

**Pyant v Doherty**

2008 NY Slip Op 30403(U)

February 4, 2008

Supreme Court, New York County

Docket Number: 0111167/2007

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM  
*Justice*

PART 13

Richard Pyant

INDEX NO. 111167/07

MOTION DATE 11/15/07

- v -

MOTION SEQ. NO. 001

John J. Doherty, as Commissloner of  
The Department of Sanitaton of the City of New York  
and the City of New York

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

The following papers, numbered 1 to \_\_\_\_\_ were filed on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits \_\_\_\_\_

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

*This Judge's Office will not accept any papers filed on this motion to/for \_\_\_\_\_ until the notice of entry, copies of which must appear in person at the County Clerk's Office, Room 1410.*

**PAPERS NUMBERED**  
\_\_\_\_\_ to County Clerk  
\_\_\_\_\_ to \_\_\_\_\_  
\_\_\_\_\_ must  
\_\_\_\_\_ (Room)

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this petition is denied and the cross-motion to dismiss the petition is granted on the ground that petitioner has failed to state a cause of action.

Petitioner was appointed to the Department of Sanitaton from a competitive list and commenced work as a probationary employee in May 1989. In June 2004 charges were brought against him for having the presence of a prohibited substance in his body after he tested positive for codeine and morphine. According to petitioner, he had tested positive for those substances because he had taken a Tylenol #3 (Tylenol with Codeine) for a severe toothache, and the pain medication had not been prescribed for him, but was his wife's medication. The petition alleges that since petiltloner did not have a prescription in his name, he was technically guilty of the

charge. Accordingly, he signed a Last Chance Agreement which provided, among other things, that he had to sign undated resignation papers and that upon a subsequent positive drug test or positive Breathalyzer of any level, the Department of Sanitation had the discretion to submit his resignation. Petitioner also agreed to waive any hearing or right to be heard contesting the laboratory findings.

On March 22, 2007, a Breathalyzer test taken by petitioner indicated a reading of .017% and based upon this result, petitioner was terminated from his employment on April 28, 2007. Petitioner alleges that this reading was a minuscule reading that was the result of petitioner having used Listerine Whitening Pre-Wash Rinse and Listerine Mouthwash Rinse the morning of the test. He alleges that in order to have violated the Last Chance Agreement the ingestion of alcohol must have been intentional, and that he did not intentionally consume alcohol. He also claims that the Department did not follow U.S. Department of Transportation protocols which require the administration of a second test upon a positive reading.

Respondents have cross-moved to dismiss the petition on the grounds that it is barred by the Statute of Limitations and that it fails to state a cause of action. Regarding the limitations period, respondents assert that petitioner's challenge to the Last Chance Agreement that was signed in 2004 is untimely, as was the proceeding in Nedd v. Koehler (159 AD2d 344 [1990]). However, in Nedd, petitioner challenged the validity of the plea agreement on the grounds of duress and that it was void for indefiniteness. Here, petitioner is not challenging the Agreement, he is challenging his termination on the grounds that respondents acted in bad faith, arbitrarily and capriciously. Accordingly, this proceeding is timely.

Respondents have shown that the petition fails to state a cause of action. Petitioner's allegation that he must have intentionally ingested alcohol is not supported by the express terms of the Last Chance Agreement. And, while petitioner's explanation for the positive Breathalyzer test is plausible,

by signing the agreement he waived any right to a hearing or to otherwise be heard in an effort to contest the findings. This unfortunate circumstance and the harsh result caused by petitioner waiving his right to a hearing must be viewed in the context of the use and purpose of Last Chance Agreements. As is pointed out by respondents, these agreements " . . . have enabled many employees of the City to make another attempt at preserving their employment despite offenses that otherwise might well have resulted in termination. To be offered by the City these Agreements must be legally and practically effective. To be legally and practically effective the Agreement cannot be subject to excuses, alibis, and other attempts to procure yet another chance." (Memorandum of law, p. 15.)

Stipulations in settlement of disciplinary proceedings which contain a waiver of the right to a hearing have been upheld. As was noted by the Court of Appeals in Matter of Abramovich v. Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown (46 NY2d 450 [1979]), cert. denied 444 US 845 [1979], "[j]udicial acceptance of compromises in which the most fundamental of rights are waived is not uncommon." (id. at 456; see also Newman v. Fire Department of the City of New York, \_\_\_ AD3d \_\_\_, 2008 NY Slip Op. 00172; Winkler v. Kingston Housing Authority, 259 AD2d 819 [1999])

The allegations do not support a bad faith termination or discharge for an improper reason. Nor do the allegations support a claim of arbitrariness in that petitioner does not allege that the result of the Breathalyzer was incorrect, only that the reading was so minuscule that it should not have resulted in his termination despite the terms of the agreement that upon a positive reading of any level, respondents had the discretion to require his resignation. Thus, petitioner has not stated a cause of action (compare Miller v. New York State Department of Correctional Services, 126 AD2d 831, 832 [1987], Casey, J., dissenting).

Finally, petitioner's claim that respondents violated Department of

Transportation testing protocols by not performing a second test does not state a cognizable cause of action. The relevant protocol requires a second test only when the first test result is .02% or higher (49 CFR § 40.247).

Accordingly, the cross-motion is granted.

ADJUDGED that this proceeding is dismissed.

**UNFILED JUDGMENT**  
This judgment has not been filed by the County Clerk and notice of entry of judgment is hereby given. To obtain entry, counsel for the judgment representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2/4/08

SA-S  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST     REFERENCE