

Matter of O'Neal v State of New York

2014 NY Slip Op 30413(U)

February 14, 2014

Supreme Court, New York County

Docket Number: 103492/12

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

PART IA **PART 16**

Index Number : 103492/2012
O'NEAL, TONY
vs.
STATE OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this ~~motion~~ *petition* is granted to the extent provided in the accompanying memorandum decision.

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: FEB 14 2014

Alice Schlesinger, J.S.C.

ALICE SCHLESINGER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

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

-----X
In the Matter of the Application of
TONY O'NEAL,

Petitioner,

Index No. 103492/12
Motion Seq. No.001

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

-against-

UNFILED JUDGMENT

STATE OF NEW YORK/OFFICE OF MENTAL HEALTH
Respondent.

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).

-----X
SCHLESINGER, J.:

August 23, 2007 was not a good day for Tony O'Neal. On that day while he was working at his job as a Developmental Aide for the New York State Office for People with Developmental Disabilities at 888 Fountain Avenue in Brooklyn, NY, there was some kind of encounter with his supervisor, Millicent Rattroy. This event resulted in O'Neal's arrest on September 9, 2007. He was charged with assault (an A misdemeanor), menacing and harassment.

December 10, 2007 was also a bad day. That was when the State put O'Neal on notice that this incident, giving rise to criminal charges, was the predicate for action being taken to terminate him from his job.

The criminal matter was heard in Brooklyn Criminal Court on October 14, 2008. It was heard by a judge rather than a jury. The law prevents a defendant from having a jury hear and decide his case if he faces a penalty of less than six months in jail. The assault charge, an A misdemeanor, was punishable by up to one year in jail. However, the prosecution has the right (one vigorously challenged) to reduce the charge to a lesser one, without giving reasons for this action. See, *People v Williams*, 120 Misc.2d

68 (Crim. Ct., Bronx Co.1983) That is what was done here. Mr. O'Neal was charged with attempted assault, a B misdemeanor punishable by only three months incarceration, despite the fact that Ms. Rattroy's testimony was that Mr. O'Neal had actually punched her, and not merely attempted to.

The judge hearing the charges convicted him. Would a jury have acted otherwise? It is possible. More on this later. But certainly, October 14, 2008, when this occurred, was not a good day for Mr. O'Neal. Nor was December 4, 2008, when he was sentenced to 30 days in jail.

Tony O'Neal believed he was unjustly convicted and wished to pursue an appeal. His attorney, in this regard, did file a timely notice of appeal on December 29, 2008. However, Mr. O'Neal was obliged to file an application for poor person's relief so that an attorney from the Legal Aid Society would be appointed to continue its representation. Certainly, O'Neal was entitled to this relief as he had been suspended without pay from his job. But he was required to make a formal request.

At first, he did not have the form. Then it was sent to a mistaken address. Finally, he was confused how to fill it out. So the application was not timely filed, leading the court to dismiss his appeal on April 23, 2009. Not a good thing for Mr. O'Neal.

Mr. O'Neal had been told that his appeal could take up to two years. So he waited. Finally, in February 2010, he went back to court where it seems he learned of the April 2009 dismissal. He then contacted Legal Aid and spoke to Ms. Bonnie Goldberg, a staff attorney there, about filling out the poor person's application.¹

¹At the request of this Court as to why it took so long for the appeal to be decided, counsel for petitioner submitted an affirmation that Bonnie Goldberg had submitted to the Kings County court as part of her motion on behalf of Mr. O'Neal to vacate the dismissal of his appeal.

Ms. Goldberg helped Mr. O'Neal with the application for poor person's relief, which was finally filed on June 24, 2010. But the prosecution opposed the motion to vacate the dismissal, and on July 9, 2010, the court denied the relief, stating that the appeal had been dismissed and O'Neal had failed to show good cause to vacate that dismissal. Ms. Goldberg then bought a formal motion to vacate the dismissal, which was finally granted on August 24, 2010.

Then, more time passed before Legal Aid assigned the case to an attorney to perfect the appeal. This finally happened on May 2, 2011, and a brief was then submitted to the Appellate Term on June 27, 2011. The appellate court issued its decision in favor of O'Neal on February 15, 2012, dismissing the criminal charges in their entirety. That was a particularly good day for Mr. O'Neal, or so it seemed.

But in the meantime, the arbitration mandated pursuant to the Collective Bargaining Agreement between O'Neal's union, the Civil Service Employees Association, and the State had occurred in 2008, 2009 and much of 2010. It had been adjourned many times, for a number of different reasons by both sides. The hope then was that Mr. O'Neal's criminal appeal would be decided before the arbitration. Mr. O'Neal had always maintained his innocence and fervently believed that a higher court would agree. (See Ms. Goldberg's affirmation).

On September 16, 2010, the Arbitrator assigned to the case ruled that "no adjournment would be granted and directed that the case proceed..." The reason given was the long history of adjournments for a controversy that had been first noticed for arbitration in 2007. The Arbitrator denied counsel's application for an adjournment so that her client, the Grievant Tony O'Neal, could appear and aid in his defense, even though counsel told the Arbitrator that Mr. O'Neal had become very depressed and had

told her that he was unable to attend. The Arbitrator noted that there was no medical proof submitted showing such a condition.²

At the outset of the hearing, Arbitrator Sirefman decided that Mr. O'Neal's guilt had been predetermined by his conviction because the criminal charges had formed the basis for the Notice of Discipline. In this regard, the State offered and the Arbitrator accepted into evidence a transcript of the sentencing by the Criminal Court Judge. That was the entire hearing. In other words, no witnesses were called and no testimony was taken to prove the events charged. Arbitrator Sirefman said that the "focus of the hearing would be the appropriate penalty" because guilt was assumed.

On the penalty, arguments were heard. The Union lawyer pointed out Mr. O'Neal's history of employment on the job since 1995 with but one incident about ten years before 2007 of a verbal altercation with a supervisor. This incident had been noted in the Notice of Discipline. Significantly, O'Neal's counsel told the Arbitrator: "Grievant does not accept the criminal court's judgment and is actively pursuing an appeal" (p. 5 of Award).

The State's position was nothing more than a reminder to the Arbitrator that Mr. O'Neal had been "convicted under the beyond a reasonable doubt standard." But he added, and it is not known where he got this information, that this was "a sucker punch" that was "delivered with malice and forethought" (p. 6). He also referred to another State exhibit which apparently was also accepted into evidence, the complainant's medical statements. He maintained that "her pains continue." Finally, he characterized the conduct as "so outrageous" that "there should be no second chance."

²The Arbitrator, Josef Sirefman, also noted that Mr. O'Neal's position, which was a "hands-on" one, had not been filled because he was still on suspension and technically in that job.

The Arbitrator solely relied on the State's argument and the sentencing minutes. It appears that the record of the trial itself was not introduced. At sentence, the judge hearing and convicting O'Neal had stated that for him "the bottom line is that this is an unprovoked assault" and the complainant "is still suffering from the effects of that unprovoked assault."

The Award was announced on October 28, 2010. It included the following three findings: 1) Tony O'Neal was guilty of the specified charges; 2) the penalty of termination was appropriate; and 3) the State had probable cause to suspend him without pay. This was certainly a terrible outcome for Mr. O'Neal, but one he could have reasonably anticipated.

It should be kept in mind that this Award post-dated by two months the Appellate Term's decision vacating the dismissal of O'Neal's appeal. But it predated by more than seven months the assignment of his case to a Legal Aid appeals lawyer, an additional eight plus months before that lawyer filed a brief, and eight more months before the Appellate Term handed down its decision in favor of O'Neal.

It was on that date, February 15, 2012, that Mr. O'Neal at last obtained some vindication. The appellate court unanimously reversed his conviction. But it did more. It also dismissed the "information".³ Such a dismissal is highly unusual and was based upon the appellate court's "exercise of our factual review power."

Earlier in the opinion, the Appellate Term set down a brief summary of the trial testimony. The complaining witness had testified that O'Neal had attacked her, both verbally and physically, and had punched and kicked her. She had also said that the

³In Criminal Court, misdemeanor charges are contained in an information. In contrast, in Supreme Court felony charges are contained in an indictment returned by a Grand Jury.

incident had occurred at the job site and that two co-workers, within 20 feet of the incident, had rushed in to pull O'Neal away. She identified those co-workers. However, the two co-workers, also testifying under oath, but for the defense, had said that no such physical altercation had occurred, though O'Neal had raised his voice during a discussion about a requested vacation. Further, they testified that the complainant, their supervisor also, had urged them to testify to events that did not happen.

Therefore, the Appellate Term found that:

the testimony of the complainant was implausible and unsupported by the testimony of the other witnesses. As there was no evidence beyond the testimony of the complainant, to support defendant's convictions, and the other witnesses, who were the complainant's subordinates, contradicted her story against their own self-interest, we find that the judgment of conviction was against the weight of the evidence.

Finally, good news for Tony O'Neal. But not for long. Two months later, on April 19, 2012, he wrote a letter to Judy Graham, Director of Human Resources at Brooklyn Developmental Disabilities Services Office ("BDDSO"), asking for reinstatement to his job. He made this request based not only on the reversal of his conviction, but also significantly on the dismissal of the criminal charges. Not unreasonably, he believed that since the State's evidence before the Arbitrator had relied exclusively on the conviction and the penalty, once that foundation fell apart --- which by the court's decision, it clearly did --- then there was nothing left to support the Award against him. But O'Neal was not reinstated. In fact, he never even received a response to his letter. His Union representative inquired into his request and was told by a BDDSO representative by telephone that "Mr. O'Neal lost his arbitration" and "it was too late for him to appeal" (¶17 of the Petition).

All of the above forms the predicate for Tony O'Neal's Article 78 petition. He is asking this Court to find that respondent's April 19, 2012 decision to deny his request for reinstatement to his former position as a Developmental Aide⁴ was arbitrary and capricious, an abuse of discretion, and undertaken in bad faith. He is asking the Court to direct respondent to reinstate him to this job title with full back pay and benefits from when his conviction was reversed (February 15, 2012), or in the alternative, to grant him a new hearing on the matter.

Counsel brought the petition within four months of Mr. O'Neal's request for reinstatement (§19). Respondent claims that the entire petition is untimely. Therefore, respondent opposes the petition with a cross motion to dismiss pursuant to CPLR §3211(a)(2),(5) and (7). As to §3211(a)(2), which deals with whether the Court has jurisdiction of the subject matter of the action, respondent argues it does not because an Article 78 proceeding cannot be used to challenge or overturn an arbitration award.

With regard to §3211(a)(5), which enumerates a number of legal bars to the maintenance of an action, the one urged here is that the petition is time-barred. Counsel claims that O'Neal erroneously uses the April 2012 date, when respondent ignored and then refused his request for reinstatement, as the date from which the four month Statute of Limitations begins to run. As noted earlier, this request was made following the Appellate Term's reversal of his conviction and dismissal of the criminal case. Instead, respondent argues, the proper date to use to start the running of the four months is October 28, 2010, the date of the arbitrator's Award terminating O'Neal's employment. Counsel also points out that if this were a challenge made pursuant to

⁴April 19 is the date BDDSO received the letter request; it gave no written response.

CPLR §7511, the sole route petitioner could take in challenging an award made after arbitration, the Statute of Limitations would be even shorter, a mere ninety days.

Counsel relies here almost exclusively on a 1980 First Department opinion, *Ametrano v New York City Hous. Authority*, 76 AD2d 811, one affirmed by the Court of Appeals. 53 NY2d 966 (1981). There are similarities in the two cases. Ametrano was a Housing Authority police officer who, at a departmental disciplinary hearing, was found guilty of threatening to shoot an unnamed individual. At the hearing, Ametrano's guilt was established by the submission of a certificate of disposition showing that he had been convicted of reckless endangerment in the second degree. Petitioner was then informed in a letter that he would be dismissed from his position at the end of October 28, 1976. Over two years later, on December 4, 1978, the Appellate Term hearing an appeal of his criminal conviction, reversed the conviction and set the matter down for a new trial.

It was on this basis that on April 2, 1979, Ametrano brought an Article 78 proceeding to compel his reinstatement as a Police Officer. This request was denied by the appellate court, stating that it had been brought more than four months after the administrative determination terminating his employment had gone into effect.

There are two critical differences between Ametrano's case and O'Neal's. First, in *Ametrano*, for reasons not explained in the decision, the appellate court reversed his conviction and ordered a new trial. In contrast here, the appellate court not only reversed the conviction, but it dismissed the case in its entirety. In other words, unlike *Ametrano*, the prosecution in O'Neal's case was not given a second chance because the conviction was "against the weight of the evidence" and would necessarily be so if

the case were to be tried again. The second distinction is that O'Neal's case involved an arbitration, one compelled by a collective bargaining agreement. Counsel for petitioner argues in her supplemental papers that it is this arbitration decision that must be set aside and a new hearing provided to her client.

I believe this position is correct, despite the apparent untimeliness of the petition pursuant to Articles 75 and 78 of the CPLR. I believe this is the correct result because it is the only one that makes any sense, the only one that comports with basic elements of fairness, and the only one that elevates substance over form. The respondent's position here, if accepted, would be the opposite of all of these things.

There is no question here that the hearing required by the collective bargaining agreement, although not one mandated explicitly by statute, still bears the imprimatur of §75 of the Civil Service Law, entitled "Removal and other Disciplinary action." This statute establishes clear procedures for covered employees that envision a hearing wherein a charged employee is entitled to representation, as well as other rights. Even though there is no requirement that the rules of evidence be followed or that technical requirements be met, an individual does have due process rights. These rights are intended to guarantee that person a certain minimum standard of fairness.

The requirement of fundamental fairness was emphasized by the Court of Appeals in *Matter of Sowa v Looney*, 23 NY2d 329 (1968). That case involved a Police Officer discharged from the Nassau County Police Department after having been found guilty at disciplinary proceedings of improper sexual advances made to a woman whose car he had stopped. The Court there said:

Compliance with the technical rules of evidence is not required in disciplinary proceedings before a Police Commissioner or other administrative officer Generally, all relevant, material and reliable evidence which will contribute to an informed result should be admissible in disciplinary proceedings for there is a public interest in ascertaining the truth of charges brought against public employees Nevertheless, no essential element of a fair trial can be dispensed with unless waived without rendering the administrative determination subject to reversal upon review.

23 NY2d at 333 (citations omitted).

The Court of Appeals upheld Sowa's termination, even though it found that results of polygraph tests had been improperly introduced into evidence as part of the case against the officer. The Court went on to say that the "mere erroneous reception of this evidence then would not be sufficient basis for annulling the Police Commissioner's determination if it is on the entire record, supported by substantial evidence" [citing to CPLR §7803(4)]. The Court then adopted Judge Learned Hand's classic definition of substantial evidence; that is, "whether in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." 23 NY2d at 335.

It is absolutely clear in this case that, despite the fact that counsel for respondent continues to repeat the allegations of the assault as if they were true, in fact they are not true. What is more, they do not meet the definition of substantial evidence.

Frankly, it is incomprehensible to this Court that O'Neal's criminal trial could result in a conviction, meaning that guilt was proven beyond any reasonable doubt, where the sole evidence was the testimony of a complainant and that testimony was not only contradicted by the testimony of two witnesses identified by the complainant as being on the scene, but these same witnesses testified that the complainant had urged

them “to testify to events that did not happen,” as confirmed by the Appellate Term decision. Though it was unusual for the Appellate Term to not only reverse this conviction but on the facts review and dismiss it, it is understandable based on its finding “that the testimony of the complainant was implausible and unsupported by the testimony of any other witness.” Therefore, when the smoke clears, one sees an Award that not only is not supported by substantial evidence, but it is not supported by anything.

What is important here is that the State in the Arbitration hearing chose to present its case against Mr. O’Neal solely on the documentary evidence that consisted of the sentencing minutes. The State could have called Ms. Rattroy to give testimony. But it did not. If it had, then depending on what other evidence was presented, the Arbitrator would have made his own decision as to the credibility of the witnesses. But since that was not the path chosen by the State, the entire foundation of its case against Mr. O’Neal fell apart when the Appellate Term vacated the conviction and dismissed the criminal charges.

A petitioner such as Tony O’Neal must be given a “meaningful hearing.” In *Matter of Verbeeck v Board of Educ.*, 118 AD2d 784 (2nd Dep’t 1986), the Appellate Division found that Ms. Verbeeck had been denied a fair hearing. There, the petitioner, a custodian, had been discharged for allegedly falsifying her time records. At the hearing, in response to Verbeeck denying the charges and presenting evidence to support her position, respondent’s counsel amended the charges and for the first time indicated that the allegedly false records pertained to dates other than the ones originally charged. Petitioner requested and received an adjournment to confront the new charges.

Meanwhile, respondent's counsel promised to bring Verbeeck's supervisor to testify as to the new dates charged. But on the adjourned date, the supervisor was not produced and no explanation was given. However, the Board hearing the case received a verified statement from this supervisor, dated after the hearing, which supported the amended charges. The Board considered this post-hearing statement in finding against the petitioner, even though petitioner had been denied the right to cross-examine the supervisor or even respond to his statement. The appellate court annulled the Award and granted a new hearing, finding that Verbeeck had not been given "a meaningful hearing, as contemplated by the collective bargaining grievance procedure." 118 AD2d 785.

Similarly here, Tony O'Neal never had a meaningful hearing. First, he was not even present, as he told his counsel that he was too depressed to even discuss the case with her or to appear. Suffering depression under circumstances that included the loss of his livelihood, denial of a jury trial and probably of a fair result at trial, loss of liberty based on his sentence of thirty days in jail, and perhaps other personal losses, could certainly explain that response. But even if O'Neal had come to the hearing, would the result have been any different? The State's entire case presumably still would have rested on the sentencing minutes accepted by the Arbitrator, as they came to the arbitration with only that evidence to offer, not knowing that O'Neal would be absent.

At this point, it might be useful to hypothesize on what would have occurred if the arbitration had occurred after the Appellate Term had vacated the conviction and dismissed the criminal charges. The State would have been compelled then to present a meaningful case, if they chose to go forward at all. Arguing, as respondent does, that

Mr. O'Neal only had 90 days to challenge the Award and move to vacate it, is at most a fatuous argument under these circumstances. Other than Mr. O'Neal testifying, what else was there to argue? Ninety days would have taken one to January 28, 2011.

Petitioner's appeal was not decided until thirteen months later, on February 15, 2012.

Finally, this Court realizes that the arbitration held here cannot be accurately characterized as one held under the dictates of a statute, which if it were, would make it mandatory rather than a voluntary arbitration. If the former, then pursuant to the dictates of *Mount St. Mary's Hosp. of Niagara Falls v Catherwood*, 26 NY2d 493 (1970) and its progeny, the arbitration would have had to accord with both procedural and substantive due process. It is clear that an appraisal of the arbitration hearing and Award here did not meet either standard. The Court of Appeals emphasized (at 503) that "due process of law requires that the award of the arbitrator be judicially reviewable for errors of law, competency and substantiality of evidence, as well as arbitrary and capricious conduct." 26 NY2d at 503. And as noted earlier, such a hearing is precisely the one contemplated by §75 of the Civil Service Law, which applies here. (See p 9, *supra*).

Mr. O'Neal's life changed on August 23, 2007 when he became involved in an altercation with his supervisor, and explicitly so on September 9, 2007, when he was arrested on her complaint. After that he was suspended and then served with a Notice of Discipline that could and did result in termination from a job he had held since 1995. Then, despite having an attorney, his rights were seriously compromised by the District Attorney's decision to reduce the charges and deprive him of a jury trial. He was then convicted on what a later, higher court described as "implausible" evidence, not supported by anything else. Then he was sentenced to jail. After this, he endured years

of waiting for his appeal to finally be heard, in the interim having a meaningless hearing that resulted in the loss of his job.

Doesn't there come a time when Tony O'Neal finally gets a fair shake? Perhaps it is years too late, but isn't Mr. O'Neal entitled to a meaningful hearing? I believe and find that he is. Therefore, pursuant to CPLR §7511(b)(iii), I am granting the petition to the extent of vacating the Arbitration Award and remanding the matter for a new hearing before a different arbitrator. There, if the State elects to proceed, it cannot use or rely on any part of the vacated criminal court proceedings.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted to the extent of vacating the October 28, 2010 Arbitration Award and remanding this matter for a new hearing consistent with the terms of this decision.

Dated: February 14, 2014

FEB 14 2014



J.S.C.
ALICE SCHLESINGER

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