

Matter of Conway v New York City Off-Track Betting Corp.
2010 NY Slip Op 30038(U)
January 6, 2010
Supreme Court, New York County
Docket Number: 107958/2009
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Lobis

PART 6

Index Number : 107958/2009

CONWAY, SEAN D.

vs.

NYC OFF TRACK BETTING CORP.

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 10/23/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ... Petition

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

Ans: 4 Aff: 5-27

Reply: 28

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*motion decided in accordance with
accompanying 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: 1/6/10

[Signature]
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**

-----X
In the Matter of the Application of

SEAN D. CONWAY,

Petitioner,

Index No. 107958/2009

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

Decision, Order, and Judgment

-against-

NEW YORK CITY OFF-TRACK
BETTING CORPORATION,

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).
Respondents.

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

Petitioner brings this Article 78 proceeding for a judgment annulling and reversing the decision of respondent New York City Off-Track Betting Corporation ("OTB") to terminate petitioner's position as a probationary Branch Manager Part Time. Respondent answered and filed objections in point of law seeking dismissal of the proceeding. Petitioner has also moved for discovery pursuant to C.P.L.R. § 408. Respondent cross-moves for an order dismissing the motion for discovery. For the reasons that follow, the petition is denied and the proceeding is dismissed.

Petitioner was first employed by OTB on March 27, 1995, as a per diem Betting Clerk. He was assigned to the Telephone Betting Center. On May 8, 1999, he was promoted to Telephone Betting Agent Full Time. Approximately seven years later, on August 28, 2006, Mr. Conway was promoted to the position of Betting Clerk Part Time. On August 13, 2007, he was promoted to the position of Branch Manager Part Time ("Branch Manager") on a probationary basis.

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This is the position from which he was terminated. He seeks re-instatement on the basis that his work was superior to other similarly situated employees. He claims that his termination was unreasonable, arbitrary, capricious, and an abuse of discretion. Furthermore, petitioner claims that the decision to terminate him from the position of Branch Manager was made in bad faith and is shocking to the conscience.

As detailed in an affidavit by Patrick Dunphy, Vice President of Branch Field Operations for OTB, the Branch Manager's duties are to oversee a branch where bets are placed by members of the public. Specific duties include opening and closing the branch, reconciling the Betting Clerk's funds with receipts, reconciling the electronic billing funds with receipts, drafting daily reconciliation statements, and a range of other administrative tasks. At the beginning of his one year period probationary, petitioner was given seven weeks of training. An extra week was added to the usual six week period at petitioner's request.

Soon after the training period ended, petitioner was making errors in reconciling the daily receipts. An extra two days of training were added in December. Petitioner continued to make errors in his reconciliation process. On July 31, 2008, petitioner signed a "Consent to extension of Probationary Term" which authorized OTB to extend his probation for a period of up to six months and allowed for termination for unsatisfactory work or conduct. After the extension, petitioner continued to violate procedure. On February 6, 2009, petitioner was notified that he failed his probation and was being reclassified to his former position of Betting Clerk Part Time Trainee.

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In reply to the allegations made by OTB, Mr. Conway does not deny that the incidents recited occurred. Rather, he disputes the importance of these incidents and offers alternative and additional facts, challenges what he was told, and asserts that his errors were harmless. He claims that he was never properly trained on the completion of important forms and other procedures. He asserts that his immediate supervisor, Mary Sweeting, was in favor of his passing probation.

In support of his petition, Mr. Conway seeks leave of court for discovery. Since a petition made pursuant to Article 78 is a special proceeding, no discovery is permitted absent a court order. Petitioner challenges certain statements that were made by Mr. Dunphy as to treatment of other probationary employees. He asserts that he needs discovery to establish his claim of disparate treatment and his other claims. In his application for discovery, he seeks documents describing the work performance for other probationary part-time employees which are solely in OTB's possession. In OTB's papers in opposition to the discovery request, respondent argues that petitioner has not met the test required to grant discovery in a special proceeding. OTB argues that no specific documents are identified and the only support for the assertion that other employees received more favorable treatment is hearsay. Finally, OTB argues that the evidence is not material to this review because it is outside the record on which this Article 78 proceeding must be based. OTB asserts that granting discovery in this instance needlessly prolongs the litigation, the very harm which C.P.L.R. § 408 was meant to prevent.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful

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procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id. When reviewing a termination from a probationary position, as petitioner pointed out, the review is even more limited. As the Court of Appeals said, "a probationary employee may be discharged without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for constitutionally impermissible purpose or in violation of a statutory or decisional law." In re York v. McGuire, 63 N.Y.2d 760, 761 (1984) (citations omitted); see also In re Swinton v. Safir, 93 N.Y.2d 758, 762-63 (1999).

Petitioner cites to a line of cases for the proposition that petitioner must be treated similarly to other individuals in his position and that he has not been so treated. The cases stand for the principle that it is arbitrary and capricious if an agency does not adhere to its own prior precedent or indicate its reasons for reaching a different result. See In re Lafayette Stor. & Moving Corp (Hartnett), 77 N.Y.2d 823, 826 (1991); In re Field Delivery Serv. Inc. (Roberts), 66 N.Y.2d 516, 518 (1985); and, the cases footnoted on page 2 of petitioner's memorandum of law. None of the cases cited are applicable to the facts herein. The cases cited do not involve probationary positions where an employer has a much broader range of options in making determinations, as long as the law is not violated. Without articulating a bad faith basis that raises a constitutional right or a violation of law, petitioner does not make out a claim to set aside his termination. See York, 63 N.Y.2d at 761. His

claim of disparate treatment borrows a term from employment discrimination cases, but petitioner has not alleged a discriminatory purpose in his failure to satisfactorily complete probation. The cases he cites are inapplicable.

As respondent argues, the court cannot substitute its judgment for that of an agency as long as the agency's determination is rationally based. Pell, 34 N.Y.2d at 230-31 (citations omitted); see also In re Purdy v. Kriesberg, 47 N.Y.2d. 354, 358 (1979). The facts alleged and not materially disputed make out such a rational basis and the result does not shock one's sense of fairness under the circumstances. In re Case v. Fleming, 189 A.D.2d 1070, 1071 (3d Dep't 1993).

Finally, the motion for discovery is denied and the cross motion is granted. The result would not change even if the requested discovery revealed that two or three similarly situated employees completed the probationary period with more errors. There is still no allegation of discrimination, legal violation, or other bad faith basis.

The petition is denied and the proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: January 6, 1994

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), 100 Nassau St., New York, N.Y. 10038, U.S.C.