

Dauids v City of New York

2009 NY Slip Op 30581(U)

March 13, 2009

Supreme Court, New York County

Docket Number: 113038/07

Judge: Joan A. Madden

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

Joseph Davids

INDEX NO.

113038/07

MOTION DATE

~~2/1/08~~ 10-30-08

MOTION SEQ. NO.

1

MOTION CAL. NO.

- v -

CITY OF NY

The following papers, numbered 1 to _____ were read on this ^{application} ~~motion~~ to/for Article 78 relief

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this ~~motion~~ ^{application} is decided in accordance with the annexed memorandum Decision Order and Judgment.

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

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

Dated: March 13, 2009

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
JOSEPH DAVIDS,
Petitioner,

-against-

Index No. 113038/07

CITY OF NEW YORK, HON. RAYMOND W. KELLY
As Police Commissioner of the New York City Police
Department, and POLICE DEPARTMENT OF THE CITY
OF NEW YORK,

Respondents.

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

-----X
Joan A. Madden, J.:

In this Article 78 proceeding, Petitioner Joseph Davids ("Petitioner") seeks an order and judgment (i) annulling the determination of Respondents City of New York, Police Commissioner of the New York City Police Department Hon. Raymond W. Kelly, and the Police Department of the City of New York (together "Respondents") demoting him from the rank of captain to the rank of lieutenant as arbitrary and capricious, in bad faith, and in violation of its own procedures, and (ii) reinstating Petitioner to the rank of captain, with back pay and benefits. Respondents oppose the petition, which the Court denies for the reasons discussed below.

Background

The New York City Police Department ("NYPD") hired Petitioner as a police officer on July 25, 1983. It later promoted him to sergeant on May 29, 1992, and to lieutenant on February 27, 1998. For both of these promotions, as well as the initial appointment to police officer, Petitioner successfully completed the requisite probationary periods. The NYPD further promoted Petitioner to the rank of captain on December 30, 2005, subject to the satisfactory completion of a probationary period.

Upon receiving his promotion to captain, Petitioner undertook a training course required of all newly promoted captains, which he completed on January 20, 2006. On that date, the NYPD assigned Petitioner to his command as the Executive Officer of Police Service Area 8 of the NYPD Housing Bureau. Patrol Guide Procedure No. 202-10 indicates that this position entailed numerous duties, including, inter alia, performing his commanding officer's function during her or his absence, responding to major radio runs and unusual occurrences within command, making indicated log entries, and supervising the performance of the command's administrative duties (Respondent's Ex. D).

New York City Police Department Administrative Guideline Procedure No. 314-07 ("AG 314-07") specifically governs the evaluation of newly promoted captains, and provides that captain evaluations should occur three times during the probationary period, on the probationary period's fourth month, tenth month, and, "if necessary," sixteenth month (Petitioner's Ex. 2). It stipulates, "The 16th month evaluation is only required for captains whose last six (6) months of probation have not been waived" (Id.). AG 314-07 lists New York City Police Department Administrative Guide Procedure No. 314-01 ("AG 314-01"), dated June 1, 2005, as a "Related Procedure."

AG 314-01 governed the general procedures for evaluating members of the service (Petitioner's Ex. 1), including probationary-captain evaluations. Subsequent modifications to AG 314-01 occurred as discussed infra. Under AG 314-01, all newly promoted officers were to remain on probation in rank for an eighteen-month period,¹ but satisfactorily completing the first

¹ Petitioner is not correct when he reads AG 314-01 to mean that probationary periods could last at most *eighteen months*. AG 314-01 does not set a maximum, and the NYPD's Notice of Examination No. 1544 expressly contemplates that "the probationary period may be extended for an additional six (6) months" beyond the eighteen-month period (Respondent's Ex. A). It is only later, when the NYPD issued Finest Message #020253, that an implied eighteen-month maximum period came to exist (See Respondent's Ex. G).

twelve-month period afforded a member the opportunity to have the remaining probationary time waived (Id. at 3). AG 314-01 additionally provides that a “rater” shall perform the evaluation (Id. at 1), and shall forward the evaluation to a “reviewer” (Id. at 2). The guideline requires the rater to “[c]omment on all areas rated below competent (2.5 or lower) and all areas rated extremely competent (5.0),” (Id. at 1) and if the ratee received a below-competent or extremely competent rating, it further stipulates that the ratee’s “commanding officer MUST be the reviewer” (Id. at 2) (emphasis in the original).

The NYPD modified AG 314-01 on May 17, 2006, when it issued Department Finest Message #020253 (Respondent’s Ex. G) (“Message”). The Message states that all newly promoted captains were to be on probation for 12 months, “unless cause exists to extend such period for an additional six months,” and that “members promoted under provisions of an eighteen month probation will have the last six months of the eighteen months waived unless cause exists to extend such probation” (Id.). The Message stated that the Police Commissioner would authorize such six-month extensions “on a case to case basis” (Id.).

In this case, Petitioner received feedback as early as April 2006 that his performance was not meeting expectations. In his affidavit, Assistant Chief Edward Delatorre (“Asst. Ch. Delatorre”) states that Petitioner had the temporary responsibility, during his commanding officer’s absence, to represent his command in the weekly CompStat meeting, where NYPD officials discuss recent crime statistics (Respondent’s Ex. E at ¶ 6). Petitioner performed poorly, and Asst. Ch. Delatorre, along with Deputy Inspector Dennis Clary (“Dep. Insp. Clary”), “advised [P]etitioner that his performance was poor, instructed him as to his deficiencies, and provided [P]etitioner with specific directions for improvement” (Id.). Petitioner received further negative verbal feedback during the summer (Id. at ¶ 7).

For Petitioner's first evaluation, the NYPD listed his first four-month period as from January 20, 2006, to May 20, 2006,² but its agents failed to prepare the evaluation until September 25, 2006 (Petitioner's Ex. 4). Inspector James A. McNamara ("Insp. McNamara") served as the rater, and in his affidavit he states that he performed the evaluation late because he, and Petitioner's other supervisors, wanted to provide Petitioner the opportunity to improve his performance so as to avoid having a negative evaluation on his employment file (Respondent's Ex. J at ¶ 4). Insp. McNamara found that Petitioner performed below competent standards overall (Petitioner's Ex. 4). Insp. McNamara assessed Petitioner as performing below competent in seven of ten categories (Id.). Insp. MacNamara's comments criticized Petitioner as lacking "knowledge about crime analysis and crime reduction strategies[,] as well as the entire Comp[S]tat process," and contained the required explanations for each area rated below competent (Id.).

Petitioner received and signed the evaluation on October 5, 2006 (Id.). Petitioner alleges that the evaluation received no reviewer signature, and the copy he provided to this Court does not contain one (Petitioner's Ex. 4). However, the copy of the evaluation that the Respondent has submitted does contain the signature of Asst. Ch. Delatorre, signing as the reviewer (Respondent's Ex. H). This discrepancy shows that Asst. Ch. Delatorre reviewed the evaluation after Petitioner received his copy. By contrast, AG 314-01 stipulates that the rater must "[d]iscuss [the] evaluation with ratee after the rater and the reviewer have signed" it (Petitioner's

² While Petitioner alleges that his probationary period commenced on the date the NYPD promoted him, which was December 30, 2005, the Respondent denies this assertion. The record before the Court does not contain information sufficient to resolve whether the probationary period began on December 30, 2005 (the date of the promotion) or January 20, 2006 (the date Petitioner completed his training course), but it is not material to this case.

Ex. 1). Furthermore, Asst. Ch. Delatorre was not Petitioner's commanding officer, as AG 314-01 required the reviewer to be when the ratoc received a rating of below competent.

Dep. Insp. Clary, who served as the rater for Petitioner's ten-month evaluation, found that Petitioner was below standards both overall and in the same seven of ten categories as on his four-month evaluation, and recommended that the NYPD extend Petitioner's probationary period (Petitioner's Ex. 5). Dep. Insp. Clary noted that Petitioner's "presentation skills have slightly improved from the last evaluation," but concluded that he still "lacked the necessary skills to be an effective manager" (Id.). Dep. Insp. Clary also provided comments for all ten evaluation areas, not just the seven for which Petitioner received below competent scores (Id.).

Although the evaluation states that it covered the period from April 30, 2006, to October 29, 2006, Dep. Insp. Clary prepared it on October 10, 2006, nineteen days before the period ended (Id.). Petitioner received and signed the evaluation on November 1, 2006 (Id.). Insp. McNamara signed as reviewer (Id.),³ even though Petitioner's commanding officer at the time was Captain Creighton ("Capt. Creighton"). Dep. Insp. Clary noted in the evaluation that he conferred with Capt. Creighton in the preparation of the evaluation (Id.). In his affidavit, Asst. Ch. Delatorre states that, in consultation with Capt. Creighton, he chose Insp. McNamara and Dep. Insp. Clary to review petitioner's evaluation for "their extensive experience, knowledge of petitioner's duties and responsibilities, and familiarity with petitioner's performance" (Respondent's Ex. E). Asst. Ch. Delatorre also had exposure to Petitioner's performance, and his affidavit extensively describes some of the "instruction and supervision" he provided

³ As with the four-month evaluation, the copy of the ten-month evaluation that Petitioner has submitted does not contain a reviewer signature, although unlike the four-month evaluation, it does have Insp. McNamara's typed name (Petitioner's Ex. 5). Respondent's copy of the ten-month evaluation has Insp. McNamara's signature as well as his typed name (Respondent's Ex. 1). Nonetheless, Petitioner does not allege that this evaluation lacked a reviewer's signature.

Petitioner (Id.). Petitioner does not dispute these statements, nor does he dispute either of his evaluations' substantive conclusions of below-standard performance (See Verified Petition).

On December 23, 2006, prior to the expiration of Petitioner's probationary period, Petitioner signed a six-month extension of the probationary period. On May 29, 2007, approximately 16 months after Petitioner's promotion, the NYPD demoted Petitioner to lieutenant.⁴

Petitioner commenced this Article 78 proceeding on September 27, 2007, alleging (1) that the Respondents' failure to comply with AG 314-07 was arbitrary and capricious, and in bad faith; (2) that Petitioner accepted the extension of probation under duress, partly since he did not receive notice that the Police Commissioner authorized the extension pursuant to the Finest Message; and (3) that the procedural failures, the duress, and Petitioner's subsequent demotion violated the New York State Constitution, Article V, Section 6, which requires that civil service promotions "shall be made according to merit and fitness"

Respondent moved to dismiss the petition on statute of limitations grounds, or, in the alternative, for failure to state a cause of action. In its interim decision and order dated June 27, 2008, this Court denied the Respondent's motion except to the extent of dismissing Petitioner's claim of duress as time-barred by the four-month statute of limitations period applicable to Article 78 proceedings. See CPLR 217. The court also directed that respondents serve a verified answer to the Petitioner, and gave Petitioner time to respond to the answer.

In support of his petition, Petitioner argues that Respondents' failure to follow their own procedures is evidence of bad faith sufficient to warrant annulling the determination to demote

⁴ Although Petitioner briefly mentioned the lack of a third evaluation in his Memorandum of Law, he failed to allege or provide evidence that the NYPD did not conduct one, and the Respondents have not addressed the matter. Consequently, this Court does not draw any inferences from its absence.

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him. Specifically, Petitioner asserts that his raters, Insp. McNamara and Asst. Ch. Delatorre, based their ratings not on Petitioner's daily duties, but on his CompStat performances, which Petitioner characterizes as an isolated and unusual part of his duties.

Petitioner further argues that the NYPD delayed his evaluations contrary to required procedures, and that such delay evinces bad faith. Specifically, Petitioner points out that whereas AG 314-07 requires the rater to evaluate probationary captains on the fourth month and tenth month of the probationary period, Petitioner's first rater, Insp. McNamara, prepared the fourth-month evaluation only on the ninth month. Petitioner argues that the second rater, Dep. Insp. Clary, had the opposite problem, preparing his evaluation over two weeks before the evaluation period ended, but a mere five days after Petitioner received his first evaluation. Petitioner contends that the four-month evaluation's late preparation effectively denied him the meaningful opportunity to improve before his second evaluation. The second evaluation's early preparation exacerbated that problem, and even "presumed, in bad faith, that [Petitioner] would not improve . . ." (Petitioner's Memorandum of Law at 13). Indeed, the second evaluation noted that Petitioner exhibited some improvement, but that he had not sufficiently progressed to change his below-competent rating.

Petitioner also asserts that the failure of his commanding officer to serve as reviewer for either evaluation undermines the "specific reason" that Petitioner believes AG 314-01 requires the commanding officer to review below competent evaluations. The reason Petitioner asserts AG 314-01 does so is "that it is the ratee's direct superior who is most capable of determining the ratee's actual performance" (*Id.* at 15).

Petitioner also contends that Respondents' failure to follow proper procedures violates his due process rights and implicates the Merit and Fitness Clause of the New York Constitution, which requires that the State, and all its civil divisions, make appointments and promotions

based on standards of merit and fitness, and that merit and fitness can only prevail when evaluations are fair and when the employer applies its rules uniformly and consistently.

In opposition, Respondents argue that Petitioner has not met his burden of demonstrating bad faith, particularly as the uncontroverted record demonstrates that Petitioner's below-competent performance provided a rational basis for his demotion. Respondents acknowledge that Petitioner's commanding officer did not review Petitioner's evaluations (Respondent's Memorandum of Law in Support of Their Verified Answer at 5), and that the NYPD conducted the four-month evaluation on September 25, 2006 and the ten-month evaluation on October 10, 2006 (Verified Answer at ¶¶ 16, 18). However, Respondents argue that these procedural defects do not suffice under the circumstances to demonstrate bad faith. See Smith v. City of New York, 118 Misc. 2d 227 (Sup. Ct. N.Y. Co. 1983) (holding that "failing to furnish periodic evaluations" to the probationary employee cannot be "the sine qua non or cause for reinstatement.").

In any event, Respondents assert that their failure to follow the Guidelines' stipulated time frame did not prejudice Petitioner since they notified him in April, 2006, before the end of the four-month period, that he was underperforming. Moreover, Respondents argue that since they delayed the four-month evaluation only to avoid placing a negative evaluation into Petitioner's employment file, the delay was not the result of bad faith.

Respondents further argue that the failure of Petitioner's commanding officer, Capt. Crcighton, to serve as the reviewer for either evaluation, despite Petitioner's below-competent ratings, does not constitute bad faith since the officers who did serve as reviewers, Asst. Ch. Delatorre, and Insp. McNamarra, were Capt. Crcighton's superiors in title and in experience.

Finally, Respondents assert that Petitioner's constitutional claim lacks merit because the record contains evidence that Petitioner performed poorly, and thus his demotion was based on his lack of merit and fitness, as required by the State constitution.

Discussion

In an Article 78 proceeding, courts may review the actions of a body or officer of government to determine whether its actions were arbitrary and capricious. See Matter of Talamo v. Murphy, 38 N.Y.2d 637, 639 (1976), In re Application of Chelrae Estates, Inc. v. State Div. of Hous. and Cmty. Renewal, Office of Rent Admin., 225 A.D.2d 387, 389 (1st Dep't 1996). The courts classify different actions as arbitrary and capricious depending on the petitioner's status. See Matter of Soto v. Koehler, 171 A.D.2d 567, 567 (1st Dep't), appeal denied, 78 N.Y.2d 855 (1991). Of relevance here, a body or officer of government may terminate or demote a probationary employee "for almost any reason, or for no reason at all," Matter of Swinton v. Safir, 93 N.Y.2d 758, 762-63 (1999) (quoting Matter of Venes v. Cmty. School Bd. of Dist. 26, 43 N.Y.2d 520, 525 (1978)), unless the government unit acted "in bad faith or for an improper or impermissible reason," id. at 763.

Moreover, the courts have held that evidence of poor performance by the probationary employee supports a finding that a discharge or demotion of a probationary employee was made in good faith. Matter of Johnson v. Katz, 68 N.Y.2d 649, 650 (1986) ("Evidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith where there is insufficient evidence of bad faith).

The employee has the evidentiary burden of demonstrating that the employer acted in bad faith. See Soto, 171 A.D.2d at 568. Here, Petitioner's only ground for asserting bad faith is Respondent's failure to comply with its own procedures. The courts have found that a violation or breach of proscribed procedures evinces bad faith only when such violation is contrary to both the procedural rule's text and its purposes. Schneider v. Lynde, 12 A.D.2d 812, 812 (2d Dep't 1961) (holding that bad faith occurred because the employer violated both the text and the

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intended purposes that the rule had for the roles of supervising officers other than the appointing officer).

On the other hand, when an employer fails to comply with a procedural requirement, but still satisfies its purposes, the procedural breach rarely has been found insufficient to support a finding of bad faith. See, e.g., Specht v. Town of Cornwall, 13 A.D.3d 380, 381 (2d Dep't 2004) (holding that respondents did not act in bad faith when they violated a procedural rule's text), Glenn v. State Univ. of N.Y., Chase Coll., 243 A.D.2d 712, 712 (2d Dep't 1997) ("[T]he primary purpose of civil service laws and rules is to promote the good of the public service, which purpose is not to be frustrated by technical or narrow constructions.") (quoting Matter of Rosenberg v. Wickham, 36 A.D.2d 881, 882 (3d Dep't 1971)), Cacamec v. Del Castillo, 140 Misc. 2d 497, 500 (Sup. Ct. N.Y. Co. 1988) (overlooking a "minor inconsistency" with the procedural rule's text), Smith, 118 Misc. 2d 227, 228 (deciding that a textual procedural breach served as "no indication that the [employer] acted arbitrarily in failing to furnish periodic evaluations to [the employee].").

Here, Petitioner has not established that Respondents' failure to follow their own procedures establishes bad faith. Respondents have adduced evidence that implies they acted in good faith, and Petitioner has failed to muster evidence that outweighs that implication.

Petitioner received below-competent scores on his evaluations, and the Respondents' witnesses, Asst. Ch. Delatorre and Insp. McNamara, provided affidavits that buttress the evaluations' conclusions. Further, Petitioner does not allege that these conclusions were substantively incorrect. This evidence of poor performance serves to indicate that Respondents acted in good faith when they demoted him. Consequently, Petitioner must offset the evidence of good faith with sufficiently persuasive evidence of bad faith. See Matter of Johnson v. Katz, 68 N.Y.2d at 650 (holding that a disputed issue of fact was not material because the degree to

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which it might have evinced bad faith could not outweigh the respondent's strong evidence of good faith).

Petitioner has not met this burden. With respect to Petitioner's assertion that the raters attached too much weight to his CompStat performances, Petitioner offers no evidence to substantiate this claim, and the raters' affidavits indicate otherwise. The evaluations themselves imply that the raters considered information other than just the Petitioner's CompStat performances. For instance, in the four-month evaluation, Insp. McNamarra wrote that Petitioner "has not shown the ability to deploy resources in an effective manner," (Petitioner's Ex. 4), a task that would not involve the CompStat meetings, which discussed crime statistics (Respondent's Ex. E at ¶ 6). Even if the raters only considered the CompStat performances, the Administrative Guidelines provide no indication that the raters must consider every duty the employee must execute. AG 314-07, which concerns captain evaluations specifically, does not direct the rater to consider each of a captain's duties. While AG 314-01 directs the rater to "[e]xamine rater's . . . record[s] of performance documentation" when they formulate their ratings (Petitioner's Ex. 1 at 1), no evidence exists to suggest they failed in this task.

The remaining asserted procedural defects (the evaluation's timing, the commanding officer's failure to serve as reviewer, and the reviewers' failure to sign the evaluations before the petitioner received his copy) are insufficient to demonstrate bad faith, particularly in light of evidence that Petitioner performed poorly. Indeed, even where Respondents breached the Guidelines' text, they substantially upheld its purposes.

Moreover, to the extent that Sackman v. Alfred Univ., 186 Misc. 2d 227 (Sup. Ct. Allegheny Co. 2000), on which Petitioner relies, can be interpreted as holding to the contrary, it is not controlling here since the petitioner in Sackman was not a probationary employee and thus the court did not employ the bad-faith standard applicable in this case.

With respect to the Respondents' failure to comply with the Guidelines' requirement that the employee receive written evaluation in the fourth and tenth month, the Respondents' noncompliance did not undermine the Guidelines' purpose, which Petitioner acknowledges was to ensure the regular evaluation of, and regular feedback regarding, the probationary employee's performance (See Petitioner's Memorandum of Law in Support of Its Verified Petition at 7) ("Evaluations provide management with an update . . . by which to measure an employee's progress. . . . [A]n evaluation gives valuable feedback to the employee by identifying those areas which require improvement."). Cf. Smith, 118 Misc. 2d at 228 (stating that the purpose of a regular probationary evaluation is to aid the employer's evaluation of the employee and to provide the employee with feedback).⁵

As early as April, 2006, Respondents had assessed Petitioner and orally notified him that he was underperforming, which is when they would have completed a timely written evaluation.⁶ See Glenn, 243 A.D.2d at 713 (holding that oral notification, and late written notification, of termination sufficed where the rule had mandated written notification). Petitioner claimed that the late four-month evaluation denied him time to improve his performance before the ten-month

⁵ AG 314-07 directs that the "[r]ater will use Performance Evaluation Captain [Form] for captains that are on probation" (Petitioner's Ex. 2 at 2) (directing the rater to use the "Form[] . . . Performance Evaluation Captain (PD439-1518).") (emphases omitted). This requirement, together with the signature requirements (Id. at 1), has the apparent purpose of ensuring adequate documentation. The April assessment was not in writing, but Respondents chose this result specifically to help Petitioner and to protect him from having a negative evaluation on his employment file (Respondent's Ex. J at ¶ 4). Additionally, Respondents communicated their concerns effectively to Petitioner, (Respondent's Ex. E at ¶ 7), which is one reason to have documentation. This technical breach, and its underlying benign motivation, does not demonstrate bad faith. See Specht, 13 A.D.3d at 381 (concluding that the employer acted in good faith when it neglected statutory documentation requirements, since the breach was "nonprejudicial [and] technical"). In any event, Petitioner does not allege that this procedural breach significantly violated the procedure's documentation purpose.

⁶ The precise timing of the probationary period's fourth month depends on whether the probationary period began on December 30, 2005, or January 20, 2006. See supra, note 2. Either way, it would have overlapped with the calendar month of April.

evaluation, but Respondents have offered un rebutted evidence that Respondent was duly advised of his deficit in his performance and that the very reason Respondents submitted the four-month evaluation late was to provide Petitioner time to improve before the written evaluation (Respondent's Ex. J at ¶ 4). The ongoing supervision and direction that Petitioner's superiors provided him supplied him that time to improve.

As to the ten-month evaluation,⁷ which Respondents completed on October 10, 2006, and provided to Petitioner on November 1, 2006, it was timely if the probationary period began on December 30, 2005, when Petitioner received his promotion.⁸

However, if the probationary period began once Petitioner completed his training on January 20, 2006, then the evaluation took place on October 10, 2006, ten days before the probationary period's tenth month would have started (it would have been October 20 – November 19, 2006). Nonetheless, since the NYPD first assessed Petitioner in April 30, 2006 (albeit not in writing), doing so again approximately five months later seems to fit AG 314-07's purpose to ensure the employee receives periodic reviews.

The next procedural violation was the failure of Petitioner's commanding officer to act as the reviewer for either of Petitioner's evaluations, as required by AG 314-01 when, as here, the

⁷ The ten-month evaluation indicates that it covered from April 30, 2006, to October 29, 2006, even though the four-month evaluation covered through May 20, 2006. It is not clear why this overlap occurred; there is some confusion whether Petitioner's probationary period began when he received the promotion or when he completed his training. See *supra*, note 2.

⁸ AG 314-07 indicates that the evaluations should occur "on the 4th, 10th, and 16th month, if necessary . . ." This language is ambiguous, since the phrase "on the month" may indicate the first day of the month, or it may indicate anytime during the month. It certainly does not specifically mandate the last day of the month, as Petitioner seems to assume implicitly. Since reasonable people may interpret the phrase "on the month" to indicate sometime during the month, then assuming the probationary period began on December 30, 2005, this Court has no reason to believe that the Respondents acted in bad faith when they conducted Petitioner's ten-month evaluation during the tenth month, which would have been September 20 – October 29, 2006.

ratee receives a below-competent rating. While the Guideline specifically states that the commanding officer must be the reviewer, it cannot be said that under the circumstances here, Respondents' failure to have the commanding officer act as the reviewer of Petitioner's below-competent ratings constitutes bad faith.

As Petitioner acknowledges, AG 314-01 is intended to ensure that the officer "who is most capable of determining the ratee's actual performance" reviews the evaluation (Petitioner's Memorandum of Law at 13). There is no evidence in the record from which the court could infer that the commanding officer worked with Petitioner more than did the two reviewers, or that the commanding officer was more capable of determining Petitioner's actual performance. The record shows that reviewers acted in consultation with the commanding officer, and that each reviewer had extensive information and experience supervising Petitioner. The record does not show that the commanding officer had similar experience. There is also no evidence to suggest that the commanding officer's failure to act as reviewer compromised the accuracy of Petitioner's evaluations. Additionally, Petitioner does not suggest that the reviewers treated him unfairly or had a bad-faith motive to violate the Guidelines.

Furthermore, even if, as Petitioner alleges, the reviewers failed to sign the evaluations before the raters and petitioner discussed the evaluations together, such failure is insufficient to establish bad faith. See Cacamese, 140 Misc. 2d at 500 (overlooking a "minor inconsistency" with the procedural rule's text). Accordingly, Petitioner has not met his burden of demonstrating that his demotion was the result of Respondents' bad faith.

Next, Respondent's failure to follow its own procedural rules cannot give rise to a due process claim since Petitioner was a probationary captain at the time of his demotion. See Meyers v. City of New York, 208 A.D.2d 258 (2d Dep't 1995).

Finally, even if this proceeding implicated the Merit and Fitness clause of the New York Constitution, since Petitioner has failed to show that his demotion was not the result of his own performance, his assertion that Respondents violated that clause is unavailing.

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition is denied and dismissed.

Dated: February 2009

March 13, 2009



J.S.C.

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).