

Matter of Jones v Shriro
2011 NY Slip Op 31278(U)
May 12, 2011
Sup Ct, NY County
Docket Number: 106389/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 5

Jones, George

INDEX NO.

106389/10

MOTION DATE

- v -

Shapiro, Dona, City of N.Y.
ET AL

MOTION SEQ. NO.

002

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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: 5-12-11

BARBARA JAFFE
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 5

-----X
 In the Matter of the Application of
 GEORGE JONES,

Petitioner,

Index No. 106389/10
 Motion Date: 3/22/11
 Motion Seq. No.: 002

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

DECISION & JUDGMENT

-against-

Dr. Dora Shiro, 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
 BARBARA JAFFE, JSC:

For petitioner:
 Mercedes M. Maldonado
 Koehler & Isaacs LLP
 61 Broadway - 25th Floor
 New York, NY 10006
 917-551-1300

For respondents:
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 Courtney Stein, ACC
 Michael A. Cardozo
 Corporation Counsel
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 212-788-1202

Petitioner seeks to vacate an administrative determination of termination. By decision and order filed September 23, 2010, I denied respondents' motion for an order dismissing the petition, ordered respondents to file and serve their answer within 20 days of service of my order with notice of entry, and permitted petitioner to re-notice this matter.

I. BACKGROUND

On October 1, 2010, petitioner re-noticed his petition for a judgment annulling the termination and ordering that he be reinstated with back pay and benefits as a correction officer

with the New York City Department of Correction (DOC). On October 28, 2010, respondents filed and served their answer alleging five defenses: (1) failure to state a cause of action upon which relief may be granted; (2) respondents' actions were legal, proper, reasonable and in conformity with law, and were neither arbitrary nor capricious; (3) petitioner's lateness and absenteeism record constituted a rational basis for termination of probationary employment; (4) as a probationer, petitioner could be terminated for any reason or no reason so long as the termination was not in bad faith, and respondents' decision to terminate was made in good faith, had a rational basis, and was not based upon a constitutionally impermissible reason; and (5) petitioner fails to satisfy his burden of demonstrating that his termination was in bad faith or based upon a constitutionally impermissible reason. (Ans.).

The pertinent facts and procedural background were recited in my September 23 decision and order and need not be repeated here, although respondents allege additional violations. (Mem. of Law in Support of Respondents' Verified Answer [Mem.], dated Oct. 20, 2010).

II. CONTENTIONS

Respondents contend that petitioner has failed to state a cause of action because he was a probationary employee who could be terminated for any reason or no reason at all, so long as the termination was not in bad faith, and petitioner has not alleged bad faith. (Mem.). They also maintain that absenteeism or lateness constitutes a rational and good faith ground upon which to terminate a probationer's employment, and that here, there are 19 instances of lateness within a two-year probationary period, 18 of which were acknowledged by petitioner and 10 of which are now acknowledged by petitioner. (Mem.).

Petitioner now claims that three of the 18 late slips bearing his signature were altered and

that DOC has failed to produce the logbook sign-in sheet which would show the exact times he signed into the facility. He also argues that as DOC had agreed at his September 2009 corrective interview to forbear from terminating him if he was not late again and that as he was never again late thereafter, his termination violates that agreement. Moreover, he observes that respondents' answer reflects that all four captains who evaluated him agreed that he should continue in his employment pending improvement in his punctuality and that he has so demonstrated that improvement. He asks that an evidentiary hearing be held pursuant to CPLR 7804(h) to resolve disputed issues of fact relating to the promise made by DOC at the corrective interview. (Affidavit of George Jones, dated Oct. 27, 2010).

III. ANALYSIS

A DOC employee on probationary status may be terminated "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." (*Matter of Soto v Koehler*, 171 AD2d 567, 567-568 [1st Dept 1991], *lv denied* 78 NY2d 855). Judicial review is limited to a determination of "whether the termination was made in bad faith." (*In the Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]; *Matter of Soto*, 171 AD2d at 568). Absent such a showing, a court has no discretion to challenge a termination decision. (*Matter of Soto*, 171 AD2d at 568).

Excessive lateness is a proper ground for termination, particularly for a corrections officer whose "duties involve the safety of the institution and the inmates" (*id.*; *Nelson v Abate*, 205 AD2d 454, 455 [1st Dept 1994]).

Absent any issue as to petitioner's probationary status, record of excessive lateness, and

respondents' good faith, there is no basis for granting petitioner the relief he requests. Petitioner also offered no proof other than his own allegation that respondents had promised at the September 2009 corrective interview to forbear from terminating him, which respondents deny, and even if they had so promised, nothing prevented them from renegeing and terminating him. (See *Santiago v Horn*, 37 AD3d 307 [1st Dept 2007] [petitioner's lateness and absenteeism, which was admitted in petition, provided proper ground upon which to dismiss proceeding]; *Matter of Soto*, 171 AD2d at 568 [petitioner's lateness constituted rational basis for termination of his probationary employment]; *Ferone v Koehler*, 160 AD2d 572 [1st Dept 1990] [petitioner failed to prove there was no rational basis for his termination as record indicated that he had numerous absences and latenesses and one incident involving departmental discipline]).

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:



 Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: May 12, 2011
 New York, New York
MAY 12 2011

UNFILED JUDGMENT

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