

**Matter of Reyes v New York City Health and Hosps.
Corp.**

2011 NY Slip Op 30652(U)

March 18, 2011

Sup Ct, New York County

Docket Number: 113355/2010

Judge: Jane S. Solomon

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 113355/2010
REYES, JOSE
vs.
NYC HEALTH AND HOSPITAL CORP.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 1/14/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1-3
4
5

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 annexed *Memorandum Decision, order and Judgment*

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: 3/18/11

JANE S. SOLOMON 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
NEW YORK COUNTY: IAS PART 55

In the Matter of the Application of

JOSE REYES,

Petitioner,

For a Judgment under Article 78 of
The Civil Practice Law and Rules,

-against-

NEW YORK CITY HEALTH AND HOSPITALS
CORP. and BELLEVUE HOSPITAL

Respondents.

INDEX NO. 113355/2010

DECISION, ORDER and
JUDGMENT

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).

JANE S. SOLOMON, J.:

In this CPLR article 78 proceeding, pro se petitioner Jose Reyes (Petitioner), a former probationary nursing aide at Bellevue Hospital (Bellevue), seeks judicial review of a determination terminating his employment by respondents New York City Health and Hospitals Corporation (HHC) on the ground that the decision was arbitrary and capricious and because his assigned Labor Relation Specialist acted in bad faith. The defendants cross-move to dismiss the petition.

BACKGROUND

In January 1981, Petitioner began working for Bellevue as a dietary aide. In 2000, he was assigned to the Central Supply Processing Unit (CSPU) as a nursing aide, where he worked in an unsupervised night-shift position (from 11 P.M. to 7:30 A.M.) until July 9, 2010. Employees in Petitioner's title are

entitled to a four step disciplinary process. A Step 1A conference is the first step in the process. Probationary employees are not afforded this process and may be terminated for any reason, except bad faith.

In early 2008, as a result of violations of the disciplinary regulations of HHC, and notwithstanding his years of employment, Petitioner was placed on probation. On September 5, 2008, Petitioner again was charged with misconduct (failing to inspect and remove broken surgical instruments, causing delay in patient care, failure to follow protocol), and despite his probationary status, an "informal Step 1A conference" was held on January 20, 2009 (Petition, Ex. C). Prior to the conference, the Petitioner and HHC negotiated a deal, where the duration of Petitioner's probationary status was increased in exchange for Petitioner's signing of a "Waiver of Employee Rights" (Waiver, attached to Petition, Ex. D), and a resignation letter (attached to Petition, Ex. B), which was held by HHC for the duration of his probation.

The waiver increased the duration of Petitioner's probation for two years (ending January 20, 2011). It specified that if any further charges of misconduct were brought against Petitioner during his probation, he would receive a Step 1A conference, but all appeal rights would be waived, and if the hearing officer determined that misconduct occurred, the

resignation letter would be implemented (Petition, Ex. D). The January 23, 2009 hearing decision echoes the language in the waiver, and specifically states: "All appeal rights are waived toward any future Labor Relations Decision" (Petition, Ex. C).

At 5:30 A.M. on March 17, 2010, Petitioner's supervisor, Mr. Acosta, made a surprise visit to Petitioner's work site; as a result, Petitioner was charged with two counts of misconduct. On April 5, 2010, a Step 1A conference was held (Petition, Ex. A). The evidence adduced was that Petitioner had not been at his post, his work was incomplete, and his "computer productivity" report showed that he been at his computer only between 11:26 P.M. and 1:53 A.M. In response, Petitioner argued that he had changed assignments with a co-worker, and he was in the bathroom at the time of the inspection.

On June 14, 2010, rejecting Petitioner's arguments, the hearing officer issued his decision, stating that Petitioner "failed to perform his assignment and also was away from his assignment as admitted without authorization, and was caught. The misconduct in this case is a clear violation of [Petitioner's] waiver and agreement signed and dated January 20, 2009" (2010 Step 1A Decision, attached to Petition, Ex. A, at 2). As a result, the charges were sustained, Petitioner's resignation letter was implemented, and he was terminated.

DISCUSSION

HHC argues that the court lacks subject matter jurisdiction over the petition, that the petition is time-barred, and that it fails to state a cause of action. It also seeks costs, disbursements and fees. These arguments are unpersuasive.

HHC construes the petition as a challenge to Petitioner's resignation letter. That is not the case. It is a challenge to the June 14 Step 1A determination that he was guilty of employee misconduct. This court has jurisdiction to hear such a petition. Next, the petition is not time barred-it was brought it within four months of the determination. Moreover, as a public benefit corporation represented by Corporation Counsel of the City of New York, HHC may not obtain costs and fees from Petitioner. These bases for dismissal verge on the frivolous. HHC's argument that the decision was not arbitrary or capricious because the hearing officer acted rationally goes to the merits of the petition and is addressed below.

The Petition must be denied because the administrative decision is rationally based. Petitioner argues that he did not violate any regulation, and so did not commit misconduct. The hearing officer addressed the testimony of both sides' witnesses and describes how he came to his decision. At the conference, Petitioner argued that his "absence from post" was simply bad timing--in that he was only in the bathroom for a few moments, and was otherwise present. The hearing officer did not believe this, nor did he accept Petitioner's other arguments. Moreover,

to the extent that this court might differ with the hearing officer's determination, "a court may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Sullivan County Harness Racing Assoc. v. Glasser*, 30 NY2d 269, 278 [1972]).

Finally, petitioner's complaint about the conduct of respondents in connection with the resolution of the earlier disciplinary process is time-barred.

Accordingly, it hereby is

ORDERED that the cross motion is denied; and it further is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: March 18, 2011

ENTER:



J.S.S.

JANE S. SOLOMON

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).