

Matter of Smalls v Goord
2005 NY Slip Op 30638(U)
March 31, 2005
Supreme Court, New York County
Docket Number: 115067/04
Judge: Saralee Evans
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 51

-----X
In the Matter of the Application of
DAMON SMALLS,

Petitioner,

Index No. 115067/04

For a Judgment and Order Under Article 78 of the
Civil Practice Law and Rules.

-against-

DECISION/ORDER
AND
JUDGMENT

COMMISSIONER GLENN S. GOORD,
NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES,

Respondent.

-----X
HON. SARALEE EVANS, J:

Recitation, as required by CPLR § 2219[a], of the papers considered in review of this
Article 78 petition and cross-motion to dismiss.

Papers	Numbered
Verified Petition, and Exhibits.....	1
Cross-Motion to Dismiss, Affirmation in Opposition and in Support of Cross-Motion.....	2

Upon the foregoing cited papers, the Decision/Order and Judgment on this petition and
cross-motion is as follows:

Petitioner Damon Smalls filed the instant Article 78 petition seeking an order compelling
a pretermination hearing pursuant to Public Officers Law §30(1)(e). Respondent cross-moves to
dismiss the petitioner.

Petitioner's employment was terminated by the New York State Department of
Correctional Services (DOCS) due to his February 20, 2004 conviction of Attempted Grand

Larceny in the fourth degree, an A misdemeanor. Petitioner originally pled guilty to Grand Larceny in the fourth degree, an E felony, but was allowed to withdraw that plea and be convicted of a lesser misdemeanor offense upon his making payments of restitution. Petitioner made the necessary payments and his conviction was reduced. Petitioner applied for reinstatement on April 27, 2004. In a letter dated June 23, 2004, DOCS denied his application, stating that it is not in the Department’s best interest to reinstate petitioner.

Petitioner argues that he was terminated in contravention to Public Officers Law §30(1)(e). Petitioner further argues that the issuance of a Certificate of Relief from Civil Disability authorized his continued employment with DOCS and that he should be awarded the opportunity of a hearing to determine if reinstatement is warranted. Respondent DOCS cross-moved to dismiss the petition on the grounds that petitioner had no clear legal right to the relief sought. DOCS further argues that Corrections Law §701(3) grants an agency the discretion not to reinstate an employee upon the issuance of a Certificate of Relief from Civil Disability.

An Article 78 procedure in the nature of a mandamus to compel a ministerial act, such as the granting of a hearing, is warranted only if petitioner has a “clear legal right to the relief sought.” *Matter of Legal Aid Society. v. Scheinman*, 53 NY2d 12, 16 (1981). Where no such right exists, petitioner’s claim is dismissed. See, *Altamore v. Barrios-Paoli*, 90 NY2d 378 (1997) [administrative body had no power to act in the manner petitioners sought to compel]; *Harper v. Angiolillo*, 89 NY2d 761 (1997) [petitioner’s request for documents pursuant to a statute was outside of legislative intent of the law].

When reviewing an agency determination pursuant to CPLR Article 78, the scope of the court’s review is narrow; only if an agency abuses its discretion and makes an arbitrary

[* 3]

determination may a court reverse an agency decision. *Matter of Pell v. Board of Education*, 34 NY2d 222 (1974). The court “must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious.” *Matter of Gilman v. DHCR*, 99 NY2d 144, 149 (2002).

Public Officers Law §30(1)(e) states, in relevant part, that a non-elected, public officer’s employment shall be terminated upon:

[the] conviction of a felony, or a crime involving a violation of [the] oath of office, provided, however, that [he] may apply for reinstatement to the appointing authority upon reversal or the vacating of such conviction where the conviction is the sole basis for the vacancy. After receipt of such application, the appointing authority shall afford such applicant a hearing to determine whether reinstatement is warranted.

An oath of office is violated when an employee is convicted of “crimes that ... arise from knowing or intentional conduct indicative of a lack of moral integrity.” *Duffy v. Ward*, 81 NY2d 127, 135 (1993). A lack of moral integrity is signaled by “wilful deceit or a calculated disregard for honest dealings.” *Id.* When an employee is convicted of a misdemeanor crime that violated his oath of office, Public Officers Law §30(1)(e) is implicated and the employee will be terminated. *Foley v. Bratton*, 92 NY2d 781, 788 (1999). A pretermination hearing is not required upon such a conviction. *Whitfield v. Fraser*, 272 F Supp2d 340 (SDNY 2003); *Bowman v. Kerik*, 271 AD2d 225 (1st Dept 2000).

Here, petitioner was convicted of Attempted Grand Larceny in the fourth degree. A person is guilty of Attempted Grand Larceny in the fourth degree when he seeks to wrongfully take the property of another. Penal Law §155.05, *et seq.* Attempting to steal property is an intentionally dishonest act (see, *Pilipiak v. Keyes*, 286 AD2d 231, 232 (1st Dept 2001); *People v. Sandoval*, 34 NY2d 371, 377 (1974)) and as such, constitutes conduct indicative of a lack of moral character. Accordingly, when petitioner pled guilty to such a crime, he was convicted of

an offense that violated his oath of office.

Petitioner has proffered no evidence indicating that his conviction was vacated or reversed. That petitioner entered into a plea agreement that eventually reduced his initial felony conviction to a misdemeanor conviction does not trigger a hearing pursuant to Public Officers Law §30(1)(e). As petitioner pled guilty to a crime which violated his oath of office, Public Officers Law §30(1)(e) was implicated, petitioner was terminated, and a pretermination hearing was not required.

By following Public Officers Law §30(1)(e), a self-executing enactment of the legislature that is intended to ensure the probity of public officers, the Department of Correctional Services did not act in an arbitrary manner when it terminated petitioner without a hearing.

For the foregoing reasons, it is

ORDERED that the Article 78 petition is denied; and it is further

ORDERED that the cross motion to dismiss the petition is granted.

This constitutes the decision/order and judgment of the court. The Clerk is directed to enter judgment accordingly.

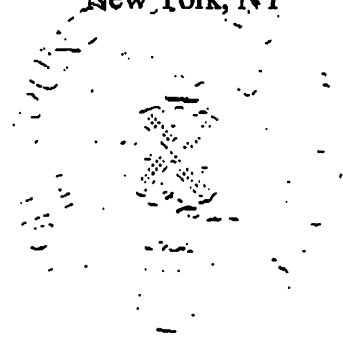
ENTER:

Dated: March 31, 2005
New York, NY

Saralee Evans
SARALEE EVANS, J.S.C.

HON. SARALEE EVANS

Norman Goodman
Clerk



FILED

APR 13 2005

COUNTY CLERKS OFFICE
NEW YORK