

**Black v New York City Dept. of Corr.**

2019 NY Slip Op 32794(U)

September 20, 2019

Supreme Court, New York County

Docket Number: 155588/2018

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

-----X

MICHAEL BLACK,

Petitioner,

- v -

THE NEW YORK CITY DEPARTMENT OF CORRECTION,  
THE CITY OF NEW YORK

Respondents.

-----X

**DECISION + ORDER ON  
MOTION**

INDEX NO. 155588/2018

MOTION DATE May 2, 2019

MOTION SEQ. NO. 001

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 30  
were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

In this Article 78 proceeding, petitioner Michael Black, seeks a judgment annulling his termination and ordering that he be reinstated with back pay, interest thereon and benefits as a Correction Officer with the New York City Department of Corrections. Respondents The New York City Department of Correction and The City of New York (DOC), have answered the Petition and seek dismissal as petitioner has failed to meet his burden to challenge DOC's good faith decision to discontinue his probationary employment.

**BACKGROUND**

Black is a former DOC correction officer appointed as a probationary correction officer with DOC on May 26, 2011, who alleges he was terminated on February 15, 2018, for reasons that were arbitrary, capricious and in bad faith. (NYCEF Doc. No. 1, ¶¶1, 2). On September 18, 2014, Petitioner was designated as "Chronic Absent" due to his excessive absences from work. (NYSCEF Doc. No. 21). From October 4, 2014, to October 23, 2014, petitioner attended a 20-day inpatient treatment for "alcohol use disorder". (NYSCEF Doc. No. 17). Respondent contends that during petitioner's employment he repeatedly violated DOC's sick leave

regulations set forth in DOC Directive 2262; specifically, on May 28, 2015, he failed to appear for his scheduled appointment with DOC's Health Management Division (HMD), and on October 18, 2015, petitioner failed to report for scheduled duty. (NYSCEF Doc. Nos. 24, 25). In or around September 2015, petitioner began a leave of absence from DOC and remained on that leave for one year, through September 2016, to continue his treatment for alcoholism which condition he alleges worsened during his seven-year employment at DOC. (NYSCEF Doc. Nos. 1, ¶¶6 -7; and 25).

In seeking dismissal of the Petition, respondent alleges that throughout 2016, petitioner continued violating DOC's Sick Leave Policy, noting that on August 8, 2016, petitioner did not notify HMD of his return to his residence. (NYSCEF Doc. No. 25). On September 23, 2016, DOC received a Psychiatric Evaluation Report concerning petitioner's alcohol use and anger issues, indicating that petitioner was qualified to return to full duty. (NYSCEF Doc. No. 17). Thereafter, on March 15, 2017, petitioner entered into a one-year Negotiated Plea Agreement (NPA and/or Agreement) with DOC wherein he agreed to accept one year probation limited to violations of DOC's sick leave rules, regulations, directives and laws. (NYSCEF Doc. Nos. 1, ¶¶8-10; and 3).

During the probationary period, petitioner was arrested on April 20, 2017 and charged with driving while intoxicated, which led to his DOC firearm privileges being revoked. (NYSCEF Doc. Nos. 19 and 26). Petitioner was again arrested on August 15, 2017, for driving while intoxicated and reportedly entered a 28-day program; he did not, however, provide any documentation of his admission or discharge to DOC's HMD. (NYSCEF Doc. Nos. 23 and 27). On August 31, 2017, petitioner was placed in Extended Chronic Absent Status due to his continuing use of sick leave and remained on unlimited sick leave from August 31, 2017 to

January 10, 2018. (NYSCEF Doc. No. 21). During his unlimited sick leave, respondents contend that petitioner continued to violate DOC's Directive 2262R, by failing to provide HMD with required and requested documentation. (NYSCEF Doc. Nos. 20, 23 and 27). Petitioner was terminated on February 15, 2018 due to his repeated violations of DOC's Sick Leave Policy which in turn violated the terms of the NPA. (NYSCEF Doc. No. 15).

Petitioner commenced this special proceeding on June 13, 2018, seeking a judgement annulling his termination and seeking to be reinstated as a correction officer with back pay and benefits. Petitioner contends that notwithstanding the NPA, DOC acted in bad faith when it charged his attendance at treatment programs against sick leave instead of medical leave and when DOC failed to undertake the "interactive process" in response to his request for medical leave. (NYSCEF Doc. No. 1, ¶¶38-39).

Respondents maintain that the Petition should be dismissed because respondents repeatedly engaged in the interactive process with petitioner, and had ample good faith bases to terminate petitioner based on his repeated violations of DOC's Sick Leave Policy. Respondents aver that DOC, on multiple occasions, accommodated petitioner's request for inpatient treatment, by allowing him to use sick leave time, and permitting him to go on leave of absence starting in 2015, for one year to continue his treatment for alcoholism. During this time, respondents allege that petitioner failed to comply with DOC's Sick Leave Policy, specifically Directive 2262R, and thus, petitioner negotiated a plea agreement, with the advice of counsel, wherein he agreed to accept one-year probation in exchange for DOC settling disciplinary charges against him for his violations of DOC's Sick Leave Policy. (NYSCEF Doc. Nos. 3 and 18).

While on probation, petitioner was arrested twice and respondents maintain that petitioner repeatedly failed to provide HMD with necessary documentation in order to take

approved leave, consequently resulting in his termination for his continued violations of DOC's Sick Leave Policy. Respondents assert that petitioner cannot state a claim under either the New York City Human Rights Law, codified at New York City Administrative Code §§ 8-101 *et seq.* ("CHRL"), and the New York State Human Rights Law, codified at New York Executive Law §§ 290 *et seq.*, ("SHRL"), and that even if such claims could be read into the Petition, the proceeding should be dismissed as the Petition does not address or even acknowledge DOC's repeated attempts to accommodate petitioner's alcohol dependency and aggression, that preceded the NPA, such as petitioner's absence from scheduled HMD appointments, his failure to report for scheduled duty, or his failure to provide documentation in support of his sick leave. Finally, respondents request that if this court concludes that the Petition can be read to allege claims under the CHRL or SHRL, that the court direct petitioner to provide authorizations permitting respondents to obtain relevant information from his treating professionals.

#### STANDARD OF REVIEW/ANALYSIS

A probationary employee, may be discharged without a hearing, or statement of reasons, for any reason or no reason at all, in the absence of a demonstration that the dismissal was in bad faith, for a constitutionally impermissible reason, or in violation of the law (*Matter of York v McGuire*, 63 NY2d 760, 761, 469 NE2d 838, 480 NYS2d 320 [1984]; *Matter of Welsh v Kerik*, 304 AD2d 417, 757 NYS2d 430 [2003], lv denied 100 NY2d 510, 798 NE2d 347, 766 NYS2d 163 [1st Dept 2003]). Judicial review of such a determination "is limited to an inquiry as to whether the termination was made in bad faith" (*Matter of Johnson v Katz*, 68 NY2d 649, 650, 496 N.E.2d 223, 505 N.Y.S.2d 64 [1986]).

The burden of raising and proving such "bad faith" is on the employee and the mere assertion of "bad faith" without the presentation of evidence demonstrating it does not satisfy the

employee's burden (*Matter of Cotrijo v Ward*, 158 A.D.2d 345, 551 N.Y.S.2d 36 [1st Dept 1990]; *D'Aiuto v Department of Water Resources*, 51 AD2d 700, 701, 379 NYS2d 409 [1st Dept 1976] ["A mere belief of bad faith does not satisfy the requirement, or warrant a hearing."]).

On March 15, 2017, petitioner entered into the Agreement with DOC to resolve then-pending disciplinary charges against him, which were based on his repeated violations of DOC's Sick Leave Policy. (NYSCEF Doc. No. 3 and 18). Petitioner agreed that his probationary period would last for one year from the date of execution of the Agreement, but could be extended by the number of days he did not perform the full duties of his position because of sick leave or other absences from work. Based on the clear terms of the Agreement, petitioner agreed to waive his rights as a tenured employee for his probationary period, and "subject [him]self to termination as any other probationary employee." (id.).

Agreements in which a tenured or permanent employee waives his procedural and contractual protections are valid, as long as the employee has entered the agreement voluntarily and with no duress (see *Matter of Abramovich v Board of Educ. of Central School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 N.Y.2d 450, 455, 386 N.E.2d 1077, 414 N.Y.S.2d 109, cert den 444 U.S. 845, 100 S. Ct. 89, 62 L. Ed. 2d 58 [1979]; *Pagan v Board of Educ. of City School Dist. of City of New York*, 56 AD3d 330, 868 N.Y.S.2d 616 [1st Dept 2008]; *Matter of Newman v Fire Dept. of City of New York*, 47 AD3d 444, 850 N.Y.S.2d 51 [1st Dept 2008]). Petitioner has not alleged that he entered the Agreement unknowingly; nor has petitioner alleged facts to suggest that he was forced to execute the Agreement under duress. Rather, without citation to any proof, petitioner summarily contends that DOC did not undertake the "interactive process" in response to his request for medical leave, and terminated him arbitrarily, capriciously, in bad faith. (NYSCEF Doc. No. 1).

Attempting to set aside the clear terms of the Agreement, petitioner asserts that he retained CSL §75 due process rights as a tenured correction officer with regard to matters related to his arrests for driving while intoxicated in May and August, 2017 and that DOC could not terminate him under the terms of the Agreement for such matters. (NYSCEF Doc. No. 1, ¶¶34, 35). Petitioner does not address or even acknowledge DOC's repeated attempts to accommodate his alcoholism, or his repeated violations of DOC's Sick Leave Policy which are amply documented in the record before this court. (NYSCEF Doc. Nos. 21-27).

Respondents have demonstrated that DOC's decision to terminate petitioner was wholly independent of his acknowledged alcohol dependency, as underscored by DOC's accommodation of petitioner's treatment programs for more than three years. As such, the record does not support petitioner's conclusory claim that his termination was due to his alcoholism and related arrests; rather, the documents submitted in support of dismissal, convincingly demonstrate that petitioner, a probationary employee, was terminated because of his repeated violations of DOC's Sick Leave Policy, which in turn violated the terms of the Agreement. (NYSCEF Doc. No. 3 and 18). (see *In re Claim of Moulton*, 198 A.D.2d 595, 603 NYS2d 240 [3d Dep't 1993] ["It was not claimant's alcoholism but his voluntary disregard of a legitimate condition of employment . . . which mandated his termination."]).

Based on the record, petitioner cannot demonstrate that DOC failed to accommodate his disability or terminated him in violation of the CHRL and SHRL. Indeed, petitioner's alcohol problem does not immunize him against the legitimate, nondiscriminatory legal action taken by respondents in terminating his probationary employment due to his continued violations of DOC's Sick Leave Policy which in turn violated the NPA. (see *Riddick v City of N.Y.*, 4 A.D.3d 242, 246, 772 NYS2d 294 [1st Dept 2004] [where the court held that plaintiff failed to raise an


issue of fact that the City terminated him, not for his alcoholism, but rather for his violent, assaultive behavior)). Accordingly, it is hereby,

ADJUDGED that the application is denied and the Petition is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED that respondents, recover from petitioner, costs and disbursements in the amount as taxed by the Clerk, and that respondents have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

9/20/2019  
DATE

  
W. FRANC PERRY, J.S.C.  
**HON. W. FRANC PERRY, III**

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN
- DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT
- OTHER
- REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: