

Maklari v Doherty

2010 NY Slip Op 33624(U)

December 9, 2010

Supreme Court, New York County

Docket Number: 104277/10

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madden
Justice

PART II

Index Number : 104277/2010
MAKLARI, CHRISTOPHER
VS.
DOHERTY, JOHN J.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 9-5-10
MOTION SEQ. NO. 001
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 *petition is decided in accordance with the answered Memorandums, Decision Order & Judgment*

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

UNFILED JUDGMENT
his 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 11B).

Dated: December 29, 2010 _____
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----X
CHRISTOPHER MAKLARI,
Petitioner,

-against-

Index No. 104277/10

JOHN J. DOHERTY, as Commissioner of the Department
of Sanitation of the City of New York, and the CITY OF
NEW YORK

Respondents.

Joan A. Madden, J.

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appear in person at the Judgment Clerk's Desk (Room
'1B)

In this Article 78 proceeding, Petitioner Christopher Maklari ("Maklari") seeks reversal of the decision of the Department of Sanitation of the City of New York City ("DOS") terminating him from his position as a sanitation worker and reinstatement to his former position at the same status that existed prior to his termination. John J. Doherty ("Doherty"), as Commissioner of DOS, and the City of New York (together, "DOS") oppose the petition and seek to dismiss it. For reasons stated below, Maklari's petition is denied and dismissed.

Background

Maklari was appointed as a sanitation worker in the DOS on or about August 15, 2005. He became a tenured employee of the DOS on or about August 14, 2006. Maklari would report to work in a garage (the "Garage") in the DOS Brooklyn South 09 District ("Maklari's District").

The DOS complaint history shows that over 40 instances of rule violations were recorded for Maklari since he became a tenured employee and that he violated Rule 1.5 ("Rule 1.5") of DOS's Code of Conduct (General Order No. 2002-06), titled "Emergency leave," 17 times between 2008 and 2009. Rule 1.5 requires sanitation workers who cannot report to work to call their work location at least one hour before their assigned tour of duty to notify the DOS that

they cannot report to work. Rule 1.5 further requires that sanitation workers supply proof of emergency within 48 hours of the request.¹

On August 19, 2009, Maklari entered into a stipulated plea agreement (the "Plea Agreement") with DOS in which he agreed to be placed on Commissioner's Probation for one year in order to set aside 10 of the instances in which he violated Rule 1.5. Maklari was provided with a copy of Operations Order 2008-06 ("2008-06"), setting forth applicable probationary criteria. Maklari asserts that he was told by the Department Advocate, Rita Brackeen ("Brackeen"), that as long as he complied with the rules outlined in 2008-06, he would not be terminated.

Commissioner's Probation provides that an employee will be evaluated by the Employee Review Board ("ERB") according to the standards used to evaluate a probationary employee. Probationary employees must abide by rules and regulations of the DOS, "especially those covering time and leave attendance, absence and lateness, and sick leave usage, and [DOS's] Code of Conduct (General Order 2002-06)." DOS Operations Order 2008-06 ("2008-06").

Pursuant to 2008-06, any probationary sanitation worker who has two Absences Without Leave ("AWOLs") following the first 60 days of his employment may be terminated. 2008-06 specifies that a probationary sanitation worker who has one AWOL following the first 60 days of his employment, may be recommended for an extension of his probationary term.

On or around September 21, 2009, Maklari called the Garage to request emergency leave due to childcare. He stated that both his wife and child had the flu, and he needed to stay home to care for his child. Maklari's request was initially granted pending submission of verifiable proof demonstrating that there was an emergency within two work days of his absence.

¹ However, there appears to be at least one exception to this requirement.

Operations Order 2008-03 ("2008-03") sets forth the procedure used by DOS for granting emergency leaves, including emergency childcare leave.² When an employee has an emergency, he must notify his immediate supervisor of the emergency and that he cannot report to work. He will then be told that he will be "carried" absent until proof of the emergency is submitted and approved by the Division Head or person of equivalent rank who, in Maklari's District, was described by DOS as the Borough Chief. Nonetheless, under 2008-03, sanitation workers are allowed up to three undocumented emergency childcare absences in a twelve month period as long as they provide proof of a dependent child. Subsequent emergency childcare absences during the twelve month period additionally require proof of emergency within two working days of the leave.

Although Maklari called the Garage to report that he was taking emergency leave within the appropriate period of time and had his child's birth certificate on file, Maklari did not submit proof of the emergency within two working days of the leave and had more than three emergency childcare absences within the relevant twelve month period. Charles Murray ("Murray"), the General Superintendent Level 1 in Maklari's District denied Maklari's request for emergency childcare leave because he deemed it excessive in light of his many other emergency leaves and because Maklari did not provide proof of the emergency and had already exhausted his first three emergency childcare absences. Murray Aff. ¶¶12-13, DOS document titled "Reason Emergency Leave Denied." The Borough Chief agreed with Murray's decision to disapprove the request. Thus, Maklari received an AWOL for being absent for his scheduled shift on September 21, 2009.

Maklari received a second AWOL on December 10, 2009, which Maklari maintains was the result of the failure of DOS to communicate to him what he was supposed to do on that day,

² It appears that 2008-03 expands upon Rule 1.5 and provides for certain exceptions.

and that his absence cannot be characterized as an AWOL and held against him. Maklari was normally scheduled to work either the 12:00 a.m. to 8:00 a.m. shift (the "Midnight Shift") or the 4:00 p.m. to 12:00 a.m. shift (the "Evening Shift").

In Maklari's District, sanitation workers normally work the same shift that they worked last unless DOS specifically informs them that their shift has changed. Maklari was aware of this procedure and had followed it in the past. Alternatively, sanitation workers can and often do call DOS to verify their work shifts. However, Murray states that sanitation workers in Maklari's District are only entitled to rely on scheduling information provided to them by: a civilian clerk, the superintendant's clerk, a supervisor, a shop steward, or Murray. Murray Aff. at ¶19. They are not entitled to rely on other sanitation workers for information as to whether their shifts have changed.

On December 7th and 8th of 2009, Maklari worked the Midnight Shift. Maklari was scheduled to be "chart," meaning on his day off, on December 9, 2009, but was supposed to work on December 10, 2009.

Maklari called his Garage on December 9, 2009 to find out whether he was expected to report for the Midnight Shift on December 10, 2009. Maklari spoke with Kevin Amass ("Amass") who was also a sanitation worker. Amass allegedly told Maklari that Maklari's name was not on the set-up board which lists all the assignments for the next day (the "Board"), for the Midnight Shift and that he was not listed on the Board at all. However, DOS maintains that the names of all employees, even those on vacation, are always on the Board.

DOS asserts that Maklari's name was on the Board, showing that he had been scheduled to attend clinic trials from 7:00 a.m. until 3:00 p.m. on December 10, 2009. DOS asserts that Amass, as a sanitation worker, lacked the authority to inform Maklari of the scheduling such that

he was entitled to rely upon it. DOS also asserts that Maklari could not have reasonably relied on Amass' statement that his name was not on the Board because the Board always lists all sanitation workers' activities for the next day. Additionally, DOS argues that in any event Maklari should not have concluded that because Amass did not see his name on the Board he was entitled to a day off from work.

DOS asserts that the superintendent's clerk for December 9, 2009, tried to telephone Maklari to tell him that he was scheduled to attend clinic trials on the next day, but was unable to reach him and was not redirected to an answering machine. Murray asserts that because Maklari was not notified of the clinic trials he expected him to take one of the following actions on December 10, 2009: (1) work the Midnight Shift, as would normally be done under his office's attendance rules, or (2) call the office later in the day and learn from someone with authority that he was scheduled for clinic trials. Murray Aff. ¶25.

Maklari asserts that since he was told that he was not on the Board for the Midnight Shift for December 10, 2009, he assumed that he was going to be placed on the Evening Shift for December 10, 2009, and did not report for the Midnight Shift. Maklari's supervisor did not mark him absent from the Midnight Shift or contact Maklari regarding his absence because he thought Maklari was attending the clinic trials. *Id.* at ¶33. However, Maklari did not report to the clinic trials or report for any shift on December 10, 2009.

Murray was informed, on December 10, 2009, that Maklari did not show up for the Midnight Shift or the clinic trials, and thereafter, in accordance with procedure, Murray called the Borough to inform the relevant authorities of the no call/no show. DOS asserts that it issued a complaint against Maklari for being absent and, thus, he received his second AWOL.³

³ The record demonstrates some discrepancies as to the characterization of Maklari's absence. DOS contends that the second AWOL was the result of Maklari being absent from the Midnight Shift as shown in Sanitation Complaint, DS 249. On the other hand, Maklari presents a

On or about December 18, 2009, the Evaluation Review Board ("ERB") recommended that Maklari be terminated. Maklari was terminated as a sanitation worker on or about December 21, 2009.

On April 1, 2010, Maklari commenced this Article 78 proceeding seeking to be restored to the position of sanitation worker. Maklari argues that he was informed by Brackeen that he would only lose his job if he violated the rules that govern Commissioner's Probation, and that he should not have received any AWOLs while on Commissioner's Probation. He asserts that he should not have been marked AWOL on September 21, 2009, because he timely informed DOS of his childcare emergency and had the birth certificate of his child on file with the agency. With respect to the AWOL on December 10, 2009, Maklari asserts that he was marked absent for missing the clinic trials, not the Midnight Shift, and that since it was DOS's responsibility to notify him that he was scheduled to attend the clinic trials, he should not have been marked AWOL.

In opposition, DOS argues that Maklari has failed to state a cause of action because probationary employees, unlike permanent civil servants, hold no property interests in their employment and can only challenge the termination of their employment by proving that the employer acted in bad faith. DOS argues that Maklari was terminated in good faith because he violated the rules and regulations applicable to sanitation workers on Commissioner's Probation by being AWOL on two occasions, in breach of his Plea Agreement.

memorandum, dated December 16, 2009, from S. Costas to Joseph Di Piazza, the Director of Human Resources, which characterizes the second AWOL as resulting from Maklari's failure to report for the clinic trials. Murray asserts that the reason that Maklari was marked AWOL on December 10, 2009, was that he did not report for either the Midnight Shift or the clinic trials. Murray Aff. at ¶37. However, such discrepancies do not provide a basis for finding that DOS's determination was irrational or made in bad faith.

DOS argues that the First AWOL was proper because, pursuant to 2008-03, since he had already taken three emergency childcare leaves within twelve months, Maklari was required to provide proof of childcare emergency within two working days of the leave in order to avoid being designated AWOL. DOS also argues that it was justified in denying Maklari's request for leave as excessive because it is within the discretion of the Borough Chief to grant unpaid emergency childcare leave, and this was Maklari's seventeenth leave under DOS's Emergency Time Off ("ETO") policy in approximately twelve months.

DOS argues that the Second AWOL was proper because Maklari neither spoke to someone with authority to inform him of his next scheduled shift nor appeared for the shift he had worked last, the Midnight Shift. DOS argues that Maklari could not have reasonably relied on Amass's statements since Maklari knew that the Board always lists the activities of all sanitation workers, and that a reasonable person with Maklari's knowledge of the practices in Maklari's District would have requested to speak with a person of authority to find out why his name was not on the Board. Furthermore, DOS argues that while Maklari states that he assumed he was supposed to work the Evening Shift, he did not report to work for that shift either. DOS thus concludes that Maklari must have known that he was scheduled to attend clinic trials and simply chose not to attend them or *any* work shift.

Discussion

It is well established that judicial review pursuant to CPLR Article 78 is limited to determining whether an administrative determination is supported in law and rationally based in the administrative record; if so, the determination should not be disturbed. Matter of Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222 (1974); see CPLR 7803(3).

“Absent a statute or rule to the contrary, a probationary employee may be discharged without a hearing and without a statement of reasons so long as the act is done in good faith and not for constitutionally impermissible purposes.” Rainey v. Maguire, 111 A.D.2d 616, 618 (1985). To the extent that 2008-06 or any other rules of DOS impose restrictions on the circumstances in which a probationary employee can be terminated, DOS must act in accordance with these restrictions. See Pastore v. City of Troy, 152 A.D.2d 808, 808-9 (1989); see also Matter of Garcia v. LeFevre, 64 N.Y.2d 1001, 1003 (1985).

A negotiated plea agreement in which a public employee facing disciplinary charges agrees to place himself on limited or unlimited probation is valid and enforceable where it is knowingly and freely entered into. Matter of Tankard v. Abate, 213 A.D.2d 320 (1st Dep’t), lv. denied, 86 NY2d 702 (1995); Abramovich v. Board of Ed. of Central School Dist. No. 1 of Towns of Brookhaven and Smithtown, 46 N.Y.2d 450 (1979), Newman v. Fire Dept. of City of New York, 47 A.D.3d 444 (1st Dep’t 2008). Since Maklari knowingly and freely entered into the Plea Agreement to be on Commissioner’s Probation, making him subject to the same criteria which ERB uses for probationary employees, the Plea Agreement was enforceable and DOS could terminate him for any reason that a probationary employee could be terminated, including for having two AWOLs during his probationary term.

Here, the evidence shows that DOS’s decision to terminate Maklari’s employment is supported in law and has a rational basis in the administrative record. With respect to the First AWOL, it cannot be said that DOS’s denial of Maklari’s request for emergency leave was irrational since Maklari failed to submit evidence of the emergency within two working days of the leave as required by the applicable rule.

The record also shows a rational basis for DOS's decision to issue the Second AWOL. There is no evidence that DOS acted with a bad faith motive in finding that Maklari was AWOL on that day, and it is uncontested that Maklari was expected to work on December 10, 2009, but did not report for the clinic trials or for any shift. Thus, DOS acted within its discretion in finding Maklari AWOL on December 10, 2009.

Since Maklari was an employee on Commissioner's Probation, subject to the same standards as probationary employees specified in 2008-06, his employment could be terminated for receiving two AWOLs during his probationary period. As such, it cannot be said that DOS acted improperly here where Maklari was AWOL on two occasions during his probationary period.

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition is denied and dismissed.

Dated: December 29, 2010

J.S.C.

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