

Marshall v Doherty

2007 NY Slip Op 33771(U)

November 16, 2007

Supreme Court, New York County

Docket Number: 0110585/2007

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PART **Part 5**

Index Number : 110585/2007
MARSHALL, JAMES
vs.
DOHERTY, JOHN J.(DEPT. OF SANITATION)
SEQUENCE NUMBER : # 001
ARTICLE 78

_____ tice

INDEX NO. 110585-07
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

ad on this motion to/for _____

PAPERS NUMBERED

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

1
2,3

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**

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 1418).

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

Dated: November 16, 2007



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

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

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

-----X

JOHN MARSHALL

Petitioner,

Index No.
405232-07

- against -

Decision
and Order

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

Mot. Seq. 001

Respondent(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
4115).

HON. EILEEN A. RAKOWER

Petitioner seeks an order from the court pursuant to CPLR Article 78, vacating respondents John Doherty, as Commissioner of the Department of Sanitation of the City of New York and the City of New York's (together, City) decision to terminate his employment, restore him to his former position, direct City to pay him back wages and award attorney's fees.

Specifically, petitioner was appointed as a probationary sanitation worker on October 17, 2005, and was required to successfully complete a one year term of probation. On October 4, 2006, the Personnel Management Division (PMD) recommended to the Evaluation Review Board (ERB) that his probation be extended for an additional six months. This recommendation resulted from of a number of infractions committed by petitioner over the course of his probationary period. Specifically, petitioner was late twice, was absent without official leave (AWOL), and was involved in a vehicular accident.

ERB voted unanimously to extend petitioner's probation until April 16, 2007. Petitioner successfully completed that extended probationary period until March 10, 2007, when he received another AWOL complaint. Petitioner states that he signed in for work on that date but was not present at his 3:00p.m. roll call and sign out time. Petitioner apparently returned to sign out approximately one-half hour after the p.m. roll call and called his supervisor to explain his absence, but his supervisor told him that "there was nothing he could do for him." On April 4, 2007 PMD recommended to ERB that petitioner should be terminated from his employment. This

recommendation was unanimously affirmed by ERB and in a one sentence letter petitioner was informed that his “services as a Sanitation Worker have been terminated under probation effective close of business April 09, 2007.” Thereafter, petitioner commenced this Article 78 proceeding.

Petitioner argues that his termination was improper because it does not comport with the criteria set forth in City’s guidelines. Specifically, Operations Order 2000-03, section (1)(a) states, in pertinent part,

1) Absent Without Leave (AWOL), Lateness, and Late/Absent Violations by

a) Probationary Sanitation Workers:

- Two(2) No Call, No Show AWOLs- recommend termination of employment.
- One (1) No Call, No Show AWOL - recommend at least three (3) months extension of probation
- Additionally, any combination of latenesses with or without AWOLS may result in probation extension or termination.

Additionally, General Order 98-06 states, in pertinent part, “Employees are considered AWOL if, on a day the employee is scheduled to work, they are not present for roll call and have not contacted their respective work location prior to the start of their work shift.”

Petitioner explains that on March 10, 2007, he was not AWOL because he worked the entire day, was in the facility locker room at sign out time and simply didn’t notice that it was 3:00 p.m. . Petitioner states that when he came downstairs at 3:25 p.m. he was told by a supervisor that he had been ordered to give petitioner a complaint.

The complaint, dated March 12, 2007, states that petitioner violated rule 1.2 because “[a]t 1500 HR. (3:00 p.m.) ROLL CALL CONDUCTED BY SUPV. C. CABURIS S.W. MARSHALL WAS NOT PRESENT. S.W. MARSHALL RETURNED FROM PAPER DUMP AT 1220 HRS. (12:20 P.M.) THAT IS WHEN HE WAS LAST SEEN” (sic.) Petitioner states that Rule 1.2 requires employees to sign in at the beginning of their shift and sign out at the end of their shift.

[* 4]

Petitioner argues that his failure to sign out on March 10, 2007 should not be considered AWOL because AWOL pertains to people who do not show up for the morning roll call and fail to contact their facility prior to their work shift. (Rule 1.2). Petitioner concludes that he did not have two AWOL violations as required for termination pursuant to Operations Order 2000-03 (1)(a) and therefore, he was erroneously discharged in bad faith, the decision was arbitrary and capricious and in violation of City's own rules and regulations.

City argues that, as a probationary employee, petitioner could have been terminated for any reason at all. City agrees that a dismissal in "bad faith" would be an exception to this rule but argues that the burden is on petitioner to prove "bad faith". City states that "bad faith" would require that petitioner's termination be for a constitutionally impermissible reason, or in contravention of statutory or decisional law. City argues that petitioner has not met his burden. City repeatedly points to the facts, as stated above and admitted by petitioner, as the lawful basis for his termination.

A court may only interfere with the determination of an administrative agency if there is no rational basis or foundation in fact for the action complained of and the exercise of discretion is arbitrary and capricious. Where a reviewing court finds that the administrative body has not acted arbitrarily but within its lawful authority, the court has no alternative but must confirm the determination. (*Matter of Pell v. Board of Educ.*, 34 NY2d 222. (1974)). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269 [1972]).

A probationary employee "may be dismissed for almost any reason, or for no reason at all" (*Venes v. Community School Board District 29*, 43 NY2d 520 [1978]) with there being an exception for a "bad faith" termination which violates petitioner's constitutional rights or is in violation of the law. (*Soto v. Koehler*, 171 AD2d 567 [1st Dept. 1991]; *Garcia v. New York City Probation Department*, 208 AD2d 475 [1st Dept. 1994]). A petitioner cannot meet his burden to demonstrate "bad faith" by conclusory allegations and the "judicial review of such a determination is limited to an inquiry as to whether the termination was made in bad faith." (*Soto v. Koehler, supra*). Additionally, it is "well settled that absenteeism or lateness constitute reasonable grounds to terminate a probationary employee." (*Ferone v. Koehler*, 160 AD2d 527 [1st dept. 1990]). This record contains numerous other factors that support City's decision and demonstrate a rational basis for petitioner's termination. (*Id.*).

[* 5]

Here, petitioner had three violations during his first year on probation which led to a six month extension of that probation. During his extended probationary period petitioner had two more violations, namely, another vehicular accident and the March 10, 2007, incident where he reported to work but then absented himself for two and one-half hours missing p.m. roll call and sign out. His argument that his dismissal was in "bad faith" is wholly conclusory and without support in the record.

It is not relevant to the court's review that City labeled this second incident AWOL pursuant to Rule 1.2 rather than or a violation of rule 1.4 which prohibits such absenteeism. Great deference must be given to an administrative agency in the interpretation of its own rules and regulations. (*Tommy and Tina Inc. v. Dep't of Consumer Affairs*, 95 AD2d 724 [1st Dept.1983]). City's decision to terminate petitioner was not in "bad faith" nor was it arbitrary and capricious because "any combination of lateness, with or without AWOLS may result in probation extension or termination." (Operations Order 200-03, (1)(a). Wherefore, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED and ADJUDGED that respondents' cross-motion to dismiss is granted.

All other relief requested is denied.

This constitutes the decision and order of the court.

Dated: November 16, 2007



EILEEN A. RAKOWER, J.S.C.

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).