

Matter of Exolas v Schiro

2014 NY Slip Op 30628(U)

March 10, 2014

Supreme Court, New York County

Docket Number: 101168/13

Judge: Donna M. Mills

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This opinion is uncorrected and not selected for official publication.

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

PRESENT : DONNA M. MILLS
Justice

PART 58

In the Matter of the Application of
MELYSA EXOLAS,

Index No. 101168/13

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

MOTION DATE _____

-against-

MOTION SEQ. NO. 01

Dr. Dora Schriro, Correction Commissioner of the
New York City Department of Correction, et al.,

Respondents.

MOTION CAL NO. _____

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits- Exhibits....	<u>1</u>
Answering Affidavits- Exhibits _____	<u>2,3</u>
Replying Affidavits _____	<u>4</u>

CROSS-MOTION: _____ YES NO

UNFILED JUDGMENT

Upon the foregoing papers, it is ordered that this motion 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).

DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

Dated: 3/10/14

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.
NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION _____

NON-FINAL DISPOSITION _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
In the Matter of the Application of
MELYSA EXOLAS,

Petitioner,

For a Judgment under Article 78
of the Civil Practice Law and Rules.

-against-

Index No. 101168/13

Dr. Dora Schriro, Correction Commissioner of the
New York City Department of Correction, et al.,

Respondents.

-----X
DONNA M. MILLS, J.:

In this Article 78 proceeding, Petitioner Melysa Exolas brings this Article 78 proceeding seeking reinstatement, back pay and benefits on the ground that the New York City Department of Correction ("DOC") based petitioner's discharge on her record of a disability in violation of the New York City Human Rights Law, Administrative Code § 8-107(1)(a) ("NYCHRL").

Petitioner, a former Probationary Correction Officer with the DOC was terminated from her probationary position on April 23, 2013, after she was found outside of her residence while on sick leave in violation of DOC policies.

Petitioner was hired as a Probationary Correction Officer for the DOC on December 22, 2011. Petitioner's period of probation was for twenty-four months, with the possibility of being extended by the number of days the employee does not perform the duties of the position which includes but is not limited to sick leave. Petitioner reported sick with the DOC on August 30, 2012, and did not return to duty until January 3, 2013.

UNFILED DOCUMENT
This judgment shall be entered by the County Clerk
and notice of entry shall be served upon persons. To
obtain entry, counsel or authorized representatives must
appear in person at the Judgment Clerk's Desk (Room
1418).

3]

The DOC's rules and regulations concerning sick leave are enforced by the DOC Health Management Division ("HMD"). The sick leave policy, which requires all employees who are on sick leave to remain in their residence or place of confinement at all times except for during a four hour block when receiving medical treatment, obtaining prescribed medicines or where contractually permitted. In addition, HMD may grant time out of residence ... for therapeutically beneficial reasons. HMD may also schedule appointments for a variety of reasons.

Petitioner's permitted four hour block during her sick leave was scheduled for 1:00 p.m. and 5:00 p.m. daily. On November 17, 2012, at approximately 11:29 a.m., DOC Captain Vanessa Vines conducted an absence control visit to petitioner at the address most recently provided to HMD by petitioner. Petitioner was not at the residence but arrived at the residence about fifteen minutes later and stated to Captain Vines that she was putting things in her vehicle, and she didn't have her cell phone on her. Captain Vines discounted her excuse and found petitioner to be in violation of DOC Directive 2262R.

A hearing was held concerning the November 17 out of residence charge by the Executive Officer of HMD, Carolyn Saunders, on November 19, 2012. Petitioner was assessed four vacation days for the November 17 violation and was counseled regarding her behavior and the department's zero tolerance policy relative to sick leave abuse.

On December 19, 2012, at approximately 8:26 p.m., DOC Captain Hyppolite conducted an absence control visit to petitioner at the address provided by petitioner to HMD and found petitioner to be out of residence in violation of DOC Directive 2262R.

* 4]

Captain Hyppolite called petitioner, and petitioner stated that she had been out picking up medication. Petitioner did not log out with HMD. Captain Hyppolite submitted this violation. On December 20, 2012, petitioner was suspended for ten days as a result of the December 19, 2012 out of residence violation.

On December 21, 2012, Executive Officer Saunders submitted petitioner for Personnel Determination Review to Alan Vengersky, DOC Deputy Commissioner of Human Resources with a recommendation that petitioner's employment with the DOC be terminated. On January 24, 2013, Deputy Commissioner Vengersky submitted a "Request For Personnel Determination," which recommended petitioner for termination, to Lewis Finkelman, DOC First Deputy Commissioner. On April 22, 2013, DOC First Deputy Commissioner Mark Cranston approved the termination of petitioner as a result of the petitioner's two violations of DOC Directive 2262R. On April 23, 2013, petitioner was terminated from employment with DOC.

"A probationary employee can be dismissed '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.'... Judicial review of such a determination 'is limited to an inquiry as to whether the termination was made in bad faith.'... The burden of raising and proving such 'bad faith' is on the employee and the mere assertion of 'bad faith' without the presentation of evidence demonstrating it does not satisfy the employee's burden" (*Matter of Soto [Koehler]*, 171 A.D.2d 567, 568, 567 N.Y.S.2d 652 [1st Dept.1991]; see also *Matter of Talamo [Murphy]*, 38 N.Y.2d 637, 639, 382 N.Y.S.2d 3, 345 N.E.2d 546 [1976]). Where bad faith is alleged, the scope of judicial review is broader (*Matter of Johnson [Katz]*,

68 N.Y.2d 649, 650, 505 N.Y.S.2d 64, 496 N.E.2d 223 [1st Dept.1986]).

Evidence in the record that petitioner twice violated respondent's sick leave rules—by being out of residence while on sick leave on two occasions, in violation of DOC Directive 2262R—establishes that the termination was not made in bad faith. Petitioner's conclusory assertions that her termination was discriminatorily based are unsupported. Thus, petitioner has failed to meet her burden of showing that the respondent's determination to terminate her was made in bad faith (*Matter of Johnson v. Katz*, 68 N.Y.2d 649, 505 N.Y.S.2d 64, 496 N.E.2d 223). In addition, the Court notes that there was a demonstrably rational basis for petitioner's termination.

Accordingly, it is hereby

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

Dated: 3/10/14

ENTER:

[Signature]
J.S.C.

DONALD A. WHELAN, J.S.C.

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 Office (Room 1418).