

Matter of Peters v Horn
2008 NY Slip Op 32612(U)
June 18, 2008
Supreme Court, New York County
Docket Number: 0114110/2007
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

Justice

PART IA. Part 16

Index Number : 114110/2007

PETERS, VALERIE

vs.

HORN, MARTIN

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

FILED

SEP 29 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: JUN 18 2008

Alice Schlesinger

ALICE SCHLESINGER 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

-----X

In the Matter of the Application of

VALERIE PETERS,

Petitioner,

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

-against-

MARTIN F. HORN, Correction Commissioner of the
New York City Department of Correction; THE NEW
YORK CITY DEPARTMENT OF CORRECTION; and
THE CITY OF NEW YORK,

Respondents.

-----X

SCHLESINGER, J.:

Index No. 114110/07
Motion Reg No. 001

FILED
SEP 29 2008
COUNTY CLERKS OFFICE
NEW YORK

The first issue which must be determined in this Article 78 proceeding is whether an alleged oral agreement between counsel for the respective parties, petitioner Ms. Valerie Peters and respondent Martin F. Horn, Correction Commissioner of the New York City Department of Correction, pertaining to when Ms. Peters' Probation Agreement would commence, is admissible to establish a condition precedent to that Agreement. The testimony of such an oral condition would be admissible if the condition does not contradict the express terms of the agreement. *Hicks v. Bush*, 10 NY2d 488 (1962).

It is Ms. Peters' position, supported with an affirmation by the attorney representing her at the relevant time, Peter Troxler, that he had reached an oral agreement with opposing counsel, Eric Yuen, on March 21, 2007 before the written Agreement was signed that Ms. Peters' probationary period would be effective on the date she returned to full duty as a Correction Officer. Petitioner had had shoulder surgery on May 16, 2006 and though

she had returned to work the following September, was scheduled for a second surgery on that shoulder on March 27, 2007 or six days after she signed the Agreement. Thus, she argues it was clearly contemplated that beginning March 27 and continuing for an undetermined time, she would be on sick leave. Ms. Peters had been served with disciplinary charges on November 27, 2006 based on excessive use of sick days. DOC was seeking to terminate her employment. However, the matter was settled by the Agreement.

Respondent's position, as articulated in its cross-motion to dismiss, is that Ms. Peter's probationary period was to commence, pursuant to paragraph two of the Agreement, when the Commission or his Designee signed it. That clause reads as follows:

I (the employee, here Valerie Peters) further understand that this period of probation will not commence until the Negotiated Plea Agreement is accepted by the agency as evidenced by the signature of the Commissioner of the New York City Department of Correction or Designee.

Peters signed this clause in a parenthesis following it.

The date of signature by the Department's designee was May 1, 2007 signifying acceptance on that date. So respondent argues the probation began on that day May 1, 2007. It was to last one year. On May 27, 2007, petitioner was found "out of residence" while on sick leave recuperating from her surgery. She was thus charged with breaching her probationary agreement and was terminated on June 22, 2007. Respondents' cross-motion is made pursuant to CPLR §3211(a)(1) based on documentary evidence.

But Ms. Peters says the alleged infraction of May 27 occurred before her probation formally began. She returned to work on June 19. That is the day the probation began, she asserts. Therefore, to the extent she was charged with violating sick day rules, she would be entitled to a Civil Service Law Section 75 hearing on that violation. While such hearing is waived on probation, again it is petitioner's position that since probation had not yet commenced, there was no waiver in effect.

The other terms of the Agreement, written in on its second and last page, is that the officer, Ms. Peters agrees to forfeit 20 vacation days and further agrees to limited probation for a period of one year, limited to sick leave rules, regulations, directives and laws.

There does seem to be some factual and logical support for petitioner's assertion as to the start of her probationary term. There is a letter written to her by Troxler of March 26, 2007 or five days after she and he signed the Agreement which endorsed the Agreement and stated:

Pursuant to my research and my conversations with the Agency Attorney, the Agreement will take effect upon the signature of the Commissioner, unless you have not returned to full duty. If you have not returned to full duty, this Agreement in addition to the pending "Lateness Probation," will take effect upon your return to full duty.

Also, in an earlier part of the letter, Troxler says "assuming the agreement is acceptable, another copy signed by a member of the Commissioner's Office will be sent to your attention. This could take a number of months" (emphasis added). Therefore, petitioner's counsel appeared to anticipate the acceptance by the Commission taking more than a month, "a number" being more consistent with Ms. Peters' returning to work after her

shoulder surgery scheduled to occur the following day, March 27.

Additionally, a document issued by the Department's Health Management Division dated May 29, 2007 and entitled "Notification of Suspension," referred to the May 27, 2007 violation and informed Ms. Peters she was being suspended without pay for 30 days pending disposition of the charges. This penalty, as pointed out by counsel for petitioner, is the maximum allowed under Civil Service Law Section 75. The charges appeared to be resolved in Ms. Peters' favor when, on June 1, 2007 she was restored to the payroll. She returned to work on June 19 and was terminated three days later, on June 22, presumably as a result of the same May 27 infraction. No Section 75 hearing was offered.

The oral condition seems also to be supported by the logic of the situation. After all, as petitioner argues, why would she agree to probation based on excess use of sick leave when within days she was undergoing a second shoulder surgery that could keep her out of work for a lengthy period of time. It would not make sense for her probation to begin before she resumed work since she might be considered in violation during that very recuperation and not have a right to a hearing to challenge such violation if she considered it to be arbitrary.

Such an event did actually occur, with the May 27 infraction but she did explain the unusual circumstances giving rise to it and her explanation had seemed to be accepted. But of course, if she was already on probation on May 27, then whatever her explanation was, it could be rejected by the Department.

In fairness, it should be pointed out that none of the above has been refuted in respondent's papers as those papers consist of respondent's cross-motion to dismiss which is single-mindedly pursued. The argument proffered is that nothing else is relevant

except the document itself, the Agreement, which says the probationary period begins when it is signed and accepted by the Commission and that was done on May 1.

This decision began with the legal principle that parol evidence may be admissible to establish a condition precedent as long as that proffered condition does not contradict the agreement itself. In other words, the non-included condition must be able to stand alongside the agreement to be admitted and considered.

On this point, respondent argues that the condition cannot stand alongside the Agreement because the alleged oral condition precedent varies, contradicts or negates the commencement date of the probation. But petitioner's counsel disagrees and says the oral condition does not alter or negate the essence or gravamen of the Agreement which is the forfeiture of 20 days vacation together with a limited one-year probationary term, limited to violation of sick leave rules and regulations.

It should be noted here that the Agreement itself contains no explicit date for the probation to commence. That date itself is conditional on an event some time in the future to be determined by a third party, the Commissioner or his Designee. Therefore, there is nothing inherently contradictory about the alleged oral condition because as Troxler points out in his March 26 letter to Ms. Peters, the acceptance by the Commissioner "could take a number of months" and might occur even after she has returned to work.

Therefore, if there was an oral condition precedent agreed upon, it could under certain circumstances live comfortably with the terms of the Agreement. In other words, there is no absolute or inevitable contradiction. And since the acceptance date is solely in the hands of the Commissioner, it would seem unfair to allow such an arbitrary and undeterminable event to dictate a contradiction.

* 7]

Therefore, I find that testimony of such an oral condition can be heard by a court. Of course, that does not end the ultimate issue on whether there was in fact such an oral condition. That must await an answer by the Respondent and if factual issues are raised therein, then a hearing to determine such issues. Please see *Winkler v. Kingston Housing Authority*, 238 AD2d 711 (3rd Dep't 1997) (on motion), 259 AD2d 819 (2nd Dep't 1999) (after trial).

Accordingly, it is hereby

ORDERED that respondent's cross motion to dismiss is denied. Respondent shall serve its answer by personal delivery to petitioner's counsel and the Court (Room 222) by July 16, 2008. Petitioner may reply in like fashion by July 31, 2008. The proceeding will be marked submitted effective that date, and counsel will be notified of the Court's decision.

This constitutes the interim decision and order of this Court.

Dated: June 18, 2008

JUN 18 2008



J.S.C.
ALICE SCHLESINGER

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