

**Matter of Newsome v Doherty**

2009 NY Slip Op 32222(U)

September 24, 2009

Supreme Court, New York County

Docket Number: 107280/09

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 107280/2009  
NEWSOME, MICHAEL  
vs.  
DOHERTY, JOHN  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 8/14/09  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
Petition 1-10  
11-24

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 petition decided  
in accordance with accompanying  
decision, order, and 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: 9/24/09 JBL 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  
NEW YORK COUNTY: IAS PART 6

-----X  
In the Matter of the Application of  
MICHAEL NEWSOME,

Petitioner,

Index No. 107280/09

Decision, Order, and Judgment

-against-

JOHN DOHERTY, as Commissioner of  
The Department of Sanitation of the City of New York  
and the City of New York,

Respondent,  
1419.

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

**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  
1419).

Petitioner Michael Newsome brings this Article 78 proceeding to challenge his termination as a sanitation worker for the City of New York Department of Sanitation (the "Department"). Petitioner asks that his termination be set aside, and that he be restored to his former position with the same status that he had on the date of his termination from employment. He also seeks back pay and benefits from the date of his termination from employment, and counsel fees for the prosecution of this action.

On or about December 8, 1997, petitioner was appointed to the position of sanitation worker by the Department. Petitioner became a tenured civil service employee one year later. On or about January 16, 2008, petitioner was served with a complaint setting forth separately enumerated charges that he loaded construction debris in excess of six bags into a Department sanitation truck, without prior authorization; took a department truck without authorization; was absent from work without authorization; and, allowed civilian, non-Department employees to load construction debris into a Department truck.

Specifically, petitioner was charged with violating General Order 2001-19 (the "Trade Waste Order")<sup>1</sup> and sections 1.2, 1.4, 5.3, 6.1 and 6.3 of the Department's Code of Conduct. The specific charges set forth in the August 27, 2008 notice were as follows:

- 1.2 Employees must accurately record their hours of duty in accordance with procedures established at their work location. Employees who are required to, must sign in when they arrive at their work location, and must sign out at the end of their work shift.
- 1.4 Employees may not be absent without authorization.
- 5.3 Employees shall not permit any unauthorized use of Department vehicles, premises, equipment, property or supplies.
- 6.1 Employees are prohibited from accepting, removing or helping to remove trade waste. Employees shall become familiar with and adhere to the department Order on Trade Waste, and with the Department's Collection Regulations.
- 6.3 Employees shall not allow individuals who are not employees of the Department to load any waste or recyclable materials into a Department vehicle.

Petitioner was advised that he was entitled to a hearing—and entitled to be represented by an attorney or other representative at the hearing—before an Administrative Law Judge ("ALJ") from the New York City Office of Administrative Trials and Hearings. Petitioner was further advised that if the charges were sustained, the sanction could range from a forfeiture of pay to dismissal from employment.

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<sup>1</sup> The Trade Waste Order addresses material that is considered construction debris and other similar material. The Trade Waste Order prohibits sanitation works from, inter alia, removing more than six (6) bags, boxes, or bundles of construction debris during his or her route without prior consultation with and permission from a supervisor.

On November 18, 19, and 25, 2008, a combined hearing was held for petitioner and Vincent Brooks, the other Department employee who was involved in the same incident, before ALJ Faye Lewis. Charles Burge, one of seven General Superintendents of the Department's Field Investigative Audit Team ("FIAT") unit; Michael B. Warren, Deputy Chief; Christopher DiNapoli, Superintendent of Bronx District 12; and, David Avarack, Superintendent in the FIAT unit, testified on behalf of the Department. The Department also submitted documentary evidence. Vincent Brooks and petitioner testified on their own behalf. They were both represented by the same counsel. Petitioner also submitted evidence of his virtually unblemished work record, and his proof that he was undergoing individual psychotherapy.

The testimony revealed that the Department received an anonymous tip on January 16, 2008, that a homeowner in the Bronx who was having major renovations performed had arranged for Department workers to remove substantial debris from the renovation site. The FIAT assigned David Avarack, a Superintendent, to conduct a stake-out of the location. Superintendent Avarack began the stake-out at 7:30 a.m., in an unmarked car. At that time, debris was piled outside the location. This in and of itself was unusual, since this was not a collection day for that area. Superintendent Avarack testified that to him, it looked like a "clean-up" from the house. At approximately 12:30 p.m., a Department truck was seen coming down the block. The truck stopped, and two Department sanitation workers began loading the debris into the truck. Two or three civilians emerged from the house to assist. After the truck was loaded and drove off, Superintendent Avarack received telephone instructions from General Superintendent Burge to stop the truck and wait.

Superintendent Burge testified that he arrived from Queens sometime later. Superintendent Burge spoke to Brooks; Brooks told Superintendent Burge that he was helping out a cousin. Apparently, Brooks had been assigned to go for a random drug test that morning. Rather than report back to the garage when he was done, and sign in for work, he met petitioner outside the garage. Petitioner, who had worked on that truck that morning with Sanitation Worker Castile, took the truck out again, and went with Brooks to the Bronx to assist him.

Superintendent Avarack, Deputy Chief Warren and Superintendent Burge escorted the truck to the dump. The debris—which was described as consisting of pieces of wood, sheetrock, metal, furniture, bags, and household junk—weighed approximately two tons. It was later learned that Newsome, who had worked that morning, went back to the garage and took the truck he had used on his route that morning, after it was dumped and cleaned. Meanwhile, Superintendent DiNapoli drove petitioner and Brooks back to the garage; they were met there by Deputy Chief Nick Vero. Petitioner and Brooks were later advised that they were suspended.

The testimony of petitioner and Brooks revealed that a few days before January 16, Brooks had been approached by a family friend (a man who had dated Brooks' cousin for approximately five years), who told Brooks that he was cleaning out a newly-purchased house, and wanted to know if Brooks could dispose of the material that was on the sidewalk. Brooks reported to the garage that morning, expecting to work his shift and be able to pick up the friend's trash at some time during or after completion of his route. Instead, Brooks was directed to report to the clinic to undergo random drug testing. When he returned to the garage, he saw Newsome, and asked

petitioner to assist him in doing a favor for a family friend. Newsome had no prior knowledge of this request.

Newsome took the truck that had just been cleaned, and drove with Brooks to the street where Brooks' friend lived. Brooks and Newsome testified that they were surprised at the large amount of material by the curb. They acknowledged that a few people from the house helped load material into the truck. After they were finished and drove off, they were stopped by Superintendent Avarack. Brooks stated that he was helping a family friend or cousin. Newsome testified that he told Superintendent Avarack that he had performed similar work in the past for bosses, and that Superintendent Avarack replied that perhaps those same people would help petitioner now. Newsome testified that after they returned to the garage, they were informed that they were being suspended. Petitioner and Brooks were suspended for ten (10) business days, and then returned to work.

In a report and recommendation dated January 30, 2009, The ALJ sustained the charges against petitioner for violating the Trade Waste Order only with respect to the fact that they loaded a substantial amount of material from the residence into the truck without first consulting their supervisor. The ALJ rejected the Department's contention that the material collected constituted "trade waste," finding that there was insufficient evidence to prove that the waste derived from a contractor. The ALJ sustained the charges as to four sections of the Department's Code of Conduct with respect to petitioner. She did not find that the charge of a violation of rule 1.2 had been sustained, since there was no evidence that he had failed to sign in and out that day. The ALJ

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recommended that petitioner's employment with the Department be terminated. The Commissioner accepted the recommendation, in a determination dated February 6, 2009; petitioner's employment was terminated effective February 10, 2009. This proceeding followed.

Petitioner specifically admits that he does not dispute the facts, but contends that the penalty of termination was excessive, given the Department's past practices. It is petitioner's claim that his termination from employment, under these facts, 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 only challenge is to the penalty and the failure to consider his years of service and prior record. Petitioner elicited testimony from all of his supervisors who testified on behalf of the Department that petitioner was a good worker, who had never given his supervisors any problems; in fact, there was testimony that petitioner performed additional work when asked to do so. Petitioner also contends that in prior cases, others who were faced with the same charges and found guilty were not terminated from employment. Finally, petitioner elicited testimony that the material that was picked up was not trade waste material but was material that the Department would normally pick up from a homeowner, albeit in certain specified quantities; this is not a case of picking up trade waste or construction debris. Petitioner 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). The City argues that this court should not upset the determination of the Commissioner and that the court should dismiss the petition.

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 Appellate Division has upheld the termination of sanitation workers for violations of the Trade Waste Order (see, e.g., Lowe v. Doherty, 52 A.D.3d 233 [1st Dep’t 2008]; Cuthbert v. Farrell, 305 A.D.2d 180 [1st Dep’t 2003]), although in both cases, there was evidence that the terminated workers had elicited and/or accepted a gratuity.

The challenge here is to the severity of the penalty. As respondents point out, the Trade Waste Order provides that termination may be imposed for violating its terms; petitioner violated the Trade Waste order and violated other rules as well. The cases that he points to in an attempt to show that the penalty of termination was disproportionate to the offense are readily distinguishable, since in none of those cases did the sanitation worker take a Department truck, after his route was finished and without authorization, and use civilians to load debris, nor were they absent from work without authorization. Rather, the cases petitioner cites are cases in which trade waste was placed into a sanitation truck while the employees were on their respective routes.

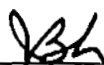
The fact that petitioner’s work was completed for the day is of no moment. He was still on the clock. While it is true that there was no evidence of money changing hands and no firm evidence that the material consisted of trade waste, the evidence was undisputed that petitioner took a Department sanitation truck, without authorization, and actively participated in a private,

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unauthorized pick up; he also allowed civilian employees to load the truck. The ALJ considered petitioner's employment history; he had but one reprimand, for a sick leave violation in 2008. The ALJ gave due consideration to Newsome's lengthy employment history and virtually unblemished disciplinary record. She considered the mitigating factors set forth above. Finally, the ALJ noted that the Department does not seem to differentiate between different types of trade waste violations. Having found that petitioner violated the Trade Waste Order, she was constrained to recommend termination of employment. Her reluctance to do so was palpable, in that she expressly noted that the Department could still agree to a post-trial settlement, and by her statement that Newsome, who was praised by his supervisors and "appeared to be the more passive participant," admitted his wrongdoing and, if allowed to continue working, would be "[un]likely to make the same error again."

Although the penalty of termination may seem harsh under these circumstances, it is not shocking to the conscience. Accordingly, I am also constrained to dismiss the petition. This constitutes the decision, order, and judgment of the court.

Dated: September 24, 2009

  
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JOAN B. LOBIS, 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). -8-