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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF LAZZARI,

Respondent,

-against-

No. 189

TOWN OF EASTCHESTER,

Appellant.

-----

27 Madison Avenue  
New York, New York 10010  
October 10, 2012

Before:

CHIEF JUDGE HONORABLE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Linda Ferrara  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of Lazzari,  
2 number 189.

3 Counsel, do you want some rebuttal time?

4 MR. TOOMEY: Yes, Chief Judge, may I have  
5 two minutes rebuttal?

6 CHIEF JUDGE LIPPMAN: Two?

7 MR. TOOMEY: Yes.

8 CHIEF JUDGE LIPPMAN: You've got it. Go  
9 ahead.

10 MR. TOOMEY: Good afternoon, Your Honors.  
11 May it please the Court, my name is Vincent Toomey.  
12 I represent the appellants in this case. This case  
13 presents an important matter of statutory  
14 construction.

15 CHIEF JUDGE LIPPMAN: Counsel, why could  
16 you ignore the direction that this employee be  
17 reinstated?

18 MR. TOOMEY: Nothing was ignored, Your  
19 Honor. The statute is very specific. It requires -  
20 - -

21 CHIEF JUDGE LIPPMAN: It doesn't require  
22 you to reinstate the employee?

23 MR. TOOMEY: It requires reinstatement if  
24 certain conditions precedent are met and those are  
25 very specific in the statute. It requires a medical

1 examination and it requires certification of fitness  
2 for duty.

3 CHIEF JUDGE LIPPMAN: Okay. But why didn't  
4 you reinstate him and then if you wanted to challenge  
5 this whole thing, go and challenge it?

6 MR. TOOMEY: Reinstating an employee with  
7 severe disabilities like this as was demonstrated by  
8 every doctor who ever - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but what  
10 authority did you have to just ignore the direction  
11 that he be reinstated?

12 MR. TOOMEY: The authority - - -

13 CHIEF JUDGE LIPPMAN: And you were told  
14 that there is a medical finding that he's fit?

15 MR. TOOMEY: - - - the authority is Section  
16 71 of the Civil Service Law itself which establishes  
17 that this is not a determination by Civil Service.  
18 This is a medical determination.

19 JUDGE READ: Well, there was a medical  
20 determination by their doctor.

21 MR. TOOMEY: There's no evidence at all,  
22 Judge Read, that there was a medical determination.

23 JUDGE READ: You don't believe them?

24 MR. TOOMEY: I - - - quite frankly and I  
25 feel badly saying this because I am not one to

1 normally challenge the integrity of an administrative  
2 agency, but mistakes are made and there are reported  
3 cases - - -

4 CHIEF JUDGE LIPPMAN: You think they lied?

5 MR. TOOMEY: Your Honor, lying would be  
6 very strong, but I do feel and I do believe that  
7 there was no certification in this case. Perhaps  
8 there was a medically - - -

9 CHIEF JUDGE LIPPMAN: Then what's the  
10 process that you should use if you believe that  
11 there's no certification or that that certification  
12 is wrong? Is there any process that you're supposed  
13 to use?

14 JUDGE READ: What about Article 78, for  
15 example?

16 MR. TOOMEY: Well actually, the process  
17 that was used was - - -

18 JUDGE CIPARICK: Or a FOIL request?

19 MR. TOOMEY: - - - the one in this case  
20 which is used in - - -

21 CHIEF JUDGE LIPPMAN: The process was to  
22 ignore what they told you to do.

23 MR. TOOMEY: I disagree with that, Your  
24 Honor. The process - - -

25 CHIEF JUDGE LIPPMAN: No? What did you do

1           that - - -

2                       MR. TOOMEY: - - - the process - - -

3                       CHIEF JUDGE LIPPMAN: - - - that wasn't  
4           ignoring what you're supposed to do?

5                       MR. TOOMEY: - - - the process that was  
6           followed was the one that I understand every other  
7           county civil service department participates in, and  
8           that is simply, we get a copy of the letter. If  
9           there's any disagreement, you contact the civil  
10          service agency and you have a rationale for their  
11          decision.

12                      JUDGE PIGOTT: Well there's no  
13          confidentiality here. I mean, obviously this  
14          gentleman's health was in question. I mean he - - -  
15          so it wasn't like the County could say this is  
16          confidential, I can't turn it over to you. They  
17          could have said by the way, it was the employer's or  
18          the employee's niece who was the doctor who said  
19          Uncle, you're fine. It could have been - - - it  
20          could have been any number of irregularities. It  
21          seems to me, that the County could have very easily  
22          cleared up as your agent in this thing to say here's  
23          the doctor's report. He's fine. And you could then  
24          say our doctors say you're supposed to look at the  
25          back, not the neck, not the - - -

1 MR. TOOMEY: I agree with you, Judge  
2 Pigott. In fact, I had a case coming out of Suffolk  
3 County, not reported because it was resolved, but an  
4 employee was sent for a return to duty physical  
5 examination, and the doctor who conducted the  
6 examination issued a report finding the employee was  
7 mentally fit to stand trial on charges. He  
8 completely mistook the standard. We're not - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel does  
10 the statute - - -

11 MR. TOOMEY: - - - we're not quibbling - -  
12 -

13 CHIEF JUDGE LIPPMAN: - - - does the  
14 statute not say, "The employee shall be reinstated if  
15 such medical officer shall certify that such person  
16 is physically and mentally fit to perform the duties  
17 of the job"? Is that what the statute says?

18 MR. TOOMEY: Yes, Chief Judge.

19 CHIEF JUDGE LIPPMAN: And - - - and - - -

20 MR. TOOMEY: And it says that all together  
21 - - -

22 CHIEF JUDGE LIPPMAN: - - - was - - - were  
23 you told that he was found to be physically and  
24 mentally fit?

25 MR. TOOMEY: No.

1 CHIEF JUDGE LIPPMAN: No?

2 MR. TOOMEY: Your Honor, no.

3 CHIEF JUDGE LIPPMAN: What were you told?

4 MR. TOOMEY: The determination for Mr.  
5 Brancati, the former deputy commissioner of civil  
6 service said that "the employee was found medically  
7 able." This statute is very, very specific. It  
8 requires a finding of physical and mental fitness.

9 JUDGE SMITH: Your basic point is you  
10 haven't been told until you've seen the certificate.

11 MR. TOOMEY: That's exactly right, Judge  
12 Smith, and it does no harm at all to anyone.

13 JUDGE SMITH: They never gave - - -

14 MR. TOOMEY: It's actually beneficial - - -  
15 -

16 JUDGE SMITH: Did they ever give you any  
17 kind of a reason why they wouldn't show you the  
18 thing?

19 MR. TOOMEY: No, Your Honor. In fact, at  
20 the first argument at the Appellate Division, one of  
21 the justices asked Mr. Rose - - -

22 JUDGE SMITH: I guess, is it - - - am I  
23 right in thinking that there's something crazy about  
24 this case on both sides? I mean, why - - - couldn't  
25 this have been worked out seven years ago? They

1           could have given you a copy or you could have put the  
2           guy back to work and made a FOIL request. I mean  
3           does this thing have to be litigated for seven years  
4           to the Court of Appeals?

5                       MR. TOOMEY: It should not have been, Your  
6           Honor. Although it's a pleasure to be here we should  
7           have not gotten this far.

8                       JUDGE SMITH: Then are you - - - okay.  
9           Well, I understand. You both agree it should never  
10          have been here. You'll each say it's the other's  
11          fault. Was not - - - could not your client have  
12          found a more expeditious way of dealing with this,  
13          maybe put the guy back at work but also make a FOIL  
14          request for the - - - for the thing?

15                      MR. TOOMEY: Your Honor?

16                      JUDGE SMITH: Could not put him back at  
17          work and make a FOIL request?

18                      MR. TOOMEY: This individual performs  
19          safety sensitive functions. He's a building  
20          inspector. He has to walk over planks and climb  
21          ladders and check out buildings.

22                      JUDGE SMITH: Okay. But couldn't you have  
23          expedited things by either bringing an Article 78 or  
24          making a FOIL request?

25                      MR. TOOMEY: That would not have expedited

1 anything. In fact, we made a request promptly.

2 Within days of the determination a request - - -

3 CHIEF JUDGE LIPPMAN: Counsel, where does  
4 it say you're entitled to the certificate?

5 MR. TOOMEY: The statute - - -

6 CHIEF JUDGE LIPPMAN: And if you wanted it,  
7 aren't there legal means to get the certificate or  
8 try to?

9 MR. TOOMEY: Yes. And the legal - - -

10 CHIEF JUDGE LIPPMAN: So again, I come back  
11 to what I originally asked you, why does the Town  
12 just ignore what's a specific statutory direction  
13 that you have to put him back to work?

14 MR. TOOMEY: We - - -

15 CHIEF JUDGE LIPPMAN: Then you bring a FOIL  
16 request, you bring an Article 78; whatever you want  
17 to do. That's what I don't understand how you - - -  
18 by what authority did you do this?

19 MR. TOOMEY: We did not ignore the  
20 determination, Your Honor. The statute says - - -

21 CHIEF JUDGE LIPPMAN: What did you do?

22 MR. TOOMEY: What we did was even before  
23 the examination was allegedly conducted by the County  
24 doctor, the Town provided all of its medical reports  
25 and said to County civil service, provide us a copy

1 of the report upon completion of the examination, not  
2 so we could disobey it, so we can comply with it.

3 CHIEF JUDGE LIPPMAN: There's no - - -  
4 there's no statute or anything that says you're  
5 entitled to it, but the statute does say you must  
6 reinstate. So, again really similar to what Judge  
7 Smith is saying, from your perspective, how do you -  
8 - - is your answer we're not going to do it and yet  
9 you don't bring any proceeding, you don't seek a FOIL  
10 request. What's the logic? What's the  
11 responsibility of the Town in this situation to just  
12 defy the County and specifically disregard what the  
13 statute says? And I don't say that rhetorically.

14 MR. TOOMEY: I - - -

15 CHIEF JUDGE LIPPMAN: Why did you do that?

16 MR. TOOMEY: - - - I understand, Your  
17 Honor, but it was not ignored. Numerous requests  
18 were made for this document. When it was first  
19 turned down, another request was made to the deputy  
20 county attorney. That request still has not been  
21 answered by the County.

22 CHIEF JUDGE LIPPMAN: I understand.

23 JUDGE GRAFFEO: You would have saved the  
24 taxpayers, in a worst case scenario, if you would  
25 have mitigated the back pay award. I mean if you

1           lose this case when all this is said and done,  
2           there's going to be a - - - there would be a very  
3           substantial award that's got to be paid by your  
4           taxpayers.

5                       MR. TOOMEY: Well, Judge Graffeo - - -

6                       JUDGE GRAFFEO: I mean why not reinstate  
7           the employee and mitigate that aspect and then  
8           litigate - - - what does the report say?

9                       MR. TOOMEY: I'll tell you why; because  
10          there's no basis for reinstatement without  
11          certification. Certification means something. It's  
12          very specific in the law. It's not a civil service -  
13          - -

14                      JUDGE GRAFFEO: Why would your  
15          determination be more important than the County 's  
16          determination? I guess that's the question.

17                      MR. TOOMEY: Because - - - yes, because the  
18          appointing authority, the Town of Eastchester, is the  
19          one that has the responsibility for reinstatement and  
20          suffers the consequences and the liability of an  
21          improvident determination. Without that  
22          certification of fitness for duty - - -

23                      JUDGE GRAFFEO: So you didn't want a  
24          Worker's - - - you thought there was going to be a  
25          Worker's Comp claim if he got injured because he



1 CHIEF JUDGE LIPPMAN: Let's go to your  
2 adversary.

3 JUDGE READ: So why didn't you give him the  
4 certificate?

5 MR. GARDINER: Uhm.

6 JUDGE READ: I know you don't have to but  
7 why didn't you?

8 MR. GARDINER: Well first of all, Your  
9 Honor, I'm Thomas Gardiner, representing the County  
10 respondents.

11 Your Honor, I think it was the County's  
12 position that we didn't want to engage in a battle of  
13 the experts when it was the - - -

14 JUDGE SMITH: Is that - - - why is that a  
15 reason for not giving him a copy?

16 MR. GARDINER: Your Honor?

17 JUDGE SMITH: Why is that a reason for not  
18 giving him a copy of a certificate that you say  
19 exists?

20 MR. GARDINER: Because the statutory - - -  
21 under the statutory standard, it's the decision - - -

22 JUDGE SMITH: Yeah, people do things they  
23 aren't commanded to do by statute all the time.  
24 Assume you're right that you had no statutory  
25 obligation - - - you do have the - - - you admit you

1 have the obligation under FOIL if someone makes a  
2 request to produce this thing?

3 MR. GARDINER: If the - - - if a proper  
4 FOIL request had been made, Your Honor, then we would  
5 examine - - -

6 JUDGE SMITH: What's - - - why are we  
7 sitting here arguing about whether you had to give it  
8 to him when it could do you no harm to give it to him  
9 and you presumably had it?

10 MR. GARDINER: Again, Your Honor, the  
11 County's feeling was that the decision of their  
12 expert was dispositive - - -

13 CHIEF JUDGE LIPPMAN: Counsel, but why  
14 isn't this just a turf war? Why don't you just give  
15 it to him?

16 JUDGE PIGOTT: I don't get it.

17 CHIEF JUDGE LIPPMAN: Look, this is talking  
18 here in the most basic way.

19 JUDGE PIGOTT: Mr. Toomey's saying you  
20 didn't even do it. I mean, how do you put up with  
21 that? How do you as the County of Westchester,  
22 knowing you've got all these towns, villages and  
23 other, that are - - - that you service and he says  
24 I've got two doctors who said this guy shouldn't be  
25 at work. And I appreciate you, on this hearsay

1 statement, lawyer or whoever you are, saying well,  
2 we've got one that says he can't. Good. Send it  
3 over to me and we'll solve this thing.

4 MR. GARDINER: Well to the extent that the  
5 Town believed that there was some kind of statutory  
6 duty to provide them with the document - - -

7 JUDGE PIGOTT: It says it in the statute.  
8 I disagree with those that say it's not. It says,  
9 "If upon such medical examination, such medical  
10 officer shall certify that such person is physically  
11 and mentally fit to perform the duties of his or her  
12 former position, he or she shall be reinstated to her  
13 former position." So where's the certification from  
14 the medical officer? And you say we've got it.  
15 We've told them we've got it. We say it says he can  
16 go back to work and that should be good enough for  
17 them. I am missing that completely. As a former  
18 county attorney, I would be embarrassed to make that  
19 representation to a town. I would say here it is,  
20 happy motoring. Give them a shout.

21 MR. GARDINER: Again, Your Honor, if it's  
22 the position that it was a statutory duty that no - -  
23 -

24 JUDGE PIGOTT: But why not?

25 MR. GARDINER: - - - no fewer than - - -

1                   JUDGE PIGOTT:  Why not?  Do you think  
2                   you've got a physician-patient confidentiality here?  
3                   Because that's clearly been waived because this whole  
4                   - - - the whole thing here is his medical condition,  
5                   so you don't have that.  He's not your employee.  
6                   He's not your client.  He's everything to  
7                   Eastchester, nothing to you, and yet Mr. Toomey could  
8                   probably make a pretty good argument that there's  
9                   something going on in Westchester County that you are  
10                  not turning this over.  And that's embarrassing to  
11                  you, it seems to me.

12                 MR. GARDINER:  Again, Your Honor, if the  
13                 position is that it was a statutory duty, there were  
14                 no fewer than two demands made for the production of  
15                 the document and they were explicitly denied.

16                 CHIEF JUDGE LIPPMAN:  Counsel - - -

17                 MR. GARDINER:  We do this with the January  
18                 7th letter and the February 5th letter.

19                 JUDGE PIGOTT:  Do you do this routinely?  
20                 Is this Westchester County's routine when they - - -  
21                 when they're asked to do a physical exam like this to  
22                 not disclose it to the employer?

23                 MR. GARDINER:  I'd have to say I don't know  
24                 the answer to that question, Your Honor.

25                 JUDGE GRAFFEO:  The County is not the

1 appointing authority. Why not give the documentation  
2 to the appointing authority?

3 MR. GARDINER: Because we're the - - -

4 JUDGE GRAFFEO: Why get the - - - why drag  
5 this through the courts for years?

6 MR. GARDINER: - - - because we are the  
7 authority that has the - - - that's been designated  
8 to make a determination as to fitness.

9 CHIEF JUDGE LIPPMAN: Counsel, is there a  
10 contentious - - -

11 JUDGE GRAFFEO: Well, you're not going to  
12 be - - - you're not going to be sued if this person  
13 does something or gets hurt on the job.

14 MR. GARDINER: Again, the statute says that  
15 there - - - there must be a reinstatement or one of  
16 the other alternatives.

17 CHIEF JUDGE LIPPMAN: Counsel, is there a  
18 contentious relationship between the County of  
19 Westchester and the Town of Eastchester that - - -  
20 but again, it seems crazy. It's seven years that  
21 this is going on, and what would seem clear is that  
22 they're ignoring what the statute tells them to do,  
23 and it seems that you're ignoring just basic common  
24 sense and logic which would be they want it, give it  
25 to them.

1 MR. GARDINER: Again, Your Honor, I am not  
2 aware of any difficulty in the relationship between  
3 the Town of Westchester - - -

4 JUDGE PIGOTT: Make something up. Why  
5 don't you turn this over? Just make something up. I  
6 can find no reason - - -

7 MR. GARDINER: My understanding of the  
8 policy, Your Honor, is simply that we weren't going  
9 to provoke a - - -

10 CHIEF JUDGE LIPPMAN: Is that your general  
11 policy?

12 JUDGE SMITH: Never - - - it is a policy  
13 never to do anything you don't have to - - - never do  
14 anything you don't have to do. We're bureaucrats.  
15 We're not going to do it unless we see it in the rule  
16 book.

17 MR. GARDINER: Again, Your Honor, we didn't  
18 have a statutory duty to do it. We're the body  
19 that's authorized - - -

20 CHIEF JUDGE LIPPMAN: Do you ever do it? I  
21 mean do you know of a case where a town has asked for  
22 a certificate - - - a medical certificate, or is it  
23 just that this never comes up and you decided - - -  
24 well it never comes up so we're not doing it here.

25 MR. GARDINER: I don't know the answer to

1           that question, Your Honor.

2                       CHIEF JUDGE LIPPMAN:   Okay.

3                       JUDGE SMITH:   Let me just - - - about the  
4           statutory interpretation, is his - - - is it really  
5           impossible to read the statute the way he reads it  
6           where it says "The medical officer shall certify"?  
7           It doesn't say who he shall certify to.   Why can't it  
8           mean shall certify to the employer?

9                       MR. GARDINER:   Again, Your Honor, then it -  
10          - - then I - - - my position would be 78031, that  
11          it's a duty enjoined by law.   There's been a demand  
12          made for its production which are two - - -

13                      JUDGE SMITH:   No, no, no, if you read it  
14          that way, if "certify" means certify to the employer,  
15          that hasn't happened yet and he has no duty to  
16          reinstate anybody.

17                      MR. GARDINER:   He's made a demand for the  
18          production.

19                      JUDGE SMITH:   No, no, no, no.   Forget about  
20          the demand.   If you read the statute where it says  
21          "the medical officer shall certify" and it doesn't  
22          say to whom he shall certify, you say well he  
23          certified to me, that's good enough for me.   He said  
24          no, you've got to certify to me.   I'm the employer.  
25          Where's the certificate?   If he's right, he wins.

1 MR. GARDINER: Again, Your Honor, my  
2 interpretation of 78031 - - -

3 JUDGE SMITH: Okay. Your - - - well, yeah,  
4 yeah - - - but is his interpretation so impossible?  
5 Well, how do you know that means certify to the  
6 County and not certify to the employer?

7 MR. GARDINER: Again, if that's the  
8 position, I would assert that the four month statute  
9 of limitations began to run from either January 7th -  
10 - -

11 JUDGE SMITH: No, no, no, I - - - no - - -

12 JUDGE GRAFFEO: Do you know if all - - -  
13 are there a lot of other counties that take your  
14 position, because there aren't a lot of these cases?

15 MR. GARDINER: No, Your Honor, I'm not  
16 aware of that.

17 JUDGE PIGOTT: If - - - to put it another  
18 way, if Eastchester said, you know, we need a  
19 certification before we can put this guy back to work  
20 and this kept going, at some point I would assume  
21 that the employee would get pretty upset. He'd be  
22 writing letters saying, you know, I want to come back  
23 to work. They'd say well we don't have the  
24 certification yet; and that's been true for seven  
25 years.

1 MR. GARDINER: Well, the - - - it was the  
2 employee that commenced this suit, Your Honor.

3 JUDGE PIGOTT: I'm not saying that. What I  
4 am saying is that the Town of Eastchester hasn't done  
5 anything wrong. They're still waiting for somebody  
6 to certify this guy's able to go back to work.

7 MR. GARDINER: Again, the County's position  
8 is that it had no statutory obligation.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.  
10 Thanks, counsel.

11 MR. GARDINER: Thank you, Your Honor.

12 MR. ROSE: May it please the Court, my name  
13 is James M. Rose and I represent Richard Lazzari who  
14 is the - - -

15 CHIEF JUDGE LIPPMAN: What's - - -

16 MR. ROSE: - - - innocent victim of this  
17 turf war.

18 CHIEF JUDGE LIPPMAN: - - - what's unfair  
19 to your client as to what's going on here between the  
20 Town and the County?

21 MR. ROSE: I'm sorry, Your Honor, could you  
22 repeat that?

23 CHIEF JUDGE LIPPMAN: What is unfair to  
24 your client as to what's going on between the Town  
25 and the County?

1 MR. ROSE: Because he's entitled to  
2 reinstatement. He has been told by the person who  
3 the statute says has the authority to make that  
4 determination, that he is fit to return to work.

5 JUDGE PIGOTT: Why wouldn't you get on the  
6 phone and call the County and say you know,  
7 Eastchester's not giving my client his job back until  
8 you give him that medical report. Would you please  
9 give him that medical report?

10 MR. ROSE: And, in fact, we did.

11 JUDGE PIGOTT: All right. So have you seen  
12 the medical report?

13 MR. ROSE: I don't know that there is a  
14 medical report.

15 JUDGE PIGOTT: That's kind of the point,  
16 isn't it, because I don't think there is either.

17 MR. ROSE: Well I don't think they're  
18 required - - - that the statute actually requires a  
19 medical report. The statute - - -

20 JUDGE PIGOTT: Well, you need a medical  
21 certification.

22 MR. ROSE: - - - the statute requires a  
23 certification. The statute requires that a - - -

24 JUDGE SMITH: You've seen that?

25 MR. ROSE: - - - a question be - - -

1 JUDGE SMITH: Have you seen the  
2 certification?

3 MR. ROSE: A - - - the statute requires - -  
4 -

5 JUDGE SMITH: Have you seen a  
6 certification?

7 MR. ROSE: No.

8 JUDGE PIGOTT: Well - - -

9 MR. ROSE: I have not. The statute  
10 requires - - -

11 JUDGE PIGOTT: Doesn't that upset you?

12 MR. ROSE: Yes.

13 JUDGE PIGOTT: I mean you're representing  
14 someone that is apparently entitled to go back to  
15 work and you're siding with the County that has taken  
16 a position that is preventing Eastchester from giving  
17 your client his job back.

18 MR. ROSE: Yes, it does, certainly. He's  
19 entitled under the statute to be reinstated with back  
20 pay.

21 JUDGE GRAFFEO: Does the record tell us if  
22 your client ever went to a County physician for the  
23 purpose of obtaining this medical certification or we  
24 don't even know that?

25 MR. ROSE: We know that from the letter of

1 Mr. Brancati saying that the medical authority has  
2 certified him to return.

3 JUDGE GRAFFEO: No, I'm saying does the  
4 record tell us that your client went to a particular  
5 physician for this - - -

6 MR. ROSE: A particular physician? No.

7 JUDGE GRAFFEO: - - - for this exam?

8 MR. ROSE: It does not have the name of the  
9 physician.

10 JUDGE GRAFFEO: So we don't even know if  
11 your - - - if this former employee went to a doctor  
12 in order to get this medical certification.

13 MR. ROSE: An administrative agency has  
14 issued a letter saying that that has occurred.

15 JUDGE PIGOTT: Have you got an affidavit  
16 from your client saying I went to see the doctor; the  
17 County wrote a letter; I want to be reinstated? I  
18 mean, did he put something in the record?

19 MR. ROSE: He wrote a letter saying - - -  
20 which is in the record saying that he has been  
21 ordered reinstated by the County. Whether it has - -  
22 -

23 CHIEF JUDGE LIPPMAN: No, no, no, but we're  
24 asking you from your own knowledge, do you know that  
25 he went to see a doctor?

1 MR. ROSE: Yes.

2 JUDGE PIGOTT: For the County?

3 MR. ROSE: Yes.

4 JUDGE PIGOTT: When?

5 MR. ROSE: I don't know when. I know from  
6 my conversations with him that he did but I don't  
7 believe that the statute actually requires that there  
8 be a report. The statute - - -

9 JUDGE PIGOTT: Well here's the problem,  
10 just as Mr. Toomey said, you know - - - and that's  
11 not - - - I don't want to say it's common but it's  
12 not unusual that you get a report from a doctor and  
13 it's fit for trial or it's - - - has achieved all of  
14 this - - - all of the medical benefits that he can  
15 under the treatment, which does not mean he's ready  
16 to go back to work. It just means that there's no  
17 cure. And I could see the Town of - - - I don't know  
18 this gentleman but I mean if something happens on the  
19 job, he goes Postal or something and he doesn't know  
20 what the County knew and the County doesn't know what  
21 was going on, you've got a real problem here.

22 MR. ROSE: Well, first of all, as I've been  
23 trying to say, the statute requires the answer to a  
24 question, the answer is - - -

25 CHIEF JUDGE LIPPMAN: Counsel, you're

1 saying there doesn't have to be a report. There just  
2 has to be a certification.

3 MR. ROSE: That's correct.

4 CHIEF JUDGE LIPPMAN: The certification  
5 could be as simple as what it says that it's one and  
6 the same to say he's fit, that could be all the  
7 certification says.

8 MR. ROSE: A single sentence: I hereby  
9 certify that I have examined - - -

10 CHIEF JUDGE LIPPMAN: And your argument is  
11 that in this case, it's very possible that that's  
12 what this is all about between the County and the  
13 Town, essentially if we assume, which I certainly do  
14 that the County is not lying about what it did or  
15 didn't do, that essentially what could have happened  
16 here is that your client went to see a doctor. They  
17 then - - - the County then wrote back to the Town and  
18 said he's fit; and maybe there's no report, and the  
19 certification would say in its barest form exactly  
20 that, that he's fit. And you're saying that's enough  
21 under the statutory scheme.

22 MR. ROSE: Under the statute. And the  
23 certification is made to the person who asks the  
24 question which is - - -

25 JUDGE SMITH: Under the - - - do you read

1 the statute as requiring a written certification or  
2 do you think an oral certification is sufficient?

3 MR. ROSE: I assume that any certification  
4 would be written but would go - - -

5 JUDGE SMITH: I would, too.

6 MR. ROSE: - - it would go to a - - -

7 JUDGE SMITH: Wouldn't you think that maybe  
8 the Town should be entitled to see that, even if they  
9 don't get a report, they could get the one line piece  
10 of paper - - -

11 MR. ROSE: Well - - -

12 JUDGE SMITH: - - - that says I hereby  
13 certify - - -

14 MR. ROSE: They would be - - -

15 JUDGE SMITH: - - - from the medical  
16 officer?

17 MR. ROSE: - - - they would be entitled if  
18 they would follow the procedure that the law provides  
19 for that, which is once they were told that they  
20 couldn't have it, they had four months to bring an  
21 Article 78. They had the right to bring - - -

22 JUDGE SMITH: I mean, why - - - I  
23 understand the argument and you may be right, but I  
24 would - - - if I were your client, and I were really  
25 itching to go back to work - - - and you can also

1           imagine that maybe he - - -

2                   MR. ROSE:   He is.

3                   JUDGE SMITH:   - - - doesn't mind getting  
4           six years back pay - - - but if he's really itching  
5           to go back to work, he should be hysterical that they  
6           haven't produced the -- - then just give him the  
7           certificate already.

8                   MR. ROSE:   And we are.   And I most  
9           respectfully submit that to this very day, no FOIL  
10          request has ever been made by the Town because - - -

11                   CHIEF JUDGE LIPPMAN:   Okay, counsel.

12                   MR. ROSE:   - - - they don't want to file a  
13          FOIL.

14                   JUDGE SMITH:   He could make one.   He could  
15          make one and hand it to Mr. Toomey.

16                   CHIEF JUDGE LIPPMAN:   Okay, counsel.   Thank  
17          you.

18                   Counselor, why - - -

19                   MR. TOOMEY:   Yes.

20                   CHIEF JUDGE LIPPMAN:   - - - assuming you're  
21          a hundred percent right, assuming that if you  
22          followed procedure, you would get the certificate,  
23          assume for the sake of argument that it would say  
24          he's fit and that's all it would say, why didn't you  
25          follow the most basic procedures that a Town would

1           legally be entitled to do like bring an Article 78 or  
2           bring a FOIL request? Why wouldn't you do that? Why  
3           didn't you do that?

4                   MR. TOOMEY: Chief Judge, we did better  
5           than that. We have higher rights than just FOIL.  
6           The Municipal Civil Service Commission essentially  
7           works for the Town. They serve as our personnel  
8           department.

9                   CHIEF JUDGE LIPPMAN: Yeah, but there's a  
10          statutory scheme that designs it. Under the  
11          statutory scheme, it says you are to reinstate.

12                   MR. TOOMEY: And it says that they are to  
13          have someone examined and there should be a  
14          certification. There is no report. There's no  
15          certification.

16                   CHIEF JUDGE LIPPMAN: Assume they're not  
17          lying, that they did an examination, and assume for  
18          the sake of that argument that the certification  
19          doesn't have to be a report, there could just be  
20          something that says he's fit, assume that. How would  
21          you get that certification if you wanted it?

22                   MR. TOOMEY: Normally - - -

23                   CHIEF JUDGE LIPPMAN: Other than just  
24          requesting and being turned down?

25                   MR. TOOMEY: Your Honor, normally in every

1 other place in the world that I've been practicing  
2 labor and employment law exclusively for twenty-five  
3 years, the agency would simply provide the letter.

4 CHIEF JUDGE LIPPMAN: Assume that the - - -

5 MR. TOOMEY: This is absurd.

6 CHIEF JUDGE LIPPMAN: - - - assume - - -  
7 assume that they're being ridiculous but that they  
8 have no legal right to give it to you without your  
9 bringing a 78 or a FOIL proceeding, why wouldn't you  
10 just go and do that?

11 MR. TOOMEY: They're not even arguing that,  
12 that they were not able to provide this for us. What  
13 they responded was we're not giving it to - - -

14 CHIEF JUDGE LIPPMAN: But they're able to -  
15 - -

16 MR. TOOMEY: - - - you because this - - -

17 CHIEF JUDGE LIPPMAN: Counsel?

18 MR. TOOMEY: - - - our property. This was  
19 their answer.

20 CHIEF JUDGE LIPPMAN: But they're able to  
21 order you to reinstate him under the statute.

22 MR. TOOMEY: Upon satisfaction of  
23 conditions precedent which never happened.  
24 Certification is something that's formal. Even the  
25 U.S. Supreme Court certifies questions to this court

1 and others. It has a precise meaning and it's meant  
2 for the public benefit - - -

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. TOOMEY: - - - to serve the public.

5 CHIEF JUDGE LIPPMAN: Thanks, counsel.

6 Thank you.

7 MR. TOOMEY: Thank you, Your Honors.

8 CHIEF JUDGE LIPPMAN: I thank all of you.

9 Appreciate it.

10 (Court is adjourned)

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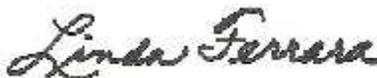
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C E R T I F I C A T I O N

I, Linda Ferrara, certify that the foregoing transcript of proceedings in the Court of Appeals of LAZZARI v. TOWN OF EASTCHESTER, No. 189 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: October 14, 2012