

**Matter of King v City of New York**

2008 NY Slip Op 30955(U)

April 1, 2008

Supreme Court, New York County

Docket Number: 0102678/2008

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER  
Justice

PART 5

TRACY KING  
- v -

INDEX NO. 102678/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

NYC DEPT OF CORRECTIONS MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits -- Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

1
2, 3
4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**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).

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

Dated: April 1, 2008

  
**EILEEN A. RAKOWER** 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 5

-----X  
In the Matter of the Application of  
TRACY KING

Petitioner,

Index No.  
102678/08

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

DECISION  
and ORDER

CITY of NEW YORK, DEPARTMENT  
CORRECTIONS

Respondent.

-----X  
HON. EILEEN A. RAKOWER

**UNFILED JUDGMENT**  
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Petitioner was hired by the New York City Department of Correction (DOC,) as a Probationary Correction Officer on August 2, 1990. During her eighteen month probationary period, petitioner had three "corrective interviews" to address her repeated lateness and absences. DOC brought charges and specifications against her in September, 2000, stating that

Said officer, on or about January 21, 2000, through August 25, 2000, failed to efficiently perform her duties by engaging in a continuing pattern of excessive lateness in that she reported late for duty on about six (6) occasions for a total of approximately ten (10) hours and thirty seven minutes without permission or authority.

Petitioner, her attorney and DOC entered into an "Negotiated Plea Agreement" on October 16, 2002, by which she agreed to forfeit three vacation days. DOC brought further charges and specifications against her in May, 2003, stating that

Said officer, on or about March 23, 2003, failed to efficiently perform her duties in that she failed to properly safeguard her departmental identification card and reported it lost.

Petitioner, her attorney and DOC entered into a second "Negotiated Plea

Agreement” on June 4, 2003 , by which she agreed to forfeit four vacation days.

DOC brought further charges and specifications against petitioner in November, 2004, stating that

Said officer, on or about December 10, 2002, through December 11, 2003, failed to efficiently perform her duties in that she has demonstrated a pattern of excessive absences and been unable to perform the full range of duties of a correction officer by reporting sick on 20 occasions totaling fifty-five (55) days absent. Said officer also failed to provide adequate medical documentation for all absences as required.

Petitioner, her attorney and DOC entered into a third “Negotiated Plea Agreement” on January 19, 2005, by which she agreed to forfeit twenty vacation days and also agreed to a one year limited probation. The plea agreement also stated

If this penalty is approved by the Commissioner of Correction, I accept said decision, and as a condition of accepting such decision of the commissioner of Correction, I hereby waive any and all rights granted to me under section 75 and 76 of the Civil Service Law and acknowledge that this acceptance is the same as a finding of guilt after a hearing.

I am fully aware that if the Commissioner of Correction approves the penalty, this waiver of my right to a section 75 hearing is final and irrevokable and that this waiver will be placed in my personnel file, as a disposition of the Disciplinary Charges and specifications.

The “Limited Probation Form” that petitioner signed states, among other things, “I have waived my rights as a tenured employee for this probationary period and subject myself to termination as any other probationary employee.”

DOC brought further charges and specifications against petitioner in May, 2006, stating that

Said officer, from January 26, 2006, thru (sic) April 9, 2006, inefficiently performed her duties in that she reported late for duty on thirteen (13) occasions by a total of three (3) hours and two (2) minutes.

DOC brought yet another set of charges and specifications against petitioner in

\* 4 ]  
November, 2006, stating that

Said officer, from April 26, 2006, thru (sic) July 19, 2006, inefficiently performed her duties in that she reported late for duty on twelve (12) occasions by a total of four (4) hours and thirteen (13) minutes.

Additionally, while out on sick leave on October 16, 2006, petitioner was not at home when DOC sent a representative for an "absence control visit" to verify that she was home sick pursuant to DOC directives. Petitioner claimed that she had official authorization to leave her home and submitted as documentation of that permission a signed authorization slip; however, the date on the authorization slip had been altered and her authorization was unsubstantiated.

Petitioner, her attorney and DOC entered into a fourth "Negotiated Plea Agreement" on January 9, 2007, by which she agreed to forfeit fifty vacation days, ten suspension days with credit for time served and a one year limited probation for lateness and altering official documents. The "Probation Agreement Form" states that her one year probation is "limited to excessive lateness, false reports, statements and testimony" and "I have waived my rights as a tenured employee for this probationary period and subject myself to termination as any other probationary employee."

Petitioner reported late for duty on twelve occasions between March 22, 2007 and August 27, 2007. The Warden of petitioner's facility requested that the Assistant Commissioner of Personnel for DOC place the matter on his agenda for review and terminate petitioner's employment. After reviewing petitioner's file, the Assistant Commissioner agreed with the Warden and recommended that petitioner be terminated. Petitioner was advised by letter dated October 17, 2007, that "[e]ffective Friday, October 19, 2007, your services as a probationary Correction Officer are terminated." Thereafter, petitioner, *pro se*, filed this Article 78 proceeding.

Petitioner argues that there is no record of dereliction for the first decade of her tenure with DOC. She states that DOC placed her on probationary status to diminish the full spectrum of her rights as a tenured civil servant. She states that she suffered from anxiety and became distraught after her son was arrested. Petitioner argues that the final negotiated plea agreement which led to her discharge "was impulsively concocted and not made in good faith." She states that she was terminated without a hearing "under the guise of justification [that] Petitioner was a non-tenured

[\* 5 ]  
probationary civil servant.” She states that bad faith is implied by respondent’s failure to hold a hearing regarding the extraordinary facts that led to her dismissal.

DOC argues that its actions were legal and proper. It states that petitioner was given numerous opportunities to demonstrate that she could comply with DOC rules however, she failed to do so. DOC notes that petitioner continued to report late and call in sick even after she signed the negotiated plea agreements. DOC argues that its actions were reasonable, in conformity with all applicable laws and regulations, and were neither arbitrary or capricious. It argues that petitioner fails to state a cause of action because her termination was not made in bad faith. DOC states that it is petitioner’s burden to show bad faith on behalf of her employer. (*Thomas v. Abate*, 205 AD2d 454 [1<sup>st</sup> Dept. 1994]).

A court may only interfere with the determination of an administrative agency if there is no rational basis or foundation in fact for the action complained of, and the exercise of discretion is arbitrary and capricious. Where a reviewing court finds that the administrative body has not acted arbitrarily but within its lawful authority, the court has no alternative but must confirm the determination. (*Matter of Pell v. Board of Educ.*, 34 NY2d 222. (1974)). The reviewing court may not substitute its judgment for that of the agency’s determination but must decide if the agency’s decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1<sup>st</sup> Dept. 1983]). Once the court finds a rational basis exists for the agency’s determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269 [1972]). Moreover, absent a showing of bad faith, a petitioner on dismissal probation may be terminated for virtually any reason (*Cipolla v. Kelly*, 26 AD3d 171 [1<sup>st</sup> Dept. 2006]).

Here, the “Limited Probation Form” that petitioner signed specifically stated “I have waived my rights as a tenured employee for this probationary period and subject myself to termination as any other probationary employee.” Notwithstanding the first decade of service in the DOC, it was petitioner’s subsequent record of absenteeism and lateness that led to the four Negotiated Plea Agreements and her placement on dismissal probation, a condition that she agreed to not once, but twice, and with the advice of counsel.

“It is well settled that a probationary employee may be discharged 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 NY2d 760 [1984]). Under such circumstances, the court’s inquiry “is limited to the question of whether the dismissal was in bad faith.” (*Nelson v. Abate*, 205 AD2d 454[1st Dept. 1994]).

Petitioner’s claim of bad faith on the part of DOC is conclusory and unsupported by the facts. (*Id.*). DOC had sufficient reason to exercise its option with respect to petitioner’s dismissal probation and terminate her employment. (*Cipolla v. Kelly, supra*). Under the circumstances of this case, it cannot be said that the DOC’s decision to discharge petitioner was arbitrary, capricious, irrational, unlawful or made in bad faith. Wherefore, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

All other relief requested is denied.

Dated: April 1, 2008



EILEEN A. RAKOWER, J.S.C.

**UNFILED JUDGMENT**  
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