

Woods v Garcia

2014 NY Slip Op 33623(U)

September 29, 2014

Supreme Court, New York County

Docket Number: 100402/2014

Judge: Joan B. Lobis

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.

EA 10/3/14
E

✓

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

Interim

Index Number : 100402/2014

WOODS, CHRISTOPHER

PART _____

vs

GARCIA, KATHRYN

INDEX NO. _____

Sequence Number : 001

MOTION DATE 8/4/14

ARTICLE 78

MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for Special Proceeding

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1, 2

Answering Affidavits — Exhibits _____ | No(s) 3, 4

Replying Affidavits _____ | No(s) 5

Upon the foregoing papers, it is ordered that this ^{petition} motion is held in abeyance pending the recommendation of the special Referee. See Attached Decision + Order

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


FILED
OCT 03 2014
NEW YORK
COUNTY CLERKS OFFICE

RECEIVED

OCT 03 2014

GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 9/29/14


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

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
CHRISTOPHER WOODS,

Petitioner,

Index No. 100402/2014

-against-

Interim Decision and Order

KATHRYN GARCIA, AS COMMISSIONER OF THE
NEW YORK CITY SANITATION DEPARTMENT,
JOHN J. DOHERTY, AS FORMER COMMISSIONER OF
THE NEW YORK CITY SANITATION DEPARTMENT,
AND THE CITY OF NEW YORK,

Respondents.

FILED

OCT 03 2014

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

**NEW YORK
COUNTY CLERK'S OFFICE**

This special proceeding arises from the New York City Sanitation Department's termination of Christopher Woods's employment on January 28, 2014. Mr. Woods now petitions the Court for an order annulling the January 28, 2014, determination. Respondents Kathryn Garcia, as commissioner of the New York City Department of Sanitation;¹ John Doherty, as former commissioner of the New York City Department of Sanitation; and the City of New York (collectively "DSNY") oppose the petition.

Christopher Woods was an employee of DSNY Garage Brooklyn South 11 starting in April 2000. On December 8, 2012, Mr. Woods was ordered to take a Breathalyzer test, which tested positive for an elevated blood alcohol content. He had previously failed a substance use test in 2008. To avoid termination, Mr. Woods entered and signed a plea agreement signed on January 17, 2013, in which he waived "any and all rights granted to [him] under the New York City Administrative Code and any other applicable statute, regulation or agreement which pertains to

¹ Sued here as the New York City Sanitation Department.

disciplinary action against New York City employees and acknowledge that this acceptance is the same as a finding of guilt after a hearing.”

Mr. Woods also entered into a “Last Chance Agreement” (LCA) and gave his DSNY Department Advocate a copy of his resignation, as required by the agreement, signed January 17, 2013. The Department Advocate would have sole discretion to submit the resignation if “a subsequent positive drug test, or a subsequent Breathalyzer registering any level of alcohol, or refusal to test including not providing a urine sample within a three hour period[.]” In the LCA, Mr. Woods also waived “any hearing or right to be heard for the purpose of contesting the laboratory findings or the circumstances surrounding a charge of refusing to test.” The agreement was signed by Mr. Woods, his attorney, and his department advocate.

On December 12, 2013, Mr. Woods was scheduled to work an evening shift at Brooklyn South 11. Before arriving at work, Mr. Woods claims that he found out that his mother could not watch his daughter because she felt sick, and, as a result, he needed to pick up his daughter from his mother’s house. He attaches phone records as evidence of his phone conversations with his parents, brother, and daughter’s mother, prior to his arrival at work. Upon arriving at Brooklyn South 11, Mr. Woods first spoke with Night District Supervisor Charles Hoffman. DSNY claims that Mr. Hoffman informed Mr. Woods twice that he was scheduled for a substance use test on the same day. Mr. Woods denies that he spoke with Mr. Hoffman regarding the test but informed him that he needed emergency time off for child care.

Mr. Woods then went to speak to his supervisor, Kenneth Lie-Wei. DSNY claims that at that time Mr. Lie-Wei informed Mr. Woods that he needed to submit to drug and alcohol testing. Mr. Woods claims that no conversation about submitting to a substance use test took place. Mr. Woods claims that he only told Mr. Lie-Wei that he needed to take emergency time off for child care. Both DSNY and Mr. Woods agree that following the conversation with Mr. Lie-Wei, Mr. Woods then left Brooklyn South 11. Later that evening, Mr. Lie-Wei called Mr. Woods and told him that he was suspended without further notice and should contact his department advocate. A disciplinary complaint dated December 13, 2013, was issued suspending Mr. Woods with pay pending further notice.

On December 13, 2013, Mr. Woods called Mr. Lie-Wei, who told him to contact the department advocate. On December 17, 2013, Mr. Woods called Mr. Lie-Wei to ask him to meet in person, which Mr. Lie-Wei agreed to do. They met that evening, at which time Mr. Woods explained to Mr. Lie-Wei that he had no knowledge that on December 12, 2013, Mr. Lie-Wei had ordered him to take a substance use test. Mr. Woods asked him to write a statement stating that it is possible that he did not hear Mr. Lie-Wei's order. DSNY claims that out of sympathy Mr. Lie-Wei agreed to write the statement, which was then signed and notarized. Mr. Woods then mailed the statement, along with a statement from his attorney requesting an investigation of the matter, to DSNY. The matter was then investigated for Respondents by DSNY Department Advocate Rita. R. Brackeen.

On January 23, 2014, Ms. Brackeen sent Mr. Woods a letter stating that DSNY had accepted the resignation submitted with his LCA. The letter was sent by certified mail but was

returned to DSNY on February 21, 2014, as unclaimed. Mr. Woods claims he did not learn of his termination until requesting a disciplinary file from his union. On February 21, 2014, Ms. Brackeen sent a letter to Mr. Wood's counsel that reiterated the facts of the matter and stated that "It is clear SW Woods knowingly left this location after being ordered to submit to substance testing. He only claimed there was an emergency after he was given the orders . . . Based upon the above information, Mr. Woods was quite aware he was ordered to test." Mr. Woods was officially terminated as of January 28, 2014.

Mr. Woods now petitions this court for an Order annulling DSNY's determination. He claims that his resignation was submitted improperly and that DSNY acted in bad faith. He requests that the Court declare that the Respondents action was taken in violation of lawful procedure, was affected by an error of law, were wrongful, arbitrary and capricious, and an abuse of discretion. He claims that Respondents failed to perform a duty enjoined upon them by law by not having an evidentiary hearing pursuant to the Administrative Code and Civil Service Law. He requests that the Court direct an evidentiary hearing as to whether he violated the January 17, 2013.

Petitioner argues that DSNY's determination is arbitrary and without sound basis in reason, or supported by proof sufficient to satisfy a reasonable person. He contends that Mr. Lie-Wei did not directly or effectively communicate that the order to submit to a drug or alcohol use test, which Mr. Woods states Mr. Lie-Wei acknowledges in a sworn statement. Petitioner claims he had a legitimate family emergency that required him to leave work early. He claims that, in investigating the matter, the department advocate, Rita Brackeen, ignored inconsistent statements by Mr. Lie-Wei and did not give Petitioner an opportunity to explain what had occurred.

Petitioner asserts that DSNY cannot show credible evidence of a violation of the LCA, and that as a result his waiver of a statutory hearing does not apply. He maintains that because he was not given a hearing pursuant to the Administrative Code and Civil Service Law that his termination violated his due process rights.

Respondents DSNY argue that the petition is barred by a prior settlement. Respondents contend that it is well established that employees may waive their rights to challenge a future determination in a settlement of a disciplinary action. They assert that Petitioner and his attorney signed the LCA, which resolved the December 2012 substance use charges pending against the Petitioner. They also argue that the decision to submit Petitioner's resignation was not arbitrary and capricious as two supervisors Mr. Lie-Wei and Mr. Hoffman, had ordered Mr. Woods to submit to testing on December 12, 2013. In support of their position, Respondents submit the administrative record, which includes an attendance log with a note written by Mr. Hoffman that Petitioner left the premises at 160:00 hours after being told he had to submit to random drug/alcohol testing. Mr. Woods never signed himself out.

Respondents also submit the sworn affidavit of Department Advocate Rita. R. Brackeen. Ms. Brackeen explains that she sent Petitioner a disciplinary complaint on December 13, 2013. She then investigated the matter, which included Mr. Lie-Wei's notarized statement, conversations with Mr. Lie-Wei, Night Borough Superintendent Robert Callahan, and a handwritten statement from Night District Supervisor Charles Hoffman. She avers that Mr. Lie-Wei requested Petitioner to take a substance test, after which point Petitioner left the office and appeared to be going to the stairs of the Borough Office, the location where he was to report for

the substance test. Ms. Bracken affirms that Mr. Lie-Wei was not told by Petitioner that he was taking emergency time off, or that he was leaving. She explains that based on her conversations with Mr. Callahan, he informed two supervisors, presumably Mr. Hoffman and Mr. Lie-Wei, that Mr. Woods should be ordered to submit to a substance test, and that fifteen to twenty minutes after Mr. Callahan communicated the order to the supervisors, Mr. Woods had left without signing out. Ms. Brackeen also received an unsworn handwritten statement from Mr. Hoffman, in which Mr. Hoffman states that he told the Petitioner twice to submit to an order for substance testing, both occasions prior to meeting with Mr. Lie-Wei.

In reply, Petitioner claims he did not violate the terms of his settlement agreement. He asserts that there is no credible evidence that could lead an impartial fact-finder to rationally believe that Petitioner refused an order to take a substance use test. Petitioner maintains that the investigation conducted by the DSNY was flawed and biased. Petitioner claims that the administrative record includes a version of events by the night district supervisor, Charles Hoffman, which was improperly relied on by Respondents. Petitioner argues that Mr. Hoffman submitted a hand written statement dated December 18, 2013, which violates the DSNY Code of Conduct that requires a contemporaneous statement of the events. Petitioner claims that Department Advocate Brackeen at no point stated that she interviewed Mr. Hoffman, and Mr. Hoffman never explicitly states that he actually gave Petitioner a direct order to be tested.

In challenges under Section 7803(3), the arbitrary or capricious test relates to whether administrative action is justified or without foundation in fact. Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). Where a petition claims that an agency failed to comply with its own

internal procedures, this Court reviews whether the determination was “made in violation of lawful procedure.” E.g., Blaize v. Klein, 68 A.D.3d 759, 761 (2d Dep’t 2009). “[A]n agency’s rules and regulations promulgated pursuant to statutory authority are binding upon it as well as the individuals affected by the rule or regulation.” Lehman v. Bd. of Educ., 82 A.D.2d 832, 834 (2d Dep’t 1981). If a rule or regulation affects an individual’s “substantial rights,” it “may not be waived by the agency.” Id. “An adverse agency determination must be reversed when the relevant agency does not comply with either a mandatory provision, or one that was ‘intended to be strictly enforced.’” 68 A.D.3d at 761 (quoting Syquia v. Bd. of Educ., 80 N.Y.2d 531, 536 (1992)). Section 7804(h) allows for hearings for triable issues of fact raised in a special proceeding.

An employee “may waive his right to procedural due process protections in those instances in which the waiver is predicated ‘upon the existence of a bona fide agreement by which the employee received a desired benefit in return for the waiver, the complete absence of duress, coercion or bad faith and the open and knowing nature of the waiver’s execution [.]’” Montiel v. Kiley, 147 A.D.2d 402, 404 (1st Dep’t, 1989) (internal citations omitted); see also Abramovich v. Bd. of Educ., 46 N.Y.2d 450 (1979). In cases where a petitioner denies violating an agreement, “Petitioner may not . . . claim that he should be accorded a hearing on the issue of whether he is, in fact, guilty of the infractions for which he was terminated.” Montiel, 147 A.D.2d at 405. Such settlements can include situations where a petitioner “knowingly and voluntarily consented to be placed on probation . . . during which the [agency] would have the ‘sole discretion as to the propriety of invoking the penalty of dismissal’ and, moreover, could take this action ‘without the necessity of affording [petitioner] the right to a further’ hearing.” Id. at 404-05. The Court of Appeals has approved agreements involving a disciplinary evaluation period during which a

petitioner could be terminated in exchange for his employer withdrawing pending charges. See Miller v. Coughlin, 59 N.Y.2d 490 (1983).

In this matter, Petitioner signed the LCA, which provided for a probationary period and mandatory substance use tests. Mr. Woods accepted the agreement and “knowingly relinquished the right to appeal or otherwise challenge the test results or testing procedures.” Presti v. Farrell, 23 A.D.3d 211, 211 (1st Dep’t 2011) (citing Montiel, 147 A.D.2d at 402). The agreement required Mr. Woods to submit to testing when ordered, and he relinquished his right to contest the circumstances surrounding a failure to submit. This, however, does not mean that there are no factual issues that need to be resolved. Mr. Woods’ claim that he was not told to submit to a substance test is a factual issue that is disputed by Respondents. If DSNY did not communicate to Mr. Woods to submit to a test, then it cannot be said that he refused to submit or violated his LCA. Pursuant to Section 7804 of the Civil Practice Law and Rules, when “a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith.” Accordingly, it is

ORDERED that this matter is referred to a Special Referee to hear and report with recommendations, or hear and determine, if the parties so stipulate in writing, pursuant to Section 4317 of the Civil Practice Law and Rules, whether DSNY reasonably communicated to Petitioner that he was required to submit to a substance test on the date of December 12, 2013.


ORDERED that Petitioner shall, within 15 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Special Referee Information

sheet upon the Special Referee Clerk in the Motion Support Office to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the petition is held in abeyance pending the recommendation of the Special Referee.

Dated: September 29, 2014

ENTER:



JOAN B. LOBIS, J.S.C.

FILED
OCT. 03 2014
NEW YORK
COUNTY CLERKS OFFICE