

Matter of Flores v Doherty

2008 NY Slip Op 30872(U)

March 18, 2008

Supreme Court, New York County

Docket Number: 0112180/2005

Judge: Doris Ling-Cohan

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

PRESENT: **JUSTICE DORIS LING-COLLIER**

PART 36

*In the Matter of
Joseph Flores*

INDEX NO. 112180/05

MOTION DATE _____

- v -

John J. Doherty et al.

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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 1412).

PAPERS NUMBERED _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ *Article 78 proceeding is decided in accordance with the attached memorandum decision.*

Copies of this decision/order shall be mailed to the parties by the Clerk of the Court.

Dated: 3/18/08

[Signature]
J.S.C.
JUSTICE DORIS LING-COLLIER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 36**

In the Matter of the Application of _____)
 JOSEPH FLORES,)

Petitioner,)

For a Judgment under Article 78 of the Civil)
 Practice Law and Rules)

-against-)

Index No. 112180/2005

JOHN J. DOHERTY, as Commissioner of The)
 Department of Sanitation of the City of New)
 York, the Department of Personnel of the City of)
 New York and the City of New York,)

Motion Seq. No.: 002

UNFILED JUDGMENT
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 appear in person at the Judgment Clerk's Desk (Room
 1415).

DORIS LING-COHAN, J.:

Petitioner Joseph Flores brings this Article 78 proceeding, seeking a judgment vacating and setting aside respondents' termination of petitioner's employment, restoring petitioner to his former position at the same status that existed prior to his termination, and directing respondents to pay petitioner all wages and benefits from the date of termination to the date of restoration, and reasonable attorney's fees.

Respondents previously moved pursuant to CPLR 3211 (a) (7), to dismiss the petition for failure to state a cause of action. Respondents' motion was denied and respondent was directed to serve an answer. Respondents have served their answer and the matter has been submitted to the Court for decision.

Petitioner's career at the Department of Sanitation (DOS) spanned almost a decade. On August 28, 1995, petitioner was appointed to the DOS from a competitive list and commenced work as a probationary employee. In accordance with Civil Service Law § 75, petitioner became a tenured employee after successful completion of one year of employment. On December 14, 2004, however, after over nine (9) years of employment, petitioner entered into a plea agreement with DOS which states in pertinent part: "I agree to be placed on one year's probation using the same criteria which ERB (Employee Review Board) uses for probationary Sanitation Workers. Should I violate my probation, I understand I will be terminated without the benefit of a conference and/or hearing."

[* 3]

According to respondents, petitioner was placed on probation for violations which included time and leave violations. [Respondents' Memorandum of Law, at 12]. Such period commenced on December 22, 2004, through and including December 21, 2005.

In a memorandum dated April 22, 2005, the Personnel Management Division of DOS recommended to Joseph DiPiazza, director of human resources for DOS, to terminate petitioner, based on six violations of DOS's time and leave regulations, all of which were committed while petitioner was on probation pursuant to the aforementioned plea agreement. On December 22, 2004, the first day of the probation, petitioner, while out on sick leave, failed to report to the medical clinic as required by DOS regulations. On February 10, 2005 and February 24, 2005, petitioner was absent without leave. On March 26, 2005, petitioner failed to follow DOS guidelines for calling in sick. On March 31, 2005 and April 4, 2005, petitioner was absent without leave.

On April 25, 2005, the ERB voted to recommend the termination of petitioner based on the above referenced six violations. Later that day, DOS Deputy Commissioner Lorenzo Cipollina recommended to respondent DOS Commissioner John Doherty that petitioner's employment be terminated. Petitioner was terminated, effective on the close of business May 2, 2005.

Prior to his termination on May 2, 2005, petitioner voluntarily approached the DOS Employee Assistance Unit (EAU) for assistance with his disability. [¶21, Petition]. The EAU is designed to provide treatment to employees who are suffering from substance abuse. Petitioner was referred to an out-patient facility and was to begin treatment for alcohol abuse the following day, on May 3, 2005. Petitioner did not have the opportunity to complete the DOS recommended treatment because of his termination.¹

According to petitioner, "[o]n September 11, 2001 petitioner's best friend, Frank Monahan, died during the attack. As a result of this incident, petitioner began drinking to alleviate the pain of his loss. Petitioner went from a few drinks to a fifth of rum." [Petition, paragraph 12].

¹ It is noted that respondents have not asserted that petitioner sought assistance from the EAU only after receipt of the letter of termination.

In addition to suffering the death of his best friend in 2001 because of the 9-11 attack, petitioner recounts an additional tragedy causing him to resort to alcohol. In a letter to the Commissioner of Sanitation written after his termination², petitioner writes to appeal the decision to terminate and provides the following additional information about the circumstances surrounding his termination:

“I really don’t know how I let my situation at work escalate to this level...I was ‘out of control’, not to mention in March I found out that the house in which I originally bought with my father (we split the purchase) was no longer mine. When we refinanced my father cheated me and took over full ownership behind my back. After this incident I totally lost it. Thus, my “off work” actions became totally nuts. I was drinking almost every night thinking all of my problems were going to go away; meanwhile they were only getting much worse...I have recently turned things around by attending an AA support group. I have been sober for the past five weeks and I feel like a new man...It is still hard for me to believe I’m not ‘on the job’. I loved that job and I miss all the guys and being one of New York’s Strongest. I put in 9 ½ years ...I simply let my personal life interfere with my work life...I feel that if you can give me a chance and give me my job back I wouldn’t miss a single day...I recently reached out to EAU to get help for my problem, but a day or two later I was terminated. I really didn’t know much about EAU but my friend...told me to go because he said it was a great help to him. So I took his advice and I went. If I were to get my job back, I would immediately go to EAU and an out patient group to stay sober... If I was given the opportunity to go back to work I wouldn’t let you down or embarrass you in any way. I have a wife and three children and I would agree to any conditions you set forth...”.

[Exh. G, Notice of Motion to Re-Notice Petition]. It is undisputed that respondents did not have such facts fully before them, prior to petitioner’s termination.

Pursuant to DOS policy, as stated in Policy and Administrative Procedure No. 95.05:

“the intent of [our Substance Abuse Policy] to protect the health and safety of the public and [DOS] employees and to ensure that employees troubled by drug and alcohol abuse problems get the help they need...The [DOS] will continue to refer troubled employees to EAU for treatment...[p]articipation in an EAU program which results in recovery from a problem and improved job performance will not affect an employee’s future in the department or his or her chances for promotion. The standard against which all employees are measured is job performance. An employee who has been in an EAU program will be judged neither more harshly, nor more leniently than other department

² The letter is undated.

* 5]

employees. The [DOS] encourages all employees to seek assistance from EAU, where assistance will be given as appropriate...Because the [DOS] hopes that troubled employees can seek assistance for problems before they dominate the employee's life, special provisions have been made for voluntary referrals...".

[Exh. J, Notice of Motion].

While petitioner does not deny any of the underlying facts concerning the six violations of the time and leave regulations, he asserts that respondents failed to take into account petitioner's alcoholism problem, when deciding to terminate him. It is petitioner's position that the failure to take this into account was not only bad faith, but also a violation of both DOS policy and the Americans with Disabilities Act (ADA). Petitioner further claims that it was bad faith and a violation of the above DOS policy to terminate him before he had an opportunity to complete the EAU program that he was scheduled to begin May 3, 2005, the day following his termination. It is noted that petitioner's personal tragedy, which caused his alcohol problem, started in 2001, with his best friend dying in the 9-11 attack, prior to his being placed on probation in the first place.

The function of judicial review in an Article 78 proceeding is not to weigh the facts and merits de novo and substitute the court's judgment for that of the agency's determination, but to decide if the determination can be supported on any reasonable basis. *Clancey-Cullen Storage Co., Inc. v Board of Elections in the City of New York*, 98 AD2d 635, 637 (1st Dept 1983). However, the court has the power to remit a matter to the agency where "further agency action is necessary to cure deficiencies in the record". *Matter of Police Benevolent v. Vacco*, 253 AD2d 920, 921 (3d Dept 1998), *lv denied* 92 NY2d 818 (1998); *see also Matter of Montauk Improvement, Inc. v. Proccacino*, 41 NY2d 913 (1977).

As a matter of fundamental fairness, under the circumstances here, petitioner should be given the opportunity to present all his evidence to be evaluated by respondents and, accordingly, this matter is remanded to respondents. *See Matter of 47 Clinton St. Co. v. New York State Div. Of Hous. and Community Renewal*, 161 AD2d 402 (1st Dept 1990)("Review of the record indicates that remission to the respondent for the submission of a complete record, further fact-finding, and a new determination is necessary in order...to'...render substantial justice to the parties concerned.' ");

[*6]

Quiroz v. NYS Div. of Hous. and Community Renewal, 181 Misc 2d 734 (Sup Court, New York County 1999). In making its decision, the ERB did not have a complete record before it. When rendering its decision, the ERB was not aware that: (1) petitioner's substance abuse problem was the cause of his attendance issues, both prior to, and during his probation; (2) petitioner voluntarily sought assistance from the EAU and was scheduled to commence a DOS recommended treatment program; and (3) potentially mitigating factors existed, including the tragic and sudden loss of petitioner's best friend due to 9-11, and the loss of his home. Moreover, having not known of petitioner's alcohol abuse problem, the ERB did not have the opportunity to consider the strong DOS policy "to protect the health and safety of ...[DOS] employees and to ensure that employees troubled by drug and alcohol abuse problems get the help they need...". [Exh. J, Notice of Motion].

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent of remanding this matter to respondent for proceedings in accordance with this decision, which shall take place within 60 days of this decision.³

This constitutes the decision and judgment of the court.

Dated: March 7, 2008



Hon. Doris Ling-Cohan, J.S.C.

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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).

³ The Court notes that at the conferences held in this case, petitioner offered to extend his probation period, maintaining that he has resolved his alcohol problem. In all Court appearances, petitioner acted appropriately and was timely.