

**Matter of Wheelock v New York City**

2008 NY Slip Op 31690(U)

June 11, 2008

Supreme Court, New York County

Docket Number: 0111062/2007

Judge: Joan Madden

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

PRESENT: Hon. Joan A. M. Eder

PART 11

Index Number : 111062/2007

**WHEELOCK, ERIC**

vs.

**NEW YORK CITY**

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO. 111062-07

MOTION DATE 12-20-06

MOTION SEQ. NO. #001

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

read on this <sup>petition</sup> motion to/for Article 78  
relief.

PAPERS NUMBERED \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion <sup>petition</sup> is decided in accordance  
 with attached memorandum Decision, Order + Judgment.

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

**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 1419).

Dated: June 11, 2008

[Signature]  
 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 : IAS PART 11

-----X  
In the Matter of an Article 78 Proceeding Eric Wheelock,

Petitioner,

-against-

Index No. 111062/2007

New York City and  
New York City Department of Consumer Affairs

Respondent.

**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 1410).

-----X  
**Joan A. Madden, J.:**

In this Article 78 special proceeding, petitioner Eric Wheelock applies for an order vacating and annulling the determination of respondents New York City and New York City Department of Consumer Affairs (respondents or Consumer Affairs) terminating his probationary employment as arbitrary and capricious and reinstating him to his former position or, in the alternative, directing respondents to conduct a hearing.

On June 29, 1998, petitioner was initially appointed by respondents as temporary inspector, Consumer Affairs, under the Youth Tobacco Initiative. On May 15, 2000, respondents appointed petitioner as a provisional inspector, Consumer Affairs, level 1. Five years later, petitioner was appointed from an open competitive civil service list of eligibles as an inspector, Consumer Affairs, level 1.

Petitioner's duties included performing compliance checks and specific complaint inspections and investigations of tobacco retailers to ensure their compliance with the relevant laws, rules, regulations, and operational standards. His duties also included preparing reports,

certificates of inspection, notices of violations and hearings, and other documents relevant to the inspection and investigative process.

Respondents allege that, during petitioner's employment, he had a history of tardiness and unauthorized absences and other disciplinary infractions in violation of the Consumer Affairs code of conduct, revised May 26, 1999 (the Code). Respondents issued petitioner a formal warning in which it alleges that, on May 19, 2006, petitioner violated the Code by failing to follow the inspection safety guidelines and by falsifying entries on his time sheets.

By memorandum dated July 12, 2006, respondents notified petitioner that, on July 7, 2006, petitioner left his scheduled route assignment for one hour without authorization, failed to notify his supervisors of the absence, and made false entries on his certificate of inspection and completed route sheet, including reporting an unauthorized inspection. In the memorandum, respondents notified petitioner that his performance and behavior were in violation of the Code, Chapter III, rule 3, §§ I (making false reports), P (neglecting assigned tasks), Q (performance of duties in an improper, inefficient, negligent or careless manner), S (unauthorized absence from assigned work location), U (engaging in conduct prejudicial to the good order and discipline of Consumer Affairs), and V (persistently violating Consumer Affairs rules, orders, directives, or procedures). Respondents also notified petitioner that the matter was referred to the disciplinary advocate for further action.

By memorandum dated July 24, 2006, respondents suspended petitioner without pay for 20 days and served him with a notice of informal conference and charges and specifications, charging petitioner with Code violations occurring from March 24, 2005 through July 7, 2006. The violations were comprised of seven charges and 26 individual specifications of alleged

misconduct, including failing to adhere to the tobacco product inspection protocol and being absent without leave.

On August 24, 2006, respondents notified petitioner that, following the informal conference at which petitioner was represented by DC 37 union representatives, six of the seven charges were established, and that a 20-day suspension without pay and termination of his employment were the recommended penalties. Petitioner refused to accept the recommendation and chose to proceed with a hearing before the Office of Administrative Trials & Hearings [OATH], pursuant to Civil Service Law § 75.

During the OATH hearing, at which petitioner appeared with legal counsel and two union representatives, petitioner pleaded "no contest" to the charges and agreed to accept a 44-day suspension without pay and to be placed on disciplinary dismissal probation for a period of one year (see Matter of Dept. of Consumer Affairs v Wheelock, OATH index no. 07-0690, Oct. 23, 2006, Miller, ALJ). Petitioner further agreed that, during the probationary period, his employment could be terminated for Code violations (*id.*).

Respondents allege that, on January 21, 2007, while on dismissal probation, petitioner indicated on his route sheets that two of the locations that he was required to inspect had gone out of business. Respondents further allege that a follow-up inspection revealed that the businesses were open and fully operational and that petitioner had falsely stated that they were out of business.

In addition, respondents allege that, on March 25, 2007, a follow-up investigation revealed that petitioner did not accompany his partner in the inspections of five locations that his team was assigned to investigate and, instead, falsified his time sheets and left the route early

without authorization. Respondents contend that this conduct violates respondents' tobacco enforcement operation procedures that require all inspectors to enter into the premises under inspection and that they had earlier advised petitioner of this protocol by memorandum dated November 26, 2002.

By memorandum dated March 30, 2007, respondents advised petitioner of the March 25 and 26, 2007 follow-up inspections and their findings of repeated Code violations. On March 30, 2007, respondents handed petitioner a letter dated March 30, 2007, in which respondents advised petitioner that his employment was being terminated, effective March 30, 2007, and that he must return all Consumer Affairs equipment immediately.

Petitioner seeks to vacate respondents' determination on the ground that the alleged misconduct is minor and does not justify termination.

In opposition, respondents contend that the petition must be dismissed on grounds that it is untimely and that their decision to terminate petitioner's employment is amply supported by a rational basis in the administrative record.

Section 217 (1) of the CPLR provides that a special proceeding pursuant to CPLR Article 78 "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner."

Petitioner does not dispute that respondents notified him on March 30, 2007 by hand delivering to him a letter dated March 30, 2007 expressly advising that they were terminating his employment immediately, effective on March 30, 2007. Therefore, the four-month limitations period began running on March 30, 2007 and expired on July 30, 2007. Petitioner did not commence this proceeding until August 10, 2007, 11 days after expiration of the limitations

period.

Contrary to petitioner's contention, the April 13, 2007 date indicated on the DC 37 confirmation of employment termination form completed by a Consumer Affairs payroll officer is not the date on which the limitations period began to run. The limitations period runs from "the date the employee or former employee knew or should have known the breach has occurred, or within four months of the date the employee or former employee suffers actual harm" (CPLR § 217 [2] [a]). Given that respondents notified petitioner in writing on March 30, 2007 that his employment was terminated on that date, the record conclusively establishes that March 30, 2007 is the date that respondents' determination became final and binding on petitioner and the date on which petitioner suffered actual harm (see Matter of Feldman v New York State Teachers' Retirement Sys., 14 AD3d 769 [3d Dept 2005]).

For these reasons, this proceeding is time-barred.

In any event, even had the proceeding been timely commenced, the petition would have been dismissed on the ground that respondents' determination is amply supported by the record.

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 Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 [1974]; see CPLR 7803 [3]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (id. at 231).

"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, 761 [1984]; Matter of Talamo v Murphy, 38 NY2d 637 [1976]; see CPLR 7803 [3]). Similarly, a tenured employee who agrees to be returned to probationary status in settlement of disciplinary charges and voluntarily and knowingly waives his statutory and contractual rights to a hearing may be dismissed without a hearing and without notice, upon the employer's determination that the employee committed additional disciplinary infractions during the probationary period (Matter of Rogers v City of New York Dept. of Correction, 193 AD2d 506 [1<sup>st</sup> Dept], lv dismissed 82 NY2d 820 [1993]; Matter of Soto v Koehler, 171 AD2d 567 [1<sup>st</sup> Dept], appeal denied 78 NY2d 855 [1991]).

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 (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 [1<sup>st</sup> Dept 2005]). Here, petitioner has failed to so demonstrate.

Petitioner is not entitled to a hearing or notice prior to termination of his employment. Petitioner agreed to be returned to probationary status in settlement of the various disciplinary charges brought against him. During the OATH hearing at which petitioner was represented by counsel and union representatives, Administrative Law Judge (ALJ) Kara J. Miller extensively questioned petitioner regarding his understanding as to the settlement terms (see Matter of Dept. of Consumer Affairs v Wheelock, OATH index no. 07-0690, Oct. 23, 2006, Miller, ALJ, supra). Petitioner stated on the record that he understood and agreed to the settlement terms, that he had

an opportunity to speak with his attorney and the union representatives present, and that he entered into the settlement terms willingly (*id.*). Petitioner also stated that he understood that the 12-month probation was a general probation with respect to the Code provisions (*id.*).

Petitioner does not deny the conduct during his probation cited by respondents. Petitioner does not deny that, on January 21, 2007, he indicated on his route sheets that two of the locations that he was required to inspect had gone out of business, when in fact the businesses were open and fully operational.

Moreover, petitioner does not deny respondents' allegations that, on March 25, 2007, he failed to accompany his partner in the inspections of five locations that his undercover team was assigned to investigate. Instead, petitioner contends merely that, as a member of a team, he was not required by Consumer Affairs protocol to accompany his partner on the inspections. However, a Consumer Affairs memorandum expressly reminds tobacco enforcement personnel that undercover tobacco enforcement operating procedure requires that, having arrived at the location to be inspected, "one inspector will enter the location first, then the minor and finally the second inspector" (Consumer Affairs Nov. 26, 2002 Memo, ¶ 5). Petitioner does not deny that he was an inspector subject to the memorandum, that the cited inspections were undercover, or that he received a copy of the memorandum when it was issued by respondents.

For these reasons, petitioner has failed to demonstrate that respondents' termination of petitioner's employment was undertaken in bad faith or for constitutionally impermissible reasons. Instead, the determination is supported by a rational basis in the record.

Accordingly, it is

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

with costs and disbursements to respondents New York City and New York City Department of  
Consumer Affairs.

Dated: ~~May~~ <sup>June 11, 2008</sup> 2008

  
\_\_\_\_\_  
J.S.C.

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