

**Matter of Dickinson v New York State Unified Ct.
Sys.**

2011 NY Slip Op 30463(U)

March 1, 2011

Supreme Court, New York County

Docket Number: 112573/10

Judge: Martin Schoenfeld

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

PRESENT: Schuerfeld

PART 28

Index Number : 112573/2010
DICKINSON, JOHN
 VS.
NYS UNIFIED COURT SYSTEM
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED	
1-3	
4-5	
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Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits Cert. filed Administrative Record

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion shall be transferred to the Appellate Division, First Dept, for review and determination pursuant to CPLR 78-4(g) in accordance with the accompanying memorandum decision, and that the clerk of this Court shall transfer the entire file to the chief clerk of the Appellate Division, First Dept.

FILED

MAR 02 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/1/11 _____ J.S.C.
 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: PART 28

FILED

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COUNTY CLERK'S OFFICE**

-----X
In the Matter of the Application of

JOHN DICKINSON,

Petitioner,

For a Judgment Under Article 78 of the
Civil Practice Law and Rules,

Index No. 112573/10

-against-

NEW YORK STATE UNIFIED COURT SYSTEM,
OFFICE OF COURT ADMINISTRATION,

Respondent.

-----X
Martin Schoenfeld, J.:

In this Article 78 proceeding, petitioner John Dickinson seeks to annul the determination of respondent New York State Unified Court System, Office of Court Administration (OCA) to terminate petitioner's employment with respondent, after a hearing was held before a judicial hearing officer (JHO). Respondent replies that the matter should be sent to the Appellate Division, First Department, as, according to respondent, the petition raises questions of substantial evidence.

Petitioner was employed by OCA as an Associate Court Clerk. His employment was terminated on May 24, 2010, pursuant to a Notice of Charges (Charges) leveled against petitioner by OCA on

February 17, 2009. Charges, Petition, Ex. 1. The Charges involve petitioner's alleged excessive absences from work (Specification No. 1), and excessive latenesses. Specification No. 2.

Then Deputy Chief Administrative Judge Joan B. Carey appointed a JHO to conduct a hearing of the Charges, and to issue a Recommendation and Report. Following the hearing, both sides submitted post-hearing briefs. According to petitioner, OCA submitted additional time sheets as part of its brief, which had not been presented at the hearing. Petitioner objected to the inclusion of this material.

In a written Report and Recommendation dated April 24, 2010 (Report) (Certified Record, Ex. G), the JHO sustained both Specifications of the Charges, and recommended that petitioner's employment be terminated. In the Report, the JHO, while finding that "Respondent's pattern of excessive absences and latenesses demonstrates in crystal clear fashion his lack of fitness in this job title" (Report, at 7), acknowledged, in a footnote, that he had considered the additional time sheets documenting petitioner's continued pattern of excessive absences since the Charges were made. The JHO stated that he was:

considering this additional evidence for the limited purpose of determining the accuracy of the assertion by [petitioner] and his experts that he is in remission.¹

¹Petitioner claimed to be suffering from a mental illness.

Additionally, I am considering these absences as they bear on the [petitioner's] bona fides that he has seen the light and come to the realization that his excessive absences could result in the loss of his job.

Id.

Following the issuance of the Report, Deputy Chief Administrative Judge Fern A. Fisher issued a Directive, dated May 24, 2010, upholding the JHO's recommendation. Petition, Ex. 8. By means of the Directive, petitioner was terminated from his position as an Associate Court Clerk.

Petitioner seeks to annul OCA's determination to terminate him, on the ground that the JHO's consideration of the additional time sheets was a "manifest violation[] of due process" (Petition, at 4), and that, in addition, the "penalty of termination is draconian." *Id.* Petitioner also objects to the JHO's alleged reliance on other records of latenesses and absences pre-dating the Charges. Alternatively, if this court chooses not to annul the Directive, petitioner argues that the question presented here is whether there was substantial evidence in the record to support the Report, so as to require that this petition be transferred to the Appellate Division, First Department, for consideration under CPLR 7804 (g). OCA's objection to the petition echos petitioner's argument for the transfer of the matter to the Appellate Division, based on questions of substantial evidence raised in the hearing, and manifested in the Report.

CPLR 7804 (g) provides that issues of substantial evidence raised in a hearing required by law be transferred to the appellate division "within the judicial department embracing the county in which the proceeding was commenced." "Judicial review of an administrative determination made as the result of a hearing required by law is limited to whether that determination is supported by substantial evidence." *Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 AD3d 388, 390 (1st Dept 2006). This rule applies to petitions brought against OCA. *Matter of Hughes v New York State Unified Court System*, ___AD3d___, 2010 NY Slip Op 07932 (2d Dept 2010).

"CPLR article 78 prohibits the Supreme Court from reaching the issue of whether an agency determination is supported by substantial evidence," and requires that such petition be transferred to the Appellate Division (*Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 AD3d at 390). Nevertheless, CPLR 7804 (g) requires that the Supreme Court shall "first dispose of such other objections as could terminate the proceeding" *Matter of Save Easton Environment v Marsh*, 213 AD2d 961 (3d Dept 1995).

Questions of due process can, in some instances, be dispositive of a proceeding, sufficient to defeat the need to transfer a matter to the Appellate Division. *Earl v Turner*, 303 AD2d 282 (1st Dept 2003); *McCarter v Franco*, 227 AD2d 358 (1st

[* 6]

Dept 1996). In this regard, it is axiomatic that due process requires notice of the Charges. See *Wolfe v Kelly*, ___AD3d___, 2010 NY Slip Op 08847 (1st Dept 2010). Within the context of administrative hearings, "the charges need to be 'reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him ... and to allow for the preparation of an adequate defense.'" *Id.* at *3, quoting *Matter of Block v Ambach*, 73 NY2d 323, 333 (1989).

Petitioner herein claims that the JHO's consideration of the additional time sheets, and absences post-dating the Charges, is a denial of due process which should be addressed by this court. As he did not have the opportunity to address those alleged charges, petitioner claims that this is a denial of due process which serves to provide the basis to annul his termination. However, whether or not the JHO's consideration of the additional time sheets or of a few additional absences not listed in the Charges, violated petitioner's due process rights, the court finds that such issue is not dispositive of the matter at hand and, as such, need not be addressed by this court. It is evident that the additional time sheets, if indeed they played any real part at all, were not the only basis upon which the JHO made his determination. The JHO had before him a plethora of documentation as to petitioner's transgressions. Therefore, the

only matter before this court is, whether the JHO's determination that petitioner was excessively absent or late so as to warrant the penalty of termination, is supported by substantial evidence. This, then, is a matter for the appellate court to decide.

Accordingly, it is

ORDERED that the issue of substantial evidence, as relied on in the Recommendation and Report of the Judicial Hearing Officer, finding that John Dickinson's latenesses and absences were excessive, and, as a result, that he should be terminated from his position as an Associate Court Clerk, shall be transferred to the Appellate Division, First Department, for review and determination; and it is further

ORDERED that the Clerk of this Court shall transfer the entire file to the Chief Clerk of the Appellate Division, First Department.

Dated: March 1, 2011

ENTER:



J.S.C.

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