

<b>Matter of Lynch v Horn</b>
2009 NY Slip Op 30152(U)
January 22, 2009
Supreme Court, New York County
Docket Number: 114211/08
Judge: Nicholas Figueroa
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SUPREME COURT OF THE STATE OF NEW YORK / NEW YORK COUNTY

PRESENT: Nicholas F. Figueroa PART \_\_\_\_\_

Index Number : 114211/2008  
LYNCH, LOUISE  
VS.  
HORN, MARTIN  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. 114211/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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 be denied and the  
petition dismissed.

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

Dated: 1-23-09 \_\_\_\_\_ J.S.C.

Check one:  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

-----X

In the Matter of the Petition of

LOUISE LYNCH,

Petitioner,

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

Index No. 114211/08

- against -

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

Respondents.

-----X

Nicholas Figueroa, J.:

Petitioner Louise Lynch commenced this Article 78 proceeding against the New York City Department of Correctional Services ("DOC"), et al., alleging that DOC's termination of her employment as a correction officer was arbitrary and capricious. Petitioner seeks reinstatement as well as full back pay, seniority, and benefits.

Petitioner was appointed to her DOC position on November 19, 2006, subject to a standard two-year probationary period. Some four months later, she was arrested on a charge of Robbery in the 3<sup>rd</sup> Degree. As of April 4, 2007, she was suspended from duty pending disposition of such charges and, by DOC letter dated April 25, 2007, was notified that her employment was terminated. The criminal case against her was ultimately dismissed, however,

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and, by DOC letter dated February 5, 2008, she was rehired.

Once rehired, petitioner was immediately assigned to the Correction Academy for re-training from February 5 to February 16 of 2008. At the end of such training, petitioner was advised that she needed medical and psychological clearances before she could be assigned to a post. Such clearances were obtained ten days later. In the interim, petitioner was put on sick leave. On February 28, 2008, she was assigned to the George Motchan Detention Center ("GMDC") on Riker's Island.

On December 1, 2006, petitioner had been given the first of four urine tests prescribed for probationary correction officers under DOC Directive 7506. She was given the second such test on July 23, 2008. The results of both tests were negative for drug use. On August 7, 2008, shortly after the beginning of her 7a.m. to 3 p.m. tour of duty, she was ordered to report for submission of another urine sample. On August 18, 2008, the testing laboratory reported that such third urine test was positive for cocaine use, as was the re-test required under section VI(E) of Directive 7506.

By DOC letter dated August 22, 2008, petitioner was notified that her employment was terminated effective as of that date. Under Directive 7506, she was entitled to request a re-test by an appropriate laboratory of her choice. She declined to do so. Instead, she filed the instant petition.

In an Article 78 proceeding, an administrative agency's decision may not be disturbed by the court unless it was arbitrary, capricious, or erroneous as a matter of law (CPLR 7803[3]). In other words, the agency's decision must be affirmed if there is a rational basis for it (Pell v Board of Education, 34 NY2d 222).

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Directive 7506 is applicable to all probationary correction officers and is part of the screening process by which DOC attempts to assure "the safety of [correctional staff]..., the inmates they supervise and the security of the facility where they work..." (Directive 7506 [II]).

In relevant part, the Directive provides that,

III. POLICY The use of drugs either on or off duty by members on probation shall be cause for termination....

VI. PROCEDURES In addition to ... testing all probationary Correction Officers while they are assigned to the Training Academy, as part of their end-of-probation physical examination and on the basis of reasonable suspicion, the ... Health Management Division (H.M.D.) will ensure that all probationary Correction Officers are tested twice during their probationary periods....H.M.D. will on an unannounced basis[] visit all Commands with probationary Correction Officers and request ... the Commanding Officer or his ... designee[] to direct those probationary Correction Officers identified by H.M.D. to report to the Drug Testing Area immediately following their tour(s) .... A uniformed supervisor or Health Management Division staff member of the same gender as the member being tested will ensure the integrity of the testing procedure by observing the act of urination, the placement of specimen in a bottle and the surrender of the specimen.. .. Specimens shall be sealed and labeled in the presence of the member tested. The storage, transportation and surrender of specimens to the laboratory for testing shall be under the strict supervision of the Health Management Division to maintain an unbroken chain of custody throughout the testing procedure.

Petitioner maintains that respondents did not follow such procedures and that they therefore impermissibly exercised an "unbridled discretion" in their administration of the test.

First, petitioner alleges that the bag containing her urine specimen was not "sealed in her presence" as required by the foregoing provisions and that it was therefore subject to tampering. By her own account, she herself had poured the specimen into two cups, signed the labels sealing the lids with which she closed the cups, placed both cups in a bag, and then (after reaching into the bag to check that the lids were secure) handed the bag to the supervising Health

Management Division (HMD) employee.

Respondents have submitted an affidavit from the HMD employee who supervised the August 7, 2008, drug test. In such affidavit, the HMD supervisor, a 20-year DOC veteran who has been in her current position for some six years, describes the steps that are taken to assure the integrity of the process, including the chain of custody from correction officer to the laboratory; avers that it is her standard practice to allow the subject to seal the bag herself; and further avers that she would never accept any bag that was not thus sealed. Such steps are in no respect inconsistent with the procedure mandated by Directive 7506. Accordingly, there was a rational basis for respondents to conclude that the bag in question had been safeguarded against tampering.

Petitioner also alleges that respondents violated Directive 7506 when they required her to undergo drug testing on August 7, 2008, only two weeks after her second such test. However, the Directive does not purport to prescribe the spacing of the four tests required to be administered within the two-year probationary period. Petitioner also argues that she had not been "identified" by HMD" as required by the Directive, but had instead been singled out for testing that day by certain of her superiors at GMDC. In such connection, she points out that she personally saw only one other correction officer also report for testing that morning. The record indicates, however, that a total of five correction officers were tested that day. Moreover, the affidavit of an HMD employee corroborates the affidavit of a GMDC Captain, to the effect that petitioner had been directed to report for testing because her name was on a list received from HMD. Petitioner's extensive speculations about the existence or non-existence of such a list are insufficient to discredit such submissions. Furthermore, the fact that petitioner was directed to

\* 6 ]  
report for testing during her tour of duty, rather than being required to submit to testing after hours — if anything an accommodation to petitioner — does not amount to a material departure from the terms of the Directive or a subversion of its purposes.

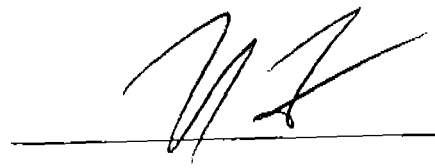
Finally, it is noted that petitioner cites several grounds for her suspicion that the testing process was in her case misused by persons having an agenda against her. These include her termination in April 2007 (which was vacated when the criminal case against her was dismissed); that she was advised to get medical and psychological clearances only after her re-training had been concluded (a reasonable administrative requirement); that she had been reported as chronically absent during the time that it took to obtain such clearances (a report that was promptly rescinded when she challenged it); that her application for permission to carry a firearm was initially denied (an application that was, however, ultimately granted); that she was denied her first choice of vacation periods (having in fact failed to complete her application in accordance with its printed instructions); and that her superiors at GMDC had purportedly spoken to her disrespectfully.

Generally, a provisional or probationary employee may be terminated even without cause, although the employer may not act in bad faith (Johnson v Katz, 68 NY2d 649, 650). Petitioner's unfounded speculations, however, do not support the conclusion of bad faith in administering the required drug test. Respondents' decision to terminate petitioner's

employment was not arbitrary or capricious based on the results of her blood tests.

Accordingly, it is ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.



J.S.C.

Dated: January 22 , 2009

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