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

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

TIAJWANA STEVENS

-v-

DR. DORA SCHRIRO, et al.

INDEX NO. 118045/2009

MOTION DATE

MOTION SEQ. NO. 01

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, It is ordered that this motion is and adjudged that:

The court granted respondents' motion to dismiss the petition at the close of the evidence presented by petitioner and dismissed this proceeding for the reasons explained on the record at the jury trial 11/15/13. C.P.L.R. § 4401.

FILED
MAY -6 2014
COUNTY CLERK'S OFFICE
NEW YORK

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NYS SUPREME COURT - CIVIL

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

Dated: 11/15/13

Lucy Billings, J.S.C.
LUCY BILLINGS
J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ..... PETITION MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Norman Goodman
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
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In the Matter of the Application of
TIAJWANA STEVENS,

Petitioner,

Index No.: 108215/09

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

-against-

DECISION AND ORDER

DR. DORA SCHRIRO, Correction Commissioner
of the New York City Department of
Correction; NEW YORK CITY DEPARTMENT OF
CORRECTION; and CITY OF NEW YORK,

Respondents

----------x



APPEARANCES:

For Petitioner
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For Respondents
Rebecca Hirschklau, Assistant Corporation Counsel
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LUCY BILLINGS, J.:

I. BACKGROUND

In this proceeding pursuant to C.P.L.R. Article 78, petitioner seeks an order and judgment annulling respondents' decision to terminate her employment as a probationary correction officer of the New York City Department of Correction and reinstating her as a correction officer with back pay and benefits. C.P.L.R. § 7803(3). Respondents move to dismiss the petition on the ground that the petition fails to state a claim.

C.P.L.R. §§ 3211(a)(7), 7804(f).

Nothing in the current record before the court sets forth in writing respondents' decision or reasons for terminating petitioner's employment. The only indication of their bases for the termination is the New York State Department of Labor's questionnaire to petitioner asking her to respond to her employer's bases for contesting her Unemployment Insurance claim:

> a. She did not file a report of witnessing an incident involving the use of force immediately after the incident, until the Inspector General's office directed her to file the report.
>
> b. She gave misleading and false testimony during the investigation of the use of force, to "defray" her involvement. Specifically, she testified that an inmate opened his cell door and exited his cell himself, rather than that he was locked out of his cell and directed to a bridge area for a beating.
>
> c. Before the incident, she was off-post without a supervisor's permission.

Pet., Ex G.

II. APPLICABLE STANDARDS

Respondents may terminate petitioner's employment as a probationary correction officer of the City of New York without any statement of reasons or hearing. Talamo v. Murphy, 38 N.Y.2d 637, 639 (1976); Che Lin Tsao, 28 A.D.3d 320, 321 (1st Dep't 2006); Garcia v. New York City Probation Dept., 208 A.D.2d 475,

476 (1st Dep't 1994); Nelson v. Abate, 205 A.D.2d 454, 455 (1st Dep't 1994). To sustain a claim for reversal of that decision and reinstatement, petitioner, as a probationary City employee, must demonstrate that her termination was for a constitutionally impermissible reason, otherwise in violation of law, in bad faith, or arbitrary. Johnson v. Katz, 68 N.Y.2d 649, 650 (1986); York v. McGuire, 63 N.Y.2d 760, 761 (1984); Che Lin Tsao, 28 A.D.3d at 321; Cipolla v. Kelly, 26 A.D.3d 171 (1st Dep't 2006). Absent such a showing, respondents may terminate her probationary employment for any other reason or for no reason at all. Swindler v. Safir, 93 N.Y.2d 758, 762-63 (1999); Che Lin Tsao, 28 A.D.3d at 321; Cipolla v. Kelly, 26 A.D.3d 171.

Petitioner bears the burden to present admissible evidence showing such a deprivation of her rights, bad faith, or arbitrary action. Johnson v. Katz, 68 N.Y.2d at 650; Che Lin Tsao, 28 A.D.3d at 321; Medina v. Sielaff, 182 A.D.2d 424, 427 (1992); Green v. Board of Educ. of City Dist. of N.Y., 262 A.D.2d 411 (2d Dep't 1999). Conclusory allegations of bad faith or speculation that respondents' underlying motivation was unlawful do not satisfy her burden. Che Lin Tsao, 28 A.D.3d at 321; Garcia v. New York City Probation Dept., 208 A.D.2d at 476; Medina v. Sielaff, 182 A.D.2d at 427-28; Green v. Board of Educ. of City Dist. of N.Y., 262 A.D.2d at 412. Satisfying her burden entitles her to a hearing on whether her termination was in fact in violation of her rights, in bad faith, or arbitrary, not to an automatic reversal of respondents' decision. Swindler v. Safir,

93 N.Y.2d at 763; Cipolla v. Kelly, 26 A.D.3d 171; Medina v. Sielaff, 182 A.D.2d at 427.

III. THE PETITION'S ALLEGATIONS BASED ON ADMISSIBLE EVIDENCE

A. Petitioner's Assignment

The verified petition, supported by affidavits and admissible documents upon a witness' foundation, sets forth as follows. Respondents terminated petitioner's employment August 28, 2009, two days before her probationary period of two years from her hiring August 30, 2007, was to expire. Throughout those nearly two years, her attendance, punctuality, and performance on the job were exemplary. See Johnson v. Katz, 68 N.Y.2d at 650; Nelson v. Abate, 205 A.D.2d at 455. After six months on the job, respondents assigned petitioner to an all male, gang-affiliated, violent, and highly classified inmate housing area on New York City's Riker's Island, staffed by three correction officers at each of three posts: an A station and B and C corridors.

The A station contained controls to open and close inmates' cells, but the controls never functioned during petitioner's years of employment. The A station consequently contained a substitute device, an Emergency Release (ER) bar that the correction officers inserted into an ER hole outside each cell to crank it open. The ER bar was the only mechanism to open cells. They could not be opened from the station, although it housed the bar when not in use. Inmates had figured out how to jam or otherwise manipulate their cell locks, however, to open their cells, a situation well known within the Department of Correction

(DOC), through procedures for reporting inoperable cells to the area supervisor, who endorsed the reports and acknowledged the conditions reported. The facility control supervisor also received the reports and forwarded them to the facility mechanics supervisor, who maintained the records. To further demonstrate DOC's knowledge, petitioner presents witnesses and entries from DOC records of 24 cell doors on the A and B corridors that did not lock, 12 reports further indicating the lock could be manipulated, between June 19, 2008, and August 24, 2009, as well as seven similar reports during September through November 2009.

On September 20, 2008, during the 3:00 to 11:00 p.m. tour of duty, petitioner assumed her post at the A station. Between 3:00 and 5:00 p.m. an incident involving a gang-affiliated inmate in another highly classified inmate housing area prompted a decision to lock in all highly classified inmate housing areas, including petitioner's floor, which prohibited releasing an inmate from his cell for any purpose.

Around 5:30 p.m. petitioner left her post to assist B corridor officer Kenju Strunkey collecting food trays, while keeping her post within her view, and then returned directly to the A station. The ER bar remained in the A station throughout her tour of duty that evening.

B. Inmate Ricks's Assault on Officer Strunkey

The petition, supported by Officer Strunkey's affidavit, sets forth that around 7:45 p.m. that evening, as Officer Strunkey approached petitioner at the A station, she observed

inmate Dennis Ricks out of his cell approaching Officer Strunkey and her. Officer Strunkey instructed her to contact the probe team for assistance, which, without an operable telephone, she did repeatedly via radio. Strunkey attempted to use his pepper spray, but Ricks blocked the officer by rushing at him, punching his head and toward his body. Ricks continued to pursue Strunkey, moving from the A station into a bridge area as they grappled with each other. Three additional correction officers, Conyers, Rouse, and Rush, came to render assistance and with Strunkey gained control of Ricks and handcuffed him on the floor.

According to the first hand accounts of petitioner and Officer Strunkey, he used only such force as necessary to defend himself. Although he was treated for shoulder and thumb injuries, no one shed any blood during inmate Ricks's assault, nor found any blood around the A station or bridge area.

C. The Investigation

Petitioner attests that on September 21, 2008, she submitted to DOC a report of the incident involving the use of force the day before. On September 27, 2008, three other corrections officers, Officers Rouse and Rush and a third, Officer Espino, submitted reports of the incident. DOC did not consider their reports to be delinquent. In December 2008, new personnel assumed administration of the detention center that included the inmate housing area to which petitioner had been assigned in February-September and again around November 2008. On March 31, 2009, the new administration ordered her to submit a second use

of force report, with which she immediately complied.

The March 2009 report DOC requested from petitioner is not on a "Use of Force Witness Report" form used by her and her fellow correction officers when they reported the use of force September 20, 2008, shortly afterward. Pet., Exs. D and F. The later report is simply a narrative memorandum from petitioner to Warden Davis, suggesting that DOC requested this later report to ascertain whether her version of events remained consistent with her earlier version. While the later report is not verbatim the same, it is entirely consistent, yet particularly corroborative in that it reveals no reliance on her earlier narration.

On August 20, 2009, a DOC investigator interviewed petitioner under oath. Petitioner maintained that no stabbing occurred during the encounter with inmate Ricks September 20, 2008. The investigator expressed to petitioner that the investigation was targeting Officer Strunkey, not petitioner; wanted petitioner to change her account to report that she observed Strunkey stab Ricks; and gave her a few days to reconsider and comply. When petitioner refused to change her account, termination of her employment ensued August 28, 2009.

## IV. SATISFACTION OF PETITIONER'S BURDEN TO SHOW A DEPRIVATION OF HER RIGHTS, BAD FAITH, OR ARBITRARY ACTION

Taking the only indication of respondents' bases for terminating petitioner's employment and assessing them against the only admissible evidence in the record thus far yield the following conclusions.

A. Failure to File a Use of Force Report

The record contains no explanation why DOC disregarded the report petitioner attests she submitted to DOC September 21, 2008, of the incident involving the use of force the evening before: not even a claim that her attestation is false, let alone reasons for disbelieving it. While respondents are not compelled to accept the credibility of petitioner's version of events, Swindler v. Safir, 93 N.Y.2d at 763, the record lacks identified conflicts between her version and any other witness' version, discrepancies between her account and DOC records, or inconsistencies in her own different accounts. See id. at 762; Johnson v. Katz, 68 N.Y.2d at 650; Talamo v. Murphy, 38 N.Y.2d at 639. The record lacks any evidence not only that petitioner in fact failed to submit a report by an identified deadline, but also that her lateness violated a DOC rule or that she was repeatedly lax regarding reports. See Bradford v. New York City Dept. of Corrections, 56 A.D.3d 290, 291 (1st Dep't 2008); Nelson v. Abate, 205 A.D.2d at 455.

B. Misleading Testimony During the Investigation

Likewise, nothing in the record supports a conclusion that petitioner's testimony to the investigator investigating the use of force was misleading or was to minimize her involvement in the incident. The record points to no contrary accounts by Officers Strunkey, Rush, Rouse, Espino, or Conyers or anyone else present other than inmate Ricks, who obviously had a motive to implicate Officer Strunkey by attributing Ricks's release from his cell to

Strunkey, portraying the assault as initiated by him, and maximizing its seriousness.

Although the other officers' use of force reports, Ex. H, likely would qualify as admissible public or business records, absent their certification, C.P.L.R. §§ 4518(c), 4520, 4540(a) and (b); People v. Mertz, 68 N.Y.2d 136, 147-48 (1986); People v. Brown, 221 A.D.2d 270, 271 (1st Dep't 1995); People v. Smith, 258 A.D.2d 245, 249-50 (4th Dep't 1999); People v. Hudson, 237 A.D.2d 943, 944 (4th Dep't 1997); see People v. James, 4 A.D.3d 774, 775 (4th Dep't 2004), or a witness laying a business record foundation, petitioner has not presented them in admissible form. C.P.L.R. §§ 3122-a, 4518(a); People v. Mertz, 68 N.Y.2d at 147; Zuluaga v. P.P.C. Constr., LLC, 45 A.D.3d 479, 480 (1st Dep't 2007); Vento v. City of New York, 25 A.D.3d 329, 330 (1st Dep't 2006); Holliday v. Hudson Armored Car & Courier Serv., 301 A.D.2d 392, 396 (1st Dep't 2003). See People v. Rawlins, 37 A.D.3d 183, 184 (1st Dep't 2007), aff'd, 10 N.Y.3d 136 (2008); Kupferle v. Deidra Transp., 300 A.D.2d 192 (1st Dep't 2002). Therefore the court does not rely on them to substantiate the petition. Nevertheless, were the court to consider their contents, they consistently portray inmate Ricks as the aggressor and all use of force September 20, 2008, as the minimum necessary to stop his aggression, fully supporting petitioner's account and by no means undermining it.

The record reveals no further attempt by DOC to verify either inmate Ricks's account or petitioner's account. Nor does

the record suggest any other reason why DOC credited his account and wholly discredited her testimony that Ricks opened his cell door and exited his cell himself, see Swindler v. Safir, 93 N.Y.2d at 762, other than DOC's unwillingness to accept that a condition allowing inmates to manipulate their cell locks persisted and the investigator's outright admission that DOC sought to implicate Officer Strunkey.

Since all inmates on the floor were locked in, and the ER remained in the A station, out of Officer's Strunkey's hands, it would have been impossible for Strunkey, after the lockdown, to have locked inmate Ricks out of his cell. As for a stabbing, nothing indicates any blood found at or near the site of the assault, nor any wounds on Ricks. Consequently, and most tellingly, Strunkey has never been charged with any disciplinary violation relating to September 20, 2008, with releasing an inmate out his cell, or with assaulting an inmate, by stabbing, by beating, or otherwise.

C. The Consequences of Petitioner Leaving Her Post Before the Incident Involving the Use of Force

Petitioner admits she left her post and returned to it shortly, over two hours before inmate Ricks approached Officer Strunkey. She did not obtain a supervisor's permission to leave her post; nevertheless, she did so to assist another correction officer in collecting food trays, an undertaking above the call of duty, in an effort to maintain an efficient operation on their floor, and kept her post in view throughout.

Although petitioner admits this act, respondents have not

claimed it violated any disciplinary rule. Bradford v. New York City Dept. of Corrections, 56 A.D.3d at 291. Nor have they claimed this act alone precipitated termination of her employment. The circumstances of her leaving her post are a far cry, for example, from a departure in dereliction of duty, for a prohibited purpose, or posing a risk in security. See Medina v. Sielaff, 182 A.D.2d at 427. Nothing in the record indicates any causal connection between her actions away from her post and the encounter between inmate Ricks and Officer Strunkey over two hours later.

V. CONCLUSIONS

To be sure, it is not enough that any findings, for example, that petitioner never filed a use of force report until March 2009, that her testimony Ricks exited his cell himself was unworthy of belief, or that her departure from her post led to the use of force or constituted a disciplinary infraction warranting discharge, may be proved erroneous. To meet her heavy burden, petitioner must demonstrate that DOC acted in violation of her rights, in bad faith, or arbitrarily based on the facts known to DOC when discharging her.

Here, the only facts known to DOC that could support petitioner's discharge when DOC discharged her and that are currently in the record are the following. On March 31, 2009, without contending that petitioner had never previously submitted a use of force report for the incident September 20, 2008, DOC ordered her to submit, and she submitted, such a report. Inmate

Ricks, albeit none of the other six persons, all correction officers, present, attributed his release from his cell to Officer Strunkey and portrayed the encounter with Strunkey September 20, 2008, as a stabbing or beating by him. Finally, petitioner admitted she was briefly away from her post without permission two hours beforehand.

Nothing in the record, however, establishes that DOC even based its termination of petitioner's employment on any of these facts. In contrast, all the contrary admissible evidence, not only that petitioner submitted a report long before March 2009, that Ricks released himself and assaulted Strunkey, and that her brief departure from her post was to undertake additional duties and bore no connection to that incident, but more, points to a conclusion that the termination was in bad faith or arbitrary. It was instead a means to conceal facts unfavorable to DOC.

First is DOC's unwillingness to admit, even in its motion to dismiss the petition, a serious weakness in security at the inmate housing area where petitioner was stationed. More compelling is DOC admitting deliberate tactics to target Officer Strunkey, but finding no grounds to charge, let alone discipline him, even though a basis for petitioner's discharge was her refusal to attribute inmate Ricks's release during a lockdown and his stabbing or beating to Strunkey: conduct that surely amounted to serious disciplinary violations.

Further is the uncanny timing of her discharge. It came over 11 months after the use of force, with no explanation why

DOC did not respond sooner. The discharge ensued only days after DOC's investigator asked petitioner to change her account, to report that Officer Strunkey stabbed inmate Ricks, and gave her a few days to comply, which she refused to do. This sequence strongly suggests deliberate retaliation for her refusal to support DOC's objective in targeting Strunkey. Precipitously, the discharge also fell only days before her probation expired, which would require DOC to mount far more substantial grounds and pursue a far more rigorous process to end her employment.

All this evidence accomplishes more than simply contesting respondents' version of the facts or exposing respondents' good faith mistake. See Swindler v. Safir, 93 N.Y.2d at 762; Johnson v. Katz, 68 N.Y.2d at 650; Talamo v. Murphy, 38 N.Y.2d at 639. The evidence raises substantial issues as to respondents' deliberate bad faith and motives and their arbitrariness. In fact, as yet, the record contains no version of facts from respondents, only their motion to dismiss, which accepts petitioner's version of the facts as true. Noonan v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Pramer v. S.C.A. v. Abaplus Intern. Corp., __ A.D.3d __, 2010 WL 2302367 at *6 (1st Dep't June 10, 2010); Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010). Therefore, while this record, containing petitioner's version of the facts supported by admissible evidence, provides ample basis for denying respondents' motion, the court must await their answer before determining whether to

grant the petition, even to the extent of ordering a hearing. See C.P.L.R. § 7804(d).

VI. DISPOSITION

Consequently, for the reasons explained above, the court denies respondents' motion to dismiss the petition. C.P.L.R. §§ 3211(a)(7), 7804(f). Respondents shall file and deliver to the court at 71 Thomas Street, Room 103, any answer to the petition within 20 days after service of this order with notice of entry. See C.P.L.R. §§ 3012(a), 3211(f), 7804(c). Petitioner shall file and likewise deliver any reply within 20 days after service of an answer. See C.P.L.R. §§ 3012(a), 7804(c) and (d). After expiration of these 20 days, the court will schedule a further hearing on the petition to determine the extent of relief to be granted.

This decision constitutes the court's order. The court will mail copies to the parties' attorneys.

DATED: August 27, 2010

LUCY BILLINGS, J.S.C.