

Matter of Rodriguez v City of New York

2009 NY Slip Op 30105(U)

January 13, 2009

Supreme Court, New York County

Docket Number: 110402/08

Judge: Joan B. Lobis

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

DECEASED. Joan B. Lohis

PART 6

Index Number : 110402/2008

RODRIGUEZ, ROBERT

vs
CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 11/12/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 22 were read on this motion to/for Art 78 petition

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>Petition 1-8</u>
Answering Affidavits — Exhibits	<u>Answer 9-21</u>
Replying Affidavits	<u>Reply 22</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that

UNFILED JUDGMENT
 No 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).

**PETITION
 MOTION DECIDED IN ACCORDANCE WITH
 ACCOMPANYING DECISION AND ORDER AND JUDGMENT**

NYS SUPREME COURT
 RECEIVED
 JAN 15 2009
 MOTION SUPPORT OFFICE

Dated: 1/13/09

JSh
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

CA SP

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
In the Matter of the Application of
ROBERT RODRIGUEZ,

Petitioner,

Index No. 110402/08

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

Decision, Order, and Judgment

-against-

THE CITY OF NEW YORK, MICHAEL
BLOOMBERG, as Mayor of the City of New York
and THE NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

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

Petitioner brings this Article 78 proceeding to challenge his termination as a Senior Sewage Treatment Worker of the New York City Department of Environmental Protection (the "DEP"). In October 2007, the DEP served petitioner with notice of four disciplinary charges (the "Notice"). He was accused of violating Rules E6, E9, E12, and E24 of the DEP's Uniform Code of Discipline, set forth in pertinent part:

E. OFFICIAL CONDUCT

* * *

6. Employees shall not conduct themselves in a manner prejudicial to good order and discipline.

* * *

9. Every employee shall immediately notify this Agency of any arrest, or, conviction of a crime. Such notification shall be in writing and directed to: (a) his immediate supervisor; and (b) to the Commissioner or acting head of his department.

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).

PROHIBITED ACTIVITIES

* * *

12. Employees shall not neglect their assigned duty or duties.

* * *

24. Employees shall not, except when authorized, absent themselves from nor leave their assigned work location and/or tour of duty.

(Underlining in original.) The Notice comprised four distinct charges. Charge I alleged that petitioner was absent from his tour of duty without authorization on January 30 and 31, 2007; August 14, 15, 16, and 19, 2006; July 10, 11, and 12, 2006; and, May 2 and 3, 2006. Charge II alleged that petitioner neglected his duty by submitting a false and/or fraudulent doctor's note on February 14, 2007, for his absence due to alleged illness on January 30 and 31, 2007; that he neglected his duty by absenting himself without authorization on January 30, 2007 and by failing to attend a training session in Red Hook on Field Safety, which he was scheduled to attend; that he neglected his duty by submitting a false and/or fraudulent doctor's note on September 11, 2006, for his absence due to alleged illness on August 14, 15, 16 and 19, 2006; and, that he neglected his duty by submitting a false and/or fraudulent doctor's note on July 18, 2006, for his absences due to alleged illness on July 10, 11, and 12, 2006. Charge III consisted of petitioner's failure to notify the DEP of his arrest on October 3, 2007 in Queens County for multiple counts of Offering a False Instrument for Filing, a class E felony. The final charge asserted that petitioner conducted himself in a manner prejudicial to good order and discipline by submitting false and/or fraudulent doctor's notes on separate occasions for each of the dates specified in Charge I, plus three additional notes, totaling seven (7)

specific doctor's notes. The Notice enumerated the possible consequences of a guilty finding: petitioner could be reprimanded, fined in an amount not to exceed \$100, suspended without pay for a maximum of two months, demoted to a lower civil service grade and title, or dismissed.

The DEP conducted an informal conference on December 10, 2007. The charges were sustained and termination was recommended. Petitioner did not accept the recommended penalty and opted to proceed to an administrative hearing with the City of New York Office of Administration Trials and Hearings ("OATH"). The hearing was held on March 14, 2008. On the basis of the testimony of Chief Investigator Daniel Lau of the City of New York Department of Investigation, the hearing officer sustained the bulk of the charges. While petitioner did not testify because of the pending criminal case, he offered no defense of any sort. In his Report and Recommendation, dated April 29, 2008, the Administrative Law Judge (the "ALJ") found that petitioner submitted fraudulent medical notes dated April 11, 2005; November 3, 2005; May 2, 2006; July 12, 2006; August 14, 2006; and, January 30, 2007. He also concluded that petitioner was absent without leave for the dates specified in Charge I and failed to provide immediate written notification of his arrest. The ALJ did not find that the December 20, 2006 note was fraudulent. While noting that submitting fraudulent medical notes is egregious misconduct and generally leads to termination of employment, the ALJ recommended a 60-day suspension, citing petitioner's 26 years of service, a lack of a prior disciplinary record, and a recent evaluation describing him as an outstanding worker. By letter dated May 15, 2008, the Commissioner, Emily Lloyd, adopted the findings of the ALJ but not the recommendation for a penalty; the Commissioner ordered that petitioner be terminated from employment. It is that final administrative determination that petitioner challenges by this special proceeding.

It is petitioner's claim that his termination from employment was arbitrary and capricious and constitutes an abuse of discretion. He does not argue that sustaining the bulk of the charges was arbitrary and capricious and constitutes an abuse of discretion. His challenge is to the penalty, the rejection of the ALJ's recommendation, and the failure to consider his years of service and prior unblemished record. He asserts that the decision to dismiss him was without a rational basis and unsupported by the facts. Pell v. Board of Education, 34 N.Y.2d 222 (1974). In petitioner's reply memorandum, he urges that the Commissioner's failure to state a reason for rejecting the recommended penalty and imposing the sanction of termination was arbitrary and capricious and constitutes an abuse of discretion.

The City argues that this court should not upset the determination of the Commissioner and that the court should dismiss the petition. Not only was the Commissioner not under any obligation to accept the ALJ's findings, 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). The City urges that this standard has not been met here. It cites to other cases¹ where termination was sustained on an appeal. The lead petitioner in Pell was terminated from a position as a teacher for falsely certifying

¹ Indeed, the same day the ALJ recommended dismissal for another client of petitioner's attorney for fraudulent physician's notes, albeit a greater number of notes.

he was ill. See also, Kelly, supra; Gailband v. Christian, 56 N.Y.2d 890 (1982); Wallace v. Dep't of Sanitation, 303 A.D.2d 295 (1st Dep't 2003).

The challenge here is to the severity of the penalty. The argument that the Commissioner failed to articulate her reason for rejecting the ALJ's recommendation is without merit. By accepting the findings of the ALJ and affirmatively stating that falsification of medical notes submitted to obtain sick time is egregious misconduct, the Commissioner has no duty to explain why she did not follow the recommendation of a less severe penalty. As the Court of Appeals stated, the test the court must apply to set aside a determination is "only if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Pell, supra, 34 N.Y.2d at 233. While a test involving an interest of justice standard might lead to a different result and the notion of progressive discipline might be a more reasonable approach to employee misconduct from the point of view of an employee, this court must conclude that the termination cannot be overturned. The petition is dismissed.

This constitutes the decision, order, and judgment of the court.

Dated: January 13, 2009



JOAN B. LOBIS, J.S.C.

WARNING
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 1415).