Matter of Nieves v New York City Health & Hosps. Corp.
2006 NY Slip Op 30766(U)
April 10, 2006
Supreme Court, New York County
Docket Number: 106512/05
Judge: Doris Ling-Cohan

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: **IAS PART 62/36**

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In the Matter of the Application of
ANGEL NIEVES,

Petitioner,

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

Index No. 106512/05

- against-

Motion Seq. No.: 001

NEW YORK CITY HEALTH & HOSPITALS
CORP. and THE CITY OF NEW YORK,

Respondents.

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DORIS LING-COHAN, J.:

In this Article 78 proceeding, petitioner seeks an order: (1) declaring his termination from his position as Special Officer with the New York City Health and Hospitals Corporation ("HHC") to be arbitrary and capricious, an abuse of discretion, and/or not based upon the substantial evidence in the record; (2) declaring the decision by the Personnel Review Board ("PRB") which dismissed petitioner's appeal of his termination to be arbitrary and capricious, an abuse of discretion, and/or not based upon substantial evidence in the record; (3) reinstating petitioner to his position as a Special Officer with the HHC; (4) awarding petitioner back-pay, wages and benefits to which he was entitled but failed to receive from June 25, 2004, to the date of his reinstatement. In the alternative, petitioner seeks an order remanding this matter to the PRB to provide petitioner with a disciplinary hearing in accordance with its rules. Petitioner further seeks attorneys' fees and other litigation expenses.

Respondents have cross-moved pursuant to CPLR §§ 7804(f), 3211(a)(5) and 3211(a)(7), to dismiss the petition on the ground that it is time barred and fails to state a cause of action.

001

Background

Petitioner was hired as Special Officer with the HHC on a provisional basis on July 7, 2000. On or about April 12, 2004, petitioner was permanently appointed to the title of Special Officer and was placed on a reduced probationary period of three (3) months, due to petitioner's prior service as a provisional employee.

By letter dated June 22, 2005, petitioner was terminated from his position as a probationary Special Officer, effective June 25, 2004, without an evidentiary hearing. The June 22, 2005 letter, did not contain a reason for petitioner's termination; however, according to respondents, petitioner was terminated after an allegation was substantiated that he used excessive force when making an arrest.[1]

On July 22, 2004, petitioner filed an appeal of his termination to the PRB, arguing that his termination was arbitrary and capricious and violated HHC's personnel rules and regulations. On December 30, 2004, the PRB issued a decision dismissing petitioner's appeal.

In its December 30, 2004 decision, the PRB specified that: "a probationary employee's right to appeal is limited. The [HHC's] termination of [petitioner] for misconduct during his probationary term is generally not reviewable in accordance with Interim Decision No. 290".[2]

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[1] On June 13, 2004, while on duty at Lincoln Hospital, petitioner ejected an allegedly intoxicated and disorderly individual attempting to gain access after visiting hours. The individual returned several times and was ultimately placed under arrest after being given several warnings. On June 14, 2004, the individual complained to Lincoln Hospital's Guest Relations Department that petitioner used excessive force in arresting him. On June 21, 2004, the complaint of excessive force was substantiated by Captain Fermin Padilla, after a review of a tape of the incident captured by Lincoln Hospital's closed circuit television system. [*See* Notice of Petition, Exh. 8].

[2] PRB Interim Decision No. 290 provides in pertinent part as follows:
"Any appeal filed...by a probationary employee shall only be entertained by the [PRB] if it is alleged in the appeal that the [HHC] failed to adhere to the [HHC's] Rule 6:1:2, providing the probationary employee with at least one performance evaluation...The [PRB] shall not entertain any appeal where a probationary employee is terminated for any act of misconduct".

[Notice of Petition, Exh. 12].

Petitioner commenced this Article 78 proceeding, on or about May 10, 2005, to, *inter alia*, review and reverse his termination, as well as the decision and determination of the PRB to dismiss his appeal of his termination.

Petitioner claims, *inter alia*, that his termination was arbitrary and capricious and violated HHC's personnel rules and regulations and that he was entitled to appeal the termination to the PRB since there was a violation of Rule 6:1:2 of HHC's personnel rules and regulations which require that there be at least one appraisal/review during a probationary employee's probationary period, no later than midway through the period. Petitioner further asserts that he was entitled to receive a disciplinary hearing due to his prior service as a provisional Special Officer pursuant to, *inter alia*, PRB Interim Decisions Numbered 290 and 991.

In seeking dismissal of this proceeding, respondents maintain that: (1) petitioner's challenge to his termination is time barred; and (2) the PRB properly dismissed petitioner's appeal since at the time of petitioner's termination he was a probationary employee, with no right to an appeal.

In opposition to respondents' cross-motion to dismiss, petitioner argues that this proceeding is timely since it was commenced within four months of the PRB's decision dismissing his appeal. Petitioner maintains that he properly filed an appeal of his termination with the PRB, in an effort to exhaust his administrative remedies, prior to requesting judicial intervention. Petitioner further asserts that there are factual issues as to petitioner's unjust termination, his probationary status, and his right to appeal his termination to the PRB, to warrant a denial of respondents' motion to dismiss.

Discussion

Under CPLR §217, "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner". The four-month time period to commence an Article 78 proceeding to review a discharge of a probationary governmental employee begins to run from notice of, or the effective date of the discharge, whichever is later. *Matter of De Milio v. Broghard*, 55 NY2d 216 (1982); *Matter of Levine v. Bd. of Educ. of the City of New York*, 272 AD2d 328 (2nd Dept 2000); *Matter of Persico v. Bd. of Educ.*, 220 AD2d 512 (2nd Dept 1995).

Here, petitioner was terminated from his probationary position, effective June 25, 2004. Thus, this proceeding to challenge petitioner's termination, which was not commenced until May 10, 2005, is time barred. *See De Milio v. Broghard*, 55 NY2d at 220.

Petitioner's argument that this case is timely since it was commenced within four months of the PRB decision dismissing his appeal is misplaced. Petitioner failed to establish that as a probationary employee, he had a right to an appeal to the PRB.

Petitioner's basis for asserting that the PRB had jurisdiction to hear the appeal of his termination is based upon the following two arguments: (1) that HHC violated rule 6:1:2 because he did not receive a performance review mid-way during his probationary period; and (2) that even though he was a probationary employee at the time of his termination, since he had more than two years of service with HHC as a provisional employee, he was entitled to a disciplinary hearing. Both arguments, however, lack merit.

PRB Interim Decision 290 addresses the circumstances under which the PRB would hear an appeal by a provisional or probationary employee. Such decision provides, inter alia, that the only instance in which a probationary employee is entitled to review by the PRB, is where it is alleged that HHC failed to comply with Rule 6:1:2 with respect to providing the probationary employee with a timely performance evaluation. The decision further provides that the PRB

"shall not entertain any appeal where a probationary employee is terminated for any act of misconduct". [Exh. 4, Notice of Petition].

As argued by respondents in seeking dismissal of petitioner's appeal before the PRB, Rule 6:1:2 of the HHC's personnel rules and regulations, as revised on March 2, 2001, provides that where a probationary period of an employee has been reduced due to prior service, an appraisal shall be conducted within six months of appointment, or prior to the end of the probationary period, whichever is earlier. Here, it is not disputed that petitioner's probationary period was reduced from one year to three months due to his prior service, and that petitioner's probationary period had yet to be completed at the time of his termination. Thus, a performance review was not required by Rule 6:1:2 prior to petitioner's termination, and such cannot provide a basis for the PRB to hear petitioner's appeal.

Additionally, petitioner cites to no persuasive authority for the proposition that he retained the rights of a provisional employee upon his appointment to the civil service permanent position of Special Officer, and that he was entitled to a hearing based upon his prior service as a provisional employee, despite being a probationary employee at the time of his termination.

Furthermore, even if this Court were to find that this proceeding was timely commenced, petitioner failed to establish a basis for the within requested relief.

Judicial review of an administrative determination is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion..." (CPLR 7803 [3]). The Court of Appeals explained the "arbitrary and capricious" standard in *Matter of Pell v. Board of Educ.* (34 NY2d 222, 231 [1974]) as follows:

> "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact' [1 N.Y. Jur., Administrative Law, § 184, p. 609]. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."

Thus, a court may not substitute its judgment for that of an administrative agency, if there is a rational basis for the agency's determination. *See Matter of Nehorayoff v. Mills*, 95 NY2d 671, 675 (2001). The court may not overturn the determination of an administrative agency merely because it would have reached a contrary result. *See Matter of Sullivan County Harness Racing Assn., Inc. v. Glasser*, 30 NY2d 269, 278 (1972); *Matter of Kaplan v. Bratton*, 249 AD2d 199, 201 (1st Dept 1998).

Applying such principles to the within case, both the decision by HHC to terminate petitioner and the decision by the PRB to dismiss petitioner's appeal of his termination, were rational, not arbitrary, nor capricious. With respect to the PRB decision, as detailed above, petitioner, as a probationary employee terminated for misconduct, had no right to an appeal to the PRB, and therefore, the PRB's dismissal of his appeal was proper.

Further, with respect to petitioner's termination by HHC, it is not disputed that, at the time of petitioner's termination, he was a probationary employee. A probationary employee may be terminated without a hearing and statement of reason, provided that it is done in good faith and without a constitutionally impermissible motive. *See Matter of York v. McGuire,* 63 NY2d 760 (1984); *Matter of Talamo v. Murphy*, 38 NY2d 637(1976); *Matter of Johnson v. Katz,* 68 NY2d 649 (1986). Judicial review of a determination to dismiss a probationary employee is limited to an inquiry as to whether the termination was made in bad faith, with the petitioner bearing the burden of raising and proving such bad faith. *In the Matter of Butler v. Abate*, 204 AD2d 171, 172 (1st Dept 1994). Mere conclusory allegations based upon speculations are insufficient to meet that burden. *See id.* at 172. Unsupported allegations of bad faith does not warrant an evidentiary hearing. *Id* at 172; *see also Matter of Johnson v. Katz*, 68 NY2d at 650.

In this proceeding, there has been no showing, nor allegation, by petitioner that the HHC acted in bad faith, nor for a constitutionally impermissible reason, in his termination. *See Matter of York v McGuire*, 99 AD2d 1023, 1024 (1st Dept 1984); *Matter of Dolcemaschio*, 180 AD2d 573 (1st

Dept 1992). Further, evidence that petitioner used excess force in making an arrest can certainly provide a rational basis for the termination of a probationary law enforcement officer. Further, it was only after an investigation was conducted and the allegation of use of excessive force was substantiated, that HHC terminated petitioner.

Accordingly, it is

ORDERED & ADJUDGED that the petition is denied and the proceeding is dismissed; it is further

ORDERED that respondents' cross-motion to dismiss is granted; and it is further

ORDERED that within 30 days of entry, respondents shall serve a copy of this order and judgment upon petitioner with notice of entry.

This constitutes the decision, order and judgment of this Court.

Dated: 4/18/06

HON. DORIS LING-COHAN

J.S.C.

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Norman Goodman
Clerk

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