

Matter of Wong v Ponte
2017 NY Slip Op 31845(U)
August 14, 2017
Supreme Court, Queens County
Docket Number: 14684/16
Judge: Howard G. Lane
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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IA PART 6

In the Matter of JIMMY WONG,

By: Lane, J.

Petitioner,

Index No. 14684/16

for a Judgment pursuant to Article
78 of the Civil Practice Law and
Rules

Date: August 14, 2017

Motion

Date March 6, 2017

-against-

Motion

JOSEPH PONTE, Commissioner of
Correction, et al.,

Cal. No. 196

Motion

Respondents.

Seq. No. 1

Petitioner, a former probationary correction officer for the New York City Department of Correction (DOC), brings this Article 78 proceeding seeking (1) to annul the determination of respondent DOC that terminated his employment as a probationary correction officer; (2) reinstatement as a correction officer; (3) an award of back pay and benefits; and (4) a declaration that his employment status is permanent.

Petitioner asserts that the determination to terminate his employment should be annulled on the grounds that: (1) he was removed from his position by Deputy Commissioner of Human Resources, Nadene M. Pinnock, who was not authorized under law to remove him from service; (2) he was no longer a probationary

employee but a permanent civil service employee with Civil Service Law protection against summary and arbitrary removal from service on the date he was terminated; respondent Department of Citywide Administrative Services unjustly omitted the applicable probationary period for his job from its Notice of Examination which left him in a perpetual state of uncertainty as to the status of his probation; (4) he was incorrectly classified as a probationary employee but, as such, he could only be removed from employment for unsatisfactory conduct or performance yet he was removed for reasons other than that because his performance record was impeccable; (5) the respondent Commissioner Ponte failed to give him any reason for his removal from service; (6) he was not given written notice of his termination at least one week from his termination from employment and was, thus, denied his statutory right to request and have an interview with the appointing authority; and (7) respondent DOC failed to adhere to its own policy on evaluating probationary officers pursuant to Directives #2219 and 2230.

In their verified answer to the petition, the respondents indicate that the petitioner was appointed as a Probationary Correction Officer on August 6, 2015. Petitioner took Correction Officer Exam No. 3300. The evidence submitted herein by the respondents demonstrates that the Notice of Examination for Correction Officer Exam Nos. 3300, 3301, 3302 and

3303 informs applicants such as the petitioner that the probationary period for the Correction Officer position is twenty-four (24) months. After taking and passing Exam No. 3300, the petitioner was assigned list number 179 and was subsequently appointed as a probationary correction officer. Contrary to the petitioner's contention, the evidence submitted by the respondents also establishes that, on June 17, 2015, petitioner signed a Notice of Conditions of Probation form acknowledging that the probationary period for each newly appointed correction officer is twenty-four (24) months and may be extended by the number of days an employee does not perform the duties of the position including sick leave, annual leave, absence without leave or suspension from duty without pay, etc.

Petitioner attended academy training from August 6, 2015 to December 13, 2015. Petitioner received supplemental education and training in deadly physical force, range preparation, chemical agents (aerosol), fire safety, CPR/first aid, human relations sensitivity, and peace officer training. Beginning December 14, 2015, the petitioner was assigned to work at the Anna M. Kross Center (AMKC) at Rikers Island. It is undisputed that on July 30, 2016, when petitioner was assigned to Housing Area Quadrant Upper 7 Tier at the Anna M. Kross Center, an inmate-to-inmate fight occurred there, which resulted in a slashing incident.

Respondents state that surveillance footage of the incident was reviewed in an effort to analyze the slashing incident. The observed footage revealed that the petitioner failed to complete a mandatory 1500 hour lock-in process and had abandoned his post without properly being relieved. In addition, it was revealed that the petitioner failed to notify the housing area supervisor that the inmates were refusing to cooperate with lock-in procedures. The footage also revealed that the petitioner left his post with multiple cell doors open and unsecured. These actions were in direct violation of several departmental rules and regulations.

On August 8, 2016, the petitioner's supervisor AMKC Deputy Warden Antoinette Cort charged him with violating four (4) department rules and regulations regarding the incidents that occurred on July 30, 2016, to wit: Departmental Rule and Regulation 3.05.120 providing that members of the department are responsible for the efficient performance of their duties and for the proper supervision of inmates under their direction; Departmental Rule and Regulation 3.05.150 providing that an employee's authority over a post ceases at the end of the employee's tour of duty when properly relieved; Departmental Rule & Regulation 4.35.080 providing that members of the department shall cooperate in maintaining the security and good order of the facility; and Departmental Rule and Regulation; and Directive

#4257 for failure to perform or negligent performance of routine security checks, including but not limited to, failing to ensure all doors, gates, cells, pens, etc. are secured and locked at all times.

After a review and investigation of the incident, AMKC Warden Maxsolaine Mingo recommended the petitioner's termination as a result of the petitioner's failure to follow basic and imperative security procedures as charged, which ultimately resulted in the slashing incident. Thereafter, First Deputy Commissioner Dina Simon reviewed Warden Mingo's recommendation, pursuant to the established written authority delegated to her by Commissioner Joseph Ponte to appoint and remove Department of Correction employees and, on September 15, 2016, determined that the petitioner should be terminated.

Respondents also demonstrate that policy directives 2219 and 2230, which were alleged by the petitioner to have been violated and not followed as required in evaluating probationary employees, were replaced and rescinded on October 19, 2015 and September 8, 2005, respectively, and were not in effect when the petitioner's misconduct was committed and led to his termination.

Lastly, the petitioner's contention that he was not a probationary employee at the time of the incident and on the date of his termination is rejected because it is belied by the respondents' documentary evidence. Respondents' submissions

clearly establish that the petitioner was subject to a 24-month probationary employment period of which he was informed and had acknowledged, in writing, prior to his appointment as a probationary correction officer. This evidence was not rebutted.

"A probationary employee may be dismissed for almost any reason, or for no reason at all, and the employee has no right to challenge the termination in a hearing or otherwise, absent a showing that he or she was dismissed in bad faith or for an improper or impermissible reason. The burden falls on the petitioner to demonstrate by competent proof that bad faith exists, or that the termination was for an improper or impermissible reason" (*Castro v. Schriro*, 140 AD3d 644 [2016][citations omitted]); see, *Matter of York v. McGuire*, 63 NY2d 760; [1984]; *Matter of Swinton v. Safir*, 93 NY2d 758 [1999]; *Matter of Che Lin Tsao v. Kelly*, 28 AD3d 320 [2006]).

Here, the factors leading to the decision to terminate the petitioner are not in dispute. The petitioner does not contest that he ignored basic and imperative security procedures and violated department rules regulations as charged, which led to the slashing incident and provided a sufficient basis for his termination. As such, the petitioner has failed to meet his requisite burden of demonstrating bad faith or that his termination was for an improper or impermissible reason and dismissal of the petition is warranted.

The petitioner's remaining contentions are without merit.

Accordingly, petitioner's application is denied and the petition is hereby dismissed.

Howard G. Lane, J.S.C.