Dean v City of New York
2010 NY Slip Op 32619(U)
September 20, 2010
Supreme Court, New York County
Docket Number: 104144/10
Judge: Joan A. Madden
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SCANNED ON 9/23/2010
[* 1]

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

PRESENT: Madden, Justice — PART 11

Dean, Shalaine

- v -

City of New York

INDEX NO. 104144/10

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for Ans 78

	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 cross motion is decided in accordance with the annexed Memorandum Decision Order + 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: Sept 28, 2010

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):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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SHALAINE DEAN,

Petitioner,

-against-

Index No. 104144/10

THE CITY OF NEW YORK; AND PARKS AND RECREATION DEPT.,

Defendants.

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UNFILED JUDGMENT
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Joan A. Madden, J.

In this Article 78 proceeding, Petitioner Shalaine Dean ("Dean") seeks reversal of the decision of the City of New York's Department of Parks and Recreation ("DPR") demoting her from Associate Urban Park Ranger ("AUPR") to Urban Park Ranger ("UPR") and reinstatement to the position of AUPR. The DPR and the City of New York (together with the DPR, the "City") oppose Dean's petition and cross move to dismiss the petition for failure to state a cause of action. For reasons stated below, the City's cross motion to dismiss is granted.

Background

On May 29, 2001, Dean was hired by the City as an UPR. On October 18, 2005, Rajinder Garcha ("Garcha"), Deputy Director of Personnel at the DPR, wrote a letter to Dean ("Garcha's Letter") informing her that she was being promoted to the position of AUPR, and that this promotion would be effective October 31, 2005. Garcha's Letter further states that Dean's "permanent status begins on that date and [that she is] serving a one year probationary period…[which] is subject to extension by the number of days [she] is absent or [does] not perform the duties of [her position as an AUPR]." From October 31, 2005 until December 8, 2005, Dean worked as an AUPR on full duty.

On December 8, 2005, Dean developed asthma in a work related incident caused by exposure to toxic fumes (the "fumes") in a building owned and operated by the City, and took disability leave beginning on that day. The New York State Worker's Compensation Board found Dean's injuries from exposure to the fumes to be compensable and granted her "two awards covering the following periods: [December 27, 2005 – March 21, 2006, May 4, 2006 – June 18, 2006, August 16, 2006 – November 14, 2006, November 14, 2006 – February 25, 2007], for a total of ten [m]onths." Furthermore, at some time prior to her return to work at the DPR, Dean took extended maternity leave pursuant to the Family and Medical Leave Act.

Dean returned to work on May 1, 2009, pursuant to the determination of a physician chosen by the City that Dean was fit to return to her position, but on "moderate duty" based on a medical advice to avoid more than moderate exercise.[1] Dean appears to have remained on moderate duty for the duration of her employment as an AUPR. On October 27, 2009, Captain Cruz, Dean's immediate supervisor, wrote a memorandum (the "cautionary statement"), submitted to the court by Dean, which was a confirmation of a conversation Captain Cruz had with Dean in which he cautioned her for a violation of "Rule III Conduct Unbecoming a City Employ[ee] Sec. (2) Neglect of Duty," because she allegedly failed to send home a drunk officer under her supervision or to report this incident. The cautionary statement included a designation of Dean's status as permanent, and did not mark her status as probationary.

On January 19, 2010, Captain Cruz wrote a performance evaluation (the "performance evaluation") of Dean which categorized her performance as poor and it appears that the City decided to demote Dean to the position of UPR based on poor performance as conveyed in the

[1] The City asserts that time that Dean spent on modified duty may not be counted towards the length of her probationary term and that there is no difference between moderate duty and modified duty; however, a determination on this issue would not affect this decision since as set forth below, even if Dean returned to full duty May 1, 2009, Dean would not have completed her one-year probationary period.

performance evaluation. Dean asserts that she was not provided with a copy of the performance evaluation. In a letter dated March 12, 2010, Dean was given notice of the City's decision to reduce her rank. The demotion was effective at the close of business on March 13, 2010.

On or around March 28, 2010, Dean commenced this Article 78 proceeding seeking to be restored to the position of AUPR. Dean asserts that her demotion was improper because she was a permanent employee who completed her probationary period at the time of her demotion and, as such, could not be removed from her position as an AUPR without a showing of incompetency or misconduct following a hearing, which she was not afforded. Dean also asserts that her probationary period ended on October 31, 2006, one year after her promotion to the position of AUPR became effective. Alternatively, Dean asserts that, even if her probationary period did not end on October 31, 2006, the time she spent on disability leave for which she received worker's compensation must be included in the calculation of the days she worked as an AUPR during the probationary period, and that when this time is added to the time that Dean was present at work in the position of AUPR, she has completed over one year of service. Dean also asserts that at no time did the DPR refer to her position as probationary, as evidenced in part by the cautionary statement.

Dean alternatively argues that, even if she was still a probationary employee at the time she was demoted, the demotion was improper as it was made in bad faith since the City's actions were in violation of provisions of the Civil Service Law ("CSL") relating to the probationary term of civil service employees, and Article X, Section 1 of the Citywide Collective Bargaining Agreement (the "CBA"). Dean asserts that, under Article X, Section 1 of the CBA, she should have been shown the performance evaluation and given a chance to answer it, and that, since she was not afforded this opportunity, her due process rights were violated.

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The City cross moves to dismiss the petition arguing that, pursuant to the Personnel Rules of the City (the "Personnel Rules"), Dean's one year probationary period was extended day-for-day automatically for each day that she did not perform the full duties of the AUPR position, including the days she was on disability leave for which she was found to be entitled to Worker's Compensation. The City further asserts that, even assuming that Dean had returned to full, rather than modified duty on May 1, 2010, she would not have completed the one year probation period, as she had only worked as an AUPR for 11 months and 22 days.

The City further asserts that Dean's petition fails to state a cause of action because a probationary employee can be terminated for any reason or no reason at all, so long as the termination is not in bad faith and the termination is not made in violation of the Constitution, a statute or decisional law. The City asserts that Dean was terminated based on her performance evaluation, and her petition does not allege any such violation that could serve as a basis for this cause of action, rather it relies on conclusory allegations of bad faith. The City also asserts that the provisions of the CSL which Dean cites are applicable to the state civil service system, rather than the city civil service system. Furthermore, the City argues that Article X, Section 1 of the CBA does not bar the consideration of Dean's performance evaluation in a decision to demote her because a demotion does not constitute a disciplinary proceeding. The City further asserts that, even if the City violated the CBA, such a violation is a contract claim and Dean must first exhaust the remedies provided for in the CBA before proceeding to court.

In response, Dean argues that the City has provided no evidence that it was acting in good faith and not in violation of the CSL, Personnel Rules, or relevant provisions of the CBA.

Dean further argues that, while she is an employee of the City and not New York State, the CSL is applicable to her because city regulations cannot be inconsistent with or supersede CSL.[2]

Discussion

In determining a motion to dismiss a petition seeking Article 78 relief for failure to state a cause of action, the court may not look beyond the allegations in the petition, which must be accepted as true. Marlow v. Tully, 79 A.D.2d 546, 547 (1st Dep't 1980); Scott v. Commissioner of Correctional Services, 194 A.D.2d 1042 (3rd Dep't 1993). Even accepting that all the facts alleged in the complaint are true, Dean has failed to state a claim for relief.

In accordance with Personnel Rule 5.2.1(a), Dean was placed on a one year probationary period following her promotion to the position of AUPR and her probationary period was automatically extended by the number of days she did not perform the duties of her position, in accordance with Personnel Rule 5.2.8(b). It is uncontested that Dean was not actively serving as an AUPR, on full or modified duty, for a full year prior to her demotion. Contrary to Dean's arguments, the time she spent on disability leave for which she received workers compensation need not be included in the calculation of the length of her probationary period. "The purpose of excluding from the probationary term periods during which a probationer is not at work performing his or her duties is...to enable the appointing officer to ascertain the fitness of the probationer..." which cannot be done when the probationer is not on the job. Tomlinson v. Ward, 110 A.D.2d 537, 538 (1st Dep't), aff'd., 66 NY2d 771 (1985). Thus, it has been found that the length of the probationary period is properly extended by the days a probationer spends away from duty, regardless of whether such absence is involuntary or even laudatory. See Id.

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[2]Dean also asserts that the cross motion "was served out of time in the meaning of CPLR 2214," but the record does not support her assertion.

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(leave due to jury duty); Thomas v. Abate, 213 A.D.2d 251, 252 (1st Dept 1995)(leave due to injury from car accident).

Moreover, as argued by the City, even if it is assumed that Dean returned to full, as opposed to modified duty, on May 1, 2010, she would not have completed the one-year probationary period[3]. Additionally, the cautionary statement did not remove Dean from her probationary period or provide evidence that the probationary period had been waived because Dean was a permanent employee serving a probationary term in the position of AUPR and, thus, the designation of her as a permanent employee is consistent with a continued probationary term. Accordingly, Dean's position that she was a permanent employee who completed her probationary period as an AUPR at the time she was dismissed is without merit.

Dean's arguments that she was improperly demoted even if she was still serving her probationary period are also unavailing. It is well settled that a probationary employee may be demoted without a hearing and without a statement of reasons at any time while serving a probationary term absent proof that such discharge was for a constitutionally impermissible reason, in violation of statutory or decisional law, or in bad faith. See e.g. Rainey v. Maguire, 111 A.D.2d 616, 618 (1976) citing York v. McGuire, 63 N.Y.2d 760, 761 (1984); see also Swinton v. Safir, 93 N.Y.2d 758, 763 (1999) (holding that a probationary employee has no right to challenge termination absent a showing of bad faith); Talamo v. Murphy, 38 N.Y.2d 637, 639 (1976) (stating that courts will not interfere with the discretion of officers to terminate a probationary employee unless the action complained of was arbitrary and capricious).

Petitioner "bears the burden of demonstrating respondent's bad faith or illegal or arbitrary action." Rainey at 618. Moreover, while the court is required to accept the allegations in the petition as true, conclusory allegations of bad faith are insufficient to meet this

[3]It appears that petitioner worked 356 days out of the 365 days in a year.

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burden. Welsh v. Kerik, 304 AD2d 417 (1st Dept 2003); Santoro v. County of Suffolk, 20 A.D.2d 429 (2d Dept 2005)..

Here, petitioner has not met her burden of establishing bad faith, particularly as the cautionary statement and the poor performance evaluation provided a rational basis for Dean's demotion. See Morales v. Patel, 232 A.D.2d 319 (1st Dept 1996). Moreover, the provisions of the CSL governing probationary employment of state employees relied on by Dean are inapplicable here as Dean is a municipal employee. See CSL § 63 (providing that "municipal civil service commissions, [subject to certain exceptions not applicable here], provide by rule for the conditions and extent of probationary service"); see also, Goodman v. Department of Civil Service of Suffolk, 151 A.D.2d 481 (2d Dept 1989).

Finally, Dean's argument that the City acted in bad faith by failing to comply with the provision of the CBA which required that she be provided with a copy of the performance evaluation is unavailing, since her exclusive remedy in the event of such violation is to pursue the grievance procedure set forth in the CBA. Plummer v. Klepak, 48 N.Y.2d 486, 489 (1979), cert denied, 445 U.S. 952 (1980).

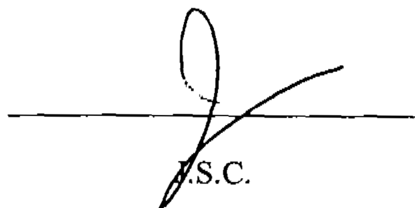
Conclusion

In view of the above, it is

ORDERED that the City's cross motion to dismiss is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and dismissed.

Dated: September 30, 2010



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