

**Matter of Wharton v New York City Dept. of
Correction**

2008 NY Slip Op 32289(U)

August 12, 2008

Supreme Court, New York County

Docket Number: 0103493/2008

Judge: Kibbie F. Payne

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4

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In the Matter of the Application of
SHAUNACEY WHARTON,

Petitioner,

-against-

Index No. 103493/08

NEW YORK CITY DEPARTMENT OF
CORRECTION and DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES,
CITYWIDE PERSONNEL

Judgment/Decision

UNFILED JUDGMENT
This judgment has not been entered in the County Clerk's Office and notice of entry must be obtained by the County Clerk. To obtain entry, counsel or other representative must appear in person at the Judgment Clerk's Desk (Room 415).

For a Judgment Pursuant to
Article 78 of the CPLR

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KIBBIE F. PAYNE, J.:

In this Article 78 proceeding, petitioner Shaunacey Wharton seeks reinstatement to the status of a probationary New York City Correction Officer, along with back pay and, in the alternative, a name-clearing hearing. Respondent the New York City Department of Correction ("DOC") has answered, seeking the denial of the petition and dismissal of the instant proceeding.

Petitioner was hired by respondent DOC as a probationary Corrections Officer on February 23, 2006. During her probationary period, which continued for 24 months from the date petitioner was hired, up to her termination, she had not received any notices of discipline.

According to petitioner, on August 24, 2007, shortly after arriving, she was arrested at her parents' home by members of the

New York City Police Department, for (1) Criminal Possession of a Controlled Substance; (2) Criminal Possession of a Weapon in the Third Degree; (3) Criminal Possession of Drug Paraphernalia in the Second Degree; and (4) Criminal Possession of Marijuana in the Fifth Degree. According to the Preliminary Report of the DOC's Investigation Division ("Preliminary Report"), which was based on the information provided by the police, the police based petitioner's arrest on the discovery at the residence of a room set aside "for the express purpose of preparing and packaging narcotics . . . including a scale and packaging material"

(Answer, Ex. 2). The Preliminary Report also noted that:

a loaded firearm and an amount of Marijuana were also discovered. Further investigation discovered that a room, allegedly occupied by Probationary Correction Officer Wharton (her bedroom) had a marijuana cigarette in an ash tray.

Id.

At the time of her arrest, petitioner was still a probationary employee of the DOC.

After she was arrested, petitioner notified the DOC of her arrest. The next day, August 25, 2007, petitioner received a Notice of Summary Suspension From Duty. The notice listed the "Reason for Suspension" as arising from petitioner's August 24th arrest (Petition, Ex. A).

Petitioner appeared in Criminal Court, Queens County, on November 9, 2007. There, her attorney presented the court with several items, to support the argument that petitioner did not

live with her parents, but maintained a separate residence (see Transcript of Hearing, Petition, Ex. B, at 2). At that court appearance, the Assistant District Attorney moved to dismiss the case, and the case was dismissed and sealed. Accordingly, the court issued a Certificate of Disposition reflecting the dismissal on November 9, 2007 (*id.*, Ex. C).

After the dismissal, petitioner applied to the DOC for reinstatement. However, in a letter dated November 19, 2007, from Assistant Commissioner Alan Vengersky, petitioner was informed that "[e]ffective Tuesday, November 20, 2007, your services as a probationary Correction Officer are terminated" (*id.*, Ex. D). Petitioner was directed to return any city property in her possession back to the DOC.

Petitioner apparently wrote to the DOC for clarification of the November 19, 2007 letter. She was informed, in a letter from Peter G. Curcio, the DOC's Bureau Chief, dated January 3, 2008, that "[d]ue to your arrest on August 2007 your probationary employment with the [Department] was discontinued" (*id.*, Ex. E). A second letter to petitioner from Mr. Vengersky stated that:

[a]s you noted in your letter of December 21, 2007 you were terminated effective November 7, 2007. A probationary Correction Officer may be terminated during the course of his/her probationary period without explanation pursuant to City policy and practice.

You were terminated during your probationary period in accordance with the Department of Correction's review of your actions during probation.

The legal procedures which were pursued concerning your criminal matter, do not compel me to recommend reversing the termination.

Id., Ex. F.

Once she was terminated, petitioner applied for unemployment insurance to the New York State Department of Labor. Although her application was contested by the DOC, the Department of Labor found in petitioner's favor, and awarded her benefits (*id.*, Ex. G).

Petitioner claims that, although the DOC had the right to fire her without giving any legal reason, it chose to do so, and that the decision it gave, *viz.*, her arrest, was arbitrary and capricious, because she had been exonerated for that arrest. Petitioner also claims that the DOC is barred by either *res judicata* or collateral estoppel from claiming that she was terminated for good cause, based on the effect of the Department of Labor's decision granting her unemployment benefits.

Initially, this court finds that the DOC is not barred from arguing that it terminated petitioner in good faith, by virtue of the award petitioner obtained from the Department of Labor. New York Labor Law § 623 (2) declares that "[n]o finding of fact or law contained in a decision rendered pursuant to this article by a referee, the appeal board or a court shall preclude the litigation of any issue of fact or law in any subsequent action

or proceeding[.]”¹ Consequently, New York courts have uniformly held that determinations of the Department of Labor concerning unemployment insurance are “without preclusive effect in [an] action” (*Wooten v. New York City Dep't of Gen. Servs.*, 207 AD2d 754, 754 [1st Dept 1994]; see also *Matter of Watson v Bratton*, 243 AD2d 295, 295 [1st Dept 1997]; *Matter of Rivoli v Stern*, 160 AD2d 601, 601 [1st Dept 1990]). Therefore, the Department of Labor’s determination is without preclusive effect herein.

“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]). He or she may be discharged “for ‘almost any reason or for no reason at all’ as long as it is not ‘in bad faith or for an improper or impermissible reason’” (*Matter of Duncan v Kelly*, 9 NY3d 1024, 1025 [2008], quoting *Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]). The question, thus, is whether or not the DOC terminated petitioner in bad faith.

However, at this point, the information submitted by both petitioner and the DOC leaves unclear the reasons underlying

¹ This section contains several exceptions, which do not apply to the present matter.

petitioner's termination. While the January 3, 2008 letter from the DOC's Bureau Chief cites petitioner's arrest as the impetus for her termination, on the other hand, letters from Mr. Vengersky do not cite the arrest as the reason for termination. Further, the DOC's Preliminary Report recommended that:

based upon the facts and circumstances of this incident probationary Correction Officer Shaunacey Wharton, shield #17762 is found to be in violation of the following department rules and regulations.

- (A) 3.20.010 - Professional Demeanor
- (B) 3.20.030 - Conduct Unbecoming
- (C) 3.20.300 - Nature to bring discredit to the Department.

Answer, Ex. 2, at 4.

In addition, a memorandum to Mr. Vengersky from the DOC's Deputy Commissioner, Investigation and Trials Division, dated August 28, 2007, which was written while the charges were still pending against petitioner, again recommended termination on the same set of facts as reported on the Preliminary Report, and based on the same three violation of departmental rules and regulations (*id.*, Ex. 3). A DOC Investigation Division Investigative Report ("Investigative Report"), written in early September 2007, also reviewed the facts, determining that petitioner was in violation of the same DOC rules and regulations (*id.*, Ex. 4). This report further stated that "Officer Wharton acted in a manner that is below the expected comportment of an employee of the City of New York and her actions have brought discredit to the department" and, therefore, recommended termination (*id.*, Ex. 4, at 2).

The Appellate Division, First Department has noted that, where a probationary employee is arrested for committing a crime, the "[t]ermination of a probationary employee is not in bad faith even where . . . all criminal charges against her are subsequently dropped" (*Matter of Holmes v Sielaff*, 182 AD2d 557, 558 [1st Dept 1992]; see also *Matter of Rocco v Kelly*, 20 AD3d 364, 367 [1st Dept 2005], citing *Holmes*, 182 AD2d at 558). However, in some of these cases, while the criminal charges were dropped, the probationary employee still appears to have comported him or herself badly (see, e.g., *Matter of Brown v Condon*, 186 AD2d 43 [1st Dept 1992]; *Matter of Holder v Sielaff*, 184 A.D.2d 228 [1st Dept 1992]).

In the present matter, pursuant to the investigation conducted by the DOC, it appears that the decision to terminate petitioner was based—at least partially—upon her arrest. However, since factual issues exist—to wit, whether petitioner's termination was based on her arrest or other reasons—this matter is remanded to the DOC for the resolution of those issues. (*Board of Education v. Ambach*, 132 AD2d 257, 261 [3d Dept 1987] [remanding to agency where record had insufficient information and factual issues existed requiring resolution]). While CPLR 7806 does not specifically address remanding to an agency, "leading commentators have noted that such remands are very much a part of the court's power" (*Ambach*, 132 AD2d at 261, citing

Siegel, NY Prac § 570, at 800; 8 Weinstein-Korn-Miller, NY Civ Prac para. 7806.01; see also *Dukuly v. Aponte*, 204 AD2d 189, 189 [1st Dept 1994]). Here, remand to the DOC is appropriate in order to more thoroughly establish the facts concerning the basis for petitioner's termination, her fitness to serve as a correction officer and her misconduct, if any (see *Lacey v. Coughlin*, 97 AD2d 824, 825 [2d Dept 1983]; *Garrison v. Koehler*, 161 AD2d 322, 324 [1st Dept 1990]).

Finally, petitioner requests a name-clearing hearing. The three requirements for a name-clearing hearing are "governmental defamatory action (if untrue)" and loss of employment "in conjunction therewith," and "dissemination of the stigmatizing material" (*Matter of Swinton v Safir*, 93 NY2d at 764). "The sole purpose of a name-clearing hearing is to afford the employee an opportunity to prove that the stigmatizing material in the personnel file is false" (*Swinton*, 93 NY2d at 763, n.).

In the case at bar, the material contained in petitioner's record is not false. It is undisputed that petitioner was arrested for the charges described. Any suggestion in the record that petitioner may have maintained her residence at her parents' home is dispelled, because the record also clearly indicates that the charges against petitioner were dismissed. Therefore, the content of the DOC's records does not warrant a name-clearing hearing. Accordingly, it is

ORDERED and ADJUDGED that respondent's determination is modified to vacate the penalty and remanded for further proceedings in accordance with this opinion.

The foregoing constitutes the judgment and order of this court.

Dated: August 12, 2008

ENTER:



KIBBIE F. PAYNE
J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be given hereon. To obtain entry, counsel or the party's representative must appear in person at the Judgment Clerk's Desk (Room 141B).