

**Matter of Bradford v New York City Dept. of
Correction**

2007 NY Slip Op 30938(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0111044/2005

Judge: Debra A. James

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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: 11/01/06

- v -

Motion Seq. No.: 01002

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 court previously denied the respondent's motion to
dismiss this CPLR Article 78 proceeding by Order dated July 11,
2006, and shall now render judgment on the petition following
upon joinder of issue by the respondent.

As set forth in this court's prior Order, petitioner seeks
to annul respondent's April 8, 2005, determination terminating
her employment. Petitioner was employed by the respondent as a
legal coordinator. The parties entered into a negotiated plea
agreement dated December 3, 2003, to settle certain disciplinary
charges brought by respondent against petitioner. Under the plea

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

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).

agreement the petitioner forfeited 28 vacation days, and consented to accept "one (1) 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 in pertinent part:

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."

The inquiry in this proceeding as stated in this court's prior Order is whether the respondent was entitled to discharge the petitioner without notice of charges and without a hearing under the negotiated plea agreement. The court in deciding this matter is guided by the prior decision of Matter of Tankard v Abate (159 Misc2d 339 [Sup Ct, NY County 1993] mod on other grounds 213 AD2d 320 [1st Dept 1995]). The trial court stated therein

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. On appeal, the First Department found that "[t]he issues presented are entirely those of law: (i) was petitioner's failure to notify [the supervisor] a breach of a DOC AWOL, lateness, or sick leave regulation, and (ii) was petitioner's appearance at work on the day of the appointment a completely curative action?" Matter of Tankard v Abate, 213 AD2d 320, 322 (1st Dept 1995). In Tankard, the Court held that because it was uncontroverted that the petitioner in that case had violated the AWOL regulation, a breach of the limited probation agreement was established as a matter of law and no hearing or notice of charges was required. The court notes that respondent's reliance upon the decision in Fortner v New York City Dept. of Correction (280 AD2d 381, 382 [1st Dept 2001]) is misplaced because although the negotiated plea agreement in that case was described as "limited," the terms of the agreement provided for termination without appeal if "the employee's service is unsatisfactory" and therefore the probation agreement by its terms was more analogous to full probation (see Fortner v New York City Dept. of Correction 69 NY2d 970, 971 [1987] affg 280 AD2d 381).

In this case, respondent in its answer sets forth a number grounds and incidents to support its determination supporting petitioner. However, because the probation in this action is limited to the predicate grounds set forth in the agreement, the

only charges that respondent may use to support its position that the limited probation agreement was violated are those that occurred during the period the agreement was in effect.¹

Respondent contends that inclusive of the duration of petitioner's Worker's Compensation leave, the agreement was in effect from February 10, 2004, through November 2, 2005. The court finds that only four of the predicate charges that are raised in the answering papers occurred during this period. First, respondent alleges that during February and March 2005 petitioner failed to provide accurate and complete statistical data to the respondent's computer systems office. Second, respondent alleges that on January 14, 2005, petitioner caused an inmate to falsify time entries thereby breaching respondent's regulations and not efficiently performing petitioner's duties. Third, respondent asserts that petitioner was AWOL on January 18 and 19, 2005. Finally, respondent alleges that on January 20,

¹ Respondent's argument that conduct occurring before the commencement of the probationary period may form the basis for dismissal during the probationary period is contrary to the very terms of the limited probation agreement which states "[a]ny misconduct committed prior to the date of acceptance of this negotiated plea shall not affect my probation." The cases cited by the respondent in support of its position concern dismissal or "full" probation agreements that do not contain the referenced limitation. See Matter of Garrett v Safir, 253 AD2d 700 (1st Dept 1998) (probationary dismissal); Matter of Fraser v Safir, 282 AD2d 334 (1st Dept 2001) (probationary dismissal); Matter of Ward v Bratton, 237 AD2d 204 (1st Dept 1997) (disciplinary probation); Matter of Prestia v Brown, 191 AD2d 224, 225 (1st Dept 1993) (disciplinary probation).

2005, petitioner yelled profanities at certain correction officers and referred to the supervisor as "Mr." rather than "Deputy Warden." Fourth, respondent alleges that petitioner failed to provide statistical information to the Facility Information Systems Office and that this constitutes a failure to efficiently perform the assigned duties. Respondent contends that these incidents constitute violations of the limited probation agreement and that under Tankard the petitioner is not entitled to a hearing.

The court disagrees with respondent's assertions and finds that respondent's determination must be overturned and the matter remitted to the respondent to file notice of charges and conduct a hearing as to whether the petitioner violated the probationary agreement. This case is distinguishable in result from Tankard because here there is a sharp factual dispute as to the facts upon which respondent's determination is based. With respect to respondent's charge that petitioner improperly caused an inmate to enter incorrect log entries on January 19, 2005, petitioner argues that the respondent's regulations as cited in the Memorandum of Complaint, entitled "Directive 3501" provide in Section III.B.3.b that "Law Library officers shall be responsible for the following: maintaining attendance and special logs and twenty-four hour report; maintain sign-up sheets . . . supervising inmates in attendance and notifying area supervisor

immediately of need to remove any inmates. . . ." It thus appears that contrary to respondent's allegations, the petitioner could not have breached the respondent's regulation as asserted by the respondent because the petitioner had no responsibility or duty with respect to the subject log entries as set forth in the respondent's own rules. While it is not the province of this court in this proceeding to determine whether respondent's allegations have any merit in light of the facts adduced by the petitioner, although the court does consider it curious that the respondent is apparently unaware of petitioner's duties, the court does find that the petitioner raises an issue of disputed fact such that respondent cannot rely upon the proffered charge as a basis for a probationary dismissal.

With respect to respondent's charge that the petitioner was AWOL, petitioner responds to this charge by appending copies of "Request to be Excused From Duty" slips for both January 18 and 19, 2005, that were signed "Approved" by the Director of the Law Library. Assuming the veracity of the evidence adduced, these slips would conclusively rebut the allegation that petitioner violated the "AWOL" clause of the limited probation stipulation.

Respondent further alleges that on January 20, 2005, petitioner used foul language to certain officers while executing her duties. The submission attached to the memorandum of complaint show that while the commanding officer requested and

ordered certain officers to provide statements regarding the facts surrounding alleged acts of the petitioner, no statement from the petitioner appears to have been requested. In any event, the petitioner in her affidavit in reply denies the allegations and states that she made complaint to her supervisor and the Inspector General regarding foul language directed at her. At a minimum, the facts surrounding the incident are in dispute and cannot therefore serve as a vehicle for petitioner's termination under the limited probation agreement without a hearing to resolve the factual disputes.

Finally, petitioner calls into question the factual assertions relied upon by respondent in alleging that petitioner failed to provide statistical data to the respondent's computer systems office as required by respondent's regulations. Petitioner submits a copy of a memorandum by a correction's officer responsible for data collection dated February 24, 2005, in which the officer states that the petitioner "complied and furnished this writer with FIS Law Library receipts." This evidence, contrary to the allegations made by the respondent, appears to demonstrate that the petitioner did efficiently perform her duties. In any event, such a sharp factual dispute precludes any summary determination that the petitioner violated the terms of the limited probation agreement.

"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." Tankard v. Abate, 159 Misc2d 339, 341 (Sup Ct, NY County 1993). The limited probation agreement here provided for summary termination only upon the commission of certain acts and to the extent there is a factual dispute as to whether those acts occurred, the respondent is required to hold a hearing to determine the truth of the allegations. Petitioner in this proceeding has come forward with credible evidence to rebut respondent's proffer of what it considered to be prima facie evidence that the probation agreement was violated. The court therefore holds that the petitioner is entitled to a hearing on the issue of whether the limited probationary agreement has been violated and petitioner's termination in the absence of such a hearing and determination resulting therefrom is arbitrary and capricious.

Accordingly, it is

ORDERED and ADJUDGED that the petition is GRANTED; and it is further

ORDERED and ADJUDGED that the respondent's determination terminating the employment of the petitioner is hereby VACATED; and it is further

ORDERED and ADJUDGED that this matter is remanded to the respondent to conduct a hearing after presentation of charges on petitioner's grievance in accordance with this opinion; and it is further

ORDERED and ADJUDGED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: April 20, 2007

ENTER:

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