

**Matter of Brockington v State of N.Y. Dept. of Motor
Vehs.**

2010 NY Slip Op 30050(U)

January 7, 2010

Supreme Court, New York County

Docket Number: 108262/2009

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Application of,
CRAIG BROCKINGTON

Petitioner,
-against-

STATE OF NEW YORK/NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES

Respondent.

INDEX NO. 108262/09

MOTION DATE Oct. 21, 2009

MOTION SEQ. NO. 001

MOTION CAL. NO. 14

The following papers, numbered 1 to 3 were read on this petition pursuant to CPLR Article 78

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

Cross-Motion: Yes No

Upon the foregoing papers, the petition pursuant to CPLR article 78 is decided in accordance with accompanying decision and judgment.

UNFILED JUDGMENT

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

Dated: 1/7/10

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
In the Matter of the Application of
CRAIG BROCKINGTON,

Petitioner,

DECISION AND
JUDGMENT

Index No. 108262/2009

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

-against-

STATE OF NEW YORK/NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES,

Respondent.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
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appear in person at the Judgment Clerk's Desk (Room
141E).

-----X
O. PETER SHERWOOD, J.:

In this proceeding pursuant to Article 78 of the Civil Practice Law and Rules (CPLR), petitioner seeks a judgment: (1) annulling and vacating as arbitrary and capricious respondent's determination, dated February 13, 2009, which terminated his employment with the New York State Department of Motor Vehicles ("DMV"); and (2) ordering respondent to reinstate petitioner to the position of Motor Vehicle Representative - - Grade 9, with full back pay and benefits. Respondent opposes the application or, alternatively, conducting a hearing to determine whether respondent's termination of his employment was undertaken in bad faith.

Petitioner Craig Brockington ("petitioner") is a civil servant who had been employed by the DMV as a Motor Vehicles Representative ("MVR") - Grade II since 2005. In such position, petitioner was represented by the Civil Service Employees Association, Inc. ("CSEA") and was bound by the terms of a collective bargaining agreement ("CBA") between CSEA and the State of New York ("the State") (Pet. ¶¶ 2, 5).

On October 14, 2008, petitioner entered into a settlement agreement ("the settlement agreement") with DMV to resolve several Notices of Discipline ("NOD") issued to petitioner dated, respectively, May 5, 2008, May 15, 2008 and September 15, 2008 (Pet. ¶¶ 6, 7, Ex. "B"). Pursuant to the terms of the settlement agreement, the penalty of termination proposed by each NOD was held in abeyance for a one-year period and DMV was entitled to terminate petitioner's employment if

during such one-year period commencing that same date DMV determined that petitioner had an instance of misconduct or incompetence that was the same or similar to those stated in the NODs upon which the settlement was based or petitioner failed to provide documentation for any non-pre-approved absences upon his return to work or within a maximum of three business days (*id.*). The settlement agreement further provided that:

Neither the Department's determination that the employee's action or actions during the abeyance period are same or similar to that stated in the Notice of Discipline nor the imposition of the penalty of TERMINATION shall be subject to review pursuant to Article 33 or Article 34 of the collective bargaining agreement. The signatures of the employee and the employee's representative herein signify the knowing waiver of any further appeal to the procedures of Article 33 or Article 34 of the collective bargaining agreement including arbitration under said Article 33 or 34.

The settlement agreement bears the petitioner's signature as well as that of his CSEA representative.

By letter dated February 6, 2009, DMV advised petitioner that he had violated the terms of the settlement agreement based upon an alleged failure to follow DMV's procedures with respect to a second party registration transaction petitioner processed on December 12, 2008, and the DMV considered such failure to be the same or similar to the NOD issued on September 15, 2008 charging him with failure to follow departmental procedures (Ans. ¶ 42, Ex. "11"). Petitioner was directed to attend a meeting on February 13, 2009. Following the February 13th meeting with DMV at which petitioner and his CSEA representative were present, DMV sent a letter terminating petitioner's employment effective at the close of business that same date on the ground that he had violated the settlement agreement and that his explanation regarding the December 12, 2009 transaction at issue was unacceptable (Pet. ¶ 9, Ex. "C").

Petitioner then commenced this CPLR Article 78 proceeding to annul respondent's determination and to compel respondent to reinstate him to his employment with back pay and benefits. Petitioner contends that the termination was unlawful and unjust as respondent failed to follow the procedures outlined in Article 33 of the CBA and was also arbitrary and capricious, an abuse of discretion, and undertaken in bad faith as he had properly followed departmental rules.

DMV notes in the first instance that petitioner in the separation agreement specifically waived his right to review under the procedures outlined under Article 33 of the CBA. Alternatively, respondent contends that to the extent petitioner did not waive such right to review he has failed to

exhaust his administrative remedies by completing all steps of the grievance procedure provided in Article 33. The DMV argues further that its determination terminating petitioner's employment is not arbitrary, capricious, an abuse of discretion or undertaken in bad faith as it was in accordance with the terms of the separation agreement to which petitioner consented. In this regard, the DMV observes that although the separation agreement was based upon three NODs, petitioner had been served with approximately 20 NODs within the previous year and a half. The last three NODs covered by the separation agreement charged insubordination (May 5, 2008 NOD), filing a false instrument (May 15, 2008 NOD) and failure to follow a directive and departmental procedures and inappropriate behavior (September 15, 2008 NOD) and each proposed that petitioner be terminated. Thus, DMV contends that petitioner's action in improperly processing the second-party registration in violation of its procedures was same or similar to the NODs underlying the settlement agreement and, therefore, DMV's action in terminating petitioner for violating the settlement agreement has a rational basis.

The court's role in reviewing a decision of an administrative agency is limited. The standard of review is whether or not the administrative determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious and without a rational basis in the administrative record (*see*, CPLR 7803; *Pell v Board of Education*, 34 NY2d 222, 231 [1974]). The court may not conduct a de novo review of the facts and circumstances or substitute its own judgment for that of the administrative agency (*see*, *Greystone Management Corp. v Conciliation and Appeals Bd.*, 94 AD2d 614, 616 [1st Dept 1983], *affd.* 62 NY2d 763 [1984]). Rather, the court should review the record as a whole to determine whether a rational basis exists to support the findings of the administrative agency (*see*, *Nelson v Roberts*, 304 AD2d 20 [1st Dept 2003]). Moreover, where the administrative determination requires an evaluation of the facts within an area of the administrative body's expertise, the determination must be accorded great weight and judicial deference (*see*, *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 335, 363 [1987]). An action is arbitrary and capricious when the action is taken "without regard to the facts" (*Pell v Board of Education, supra*).

In reviewing the record of the instant matter, this Court defers to the respondent's judgment that in the exercise of its expert discretion and considering the terms of the settlement agreement that

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petitioner violated a departmental procedure when he improperly processed the second-party registration on December 12, 2008. Petitioner's arguments in support of his application fail to address or acknowledge that the settlement agreement contains a specific waiver of his right to proceed under the procedures outlined in Article 33 or 34 of the CBA. Thus, his contention that DMV failed to follow such procedures lacks merit. Petitioner also erroneously contends that DMV based its termination upon his accepting a check with respect to the subject second-party registration which later was dishonored. That was not the basis of the charge. Rather, it was petitioner's failure to reject the transaction based upon an earlier improper transfer of title to the motor vehicle in question. This Court will not substitute its judgment for that of respondent on the question of whether petitioner's conduct as to the December 12, 2008 transaction was the same or similar to the NODs upon which the settlement agreement was based. Pursuant to the terms of the settlement agreement, such determination was placed solely within the discretion of the DMV. Inasmuch as respondent's determination to terminate petitioner's employment has a rational basis in the administrative record, it is neither arbitrary nor capricious. Nor is there anything in the record to demonstrate that the DMV acted in bad faith. Rather, it appears that despite ample opportunity petitioner failed to remedy the conduct upon which the NODs were based.

Accordingly, it is

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

This constitutes the decision and judgment of the court.

DATED: 1/7/10

ENTER,



O. PETER SHERWOOD

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 1015).