

**Matter of Dokyi v New York State Banking Dept.**

2009 NY Slip Op 32344(U)

October 9, 2009

Supreme Court, New York County

Docket Number: 106705/09

Judge: Jane S. Solomon

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

PRESENT. **JANE S. SOLOMON**

PART 55

Index Number : 106705/2009

DOKYI, TRACY

VS.

NEW YORK STATE BANKING DEPARTMENT

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO. .

106705-09

MOTION DATE

7/24/09

MOTION SEQ. NO.

#001

MOTION CAL. NO.

were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-4

5-10

11

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

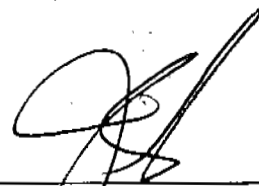
*petition is decided in accordance with the amended memorandum decision, order and judgment.*

**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: \_\_\_\_\_

10/9/09



**JANE S. SOLOMON** 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 CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 55

-----x  
In the Matter of the Application of  
TRACY DOKYI,

Index No.: 106705/09

Petitioner,

-against-

DECISION, ORDER and  
JUDGMENT

THE NEW YORK STATE BANKING DEPARTMENT  
and RICHARD NEWMAN, Superintendent of  
Banks,

Respondents.

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SOLOMON, J.:

**UNFILED JUDGMENT**

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FACTUAL BACKGROUND

Petitioner Tracy Dokyi instituted this action, pursuant to Article 78, to overturn respondents' decision to terminate petitioner's probationary employment with respondent The New York State Banking Department (NYSBD) as being arbitrary and capricious.

Petitioner was hired by NYSBD on August 13, 2007, as a Bank Examiner Trainee 1. Upon satisfactory completion of the first year of training, the trainees are advanced to the position of Bank Examiner Trainee 2. The appointment as trainee involves a two-year probationary period, in accordance with New York's Civil Service Law § 63. If a trainee's conduct or performance is not satisfactory, he or she could be terminated at any time after eight weeks of service and before completion of the two-year term of probation.

From September, 2007 through February, 2008, petitioner

was assigned to work for NYSBD's Foreign and Wholesale Banks Division, under the mentorship of Joe Aiello. For the months of September, 2007 through December, 2007, petitioner received job performance ratings of "Highly Effective." For the months of January and February, 2008, petitioner was rated as "Outstanding." Opp. Ex. A.

From March through July, 2008, petitioner was assigned to work for NYSBD's Community and Regional Banks Division, under the mentorship of Joseph Williams (Williams). From March through July, 2008, petitioner received overall job ratings as "Satisfactory." However, Williams noted that petitioner needed constant supervision, and needed improvement in her writing skills, and that she appeared to lack enthusiasm for the job. Opp. Ex. B.

In August, 2008, petitioner advanced to the position of Bank Examiner Trainee 2, and Williams remained her mentor. That month petitioner received an overall rating of "Unsatisfactory." According to William's affidavit, petitioner needed constant direction and supervision, and he had problems locating petitioner when she was on assignment.

From September through December, 2008, petitioner worked for NYSBD's Licensed Financial Services Division, under the mentorship of Gilda Iyog (Iyog). During this entire period, petitioner received monthly overall evaluations that rated her

performance as "Unsatisfactory." According to Iyog's affidavit, and the monthly reports attached as exhibits to the opposition papers, Iyog identified attendance problems with petitioner, not only in tardiness, but in Iyog's inability, on several occasions, to locate petitioner while petitioner was allegedly at work. Additionally, it was noted that petitioner fell asleep during some training programs.

On October 8, 2008, Paul Zhang (Zhang), the Supervising Bank Examiner and Training Director, wrote to his superiors indicating that, because of her poor work performance, petitioner should be terminated. Opp. Ex. R. Zhang reiterated this recommendation by e-mail on December 1, 2008. *Id.* On January 14, 2009, NYSBD's Director of Human Resources recommended that petitioner be terminated, and that recommendation was approved by NYSBD's Chief Administrative Officer on January 21, 2009. Opp. Ex. S.

On January 20, 2009, petitioner slipped and fell at a bank while on field assignment, fracturing her ankle and spraining her back. Petitioner filed for Workers' Compensation, and was notified the next day that she was terminated, effective January 29, 2009. Pet. Ex. D. She challenges the determination terminating her probationary employment in this proceeding.

Petitioner alleges that she was sexually harassed by Williams while she was under his mentorship, and, because she

refused his advances, Williams downgraded her performance evaluations and attempted to damage her reputation with her other mentors. Petitioner further claims that she was only late a few times, and that her time-sheets were altered by respondents. Additionally, petitioner says that she was terminated because of her-accident and her filing for Workers' Compensation benefits.

Petitioner does not aver, nor is any evidence presented, that she ever notified anyone at NYSBD of Williams' alleged inappropriate advances. Although petitioner has attached, as exhibits, time-sheets indicating that she was on-time, only one of those sheets is actually signed, whereas the time-sheets provided by respondents, indicating tardiness, are all signed by petitioner and her then-current mentor. Opp. Ex. E, G, J and K. Furthermore, in a letter written by petitioner on December 22, 2008 (Opp. Ex. Q), she admits that she was late a number of times, but asserts that her tardiness was caused by her need to care for her "critically ill" mother, a fact of which she had not previously informed anyone at NYSBD.<sup>1</sup>

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<sup>1</sup> According to a December 2008 email from Zhang (Opp. Ex. O), after he advised petitioner that her tardiness and other performance problems could result in termination, she reported that her mother was sick since August, and had been in a coma. She was asked to provide a doctor's statement. The doctor's note revealed that the mother suffered from carpal tunnel syndrome that required the mother to take a day or two off from work when symptoms flared (Opp. Ex. P). Petitioner now denies that she ever claimed that her mother was in a coma, but does not contest that she used her mother's condition to excuse her tardiness.

DISCUSSION

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 [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974). The test is whether the action taken is justified or without foundation in fact. *Id.* at 231. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.*

"Petitioner, as a probationary employee, may be discharged without a hearing, or statement of reasons, for any reason or no reason at all, in the absence of a demonstration that the dismissal was in bad faith, for a constitutionally impermissible reason, or in violation of the law. While a hearing may be necessary in those instances where an issue of a substantial nature is raised regarding the probationary employee's dismissal, the burden falls squarely on the petitioner to demonstrate, by competent proof, that a substantial issue of bad faith exists, or that the termination was for an improper or impermissible reason, and mere speculation, or bald, conclusory allegations are insufficient to shoulder this burden [internal citations omitted]."

*Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 (1<sup>st</sup> Dept 2006); *Matter of Nieves-Diaz v City of New York*, 37 AD3d 356 (1<sup>st</sup> Dept 2007); *Matter of Vaillancourt v New York State Liquor Authority*, 153 AD2d 531 (1<sup>st</sup> Dept 1989), *aff'd* 75 NY2d 889 (1990).

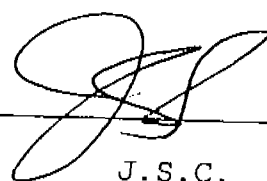
Petitioner has failed to meet her burden to demonstrate that respondents acted in bad faith or in an arbitrary or capricious manner. See generally *Matter of Bradford v New York City Department of Correction*, 56 AD3d 290 (1<sup>st</sup> Dept 2008). NYSBD has submitted evidence in support of its action terminating petitioner from her probationary employment, which shows there was a rational basis for the determination. The documents provided indicate that, whereas petitioner began her probationary training with excellent evaluations, her performance deteriorated as time went on. Additionally, petitioner, in her above-quoted letter, admits to her tardiness, and tardiness has been held as a proper and sufficient basis for terminating a probationary employee. *Matter of Santiago v Horn*, 37 AD3d 307 (1<sup>st</sup> Dept 2007); *Nelson v Abate*, 205 AD2d 454 (1<sup>st</sup> Dept 1994).

Moreover, even if petitioner's allegations against Williams were true, those facts were not before respondents, nor is there any indication that those allegations formed any part of respondents' decision. The court is bound to review the record as known to respondents at the time the questioned action was taken, not facts and issues raised by petitioner after the fact. *Matter of Rizzo v New York State Division of Housing and Community Renewal*, 16 AD3d 72 (1<sup>st</sup> Dept), *affd* 6 NY3d 104 (2005).

Based on the foregoing, it hereby is  
ORDERED and ADJUDGED that the petition is denied and  
the proceeding is dismissed.

Dated: October 9, 2009

ENTER:

  
\_\_\_\_\_  
J.S.C.

**JANE S. SOLOMON**

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