

Matter of Ruiz v New York City Hous. Auth.
2010 NY Slip Op 31672(U)
June 21, 2010
Supreme Court, New York County
Docket Number: 116206/09
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EMILY JANE GOODMAN

PRESENT: _____

PART 17

Index Number : 116206/2009

RUIZ, BRUCE D.

VS.

NYC HOUSING AUTHORITY

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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 *for the motion is decided*

for attached

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 1242)

Dated: 6/24/10

[Signature]
EMILY JANE GOODMAN 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
COUNTY OF NEW YORK: PART 17

-----X

In the Matter of the Application of
BRUCE D. RUIZ,

Index No. 116206/09

Petitioner,

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

-against-

NEW YORK CITY HOUSING AUTHORITY,

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 for the petitioner and respondent must

Respondent.

-----X

Emily Jane Goodman, J.S.C.:

In this CPLR Article 78 proceeding, petitioner Bruce D. Ruiz ("Petitioner") seeks to challenge termination of his probationary employment by respondent New York City Housing Authority ("Housing Authority").

Petitioner was formerly employed by Housing Authority as a Caretaker. Petitioner was placed on probation after pleading guilty to failing to report for snow removal duties, failing to perform his job duties in a satisfactory manner and failing to report an arrest, as required under Housing Authority rules. The Housing Authority terminated Petitioner's employment for allegedly, during his probationary period, being AWOL nine times, failing to report for snow removal duties, being rude and

disrespectful to supervisors, and being heedless of Housing Authority rules.

I. Background

Petitioner was appointed to the position of Caretaker on April 30, 2001. The duties of a Caretaker include general janitorial duties and snow removal. On January 12, 2007, at a conference, Petitioner pled guilty to 4 charges. The first charge was that Petitioner was AWOL for 5 days in 2005. Second, Petitioner failed to report for emergency snow removal, as required, on January 15, 2006 and February 22, 2005. Third, Petitioner failed and/or neglected his duties as a Caretaker on June 30, 2005. Fourth, Petitioner failed to report an arrest of March 7, 2006. The penalty imposed on Petitioner was a twenty (20) day suspension without pay, a requirement that Petitioner undergo treatment at the New York City Employee Assistance Program, and an 18 month General Probationary Evaluation Period which began on January 31, 2007 and ended on June 30, 2008, but was subject to extension. The Disciplinary Conference Disposition agreement, signed by Petitioner at the conference, provides that:

An employee who is subject to a General Probationary Evaluation Period may be terminated from his employment without the service of charges, without a hearing and without further appeal on the basis of incompetency, misconduct or unsatisfactory service during the

stipulated General Probationary Evaluation Period, except that said termination may not be arbitrary or capricious.

Subsequently, a letter to Petitioner, dated January 31, 2007 stated: "you may be terminated at any time during your evaluation period for incompetency, misconduct or unsatisfactory service. or if you do not comply with the Employee Assistance Program's recommendations." (*sic*)

Although Petitioner's eighteen-month General Probationary Evaluation Period was initially scheduled to begin on January 31, 2007 and end on June 30, 2008, the probationary period was extended through July 31, 2009 because Petitioner missed a total of 396 workdays during the General Probationary Evaluation Period.¹ 305 days were missed due to approved sick leave. Respondent alleges an additional 66 days were added to Petitioner's probation but there is no indication that these days were not approved (other than the 9 AWOL days which Respondent considered in terminating Petitioner). For example, it appears from the record that Petitioner took 18 personal days with pay, 15

¹ The Disciplinary Conference Disposition agreement provided that: If, for any reason, the employee does not perform the duties of the position for any time during the General Probationary Evaluation Period; for example, because of limited duty status, annual leave, sick leave, or leave without pay, the Probationary period shall be extended by the number of days when the employee does not perform such duties.

personal days without pay, 13 sick days with pay and 11 sick days without pay.

During Petitioner's probation, Respondent maintains that Petitioner failed to report for snow removal duties on January 18, 2009 and went AWOL nine (9) times. Additionally, Petitioner allegedly responded to instruction and criticism from his supervisors with rudeness and disrespect. For example, On June 11, 2009, when Petitioner was told that he should come to work, Petitioner responded "All I need to do is to eat, shit and die". Petitioner did not show up to work on that day and was noted as being AWOL by the Housing Authority. However, the Court notes that this statement, which the Court does not condone, was made in response to Petitioner's call to his supervisor informing him that Petitioner was too sick to come in and his supervisor's response, that Petitioner was to "come in anyway".

Petitioner was warned about his absenteeism by a counseling memorandum dated February 12, 2009.

Housing Manager Emanuel J. Sandi sent a memorandum to the Deputy Director for Bronx Management on June 30, 2009, requesting that Petitioner's probationary employment be terminated. The memorandum reported that:

Bruce Ruiz has failed his last two Conference Disposition Probationary Evaluations. ... For the past eighteen (18) months, he has been excessively absent. He has been pay docked many times, but has shown no sign of improving his time and attendance. His attitude about his duties is unprofessional.

The Authority terminated Petitioner's employment effective July 30, 2009.

II. Discussion

Generally, courts will not interfere with the determinations of agencies unless "there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious [internal quotation marks omitted]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974). "This settled standard requires the Court to assess whether the action in question was taken 'without sound basis in reason and ... without regard to the facts.'" *Matter of County of Monroe v Kaladjian*, 83 NY2d 185, 189 (1994), quoting *Pell*, 34 NY2d at 231; see also *Soho Alliance v New York State Liquor Authority*, 32 AD3d 363, 363 (1st Dept 2006) ("a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious").

The decision to terminate Petitioner is not arbitrary and capricious or without a rational basis.

Respondent terminated Petitioner for being AWOL nine times during his probation on 2/18/2009, 2/19/2009, 3/6/2009, 3/9/2009, 6/8/2009, 6/11/2009, 6/12/2009, 6/26/2009 and 6/30/2009.

Petitioner denied missing any snow removal dates since 2006 and generally claims that he was absent due to disability. New York courts have held that administrative agencies' determinations to terminate probationary employees have a rational basis and are made in good faith when those terminations are based on even one absence without leave. See Schmitt v. New York State Dept of Correctional Services, 47 A.D.3d 1098, 1099 (3d Dept. 2008) ("record evidence supporting respondent's conclusion that petitioner violated the last chance agreement by being AWOL on June 6, 2004 establishes that the decision to terminate respondent was made in good faith"); See also Doubert v. Commissioner, New York City Police Dept., 757 N.Y.S.2d 268, 269 (1st Dept. 2003) (non-probationary employee being disciplined for being AWOL on one occasion was appropriate and not arbitrary, even when the absence was from "involuntary overtime"); Juan v. County of Suffolk, 209 A.D.2d 523, 524 (2d Dept. 1994) (where probationary employee was AWOL for three days, "the record shows that the determination to discharge the petitioner was not

arbitrary and capricious, but had a rational basis and was carried out in good faith"). New York courts have likewise held that an employee's failure to follow an agency's procedure for giving notice of foreseeable absences constitutes insubordination and a rational basis for termination. See Auxier v. Town of Laurens, 23 A.D.3d 912, 914 (3d Dept. 2005) (affirming termination of employee where agency substantiated a charge of insubordination premised on employee's failure to notify it of absences).

Although it appears that Petitioner has very serious back problems that cause him pain, radiculopathy and severely inhibit his ability to work (herniations at L5-S1, L1-2, L3-4 and spinal stenosis) and he has submitted chiropractic records for exhaustive treatment in 2009, he submits no evidence that he complied with the Personnel Rules and Regulations.² Here, the Personnel Rules and Regulations of the Authority state that:

Employees may not absent themselves from work without the approval of their Housing Manager/Division Chief or designee except for circumstances beyond their control. Employees unable to report for duty for any reason must notify their Division Chief in accordance with the practices of their division. In any event this notification must be made no later than one hour after the start of their shift of as soon as possible (*sic*)...

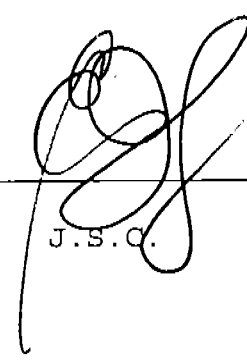
² However, this Decision is without prejudice to Petitioner's commencing any appropriate action based on his allegation that his supervisor failed to place him on light duty due to his extensive back injuries.

At a minimum, even if Petitioner was too disabled to work on the days he was declared AWOL/absent, Petitioner provided no evidence that he complied with the Respondent's Personnel Rules and Regulations or notified his employer of his situation.

Accordingly, it is

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

Dated: June 21, 2010

ENTER: 

J.S.C.

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