

Matter of Bradford v New York City Dept. of Correction
2006 NY Slip Op 30569(U)
July 11, 2006
Supreme Court, New York County
Docket Number: 111044/05
Judge: Debra A. James
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

In the Matter of
STEPHANIE BRADFORD,

Petitioner,

Index No.: 111044/05

Motion Date: 02/28/06

- v -

Motion Seq. No.: 01

NEW YORK CITY DEPARTMENT OF CORRECTION,
Respondent.

Motion Cal. No.: _____

The following papers, numbered 1 to 7 were read on this cross-motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1 - 3	_____
4 - 5	_____
6 - 7	_____

Cross-Motion: Yes No

Upon the foregoing papers,

The cross-motion shall be denied and the respondent directed to answer the petition.

In this CPLR Article 78 proceeding, petitioner seeks to annul respondent's April 8, 2005, determination terminating her employment. It is undisputed on this application that petitioner was employed by the respondent as a legal coordinator. The parties agreed to settle certain disciplinary charges brought by respondent by entering into a negotiated plea agreement dated December 3, 2003. Under the plea agreement the petitioner forfeited 28 vacation days, and consented to accept "one (1)

FILED
JUL 28 2006
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

[* 2]

year's limited probation as attached limited to rules, regulations, directives, operation orders, institutional orders concerning: AWOLs, time and leave, sign in/out procedures, being on post and efficient performance." The plea form continues "If this penalty is approved by the Commissioner of Correction, I accept said decision, and as a condition of accepting such decision of the Commissioner of Correction, I hereby waive any and all rights granted to me under section 75 and 76 of the Civil Service Law and acknowledge that this acceptance is the same as finding of guilt after a hearing." As part of the plea agreement the parties executed a "Probation Agreement Form" which stated limited probation for a period of one (1) year limited to rules, regulations, directives, operation orders, policies and institutional orders concerning: AWOLs, time and leave, sign in/out procedures, being on post and efficient performance. . . I have waived my rights as a tenured employee for this probationary period and subject myself to termination as any other probationary employee."

By letter dated April 8, 2005, the respondent terminated petitioner's employment stating "Effective close of business Friday, April 08, 2005, your services as a probationary Legal Coordinator with the New York City Department of Correction are terminated." On April 14, 2005, petitioner's union filed a grievance on behalf of the petitioner. By letter dated April 28,

2005, respondent denied the grievance stating that the "matter is not grievable."

Respondent moves to dismiss arguing that the petitioner waived any rights to hearing in the plea agreement when she consented to be treated as a probationary employee. The court agrees with petitioner that respondent misstates the law as previously enunciated by this court and the First Department in a case involving the respondent, Tankard v Abate (159 Misc2d 339 [S Ct, NY County 1993] mod on other grounds 213 AD2d 320 [1st Dept 1995]).

As in this proceeding, the proceeding in Tankard "involves the distinction, if any, in Civil Service Law between the rights of one placed on 'full probation' and one placed on 'limited probation.'" Id. at 340. Almost on all fours with this proceeding,

On March 17, 1992, the petitioner and the DOC entered into a "negotiated plea agreement".

In the negotiated plea agreement, the petitioner agreed to accept as a penalty "Probation for a period of twelve (12) months limited to AWOL's (Rule 3.05.060), latenesses (Rule 3.10.060) and sick leave violations (Directives 22612, 2258)."

A document entitled "Probation Agreement Form" contained among other things the following language: "I, Vernaldo Tankard, shield #5646, fully understand that by accepting the negotiated plea of Limited Probation for a period of twelve (12) Months limited to AWOL's, latenesses, and sick leave violations [sic]."

It also stated: "I have waived my rights as a tenured employee for this probationary period and am subject to termination as any other probationary employee." The document is dated March 17, 1992 and is signed by the

petitioner, his attorney and the DOC's attorney. It was thereafter approved by the Commissioner.

Id.

After acknowledging the "apparent contradiction between the two quoted provisions of the plea agreement" the court noted that the respondent as in this case "assumed that there is no distinction and all of the cases cited by the Corporation Counsel in support of dismissal assume that there is no limitation to this probation." Id. at 340-341. The court went on to cite the general principle that "[a] negotiated plea agreement is a contract and is to be interpreted by rules applying to any contract. Thus, it is the obligation of the court to give effect to every portion of the agreement and no provision of a contract should be left without force and effect." Id. (citations omitted).

The Tankard court then held that

The distinction between probation "limited to AWOL's ... latenesses ... and sick leave violations" and "full" probation is best understood in the context of the right of the employer to discharge the employee during the probationary period. It is reasonable to infer that this "limited probation" may only result in discharge without charges or a hearing during the term of probation if the petitioner violated the rules of the respondent concerning absence without leave, lateness and sick leave; while the rights to discharge him "as any other probationary employee" requires no reason whatever. Thus, for instance, under the limited probation defined in the negotiated plea agreement, there would be no right to discharge the employee because of unsatisfactory work performance without giving the employee notice of charges and a hearing; but "any other probationary employee"

could be discharged for that or any other reason or for no reason at all.

It then becomes the duty of the court to reconcile these provisions, giving effect to both of them without distorting the apparent intent of the parties.

In my view, if it is undisputed that the petitioner was absent without leave or late for work or wrongfully absented himself from work claiming to be ill or otherwise violated relevant sick leave directives during the probationary term, the DOC was entitled to discharge the petitioner without notice of charges and without a hearing under the negotiated plea agreement.

Id. at 341-342. This holding is supported by the Court of Appeals decision Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educational Services (77 NY2d 753, 759 [1991]), where the Court held that "[although a probationary employee normally may be terminated for any reason, so long as the reason is not arbitrary and capricious, the more stringent and unique Ontario County Civil Service Rules circumscribe this general rule and limit the discharge of a probationary employee to the specific reasons set forth therein. Thus, the inquiry here is to determine whether the stated reason for petitioner's termination is in accord with those rules."

In Tankard, the Appellate Division, First Department, vacated the court's direction that a hearing be held on Tankard's dismissal finding that the evidence in the proceeding established that the petitioner had violated the terms of the negotiated plea agreement. Tankard, 213 AD2d at 322. However, the Court applied the same legal standard as set forth by the trial court, that is, the inquiry is whether the terms of the limited probation were

violated. Therefore, the Appellate Division implicitly recognized that an employee on limited probation cannot be summarily dismissed without evidence that the employee violated the express terms of the probation.

Respondent on this motion presents no argument as why this court should ignore the controlling authority of Tankard. As the court is only considering the respondent's cross-motion to dismiss on point of law at this time, the court must accept as true the factual allegations in the petition that the respondent has provided no reasons for the petitioner's dismissal. Should the respondent fail to introduce contrary facts in its answering papers in opposition to the petition, this court would be compelled to follow the Tankard court.

Accordingly, it is

ORDERED that the respondent's cross-motion to dismiss the petition is DENIED; and it is further

ORDERED that the Clerk of the Motion Support Office is directed to calendar the Petition and supporting papers as Motion Sequence No. 2, returnable on August 11, 2006; and it is further

ORDERED that pursuant to CPLR 7804 (f) the respondent is directed to serve its answer and brief upon the petitioner on or before August 4, 2006; and it is further

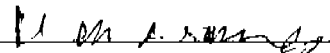
ORDERED that the respondent is directed to file its answer and brief, and the petitioner is directed to file and serve any

reply thereto at the calendar call at the motion support office,
Room 130, 60 Centre Street, at 9:30 A.M. on August 11, 2006.

This is the decision and order of the court.

Dated: July 11, 2006

ENTER:


DEBRA A. JAMES J.S.C.
J.S.C.

FILED
JUL 28 2006
COUNTY CLERK'S OFFICE
NEW YORK