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

PRESENT: Joan B. Lobis Justice PART 6

Index Number : 100784/2011
MARTINEZ, MAYKIDANI A.
vs.
VENGERSKY, ALAN
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 5-19-11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	Petition 1-4
Answering Affidavits — Exhibits	X-mot 5-7
Replying Affidavits	8-9, 10; 11

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition decided in accordance with accompanying 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: 7/18/11

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
NEW YORK COUNTY

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In the Matter of the Application of
MAYKIDANI A. MARTINEZ,

Index No. 100784/11

Petitioner,

Decision, Order, and Judgment

-against-

ALLAN VENGERSKY,

Respondent.

----------X

JOAN B. LOBIS, J.S.C.:

Petitioner, proceeding pro se, brings this Article 78 proceeding for a judgment annulling and reversing the decision of respondent Allan Vengersky as Deputy Commissioner of the New York City Department of Correction ("DOC") to terminate his position as a probationary corrections officer. Respondent cross-moves, pursuant to C.P.L.R. § 7804 and Rule 3211(a)(7), for an order dismissing the petition for failing to state a cause of action. For the reasons set forth below, the cross motion is granted, the petition is denied, and the proceeding is dismissed.

Petitioner was first employed by DOC on June 26, 2008 as probationary corrections officer. The probationary period was supposed to last two years; however, counsel for respondent alleges that petitioner's probationary period was extended to February 11, 2011, in accordance with 55 R.C.N.Y. § 5.2.8(b), whereby probationary periods are "extended by the number of days when the probationer does not perform the duties of the position, for example: limited duty status, annual leave, sick leave, leave without pay, or use of compensatory time earned in a different job title." Counsel for respondent alleges that petitioner, during the probationary period, was absent 84 times and also on an extensive amount of limited duty. Counsel for respondent bases these statements on

a document called a DOC Personnel Determination Review, which he alleges is attached to the petition. Such document was not annexed to the petition filed with the court. Nevertheless, petitioner does not dispute that he was absent 84 times and on limited duty for a period of time. Nor does petitioner dispute respondent's counsel's assertion that he was involved in a physical altercation with a prisoner, although petitioner maintains that he was entirely blameless. Before the expiration of the probationary period, but after two years had elapsed since June 26, 2008, respondent notified petitioner by letter dated September 22, 2010, that effective that same day, petitioner was terminated from his position as a probationary corrections officer. Petitioner wrote back to respondent requesting reinstatement. By letter dated January 4, 2011, respondent informed petitioner that DOC would stand by its determination.

In support of his petition, petitioner argues that DOC violated its own rules and regulations by terminating him. Petitioner sets forth that he was never notified nor did he consent to an extension of his probation beyond two years, both of which, he argues, are prerequisites under DOC's rules and regulations for extensions of probation. Therefore, he seemingly alleges that the probationary period ended on June 26, 2010 (exactly two years after his start date) and was not extended in accordance with DOC's rules and regulations.

In opposition, respondent cross-moves to dismiss the petition for failing to state a cause of action. He argues that petitioner is required to allege that DOC terminated him in bad faith or otherwise acted illegally or improperly in terminating him. Here, respondent contends, petitioner has failed to allege bad faith or illegal or improper motive. With regard to the probationary period, respondent argues that it was appropriately extended to February 11, 2011 under

55 R.C.N.Y. § 5.2.8(b) due to petitioner's absences and time on limited duty. Respondent maintains that petitioner was aware of this rule when he signed a notice of conditions of probation. Respondent attaches this notice to the cross-motion and it does set forth that the probation "may be extended by the number of days the employee does not perform the duties of the position."

In opposition to the cross motion, petitioner argues that his absences were due to an occupational injury resulting from the physical altercation with the inmate and as such he is entitled to protections under Civil Service Law § 71. In respondent's reply to the cross motion, respondent again asserts that the probationary period was properly extended. In reply to his petition, petitioner argues that extensions of probation must be by written consent of the employee and that DOC's alleged "unlimited sick leave policy" prevents absences from counting against the probationary period.

On a motion to dismiss a special proceeding, "the court must 'accept the facts as alleged in the [petition] as true, accord [petitioner] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" In re Yan Ping Xu v. New York City Dept. of Health, 77 A.D.3d 40, 43 (1st Dep't 2010) (citation omitted). Turning first to petitioner's argument that his probationary period ended on June 26, 2010, 55 R.C.N.Y. § 5.2.8(a) sets forth, in pertinent part, that "upon the written request of the agency head setting forth the reasons therefor and with the written consent of the probationer, the commissioner of citywide administrative services may authorize the extension of the probationary term for one or more additional periods not exceeding in the aggregate six months." The very next section, 55 R.C.N.Y. § 5.2.8.(b), states that "notwithstanding the provisions of paragraph[]. . . 5.2.8(a)," the

initial probationary period is extended by the number of days that the employee does not perform his or her duties. This automatic extension is justified because probationary employees, who must "demonstrate the ability to perform the duties of the office," should not benefit by counting days that they did not actually work nor should they be deprived of a "reasonable opportunity" to demonstrate their fitness. In re Tomlinson v. Ward, 110 A.D.2d 537, 538 (1st Dep't) aff'd, 66 N.Y.2d 771 (1985); see also In re Garcia v. Bratton, 90 N.Y.2d 991, 993 (1997).

The language of 55 R.C.N.Y. § 5.2.8(b) clearly provides an exception to the rule that probationary periods can only be extended by written consent of the employee. The exception has a rational basis for the reasons set forth above. Since petitioner concedes that he was absent for 84 days and on limited duty, his probationary period was appropriately extended beyond June 26, 2010. Therefore, there is no legal support for petitioner's claim that his probationary period ended on June 26, 2010 and that his summary termination on September 22, 2010 was unauthorized.

To the extent that petitioner argues that respondent violated Civil Service Law § 71 by terminating him, as a probationary employee, respondent was entitled to dismiss petitioner "'for almost any reason, or for no reason at all.'" In re Swinton v. Safir, 93 N.Y.2d 758, 762-63 (1999), quoting In re Venes v Community School Bd. of Dist. 26, 43 N.Y.2d 520, 525 (1978). The decision to terminate petitioner cannot be overturned unless he can demonstrate that he "was dismissed in bad faith or for an improper or impermissible reason." Swinton, 93 N.Y.2d at 763 (citations omitted). Here, petitioner has alleged no facts that would support a cognizable legal theory that he was terminated in bad faith or for an otherwise improper reason. Even accepting as true an allegation that absenteeism was the reason for the termination, an employer's decision to terminate

a probationary employee for days in which the employee was absent, even if medically justified, is not de facto evidence of bad faith. See e.g., In re Santiago v. Horn, 37 A.D.3d 307 (1st Dep't 2007); In re Skidmore v. Abate, 213 A.D.2d 259, 260 (1st Dep't 1995). Accordingly, it is hereby

ORDERED that the cross-motion is granted; and it is further

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

Dated: July 13, 2011

JOAN B. LOBIS, J.S.C.

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).