

Matter of Nelson v Horn
2007 NY Slip Op 31595(U)
June 1, 2007
Supreme Court, New York County
Docket Number: 0113765/2006
Judge: William A. Wetzel
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. WILLIAM A. WETZEL
Justice

PART 50E

Index Number : 113765/2006
NELSON, CYBTHIA
vs
HORN, MARTIN F.
Sequence Number : 001
ARTICLE 78

EX NO. _____
OTION DATE _____
OTION SEQ. NO. _____
OTION CAL. NO. _____

Ti _____ tion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

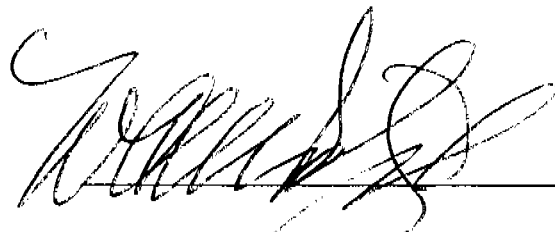
Upon the foregoing papers, it is ordered that this motion *is denied*

See the order of 6/5/07

So ordered

FILED
JUN 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/1/07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50E

In the Matter of the Application of CYNTHIA NELSON, ^x

Petitioner,

DECISION AND ORDER
Index No. 113765/06

-against-

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

Respondent.

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

^x

WILLIAM A. WETZEL, J.:

Petitioner, a corrections officer, employed by the respondent, brings this proceeding pursuant to Article 78 of the CPLR seeking to annul a decision by the respondent terminating her employment, and awarding her reinstatement and back pay. Alternatively, petitioner seeks an evidentiary hearing pursuant to CPLR 7804(h).

In 2005, petitioner was charged with violating the rules and regulations of the respondent in that she failed to report to a scheduled tour of duty, failed to inform her command of the reason for her absences, failed to report to a scheduled institutional search, and other related charges. Petitioner was given an opportunity to be heard as to these charges and thereafter she was found guilty of many of the charges. Petitioner was, however, given the opportunity to avoid termination by entering into a negotiated plea agreement dated March 31, 2005.

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The substantive terms of the agreement provided that her one year probation would be limited to "AWOLS" and "Latenesses". In this agreement, petitioner waived her rights as a tenured employee and subjected herself to termination as would apply to any other probationary employee. Both parties acknowledge that the termination of a probationary employee can only be set aside upon a finding of "bad faith" which would mean a constitutionally impermissible reason or a violation of statutory or decisional law. See Swinton v. Safir, 93 NY2d 758 (1999). The petitioner is not entitled to have the court review the decision "de novo" and substitute its judgment for that of the respondent. Petitioner has the burden of demonstrating, by competent proof, that a substantial issue of bad faith exists or that the determination was for an improper or impermissible reason. Mere speculation or bald conclusory allegations are insufficient. If petitioner hasn't met this initial burden, no hearing is necessary. See Tsao v. Kelly, 28 AD3d 320 (1st Dept. 2006).

Petitioner alleges that the respondent was terminated because she failed to provide medical documentation justifying three absences, failed to show up for work on two other dates, and furthermore, she was late for work eight times. Petitioner claims that these absences were all justified and documented, and were the result of her having the illness known as Lupus.

The respondent claims that on January 24, 2006, the petitioner called and said she was unable to report. She was told to obtain a doctor's note and to call back with an update. Petitioner responds that she was told by an unnamed individual to bring the note. She claims this was impossible due to her illness, and therefore she faxed it. Respondent denies receiving the note, and even in this proceeding, petitioner provides no copy.

Respondent alleges that a similar incident occurred on February 8, 2006, when petitioner called to inform them that she could not report due to illness and was told to send in a note. The same thing occurred on February 9, 2006. Petitioner states that she provided a note that was dated January 31.

Petitioner was absent on February 10, 2006, and was told to report, however, she failed to report and went to the emergency room sometime on February 10, 2006.

Further, the respondents state that the petitioner was late for work on eight dates. Petitioner merely states that her lateness was due to her illness.

It is understood that because of her probationary status, the respondent need only satisfy the court as to one or more of the violations and this court does not need to hold an evidentiary hearing as to each and every allegation. In that regard, the petitioner has failed to make an adequate showing that these absences and latenesses are justified and should have been excused.

Petitioner argues that all of these latenesses and absences are basically related to her illness and therefore she is entitled to protection under various state and federal statutes which protect an individual with a disability. This argument is easily rejected. In the first instance, while petitioner argues that all of her absences and latenesses were in some way related to a disability, she has failed to adequately document that fact, particularly with regard to her latenesses, and more importantly, she has failed to comply with the applicable rules and regulations involving notification and documentation. It cannot be said that her failure to comply with the rules and regulations should be protected even if the absences were legitimate.

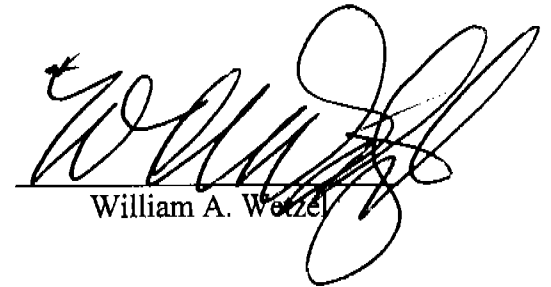
This petitioner was given a "second chance" under the terms of the negotiated plea agreement which had extremely limited conditions for her probationary status. This record demonstrates that she acted unilaterally in disregarding her obligations, and whether they were

related to her illness or not, they are a clear violation of the plea agreement. Petitioner has woefully failed to meet her burden of demonstrating otherwise.

For the reasons stated herein, the petition is in all respects denied.

This constitutes the Decision and Order of this court.

Dated: June 1, 2007
New York, New York



William A. Wezely

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