

Edwards v Horn

2005 NY Slip Op 30636(U)

September 7, 2005

Supreme Court, New York County

Docket Number: 114903/2004

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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In the Matter of the Application of

DAWN EDWARDS,

Petitioner,

for a Judgment pursuant to Article 78 of the Civil
Practice Law and Rules,

Index No.: 114903/2004

-against-

MARTIN HORN, Commissioner of the New York
City Department of Correction; THE NEW YORK
CITY DEPARTMENT OF CORRECTION; and
THE CITY OF NEW YORK,

Respondents.

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In this Article 78 proceeding, petitioner, a probationary correction officer, challenges respondents' termination of her employment. Respondents cross-move to dismiss the petition.

Petitioner worked as a probationary correction officer for respondent New York City Department of Correction ("DOC") from June 6, 2002 until her termination on June 29, 2004. As alleged in the petition, on July 2, 2004, petitioner contacted the DOC to inquire why she was terminated; DOC Human Resources informed her that she was terminated, in part, for taking excessive vacation days. Petitioner also believes that she was terminated for receiving a command discipline for failing to respond to a fight between two inmates on March 7, 2004.

Petitioner contends that DOC's decision to terminate her employment lacks a rational basis. According to petitioner, DOC approved the vacation time that petitioner had taken.

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Petitioner argues that if DOC considered the vacation time excessive, DOC should not have approved the time. Petitioner further argues that her command discipline should not have been a factor in deciding termination because her captain allegedly informed her that it would not affect her probationary status. In addition, petitioner contends that DOC violated its own directive which establishes procedures for evaluating probationary correction officers' job performance and for termination of such officers' service.

Respondents argue that petitioner's termination was not made in bad faith. Respondents argue that it was within the scope of agency discretion for DOC to terminate petitioner for failure to respond to a prison fight. They further argue that petitioner's assertion that she was terminated for excessive vacation leave is based solely on hearsay and speculation. Lastly, respondents contend that DOC's directive specifying procedures for termination of probationary employees is not mandatory, and that strict compliance with DOC's rules was not required because the rules did not afford petitioner a substantial procedural right.

"It is well settled that a provisional or probationary employee may be discharged for any or no reason at all in the absence of a showing that his or her dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of a law (see Matter of Swinton v Safir, 93 NY2d 758, 762-763; Matter of Preddice v Callanan, 69 NY2d 812)." (Matter of Brown v City of New York, 280 AD2d 368, 370 [1st Dept 2001].) "Judicial review of such a determination 'is limited to an inquiry as to whether the termination was made in bad faith.' (Matter of Johnson v Katz, 68 NY2d 649, 650.) The burden of raising and proving such 'bad faith' is on the employee and the mere assertion of 'bad faith' without the presentation of evidence demonstrating it does not satisfy the employee's burden." (Matter of Soto v Koehler, 171 AD2d 567, 568 [1st Dept

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1991], appeal denied 78 NY2d 855; Matter of Simpson v Abate, 213 AD2d 190 [1st Dept 1995].)

Petitioner has not sustained her burden of showing that her termination was made in bad faith. DOC had a rational basis for terminating petitioner based on the command discipline that she received during her probationary period.

Nor is petitioner entitled to relief based on DOC's internal directive. Directive 2219, on which petitioner relies, provides in pertinent part:

In the event a Probationary Correction Officer is recommended for termination, the Commanding Officer of the facility shall advise the officer of that fact and permit the officer to prepare a written statement on his/her own behalf which shall be attached to the Commanding Officer's recommendation and forwarded through the chain of command to the Head of Personnel. Exceptions to this opportunity may occur based on time restrictions. Failure to be afforded this privilege shall not be subject to the Grievance Procedure.

It is well settled that probationary employees are not ordinarily entitled to a hearing or a statement of reasons for termination in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose, or in violation of statutory or decisional law. (See Matter of York v McGuire, 63 NY2d 760, 761 [1984].) However, "[t]he rules of an administrative agency, duly promulgated, are binding upon the agency." (Matter of Frick v Bahou, 56 NY2d 777, 778 [1982].) "A corollary of this principle is that rules of an administrative agency which regulate procedure affecting substantial rights of individuals may not be waived by the agency." (Matter of Lehman v Board of Educ., 82 AD2d 832, 834 [2d Dept 1981] [and cases cited therein].)

More specifically, in the context of termination of probationary employees, it has been had that where an agency establishes rules and regulations governing the termination of probationary employees, violation of such rules may be sufficient to trigger a trial on the issue of

bad faith. (See Matter of Gordon v Town of Queensbury, 256 AD2d 784 [3d Dept 1998].)

However, disciplinary procedures set forth in a collective bargaining agreement may be substituted for agency rules, "in which case an employee is entitled to no more procedural protections than those expressly afforded him [or her] under the collective bargaining agreement." (Id. at 786 [internal quotation marks omitted]. See also Matter of Apuzzo v County of Ulster, 98 AD2d 869 [3d Dept 1983], aff'd 62 NY2d 960 [1984] for reasons stated below.)

Applying these principles to the instant case, the court holds that Directive 2219 does not warrant reversal of respondents' termination of petitioner. It is undisputed that DOC did not comply with the requirements of Directive 2219 in that it did not afford petitioner an opportunity to prepare a written statement on her own behalf. Moreover, DOC fails to make any showing that there was not adequate time to afford petitioner this opportunity. Nevertheless, Directive 2219 expressly provides that failure of DOC to afford the probationary employee the opportunity to submit a written statement "shall not be subject to the Grievance Procedure." Under these circumstances, the court finds that the Directive does not confer a substantial procedural right upon petitioner and does not entitle petitioner to more procedural protections than the collective bargaining agreement provides. DOC's failure to comply with the Directive accordingly cannot support a finding of bad faith. (See Matter of Gordon, 256 AD2d at 786.)¹

The court has considered petitioner's remaining contentions and finds them to be without merit.

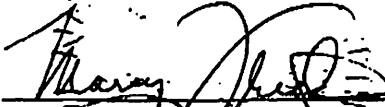
¹While petitioner does not expressly argue that DOC's failure to follow its internal directive violated petitioner's constitutional rights, it is noted that such a claim was rejected where brought by a probationary employee alleging DOC's violation of a different provision of DOC's rules governing discharge of probationary employees. (See Meyers v City of New York, 208 AD2d 258 [2d Dept 1995].)

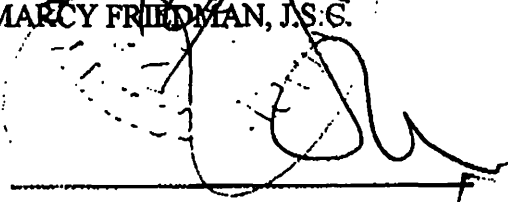
It is accordingly hereby ORDERED that respondents' cross-motion is granted to the extent of dismissing the petition.

This constitutes the decision and judgment of the court.

Dated: New York, New York
September 7, 2005

ENTER:



MARCY FRIEDMAN, J.S.G.


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