

Matter of Colon v MTA Bridges and Tunnels
2006 NY Slip Op 30782(U)
April 7, 2006
Supreme Court, New York County
Docket Number: 110034-05
Judge: Rosalyn H. Richter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

In the Matter of the Application of

ISMAEL COLON,

Petitioner,

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

INTERIM DECISION AND
JUDGMENT

Index No. 110034-05

Motion Sequence No. 1

-against-

MTA BRIDGES AND TUNNELS,
METROPOLITAN TRANSPORTATION
AUTHORITY, DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES OF THE CITY
OF NEW YORK and the CITY OF NEW YORK,

Respondents.

Richter, J.:

In this Article 78 proceeding, petitioner Ismael Colon challenges the termination of his employment as a bridge and tunnel officer with respondent Triborough Bridge and Tunnel Authority ("TBTA"). Petitioner brings this proceeding against TBTA, sued herein as MTA Bridges and Tunnels, the Metropolitan Transportation Authority, TBTA's parent agency, the New York City Department of Citywide Administrative Services ("DCAS") and the City of New York. Petitioner maintains that he was summarily fired and was denied his statutory right to a hearing before termination. TBTA argues that Colon was not entitled to a hearing because he was a probationary employee at the time of his termination.

The following facts are not in dispute. On June 14, 2003, Colon took a civil service examination for the position of bridge and tunnel officer. Colon passed the examination and was

put on the list of approved candidates. Thereafter, TBTA offered Colon the position of temporary bridge and tunnel officer while he was awaiting a permanent appointment. Colon accepted the offer and began work on or about December 10, 2003. In March 2004, TBTA advised Colon that he was being considered for permanent appointment. After an interview and a physical, TBTA approved the appointment and on April 19, 2004, Colon was appointed as a permanent bridge and tunnel officer. In the letter informing Colon of his appointment, he was advised that the probationary period for the position was one year.

On March 6, 2005, Colon was arrested while off-duty and charged with Assault in the Second Degree, a class D felony, and Menacing in the Second Degree, a class A misdemeanor. According to the police report, Colon allegedly struck an individual in the face with a 9 millimeter semi-automatic pistol, then racked the slide of the gun and threatened to shoot the victim. Upon learning about the arrest the next day, TBTA placed Colon on administrative leave. On March 22, 2005, TBTA terminated Colon's employment as a bridge and tunnel officer. No hearing was held prior to Colon's termination. Colon contends that on May 5, 2005, all of the charges against him were dismissed.

There is no question that an employee may be terminated from his employment during his probationary period without a hearing for any reason or no reason at all, with limited exceptions not applicable here. *York v. McGuire*, 63 N.Y.2d 760 (1984). Conversely, an employee who has completed probation must be afforded a hearing prior to termination. Colon's probationary period is governed by the Personnel Rules and Regulations of the City of New York, which are applicable to positions in TBTA. 55 RCNY Appendix A, § 2.5. Under those rules, appointments to positions in the competitive class of TBTA shall be for a probationary period of one year. 55 RCNY

Appendix A, § 5.2.1[a]. Colon was appointed to his permanent position on April 19, 2004 and thus his probationary period extends to April 19, 2005. *See Grant v. New York State Office of Mental Health*, 215 A.D.2d 253 (1st Dept. 1999)(petitioner's one year probationary term commenced when he became a permanent employee), *citing Matter of Reis v. New York State Housing Finance Agency*, 74 N.Y.2d 724 (1989). Since Colon was terminated on March 22, 2005, before his probation ended, he was not entitled to a hearing.

Colon, however, contends that the period of time he worked as a temporary bridge and tunnel officer should be credited toward his probation. In support of his position, Colon points out that when he was first hired for the temporary position, and again when he was hired as a permanent employee, he was given a set of papers called the Comprehensive Personnel Document ("CPD-B"). According to the petition, Page 31 of that document contains language stating that an employee's probationary period shall be reduced by the amount of time previously served in a temporary job assignment immediately preceding appointment to the permanent position if the temporary position had the same title and particular job assignment as the permanent position. Although TBTA admits that it gave Colon the CPD-B, it denies that he received Page 31 of that document.

The Court need not resolve this factual dispute because even if Colon received Page 31, that would not have served to extend his probationary period by the time he worked as a temporary employee. The document plainly states that the provision relied upon by Colon is "[b]ased on the Citywide Agreement", a collective bargaining agreement entered into between the City of New York and its major labor unions. Since TBTA is not a signatory to the Citywide Agreement, it cannot be bound by its terms. Thus, the provision upon which Colon relies does not apply to him and cannot

be used as a basis to shorten his one year probationary term.¹

Nor is there any merit to Colon's argument that his receipt of the document shows that DCAS had promulgated a different rule regarding calculation of his probationary term. The Personnel Rules make clear that the probationary period is one year "unless otherwise set forth in the terms and conditions of the certification for appointment as determined by [DCAS's commissioner]". 55 RCNY Appendix A, § 5.2.1[a]. Colon has not provided any evidence that this exception applies and the Court concludes that simply providing Colon with Page 31 does not suffice to apply this exception.² Since Colon has failed to cite to any statute or regulation to support his contention that his temporary service should count toward his one-year probationary term, he was not entitled to a hearing before his termination.

Colon also argues that his receipt of Page 31 equitably estops TBTA from claiming that his temporary employment should not be included in his probationary term. However, equitable estoppel is generally unavailable against a public entity and can be asserted against the government in only the "rarest cases". *Parkview Associates v. City of New York*, 71 N.Y.2d 274, 282 (1988). "[T]he doctrine should only be applied when failure to do so would operate to defeat a right legally and rightfully obtained. It cannot operate to create a right." *Matter of McLaughlin v. Berle*, 71 A.D.2d 707, 708 (3d Dept. 1979). Here, since Colon never obtained a legal right to have the time spent in the temporary position included in his probationary period, equitable estoppel does not

¹ Even if the provision applied to Colon, TBTA has shown that Colon's temporary position was not the same "particular job assignment" as the permanent position, which would bar the inclusion of the time Colon spent in the temporary position in calculating the probationary period.

² Nor does Colon fit within the provisions of 55 RCNY Appendix A, § 5.2.2[a] because he did not serve in a promotional title and because the time he spent as a temporary employee was less than one year.

apply. See *Matter of Jackson v. Triborough Bridge and Tunnel Authority*, 155 Misc.2d 715 (Sup. Ct. N.Y. Cty. 1992)(declining to apply equitable estoppel against TBTA on grounds that rights cannot be created by virtue of administrative error).

Colon argues that even if the Court finds that he was still on probation at the time of his termination, TBTA's decision to discharge him without a hearing was in bad faith. Colon maintains that TBTA should have waited until the resolution of the criminal case or should have extended his probation to such time. However, TBTA was under no obligation to await the outcome of the charges particularly here where they involved the off-duty use of a firearm by a peace officer. See *Green v. New York City Police Department*, 235 A.D.2d 475 (2d Dept. 1997)(dismissal of probationary employee after arrest on assault charges); *Holder v. Sielaff*, 184 A.D.2d 228 (1st Dept. 1992)("dismissal of [the criminal] charges against petitioner do not raise an issue of fact to support petitioner's claim that he was terminated in bad faith or for a constitutionally impermissible purpose").

Finally, Colon asserts that he is entitled to a name-clearing hearing. In light of the factual disputes underlying this claim, the Court orders a hearing on this issue, including, but not limited to, the likelihood of dissemination. See *Swinton v. Safir*, 93 N.Y.2d 758 (1999). Accordingly, it is

ORDERED and ADJUDGED that the petition is denied to the extent that it seeks a determination that the TBTA's discharge of Colon without a hearing was arbitrary, capricious or in violation of law;³ and it is further

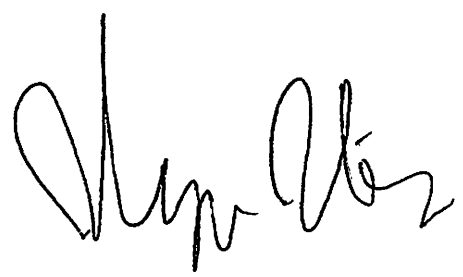
ORDERED that the parties are directed to appear in Part 24 on April 21, 2006 at 10:00 a.m.

³ The proceeding should be dismissed against DCAS and the City of New York for the additional reason that they were not involved in the decision to terminate Colon.

for a hearing on whether Colon is entitled to a name-clearing hearing.

This constitutes the interim decision and judgment of the Court.

April 7, 2006

A handwritten signature in black ink, appearing to read "Rosalyn Richter". The signature is written in a cursive, flowing style with a prominent vertical stroke at the beginning.

Justice Rosalyn Richter