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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 106757/2010

SANCHEZ, MARIELENA

VS.

SCHRIRO, DR.DORA

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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 and cross motion are decided per attached

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

Dated: 4/4/11

_____ J.S.C.

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☑ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

- -X

In the Matter of the Application of Index No. 106757/10
Marielena Sanchez,

Petitioner,

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

-against-

Dr. Dora Schriro, Correction Commissioner of
the New York City Department of Correction;
THE NEW YORK CITY DEPARTMENT OF CORRECTION;
and THE CITY OF NEW YORK,

Respondents.

- -X

EMILY JANE GOODMAN, J.S.C.:

Petitioner, a probationary correction officer terminated by respondent Department of Corrections of the City of New York ("DOC") for testing positive for cannabinoid, a marijuana derivative, brings this Article 78 petition seeking a judgment reinstating her, with back pay and benefits. DOC cross-moves to

dismiss the petition for failure to state a cause of action. The petition and cross motion are held in abeyance pending a hearing, pursuant to CPLR 7804 (h), before a Special Referee who shall hear and report on whether the decision to terminate Petitioner was made in bad faith.

"It is well settled that a probationary employee may be discharged without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law" (York v McGuire, 63 NY2d 760, 761 [1984]; see, Swinton v Safir, 93 NY2d 758 [1999]). Judicial review of the determination is thus limited to whether the discharge was made in a bad faith or for an improper or impermissible reason (Matter of Duncan v Kelly, 9 NY3d 1024 [2008]; Johnson v Katz, 68 NY2d 649 [1986]).[1] The terminated employee bears the burden of submitting competent proof an improper motive (Beacham v Brown, 215 AD2d 334 [1st Dept 1995]).

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[1]Petitioner argues, in the alternative, that the relevant standard is not whether the decision was made in bad faith, but whether it was arbitrary and capricious. Petitioner cites to cases from the 1970s and 1980s, which reference the arbitrary and capricious standard, or, use that term interchangeably with good faith. However, none of these cases abrogate the standard of bad faith as it applies to a probationary employee, or, can be read to support Petitioner's argument that an arbitrary and capricious standard should be applied here. In any event, as recently as 2008, the Court of Appeals reiterated the bad faith standard in Matter of Duncan, cited above.

Conclusory or speculative allegations of bad faith are insufficient (Thomas v Abate, 213 AD 251 [1st Dept 1995]).

Here, Respondents fault Petitioner for not disclosing that prior to the drug test, she consumed an energy beverage Twinlab Energy Fuel High Performance Drink, which according to material submitted by Petitioner, and not disputed by Respondents, may result in a false positive for THC (found in marijuana) because it contains Riboflavin. Respondents point to the questionnaire which Petitioner filled out immediately prior to her test, which required her to disclose "alcoholic beverages and mixers" ingested in the past 72 hours, "medications" taken during the past 72 hours, and "all foods" taken in the past 24 hours. The evidence submitted by Petitioner, and not disputed by Respondents, is that the energy drink contains no alcohol and therefore cannot be considered an alcoholic beverage. The energy drink cannot be considered medication or food, and because the term mixer is not defined, but is associated only with alcohol, the questionnaire cannot be read to require disclosure of consumption of an energy drink.[2] Accordingly, it is not clear why Respondents fault Petitioner for not disclosing consumption of the energy drink, when they did not request such disclosure.

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[2]Given what has transpired, it might be advisable that the questionnaire is revised to address consumption of energy drinks, especially given their popularity and the potential for a false positive result.

In any event, an issue of fact is raised as to bad faith because the LabCorp report indicates "The processing of this specimen was initially suspended because of an administrative problem. Testing has subsequently been performed according to your specific written request." This unexplained and irregular comment is sufficient to warrant a hearing as its meaning, as it might suggest that the problem was connected to the false positive and was ignored by Respondents.[3] Accordingly, as the First Department stated in Kroboth v Sexton (160 AD2d 126 [1990] [agency did not act in good faith]) it would be "Orwellian" for Respondents to fault Petitioner for not disclosing consumption of an energy drink, which undisputably could result in a false positive, and then terminate her for failing a drug test, while ignoring all evidence which would indicate that the test was not reliable, or, resulted in a false positive result (see also Ward v Buric, 176 AD2d 571 [1st Dept 1991] [bad faith can be predicated on "inappropriate" actions]).

Accordingly, it is

ORDERED that the petition and cross motion are held in abeyance pending a hearing, pursuant to CPLR 7804 (h), before a Special Referee who shall hear and report on whether the decision

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[3]The questionnaire filled out by Petitioner indicates under a note that "YOU HAVE THE RIGHT TO HAVE YOUR SPECIMEN EXAMINED AT ANOTHER LABORATORY" but it appears Petitioner was not notified about the problem with her specimen.

to terminate Petitioner was made in bad faith, and may issue any discovery orders in connection therewith; and it is further

ORDERED that after a decision by the Special Referee, either party shall move to confirm and/or reject the Special Referee's Report, after which the Court shall decide the Petition and cross motion.

This constitutes the Decision and Order of the Court.

Dated: April 4, 2011

ENTER:

J.S.C.
EMILY JANE GOODMAN