

Zambrotto v Doherty
2011 NY Slip Op 32269(U)
August 17, 2011
Supreme Court, New York County
Docket Number: 101384/2011
Judge: Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN B. LOBIS
Justice

PART 6

Index Number : 101384/2011
ZAMBROTTO, JOSEPH
vs.
DOHERTY, JOHN J.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 6/10/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
Petition 1-17
Not to dismiss 18

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 motion

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION,
Order + Judgment

Dated: 8/17/11

JBL
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: IAS PART 6**

-----X
JOSEPH ZAMBROTTO,

Petitioner,

Index No. 101348/11

-against-

Decision, Order, and Judgment

JOHN J. DOHERTY, as Commissioner of the
Department of Sanitation of the City of New York,
and the City of New York,

UNFILED JUDGMENT

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appear in person at the Judgment Clerk's Desk (Room
141B).

Respondents

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

Petitioner Joseph Zambrotto brings this proceeding under Article 78 of the C.P.L.R. seeking a judgment vacating and setting aside his termination from the Department of Sanitation of the City of New York (the "Department"), which occurred on October 13, 2010; restoring him to his former position; and directing respondents to pay him his wages and benefits from the date of termination to the date of restoration. Respondents John J. Doherty, as Commissioner of the Department, and the City of New York cross-move for a judgment dismissing the proceeding pursuant to C.P.L.R. Rule 3211(a)(7) and § 7804(f), on the grounds that the petition fails to state a cause of action.

Mr. Zambrotto was first appointed to the Department as a sanitation worker on November 22, 1999, and became a tenured employee approximately one year later. On April 1, 2010, in order to settle Department disciplinary complaints that had been issued against him, petitioner entered into a plea agreement whereby he elected to waive his right to a hearing on the disciplinary complaints and agreed to be placed on Commissioner's Probation for one year. The terms of the plea agreement specify that should petitioner violate his probation, he would be

terminated without the benefit of a conference and/or hearing. According to the petition, after petitioner signed the plea agreement, Department Advocate Rita Brackeen served him with a copy of the Department's Operations Order 2008-06 ("Order 2008-06"), which explains, *inter alia*, that probationers are expected to demonstrate that they are willing to follow the Department's rules and regulations, especially regarding time and leave and the Department's Code of Conduct. Further, probationers must conduct themselves responsibly and in a manner that is non-prejudicial to good order and discipline and that does not discredit the City, State, or Department. Probationers must submit medical documentation for every instance of sick leave. They must adhere to the Department's rules and regulations, violations of which may result in termination.

Petitioner incurred four disciplinary complaints in the five months following the plea agreement. On May 10, 2010, petitioner was charged with engaging in activities prejudicial to the good order and discipline of the Department and bringing discredit to the City of New York for having been arrested for assault two days prior. On July 12, 2010, petitioner was charged with a violation of the Department's safety orders for having driven his sanitation truck through an intersection with another sanitation worker hanging onto the outside of the cab. On July 14, 2010, petitioner was charged with a violation of the Department's orders prohibiting offensive or pornographic material on Department property with respect to a pornographic videotape discovered at the facility he was assigned to. On September 29, 2010, petitioner was charged with violating the Department's rule that employees must remain at home when on paid sick leave unless given permission otherwise, as he had not been at home during a home/phone check on a day that he was out sick, and he had subsequently failed to timely present medical documentation of his whereabouts.

On September 30, 2010, the Personnel Management Division recommended to the Employee Review Board ("ERB") that petitioner be terminated based on the four aforementioned disciplinary complaints. After a discussion, three members of the ERB voted to terminate petitioner and two voted to wait until the pending court case regarding the assault was resolved. On October 13, 2010, petitioner was terminated, and this petition to challenge the termination followed shortly thereafter.

Petitioner argues that the Department terminated him in bad faith. He maintains that Ms. Brackeen verbally informed him that he would not be terminated as long as he complied with Order 2008-06, and that "minor violations of the Code of Conduct would not cause him to be terminated while he was on Commissioner's Probation." He asserts that the criminal charges against him related to his arrest for assault were dismissed on November 17, 2010; that he had nothing to do with the possession, procurement, use, or ownership of the pornography in a facility that he was only temporarily assigned to anyway; that he had no choice but to continue through the intersection after his co-worker jumped onto the step of the cab; and that he mailed a medical note to the Department but he does not know what happened to the medical note after he placed it in the mail. Regardless, petitioner contends that none of the alleged violations meets the criteria for termination under Order 2008-06, and that the arrest case has no bearing on his probationary status since it occurred "off the job" and the charges were subsequently dismissed.

In their cross motion to dismiss for failure to state a claim, respondents argue that the petition does not allege facts demonstrating that the Department's termination was in "bad faith."

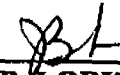
Respondents set forth that the four disciplinary complaints that petitioner received while on Commissioner's Probation constitute violations of the terms of his probation. With respect to the arrest, respondents maintain that even if criminal charges are never substantiated or ultimately dismissed, misconduct leading to an arrest is a rational, good faith reason to terminate a probationer's employment. They further maintain that the arrest, alone, is a good faith reason to terminate probationary employment because it violates the Commissioner's Probation terms that probationers "are required to conduct themselves responsibly and in a manner that is non-prejudicial to good order and discipline, or which tends to discredit the City, the State, or [the Department]." As to the safety violation, respondents argue that the record demonstrates that petitioner did operate his sanitation truck in an unsafe manner, even though petitioner has attempted to explain his actions. As to the pornography charge, respondents argue that the record demonstrates that pornography was found in the facility that petitioner was assigned to and that under Department policy he had an obligation to report any such material but did not. As to the medical documentation charge, respondents maintain that regardless of petitioner's arguments now, between September 8, 2010, and September 29, 2010, the Department's medical division did not receive medical documentation regarding his absence from home during a paid sick leave. Respondents argue that based on the totality of the disciplinary complaints that petitioner accrued after he was placed on Commissioner's Probation, the petition fails to demonstrate that the termination was in bad faith.

"Judicial review of [a] determination to discharge [a] probationary employee is limited to an inquiry as to whether the termination was made in bad faith." In re Johnson v. Katz, 68 N.Y.2d 649 (1986). See also In re Abreu v. Doherty, 63 A.D.3d 490 (1st Dep't 2009). The

probationary employee bears the burden of demonstrating bad faith in challenging his or her discharge. In re Soto v. Koshler, 171 A.D.2d 567, 568 (1st Dep't 1991). Petitioner does not dispute that in signing the plea agreement, he agreed that he would be terminated without a hearing or a conference if he violated the terms of his probation. The record establishes that regardless of the excuses he presents here, petitioner incurred four disciplinary complaints during his probation, evidencing four violations of the Department's rules and regulations, Order 2008-06, and the terms of the plea agreement. Even assuming the veracity of his excuses, they are insufficient to demonstrate that respondents' decision to terminate was made in bad faith. Accordingly, it is hereby

ORDERED and ADJUDGED that the cross motion is granted, the petition is denied, and the proceeding is dismissed in its entirety.

Dated: August 7, 2011



 JOAN B. LOBIS, J.S.C.
UNFILED JUDGMENT

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