

<b>Matter of Singh v Schriro</b>
2015 NY Slip Op 31334(U)
May 4, 2015
Supreme Court, Queens County
Docket Number: 23372/13
Judge: Howard G. Lane
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IA PART 6

-----  
In the Matter of the Application of PAUL SINGH,

Index No 23372/13

Petitioner,

Motion Date March 18, 2014

-against-

Motion Seq. No. 1

DORA B. SCHIRO, COMMISSIONER, NEW  
YORK CITY DEPARTMENT OF CORRECTION,  
NEW YORK CITY DEPARTMENT OF  
CORRECTION, CITY OF NEW YORK,

Motion Cal. No. 173

Respondents.  
-----

Papers  
Numbered

Notice of Petition-Petition-Affidavit of Service.....	1-4
Notice of Cross Motion-Memorandum of Law.....	5-8
Opposing Affirmation.....	9-10
Reply Memorandum of Law.....	11-12
Respondent's Verified Answer and Memorandum of Law.....	13-15
Reply.....	16-17

This Article 78 petition by petitioner Paul Singh for a judgment annulling respondents' determination terminating his employment and reinstating him to his position as a probationary Correction's Officer, restoring all back pay, service time, seniority and all fringe benefits, and awarding costs, disbursements and reasonable attorney's fees is denied.

Via previous application to this Court, petitioner moved for the same relief and

Respondents Dora B. Schriro, Commissioner, New York City Department of Correction, New York City Department of Correction, and City of New York cross moved for an order dismissing the petition pursuant to CPLR 3211(a)(7) on the grounds that it failed to state a cause of action. The cross-motion was denied by Order of this Court dated August 4, 2014 and in said order respondents were granted leave to serve and file an Answer and supporting Affidavits, and the petition was re-noticed to be heard.

Upon being re-noticed, the Court finds as follows:

Petitioner Paul Singh was hired as a probationary correction officer on May 16, 2013, completed his training at the Department of Correction's (DOC) Academy and graduated from said Academy on August 28, 2013. Petitioner was terminated on August 30, 2013, and was not provided with any reason for his termination.

Prior to commencing employment with the DOC, petitioner was employed part-time by Gonzales Consulting Services, Inc. (Gonzales), where he was part of a security detail at a federal office building located at 201 Varick Street in New York County. Petitioner also had a position with G4S Security, a federal contractor. While employed by Gonzales, petitioner worked as a close circuit TV security monitor. During the period of time petitioner was employed by Gonzales at 201 Varick Street, Thomas P. Hayes, the Fire Safety Director for said building was charged with the theft of money and property from the offices of the U.S. Department of Homeland Security, Immigration and Customs Enforcement and the Department of Veterans' Affairs. On October 14, 2011, criminal charges were filed against Hayes in the United States District Court, Southern District of New York. On January 18, 2012, Hayes entered a guilty plea, and while awaiting sentencing died on May 1, 2012. An order of nolle prosequi was entered with respect to Hayes on June 26, 2012.

Petitioner alleges that during the course of his employment at 210 Varick Street he was not informed of the charges against Hayes, or of the circumstances leading to his arrest and prosecution. He alleges that after Hayes death, while he was working for Gonzales at another building, a colleague informed him of Hayes arrest and death. He alleges that his interactions with Hayes at 201 Varick Street consisted of cursory salutations.

Petitioner alleges he was questioned about Hayes by the Department of Homeland Security on August 20, 2013, while he was at the Academy. He alleges that he was never informed that he was the subject or target of any investigation by said agency, and that he was asked questions about his shift. He states that he answered truthfully that it was common practice for security officers to relieve each other near the end of their respective

shifts, provided that they had performed their full eight to twelve hour shift. He alleges that his supervisors and employer Gonzales was fully aware of this practice, and that he was never discipline or counseled regarding this practice.

Petitioner alleges that during his exit interview, DOC Captain Loomis informed him that he was being terminated because of his interview with Homeland Security. He alleges that Loomis did not elaborate on this, and only directed him to write "I was falsely accused. I have no knowledge of what they are accusing me of". He alleges that Captain Loomis advised him that if he obtained a letter from the Department of Homeland Security that the "allegations" against him were dropped, he should bring it to the DOC and should have "no problem" getting his position back. Petitioner alleges, based upon his own inquiries, that there are no pending case or allegations against him. He alleges that the Department of Homeland Security informed him that it was not customary for them to issue letters of exoneration, and that if there were any continued impediment to his reinstatement with the DOC, the matter would rest with the New York City Department of Investigation(DOI). Petitioner alleges that the DOI did not pursue any investigation or action with respect to him.

Petitioner alleges that he was an exemplary employee while employed by Gonzales and at GS4 Security, Inc., and attaches to the petition reference letters from his former employers. He alleges that he left his former employment voluntarily and amicably, in order to take the position with the DOC.

Petitioner further alleges that after the Department of Homeland Security closed its inquiry and did not take any further action, the DOC through its Personnel Division stated that he was terminated because he failed to reveal in his employment application that he had left his position at Gonzales while he was "under investigation". Petitioner alleges that when it became apparent that there was no evidence of that he was ever investigated while he was employed at Gonzales, DOC's Deputy Commissioner of Human Resources "later stated that Petitioner was terminated for falsifying his time when employed by the federal contractor". Petitioner alleges that he was never implicated in any wrongdoing by the Department of Homeland Security or the New York City Department of Investigation, and was never the subject of an investigation, and that respondent's "newly minted" reason for his termination is inaccurate and also impugns his character and integrity.

Petitioner alleges that respondents' decision to terminate him was arbitrary and capricious and made in bad faith. Petitioner seeks to be reinstated to his probationary position, with full back pay, seniority rights and all benefits. Petitioner also seeks to recover costs, disbursements and reasonable attorney's fees.

Respondents argue that as petitioner was a probationary employee, he could be terminated without notice and without a hearing, so long as the termination was not based on a constitutionally impermissible reason or made in bad faith. They assert that petitioner is unable to establish that the termination was made in bad faith, and that even if the termination decision was based on an incorrect reason, this is insufficient as a matter of law to annul the termination.

Petitioner asserts that respondent gave conflicting reasons for his termination, and that its argument that the DOC was under no obligation to investigate petitioner or provide any reason for his termination supports his contention that the DOC was acting on whim and caprice, lacks a factual and rational basis, and was arbitrary and capricious.

Respondents further assert that petitioner had no legal right to a statement of the reasons underlying the termination; that unofficial and incorrect statements by DOC officials regarding the basis underlying petitioner's termination are insufficient to overturn the decision to terminate him; and that petitioner has failed to establish that the DOC's decision to terminate him was made in bad faith.

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*, 117AD3d 1045 [2d Dept 2012]; *Matter of Lane v City of New York*, 92 AD3d 786, 786-787 [2d Dept 2012]; *leave to appeal denied*, 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). Where, the petitioner's claim is based on "bad faith" the petitioner bears the burden of demonstrating respondent's bad faith by competent evidence, rather than speculation (*see Swinton v Safir*, 93 NY2d 758, *supra*; *Bourne v New York City Transit Auth.*, 274 AD2d 581 [2nd Dept 2000]; *Matter of Soto [Koehler]*, 171 AD2d 567, 568 [1st Dept 1991]; *see also Matter of Talamo [Murphy]*, 38 NY2d 637, 639, [1976]). The function of the court "should not be to second guess . . . [but] is simply to determine if petitioner has shown bad faith on the part of the respondent" (*Soto v Koehler*, 171 AD2d at 569).

The Court finds that in the instant case, petitioner fails to point to any competent evidence demonstrating that the DOC's determination to terminate his employment was made in bad faith, for an impermissible reason, or in violation of statutory or decisional law. His claim that after he was terminated various DOC personnel made inaccurate and unofficial statements regarding his prior employment is insufficient to establish that his employment was terminated in bad faith (*see Matter of Lane v City of New York*, 92 AD3d at 786-787; *Walsh v New York State Thruway Auth.*, 24 AD3d at 756). Furthermore, the record reveals that petitioner has admitted to "discrepancies on his time sheets" while working for his former employer. As the Appellate Division, Second Department held in *Moran v. Triborough Bridge & Tunnel Authority*, 188 AD2d 601 [2d Dept 1992], the Triborough Bridge & Tunnel Authority did not act in "bad faith" when it terminated a probationary employee after an investigation revealed that petitioner was providing inaccurate times on his time sheets while working at the same time for a second employer, and a timecard revealed that the petitioner indicated a purported arrival time at one employer, but that time was earlier than the time he punched out from work at the Triborough Bridge and Tunnel Authority. As such, the respondents' reason in the instant matter did not constitute bad faith and petitioner has failed to meet his burden in this proceeding.

Furthermore petitioner's speculative allegations of bad faith are insufficient to warrant a hearing (*see Walsh v New York State Thruway Auth.*, 24 AD3d 755, *supra*; *Matter of Bourne v New York City Tr. Auth.*, 274 AD2d 581 [2d Dept 2000]).

Accordingly, the petition is dismissed.

This constitutes the decision and order of the Court.

Dated: May 4, 2015

.....  
**Howard G. Lane, J.S.C.**