

Quick v Horn

2008 NY Slip Op 30086(U)

January 8, 2008

Supreme Court, New York County

Docket Number: 0114839/2006

Judge: Joan Madden

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.

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

PRESENT. Hon. Joan A. Mader

Index Number : 114839/2006

PART 11

QUICK, APRIL

vs HORN, MARTIN F.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 9-20-07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for ^{applicably} Article 78 which

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

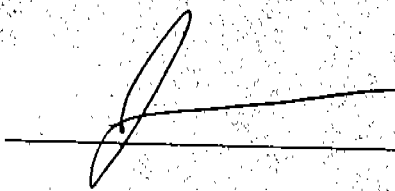
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision and Order.

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

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 8, 2008


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 : IAS PART 11

-----X
APRIL QUICK,

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

-against-

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

Respondents.
-----X

Index No. 114839/06

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE

Joan A. Madden, J.:

In this Article 78 proceeding, petitioner April Quick challenges the determination of respondents Martin Horn, Commissioner of the New York City Department of Correction, the New York City Department of Correction ("DOC"), and the City of New York terminating her employment as a probationary correction officer as arbitrary, capricious, and in bad faith. Petitioner seeks a judgment annulling the determination and awarding her reinstatement with full pay and benefits or, in the alternative, directing that a hearing on the circumstances underlying the termination be held pursuant to CPLR 7804 (h). Respondents submit a verified answer opposing the petition.¹

Background

Petitioner was employed by the DOC as a probationary correction officer from August 12, 2004 through June 15, 2006. On December 30, 2005, a complaint was filed with the New York

¹By interim order dated May 29, 2007, this court denied the DOC's cross motion to dismiss the petition and directed the DOC to serve and file an answer on the ground that petitioner had adequately pleaded that the DOC had acted in bad faith.

City Department of Investigation ("DOI") against petitioner by a person identifying himself as a parole officer named Johnson Robenson ("Robenson"), who alleged he was assigned to a former inmate and parolee named Rashid Stanley ("Stanley"). The complaint alleged that while visiting Stanley, Robenson noticed petitioner's uniform hanging in Stanley's apartment². In response DOC initiated an investigation concerning her undue familiarity with Stanley. DOC subsequently closed the investigation, without filing charges against petitioner and noted that Stanley had moved out of petitioner's residence, and that petitioner stated that she did not know she was required to report that she was living with a parolee who was not incarcerated.

In her affidavit, petitioner states that she resided with Stanley from November 2002 until December 2005, when Stanley moved out of their apartment at petitioner's request. Petitioner also states that Stanley's parole officer since January 2003, was an individual named Ms. Caren Kramer, and that she spoke to Ms. Kramer after the first complaint and Ms. Kramer informed her that she did not know anything about the complaint or that petitioner was a corrections officer.

According to petitioner, on February 21, 2006, she left her apartment at approximately 9:30 p.m. on her way to work an 11-p.m.-to-7-a.m. tour at Riker's Island. As she arrived at her car, Stanley approached her, verbally harassed her, grabbed her by her jacket, pushed her against her car, picked up a glass bottle in a threatening manner, cursed at her, and threatened to kill her. Stanley also threatened to have petitioner fired from her position as a probationary correction officer.

According to petitioner, following the incident, she immediately proceeded to Riker's

² In her affidavit, petitioner states that she kept her uniform in her locker at Riker's Island and not in her residence so the statement by Robenson regarding seeing her uniform in the apartment is untrue.

Island, where she advised Captain Ryan of Stanley's threatening behavior, and thereafter as instructed by Captain Ryan, reported the incident to Deputy Warden Jones, who directed her, accompanied by two escorts, to file a domestic violence incident report with the New York Police Department (NYPD) at the 75th precinct. Petitioner states that she immediately complied with the order and also prepared and sent a written incident report to Warden Nadine Felton, and submits copies of both incident reports, each dated February 22, 2006.

Also on February 22, 2006, an individual purporting to be Robenson contacted DOI with another complaint about petitioner and Stanley. In an unsworn and undated statement, on Division of Parole letter head, indicating that it was faxed from "the Village Copier," the purported Robenson advised the Investigation Division of DOC that, on February 21, 2006, Stanley reported to him that the day before while driving petitioner's car with petitioner's shield on the dashboard, he had been pulled over by police officers from the 79th precinct. The statement also indicates that Stanley advised Robenson that he told the officers that the shield belonged to petitioner, that the officers placed Stanley under arrest for impersonating an officer, and that Stanley telephoned petitioner, who went to the 79th precinct and retrieved her shield and identification, advising that she had left them in her automobile by mistake.

According to the statement, Stanley was not charged and was released from custody, and that during his visit with Stanley, Robenson spoke to petitioner, who asked him not to find Stanley in violation of his parole because the mistake was hers, not Stanley's. The statement also indicates that when Robenson attempted to obtain a copy of the police report from the 79th precinct, he discovered no record of the traffic stop or arrest was on file.

It is alleged in the verified answer that on March 9, 2006, a DOC investigator spoke to an

individual who identified himself as parole officer Robenson. Robenson told the investigator that petitioner was no longer living with Stanley, that he had spoken to petitioner who told him that Stanley did not steal her car or identification and that she did not want to get Stanley in trouble. Robenson also informed the investigator that he had tried to retrieve the paperwork regarding Stanley's arrest but was unable to retrieve it.

DOC ordered petitioner to report on March 23, 2006 to the DOC Investigation Division for an interview regarding the manner in which petitioner's shield and identification came to be in the possession of a New York State parolee, pursuant to Mayor's Executive Order No. 16.³ During the interview at which petitioner provided sworn testimony, the investigators asked petitioner whether she had lost her DOC shield and identification, whether she had permitted Stanley to use her automobile or allowed him to come into possession of her DOC shield and identification, and whether she had ever retrieved these items from the 79th precinct. Petitioner, who was represented by an attorney supplied by her union, testified that she had never lost these items, never permitted Stanley to possess them or to drive her automobile, and never retrieved the items from the 79th precinct.

Petitioner further testified that around the time of this alleged incident, which she denied occurred, Stanley had harassed her outside her building, and that she reported the incident to the Deputy Warden at Riker's Island who sent her with two escorts to the 75th precinct to file an incident report. Significantly, the DOC failed to make any inquiry at the hearing to verify petitioner's testimony that she reported the harassment incident to the Deputy Warden or that as

³ Mayor's Executive Order No. 16, as amended in 1986, gives each agency responsibility for prosecution of all formal administrative proceedings, including removal and other disciplinary proceedings for misconduct or incompetency.

per his instruction, accompanied by two escorts, she filed an incident report at the 75th precinct.

In an investigative report issued in May 2006, the DOC Investigation Division concluded that petitioner had given false and/or misleading statements during the interview and had in fact permitted a parolee to possess her shield and identification. DOC based this determination on the discrepancies between Robenson's unsworn verbal and written statements to the Investigation Division and petitioner's sworn testimony.

Petitioner now seeks an order annulling DOC's determination as arbitrary, capricious, and in bad faith or, in the alternative, directing that a hearing on the underlying circumstances be held. In support of her application, petitioner asserts that Robenson is not a parole officer and is a fictitious person, that the complaint against her was fraudulent, that she never spoke to any individual named Robenson about Stanley, and that she never lost her DOC shield and identification, and that, therefore, she could not have retrieved these items from the 79th precinct.

In support of her allegations that Robenson is fictitious, petitioner has submitted an affidavit by Cassandra Allison, a labor relations representative employed by the New York State Executive Department, Division of Parole (the Division). In her affidavit, Allison attests that her search of the Division's personnel records and files has revealed that the Division did not employ an individual named "Johnson Robenson" or "Johnson Robinson" in 2005 or 2006 in any capacity, including that of parole officer (see Cassandra Allison Aug. 23, 2007 Aff., ¶ 4; see also Allison Aug. 6 and Aug. 17, 2007 letters). Allison also identified by name the two individuals, both female, who were alternately assigned as Stanley's parole officers from March 26, 2002 through June 26, 2006, when Stanley was discharged from the Division's supervision. With regard to Robenson's statement, Allison attests that, although the statement appears to be written

on Division letterhead, the Division has no record of it (id., ¶ 6).

In opposition, DOC argues that its determination to terminate petitioner's employment based wholly on statements of an individual purporting to be Robenson was rational since petitioner's employment was probationary and, therefore, petitioner could be terminated for any reason or no reason, in the absence of bad faith, and that petitioner has failed to set forth any evidence of bad faith by the DOC.

Discussion

It is well established that judicial review pursuant to CPLR article 78 is limited to determining whether the administrative determination is supported in law and is rationally based in the administrative record; if so, the determination should not be disturbed (Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 [1974]; see CPLR 7803 [3]).

As petitioner is a probationary employee she "may be discharged without a hearing and without a statement of reasons as long as the act is done in good faith and not for constitutionally impermissible purposes." Rainey v. McGuire, 111 AD2d 616, 618 (1st Dept 1985). The petitioner bears the burden of demonstrating that the respondents lacked a good faith reason for their determination, and must present evidentiary facts sufficient to raise an issue of bad faith, illegality, or arbitrary and capricious conduct. Id ; see also, Matter of Sachs v Board of Educ. of Mineola Union Free School Dist., 71 AD2d 898 (2d Dept 1979), affd 50 NY2d 830 (1980); Matter of Witherspoon v Horn, 19 AD3d 250 (1st Dept 2005).

Here, petitioner has met this burden by producing evidence suggesting that respondents acted in bad faith and/or arbitrary or capricious manner in terminating her employment based on

the unsubstantiated and unverified statements of an individual named Robenson who purported to be Stanley's parole officer. Notably, Robenson's written statement bears indications that an investigation into the writer's credentials and the statement's authenticity was warranted. Thus, the statement contains obvious spelling errors, such as "pricent" instead of "precinct" and "A pon" instead of "upon." In addition, the statement has a facsimile marking from "The Village Copier," indicating that it was sent from a private copy company, rather than from the Division office.

The statement also does not include an office telephone number for Robenson. Robenson apparently verbally supplied a cell phone number to the DOC Investigative Division which is listed as Robenson's contact number on the DOC report and personnel determination review. However, petitioner has submitted a Sprint invoice dated July 10, 2007 that indicates that the number is Stanley's personal cell phone number.

Furthermore, respondents do not allege that they made any attempt during the investigation to verify that Robenson was employed as a parole officer, was assigned to supervise Stanley, or that the events described in the Robenson statement actually occurred, despite numerous indications that such investigation was necessary, including petitioner's statements regarding the incident involving Stanley on the same date that the individual purporting to be Robenson filed his second complaint against petitioner, and despite petitioner's sworn denial of all allegations of wrongdoing at her interview. While the respondents rely on Robenson's verbal and written statements to oppose the petition, they provide no evidence to controvert petitioner's proof that Robenson is not a parole officer or a real person or that the events reported in the statement occurred. Furthermore, evidence suggesting bad faith includes respondents' failure to

inquire as to whether petitioner reported the harassment incident involving Stanley to the Deputy Warden, and whether petitioner, as instructed, reported the incident to the 75th precinct with two escorts, which presumably could have been verified by DOC records.

Under these circumstances, as petitioner has raised a substantial issue regarding her dismissal, a hearing pursuant to CPLR 7804(h) is required to determine whether respondents acted in bad faith or an arbitrary or capricious manner when they terminated petitioner's employment as a probationary correction officer. See Ch Lin Tsao v. Kelly, 28 AD3d 320, 321 (1st Dept 2006) ("a hearing may be necessary in those instances where an issue of substantial nature is raised regarding a probationary employee's dismissal"); Doolittle v. Lettiere, 202 AD2d 991 (4th Dept 1994) (holding that "evidence submitted by petitioner, consisting of his own affidavit and those of his co-workers was sufficient to raise a question of fact on the issue of respondents' bad faith"); Miciotta v. McMickens, 118 AD2d 489 (1st Dept 1986) ("where a substantial issue is raised that the termination was not due to the failure to perform satisfactory service during the probationary period, but was due to causes unrelated performance").

Moreover, Weir v. Bratton, 4 AD3d 160 (1st Dept), lv denied, 3 NY3d 611 (2004), cert denied, 545 US 1140 (2005) on which respondents rely in opposition is not to the contrary. Although in Weir, it was held that respondent's reliance on erroneous information in connection with the termination of a probationary employee did not amount to bad faith, such a determination was made based on the particular facts of that case, and only after a hearing was held by the trial court in accordance with CPLR 7804(h).

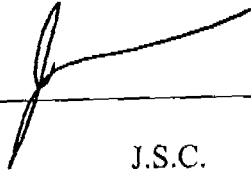
Accordingly, it is

ORDERED that the petition is granted to the extent of directing that a hearing be held on

the issue of whether respondents acted in bad faith or an arbitrary or capricious manner when they terminated petitioner's employment as a probationary correction officer; and it is further

ORDERED that such hearing shall be held in Part 11, room 351, 60 Centre Street, New York, NY, on January 25, 2008, at 10:00 am.

Dated: January 8, 2008



J.S.C.

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE