No._____

IN THE

Supreme Court of the United States

IVON CASTRO,

Petitioner

v.

DINA SIMON, INDIVIDUALLY AND AS DEPUTY COMMISSIONER, ELIZABETH CASTRO, CORRECTION OFFICERS' BENEVOLENT ASSOCIATION, INC., STEVEN ISACCS, MERCEDES MALDONADO, KOEHLER & ISAACS LLP, CITY OF NEW YORK,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

IVON CASTRO
PETITIONER, PRO SE
P.O. BOX 1273
BRONX, NEW YORK 10471
(646) 351-9120

QUESTIONS PRESENTED

New York State Courts have consistently annulled determinations of administrative agencies that terminated the employment of competitive class civil service employees from a Civil Service Law Section 75 disciplinary proceeding, where the procedures of Civil Service Law Section 75 were not complied with in the course of that termination from service.

On March 2, 2015, Ms. Castro was served with charges and specifications under New York Civil Service Law Section 75. But no hearing was held to determine the charges and specifications and no facts or findings were ever made by a hearing officer pursuant to that law; nor was any record of a disciplinary proceeding made; except for the serving of the charges. Nonetheless, thirty days after being served with the charges and specifications, and on April 2, 2015, Ms. Castro's employment was terminated based on the charges and specifications made against her.

1. The question presented is whether the Second Circuit's holding that Ms. Castro's "termination was based entirely on allegations of job-related misconduct," is consistent with the rule set by the New York Court of Appeals in Matter of Wiggins v. Board of Educ., 60 N.Y.2d 385, 388-89 (1983), and the due process clause of the Fourteenth Amendment to the U.S. Constitution?

New York Courts have consistently held that a competitive class civil service employee has lawfully achieved tenure in their position where that employee satisfactorily completed the minimum period of probationary service set forth in a County's rules promulgated under Civil Service Law Section 63, and where that employee was not given notice that the minimum period of probationary service would continue to the maximum period of probationary service set forth in the County Rule.

Ms. Castro satisfactorily completed the prescribed two-month minimum period of probationary service set forth in the Personnel Rules and Regulations of the City of New York (55 RCNY, Appendix A; hereinafter, "PRR") without notice being given to her that the minimum period of probationary service would continue to the maximum period of probationary service.

2. The question presented is whether the Second Circuit's affirmance of the District Court's holding that Ms. Castro did not achieve tenure upon her satisfactory completion of the two-month minimum period of probationary service, is consistent with the rule set by the New York Court of Appeals in Matter of Albano v. Kirby, 36 N.Y.2d 526 (1975)?

New York Courts have consistently annulled determinations of administrative agencies where removal of a competitive class civil service employee was effected by a person whom did not possess the power to appoint and remove, and have declared that

the power to appoint and remove is a nondelegable statutory power conferred on an appointing authority.

Ms. Castro's civil service employment was terminated by a person whom did not possess the power under law to appoint and remove and whom was not the appointing authority: Defendant Dina Simon.

3. The question presented is whether the manner by which Ms. Castro's employment was terminated, is in violation of the rule set by the New York Court of Appeals in Matter of Simpson v. Wolansky, 38 N.Y.2d 391 (1975), its progeny, and the due process clause of the Fourteenth Amendment to the U.S. Constitution?

PARTIES TO THE PROCEEDING

All parties to the proceeding below are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ivon Castro respectfully petitions for a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit issued an order denying Castro's petition for panel rehearing, *Castro v. Simon,* No. 19-327-cv (2d Cir. Oct. 17, 2019) (Order). The Order is reproduced in the Appendix to this Petition ("Pet. App.") at 1a.

The United States Court of Appeals for the Second Circuit issued a Summary Order on October 1, 2019, affirming the District Court's denial of Castro's amended complaint. *Castro v. Simon,* No. 19-327-cv (2d Cir. Oct. 1, 2019) (Summary Order). A copy is reproduced at Pet. App. 3a-8a.

The Judgment (Jan. 22, 2019); Memorandum and Order of the United States District Court for the Eastern District of New York granting defendants' motions to dismiss Castro's amended complaint, *Castro v. Simon,* 17-CV-6083 (AMD) (LB) (E.D.N.Y. Jan. 7, 2019), is reproduced at Pet. App. 9a-29a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The order of the Court of Appeals was entered on October 17, 2019.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case raises the important question of whether Ms. Castro's right to due process of law was violated where the rule set by the New York Court of

Appeals ("A disciplinary proceeding will be voided and the *status quo ante* restored when there has been some era that taints the entire proceeding.") Wiggins v. Board of Educ., 60 N.Y.2d 385, 388-89 (1983), was not followed in her dismissal from service and where the refusal by the City defendants to adhere to the State's Highest Court has impacted the federal question in Ms. Castro's case before the District Court.

And whether the City of New York can ignore the rule set by the New York Court of Appeals in Matter of Albano v. Kirby, 36 N.Y.2d 526, 533 (1975) ("[A]n appointing authority. ... cannot eliminate the initial requirement of appointment for a minimum period of probation, which must be separate and distinct from a possible further maximum period of probation."), where that refusal to adhere to the State's Highest Court impacted the federal question in Ms. Castro's case before the District Court.

Finally, this cases raises the important question of whether the City of New York can ignore the rule set by the New York Court of Appeals in Matter of Simpson v. Wolansky, 38 N.Y.2d 391, 394 (1975) ("Although it was not necessary that the director personally conduct the hearing, it was essential that any determination as to misconduct and penalty be made by the director, as that function may not be delegated."); where that refusal to adhere to the State's Highest Court impacted the federal question in Ms. Castro's case before the District Court.

REASONS FOR GRANTING THE WRIT

New York Courts have consistently annulled administrative agency determinations that terminated the employment of competitive class civil service employees from a Civil Service Law Section 75 disciplinary proceeding, where the procedures of Civil Service Law Section 75 were not complied with in the course of that termination from service. *See e.g.,* Matter of Arthur v. Soares, 95 A.D.3d 1619, 1621 (2012); Matter of Gardner v. Coxsackie-Athens Cent. School Dist. Bd. of Educ., 92 A.D.3d at 1095 (2012); Matter of Blount v. Forbes, 250 App. Div. 15, 18 (1937); Matter of Perez v. New York State Dept. of Labor, 244 A.D.2d at 844-845 (1997).

On March 2, 2015, the New York City Department of Correction ("DOC") took disciplinary action against Ms. Castro and served her with charges and specifications of misconduct under New York Civil Service Law Section 75. But no hearing under Civil Service Law Section 75 was held to determine the charges and specifications brought against her, and no facts or findings were ever made by a hearing officer pursuant to that law. Nor was any record of a disciplinary proceeding established; except for the serving of the charges. Nonetheless, thirty days after being served with the charges and specifications, and on April 2, 2015, Ms. Castro's employment was terminated based on the charges and specifications made against her.

The DOC initiated the disciplinary action under Civil Service Law Section 75 subdivision 2; but then defendant Simon imposed the penalty under Section 75 subdivision 3 "dismissal from service," without complying with the provisions for the conduct of a hearing; or of Ms. Castro's right to confront witnesses and see documents used against her (subd. 2); amongst other provisions in that law not adhered to in Ms. Castro's unlawful removal.

The writ should also be granted, Ms. Castro respectfully submits, because the District Court simply misapplied 55 RCNY Appendix A, Rule 5.2.7(c) and the rule set by the Court of Appeals in *Albano.*

The Albano Court said, "We are confronted with a question of interpretation ...." (*Id.* at 530); and went on to interpret the county's rule which provided for a minimum period of probationary service and a maximum period of probationary service. And held that the appointing authority "cannot eliminate the initial requirement of appointment for a minimum period of probation, which must be separate and distinct from a possible further maximum period of probation."

The District Court, citing Rule 5.2.7(c), reasoned that it "specifically allows the City defendants to extend the probationary term beyond the two-month minimum, which they did in this case." (Memorandum and Order ("M/O"), at 10).

But that interpretation conflicts squarely with *Albano* and the prohibitions stated in that case. Additionally, the District Court did not review the whole "Probationary Term" rule under 55 RCNY Appendix A (5.2.1 et seq.) in reaching its decision.

The District Court also erroneously reasoned, citing Matter of Cancel v. N.Y.C. Human Res. Admin./Dep't of Soc. Servs., No. 11-CV-9725, 2015 WL 505404, *2 (S.D.N.Y. Feb. 6, 2015); (M/O, at 10), that *Albano* "does not help plaintiff, because it involved a Suffolk County regulation providing that appointments became permanent at the end of a minimum probationary term ... ."

The District Court's reasoning is incorrect because several cases since *Albano*, and from other county jurisdictions than Suffolk County, have obeyed the rule set forth in *Albano*. *See for example*, Matter of Jones v. Des Moines Civil Service Com'n, 430 NW2d 106 (Iowa Sup. Ct. 1988); Matter of Clark v. Comr. of Soc. Serv., 53 A.D.2d 122 (3rd Dep't 1976); Matter of Ignacio v. Westchester County Health Care Corp., 2010 NY Slip Op 51240(U).

The Second Circuit's ruling erroneously adopted the District Court's interpretation of Rule 5.2.7(c) and the application of *Albano*.

Finally, the writ should be granted because New York Courts have consistently annulled administrative agency determinations where removal of a competitive class civil service employee was effected by a person whom did not possess the

power to appoint and remove, and have declared that the power to appoint and remove was a nondelegable statutory power conferred on an appointing authority.

Ms. Castro's employment was terminated by defendant Dina Simon; whom was not a person having the power to appoint and remove subordinate employees in the DOC.

Ms. Castro contends that it would set a dangerous precedent and effectively eviscerate years of case law if the District Court's memorandum and order are allowed to stand in light of the foregoing facts and circumstances.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant her petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

Ivon Castro
Petitioner, Pro Se
P.O. Box 1273
Bronx, New York 10471
(646) 351-9120