

Wilson v City of New York

2011 NY Slip Op 30150(U)

January 20, 2011

Sup Ct, New York County

Docket Number: 113351/09

Judge: Alice Schlesinger

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

IA PART 16
PART _____

PRESENT: ALICE SCHLESINGER
Justice

Edward Wilson, Jr.
- v -
City of New York, New York City
Department of Correction,

INDEX NO. 113351/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 proceeding is granted to the extent provided in the accompanying memorandum decision.

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: JAN 20 2011

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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

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

-----X
EDWARD WILSON, JR.,

Petitioner,

Index No. 113351/09
Motion Seq. No. 001

-against-

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF CORRECTION,

Respondents

For an Order and Judgment Pursuant to an
Article 78 of the Civil Practice Law and Rules.

UNFILED JUDGMENT
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

-----X
SCHLESINGER, J.:

On December 6, 2006, Edward Wilson, Jr. became a Correction Officer for the New York City Department of Correction. On May 21, 2009, he was informed by letter that his services "as a probationary Correction Officer are terminated". That termination was to be effective the next day, May 22, 2009, when he was directed to "surrender" all his indicia of employment. No reason was given for his termination.

The termination date was clearly beyond the two-year period of probation mandated for correction officers which, in the normal course of events, would have ended in December 2008. However, because of significant absences due to sickness (he had a pink eye condition that may have been work related and hypertension for which he was medicated), his probationary term was extended to July 14, 2009.

Why was Mr. Wilson terminated? That question, one would think, is a simple one to answer. But it is not. In fact, I have made that inquiry on a number of occasions during the course of these proceedings. But it is an important question since in this Article 78 proceeding, Mr. Wilson is petitioning the Court to vacate that termination. Further, since

the Court has an extremely limited role in deciding whether to grant the petition or dismiss it, the reason for the termination is critical. As was said by our highest Court: "Judicial review of the determination to discharge this probationary employee is limited to an inquiry as to whether the termination was made in bad faith. *Johnson v. Katz*, 68 NY2d 649, 650 (1986).

In *Johnson* there was a sufficient showing that established good faith. This showing came in the form of affidavits from petitioner's supervisors detailing continuing problems with other staff, a performance appraisal two months before petitioner's termination that showed a low rating in this category and the petitioner's own explanation as to why she could not get along with fellow employees.

But here, at least at the outset, there was nothing. Nothing other than a cross-motion by the Department to dismiss the petition. Mr. Wilson had been given no insight or information regarding his termination. Neither had the Court. In the employee's case, one who is in a probationary status need not be given a reason. But not so vis-a-vis the Court when it has a petition alleging bad faith by the respondent. I said as much in my first decision in these proceedings on April 21, 2010, wherein I denied the Department's motion to dismiss presented in an opposition memorandum containing no factual information at all.

In citing an opinion *Matter of Montauk Improvement v Proccacino*, 41 NY2d 913 (1977), I said that it was not the role of the Court to surmise or speculate as to how or why an agency reached a particular conclusion. I directed respondent to file an answer and allowed for a response from the petitioner.

The Answer did provide a great deal of information. Although, after reading it and the Reply and additional papers in opposition to allegedly new material in the Reply, which I allowed, I still felt uncertain and unclear as to the basis for the termination (see pgs 5-13 of the minutes of oral argument of December 1, 2010).

There is certainly information provided in a document entitled "New York City Department of Corrections. Personnel Determination Review." It is dated May 19, 2009. It begins by giving a "Request/Recommendation" which is "Termination".

The first matter of a substantive nature deals with an account of an incident that occurred on August 16, 2007, eight months after Mr. Wilson began his employment. The entire narrative is a verbatim retelling of a complaint prepared in the first instance on August 20, 2007, four days after the incident. Briefly, Wilson was given a change of post and told to report at 15:30 hours. But for reasons unknown, he could not be located at the new post at the designated time. Rather, he reappeared at approximately 16:10 hours (about 40 minutes late). In the interim, many telephone calls were made. The report(s) concluded as follows:

Officer Wilson's failure to report to his appointed place of duty at the scheduled time caused an undue hardship on our command wherein we had to incur yet another financial burden of overtime. This is unacceptable and will not be tolerated.

In both reports (prepared almost two years apart) three Rule numbers that Wilson violated were enumerated: R&R 3.05.100, regarding members reporting to their appointed place at the time scheduled; R&R 2.30.020, regarding failure to cooperate with a supervisor; and R&R 3.20.070, regarding failure to obey a supervisor's lawful order.

Yet there is a significant difference between these two reports. In the one prepared contemporaneously with the events in question, under the section "Disposition By Hearing Officer" in the "Justification" section the following appears:

Officer claims he went to search but failed to sign the logbook. Further states he didn't realize his post had been changed. This appears to be an isolated incident. Officer assures that there will be no reoccurrence.

And from what the records show, there was no reoccurrence. Significantly, however, this "Justification" part appears nowhere in the termination document.

Finally, in the "Varied Penalty" section, also omitted from the May 2009 report, the original report says "Reprimand". One gleans from this statement that Wilson erred, was called up on it, apologized and gave a commitment that it would not happen again, and was reprimanded. Yet the incident nevertheless reappears two years later as an alleged cause for his termination.

In the May 19, 2009 document, a second incident is discussed, one occurring on April 17, 2008, while Officer Wilson was off duty at his home in the Bronx with his children. On that date, petitioner was arrested and charged with the misdemeanor of Penal Law 195.05, Obstruction of Government Administration. While executing a search warrant at a different address in the Bronx, at the home of his ex-girl friend's parents, the Police observed crack, cocaine and marijuana in plain view. The ex-girlfriend, a Police Officer Shawntay Smith, was with one of her children, a two-year old. Ms. Smith told the officers that two of her other children were with their father, Wilson, for the night. The Police then contacted Administration of Child Services who apparently directed them to go to Wilson's home and remove the children.

Wilson "verbally and repeatedly refused to surrender custody of his children and was subsequently arrested." That arrest was adjourned in contemplation of dismissal (ACD'd) and ultimately dismissed. On the May 2009 termination document, Rules and Regulations that were allegedly violated were stated as follows: 3.20.010-Professional Demeanor; 3.20.30-Conduct Unbecoming of an Employee; and 3.20.300-Conduct of a Nature to being (sic) discredit upon the Department. Then the following is stated: "Although, Correction Officer Wilson, Jr., was arrested and charged with Obstructing Governmental Administration, there are extenuating circumstances that should be considered for the purpose of deferring termination" (underlining in the original). What follows, verbatim, are those circumstances.

Sergeant Anders [the arresting officer, whose actual name is Anders Scott] was interviewed in regard to this matter, he stated in sum and substance that the subjects of the search warrant were the brother and mother of NYPD Police Officer Shawntay Smith. Police Officer Shawntay Smith is the ex-girlfriend of Correction Officer Edward Wilson, Jr. Police Officer Smith has five children, two of these children are also Correction Officer Wilson Jr.'s children. Correction Officer Wilson, Jr. was not involved in the execution of the search warrant nor was he subject of any criminality prior to this incident. The search warrant resulted in the discovery of cocaine and marijuana, along with the arrest of Police Officer Smith's mother and brother. During the execution of the search warrant, Police Officer Smith's two-year old child was present. ACS was notified. ACS responded and interviewed Police Officer Smith. Police Officer Smith informed ACS that she has five children and that she had custody of all of them. She further stated that her other four children were with her ex-boyfriend, Correction Officer Wilson for the night. Police Officer Smith stated

that Correction Officer Wilson, Jr., is the father of two of her five children. ACS was going to leave the children in the custody of Police Officer Smith until they learned that she had been previously arrested for assault. (This arrest could not be verified). ACS determined that all the children would be removed. ACS generated a petition to remove all of the children and responded to Correction Officer Wilson, Jr.'s residence. The police and ACS were unaware of Correction Officer Wilson, Jr.'s status as a Correction Officer at that time. The police informed Correction Officer Wilson, Jr., that they were present along with ACS with a petition to remove the children. He was uncooperative and he would not allow the children to be removed. It was explained to Correction Officer Wilson Jr. that if he did not allow the children to be removed he would be arrested. Correction Officer Wilson was not physically abusive during his noncompliance; rather he stood in the way of the officers preventing them from accessing the children. Eventually, Correction Officer Wilson, Jr. was placed under arrest for Obstructing Governmental Administration and removed to the 42nd Precinct. Prior to his arrest, Correction Officer Wilson was permitted to make several phone calls. Correction Officer Wilson, Jr., placed a call to 911 in an attempt to obtain assistance and prevent his arrest.

According to Sergeant Anders, Correction Officer Wilson, Jr, was remorseful following his arrest and much more cooperative. Sergeant Anders indicated that he felt Correction Officer Wilson, Jr. placed himself in a difficult position in regard to the removal of his children.

A records check with NYPD was conducted in regard to the arrest of Correction Officer Edward Wilson, Jr. NYPD informed the investigation division that there were no Domestic Incident Reports on file for either Correction Officer Wilson, Jr. or Police Officer Smith. Additionally, there are no orders of

protection on file for either officer. This is Correction Officer Wilson's first arrest. His ex-girlfriend, Shawntay Smith, has no prior arrests.

A records check with ACS was conducted in regard to the arrest of Correction Officer Wilson. There were no incidents on file with ACS. Police Officer Smith has a total of three incidents on file with ACS. Correction Officer Wilson is not named in these incidents.

Aside and apart from the April 17 arrest, this officer is recommended for termination based upon his disciplinary and attendance record. (Emphasis added).

Which brings us to his attendance record. Mr. Wilson was absent a total of 198 days and was on modified duty from December 13, 2008 until January 1, 2009. From January 1, 2009 to the date of his termination on May 22, 2009, a period of almost five months, he took no sick leave.

According to an affirmation from counsel in Reply, on or about June 6, 2008, Wilson was "involuntarily placed by the Department on medical leave due to pink eye, he caught while performing his job duties, as well as high blood pressure, and was not allowed to return to light duty until on or about December 12, 2008 or full duty until on or about December 28, 2008" (§ 3 of Reply). In respondent's opposition to the Reply, no challenge is made to any part of this statement.

Further and of significance, again according to his counsel, Wilson was never informed that he was placed on "chronic leave status pursuant to the Department's own policy directive:" Absence Control/Uniformed Sick Leave Policy, Directive #2258R-A. That directive mandates that an officer who "reports sick on twelve or more work days within a

twelve month period **shall** be classified as chronic absent and notified in writing of the classification” (emphasis added).

This notice must be sent to the employee, but it was not sent here. The notice then gives the employee 20 days after receipt of it to file a written appeal. But again, Wilson never received this notice. That fact is not challenged. Rather, in paragraph 25 of the opposition to the Reply, counsel for the Department, citing to *Matter of Davids v City of New York*, 72 AD3d 557 (1st Dep’t 2010),¹ states that: “Even assuming arguendo, that the DOC did not follow the proper procedures, such a procedural defect does not rise to the level of demonstrating bad faith or prevent the DOC from lawfully terminating petitioner’s probationary employment.”

That in its totality appears to be the basis for Wilson’s termination – an incident occurring about two years earlier when Wilson was a comparatively new employee, which was disposed of at the time it happened with a “reprimand” (an incident that was never repeated); and an off-duty arrest that arguably should never have occurred because arguably the Police should never have gone to Wilson’s house. Moreover, that off-duty incident had nothing to do with Wilson’s job performance and was not only dismissed, but the Department stated that it was making its determination “aside and apart from the April 17, 2008 arrest.” In other words, the statement is an acknowledgment that respondent could not in good faith use the arrest as a predicate for the termination. At best the April

¹*Davids* involved a demotion of a petitioner in an Article 78 proceeding from probationary captain back to lieutenant. The Court found technical delays in preparing evaluations but also found that these delays were undertaken to provide the petitioner with time to bring his performance up to department standards and so did not evince bad faith. The record there also “amply supports the conclusion that his job performance was unsatisfactory.”

17, 2008 off-duty arrest may have been considered, but certainly the Department was (and properly so) uncomfortable in relying upon it in any substantive way.

Finally, one must address the reference to Wilson's attendance record. While the sick days could be viewed as excessive, he was never questioned about them or challenged as to their authenticity. Further, the Department's failure to follow its own policy directive and notify petitioner that he was "chronically absent", which would have given him the right to challenge such finding, is not here a mere technicality. Wilson certainly may have had arguments to make vis-a-vis this classification, such as that the pink eye resulted from inmate contact and was job related and that it was the Department's decision that his high blood pressure had to be successfully regulated before he could resume his full duties. Giving proper notice to someone is rarely a technicality, particularly when the notice carries with it a right to question and appeal such a designation.

There is a legion of cases in this area on whether or not a City agency has acted in bad faith in terminating a probationary employee. And since the burden is on the employee to show bad faith, and since the agency is generally given wide latitude in discharging such an employee, it is not often that such a finding is made by a trial court and sustained at the appellate level.

In the research I have done, those cases where terminations were set aside or hearings directed can be distinguished, but then again the greater number of decisions affirming dismissals can also be distinguished. For example, (in chronological order) in *Matter of Ramos v Department of Mental Hygiene*, 34 AD2d 925 (1st Dep't 1970), a hearing was directed because a substantial issue had been raised that the probationary employee's discharge was in reality a result of a personality conflict with a supervisor, as

opposed to substandard work; in *Matter of Garrison v Koehler*, 161 AD2d 322 (1st Dep't 1990) a hearing was directed because the female employee's termination may well have been attributable to sex discrimination and thus was in bad faith; in *Kroboth v Sexton*, 160 AD2d 126 (1st Dep't 1990), the decision to terminate a sanitation employee who sought help via the Department's Emergency Assistance Unit but was found to be AWOL instead, appeared to violate the policy of encouraging workers to ask for help and was found to be in bad faith; in *Matter of Roberts v Sielaff*, 202 AD2d 179, 180 (1st Dep't 1994), bad faith was found and the Department of Correction was directed to reinstate petitioner in light of the fact that "respondent's determination to terminate petitioner was not factually supported by the testimony of respondent's witnesses or petitioner's internal investigations"; and in *Matter of Higgins v La Paglia*, 281 AD2d 679 (3rd Dep't 2001), a hearing was directed regarding the termination of a probationary correction officer for the Ulster County Sheriff's Department where an issue was raised as to good faith because of conflicting evaluation reports and allegations by petitioner that he was not afforded academy training due to his work schedule, as were other newly hired correction officers.

As stated earlier, the decisions upholding the Department's or City agency's decision to terminate a probationary employee are far more numerous. I will name only two cited by respondent, both of which can be distinguished from the instant case. In *Matter of Jones v Sielaff*, 189 AD2d 593 (1st Dep't 1993), the petitioner was terminated because of four unauthorized absences within a period of five months. This decision was found not to constitute bad faith. In *Matter of Camacho v State Division of Human Rights*, 2005 NY Misc. LEXIS 3551, (Sup Ct, N.Y. Co.), a Police Administrative Aid still on

probation complained that she had been discriminated against for a variety of reasons, including her well-documented medical disabilities. However, the Court found that chronic or excessive absenteeism could be a sufficient basis for termination because, in part, petitioner could not demonstrate that she could perform her employment in a reasonable manner in light of evidence to the contrary. Finally, in *Johnson v Katz (supra)*, there was evidence supporting the fact that petitioner did not communicate or work well with other employees.

All of the above cases are easily distinguishable from Wilson's case. Mr. Wilson never had unauthorized absences, nor did he display an inability to perform his job as a Correction Officer. In fact, from January through May 2009, he was on full duty and was not absent a single day. Finally, there was never any allegation that he had difficulty working with others.

In conclusion, each of these probationary termination cases is *sui generis*. They are often heavily fact laden, where appropriately deference is given to supervisory personnel evaluating the employee. How, under such circumstances as these as well as in the other cases, does one define bad faith? It is difficult to do affirmatively and often is defined by the things it is not. Here, the decision to terminate Edward Wilson, as stated at the outset, is first of all not easily understood. Was it really the August 2007 incident once again rearing its ugly head? Or was it the April 2008 off-duty arrest, which seems outrageous on its facts? Wilson, who was never the subject of any Criminal or Family Court probe, had his home invaded, his children removed, and himself arrested for seemingly no good reason. Or was it the authorized sick leave ending five months earlier, for which Wilson was never put on notice that he was in jeopardy of losing his job, which would have given him the opportunity to appeal.

What is more, whether these incidents are considered singularly or in combination, the decision simply seems unfair. Beyond that, it makes no sense.

So finally, does a decision whose predicate is unclear, whose result is unfair and/or irrational, and that is based in part on the Department's failure to follow its own notice directives, constitute bad faith? I find that it does.

Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent that the decision of respondent New York City Department of Correction terminating petitioner as a probationary correction officer is vacated and annulled and petitioner is reinstated to said position without back pay but with all benefits going forward; and it is further

ORDERED that the matter is remanded to the Department to calculate the time remaining on Wilson's probationary status so that he can complete the probationary term and become a tenured member of the force.

Dated: January 20, 2011

JAN 20 2011



J.S.C.

ALICE SCHLESINGER

UNFILED JUDGMENT

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