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

PRESENT: Joan B. Lobis PART 6

Index Number : 102780/2009

DIAZ, ROBERT

vs

NYC DEPT OF TRANSPORTATION

Sequence Number : 001

ARTICLE 78

INDEX NO. 102780/09

MOTION DATE 6/24/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 25 were read on this ~~motion to/for~~ Art 78 pet.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-13
Answering Affidavits — Exhibits	14-25
Replying Affidavits	

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition decided in accordance with accompanying decision, order and judgment.

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).

Dated: 4/16/09

J.S.C.

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

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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In the Matter of the Application of
ROBERT DIAZ,

Petitioner,

Index No.: 102780/09

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

Decision, Order, and Judgment

- against -

NEW YORK CITY DEPARTMENT OF TRANSPORTATION, AND JANETTE SADIK-KHAN, COMMISSIONER, NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

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JOAN B. LOBIS, J.S.C.:

Petitioner Robert Diaz brings this Article 78 proceeding seeking reinstatement to his former position with respondent, the New York City Department of Transportation ("DOT"). Petitioner asserts that the decision to terminate his employment was arbitrary and capricious and an abuse of discretion. In addition to reinstatement, he seeks back pay, wages, and benefits retroactive to June 9, 2008, his last date on the payroll. Alternatively, petitioner requests reinstatement with a modified penalty, or a judgment annulling his termination and an order requiring arbitration between the parties.

Petitioner began working for DOT on July 17, 2005 as an Assistant City Highway Repairer ("ACHR") under the Citywide Concrete Program. The position is a seasonal appointment, typically beginning in March and extending to December each year. Petitioner was hired in that

capacity four different times in the four years between 2005 and 2008, although, pursuant to DOT regulations, he is considered to have worked for DOT for only two complete seasons.[1]

On September 17, 2007, petitioner was arrested and charged with Criminal Sale of a Controlled Substance in the Third Degree, Penal Law § 220.39(1), a class B felony. The next day, petitioner duly notified DOT that he had been arrested. On April 1, 2008, he pled guilty to two counts of Possession of a Controlled Substance in the Seventh Degree, Penal Law § 220.03, and was fined $2,000. The presiding judge, the Hon. Guy J. Mangano, Jr., issued petitioner a Certificate of Relief from Disabilities.

On May 6, 2008, DOT began an employment termination proceeding against petitioner, claiming that he had violated three paragraphs of DOT's Code of Conduct: (1) that he had violated the New York State Penal Code; (2) that he "engaged in conduct prejudicial to the good order and discipline of DOT;" and, (3) that he "engaged in conduct tending to bring the City of New York . . . into disrepute."

Under the Memorandum of Agreement between DOT and petitioner's union, District Council 37 (the "Union"), the first proceeding is a "Step A" conference, which occurred on May 20,

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[1] Regulations dictate that a seasonal employee who begins employment prior to July 1 is considered to have completed one season of employment in December of that year. Employees who begin work after the July 1 date complete one season on the anniversary of their start date. Since petitioner began work on July17, 2005, his first season was completed on the same day in 2006. He then completed his second season on July 17, 2007. Since petitioner's termination was confirmed on July 9, 2008, he remains eight days short of completing a third season of employment. The dates of his employment are as follows: July 17, 2005 to December 10, 2005; March 12, 2006 to December 10, 2006; March 12, 2007 to December 9, 2007; and, March 9, 2008 to July 9, 2008.

2008. The charges against petitioner were substantiated and his termination was recommended. Petitioner rejected the recommendation and elected to appeal to a "Step B" conference, which was convened on July 2, 2008. Present at the conference were petitioner; his attorneys; and an Advocate's Office representative. The appeal was argued before Gordon Goldberg, the Director of Labor Relations for DOT.

At the Step B conference, petitioner presented character reference testimony from his half-sister, who is a retired police officer; M.B., who claimed to be the true owner of the drugs that petitioner pleaded guilty to possessing; and, three of petitioner's prior DOT supervisors, who testified to the superior quality of petitioner's work at DOT and asked for his reinstatement. After reviewing all of the evidence, Mr. Goldberg determined that DOT had met its burden of proof, and issued a decision on July 8, 2008, affirming the termination decision of the Step A conference. Petitioner was terminated from employment effective July 8, 2008, and was removed from the payroll the next day.

On August 11, 2008, petitioner appealed to a Step III review. The Step III hearing was held on October 22, 2008, where petitioner submitted claims on both procedural and substantive grounds. Petitioner argued that the procedure utilized was wrong. He asserted that his grievance rights should be governed by the terms of the "2005- 2008 Blue Collar Agreement" and not the "Memorandum of Agreement," of 1999. The Blue Collar Agreement provides that, instead of a Step III hearing being the final forum for appeal, a final and binding arbitration is the final appeal of a dispute (pursuant to Article VI, Section 1g of Grievance procedure).

Petitioner then made two substantive arguments in his grievance. First, since the offense petitioner committed is not among the twenty-one enumerated offenses in the Code of Conduct for which an employee may be terminated, he argued that he cannot be charged with violating the Code of Conduct. Second, petitioner resubmitted evidence given at the Step B conference, including the testimony of petitioner's half-sister; the admission of the alleged owner of the drugs; and, the recommendations of petitioner's co-workers and supervisors, in an attempt to prove that petitioner had not committed the crimes to which he pled guilty.

The Review Officer, representing the Commissioner, denied the grievance in a final written decision, dated November 3, 2008.[2] He first addressed the procedural objections, stating that the Memorandum of Agreement sets forth that it may be altered only by the "mutual written consent" of both parties. That the 2005-08 Blue Collar Agreement makes no mention of the Memorandum of Agreement, he found, is insufficient to meet the threshold of mutual written consent. As to the merits, the Review Officer quoted Paragraph 4 of the Code of Conduct, which provides that no employee is to "be convicted of *any crime* or *any violation* of the New York State Penal Law." (Emphasis in original.) That Appendix A goes on to list specific violations does not exclude all others. Additionally, although the Review Officer was disturbed by the fact that it appeared that petitioner "may well have been in the wrong place at the wrong time," he noted that the Step III proceeding is not a place to investigate the crime. The only relevant fact is that petitioner was convicted.

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[2] A decision was rendered initially on October 30, 2008, but was later revised on November 3 because of an erroneous footnote in the original decision which said that petitioner had 15 days to appeal. Since petitioner had no recourse to appeal, the revised decision was then published with the footnote removed.

As part of his claims in this proceeding, petitioner restates the arguments he made as part of his grievance procedure. In the alternative, he urges this court to modify his penalty. He argues that a suspension and other conditions short of termination are more appropriate.

Before turning to the merits of the determination to terminate petitioner's employment, respondents raise the affirmative defense that this petition is time-barred because petitioner was terminated from employment effective July 9, 2008, and this proceeding was commenced more than four months later, on February 26, 2009. The issue of whether this proceeding is time-barred is not as clear cut as respondents contend. If the relevant date is the date of petitioner's termination from employment, this proceeding is clearly time-barred. But, although petitioner was terminated from employment, he promptly requested a Step III review of the decision. The determination of the Step III review was not issued until October 30, 2008. This proceeding was commenced within four months of the Step III decision reaffirming the decision to terminate petitioner's employment.

Respondents' verified answer reflects that the Step III review was in accordance with the Memorandum of Agreement. Given the fact that the Memorandum of Agreement provides that its procedures "shall govern," the three-step review procedure appears to be a mandatory prerequisite to the bringing of an Article 78 petition. Indeed, had petitioner skipped this step, and brought an Article 78 proceeding immediately after his termination, respondents could well have asserted that the petition should be dismissed for failure to exhaust administrative remedies. See, e.g., Barrera v. Frontier Cent. School Dist., 227 A.D.2d 890, 891 (4th Dep't 1996) ("[W]here a collective

bargaining agreement requires that a particular dispute be resolved pursuant to a grievance procedure, an employee's failure to grieve will constitute a failure to exhaust, thereby precluding relief under CPLR article 78.").

The cases relied on by respondents in support of their contention that the July 9, 2008 date governs are distinguishable from the facts in this matter. In Raykowski v. New York City Dept. of Transp., 259 A.D.2d 367 (1999), eight months after petitioner's employment was terminated, he sought a meeting to review the decision; the court held that the meeting did not constitute a fresh look at the decision. Similarly, in De Milio v. Borghard, 55 N.Y.2d 216 (1982), petitioner was terminated from employment, and then wrote a letter to the Commissioner requesting reconsideration, after he pursued his administrative remedies. The court held that bringing the Article 78 proceeding four months after the Commissioner's decision rejecting the letter's request for reconsideration was untimely.

These and other cases relied on by respondents all concern requests for reconsideration, which is different than the process in this case. Here, in contrast, petitioner followed the formal procedures set forth in the Memorandum of Agreement, which is an appeal to Step III. The decision denying petitioner's Step B decision states that petitioner "may elect to appeal this decision to the Commissioner," whose written reply "shall be final, binding, and not subject to the grievance procedure or arbitration." Although his employment was terminated in July 2008, the review process was not completed until the final administrative appeal that petitioner was entitled to pursue. Respondents do not cite to any cases with facts that are substantially similar to the

circumstances here, in which an employee was terminated from employment but still pursued the administrative process to which he was entitled, rather than additional, informal requests for reconsideration. Accordingly, this court declines to hold that the petition is time-barred because petitioner pursued all of his entitled avenues of administrative review; rather, this court will consider the petition on the merits.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

Petitioner's claim that his guilty plea to two counts of Possession of a Controlled Substance in the Seventh Degree, Penal Law § 220.03, did not warrant his termination from employment because this specific crime is not enumerated in DOT's Code of Conduct is without merit. The Code of Conduct states specifically that a DOT employee "shall not . . . [b]e convicted of any crime or any violation of the New York State Penal Law." The fact that Appendix A contains selected sections of the Penal Law does not narrow the phrase "any crime."

Petitioner argues that there is a conflict between the Blue Collar Agreement and the Memorandum of Agreement; he argues that the Memorandum of Agreement should not be applied

to his circumstances. Respondents assert that the Memorandum of Agreement was properly applied to petitioner, since he had not completed three consecutive seasons of employment. Section 4(b) of the Memorandum of Agreement applies to employees who have completed less than three consecutive seasons of employment but more than one season of service. The procedure provides for a three-step grievance process, culminating in an appeal to the Commissioner of Labor Relations. Only employees with more than three consecutive seasons of service have a right to proceed to arbitration, as set forth in § 4(c), if the Union elects to proceed to arbitration on the employee's behalf and with the employee's consent.

The Blue Collar Agreement covers only those employees in job titles that are listed in the Blue Collar Agreement. The Blue Collar Agreement only applies to an ACHR when the ACHR has achieved full-time annualized status. This does not occur until successful completion of five consecutive seasons of seasonal employment. Since petitioner was a seasonal ACHR, his employment was not covered by the Blue Collar Agreement. In any event, even if petitioner had been covered by the Blue Collar Agreement, any appeal to arbitration can only be brought by the Union, and may not be pursued by the employee directly.

Finally, the penalty of termination from employment was not disproportionate to the offense. It is well-settled that "[a] court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." Pell, supra at 231. To upset the penalty phase, a penalty must be found to be "'so disproportionate to the offense . . . as to be shocking to one's sense of fairness.'" Id. at 233, quoting

Stolz v. Board of Regents, 4 A.D.2d 361, 364 (3d Dep't 1957); Kelly v. Safir, 96 N.Y.2d 32, 38, rearg. denied 96 N.Y.2d 854 (2001). It is not shocking to one's sense of fairness that an employee who works in a position in which he may be required to drive heavy trucks and operate heavy machinery be discharged from employment for a drug-related offense. Petitioner's guilty plea precludes relitigation of the underlying misconduct. People v. Taylor, 65 N.Y.2d 1, 5 (1985).

The court has considered all of petitioner's other contentions and finds them to be without merit. Given petitioner's guilty plea to the possession of drugs, and that his termination from employment resulted from that conviction in accordance with a plain reading of DOT's Code of Conduct, it was not arbitrary and capricious, nor was it an abuse of discretion, for DOT to terminate petitioner's employment.

Accordingly, the petition is denied and the proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: July 16, 2009

JOAN B. LOBIS, J.S.C.