

**Matter of Rodriguez v New York City Hous. Auth.**

2014 NY Slip Op 31573(U)

June 18, 2014

Sup Ct, New York County

Docket Number: 100716/2013

Judge: Doris Ling-Cohan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**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 41B). X

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

In the Matter of the Application of  
XAVIER RODRIGUEZ,  
  
Petitioner,  
  
- against -

Index No. 100716/2013  
Motion Seq. No.: 001

NEW YORK CITY HOUSING AUTHORITY,  
Respondent.

The following papers, numbered 1 - 5 were considered on this Article 78 proceeding:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	1, 2
Answering Affidavits — Exhibits ___ (& Memorandum of Law) _____	3, 4, 5
Replying Affidavits _____	_____
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	_____

Upon the foregoing papers, it is ordered that this Article 78 petition is decided as indicated below.

Petitioner Xavier Rodriguez seeks an order pursuant to Article 78 of the CPLR annulling and setting aside respondent New York City Housing Authority's (NYCHA) termination of petitioner's employment, and awarding petitioner all back pay and benefits.

BACKGROUND

Petitioner, represented by counsel, was placed on probation pursuant to an agreement ("Disciplinary Proceeding Conference Disposition"), in which he pled guilty to three disciplinary charges preferred against him by NYCHA for incompetency or misconduct in connection with his employment as a caretaker for respondent. The disciplinary charges against petitioner included: 1) violation, on or about September 24, 2011, of NYCHA Human Resources Manual for possession, use, or sale of a quantity of marihuana; 2) violation of NYCHA Human Resources Manual for failure to report his arrest of September 24, 2011, for Criminal Possession

\* 2]

of Marihuana in the Fifth Degree, in violation of New York Penal Law (NYPL) § 221.10 and for Unlawful Possession of Marihuana, in violation of NYPL § 221.05, to the Inspector General's Office, within three business days of occurrence; and 3) violation of NYCHA Human Resources Manual for violating respondent's time and leave rules and regulations, by being excessively late in reporting to work (amounting to being late 45 times for a total of 1626 minutes).

Before his probationary period expired, however, on January 6, 2013, petitioner was arrested on three charges: Criminal Possession of a Controlled Substance in the Third Degree, NYPL § 220.16(1); Criminal Possession of a Narcotic Drug in the Fourth Degree, NYPL § 220.09(1); and Criminal Possession of a Controlled Substance in the 5<sup>th</sup> Degree, NYPL § 220.06(1). By letter dated January 11, 2013, respondent notified petitioner that his employment was terminated by close of business on January 11, 2013, consistent with the terms agreed to in the Disciplinary Proceeding Conference Disposition, dated January 26, 2013. Thereafter, petitioner commenced this Article 78 proceeding seeking to annul respondent's termination of petitioner's probationary employment.

#### DISCUSSION

Based upon the within submissions, the petition is denied and the proceeding is dismissed, as petitioner has failed to show that respondent's decision was made in bad faith. *See Matter of Anonymous v Codd*, 40 NY2d 860, 860 (1976); *Matter of York v McGuire*, 63 NY2d 760, 761 (1984); *Matter of Van Dyke v New York State Dept. of Educ.*, 144 AD2d 85, 87 (3d Dept 1989), *lv denied* 74 NY2d 607 (1989). At the time of his dismissal, petitioner was on probationary status. While in such status, petitioner "may be dismissed for almost any reason, or for no reason at all." *Matter of Venes v Community School Bd. of Dist. 26*, 43 NY2d 520, 525 (1978); *see Matter of Swinton v Safir*, 93 NY2d 758, 762-763 (1999). Moreover, a probationary

\* 3]

employee may be terminated without a hearing concerning the reasons for dismissal and without any stated specific reason, provided that it is done in good faith and without a constitutionally impermissible purpose or in violation of statutory or decisional law. See *Matter of York v McGuire*, 63 NY2d 760, 761 (1984); *Matter of Talamo v Murphy*, 38 NY2d 637, 639 (1976); *Matter of Medina v Sielaff*, 182 AD2d 424, 427 (1st Dept 1992).

Judicial review of a determination to dismiss a probationary employee is limited to an inquiry as to whether the termination was made in bad faith, with the petitioner bearing the burden of raising and proving such bad faith. *Matter of Butler v Abate*, 204 AD2d 171, 172 (1st Dept 1994). As such, a probationary employee has “no right to challenge the termination by way of a hearing or otherwise, absent a showing that [the dismissal was] in bad faith or for an improper or impermissible reason.” *Matter of Swinton*, 93 NY2d at 763; see also *Matter of Anonymous*, 40 NY2d at 860; *Matter of York*, 63 NY2d at 761. “[M]ere conclusory allegations based upon speculations [are] insufficient to meet that burden.” *Matter of Butler*, 204 AD2d at 172.

In the instant case, petitioner has failed to show that NYCHA either dismissed him in bad faith or for any impermissible reason. Petitioner contends that respondent’s decision to terminate his employment before a resolution of his criminal case and without any evidence of misconduct was arbitrary and capricious and constitutes an abuse of discretion. Petitioner further argues that the criminal charges against him have been dismissed and sealed, thus respondent’s termination of his employment was made in bad faith and is shocking to one’s sense of fairness. Contrary to petitioner’s contention, however, a probationary employee may be terminated following an arrest and the subsequent dismissal of the criminal charges does not raise an issue of fact that the employee was terminated arbitrarily, capriciously, in bad faith, or for a constitutionally

impermissible reason. *See Matter of Holder v Sielaff*, 184 AD2d 228, 228 (1st Dept 1992) (holding that the subsequent dismissal of criminal charges against petitioner, on which basis his probationary employment was terminated by respondent, did not raise an issue of fact to support a finding of bad faith or constitutionally impermissible purpose); *Matter of Holmes v Sielaff*, 182 AD2d 557, 558 (1st Dept 1992) (finding that the termination of a probationary employee is not in bad faith even where all criminal charges against petitioner are subsequently dropped); *Matter of Brown v Condon*, 186 A.D.2d 43, 43 (1st Dept 1992) (holding probationary employee's subsequent acquittal on charges of Vehicle and Traffic Law violations failed to establish that his probationary employment was terminated in bad faith); *Matter of Smith v Abate*, 212 AD2d 449, 450 (1st Dept 1995) (finding no bad faith established by a probationary employee who proffered evidence that he was unknowingly drugged the night before he tested positive for cocaine in a random urinalysis test).

Furthermore, the cases relied upon by petitioner are inapposite because they pertain to findings of misconduct in the context of unemployment insurance benefits, which cannot be premised upon an arrest alone, unsupported by a conviction, rather than the issue herein which relates to the termination of probationary employment. *Matter of Weigand (Nassau County Civ. Serv. Commn. -Commissioner of Labor)*, 259 AD2d 824, 824 (3d Dept 1999); *Matter of Benjamin (Hartnett)*, 175 AD2d 936, 937 (3d Dept 1991). In contrast, here, respondent's decision to discharge petitioner could have been based merely on his arrest, prior to the conclusion of his criminal case and regardless of any subsequent dismissal of criminal charges, absent any bad faith determination or constitutionally impermissible purpose because petitioner was on probationary status and, thus, he could be terminated without a hearing and without a statement of reasons. *See Matter of Holder*, 184 AD2d at 228; *Matter of Holmes*, 182 AD2d at

558; *Matter of Brown*, 186 A.D.2d at 43; *Matter of Smith v Abate*, 212 AD2d at 450; *Matter of York*, 63 NY2d at 761; *Matter of Talamo*, 38 NY2d at 639; *Matter of Medina*, 182 AD2d at 427.

Moreover, petitioner, who was represented by counsel, agreed to a stipulated settlement agreement with respondent to resolve prior disciplinary charges brought against him, which provided that petitioner, during the agreed upon one-year probationary evaluation period, "may be terminated from employment on the basis of incompetency, misconduct or unsatisfactory service, without the service of charges or a hearing." Petitioner's exhibit A at 3. As petitioner has failed to meet his burden to establish that respondent acted in bad faith or that respondent's determination was arbitrary and capricious, his petition is denied and the proceeding is dismissed.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and a judgment of dismissal be entered, without costs and disbursements; and it is further

ORDERED that, within 30 days of entry of this order, respondent NYCHA shall serve upon petitioner a copy of this decision and judgment with notice of entry.

This constitutes the decision, order and judgment of this court.

**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: 6/18/14

[Signature]  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST