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

PRESENT: WALTER B. TOLUB Justice PART

Index Number : 400240/2008

IZQUIERDO, BIENVENIDO

VS.

BLOOMBERG, MICHAEL R.

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 400240-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

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: 1/21/09

WALTER B. TOLUB J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
----------X

Case No.1:

In the Matter of the Application of
BIENVENIDO IZQUIERDO,

Petitioner,

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

-against-

Index No.
400240/2008

MICHAEL R. BLOOMBERG, Mayor of the City of New York, NEW YORK CITY, NEW YORK CITY DEPARTMENT OF TRANSPORTATION and JANNETTE SADIK-KAHN, as Commissioner of the New York City Department of Transportation,

Respondents.

Case No. 2:

BIENVENIDO IZQUIERDO,

Plaintiff,

-against-

MICHAEL R. BLOOMBERG, Mayor of the City of New York, NEW YORK CITY, NEW YORK CITY DEPARTMENT OF TRANSPORTATION and JANNETTE SADIK-KAHN, as Commissioner of the New York City Department of Transportation,

Defendants.
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WALTER B. TOLUB, J.:

In this "hybrid" Article 78 proceeding, petitioner Bienvenido Izquierdo (petitioner) seeks an order and judgment (1)

annulling the determination of respondents Jannette Sadik-Kahn, Commissioner of the New York City Department of Transportation, the New York City Department of Transportation (DOT), and the City of New York, terminating his employment as a Highway Repairer, and (2) directing that he be reinstated with back pay and benefits, including seniority. Petitioner additionally seeks an order enjoining and prohibiting respondents/defendants from engaging in unlawful discrimination based on a disability, in violation of New York City and New York State Human Rights Laws.

Respondents cross-move to dismiss the petition/complaint pursuant to CPLR 217, 3211 (a) (5) and (a) (7), on the grounds that petitioner is time-barred from challenging the terms of a Stipulation and Agreement that he executed on July 3, 2006, and the petition otherwise fails to state a cause of action.

BACKGROUND

On June 15, 2007, petitioner was terminated from his position at the DOT, after 27 years with the agency. At the time of his termination, petitioner was employed in the title of Highway Repairer, a position that required petitioner to possess and maintain a Class B Commercial Driver's License (CDL).

On June 23, 2006, petitioner's CDL was revoked after he was convicted for driving while intoxicated. Three days later, on June 26, 2006, DOT notified petitioner that he was being removed from his position, due to his failure to posses a valid driver's

license in the class required by his job title. The notification letter advised petitioner to report to the Advocate's Office with his union representative no later than Monday July 3, 2006, to apprise the agency of his license status (*see* Petition: Exh. K).

On July 3, 2006, petitioner appeared at the Advocate's Office with his union representative, as directed. Petitioner alleges that, because the representative "did not represent him in good faith" during the meeting (Petition, ¶ 41), petitioner signed a "Waiver of Union Representative" dismissing him (*see* Petition: Exh. L).[1]

At the meeting, petitioner executed a Stipulation and Agreement (Agreement) with DOT, in which petitioner accepted "a suspension from his position with the agency until such time that his driver's license is restored" (*id.*: Exh. M, ¶ 5). The Agreement provided that, "in the event that a suspension pursuant to this Agreement exceeds a period of six (6) months, [petitioner] shall be terminated from his position with the

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[1]In the waiver, Petitioner expressly acknowledged that

> I ... HAVE BEEN ADVISED THAT I HAVE THE RIGHT TO HAVE A UNION REPRESENTATIVE PRESENT DURING MY INTERVIEW AT THE OFFICE OF THE ADVOCATE GENERAL TODAY. I HAVE CHOSEN TO APPEAR WITHOUT SUCH REPRESENTATIVE PRESENT. I UNDERSTAND, HOWEVER, THAT I MAY STOP THE INTERVIEW TO GET A REPRESENTATIVE IF I CHOOSE TO DO SO. I HAVE WAIVED MY RIGHT TO UNION REPRESENTATION TODAY FREELY AND VOLUNTARILY WITHOUT ANY THREATS OR PROMISES OF ANY KIND

(Petition: Exh. L).

agency" (*id.*, ¶ 13).

In signing the Agreement, petitioner acknowledged that he was "waiv[ing] any rights he may have pursuant to New York Civil Service Law and/or any collective bargaining agreement to challenge the termination of his position with the agency pursuant to ... [paragraph] thirteen" (*id.*, ¶ 14). Petitioner acknowledged that

> this Agreement constitutes a wavier by [Petitioner] whereby he is estopped from commencing any judicial or administrative proceedings or appeal before any court of competent jurisdiction, administrative tribunal, or Civil Service Commission to contest the lawfulness, authority, and jurisdiction of the Commissioner in imposing the terms which are embodied in this Stipulation

(*id.*, ¶ 16). Petitioner also confirmed that

> this Stipulation and Agreement has been entered into knowingly and intentionally, without coercion or duress practiced upon him or influencing him in any way, and after having discussions with and having been advised by his union representative and/or counsel, does accepts [sic] all terms and conditions contained herein

(*id.*, ¶ 17).

As it turns out, petitioner was unable to regain his CDL within six months, because his license was revoked by the Department of Motor Vehicles for a full year. On June 15, 2007, petitioner was notified that, effective immediately, he no longer qualified for, and thus had forfeited, his position (Petition: Exh. N).

Petitioner's CDL was restored on July 2, 2007, after which

he made several requests to DOT to reconsider its determination. When DOT declined, petitioner commenced the instant proceeding in Bronx County on October 12, 2007. By stipulation and order dated November 14, 2007, venue was changed to New York County.

Petitioner alleges that the decision to terminate him was unlawful, and made in bad faith, because DOT failed to follow its own established administrative policy and procedure of transferring an employee from the title of Highway Repairer to another title, upon that employee's failure to maintain a CDL. Instead, petitioner alleges, he was induced to enter the "unlawful" Agreement, containing terms that were against public policy or not fully within his control, or face immediate termination.

Petitioner additionally alleges that he is a recovering alcoholic, a recognized disability in New York State, and that his inability to maintain his CDL was a direct result of his alcoholism. Petitioner alleges that respondents discriminated against him, in violation of New York State and New York City Human Rights Laws (Executive Law § 290, *et seq.*, and Administrative Code of City of NY § 8-107, *et seq.*), by terminating petitioner for his alcohol-related inability to maintain his CDL, without attempting to provide a reasonable accommodation to allow him to continue to perform the other essential duties of his job.

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Petitioner further contends that, given his exemplary record during his years of service, the determination to terminate him for his failure to maintain a CDL was so grave in impact, and so disproportionate to the offense charged, as to violate the fundamental fairness doctrine and constitute an abuse of discretion.

Respondents move to dismiss the petition, arguing that any challenge to the validity or terms of the Agreement is time-barred by the four-month statute of limitations applicable to Article 78 proceedings. Respondents further argue that this entire proceeding must be dismissed, as petitioner knowingly and voluntarily waived his right to bring any judicial or administrative proceeding to challenge the enforcement of the Agreement.

In any event, respondents argue that even if petitioner retained the right to challenge his termination, petitioner effectively was restored to the status of a probationary employee under the terms of the Agreement, and thus has the burden of establishing that his termination was made in bad faith. Respondents argue that petitioner has not met this burden, as the failure to maintain a minimum condition of employment is both a good faith and rational basis for termination. Respondents further argue that petitioner is incorrect in claiming that the DOT "declined to follow its own established administrative

policy" (Petition, ¶ 5). Respondents note that DOT's "Loss of License" policy, in effect since November 2003, expressly provides that, if a permanent employee loses a required license and is no longer qualified for the job title,

> (s)he will be given the opportunity to accept a voluntary six (6) month suspension in order to have the license reissued ... If the employee does not agree to the suspension, (s)he will be terminated ... If (s)he fails to obtain the license by the end of the six month suspension period, the employee will be terminated

(see Martinez Affirm., Exh. 1).

Respondents argue that, to extent that plaintiff seeks to assert a discrimination claim under New York State and New York City Human Rights Laws, petitioner has failed to allege a prima facie case of disability discrimination. Respondents further note that the petition is devoid of any allegation that petitioner ever notified anyone of his disability, or requested a reasonable accommodation.

Finally, respondents contend that petitioner's invocation of the "shocks the conscience" test in challenging his termination is inapplicable, as that standard only applies to tenured employees and petitioner cannot demonstrate that the penalty of dismissal was such as to shock one's sense of fairness.

DISCUSSION

CPLR 217 (1) provides that an Article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner ..." To

the extent that petitioner seeks to challenge the validity or terms of the Agreement, the petition is time-barred, as such right accrued on July 3, 2006, the date the Agreement was executed, and more than four months before this proceeding was commenced (*see Matter of Nedd v Koehler*, 159 AD2d 344 [1st Dept 1990]). Although respondents contend that, under *Nedd*, petitioner's challenge to his termination under the Agreement is likewise time-barred, where, as here, a permanent employee has been reduced by such an agreement to the status of a probationary employee, courts recently have held that the decision to terminate the employee only becomes final and binding on the date the termination becomes effective, and not on the date of the agreement (*see e.g. Matter of Gilliam v New York City Dept. of Sanitation*, 18 Misc 3d 1141[A], 2008 NY Slip Op 50396[U] [Sup Ct, Kings County 2008]; *see also Pyant v Doherty*, 2008 NY Slip Op 30403[U] [Sup Ct, NY County 2008]).

However, even assuming that petitioner's challenge to his termination was timely, the petition must still be denied, as petitioner affirmatively waived any right he might have to bring a proceeding or action to challenge enforcement of the Agreement. Our courts have held that agreements in which a tenured or permanent employee waives his or her procedural and contractual protections are valid, as long as the employee has entered the agreement voluntarily and with no duress (*see Matter of*

Abramovich v Board of Educ. of Central School Dist. No. 1 of Towns of Brookhaven & Smithtown, 46 NY2d 450, 455, *cert den* 444 US 845 [1979]; *Pagan v Board of Educ. of City School Dist. of City of New York*, 56 AD3d 330 [1st Dept 2008]; *Matter of Newman v Fire Dept. of City of New York*, 47 AD3d 444 [1st Dept 2008]). Petitioner has not alleged that he entered into the Agreement unknowingly; nor has petitioner alleged facts to suggest that he was forced to execute the Agreement under duress.

In any event, even if petitioner retained the right to challenge his termination under the Agreement, the standard for reviewing a public employer's termination of an employee returned to probationary status is whether the termination was made in "bad faith," i.e, for a constitutionally impermissible reason or a violation of statutory or decisional law (*Matter of Soto v Koehler*, 171 AD2d 567 [1st Dept], *lv denied* 78 NY2d 855 [1991]; citing *Matter of York v McGuire*, 63 NY2d 760, 761 [1984]). Accordingly, the burden is on petitioner to raise and prove, by competent evidence, that his termination was made in bad faith (*see Matter of Witherspoon v Horn*, 19 AD3d 250, 251 [1st Dept 2005]; *Matter of Soto*, 171 AD2d at 568).

Petitioner claims that respondents departed from DOT's policy and practice of transferring an individual who has lost his or her CDL to a different job title that does not require the license, and thereby intentionally treated him differently from

similarly situated employees. However, because plaintiff failed to offer any factual support for this claim in his petition, at oral argument on June 13, 2008, this court directed petitioner to produce evidentiary support for this claim within 10 days. In response, petitioner's attorney submitted a supplemental affidavit, in which he lists eight individuals that allegedly were transferred from the Highway Repairer title to different titles, upon their failure to maintain or qualify for a CDL. The list does not include any information as to when these alleged transfers were made.

The record reflects that DOT's written "Loss of License" policy, issued in November 2003, provides for a voluntary suspension of up to six months for a permanent employee who has lost a required license, to be followed by termination if the employee is unable to obtain the license by the end of that period (*see* Martinez Affirm., Exh. 1). Even if the supplemental affidavit provided by petitioner's attorney were sufficient to show that DOT once had a policy and practice of transferring employees to a different position on the loss of their CDL, it is insufficient to establish that this remains DOT's current policy or practice. In response to petitioner's supplemental affidavit, respondents have produced portions of the personnel files for the eight individuals listed therein; these files reflect that all of the alleged transfers took place well before the DOT adopted its

November 2003 "Loss of License" policy (*see* Martinez Reply Affirm, Exhs. 5-12).

While a court may annul a determination as arbitrary and capricious if it departs from prior administrative policy (*see e.g. Matter of Engel v Sobol*, 161 AD2d 873 [3rd Dept 1990]), petitioner has failed to meet his burden of establishing that DOT departed from its administrative policy and practice in refusing to transfer petitioner when his CDL was revoked. As petitioner's failure to maintain a CDL, a minimum qualification for his employment as a Highway Repairer, provides a legitimate and non-discriminatory reason for his termination (*see Perruza v N.Y.C. Dept. of Transp.*, Sup Ct, NY County, Feb. 15, 2005, Payne, J. Index No. 112367/04), petitioner has failed to establish that DOT acted unlawfully, or otherwise in bad faith, by terminating him.

Our courts have held that "[a]n administrative penalty must be upheld unless it 'is so disproportionate to the offense ... as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Matter of Kreisler v New York City Tr. Auth.*, 2 NY3d 775, 776 [2004], quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237 [1974]). Given the fact that petitioner, admittedly, no longer possessed the minimum qualifications for his job title on the date of his termination, it cannot be concluded, "as a matter of

law, that the penalty [imposed] shocks the judicial conscience" (*Matter of Kreisler*, 2 NY3d at 776; *see also Matter of Torrance v Stout*, 9 NY3d 1022 [2008]).

Petitioner's cause of action alleging respondents' violation of New York State and New York City Human Rights Laws also must be dismissed. In order to state a prima facie case of employment discrimination due to a disability under the State and City Human Rights Laws, petitioner must demonstrate that he suffered from a disability and that the disability caused the behavior for which he was terminated (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [1st Dept], *lv denied* 7 NY3d 707 [2006]; *see also Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]).

Petitioner alleges that, because his alcoholism led to his DWI conviction, which caused the temporary loss of his CDL, the loss of his CDL must be considered a manifestation of his disability. Petitioner contends that, as the law protects an employee from discharge for behavior that manifests a disability, his termination for failing to maintain his CDL constitutes discrimination. Petitioner cites to the situation in *McEniry*, in which the Court found disability discrimination where the employee was terminated retroactively for pre-rehabilitation alcohol-related absenteeism, after he had established that he was able to perform his job in a satisfactory manner following his discharge from a rehabilitation program (*id.*, 84 NY2d at 560).

The fact that petitioner's alcoholism may have had some connection to his drunk driving, which then led to the loss of his CDL, does not make petitioner's loss of the CDL a manifestation of his disability. In decisions involving entitlement to employment insurance benefits, courts have found no causal connection between a claimant's alcoholism and his discharge for failure to maintain a required operator's license *(see Matter of Moulton [Hudacs]*, 198 AD2d 595 [3rd Dept 1993] ["It was not claimant's alcoholism but his voluntary disregard of a legitimate condition of employment, the maintenance of an operator's license, which mandated his termination"]).

Unlike the situation in *McEniry*, petitioner was not terminated solely for pre-rehabilitation behavior causally connected to his alcoholism, but because, at the time of his termination, he failed to maintain and possess a CDL, a minimum requirement of his job title. The fact that petitioner may be an alcoholic does not mean that he is immunized from termination based on an otherwise legitimate, non-discriminatory reason, even if that reason may be linked in some way to his disability (*see Riddick v City of New York*, 4 AD3d 242 [1st Dept 2004]).

Accordingly, it is

ORDERED that the respondents cross motion to dismiss the proceeding/complaint is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding/complaint is dismissed.

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

DATED: 1/21/09

ENTER:

Hon. Walter B. Tolub, J.S.C.