

<b>Matter of Lyons v Horn</b>
2007 NY Slip Op 30689(U)
April 10, 2007
Supreme Court, New York County
Docket Number: 0106216/2006
Judge: Leland G. DeGrasse
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. LELAND DEGRASSE

PART 25

Index Number : 106216/2006

LYONS, JIMMY

vs

HORN, MARTIN

Sequence Number : 001

ARTICLE 78

INDEX NO. 106216/06

MOTION DATE 12/22/06

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room 700)

APR 10 2007

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 25

----- X

In the Matter of the Application of :  
JIMMY LYONS, :

Index No.: 106216/06

Petitioner, :

Cal. No.: of 12/22/06

For a Judgment under Article 78 :  
of the Civil Practice Law and Rules, :

-against- :

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

Respondents. :

----- X

DeGRASSE, J.:

**UNFILED JUDGMENT**  
*This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).*

Petitioner, Jimmy Lyons, brings this CPLR Article 78 proceeding to review and annul a determination of respondent, the New York City Department of Correction ("DOC"), dated January 3, 2006, which terminated petitioner's probationary employment as a correction officer. Petitioner seeks reinstatement and back pay, arguing that respondent's decision to dismiss him was arbitrary and capricious. In the alternative, petitioner requests an evidentiary and/or name-clearing hearing.

**FACTS**

Petitioner was appointed to the position of correction officer with DOC on August 12, 2004, subject to a satisfactory probationary period. By letter dated January 7, 2005, Assistant Commissioner Michael Gagliardi of the New York City Department of Homeless Services ("DHS")

wrote to DOC's Inspector General's Office in connection with information obtained by DHS during a departmental investigation into possible wrongdoing allegedly committed by petitioner while he was employed at DHS (petitioner worked at DHS from May 1998 until his resignation in August 2004). In the letter, Gagliardi stated that on June 18, 2004, petitioner, while employed as a Senior Special Officer (Sergeant) for the DHS Police, wrote a letter on behalf of former DHS police officer Robert Bosolet who was terminated from his probationary position for being on absent without leave status. Gagliardi further stated that the letter, which was introduced as evidence at Bosolet's unemployment hearing, was written by petitioner in an attempt to help clear Bosolet from violations which would serve to preclude him from receiving unemployment benefits. Gagliardi also stated that the letter contained statements which petitioner knew to be false. Finally, Gagliardi stated that the information concerning petitioner was being provided to DOC "in the interest of maintaining the integrity of the City's workforce." Enclosed with Gagliardi's letter was an affidavit by DHS Investigator Jay Burstein which detailed the results of his investigation into petitioner's alleged misconduct.

Upon receipt of this information, DOC's Investigation Division interviewed petitioner on March 25, 2005, pursuant to Mayoral Executive Order #16. In addition, by the order of Administrative Law Judge Rebecca Schwartz, petitioner was required to appear and testify at a hearing before the State Unemployment Insurance Appeal Board ("UIAB") on June 27, 2005, in the matter of former DHS police officer Bosolet. On December 19, 2005, following a departmental investigation, Investigator Anita Sandoval recommended that petitioner's case "be referred to the Personnel Division for consideration of termination." By memorandum dated December 21, 2005, DOC's Deputy Commissioner Richard R. White advised DOC's Personnel Division that petitioner should be discharged due to his "inappropriate conduct." In a Personnel Determination Review,

dated December 29, 2005, Deputy Commissioner White stated, in pertinent part:

“The Investigative Division’s investigation revealed that Correction Officer Jimmy Lyons, while an employee of the Department of Homeless Services, improperly vouched for an officer who was on AWOL (Absent Without Leave) status. Officer Lyons was not the subject officer’s direct supervisor and therefore, not authorized to make a statement in the officer’s defense.

“Officer Lyons was interviewed under Mayoral Executive Order #16 in regard to this incident. Officer Lyons gave false information by stating that he documented the calls he received from the subject officer in the appropriate command logbooks. The Investigation Division’s investigation showed that no indication was made by Officer Lyons, as he stated in his MEO-#16 interview.

“Additionally, during a New York State Unemployment hearing regarding the subject officer, Officer Lyons provided a conflicting statement while under oath. Officer Lyons denied making any notation in the command logbook when the subject officer spoke with him. Officer Lyons stated that he made logbook entries only when he received faxed medical documentation from the subject officer.

“Based on the above circumstances, the Investigation Division concludes that it is evident that Correction Officer Jimmy Lyons provided inconsistent statements and/or reports to the Department of Homeless Services, Department of Correction and State of New York Unemployment Insurance Appeal Board. Although it cannot be determined which report is accurate, it is clear that Officer Lyons modified his statement according to whom it was being told to. Additionally, Officer Lyons failed to make any notations in logbooks regarding the officer’s sick calls, as he stated during his Mayoral Executive Order #16 interview. Due to his conduct and violation of Mayoral Executive Order #16, in addition to his probationary status, it is the recommendation of the Investigation Division that Officer Lyons should be terminated for such inappropriate conduct.”

Deputy Commissioner White’s recommendation to discharge petitioner was approved by Commissioner Horn on January 3, 2006. By letter dated January 5, 2006, and received by petitioner on January 6, 2006, DOC’s Assistant Commissioner notified petitioner that his employment as a probationary correction officer with DOC was terminated as of January 6, 2006.

Petitioner then commenced this Article 78 proceeding by the filing of a notice of petition and verified petition on May 5, 2006. By amended verified petition filed on May 26, 2006 petitioner

now challenges DOC's determination that he be discharged on the grounds that DOC's actions were arbitrary, capricious and made in bad faith. In its verified answer, dated November 22, 2006, DOC argues that petitioner has failed to allege any facts to support the conclusion that its decision to terminate his probationary status was arbitrary and capricious or made in bad faith.

### DISCUSSION

"It is well settled that the employment of a probationary appointee may be terminated at the end of the probationary term without a hearing and without specific reasons being stated" (*Matter of Sargeant v Director, Brooklyn Dev. Ctr.*, 84 AD2d 843, 843 [1981]; *affd* 56 NY2d 628 [1982]; *see also Matter of Talamo v Murphy*, 38 NY2d 637, 639 [1976]; *Matter of Sachs v Bd. of Educ.*, 71 AD2d 898, 899 [1979], *affd* 50 NY2d 830 [1980]). It is equally well established that "judicial review of such a termination is limited to an inquiry as to whether it was made in bad faith and was therefore arbitrary and capricious" (*Matter of King v Sapier*, 47 AD2d 114, 116 [1975], *affd* 38 NY2d 960 [1976]; *see also Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]). Moreover, "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 [1991], *appeal denied* 78 NY2d 855 [1991]; *see also Haberman v Codd*, 48 AD2d 505, 508 [1975]).

In his reply memorandum of law, petitioner argues, *inter alia*, that DOC's decision to terminate his employment was arbitrary and capricious because it was not based on his work performance as a correction officer, but rather, on his alleged misconduct with his former employer, DHS. Petitioner further states that "[a]t bottom, this is a case about two City agencies, DHS and

DOC, bent on punishing [him] for having the audacity to break rank with management to support the unemployment claim of a subordinate employee over management's objection."

Here, petitioner's conclusory and unsubstantiated allegation that his termination was motivated by bad faith because it was based on information received from his former employer is insufficient to sustain his burden of showing that DOC's actions lacked a rational basis (*see i.e. Matter of Cortijo v Ward*, 158 AD2d 345 [1990]; *Matter of Leskow v Office of Ct. Admin.*, 248 AD2d 1004 [1998]). The record shows that DOC's decision to terminate petitioner's probationary employment was based upon Deputy Commissioner White's finding that "[petitioner] while an employee of [DHS], improperly vouched for an officer who was on AWOL (Absent Without Leave) status" by providing "inconsistent statements and/or reports" to DHS. "In determining a probationer's capability and fitness, an appointing authority is not confined to evaluating the employee's performance during the probationary term but may consider [his or] her conduct while in the service of former employers" (*Matter of Ostoyich v State of New York*, 99 AD2d 839, 839 [1984], *appeal denied* 62 NY2d 605 [1984]; *see also De Salvo v Kolb*, 54 AD2d 991 [1976]). Further, upon the completion of its departmental investigation, DOC concluded that in responding to questions regarding the matter, petitioner "gave false information" to DOC investigators during a Mayoral Executive Order #16 interview and also "provided a conflicting statement while under oath" at a UIAB hearing. Therefore, there was a basis for dismissal independent of the allegations made by petitioner's former employer (*see e.g. Matter of Swinton v Safir*, 93 NY2d 758, 763 [1999]). Accordingly, the evidence in the record establishes that DOC's decision to terminate petitioner's probationary employment was based upon his "inappropriate conduct." Consequently, the determination was made in good faith and was neither arbitrary nor capricious (*see Smith v*

*Chambers*, 32 AD2d 949 [1969], *affd* 26 NY2d 876 [1970], *rearg denied* 26 NY2d 1020 [1970]; *Johnson v Katz*, 68 NY2d at 650 [1986]).

Petitioner is not entitled to an evidentiary hearing pursuant to CPLR 7804 (h). No evidence has been submitted sufficient to raise a triable issue of fact as to whether DOC's decision to terminate petitioner's employment was arbitrary and capricious or was taken in bad faith (*see York v McGuire*, 99 AD2d 102 [1984], *affd* 63 NY2d 760 [1984]).

Lastly, petitioner argues that he is entitled to a name-clearing hearing because "the reason for his termination - giving false statements under oath - is stigmatizing and likely to foreclose him from future employment opportunities in his chosen field of law enforcement." The verified answer alleges that petitioner was terminated from his probationary position after a departmental investigation concluded that he had "provided inconsistent statements and/or reports to [DHS], [DOC] and [UIAB]" in an effort to assist a former DHS employee obtain unemployment insurance benefits. Further, in its supporting memorandum of law, DOC asserts that petitioner is not entitled to a name-clearing hearing because "petitioner has failed to allege that the allegations against him are false or stigmatizing." It is well settled that "[t]he sole purpose of a name-clearing hearing is to afford the employee an opportunity to prove that the stigmatizing material in the personnel file is false" (*Matter of Swinton*, 93 NY2d at 763 n). Here, while petitioner's reply memorandum of law denies the truth of the essential findings contained in his personnel record, the pertinent denial is not supported by an affidavit by petitioner. In the absence of a reply affidavit, setting in issue the allegations of fact contained in the verified answer, said facts must be deemed admitted (CPLR 7804 [d]; *see also Matter of Klonowski v Dept. of Fire of City of Auburn*, 58 NY2d 398 [1983]). Consequently, petitioner has failed to establish his right to a name-clearing hearing.

**CONCLUSION**

Accordingly, petitioner's application is denied and the instant petition is dismissed.

This constitutes the decision, order and judgment of the court.

Dated: APR 10 2007



J.S.C.

**HON. LELAND DeGRASSE**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).