

**Matter of Montano v City of New York**

2008 NY Slip Op 32045(U)

July 21, 2008

Supreme Court, New York County

Docket Number: 0102273/2008

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAPER, JSC

PART 8

Index Number : 102273/2008  
**MONTANO, ESTHER**  
 vs.  
**CITY OF NEW YORK**  
 SEQUENCE NUMBER : # 001  
 ARTICLE 78

Justice

INDEX NO. 102273-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

Lead on this motion to/for

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

*petition is decided pursuant to attached Deems*

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

**FILED**  
 JUL 22 2008  
 NEW YORK  
 COUNTY CLERK'S OFFICE

Dated: 7/21/2008

HON. MARILYN SHAPER, JSC  
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 62

-----x  
In the Matter of the Application of

ESTHER MONTANO,

Petitioner,

Index No. 102273/08

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

- against -

THE CITY OF NEW YORK and THE NEW YORK  
CITY POLICE DEPARTMENT,

Respondents.  
-----x

**HON. MARILYN SHAFER, J.:**

In this CPLR article 78 proceeding, petitioner, Ester Montano, seeks to annul a determination by respondents The City of New York (the "City") and New York City Police Department ("NYPD") terminating her from her position as a probationary NYPD police officer.

Respondents cross-move, pursuant to CPLR 3211(a)(7), to dismiss the petition.

The facts are as follows: Petitioner is a former probationary NYPD police officer. She was hired by the NYPD in January 2005. After completing the Police Academy, she was assigned to the 70<sup>th</sup> Precinct in Brooklyn. Initially, petitioner's two-year probationary term was set to expire in January 2007. However, her probationary period was extended by 10 months, and was scheduled to end in November 2007.

Petitioner was acquainted with an individual named Michael Colon (Mr. Colon"), who was incarcerated from November 2005 to

November 2007 on a charge of homicide. Petitioner rented a room in the home of Mr. Colon's mother. She interacted with Mr. Colon when he visited his mother's home.

In the fall of 2005, petitioner became pregnant with Mr. Colon's child. She visited Mr. Colon at Riker's Island on four or five occasions. She gave birth to a son on May 16, 2006.

In December 2006, the NYPD's Internal Affairs Bureau ("IAB") conducted an investigation into petitioner's relationship with Mr. Colon and her visits to Riker's Island. IAB also interrogated her about her knowledge of the NYPD's rule prohibiting unauthorized visits by off-duty police officers to persons incarcerated in correctional facilities. She denied knowledge of said rule. In any event, she was placed on modified duty until her termination on October 11, 2007. The criminal action against Mr. Colon and all pending criminal charges related to said action were dismissed on November 21, 2007.

Petitioner commenced this proceeding seeking to annul her termination. Respondents cross-move to dismiss the petition.

The principle is well settled that a probationary employee, such as petitioner, may be discharged without a hearing and without a statement of reasons in the absence of any determination that the dismissal was in bad faith (*Johnson v Katz*, 68 NY2d 649, 650 [1986]), arbitrary and capricious (*Pell v Board of Educ. of Union Free Sch. Dist No. 1 of the Towns of Scarsdale & Mamaroneck*, 34 NY2d 222, 231 [1974]), or for a constitutionally impermissible reason or in violation of statutory or decisional law (*Bergamini v*

*Manhattan & Bronx Surface Tr. Operating Auth.*, 62 NY2d 897, 899 [1974]). The party challenging the determination has the burden of showing by a preponderance of evidence such deprivation of rights (*Haberman v Codd*, 48 AD2d 505, 508 [1<sup>st</sup> Dept 1975]).

Here, petitioner fails to sustain her burden of showing that respondents' determination to terminate and dismiss her was made in bad faith or was arbitrary and capricious. NYPD regulation prohibits off-duty visits to inmates of correctional facilities by members of the service, without prior permission from the police officer's commanding officer (see P.G. 205 Series, Pet, Exh C). A police officer who intends to visit an inmate at a correctional facility while off-duty must request permission in writing at least seven days prior to the intended visit (*id.*). The purpose of the rule is "[t]o provide a system to monitor visits by members of the service to city, state, or federal correctional facilities" (*id.*).

Petitioner acknowledges that she violated the NYPD rule by visiting Mr. Colon at Riker's Island, but insists that NYPD failed to notify her of said rule. She claims that she merely wanted to foster a bond between her child and his father. However, given the circumstances presented herein, the Court simply cannot conclude that respondents' determination to terminate petitioner lacked a rational basis or was made in bad faith.

Even assuming that petitioner was entirely unaware that her visits to Mr. Colon at Riker's violated an NYPD rule, her ignorance does not excuse her violation of that rule (see *In the*

Matter of Tankleff v Senkowski, 3 AD3d 621, 622 [3d Dept 2004]).  
Furthermore, petitioner admits that she received a copy of the  
Patrol Guide upon her appointment as a probationary police  
officer. A copy of the rule was included in the Patrol Guide.  
Copies were also available at petitioner's Command station.

Petitioner's assertion that her termination was made in bad  
faith, since the criminal action and charges against Mr. Colon  
were eventually dismissed, ignores the chronology of events in  
this matter. The criminal action and charges against Mr. Colon  
were dismissed more than one month after petitioner's termination  
for violating NYPD's rule. Her unauthorized visits to Mr. Colon  
at Riker's Island, in violation of an express NYPD rule, provided  
a good faith basis for her termination. Good faith grounds for  
termination are not negated by petitioner's allegation that she  
was terminated in bad faith (see *Morgan v Safir*, 281 AD2d 376, 377  
[1<sup>st</sup> Dept 2001]).

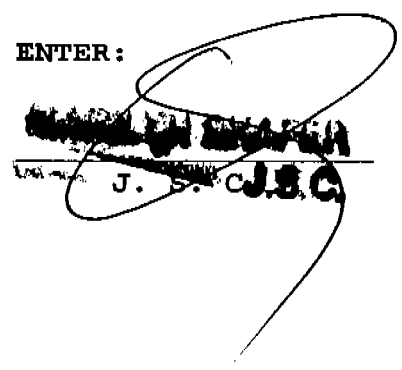
Accordingly, it is

ORDERED that the petition is denied, the cross motion is  
granted, and the petition is dismissed; and it is further

Ordered that the Clerk is directed to enter judgment  
accordingly.

Dated:

7/21/08

ENTER:  
  
J. S. CIBC