintiff's resignation in 2009 immediately following the release of a report that criticized her.
- Comptroller Walker introduced a sealed resolution at a January 19, 2010, BOE meeting abolishing the position of the Inspector General.
- The City Council passed Local Law No. 1–2010 on February 24, 2010, which repealed Local Law 1–2008.

- President Edwards introduced a resolution at a BOE meeting on June 1, 2010, to reduce the salary of the Inspector General to $0 .00.

- President Edwards and Comptroller Walker introduced a resolution at a BOE meeting on June 15, 2010, to reduce the Inspector General's salary to $1.00.

- The City Council appealed Justice Lefkowitz's August 2010 decision, which granted Mayor Young's requested injunction.

***8** • When plaintiff's salary reduction took effect in 2011, plaintiff was paid $20,000 less than his secretary.

Although Mayor Young's opponents were not successful in reducing plaintiff's salary until January 2011, and so, plaintiff's due process claims are only for *that* reduction, in light of this history, it can hardly be said plaintiff's claim rests on a reduction in his salary and nothing more.

Moreover, "the percentage of a reduction and the reasonable expectations of the parties are also relevant to the factual determination whether an employee was forced into an involuntary resignation." *Scott v. Harris Interactive, Inc.,* 512 F. App'x 25, 28 (2d Cir.2013) (summary order). Plaintiff's salary was reduced by more than two-thirds. In *Kirsch v. Fleet Street, Ltd.,* 148 F.3d 149, 161 (2d Cir.1998), the Second Circuit upheld a jury's finding of constructive discharge on the plaintiff's age discrimination claim when the plaintiff's salary was reduced by approximately 55%. In *Scott v. Harris Interactive, Inc.,* the Second Circuit held the plaintiff's salary reduction of 32% was sufficient to create a material issue of fact regarding the plaintiff's claim of constructive discharge. 512 F. App'x at 28. In *Morris v. New York City Department of Sanitation,* 2003 WL 1739009, at *5 (S.D.N.Y. Apr.2, 2003), the district court held the plaintiff had shown constructive discharge when the plaintiffs employer threatened a 28% salary reduction. In *Fogarty v. Near North Insurance Brokerage Company, Inc.,* 1997 WL 799112, at *2 (S.D.N.Y. Dec.30, 1997), the district court upheld a jury's finding of constructive discharge when the plaintiff's salary was effectively reduced by 50%. Plaintiff's percentage reduction exceeded the percentage reductions in each of the aforementioned cases.

Accordingly, considering the actions of Comptroller Walker, President Edwards, and the City Council in 2009 and 2010, together with the two-thirds reduction in plaintiff's salary, material issues of fact preclude an award of summary judgment because plaintiff's alleged constructive discharge is premised on a reduction in his salary.

C. *Reasonableness of Plaintiff's Resignation*

Finally, the City contends a reasonable person would not have felt compelled to resign considering the Inspector General's salary because Linda Morris accepted the position of Inspector General at a salary of $35,000.

When considering a claim of constructive discharge, the question is whether the "working conditions would have been so difficult or unpleasant that a reasonable person in the *employee's* shoes would have felt compelled to resign." *Pena v. Brattleboro Retreat,* 702 F.2d 322, 325 (2d Cir.1983) (emphasis added). Morris was not in plaintiff's shoes. She was not hired with the expectation of a yearly salary of $110,000, nor had she seen legislation passed to eliminate her position. She had not seen two attempted resolutions by the BOE to reduce her yearly salary first to $0.00, and then to $1.00. She had not seen her salary reduced to $35,000 without Mayor Young's approval. She had not attempted to enforce the injunction prohibiting a salary reduction by petitioning the Mayor and the City's law department. A jury could conclude that a reasonable person in *plaintiff's* shoes would have felt compelled to resign based on the cumulative effect of the aforementioned actions taken against him. Thus, simply because Morris accepted the position for three months at a salary of $35,000 does not mandate that a reasonable person in plaintiff's position would *not* have felt compelled to resign.

***9** In sum, the question of whether plaintiff was constructively discharged must be left to a jury.

IV. *Procedural Due Process*

Because a rational trier of fact could conclude plaintiff suffered a constitutional deprivation, the Court will now consider plaintiff's due process claims.

To prevail on his procedural due process claim, plaintiff must show he possessed a protected liberty or property interest and was deprived of that interest without due process. *McMenemy v. City of Rochester,* 241 F.3d 279, 285–86 (2d Cir.2001).

The City makes several arguments why this claim cannot move forward as a matter of law, each of which will be addressed in turn.

A. *Property Interest*

As it argued in its motion to dismiss, the City again contends plaintiff did not have a cognizable property interest in his position as Inspector General.

In the Court's Memorandum Decision granting in part and denying in part defendants' motions to dismiss, the Court held "plaintiff had a cognizable property interest in his unelected position as Inspector General." (Doc. # 40 at 17). And in a Memorandum Decision on defendants' motion for reconsideration, which considered the intervening change of law made effective by *Looney v. Black,* 702 F.3d 701 (2d Cir.2012), the Court again held plaintiff had "a protected property interest in his position, in spite of the City Charter not promising him a particular salary and stating the Board of Estimate would set his salary." (Doc. # 77 at 7).

The Court will not retread old ground.

The City nonetheless argues the alleged facts under which the Court previously held plaintiff had a property interest in the position of Inspector General have proven false.

The Court disagrees.

On the motions to dismiss, the Court considered defendants' argument that the 2009 amendment to Article VI–B never came into effect because it was not subject to a mandatory referendum. The Court noted Article VI–B "had not been legally challenged and existed unimpaired throughout plaintiff's tenure." (Doc. # 40 at 17 n. 2). That ruling still stands.

Moreover, on the instant motion, plaintiff has submitted evidence the 2009 amendment was valid because it was filed with the New York State Secretary of State and there was no need for a public referendum on it. Municipal Home Rule Law Section 23(f) requires a local law to be subject to a mandatory referendum if it abolishes, transfers, or curtails any power of an elective officer. The initially-passed version of Section VI–B provides the Inspector General "shall be appointed by the Mayor to hold office until the end of the term of the mayor by whom he or she was appointed and until his or her successor is appointed." (Cossu Decl. Ex. F). The 2009 amendment provides the Inspector General "shall be subject to removal from office only for cause by the Mayor and upon at least 14 days written notice to the incumbent Inspector General." (Beranbaum Decl. Ex. 55). The 2009 amendment expands the powers of the Mayor, and therefore, is not subject to Municipal Home Rule Law Section 23(f) and its required referendum.

***10** Accordingly, plaintiff has established he had a cognizable property interest in the position of Inspector General.

B. *Article 78 Proceeding*

The City also argues in the absence of the availability of a pre-deprivation hearing, plaintiff could have challenged the adoption of the 2011 budget by way of a post-deprivation Article 78 proceeding. However, as with plaintiff's property interest in his position, the Court has already ruled on this question of law. In the Memorandum Decision granting in part and denying in part defendants' motions to dismiss, the Court held plaintiff could not have commenced an Article 78 proceeding because Article 78 "is not the proper vehicle to review the validity of legislative action such as the adoption of an annual budget." (Doc. # 40 at 18) (internal quotation marks and citation omitted); *see Press v. Cnty. of Monroe,* 50 N.Y.2d 695, 701, 431 N.Y.S.2d 394, 409 N.E.2d 870 (1980); *Matter of Swanick v. Erie Cnty. Legislature,* 103 A.D.2d 1036, 1037, 478 N.Y.S.2d 404 (4th Dep't 1984); *Matter of Mohr v. Grennan,* 10 Misc.3d 610, 612, 803 N.Y.S.2d 876 (Sup.Ct., Erie Cnty.2005), *aff'd,* 37 A.D.3d 1094, 828 N.Y.S.2d 925 (4th Dep't 2007).[6] This ruling still stands, and despite the City's arguments, the Court sees no reason to reconsider the law of the case.

Accordingly, the City's motion for summary judgment on plaintiff's procedural due process claim must be denied. There is sufficient evidence in the record from which a rational trier of fact could find plaintiff was denied procedural due process because he was not afforded an opportunity to be heard meaningfully after his resignation.

V. *Substantive Due Process*

"Substantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against a government action that is incorrect or ill advised." *Kaluczky v. City of White Plains,* 57 F.3d 202, 211 (2d Cir.1995) (internal quotation marks omitted). To succeed on his substantive due process claim, plaintiff must show (1) he had a valid property interest, and (2) the City infringed on that property interest in an arbitrary or irrational manner. *Harlen Assocs. v. Inc. Vill. of Mineola,* 273 F.3d 494, 503 (2d Cir.2001).

As discussed above (*see supra,* Section IV.A), plaintiff had a cognizable property interest in his position as Inspector General. Thus, plaintiff's substantive due process claim turns on whether the City infringed on his interest in an arbitrary or irrational manner.

The Second Circuit has recognized conduct as arbitrary and outrageous if it is tainted with "fundamental procedural irregularity." *Natale v. Town of Ridgefield,* 170 F.3d 258, 262, 789 (2d Cir.1999); *see also Cine SK8, Inc. v. Town of Henrietta,* 507 F.3d 778, 785 (2d Cir.2007). However, "the Second Circuit ... has made clear that a governmental act that is unauthorized by, or that even *violates,* state or local law, is not *per se* 'conscience shocking' or 'egregious' for federal constitutional purposes or 'arbitrary in the constitutional sense.' " *TZ Manor, LLC v. Daines,* 815 F.Supp.2d 726, 747 (S.D.N.Y.2011) (collecting cases).

***11** Here, drawing all permissible inferences in plaintiff's favor, the eventual reduction of plaintiff's salary was rife with procedural irregularity, alleged violations of the TRO and injunction issued in the State Court Action, and alleged violations of Municipal Home Rule Law Section 23. The evidence in the record includes the following:

- Comptroller Walker surprised Mayor Young with a sealed ordinance seeking to abolish plaintiff's position at a January 19, 2010, meeting of the BOE. Mayor Young testified this was the first time the City Clerk had presented the BOE with sealed legislation. (Young Dep. at 43).

- Corporation Counsel Hottinger refused to certify Local Law No. 1–2010 because she believed it was in violation of Municipal Home Rule Law Section 23. A Legislative Assistant thus signed Local Law 1–2010 in Hottinger's stead.

- Hottinger brought the State Court Action to prohibit the City Council and the BOE from acting in a procedurally improper way.

- While the State Court Action was pending, City Council President Edwards introduced a resolution seeking to amend the salary of the Inspector General to $0.00. Hottinger believed this action was in contravention of the TRO. This resolution was not prepared by the City's law department, as was typical, nor was anyone in the Mayor's office advised that the $0.00 resolution was to be placed on the agenda, as was typical. (Young Dep. at 65–67).

- Despite advice from Hottinger, Edwards and Walker introduced another resolution seeking to reduce the Inspector General's salary to $1.00. Mayor Young testified this resolution did not "follow the customary rules and procedures" because it was not approved by the City Clerk's office for inclusion on the BOE meeting's agenda. (Young Dep. at 61). Young also testified this resolution was irregular because it was not prepared by the City's law department. (*Id.* at 66).

- The December 30, 2010, meeting of the BOE was not called by Mayor Young, and Young did not attend it because it was "illegal." (*Id.* at 74).

- The 2011 budget, as enacted, was not subject to a public hearing. Further, in vetoing the 2011 budget, Mayor Young believed the budget violated Justice Lefkowitz's order enjoining any action taken to reduce the capacity of the Office of the Inspector General. (Beranbaum Decl. Ex 40).

Thus, plaintiff has presented evidence from which a reasonable jury could conclude the conduct preceding the passage of the 2011 budget, and the process for implementing the 2011 budget, were aberrant. There is also evidence from which a reasonable jury could conclude Mayor Young's political opponents deliberately violated the TRO and injunction.

Moreover, " 'malicious and sadistic' abuses of power by government officials, intended to 'oppress or to cause injury' ... 'unquestionably shock the conscience.' " *Velez v. Levy,* 401 F.3d 75, 94 (2d Cir.2005) (quoting *Johnson v. Newburgh Enlarged Sch. Dist.,* 239 F.3d 246, 252 (2d Cir.2001)). There is evidence in the record from which a reasonable trier of fact could conclude Mayor Young's political opponents intended to cause plaintiff injury based on their persistent attempts to eliminate plaintiff's position and reduce his salary. (*See supra* Section III.B).

***12** Finally, the purported rationale for the salary cut—that the City was facing a budgetary crisis—rings hollow when plaintiff's secretary's salary remained $55,000 per year while plaintiff's was reduced to $35,000.

Therefore, plaintiff has presented evidence from which a reasonable jury could conclude the City's action was arbitrary

and irrational, and the City's motion cannot be granted on this ground.

The City also argues plaintiff's substantive due process claim is duplicative of his procedural due process claim, and therefore should be dismissed.

The City relies on *Rother v. NYS Department of Corrections and Community Supervision,* 970 F.Supp.2d 78, 100 (N.D.N.Y.2013) for this proposition. There, the district court held the plaintiff's "substantive-due-process claim overlaps entirely with her procedural-due-process claim" because "they both seek to remedy the same harm and challenge the same conduct." *Id.* Here, however, plaintiff's *procedural* due process claim seeks to remedy the alleged unavailability of a post-deprivation hearing and challenges the City's failure to provide one. Plaintiff's *substantive* due process claim, on the other hand, seeks to remedy the alleged arbitrary actions of the City while plaintiff served as Inspector General. Therefore, the claims are not duplicative and cannot be dismissed on that basis.

Lastly, the City argues it is immunized against plaintiff's claim because plaintiff's salary reduction was made in accordance with the BOE's power to set salaries. However, the Due Process Clause bars "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams,* 474 U.S. 327, 331 (1986). It matters not that the BOE had the authority to reduce plaintiff's salary if that authority stepped on his due process rights.

CONCLUSION

The City's motion for summary judgment is DENIED.

The Clerk is instructed to terminate the motion. (Doc. # 130).

By September 11, 2015, the parties are directed to submit a joint pretrial order in accordance with the Court's Individual Practices. Counsel are directed to attend a status conference on September 16, 2015, at 9:30 a.m., at which the Court will schedule a trial date.

SO ORDERED:

All Citations

Not Reported in F.Supp.3d, 2015 WL 4710259

Footnotes

1 All claims against the individual defendants have been dismissed. (Doc. # 77).

2 Section 24–3 prohibits full-time City employees from engaging in any other occupation "during the regular city working hours." (Beranbaum Decl. Ex. 28).

3 A concise overview of the City's budgetary process is helpful in understanding the following events. The City's budget process begins when the Mayor presents a proposed budget to the BOE. Upon receiving the proposed budget, the BOE holds public hearings and adopts an annual budget estimate. The BOE then submits the estimate to the City Council, which also holds a public hearing on the budget estimate. The City Council may adopt the budget estimate or reject any item in it, except items relating to salaries.

4 The same is true of another case upon which the City relies. In *New York City Managerial Employees Association v. Dinkins,* 807 F.Supp. 958, 974 (S.D.N.Y.1992), the district court found the plaintiffs could not proceed with their claim alleging the Mayor had wrongfully impounded funds because it would require court "intervention in matters of budgetary discretion that the New York Courts have found impermissible."

5 The City also argues plaintiff's claim cannot survive as a matter of law because he was actively looking for a job in 2011. "An employee who remains on the job while looking for alternative employment is hard-pressed to establish that her working conditions were intolerable." *Regis v. Metro. Jewish Geriatric Ctr.,* 2000 WL 264336, at * 12 (E.D.N.Y. Jan.11, 2000) (citing *Wagner v. Sanders Assocs. Inc.,* 638 F.Supp. 742, 745–46 (C.D.Cal.1996)); *see also Tepperwien v. Entergy Nuclear Operations, Inc.,* 606 F.Supp.2d 427, 447 (S.D.N.Y.2009), *Baptiste v. Cushman & Wakefield,* 2007 WL 747796, at *12 (S.D.N.Y. Mar.7, 2007) ("No reasonable jury could conclude that Plaintiff's working conditions were so intolerable that she was forced to resign when she began looking for work months before resigning and then waited nearly two weeks after she had *accepted* new employment to formally tender her resignation.").

In April 2011, plaintiff participated in a response to a request for proposal submitted to the New York State Racing Association regarding the hiring of Integrity Counsel. However, when plaintiff resigned on July 27, 2011, he had not procured employment elsewhere. And, considering the evidence in the record cumulatively, plaintiff has created a

material question of fact regarding his claim for constructive discharge, even if he applied for a new position in April 2011. *See Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 90 (2d Cir.1996) ("[T]he effect of a number of adverse conditions in the workplace is cumulative.")

6 As the City correctly points out, *Matter of Swanick* and *Matter of Mohr* involved Article 78 proceedings in state court that were converted to declaratory judgment actions or other appropriate proceedings. The argument thus goes plaintiff could have brought his claims in state court via an Article 78 proceeding that would likely have been converted to a declaratory judgment action. However, even though plaintiff cites no legal authority to support the position that only this Court may determine his claim, the City points to no legal authority to support the position that this Court *cannot* determine his claim because plaintiff did not file an Article 78 proceeding.

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