

Matter of Jones v Shriro
2010 NY Slip Op 32620(U)
September 20, 2010
Supreme Court, New York County
Docket Number: 106389/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C.

PART 5

Index Number : 106389/2010
JONES, GEORGE
VS.
SCHRIRO, DORA DR.
SEQUENCE NUMBER : 001
ARTICLE 78
CAL # 62

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

art 78
petition + mot to dismiss
this motion to for _____

PAPERS NUMBERED

1
2 3
4 5

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

Answering Affidavits -- Exhibits _____

Notice of Cross-Motion _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

SEP 23 2010

COUNTY CLERK'S OFFICE
NEW YORK

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 9/20/10 SEP 20 2010

BARBARA JAFFE
J.S.C. 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 5

-----X

In the Matter of the Application of
GEORGE JONES,

Petitioner,

Index No. 106389/10
Motion Date: 8/03/10
Motion Seq. No.: 001
Calendar No.: 62

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

DECISION & ORDER

-against-

Dr. Dora Shriro, Correction Commissioner
of the New York City Department of Correction;
THE NEW YORK CITY DEPARTMENT OF
CORRECTION; and THE CITY OF NEW YORK,

Respondents.

-----X

BARBARA JAFFE, JSC:

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FILED
SEP 23 2010
COUNTY CLERK'S OFFICE
NEW YORK

Petitioner seeks to vacate an administrative determination of termination. By notice of motion dated July 1, 2010, respondents move pursuant to CPLR 7804(f) and 3211(a)(7) for an order dismissing the petition. Petitioner opposes. For the reasons that follow, the motion is denied.

I. FACTUAL BACKGROUND

On January 17, 2008, petitioner was hired by respondents as a corrections officer for a two-year probationary period. (Notice of Petition of George Jones, dated May 14, 2010 [Jones

Pet.], Exh. D). Respondents allege that, as a probationary employee, petitioner's employment was terminable at any time and for any reason (Memorandum of Law in Support of Respondents' Cross-Motion to Dismiss the Petition [Resp. Memo.]), and that his employment was governed by the Department of Correction's (DOC) Rules and Regulations (Rules), which require punctuality and set forth penalties for tardiness (Jones Pet., Exhs. B, C, D).

Pursuant to the Rules, an employee is late when absent from his or her work location within five minutes of starting time. The extent of the tardiness is measured from the "actual arrival time at the respective facility/command." (*Id.*, Exh. C). When an employee is late, he or she must submit a written report to the Commanding Officers prior to assuming his or her post. (*Id.*, Exhs. A, C). If an employee is late for roll call, but has arrived prior to the commencement of his or her scheduled tour, a report must be submitted to roll call. (*Id.*). Where an employee believes that the tardiness is excused due to inclement weather, public transportation delays, or other reasons beyond his or her control, the excuse may be accepted only if the City Personnel Director determines that the lateness is excused on a city-wide basis and that the employee made every reasonable effort to arrive on time. (*Id.*, Exhs. A, C).

Where an employee has accumulated "an excessive lateness record, or a lateness record which reflects a serious impairment" to his or her performance, a disciplinary action will be commenced. (*Id.*, Exh. D). Petitioner alleges that in lieu of these measures, a Commanding Officer may conduct a "corrective interview" with the employee. (Jones Pet.).

On September 22, 2009, petitioner was called in for a corrective interview due to his frequent lateness. He alleges that he was told during the interview that his probationary period would be extended so long as he was not late again, but that another lateness would result in

termination. (*Id.*). Petitioner denies, without contradiction, any tardiness after the corrective interview. (*Id.*).

On January 20, 2010, DOC Warden Carmine LaBruzzo submitted a personnel determination review, recommending that petitioner be terminated from employment due to his tardiness and poor evaluation. (*Id.*, Exh. E). The review indicates that he received four probationary/performance ratings of D, and one D minus rating dated November 5, 2009. (*Id.*). The report lists 19 instances of unexcused tardiness between October 4, 2008 and September 21, 2009, ranging from five minutes to one hour on the last instance, and totaling five hours and 15 minutes. In addition to the September 22 corrective interview referenced by petitioner, the report reflects that a second corrective interview was held relating to an "unauthorized area" violation and a command discipline penalty of four vacation days. The report contains no description of these violations. (*Id.*).

II. PERTINENT PROCEDURAL BACKGROUND

On May 14, 2010, petitioner served respondent with the notice of petition, and on July 1, 2010, respondents served the instant motion in lieu of an answer.

III. CONTENTIONS

Respondents contend that petitioner has failed to state a cause of action because he was a probationary employee who could be terminated for any reason or no reason at all, so long as the termination was not in bad faith, and petitioner has not alleged bad faith. (Resp. Pet.).

Petitioner maintains that the lateness record is inaccurate as he was late 10 times and never for more than five minutes. (Jones Pet.). He alleges that the negative performance reviews were submitted by supervisors who had never worked with him and could only have based their

evaluations on the inaccurate lateness record. (*Id.*). In support, petitioner submits letters from four supervising captains who supervised him in which they praise petitioner and urge that he be given another chance. (*Id.*, Exh. F). Petitioner thus contends that the decision to terminate him is arbitrary and capricious not only because respondents promised to extend his probationary period rather than terminate him, but also because the determination is based on an inaccurate lateness record and evaluations submitted by individuals lacking personal knowledge. He also relies on the pertinent rules governing tardiness and disciplinary actions, the statements of his supervising officers, and a petition signed by dozens of his co-workers and superiors on his behalf.

IV. ANALYSIS

On a pre-answer motion to dismiss a petition pursuant to CPLR 7804(f), “only the petition may be considered, and all of its allegations are deemed to be true.” (*In the Matter of 1300 Franklin Ave. Members, LLC v Board of Trustees Incorp. Village of Garden City*, 62 AD3d 1004, 1006 [2d Dept 2009]; accord *Matter of DePaoli v Board of Ed., Somers Cent. School Dist.*, 92 AD2d 894 [2d Dept 1983]; *211 West 56th St. Assocs. v Dept. of Housing Preservation*, 78 AD2d 793, 794 [1st Dept 1980]). The court may deny the motion, order respondent to submit an answer, and grant a hearing upon request. (CPLR 7804[f]).

A DOC employee on probationary status may be terminated “without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law.” (*Soto v Koehler*, 171 AD2d 567, 567-568 [1st Dept 1991], *lv denied* 78 NY2d 855). Judicial review is limited to a determination of “whether the termination was made in bad faith.” (*In the Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]; *Soto*, 171 AD2d at 568). Absent such a showing, a

court has no discretion to challenge a termination decision. (*Soto*, 171 AD2d at 568).

Although excessive lateness is a proper ground for termination, particularly for a corrections officer whose “duties involve the safety of the institution and the inmates” (*id.*; *Nelson v Abate*, 205 AD2d 454, 455 [1st Dept 1994]), petitioner’s allegation that his termination and performance reviews are based on an inaccurate lateness record is accepted as true on this motion, and is supported by the letters accompanying the petition from which it may be inferred that if the commanding officers who personally supervised petitioner had submitted the performance reviews, they may have been favorable.

Petitioner’s allegations and the absence of any time reports demonstrating petitioner’s tardiness or evidence revealing the bases for the performance reviews give rise to a “disquieting feeling that an injustice may have occurred” (*In re Application of Davila v New York City Hous. Auth.*, 190 AD2d 511, 511-512 [1st Dept 1993], *lv denied* 87 NY2d 801 [1995] [petitioner denied using drugs, story of inadvertently ingesting drugs corroborated]; *In re Miciotta* 118 AD2d at 491 [concerns over flawed drug testing]; *Quick v Horn*, 2008 NY Slip Op 30086(U) [Sup Ct, New York County 2008] [termination based on unsubstantiated and unverified statements of individual who purported to be petitioner’s parole officer]), as well as an intimation of bad faith. Consequently, respondents have failed to establish their entitlement to an order dismissing the petition pursuant to CPLR 7804 or CPLR 3211(a)(7).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that respondents’ motion to dismiss is denied; it is further

ORDERED, that respondents serve and file their answer within 20 days of service of this

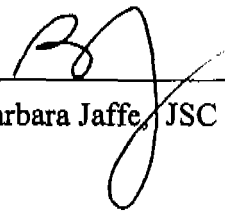
order with notice of entry; it is further

ORDERED, that petitioner may re-notice this matter in accordance with CPLR 7804(f), returnable to the Motion Support Office, Room 130, 60 Centre Street; and it is further

ORDERED, that within 20 days of entry of this order, petitioner shall serve a copy upon respondents with notice of entry.

This constitutes the decision and order of the court.

ENTER:



Barbara Jaffe, JSC

DATED: September 20, 2010
New York, New York

FILED
SEP 23 2010
COUNTY CLERK'S OFFICE
NEW YORK