

**Matter of Espinosa v New York City Dept. of
Corrections**

2015 NY Slip Op 31325(U)

June 19, 2015

Supreme Court, Queens County

Docket Number: 17136/14

Judge: Howard G. Lane

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Short Form Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**

IA PART 6

In the Matter of JOSELYN ESPINOSA,

Index

Number 17136/14

Petitioner,

Motion Date March 2, 2015

-against-

Motion Cal. No. 35

NEW YORK CITY DEPARTMENT OF
CORRECTIONS and THE CITY OF NEW YORK,

Motion Seq. No. 1

Respondents.

The following papers numbered 1 to 15 read on this Article 78 proceeding for a judgment declaring that the practices complained of in the petition are unlawful; granting a preliminary and permanent injunction against respondents enjoining them from engaging in the unlawful practices, policies, customs and usages set forth in the petition; restraining respondents from retaliating against any individual for his/her participation in this lawsuit; finding that petitioner was a permanent and/or tenured employee of respondent prior to the July 30, 2014 termination of his employment; finding that respondents' termination of petitioner's employment was in violation of CPLR 7803(3); requiring respondents to reinstate petitioner, and awarding petitioner incidental damages dues to respondents' unlawful termination of his employment.

	<u>Papers Numbered</u>
Notice of Petition- Verified Petition- Exhibits.....	1-4
Verified Answer-Affidavits-Exhibits.....	5-10
Verified Reply Affirmation-Affidavit-Exhibits.....	11-15

Upon the foregoing papers the petition is determined as follows:

In this Article 78 proceeding, petitioner Joselyn Espinosa challenges the termination of his employment with New York City Department of Correction without notice and a hearing. According to petitioner, he was a tenured employee when he was notified that he was terminated effective July 30, 2014.

Respondents assert that petitioner was a probationary employee on the date of his termination, and that the decision to terminate him was lawful, reasonable, and a proper exercise of discretion.

Petitioner Jocelyn Espinosa was appointed to the position of Corrections Officer with the New York City Department of Correction (DOC) on December 22, 2011. Prior to his appointment, petitioner signed a Notice of Condition of Probation which stated that his appointment was subject to his successful passing of the required probationary period, a background investigation and a medical examination. He acknowledged that his probationary period was twenty four (24) months, and that it “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, absences without leave or suspension from duty without pay, etc.” It is undisputed that, at the time of petitioner’s original appointment, petitioner’s probationary period was scheduled to end on December 21, 2013, at the earliest.

Petitioner was assigned to the Robert N. Davoren Complex on Riker’s Island. On February 28, 2013, petitioner was assaulted by an inmate while at work, and as a result of this incident he was on sick leave and absent from work from February 28, 2013 to April 26, 2013, for a total of thirty nine (39) work days. Prior to returning to work he was evaluated by a DOC’s House Management Division doctor. Petitioner alleges that said doctor informed him that he was being placed on light duty, and may be transferred to a different facility. Petitioner alleges that when he returned to work, his job duties and assignment remained the same, and that he was on light duty in name only. Petitioner was re-evaluated on May 27, 2013, at which time he was taken off light duty. He alleges that he continued to perform the same job duties and assignment after he was taken off light duty.

On October 12, 2013, while at work, petitioner was assaulted by another inmate. As a result of this incident, petitioner was on sick leave and absent from work from October 14, 2013 to October 25, 2013, a total of eight (8) work days. Prior to returning to work, he was evaluated by a DOC doctor and placed on light duty. Petitioner alleges that he was placed on light duty in name only, and did not have any restrictions on his job duties. On November 25, 2013, petitioner was re-evaluated and taken off light duty. It is alleged that his job duties did not change, and that he was assigned to the same posts and

duties that he had when he was on light duty.

Petitioner asserts that during his probationary period, his only other absences from work consisted of a total of seven (7) sick days, plus an additional sick day on March 30, 2014, which he claims occurred after the probationary period ended. Petitioner alleges that during his probationary period he was absent from work, or otherwise unable to perform his job duties, for a total of fifty four (54) days, and therefore his probationary period was set to end on March 9, 2014. He further alleges that he was a model employee, and that Warden Antonio Cunin conducted an “end-of probation” evaluation in December 2013, and recommended that petitioner should become a permanent employee.

Petitioner alleges that in late April 2013, the DOC unlawfully attempted to extend his probationary period until November 1, 2014, without any explanation. It asserted that this extension of probation occurred under suspicious circumstances, in that a reporter from the Daily News obtained a copy of the October 12, 2013 assault, and wrote a scathing article about dysfunction within the DOC. It is further alleged that the DOC coerced petitioner into signing an agreement which extended his probation period until November 1, 2014. Petitioner alleges that he was terminated from his employment, effective July 30, 2014, and was not given any reason for said termination. He further alleges that at the time he was terminated he was a permanent and tenured employee, and was not provided any rights pursuant to Section 75 of the Civil Service Law.

Respondents assert that at the time petitioner was terminated he was a probationary employee. It is asserted that petitioner’s original probationary period of December 21, 2013, was extended to May 1, 2014, due to his absences from work. The DOC has submitted copies of petitioner’s attendance records which establishes that he was absent from work, on days he was scheduled to work ninety three (93) work days.¹ During petitioner’s probationary period petitioner used four (4) days of sick leave in 2012; forty eight (48) days of sick leave in 2013; and had forty one (41) work days of medically monitored return in 2013(MMR). The DOC records also demonstrate that petitioner was late to work on two (2) dates in 2012 and one (1) date in 2013. In calculating the extension of probation, the DOC considered on a day to day basis the days the Correction Officer was required to work, but did not work, and does not include scheduled days off.

Respondents assert that petitioner was placed on limited duty from April 28, 2013 to May 26, 2013 and from October 25, 2013 to November 22, 2013, as he had been injured and was monitored when he returned to work. In support of this claim, respondent has submitted an affidavit from Willa Verbal, a DOC Captain, assigned to the

¹Respondents mistakenly state that the total number of sick days and MMR days is 94.

Davoren Center. Captain Verbal states that she directly supervises Correction Officers in this facility and assigns them their duties and that she was familiar with Mr. Espinosa's duties and assignments during his probationary period. She states that at the time Mr. Espinosa was placed on MMR, the DOC Health Management Division had classified him as Category III MMR, meaning that he was suffering from serious physical or psychological limitations that prevented him from being able to work a normal tour of duty. She states that plaintiff was assigned substantially limited duties from April 28, 2013 to May 26, 2013 and from October 25, 2013 to November 22, 2013, which consisted of monitoring an ongoing construction project and escorting construction workers throughout the Davoren Center, or being stationed in a control room, and that neither post involves inmate contact. She states that during said periods of time petitioner was not assigned to and did not perform the full range of duties he previously had been assigned.

The DOC determined that petitioner had not performed his full duties and completed his probationary period by December 21, 2013, and therefore his probationary period was extended until he completed one hundred thirty nine (139) additional workdays as a probationary Corrections Officer. The DOC thus extended petitioner's probationary period from December 21, 2013 to May 1, 2014. On April 24, 2014, a Personnel Determination Review was prepared for petitioner, in which Deputy Commissioner Alan Vengersky recommended that petitioner's probationary period be extended "due to his MMR, attendance, punctuality and disciplinary records". Said review was executed the same day by Acting Commissioner Mark Cranston who extended petitioner's probationary period, day for day, for another six (6) months. Petitioner executed a Notice of Extension of Probation Period on May 1, 2014, which clearly states that his probationary period has been extended, "DAY FOR DAY (12/22/13-05/01/14) +6 months (05/02/14-11/01/14), and set forth the reason for said extension as punctuality, MMR, attendance and disciplinary records".

With regard to petitioner's punctuality and attendance, the DOC's records establish that petitioner was required to undergo attendance counseling on August 10, 2012,, and April 29, 2013, and punctuality counseling on December 5, 2012, January 7, 2013, and April 29, 2013. On October 10, 2013, then Warden Antonio Cunin prepared a Probationary Correction Officer Evaluation Report, in which he indicated petitioner had not been subject to a command discipline; that he did not have a satisfactory attendance record; recommended that petitioner continue in his capacity as a Probationary Correction Officer, "Pending Improvement"; and noted that petitioner "Needs Improvement in Attendance Counseling". Petitioner was presented with the report and signed it on October 25, 2013.

Petitioner was subject to discipline on two (2) occasions. He was charged with

failure to efficiently perform his duties on May 14, 2012, in that he failed to provide safety and security to inmates, by allowing three (3) inmates to enter a cell, where they engaged in a fist fight, and the fight continued after they exited the cell. He was charged with failure to follow Chemical Agents Directive 4501R-F by not promptly dispensing his chemical agent to defend another inmate against an imminent physical attack and to maintain the safety and security of the facility, allowing the incident to escalate. In addition, was charged with the failure to write up a written report on May 15, 2012, as ordered, prior to leaving the facility. Petitioner was given a corrective interview on June 20, 2012.

The second disciplinary action arose out of the October 13, 2013 assault by an inmate, and resulted in petitioner's termination. DOC's Investigation Division (ID) conducted an investigation of the incident which included the review of surveillance video, interviews with petitioner and inmates, and a review of certain reports and records. Florence F. Finkle, Deputy Commissioner, Office of Excellence, Investigation Division in a letter sent to Alan Vengersky, Deputy Commissioner, Human Resources and Training, and dated July 11, 2014, recommended that petitioner be terminated as a probationary correction officer for his use of excessive force against the inmate. Deputy Commissioner Finkle determined that petitioner and the inmate had argued before their physical interaction; that the inmate was agitated and approached petitioner, and that although the inmate slapped petitioner's hand away, he responded with force that was not proportionate to the threat that the inmate presented and did not use alternative means to resolve the situation. She stated in her letter that petitioner repeatedly denied arguing with the inmate, and that based upon the accounts of the inmates and the video, petitioner's statements in this regard were false. She acknowledged that petitioner had sustained a concussion and other injuries in this altercation, and based upon his condition determined that petitioner had violated the department's use of force policy before he had been assaulted by the inmate. She concluded that petitioner had violated seven (7) departmental policies. Deputy Commissioner Finkle stated that in view of the injury sustained by Mr. Espinosa, and the fact that criminal charges were filed against the inmate who assaulted him, ID reviewed the case and the video with DOC Commissioner Ponte who determined that petitioner should be terminated.

On July 29, 2014, a second Personal Determination Review was prepared for petitioner, following ID's investigation. Said review included a copy of Deputy Commissioner Finkle's July 11, 2014 letter; stated that petitioner had violated seven departmental policies, used excessive force against an inmate, and misled investigators during ID's investigation. It was also noted that petitioner had received a corrective interview, three (3) instances of attendance counseling and three (3) instances of punctuality counseling. It was requested that petitioner be terminated as a preliminary

Corrections Officer. Petitioner was provided with a notice of termination of his services as a probationary Correction Officer dated July 30, 2014, which was effective as of said date.

Petitioner counsel in his reply affirmation, alleges that the the DOC had a “near-universal policy wherein it would not count a Correction Officer’s absences, suffered as a result of a line of duty injury, against the Correction Officer’s probationary period” and that the DOC’s deviation from this policy, without an explanation, is arbitrary and capricious.

In support of this proposition, petitioner has submitted an affidavit from now retired Warden Cunin. It is further asserted that the days petitioner was classified as Category III MMR he worked the same posts and duties that he had prior to the assaults, and therefore as he performed the same duties as full duty Correction Officers, the MMR days should not be included so as to extend the period of probation. Counsel asserts that Captain Verbal’s affidavit is speculative at best, as she does not state that she personally observed petitioner, and asserts that she worked a different shift than the petitioner.

The court notes that the petition is verified by counsel and that petitioner has not submitted an affidavit. Both the verified petition and reply affirmation contain a single undecipherable signature, with the name of the law firm above the signature line and the names of three attorneys typed beneath the signature line. However, the signing of the verified petition and reply affirmation in this manner does not confirm to the provisions of 22 NYCRR 130-1.1-a.

The employment of a probationary employee may be terminated without a hearing and without a statement of reasons in the absence of a demonstration that the termination was in bad faith, for a constitutionally impermissible or an illegal purpose, or in violation of statutory or decisional law (*see Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]; *Matter of Johnson v Katz*, 68 NY2d 649, 650[1986]; *Matter of York v McGuire*, 63 NY2d 760, 761[1984]; *Matter of Capece v Schultz*, 117 AD3d 1045, 1046 [2d Dept 2014]; *Matter of Lane v City of New York*, 92 AD3d 786, 786-787 [2d Dept 2012]; *lv to appeal den* 19 NY3d 810[2012]; *Matter of Johnson v New York City Dept. of Educ.*, 73 AD3d 927 [2d Dept 2010]; *Walsh v New York State Thruway Auth.*, 24 AD3d 755 [2d Dept 2005]; *Matter of Wilson v Bratton*, 266 AD2d 140, 141 [1st Dept 1999]). Judicial review of the discharge of a probationary employee is limited to whether the determination was made in bad faith or for the other improper or impermissible reasons set forth above (*see Matter of Johnson v Katz*, 68 NY2d at 650; *Walsh v New York State Thruway Auth.*, 24 AD3d at 757).

The DOC calculates extensions of probation pursuant to DOC Rule 3.30.02 and Rule 5.2.8 of the Personnel Rules and Regulations of the City of New York, which provides as follows : “(b) Notwithstanding the provisions of paragraphs 5.2.1, 5.2.2 and 5.2.8(a), the probationary term is extended by the number of days when the 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”.

Here, petitioner has failed to demonstrate that he was terminated in bad faith, for a constitutionally impermissible or for illegal purpose, or in violation of statutory or decisional law (*see Matter of Lane v City of New York*, 92 AD3d 786, 786-787[2d Dept 2012], *lv to appeal den* 19 NY3d 810 [2012]; *Matter of Johnson v New York City Dept. of Educ.*, 73 AD3d 927 [2d Dept 2010]; *Matter of Ward v Metropolitan Transp. Auth.*, 64 AD3d 719 [2d Dept 2009]; *Walsh v New York State Thruway Auth.*, 24 AD3d 755, *supra*)).

Petitioner’s assertion that his probationary period ended sometime in April 2014, and was improperly extended is based upon an improper calculation of his sick leave and limited duty status, or MMR, and is not supported by the documentary evidence. Petitioner’s counsel in his reply affirmation improperly seeks to amend the petition in order to assert new allegations.

The DOC’s calculation of petitioner’s probationary period was not arbitrary and capricious (*see Matter of Beck v Walker*, 286 AD2d 996 [4th Dept 2001][pursuant to 4 NYCRR 4.5 (g), petitioner’s probationary period should have been extended one workday for every workday he missed]; *Tomlinson v Ward*, 110 AD2d 537, 538 [1st Dept 1985], *affirmed* 66 NY2d 771[1985] [“The purpose of excluding from the probationary term periods during which a probationer is not at work performing his or her duties is not punitive . . .It is designed to enable the appointing officer to ascertain the fitness of the probationer and to give the probationer a reasonable opportunity to demonstrate the ability to perform the duties of the office”]). The record supports respondents’ contention that, on May 1, 2014, petitioner was still a probationary employee, as his probationary status had been extended by a number of additional work days corresponding to the number of days that he was on sick leave and the number of MMR days.

The documentary evidence establishes that petitioner executed the Notice of Conditions of Probation on October 22, 2011, and thus was aware that he could be terminated at any time and that the number of days that he did not perform the duties of a

Correction Officer due to sick leave, annual leave, medically monitored duty, absence without leave or suspension from duty without pay, would not be included in his probationary period.

The documentary evidence further establishes that petitioner consented to the extension of his probationary period when he executed the notice on May 1, 2014. Petitioner's claim that he was afraid of losing his job and was coerced into signing this notice, is without merit. At the time petitioner executed said notice he was on probation, and therefore could have been terminated if he did not consent to the extension of the probationary period.

Petitioner's assertion that the DOC had an informal policy of not counting sick days due to line of duty injuries, and respondent's departure from this policy without explanation is arbitrary and capricious, is without merit. Petitioner has not demonstrated that the DOC failed to include sick time for line of duty injuries when calculating a Correction Officer's probationary period. The affidavit submitted by former Warden Cunin in this regard is insufficient to establish the existence of any such policy and its application to probationary Correction Officers. Furthermore, such a policy is contrary to the provisions of DOC Rule 3.30.02 and Rule 5.2.8 of the Personnel Rules and Regulations of the City of New York. Respondents cannot be required to apply an erroneous or illegal policy to the petitioner, and thereby perpetuate error.

With respect to petitioner's limited duty status, or MMR petitioner has failed to establish that he was not placed on limited duty during the relevant time periods. Petitioner does not deny that he was categorized as Category III MMR by the DOC's doctors. As petitioner's counsel lacks personal knowledge of the facts, his reply affirmation is insufficient to challenge the factual statements set forth in Captain Verbal's affidavit.

Finally, respondents have established that petitioner's termination as a probationary Correction Officer had a rational basis and is supported by the record. Respondents were not required to follow the recommendations of former Warden Cunin. Respondents conducted an investigation of petitioner's performance of his duties in connection with the October 13, 2013 incident and determined that he had violated the department's use of force policies. In addition he had also received a corrective interview, and counseling for attendance and punctuality. Respondents, thus, have established that its termination of petitioner, a probationary employee was not made in bad faith or for the other improper or impermissible reasons.

Accordingly, it is

ORDERED AND ADJUDGED that the relief sought in the petition is denied in its entirety; and it is

ORDERED AND ADJUDGED that the petition is dismissed.

Dated: June 19, 2015

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Howard G. Lane, J.S.C.