[*1] SCANNED ON 7/17/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 113980/2006
MEDARD, JERRY
vs
DOHERTY, JOHN J.
Sequence Number : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered, motion 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~~ Petition is decided in accordance with the attached

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

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)

Dated: 7/5/07

EMILY JANE GOODMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17
- -X

JERRY MEDARD, Index No. 113980/06

Petitioner,

-against-

JOHN J. DOHERTY, as Commissioner of the Department of Sanitation of the City of New York, and the City of New York,

Respondents.

- -X

EMILY JANE GOODMAN, J.S.C.:

Petitioner Jerry Medard is a probationary sanitation worker who was ordered to take a drug test following an arrest for marijuana possession, and was terminated for failing to produce an acceptable urine sample or provide a satisfactory explanation for that failure. In this Article 78 proceeding he seeks reinstatement, back pay and attorney's fees on the grounds that he suffered from a disability -- shy bladder syndrome -- which made compliance with the testing rules impossible. For the following reasons, the petition is dismissed.

Facts

Petitioner was appointed as a sanitation worker by respondent New York City Department of Sanitation ("DSNY") on May 31, 2005, subject to a one-year probationary period. Prior to

his appointment, he completed a medical questionnaire on which he denied having or being treated for any physical, mental or medical conditions which might interfere with his job performance. He also specifically denied ever having been treated for or having experienced urinary problems.

On May 9, 2006, the DSNY's Personnel Management recommended that petitioner's probationary period be extended for three months after it was discovered that he had lacked a valid driver's license for nineteen days. On May 13, 2006, petitioner was arrested for misdemeanor marijuana possession. As a result of the arrest, petitioner was ordered to undergo a drug test on May 16, 2006. The test was subject to the provisions of the Omnibus Transportation Employee Testing Act of 1991, 49 USC §§ 45101-07, which mandates drug testing for various transportation workers including those who operate commercial motor vehicles.

Petitioner provided a first urine sample at 10:00 a.m. that morning. In accordance with the regulations of the United States Department of Transportation, the person collecting the specimen did not watch petitioner urinate (see, 49 CFR § 40.69[d]). However, because the temperature of petitioner's sample was in excess of 100 degrees Fahrenheit, he was directed to consume water and produce a second sample under direct observation (see, 49 CFR §§ 40.65[b][5], 40.67[i], 40193[b][2]). When he attempted

to do so, at 11:00 a.m., he was unable to provide a specimen. Petitioner was then given another bottle of water and ordered to remain in the waiting room.

At noon, the sample collector returned to the waiting room and reported that there "was no sign of employee." Petitioner returned by 2:45 p.m. and was given another bottle of water to expedite urination. Petitioner attempted to provide a specimen at 3:00 p.m. but was unable to do so.

Because a sufficient sample was not provided within three hours of the first unsuccessful attempt, pursuant to 49 CFR § 40.193(b)(4), the collection efforts were discontinued. Petitioner was issued a form advising him that he must obtain, within five working days, an evaluation from a licensed physician with expertise in any medical issues raised by the failure to produce the urine specimen. The form also contained instructions directed to the examining physician, stating that he or she was required to make one of the following recommendations to the DSNY Medical Review Officer ("MRO"):

> 1. A medical condition has or with a high probability could have, precluded the employee from providing a sufficient amount of urine (45) ml.
>
> 2. There is not an adequate basis for determining that medical condition has, or with a high probability could have, precluded the employee from providing a sufficient amount of urine.

> 3. As the referral physician you must provide a written statement of your recommendations and basis for review by the MRO.

Finally, the form advised petitioner that the MRO would assess the referral physician's explanation, and that if it was insufficient petitioner would be charged with a refusal to test and be subject to disciplinary action. Petitioner was placed on limited duty for the five days until he was scheduled to return to the clinic with medical documentation. On May 23, 2006, DSNY received a one-sentence note from petitioner's family doctor which stated "Mr. Medard has a urinary problem and is having evaluation by urology." That day, pending further evaluation, DSNY suspended petitioner without pay for violation of its substance abuse policy, Policy and Procedure No. 95-05.

On May 24, 2006, petitioner visited a urologist who provided a note reading "34 y[ears] o[ld], Normal prostate, Shy Bladder, Encourage to drink more." Petitioner's attorney forwarded this note to DSNY on May 25, 2006. Upon consideration of the two physicians' notes, DSNY determined that petitioner had failed to adequately explain his failure to provide a urine specimen. Specifically, the MRO found that the May 22 note was not medically specific. As to the May 24 note, the MRO noted that it was submitted late, and did not establish, as required by 49 CFR § 40.193(e), either an ascertainable physiological condition or a

medically documented, pre-existing psychological disorder. The MRO noted that the urologist who wrote the later note was not qualified to diagnose shy bladder syndrome, a psychological condition, and that there had been no examination by a qualified psychologist or psychiatrist. Finally, the MRO observed that there was no record of a shy bladder diagnosis prior to the testing attempts. Consequently, on May 30, 2006, petitioner was terminated from his probationary position as sanitation worker.

Nevertheless, on September 21, 2006 DSNY received handwritten letter from petitioner's urologist. It stated as follows:

> I met with Jerry Medard on 05/24/2006 and saw him against on June 22, 2006. He has shy-bladder syndrome. Renal sonogram and bladder sonogram were normal. The patient's shy-bladder syndrome requires the patient to urinate in privacy, with someone outside the room if needed.

On September 27, 2006, DSNY received a letter from a psychologist with the Institute for Behavior Therapy who had treated petitioner since August 3, 2006. The letter indicated that petitioner had shy bladder syndrome, having "reported intense anxiety in regards to urinating anywhere outside of his home, and typically an inability to do so." After explaining the possible origins of the syndrome and stating that petitioner was complying with treatment, the psychologist suggested that

petitioner could be accommodated with alternative blood or hair testing, or through self-catheterization. Petitioner then timely commenced this Article 78 proceeding to challenge his May 30, 2006 termination.

Discussion

The petition is dismissed. A municipal agency may terminate a probationary employee for any reason or no reason, and without explanation, so long as the dismissal is not in bad faith (see, Nieves-Diaz v City of New York, 37 AD3d 356 [1st Dept 2007]; Matter of Swinton v Safir, 93 NY2d 758 [1999]; Matter of York v McGuire, 63 NY2d 760 [1984]; Matter of Che Lin Tsao v Kelly, 28 AD3d 320 [1st Dept 2006]). "[T]he burden falls squarely on the petitioner to demonstrate, by competent proof, that a substantial issue of bad faith exists, or that the termination was for an improper or impermissible reason" (Che Lin Tao, supra at 321). That burden is not met through speculation or bald, conclusory allegations (Id.) A violation of a general sanitation department regulation may justify termination, even under the higher standard applicable to non-probationary employees (see, Mallon v Doherty, 269 AD2d 282 [1st Dept 2000]).

Petitioner has failed to establish that DSNY's decision to terminate him for violating the department's substance abuse testing policy was made in bad faith. Although shy bladder

syndrome (or paruresis) is apparently a recognized psychological condition (see, e.g., Ollis v Bennett, 659459 WL 2006 [WDNC 2006][failure to treat properly diagnosed paruresis might violate prisoner's constitutional rights][unreported disposition]), the courts have routinely rejected suspicious or unsubstantiated attempts to invoke it in defense of failure to complete drug testing (see, Infante v Selsky, 21 AD3d 633, 634 [3d Dept 2005][hearing officer entitled to reject inmate's shy bladder defense to urinalysis testing on credibility ground where examining physician concluded it would not have prevented compliance within the allotted three-hour period]; Becker v Goord, 13 AD3d 947, 948 [3d Dept 2004][inmate claim of dry bladder syndrome unsubstantiated by medical records]; Zhong v Selsky, 307 AD2d 498, 499 [rejecting inmate's unsubstantiated claim that mental block prevented him from urinating in front of others]; Cruz v Goord, 302 AD3d 816, 816 [3d Dept 2003][rejecting shy bladder syndrome defense as not credible]). Furthermore, the relevant federal regulation governing what conditions may excuse the failure to provide a urine sample provides:

> For purposes of this paragraph, a medical condition includes an ascertainable physiological condition (e.g., a urinary system dysfunction) or a medically documented pre-existing psychological disorder, but does

> not include unsupported assertions of "situational anxiety" or dehydration.

(49 CFR § 40.193[e]).

Assuming, arguendo, that petitioner did in fact suffer from shy bladder syndrome on the day of his drug test, respondent was justified in terminated him based on the record before it at the time of the termination. Petitioner does not assert that his alleged shy bladder syndrome was then a "medically documented pre-existing psychological disorder." He did not disclose it on his pre-appointment medical questionnaire. There is no record that he raised the syndrome in the course of any of his three attempts to provide a sample. Notably, he was able to provide the first specimen despite his later claim of an inability to urinate outside of his home.

Furthermore, petitioner has failed to present any excuse for meaningfully raising the issue within the five-day deadline, or before his termination. As noted above, the first physician's note did not mention the condition at all. The second merely alluded to it without a formal diagnosis. The psychologist's opinion in late September 2006, was submitted well after the termination and failed to offer any opinion on whether petitioner suffered from shy bladder syndrome on the date of testing or whether it would have then prevented him from completing the test.

Petitioner's remaining arguments are without merit. His claim that he was terminated despite an extension of his probation is factually inaccurate. The alleged "extension" was merely a recommendation, related to his lack of a valid license, that was voided after his arrest and thus never took effect. Finally, his claim that he was treated differently from other similarly situated sanitation workers is unsubstantiated. Although he has submitted an approximately 150-name roster of employees who had their probation extended in lieu of termination, it is impossible to ascertain from the cursory reasons identified whether any of them had committed an infraction as serious as the raised here.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

This Constitutes the Decision and Judgment of the Court.

Dated: July 5, 2007

ENTER:

J.S.C.

EMILY JANE GOODMAN