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

PRESENT: Judith J Gische, JSC Justice PART 10

Aisloba A brew

- v -

John J Doherty et al

INDEX NO. 105500/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this 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

The within motion/petition is decided in accordance with the decision and order annexed hereto

FILED
DEC 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 11, 2007

J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Cristobal Abreu,

Petitioner

-against-

John Doherty, as Commissioner of the Department of Sanitation of the City of New York and the City of New York,

Respondents.

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Decision/Order
Index No.: 105500/07
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Notice of Pet and Verified Pet, exhs	1
Verified Answer w/exhs	2

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.;

Petitioner Cristobal Abreu is a former probationary sanitation worker and the respondents are his former employers. Petitioner contends that the respondents' decision to terminate his employment was without sound basis in reason, and therefore, arbitrary and capricious. He seeks review of that decision by this court pursuant to Article 78. CPLR § 7803 et seq. Respondents have answered the petition and asks that it be dismissed on the merits without a hearing, based upon the record before the court.

Since this proceeding was commenced timely and is from a final determination by the Department of Sanitation, it is ripe for consideration and will be decided on the merits. CPLR § 217 (1).

Facts Presented and Arguments Made

Petitioner was hired as a probationary sanitation worker on July 18, 2005. His probationary period was for one year, as section 16-06 of the New York City Administrative Code provides. Just before he completed his probation, the Evaluation Review Board ("ERB") met to decide whether petitioner had fulfilled his obligations as a probationary employee and should be made a permanent employee. At this meeting held on June 29, 2006, the ERB voted that petitioner's probation be extended by six (6) months. The reason provided in its decision was as follows:

"S/W Abreu has been on a #4 MDA since May 27, 2006. He is currently undergoing a cardiac and gastrointestinal workup due to shortness of breath and chest pains. Extension is requested to allow for appropriate testing as well as to determine his ability to sustain regular duty. The Personnel Management Division concurs with the Medical Division. In addition, on 10/23/05 S/W Abreu incurred a complaint for AWOL."

Following that vote, Mr. Piazza, the Director of Human Resources requested permission to extend petitioner's probation stating that this "will allow the department to determine Mr. Abreu's ability to sustain the duties of his title." In relevant part, the consent provides as follows:

> "I understand that any extension of probation made pursuant to this consent does not include and is in addition to, any extension I may receive or have received due to . . . being absent due to sick leave, vacation, and any other leaves

without pay . . .

According to petitioner, the AWOL marking was undeserved because he had tried to call his supervisor on October 23, 2006 to call in sick but no one answered the phone. He took cold medicine and fell asleep, waking up well after his shift had begun. Nonetheless, as a result of signing the consent order, petitioner's probation was extended to January 17, 2007.

On November 25, 2006, before the completion of his extended probation, petitioner was delayed in getting to work. He contends that he was stuck on a delayed "R" train and could not phone in to work to let his supervisor know he would be late. Petitioner does not deny that General Order 98-06 sets forth the department's lateness/absence policy or that according to this order, or that an employee will be considered AWOL if s/he does not contact his or her supervisor 30 minutes before the start of his or her shift. Petitioner contends, however, that once he arrived at the station near his depot, he immediately called his supervisor to let him know what had happened and that he would be there in a few minutes. Petitioner's supervisor ordered him not to come in, and told him to go home. Petitioner contends he was only 5 – 10 minutes late when he called, and should have been allowed to come in. He contends he was later told he could have – and should have - called in for "emergency" leave, but was not given this option at the time, though available. This claim is based upon the following provisions of General Order 98-06 which provides that:

> "An employee who is in route to work, but due to an emergency, cannot call and arrives at the work location within fifteen (15) minutes after the start of the work shift,

> may be allowed to work at the discretion of the Borough Superintendent/ Unit Head. If the employee is allowed to work, a notation will be made in the remarks section of the time book [that it is a lateness]. If the employee is not allowed to work, they will be carried in the time book as 'A." The supervisor of the employee will refer to the AWOL section of this order and follows the procedures outlined."

As a result of the events of November 25, 2006 events, a complaint for AWOL was written up against petitioner. The complaint states that:

"On Saturday 11/25/06, S/W C. Abreu was no call, no show for his 4pm to 12 am shift. S/W Abreu was marked A.W.O.L. in the time book and deducted 8 hours pay. As a result this will be S/W C. Abreu's 1st AWOL within the last 12 months."

A probation evaluation interview was held on November 27, 2006, based on that complaint. At that interview petitioner provided the counseling supervisor with a letter from the MTA indicating the "R" train he had been on had, in fact, arrived 5 minutes late. On the form prepared following the interview, the counseling supervisor wrote that petitioner should have "called emergency" that day if he could not make the shift. The recommendation of the counseling supervisor following the interview is an AWOL marking with a three (3) month extension of petitioner's probation.

Thereafter, on December 26, 2006, petitioner was recommended for termination because "S/W accrued his second AWOL while on extended Probation." In an internal memo from the deputy commissioner to the commission dated January 4, 2007, it is noted that the ERB had placed petitioner on extended probation "due to an AWOL. During his extended period, S/W Abreu incurred an additional complaint for AWOL, which resulted in two (2) AWOLS during his probation period." Petitioner's probation

record was an attachment to that memo. It shows that petitioner had no other lateness, and an otherwise satisfactory work record, except for another marking in October 2006. On January 8, 2007, petitioner was terminated from the department.

Petitioner contends he has never been AWOL, but that if these markings were entered against him, they were because departmental policies and procedures failed to work as they should have, winding up with his being unfairly penalized.

Petitioner claims that he tried to call in sick in October 2006, but incurred the AWOL because no one was available to take his sick call at 4:00 a.m. He contends, and respondents do no deny, that there is supposed to be someone on duty to take calls because the department has round the clock shifts. Thus, petitioner contends that since there was no answering machine, and he was sick and fell asleep, the system in place failed him.

As to the November 25th incident, petitioner contends his supervisor should have let him come in (i.e. a foot race to see how late he would be), or given him the option of taking emergency leave. Petitioner contends that he called in to work as soon as he could, therefore he did not violate Operations Order 2000-03 (which is now 2005-10), as respondents contend, therefore he was not AWOL because he was not a "no call, no show."

To support the decision to terminate petitioner, and in opposition to the petition, respondents allege that petitioner was properly charged with AWOLs each time and that his probation was extended because of the first AWOL. As to the first AWOL marking, respondents allege that it was earned because petitioner did not call in. They

provide the call in log for October 23rd which shows calls starting at 7:00 am that day; no calls are logged before that time.

As for the second AWOL, respondents argue that because petitioner should have called before his shift began at 4pm on November 25, 2007, but he did not, the only option was to consider him AWOL, and because he had two AWOLs, his termination was justified, comporting with departmental requirements. Respondents rely upon Operations Order 2005-10, providing that the department can terminate the employment of a probationary, sub-managerial uniformed employee who incurs two (2) "No Call, No Show" AWOLs. This order also provides, however, that a probationary employee with one (1) AWOL can receive a recommendation for a minimum of three (3) month extension of his or her probation.

Respondents also rely upon General Order 2002-06. It requires that department employees report to work on time. It also provides, however, that an employee who cannot report to work on time has to call "at least one hour before their assigned tour of duty and notify the Department that they are unable to report to work. The employee must give a valid reason for the emergency leave and must submit verifiable proof of the emergency within 48 hours." If an employee is unable to call an hour before their scheduled tour, then they must provide a reason that is "acceptable to the Department. . ." It is respondents' contention that the supervisor properly used his discretion to not have petitioner report to work based upon the proof petitioner later provided, which is a letter from the MTA stating that petitioner's train was delayed, but only 5 minutes. It is respondents' further contention that petitioner violated General Order 98-6 which

provides that a sanitation worker will be considered AWOL if he is not present for roll call and has not called in before the start of their shift.

Discussion

A probationary employee can be dismissed "without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law . . ." Matter of York v. McGuire, 63 N.Y.2d 760, 761 (1984). The terminated employee has the burden of raising and proving his termination was in "bad faith" by presenting evidence tending to show that is the case. Soto v. Kohler, 171 A.D.2d 567 (1st Dept 1991). It is not for the court to "second guess" the agency's decision to terminate the probationary employee. Soto v. Kohler, *supra*.

When petitioner called his supervisor on November 25, 2006 he was late no more than 5 – 10 minutes. He explained why he could not call before his shift had started, but was already walking towards the sanitation depot where he was stationed, no more than a few blocks away. Even under the most stringent of the operations orders cited by each side, petitioner was not a "no call, no show," but really a late caller. Although an employee will be deemed AWOL if s/he does not call before the start of his or her tour, the supervisor has the discretion to let the worker come in for his or her shift, provided the lateness is within 15 minutes of the scheduled start of the shift. Here, petitioner was actually penalized by calling his supervisor to let him know he was minutes away from the depot. Moreover, the complaint indicates that petitioner was marked as a "no call, no show." There are employees who are true "no calls, no shows" and those who are deemed "no call, no show." Under the circumstances of this case,

and in light of the severe consequences the second AWOL marking had, this distinction is critical.

The court further considers that the record that the ERB had before it and considered was internally inconsistent. On the one had the complaint was issued because petitioner did not call in on November 25, 2006 – which is not supported by the facts. On the other hand, the ERB terminated petitioner because he had two AWOLs and was, allegedly, on extended probation for the first AWOL. It is unclear whether the ERB was aware that petitioner was instructed not to report to work on November 25th by his supervisor who did not give him any less severe options, such as letting him call in as an emergency. Thus, in deciding whether to terminate its employee, the department necessarily had to also consider whether the decision to not allow petitioner report to work was consistent with departmental policies and orders.

Although respondents now argue that the excuse petitioner ultimately offered (a train delay) was inadequate because he started his commute too late that day, therefore it would not have supported his request for emergency leave, this is an argument offered with the benefit of hindsight. Moreover, no argument is made that the excuse was unacceptable for a "routine" lateness. Since the complaint before the ERB showed petitioner as a "no call, no show" and not a late caller, it is unclear whether these circumstances were given due consideration.

Though the events of October 23, 2006, and whether petitioner was properly marked AWOL, are not directly before the court for its review, the ensuing extension of his probation is discussed extensively by each side, and played into the ERB's decision to terminate petitioner. Although petitioner did have a complaint for an AWOL, his

probation was extended to see if he could handle the rigors of his job because he was being tested for certain ailments at the time. An extension for an AWOL complaint would have resulted in a three (3) month extension of probation, along with pay being docked from the employee's pay for the missed day. Petitioner was not docked any pay, but received a longer probation of six (6) months. Thus, the express reason provided in the recommendation to extend, plus the circumstances of the AWOL call into question whether the AWOL was ever formally acted on, though carried on the books and part of his record.

Finally, the court considers that the penalty imposed – termination from employment - was disproportionate to the offense committed, under the specific facts of this particular case. Aside from these two incidents, petitioner had a satisfactory work record. Hutchinson v. Lloyd, 216 A.D. 3d (1st dept 1995).

Based upon the totality of the circumstances, the court finds that the record below is not sufficiently developed to determine whether the ERB acted in good faith in terminating petitioner, a probationary employee. In re Soto, 171 AD2d 567 (1st dept 1991). Petitioner has demonstrated that facts substantially at odds with the ERB's finding exist, and there is no indication that these facts were considered. Nieves-Diaz v. City of New York, 37 AD3d 320 (1st dept 2006); *cf* Soto v. Koehler, 171 AD2d 567 (1st dept 1991). It does not appear that the ERB knew or considered that the petitioner's supervisor instructed petitioner not to report to work, but to go home, even though petitioner was already off the train, on foot, and on his way to the depot. Nor does it appear to have considered that his supervisor did not give petitioner the option of using emergency leave, or even that any of the other, less severe penalties found in

any of the operations orders were considered. This matter is, therefore, remanded to the Department of Sanitation so that the ERB can review the record, with this court's order, to consider whether there were other less severe remedies that should have been applied under the circumstances, such as an extension of probation, rather than termination.

Petitioner's petition is, therefore, granted to the extent provided.

Any relief not expressly address has been considered and is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York

December 11, 2007

So Ordered:

Hon. Judith J. Gische, JSC