

**Matter of Tchodie v Brann**

2019 NY Slip Op 32503(U)

August 23, 2019

Supreme Court, New York County

Docket Number: 154601/19

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

POHOLASSIKI TCHODIE,

Petitioner,

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

Index No.: 154601/19  
DECISION/ORDER

-against-

CYNTHIA BRANN, Corrections Commissioner of the  
New York City Department of Corrections, THE NEW  
YORK CITY DEPARTMENT OF CORRECTIONS,  
and THE CITY OF NEW YORK,

Respondents.

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**HON. CAROL R. EDMEAD, J.S.C.:**

In this Article 78 proceeding, petitioner Pohllassiki Tchodie (Tchodie) seeks a judgment to overturn an order of the respondent New York City Department of Corrections (DOC) as arbitrary and capricious (motion sequence number 001). For the following reasons, this petition is granted.

**FACTS**

Tchodie is a former DOC corrections officer. *See* verified petition, ¶ 2. Tchodie’s employment commenced on December 19, 2016 and carried a two-year probationary period that was initially set to expire on December 18, 2018. *Id.* However, he took 15 days of annual leave time during those first two years of employment, which resulted in his probationary period being extended by another 15 days until January 8, 2019. *See* verified answer, ¶¶ 31-32; exhibit 5. DOC terminated Tchodie’s employment on January 9, 2019. *Id.*, ¶ 36; exhibit 7. Tchodie

thereafter commenced this Article 78 proceeding on May 3, 2019, and DOC filed an answer on July 10, 2019. *See* verified petition; verified answer. The matter is now before the court (motion sequence number 001).

#### DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1<sup>st</sup> Dept 1996). A determination will be deemed "arbitrary and capricious" if it is "without sound basis in reason, and in disregard of the facts." *See Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231.

Here, the relevant employment termination rule is set forth in both Section 5.2.8 of the "Personnel Rules and Regulations of the City of New York" and Section 3.30.020 of DOC's "Employee Rules and Regulations." The former provides, in pertinent part, 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 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."

*See* verified answer, exhibit 3-A. The latter provides, in pertinent part, as follows:

“(b) The period of probationary service for probationary employees shall be extended by the number of days the employee does not perform the duties of the position because of sick leave, annual leave, modified duty, jury duty, death in family, leave without pay, compensatory time, medically monitored duty, absence without leave or suspension from duty without pay. The employment of the probationer may be terminated at anytime during any such additional period.”

*Id.*, exhibit 4. In *Matter of Norman v Schriro* (2014 NY Slip Op 30955(U) [Sup Ct, NY County 2014]), this court (Moulton, J.) noted that:

“DOC Rule 3.30.020 and Rule 5.2.8 of the City Personnel Rules state that a Correction Officer's probationary period is automatically extended by one day for every day that he or she is absent or on limited duty. *See* DOC Rule 3.30.020, Rule 5.2.8 of the City Personnel Rules; *see also Matter of Smith v New York City Dept. Of Correction*, 292 AD2d 198 (1<sup>st</sup> Dept 2002) (probationary period extended by number of days Correction Officer was absent from full duty). *Probationary periods are extended through additional work days that one must perform, not calendar days. See Matter of Beck v Walker*, 286 AD2d 996 (4<sup>th</sup> Dept. 2001). Furthermore, General Construction Law (GCL) § 20 provides that in computing any specified range of dates for employment purposes, the date upon which one's employment commences is included in a calculation of days upon which one worked. As such, *employment that commences on the first day of the year would end on the last day of the year, not the first day of the following year assuming that one had worked on the first day of the year.*”

2014 NY Slip Op 30955(U), \*4 ([Sup Ct, NY County 2014) (emphasis added).

Here, Tchodie's petition somewhat counterintuitively asserts that he took 16 vacation days during his probationary period. *See* verified petition, ¶¶ 3-5. However, his assertion is contradicted by DOC's personnel records which establish that Tchodie actually took only 15 days of annual leave time during his probationary period. *See* verified answer, ¶ 31; exhibit 5. The court notes that Tchodie did not submit any evidence to support his 16-day allegation, and therefore accepts DOC's 15 day total instead, based on the aforementioned DOC records.

DOC asserts that “petitioner's fifteenth day occurred on January 9, 2019,” and that Tchodie's claim that he “acquired tenured status on or before January 8, 2019 . . . is explicitly

refuted by the record.” See respondent’s mem of law at 6. This assertion is also inaccurate.

Instead, it is clear that adding 15 business days beginning on (and including) December 19, 2018 results in Tchodie’s probation period being extended until only January 8, 2019. As a result, DOC’s assertion that Tchodie’s “probationary period was scheduled to terminate at midnight on January 9, 2019” is incorrect, and Tchodie’s probationary period actually terminated at midnight on January 8, 2019. Therefore, DOC’s conclusion that “when [it] terminated petitioner on January 9, 2019, he was still serving his probationary period” is inaccurate, as a matter of law.

CSL § 75 provides, in pertinent part, as follows:

“1. Removal and other disciplinary action. A person described in paragraph (a) . . . of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown *after a hearing* upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service . . .”

CSL § 75 (emphasis added). CPLR 7803 (3) permits a claimant to petition to review “whether a determination was made in violation of lawful procedure.” As Justice Moulton found in *Matter of Norman v Schriro*, a corrections officer who has acquired civil service tenure as a result of the expiration of his/her probationary period is “entitled to full due process rights under Section 75 of the Civil Service Law,” and DOC’s summary termination of the officer after (s)he had acquired civil service protection “infringed upon [the officer’s] due process [rights] and resulted in [his/her] termination in violation of lawful procedure within the meaning of CPLR § 7803(3).” 2014 NY Slip Op 30955(U), \*5 ([Sup Ct, NY County 2014). The same factual scenario applies to Tchodie’s claim. The documentary evidence establishes that Tchodie acquired the status of a tenured civil servant by completing his period of probationary employment on January 8, 2019.

*See* verified answer, exhibit 5. As a result, CSL § 75 (1) (a) mandates that he could only be removed from his position as a corrections officer if DOC established that he had engaged in “incompetency or misconduct” at a hearing. It did not do so, and instead summarily terminated him on January 9, 2019. *Id.*, exhibit 7. CPLR 7803 (3) mandates that such a termination decision be vacated on the grounds that it was “made in violation of lawful procedure.” Tchodie has requested this relief, and is entitled to it for the reasons set forth above. *See* verified petition, ¶¶ 17-19. Accordingly, the court grants Tchodie’s Article 78 petition, vacates DOC’s January 9, 2019 termination order, and reinstates Tchodie to his position as a corrections officer.

#### DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

**ADJUDGED** that the petition for relief, pursuant to CPLR Article 78, of petitioner Pqholassiki Tchodie (motion sequence number 001) is granted as follows:

It is hereby

**ORDERED and ADJUDGED** that the determination of the respondent New York City Department of Corrections, dated January 9, 2019, terminating petitioner as a probationary corrections officer is vacated and annulled and petitioner is reinstated to said position with back pay from January 9, 2019, the date of termination. And it is further

**ORDERED** that counsel for Petitioner shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for Respondent.

Dated: New York, New York  
August 23, 2019

ENTER:

A handwritten signature in black ink, appearing to read 'C.R. Edmead', written over a horizontal line.

Hon. Carol R. Edmead, J.S.C.