

Matter of Butler v Schiro
2011 NY Slip Op 32161(U)
August 4, 2011
Supreme Court, New York County
Docket Number: 116650/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE

PART 5

Index Number : 116650/2010
 BUTLER, SHANTELL
 VS.
 SCHRIRO, DR. DORA
 SEQUENCE NUMBER : 001
 ARTICLE 78
 CAL # 2-1

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

this motion to/for Article 78

PAPERS NUMBERED
 1
 2, 3
 4, 5

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

Cross-Motion: Yes No

UNFILED JUDGMENT

Upon the foregoing papers, it is ordered that this ~~notice~~ notice of entry cannot be served based hereon.
 This judgment has not been entered by the County Clerk.
 To obtain entry, counsel or authorized representative must E-File certificate requesting Entry of Judgment with a copy of the order and/or judgment attached.

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 8/4/11

[Signature]
 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
In the Matter of the Application of
SHANTELL BUTLER,

Petitioner,

Index No. 116650/10

Motion Date: 6/7/11

Motion Seq. No.: 001

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

DECISION & JUDGMENT

-against-

Dr. Dora Schiro, 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, J.:

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By notice of petition and verified petition dated December 22, 2010, petitioner brings this Article 78 proceeding seeking a judgment annulling respondents' decision to terminate her and directing that she be reinstated as a correction officer with the New York City Department of Correction (DOC) with back pay and benefits or, alternatively, ordering a hearing. Respondents oppose.

I. BACKGROUND

On June 26, 2008, petitioner was hired by DOC to work as a correction officer for a

two-year probationary term. (Verified Petition, dated Dec. 22, 2010 [Pet.]). On or about June 24, 2010, DOC extended petitioner's probation an additional three months due to problems with her punctuality and attendance, and she was notified that she would be closely monitored over the three months and that her failure to improve or maintain a satisfactory work record could result in her termination. (Verified Answer, dated Mar. 7, 2011 [Ans.], Exh. C).

On July 16, 2010, Paul Wiggins, with whom petitioner had been romantically involved, allegedly violated his parole. The New York State Division of Parole (Parole) issued a warrant for his arrest and an attempt was made to arrest him at petitioner's apartment. (Pet.). According to petitioner, upon hearing a knock on her apartment door and before opening the door, she asked for and heard someone say "Parole." Petitioner then stated that she needed to clothe herself and immediately after doing so, opened the door. One of the parole officers, Faith Cohen, asked her where Wiggins was and she motioned with her hand to the rear bedroom, saying "he's back there." The Parole team found Wiggins in petitioner's bedroom and arrested him. (*Id.*).

According to Senior Parole Officer Catherine Adams, six parole officers went to petitioner's apartment to arrest Wiggins. Adams remained in the courtyard of the building. After approximately ten minutes, another officer, then outside petitioner's apartment, told Adams by telephone that petitioner was not opening the apartment door and was being evasive and uncooperative. Adams could hear the officers banging on petitioner's door and asking her to open it. Before petitioner opened the door, another officer in the courtyard saw Wiggins attempt to exit from a window in petitioner's apartment and ordered him back into the apartment. When petitioner finally opened the door, Wiggins was arrested in her apartment. (Ans., Affidavit of Catherine Adams, dated Mar. 7, 2011).

Adams reported on July 26, 2010 that petitioner had failed to grant access to her apartment, was evasive when asked if Wiggins was in there, and again failed to grant access even after Wiggins was observed attempting to escape. (Ans., Exh. E).

Petitioner continued working as a correction officer until on or about August 6, 2010, when she was placed on modified assignment and transferred to another facility. (Pet.). By letter dated August 26, 2010, petitioner's supervisor referred the incident to respondents' personnel division for a determination and review and included a summary of the incident, although the source of the information is not reflected therein. He also attached a copy of Adams's July 2010 statement. (Ans., Exh. D).

On September 14, 2010, DOC terminated petitioner's employment, finding that she had engaged in governmental interference and failed to obey lawful orders when she refused to permit the Parole team to enter her apartment to apprehend Wiggins, and was uncooperative and evasive when asked about him. DOC concluded that "[petitioner] obstructed justice when she failed to cooperate with a law enforcement agency in the lawful apprehension of [Wiggins]. Furthermore, [petitioner] failed to uphold her duties as a Peace Officer when she hindered the capture of [Wiggins]." (Ans., Exh. A).

II. CONTENTIONS

Petitioner asserts that respondents' decision to terminate her was arbitrary and capricious as she cooperated with Parole in arresting Wiggins and DOC's investigation into the incident was superficial and insufficient because no one ever interviewed her or Cohen. (Pet.). She also alleges that Cohen supports her version of events. (*Id.*).

Respondents argue that as petitioner was a probationary employee, they could terminate

her for without a hearing or notice as long as the termination was not based on a constitutionally impermissible reason or made in bad faith. They also deny that they were required to interview petitioner or any of the parole officers present that day, and assert that petitioner is unable to show that her termination was made in bad faith absent any reason to discredit Adams's account of the incident. (Memo. of Law, dated Mar. 7, 2011).

In reply, petitioner contends that a hearing should be directed on the disputed issues of fact which she asserts establish that respondents acted in bad faith, and that DOC should have discredited Adams's statement as she was not at petitioner's door at the time of the incident and as none of the officers who were present were interviewed. She also submits a decision from the State of New York Unemployment Insurance Appeal Board, in which the Board granted her unemployment benefits upon finding that petitioner did not know that Wiggins was wanted for a parole violation and that she followed all of the parole officers' directives when they came to arrest him. (Reply Affidavit, dated Apr. 16, 2011, Exh. A).

In sur-reply, respondents deny that there exist any material issue of fact warranting a hearing, and maintain that the Board's decision has no preclusive or collateral estoppel effect in this proceeding and that Adams had no motive to falsify the events of July 16, 2010. (Affirmation dated Apr. 22, 2011).

III. ANALYSIS

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222,

231 [1974]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, the determination of an administrative agency, “acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency’s determination is supported by the record.” (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

It is well-settled that a municipal agency may terminate a probationary employee during the probationary period without a hearing or notice and without giving any reason for doing so, as long as the termination is not based on a constitutionally impermissible reason or in violation of a statute or legal decision, i.e. made in bad faith. (*Matter of York v McGuire*, 63 NY2d 760 [1984]). Thus, the only issue to be determined in this proceeding is whether petitioner’s termination was made in bad faith (*Matter of Johnson v Katz*, 68 NY2d 649 [1986]), which petitioner bears the burden of proving (*Matter of Lambert v Kelly*, 78 AD3d 554 [1st Dept 2010]). Conclusory or speculative allegations of bad faith are insufficient. (*Matter of Thomas v Abate*, 213 AD2d 251 [1st Dept 1995]).

Here, petitioner argues that respondents’ bad faith is evidenced by their reliance on a single statement of an officer who was not even present at her door. Although relevant to the validity of DOC’s conclusion that petitioner had engaged in improper behavior and the sufficiency of its investigation, Adams’s statement does not constitute evidence that the investigation or termination was made in bad faith. (*See Matter of Turner v Horn*, 69 AD3d 522 [1st Dept 2010] [while petitioner submitted evidence that challenged investigator’s conclusion

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that she had failed to comply with departmental rules, she submitted no evidence raising issue as to whether respondent acted in bad faith in investigating or terminating her]; *Matter of Shabazz v New York State Dept. of Correctional Servs.*, 63 AD3d 1253 [3d Dept 2009] [where petitioner terminated due to belief, based on other employees' statements, that he had violated workplace rules, his assertion that employees were mistaken or lying insufficient to raise issue as to whether termination improper]; *Matter of Green v New York City Hous. Auth.*, 25 AD3d 352 [1st Dept 2006] [petitioner terminated after respondent investigated complaint and found that she had assaulted another employee; while petitioner showed that respondent's determination may have been mistaken, she raised no issue as to whether made in bad faith]; *Matter of Weir v Bratton*, 4 AD3d 160 [1st Dept 2004], *lv denied* 3 NY3d 611, *cert denied* 545 US 1140 [2005] [even if respondent's investigator misidentified petitioner and relied on potentially erroneous DMV report, respondent's reliance thereon did not constitute bad faith].

Quick v Horn is not to the contrary as there, the court found that the respondent had conducted a superficial investigation of a complaint against the petitioner based on unverified statements made by a person impersonating a parole officer and without investigating whether the events described had actually occurred. (21 Misc 3d 1116[A], 2008 NY Slip Op 52078[U] [Sup Ct, New York County 2008]). Moreover, the respondent's investigator had rejected the petitioner's sworn testimony even though certain statements made by her were substantiated in writing, and he ignored substantial evidence indicating that the accuser's version of events was questionable. Here, by contrast, respondent's investigation was based on the report of a Senior Parole Officer, who telephonically witnessed, and was involved in, the incident at issue, and nothing in her report indicates that her version of events is incredible or inaccurate; nor did

petitioner offer any evidence to support her own account of the incident.


That the Unemployment Insurance Appeal Board found that petitioner had not engaged in misconduct may not be considered here. (*Matter of Watson v Bratton*, 243 AD2d 295 [1st Dept 1997] [Department of Labor's decision granting petitioner unemployment benefits not dispositive of issue raised in Article 78 proceeding seeking to annul respondent's termination of petitioner]; *Matter of Beacham v Brown*, 215 AD2d 334 [1st Dept 1995], *lv denied* 87 NY2d 801 [court should not have considered testimony from petitioner's unemployment benefits hearing in deciding Article 78 petition as unemployment proceeding was irrelevant to petition]; *Thomas v City of New York*, 169 AD2d 469 [1st Dept 1991] [decision by Department of Labor regarding petitioner's unemployment benefits irrelevant]).

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:



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

DATED: August 4, 2011
New York, New York
AUG 04 2011