

**Matter of Norman v Schiro**

2014 NY Slip Op 30955(U)

April 14, 2014

Sup Ct, New York County

Docket Number: 100560/2013

Judge: Peter H. Moulton

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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: Hon. Peter H. Moulton  
Justice

PART 57

In the Matter of the Petition of LARRY  
NORMAN

INDEX NO. 100560/13  
100544/2013

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

v.

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

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

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits— Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that the petition is granted in  
accordance with the attached written decision dated April 14, 2014

IT IS FURTHER ORDERED THAT THE APPROPRIATE  
CLERK OF THE COURT amend the RTJ in this  
matter to reflect INDEX NO. 100560/2013, not

Dated: 4/14/14 \_\_\_\_\_

J.S.C.

**HON. PETER H. MOULTON**

100544/  
2013

New York, New York

PETER H. MOULTON

- 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

**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).

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 57

-----X  
In the Matter of the Petition of LARRY NORMAN,

Petitioner,

—against—

Index No.100560/2013

Dora Schriro, Correction Commissioner of the New York  
City Department of Correction; THE NEW YORK CITY  
DEPARTMENT OF CORRECTION; and THE CITY OF  
NEW YORK

Respondents,

For a Judgment Pursuant to Article 78 of the CPLR.  
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**PETER H. MOULTON, J.:**

Petitioner Larry Newman seeks, pursuant to CPLR Article 78, a judgment vacating Respondents New York City Department of Correction's ("DOC") and the City of New York's decision to terminate his employment. Petitioner alleges that at the time of his termination, he was a tenured employee and, therefore, entitled to the protections of Section 75 of the N.Y. Civil Service Law ("CSL").

Respondents states that petitioner was still serving a probationary period when his employment was terminated, and therefore moves for an order dismissing the petition on the grounds that the petitioner fails to state a cause of action.

**BACKGROUND**

On December 16, 2010, petitioner, Larry Norman, was appointed to the post of Correction Officer by the DOC, pending a probationary period. Petitioner reported to his first

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shift that very same day. Petitioner's probationary employment was subject to him successfully completing a required twenty-four month probation period, a background check, and a medical examination. Prior to his probationary appointment, petitioner signed an agreement acknowledging that his twenty-four month probationary period would be extended by the number of days that he did not perform the duties of his position. Specifically, the agreement that petitioner signed when he was appointed stated, in relevant part:

[Petitioner] understand[s] that, the period of probationary service for each newly appointed employee is (24) months and may be 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, annual leave, compensatory time off, medically monitored duty, absence without leave or suspension from duty without pay, etc.

DOC calculates extensions of probation on a day-for-day basis, by considering the days that a Correction Officer was required to work but did not. It does so pursuant to DOC Rule 3.30.020 and Rule 5.2.8 of the Personnel Rules and Regulations of the City of New York. DOC Rule 3.30.020 states, in relevant part:

The period of probationary service for probationary employees shall be extended by the number of days the employee does not perform the duties of the position because of sick leave, annual leave, modified duty, jury duty, death in family, leave without pay, compensatory time, medically monitored duty, absence without leave or suspension from duty without pay. The employment of the probationer may be terminated at anytime during and such additional period.

Similarly, Rule 5.2.8 of the City Personnel Rules states:

[T]he probationary term is 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; provided, however, that the agency head may terminate the employment of the probationer at any time during any such additional period.

Notably, scheduled days off are not considered work days that would count toward the completion of probation. Here, DOC initially submitted a Verified Answer and Memorandum of Law in support of that answer outlining that petitioner took leave without pay, annual leave, or bereavement leave, and therefore did not perform the full duties of his position on the following dates: December 27, 2010 (leave without pay), October 12, 2011 (annual leave), October 13, 2011 (annual leave), October 14, 2011 (annual leave), April 2, 2012 (annual leave), April 3, 2012 (annual leave), April 4, 2012 (annual leave), August 13, 2012 (bereavement leave), August 14, 2012 (bereavement leave), August 15, 2012 (bereavement leave), August 18, 2012 (bereavement leave), October 29, 2012 (annual leave), October 30, 2012 (annual leave), October 31, 2012 (annual leave), November 1, 2012 (annual leave), November 4, 2012 (annual leave). Consequently, respondents initial submissions to the court indicated that petitioner had missed 16 days of work during his probationary period of employment.

Since DOC's records indicated that petitioner had not performed the full duties of a Correction Officer on the aforementioned dates, his probationary period was extended until he completed 16 additional work days as a probationary Correction Officer. In calculating the extension of petitioner's probationary period, DOC stated that it counted days on which petitioner was actually scheduled to work, not calendar days. As such, petitioner's probationary period was extended from December 15, 2012 until the date that he completed 16 additional work days.

By notice dated January 7, 2013, petitioner was informed of his termination as a DOC employee effective immediately. Subsequently, on April 5, 2013, petitioner commenced the instant Article 78 proceeding by claiming that he had achieved tenure on or about January 3,

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2013. Petitioner further argued that DOC's failure to afford him due process under CSL § 75 resulted in his termination being "affected by an error of law" and "in violation of lawful procedure." On July 19, 2013, respondents served petitioner with their Verified Answer and Memorandum of Law In Support of Their Answer. In their Verified Answer, respondents argued that petitioner failed to state a cause of action because he could not demonstrate that he was a tenured correction officer, and thus that he was terminated in violation of his due process rights. On August 28, 2013, respondents received a copy of petitioner's Reply Affirmation in which petitioner argued that the DOC acted too late by terminating his employment on January 7, 2013.

Following a conference with the court on December 9, 2013, respondents were ordered to review their records and submit a sur-reply to determine whether petitioner was a probationary employee at the time of his termination. Respondents subsequently submitted an affirmation in sur-reply in which respondents admitted to making affirmative misstatements in their initial answering papers. Respondents went on to state that petitioner's probationary period was scheduled to end after his shift on December 16, 2012 rather than December 15, 2012 as originally claimed. Moreover, respondents made the additional claim that petitioner had not performed full Correction Officer duties for 17 instead of 16 days.<sup>1</sup> In rebuttal, petitioner stated that he worked for an additional 17 days as a Correction Officer after the end of his original probationary period, which he stated ended on December 15, 2012. It is undisputed that petitioner did work 17 additional days after December 15, 2012, and prior to his termination on

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<sup>1</sup>In their sur-reply respondents argue that they inadvertently omitted August 19, 2012 as a date that petitioner took leave from work after having exhausted all four of his allowed dates for bereavement leave. In rebuttal, petitioner submitted an affidavit accompanied by a memo book stating that he did in fact work on August 19, 2012.

January 7, 2013. Petitioner and respondents' disagreement stems from the date that his original probation was scheduled to end, and whether petitioner worked an additional day on August 19, 2012 prior to the expiration of his original probationary period.

Petitioner submits that he was a tenured employee at the time of his dismissal and therefore seeks an order annulling his January 7, 2013 termination of his probationary employment, and directing respondents to reinstate petitioner with full back pay, benefits, and seniority.

### **DISCUSSION**

DOC Rule 3.30.020 and Rule 5.2.8 of the City Personnel Rules state that a Correction Officer's probationary period is automatically extended by one day for every day that he or she is absent or on limited duty. *See* DOC Rule 3.30.020, Rule 5.2.8 of the City Personnel Rules; *see also Matter of Smith v. New York City Dept. Of Correction*, 292 AD2d 198 (1st Dept. 2002) (probationary period extended by number of days Correction Officer was absent from full duty). Probationary periods are extended through additional work days that one must perform, not calendar days. *See Matter of Beck v. Walker*, 286 AD2d 996 (4th Dept. 2001). Furthermore, General Construction Law (GCL) § 20 provides that in computing any specified range of dates for employment purposes, the date upon which one's employment commences is included in a calculation of days upon which one worked. As such, employment that commences on the first day of the year would end on the last day of the year, not the first day of the following year assuming that one had worked on the first day of the year.

Here, respondents admit that petitioner's employment with the DOC commenced on

December 16, 2010. Furthermore, respondents do not deny the fact that petitioner worked on that date. As such December 16, 2010 was the first day of petitioner's probationary period. Thus, as petitioner points out, December 15, 2012 was the correct end date of petitioner's two year probation which began two years earlier on December 16, 2010. That is consistent with the original position adopted by respondents in their Verified Answer. Nevertheless, because petitioner had missed work at the time that his probationary period of employment was expected to conclude, his probation was extended for additional work days in accordance with DOC Rule 3.30.020 and Rule 5.2.8 of the City Personnel Rules. Following the original date that his probationary period was expected to end, December 15, 2012, petitioner made up for his missed work days starting on December 16, 2012. It is undisputed that from December 16, 2012 to January 6, 2013, petitioner worked seventeen tours as a Correction Officer. Accordingly, even if respondents are correct in stating that petitioner needed to work 17 additional days, petitioner attained tenure as a Correction Officer on January 6, 2013. That date is notably one day shy of the date upon which his employment was terminated. Therefore, the DOC's termination of petitioner's employment on January 7, 2013 occurred after petitioner had already attained tenure as a Correction Officer.

In rebuttal, respondents erroneously claim that petitioner's two year probationary period did not end until petitioner finished work on December 16, 2012. As petitioner notes, however, that computation equates to a probationary period of two years plus an additional day. It also contravenes DOC Rule 3.30.020, Rule 5.2.8 of the City Personnel Rules, and the GCL with respect to the appropriate manner to calculate days. The DOC's own internal provisions state that a two year probationary period is predicated on actual days worked. Here, had petitioner

actually worked for two years starting on December 16, 2010, his probation would have ended at the end of his work day on December 15, 2012. Any conclusion to the contrary would require that petitioner work an additional day. That is not something that petitioner agreed to either implicitly or explicitly based on the agreement that he signed in 2010. Consequently, December 16, 2012 is the correct day from which to measure the additional days that petitioner had to work following the conclusion of his original probationary period.

With respect to the additional days that petitioner worked following the original conclusion of his probationary period starting on December 16, 2012, there is no dispute that petitioner worked an additional 17 days.<sup>2</sup> Respondents only attempt to rebut this is an additional claim, absent from their Verified Answer, that petitioner missed another day of work on August 19, 2012 and therefore an extra day should be added to his probation extension, bringing the total up from 16 to 17 days. Petitioner disputes missing work on August 19, 2012, and submitted an affidavit as well as a memo book entry memorializing that he worked a 5:00 AM to 1:31 PM tour on August 19, 2012. The memo book entry goes on to memorialize that petitioner attended a roll call on that date, and signed a facility sign-in sheet and housing area log book indicating

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<sup>2</sup>The 17-day extension, and the days petitioner worked during that period of time, break down as follows: December 16, 2012 (petitioner worked a 7 AM to 3 PM tour plus overtime); December 17, 2012 (petitioner worked a 7 AM to 3 PM tour plus overtime); December 18, 2012 (petitioner worked a 7AM to 3 PM tour plus overtime); December 19, 2012 (petitioner worked a training day at the Correction Academy); December 22, 2012 (petitioner worked a 11 PM to 7 AM tour, plus overtime); December 23, 2012 (petitioner worked a 3 PM to 11 PM tour); December 24, 2012 (petitioner worked a 3 PM to 11 PM tour); December 25, 2012 (petitioner worked a 3 PM to 11 PM tour); December 28, 2012 (petitioner worked a 3 PM to 11 PM tour); December 29, 2012 (petitioner worked a 3 PM to 11 PM tour plus overtime); December 30, 2012 (petitioner worked a 3 PM to 11 PM tour); December 31, 2012 (petitioner worked a 3 PM to 11 PM tour); January 1, 2013 (petitioner worked a 11 PM to 7 AM tour); January 3, 2013 (petitioner worked a 3PM to 11 PM tour); January 4, 2013 (petitioner worked two shifts - 11 PM to 7 AM and an extra tour from 3 PM to 11 PM); January 5, 2013 (petitioner worked a 3 PM to 11 PM tour); January 6, 2013 (petitioner worked a 3 PM to 11 PM tour).

that he was at work. Accordingly, if August 19, 2012 is treated as a day that petitioner worked, in accordance with respondents' original position, petitioner then owed 16 days of work following the original conclusion of his probation. Going off of that measurement, petitioner paid the last of those days off on January 5, 2013, two days prior to his termination. Notably though, even if this court were to disregard petitioner's affidavit and adopt respondents' new position that petitioner missed work on August 19, 2012, petitioner still would have attained tenure prior to his termination on January 7, 2013. Indeed, if the court assumes that petitioner did not work on August 19, 2012 and therefore owed 17 days, he still would have completed his probation on January 6, 2013, the day on which he worked his seventeenth additional work day following the expiration of his original probation. Consequently, DOC acted too late in terminating petitioner as a probationary employee on January 7, 2013. By the time that date came about, petitioner had already acquired tenure either by two days or one, and therefore was entitled to full due process rights under Section 75 of the Civil Service Law. Respondents' denial of those rights infringed upon petitioner's due process and resulted in his termination in violation of lawful procedure within the meaning of CPLR § 7803(3).

Accordingly, it is

**ORDERED and ADJUDGED** that the petition is granted, petitioner's termination is annulled and petitioner is entitled to reinstatement with full back pay and benefits; it is further

**ORDERED** that the appropriate clerk of the court amend the RJI in this matter to reflect that the correct Index No. is 100560/2013, not 100544/2013.

Dated: April 14, 2014

ENTER:



J.S.C.

**HON. PETER H. MOULTON**

**UNFILED JUDGMENT**

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 1413).

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