

**Matter of Hyatt v Doherty**

2007 NY Slip Op 33233(U)

October 4, 2007

Supreme Court, New York County

Docket Number: 0104501/2007

Judge: Eileen A. Rakower

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

**EILEEN A. RAKOWER**

**Part 5**

PRESENT: \_\_\_\_\_ **J.S.C.**

PART \_\_\_\_\_

Index Number : 104501/2007

*Justice*

HYATT, ROBERT

INDEX NO. \_\_\_\_\_

vs

DOHERTY, JOHN

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

ARTICLE 78

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

the following papers \_\_\_\_\_ this motion to/for \_\_\_\_\_

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**  
PAGES NUMBERED  
OCT 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: October 4, 2007



**EILEEN A. RAKOWER** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
In the Matter of the Application of  
ROBERT HYATT

Petitioner,

Index No.  
104501/07

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

Decision  
And Order

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

-----X  
HON. EILEEN A. RAKOWER

Plaintiff, Robert Hyatt, brings this CPLR Article 78 proceeding seeking an order from the Court restoring him to his former position with the Department of Sanitation,(City) awarding him wages and benefits retroactive from the date of his termination and giving him attorney fees.

Petitioner was hired by City in October, 2001, and successfully completed his probationary period in October, 2002. On July 12, 2005, plaintiff was assigned for the day to work with a twenty year veteran of the Department, Conway, on a route in Queens, New York. Conway had been assigned to this particular route for the last eighteen years. A house at 153-02 76<sup>th</sup> Road (the house) was included on the route. On that same day that plaintiff was assigned to Conway's route, two Department of Buildings Inspectors were visiting the house at 153-02 to ascertain whether the men who were renovating the premises there were licensed to perform the work in progress. The Inspectors encountered two Asian men and began to make inquiries. Their efforts were fruitless, however, because, as Buildings Inspector Vitaly Zubry (Zubry) testified, the Asian men "did not really know how to speak English." They simply mumbled something that sounded like an Asian name. While Zubry was questioning them, he stated that one of the Asian men he was speaking to ran away to a parked car. He noted that Conway's truck was standing near the house. Petitioner left the passenger side of the sanitation truck and proceeded to the back

of the truck. The Asian man emerged from the parked car with two bottles of water, ran to the front of the truck and handed the bottles of water to the driver, Conway. Petitioner, "who had been emptying trash cans into the hopper, was standing by the back of the truck and was unaware of the interaction between one of the construction workers and Mr. Conway." Meanwhile Zubry retrieved a camera and took photographs of Petitioner standing by the back of the truck while at least two workers dumped construction debris into it. Buildings Inspector Zubry forwarded the photographs, which documented Petitioner permitting construction trade waste to be dumped into the truck, to the Department of Sanitation. These facts are uncontested.

Petitioner was served with a complaint in March, 2006, which stated that he had permitted civilians to load commercial waste into his City Sanitation truck in violation of City's rules. A hearing regarding the matter was held in July of 2006, before Administrative Law Judge Kara Miller (Miller) and in December of 2006, she issued her report. Miller found that during his testimony petitioner was "less than truthful" and he had, at the very least, "tacitly permitted the dumping of trade waste in the sanitation truck by passively observing the construction workers and not reporting the situation to his supervisor." Miller notes that trade waste regulation is an important part of City's goal to manage waste and prevent the misuse of City's resources. City requested petitioner's termination if he was found guilty of this charge. Miller's decision claims that there are few exceptions to that harsh sanction even when the worker is tenured and has had no prior disciplinary problems. Petitioner was such a worker, with five years tenure and an unblemished disciplinary record. Miller recommended termination and on January 8, 2007, defendant Commissioner of the Department of Sanitation accepted that recommendation and terminated plaintiff's employment.

Petitioner states that he does not disagree with the facts of this dispute but rather believes that the penalty of termination of his employment was excessive. City opposes the petition and argues that it should be transferred to the Appellate Division as a lack of "substantial evidence" claim. City claims that petitioner "directly disputes" Miller's findings that he did not report the incident to his supervisor when he points to a portion of Miller's findings which restates his testimony that he told Conway about the incident and Conway told him "not to worry about it."

As a threshold matter this Court finds that there is no need to transfer this petition to the Appellate Division. Petitioner does not dispute Miller's ultimate

finding that “he did not report to his supervisor that civilians had placed private construction waste in the collection truck.” During plaintiff’s deposition he was asked “[D]id you report [the incident] to the supervisor?” He answered “No, I did not.” Petitioner’s submission merely reiterates that he told Conway, a senior sanitation worker, about the incident. Miller’s report makes no explicit finding regarding the veracity of petitioner’s claim that he told Conway about the incident and all are in agreement that Conway was not petitioner’s supervisor.

The court notes that petitioner testified that he did not actually see anyone dump commercial refuse into the truck. Rather, he explains how he was engaged in putting back cans and picking up others when such dumping must have occurred. A photograph specifically impeaches petitioner’s testimony. Also, Zubry testified that he heard petitioner say “hurry up.” Miller found petitioner “less than truthful.”

Pursuant to CPLR § 7803(3), when a court reviews the “mode of penalty or discipline imposed” upon an individual by an administrative agency, the determination should be set aside “only if the measure of punishment or discipline imposed is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one’s sense of fairness.” (*Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]). “This calculus involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general.” (*Kelly v. Safir*, 96 N.Y.2d 32 [2001]).

Petitioner argues that the punishment of terminating his employment was unduly harsh because at least four other sanitation workers that he knows of committed the same offense as he did and were not discharged from their jobs. Petitioner also argues that his discharge was excessive because he was not given the opportunity to enter a guilty plea and receive a lesser punishment. Petitioner states that in each of the four cases he cites, the worker was permitted to enter a guilty plea and accept a thirty day suspension as his punishment.

City admits that petitioner was not given an opportunity to accept a plea bargain. City states that petitioner is “disingenuous” when he attempts to demonstrate that “he was treated more harshly [by City] than other sanitation workers in similar circumstances . . .” City continues that “the facts show that petitioner’s case is readily distinguishable from the four people he names.”

City explains that for each of the four workers that petitioner names, it was determined that they had no direct involvement with the prohibited dumping. City adds that in each of the four cases, the named worker's partner had accepted bribes to collect trade waste and in each of those cases the partner was terminated.

Here, despite petitioner's misrepresentations, Miller's finding was that petitioner merely acquiesced to the dumping. Miller explicitly found that petitioner did not take any gratuity from the men who dumped refuse in the truck. City brought disciplinary charges against Conway, but the charges were not resolved before he retired.

City sites to its own prior internal determinations for support, but supplies none of them. The only case law offered in support of City's determination in favor of termination is *Mallon v. Doherty* (269 A.D2d 282 [1<sup>st</sup> Dept. 2000]), a case which is readily distinguishable from petitioner's. In *Mallon, supra*, the record showed petitioner's "active participation in loading renovation debris . . . ."

Miller states that she considered petitioner's tenure and unblemished disciplinary record as mitigation for his transgression but his misrepresentations at trial were an aggravating factor in her recommendation to terminate his employment. This court acknowledges the importance of the integrity of the department and is mindful of the necessity that its employees adhere to its rules. Additionally, the court does not disagree with Miller that sanctions are warranted. However, this is not a situation which involves "grave moral turpitude and grave injury to the agency involved or to the public weal" (*Pell v. Board of Education, supra*). Thus, the court finds that the penalty of termination under the circumstances presented here is so disproportionate to the offense as to shock the court's sense of fairness. (*Id.*) Accordingly, the determination of the Department of Sanitation and John Doherty as Commissioner of the Department of Sanitation that petitioner's employment should be terminated is annulled and the matter is remitted to the Department of Sanitation for reconsideration and the imposition of an appropriate sanction. Wherefore it is hereby

ORDERED that the petition is granted to the extent that the determination which terminated petitioner's employment is annulled; and it is further

ORDERED that the matter of the complaint against petitioner is remitted back

to the Department of Sanitation for reconsideration of the sanction that would be appropriate.

All other relief requested is denied.

This constitutes the decision and order of the court.

DATED: October 4, 2007

  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
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NEW YORK  
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