

Matter of Malone v Horn
2008 NY Slip Op 30111(U)
January 14, 2008
Supreme Court, New York County
Docket Number: 0108250/2007
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~JUDGE SHIRLEY WERNER KORNREICH~~

PART 54

Index Number : 108250/2007

MALONE, TERRANCE

INDEX NO. 108250/07

vs

HORN, MARTIN

MOTION DATE 10/18/07

Sequence Number : 001

MOTION SEQ. NO. 1

ARTICLE 78

MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion to/for Article 78

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

PAPERS NUMBERED	
1, 2	
3	
4, 5, 6	

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

FILED

JAN 17 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/14/08

[Signature]
HON. SHIRLEY WERNER KORNREICH
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 54

----- X
In the Matter of the Application of

TERRANCE MALONE,

Petitioner,

Index No.: 108250/07

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

DECISION
and ORDER

-against-

MARTIN HORN, Commissioner of the New York
City Department of Correction; THE NEW YORK
CITY DEPARTMENT OF CORRECTION, MARTHA
K. HIRST, Commissioner of the New York City
Department of Citywide Administrative Services, THE NEW
YORK CITY DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES, ROBERTO VELEZ,
Chief Administrative Law Judge, DONNA R. MERRIS,
Administrative Law Judge of the New York City Office of
Administrative Trials and Hearings, THE NEW YORK CITY
OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS,
and THE CITY OF NEW YORK

FILED
JAN 17 2008
NEW YORK
COUNTY CLERKS OFFICE

Respondents.

----- X
KORNREICH, SHIRLEY WERNER, J.:

Pro se petitioner Terrance Malone (“petitioner” or “Malone”), a tenured Correction Officer employed by respondent New York City Department of Corrections (“DOC”), brings this Article 78 proceeding and seeks a judgment: (1) vacating and annulling respondent DOC Commissioner Martin Horn’s (“Commissioner Horn”) decision to accept Administrative Law Judge Donna R. Merris’ (“Judge Merris”) recommendation to suspend petitioner for sixty days without pay; (2) ordering that petitioner’s record be expunged of such suspension; (3) ordering

that respondent The New York City Office of Administrative Trials and Hearings (“OATH”) expunge from its database and website petitioner’s personnel records; (4) ordering that DOC overhaul its entire disciplinary system; (5) ordering that Horn be removed from office; (6) ordering that respondent Chief Administrative Judge Roberto Velez be removed from office; (7) ordering that Judge Merris be removed from office at OATH; (8) ordering that the City of New York overhaul OATH; (9) ordering that petitioner’s sixty day suspension be stayed, annulled and vacated; and (10) ordering that the City of New York completely overhaul the executive administration of OATH. Respondents oppose.

I. Background

On the morning of February 4, 2005, Captain Gerald Davis (“Captain Davis”), petitioner’s supervisor at the Anna M. Kross Center (“AMKC”) sounded an alarm requiring all members of AMKC’s response team to immediately report and address an incident that arose at the prison. A response team is a group of officers who address any problems that arise inside the facility. Following the disturbance, Captain Davis noticed that Malone did not report as ordered. In fact, Malone gave his equipment to Correction Officer Williams and asked her to replace him on the response team, while he remained at his post. Captain Davis then proceeded to call Malone at his post to inquire as to why he not only did not respond to the alarm, but also why he gave Officer Williams his equipment without telling anyone. Captain Davis testified that it was his intention to instruct Malone on proper procedure so that this type of situation could be avoided in the future. However, during the initial phone call, Malone hung up on him in mid-sentence. Captain Davis then called back and Malone proceeded to hang up on him a second time.

Captain Davis decided to go down to where Malone was stationed to speak with him face to face and ask him to prepare a written report explaining his actions. During their conversation, Captain Davis again attempted to explain to petitioner why his actions were improper. Malone became annoyed and refused to discuss his actions. Captain Davis then noticed that the insignia on Malone's uniform was incorrect. Petitioner was wearing a large older type insignia on his collar instead of the new smaller version. Captain Davis, therefore, in accordance with DOC procedure, asked to inspect Malone's utility belt. During the inspection, Captain Davis discovered that Malone was missing his utility knife. DOC procedures require all correction officers to have their utility knives clipped to their utility belts while stationed at their respective posts. Malone thereupon became agitated accusing Captain Davis of harassing him. He threw his keys and pushed Captain Davis in the chest.

On August 8, 2005, petitioner was served with charges and specifications for violations he allegedly committed stemming from this incident. Specifically, he was charged with violating approximately fourteen different DOC rules and regulations for "conduct unbecoming an officer" and failing to fully and efficiently perform his duties by: (1) leaving his post and surrendering his equipment to a fellow officer; (2) twice hanging up on and terminating the transmission of his supervisor Captain Davis; (3) abandoning his post and throwing his keys during a conversation with Captain Davis; (4) assaulting Captain Davis; (5) failing to be in proper uniform; and (6) transmitting a false/ and or misleading report concerning the incident.

Pursuant to DOC regulations, a hearing was held at OATH before Judge Merris on June 5, and 26, 2006. At the hearing, petitioner was represented by counsel. Both sides offered numerous documents and exhibits into evidence and were afforded the opportunity to call and

cross-examine witnesses. DOC called four witnesses to testify on its behalf; petitioner neither called a witnesses nor testified. Following the hearing, Judge Merris allowed each side to present post-hearing memoranda of law in further support of their positions.

On January 11, 2007, Judge Merris issued her report to Commissioner Horn. She sustained five of the six charges leveled against petitioner and recommended that he be suspended for sixty days without pay. Petitioner, through counsel, was then advised of his right to submit a letter to Commissioner Horn challenging Judge Merris' findings and to support his position as to why Commissioner Horn should not implement the proposed suspension. Petitioner's counsel submitted such a letter on January 29, 2007. On March 8, 2007, petitioner was notified by letter that Commissioner Horn affirmed Judge Merris' decision on February 22, 2007, and petitioner was suspended for sixty days without pay. Petitioner thereafter commenced the instant proceeding, pro se, on June 13, 2007.

II. *Conclusions of Law*

CPLR section 7803 provides that an Article 78 proceeding raises the question: "Whether a determination was made in violation of lawful procedure, was effected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." A court reviewing an Article 78 proceeding must judge the propriety of an administrative action solely on the reasons cited by the administration. *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Such an action must be upheld unless it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000).

Malone argues that OATH lacked jurisdiction over the proceeding and, thus, Judge

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Merris was not authorized by law to preside over his hearing. Specifically, Malone argues that pursuant to Civil Service Law § 75(2), Judge Merris did not obtain written consent from Commissioner Horn authorizing her to hear his case. According to petitioner, Civil Service Law § 75(2) mandated that Commissioner Horn should have held the hearing, and that his failure to do so and subsequent acceptance of Judge Merris' report and recommendation was arbitrary and capricious.

Civil Service Law § 75(2) permits the officer or body with power to remove or sanction a civil servant, to designate in writing a deputy or other person to conduct administrative trials and hearings in any and all disciplinary matters. *See* Civil Service Law 75(2); *Wiggins v. Board of Educ. of the City of New York*, 60 N.Y.2d 385, 387 (1983). When a deputy or other person is so designated, he "shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision." Civil Service Law 75(2). Without such written designation authorizing the deputy or other person to conduct the hearing, the removing board or officer does not have jurisdiction to discipline the civil servant. *Wiggins*, 60 N.Y.2d at 387.

In her decision, Judge Merris, in addressing these jurisdictional concerns, stated that pursuant to Civil Service Law § 75(2), OATH had jurisdiction to conduct the proceeding. Judge Merris referenced a letter of May 19, 1992 from then DOC Commissioner Abate to then Chief Judge McFaul which states, inter alia, that:

Pursuant to the provisions of Sections 71, 72, 73, and 75 of the Civil Service Law, I hereby authorize the Chief Administrative Law Judge or such Administrative Law Judges as he may assign to hold and conduct administrative trials and hearings in disciplinary

matters,....and to make such recommendations thereon to me as shall be deemed appropriate.

You are further authorized to conduct such trials and hearings in conformity with Sections 71, 72, 73, and 75 of the Civil Service Law.

Following your analysis of all the testimony and other evidence, you shall submit to me for my review the record of such trial or hearing with your report or recommendation.

This letter remains in full force and effect and serves to provide OATH with jurisdiction over DOC hearings and trials. In addition, DOC Directive #7502 ("Directive 7502") entitled "Disciplinary Process for Uniformed Personnel" states, *inter alia*, that in the event an informal conference between the parties and the Inspector General does not settle the matter, "the charges and specifications will be forwarded to [OATH] for [an] administrative hearing." Consequently, it is clear that OATH had jurisdiction over petitioner's disciplinary proceeding.

Malone also argues that he should have been disciplined in accordance with DOC Directive #7510 entitled "Early Intervention Monitoring Program" ("Directive 7510") and DOC Directive #4257 entitled "Command Discipline" ("Directive 4257"). These two sections outline procedures and penalties available to the DOC in order to avoid filing formal disciplinary charges against an officer. Directive 4257 allows commanding officers to adjudicate minor offenses committed by corrections officers without resorting to formal charges and administrative hearings. This section is "designed to correct minor deficiencies and to maintain discipline among uniformed members." However, it also permits commanding officers to initiate formal disciplinary charges where appropriate. For example, section (IV)(3) states:

Even in those situations where Command Discipline is required by this Directive, if the Commanding Officer determines that aggravating facts and circumstances warrant the filing of formal disciplinary charges he/she may do so. In such a case, the Commanding Officer shall include in the Memorandum of Complaint a statement explaining why

command discipline is inappropriate.

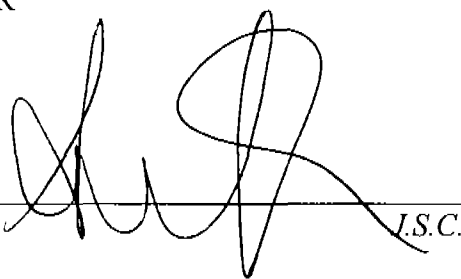
This is exactly what happened here. Captain Davis determined that formal disciplinary charges were appropriate and explained that he offered Malone a “(4) day penalty [in accordance with command disciplinary procedures] but [he] refused and requested [a] formal hearing.”

Therefore, Captain Davis and the DOC acted in accordance with the procedures outlined in Directive 4257.

Directive 7510 provides the DOC with an early intervention program to assist commanding officers to assess and monitor job performance of correction officers who may be having trouble performing their duties in accordance with DOC standards. However, section (III)(A) specifically provides that “[t]he implementation of the Early Intervention Monitoring Program is not to be construed as waving management’s responsibility to invoke disciplinary actions in cases of misconduct or violations of departmental rules/regulations.” As a result, the DOC did not violate Directive 7510. Malone violated numerous DOC rules and regulations. Petitioner’s remaining arguments have been raised for the first time before this court and, therefore, need not be addressed. *Franco*, 95 N.Y.2d at 554 (“judicial review of administrative determinations is confined to the facts and record adduced before the agency”). Accordingly it is

ORDERED that the application by petitioner seeking to vacate and annul the determination by respondent is denied and the proceeding is dismissed.

ENTER

 J.S.C.

FILED

JAN 17 2008

DATE: January 14, 2008

New York, NY **NEW YORK COUNTY CLERK'S OFFICE**