

Perez v New York City Dept. of Sanitation
2021 NY Slip Op 30725(U)
March 11, 2021
Supreme Court, New York County
Docket Number: 153966/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

MICHAEL PEREZ,

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF SANITATION,
KATHRYN GARCIA

Respondent.

-----X

INDEX NO. 153966/2020

MOTION DATE 09/28/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to REINSTATE EMPLOYMENT.

Upon the foregoing documents, respondents' cross-motion to dismiss is granted for the reasons set forth herein.

Background

In this CPLR Article 78 special proceeding, petitioner, Michael Perez ("Perez"), asks this Court to overturn the determination of the New York City Department of Sanitation ("NYDS") to terminate Perez's probationary employment. Perez alleges that the decision to terminate his employment is arbitrary and capricious and was made in bad faith. Alternatively, Perez asks this Court to order a name-clearing hearing.

The facts, as alleged in the verified petition and in petitioner's opposition to respondents' cross-motion, are as follows. On July 8, 2018, Perez was hired by NYDS as a sanitation worker, subject to an 18-month probationary period ending on or about January 9, 2020. During Perez's probationary employment he was subject to regular drug tests. Perez was drug tested in July 2018 and October 2019, and both tests were negative. On November 14, 2019, while stationed at the NYDS Marine Transfer Station, Perez was tested again. On November 20, 2019, Perez was asked to report to NYDS's medical clinic where he was advised that he had tested positive for marijuana use. That same day Perez was provided with a "Probationary 'No Pay' Notice" advising him that he was in a "no pay" status because of a violation of NYDS's Policy and Administrative Procedure No. 2012-02 on Substance Abuse ("the Substance Abuse Policy"). NYDS also served Perez with a complaint alleging a violation of the Substance Abuse Policy, specifically "2.1 under the influence of drugs or alcohol while on duty." The complaint states that the results of the November 14, 2019 drug test were positive for marijuana. Perez alleges that the drug test resulted in a false positive, as he does not use, and has never used, marijuana.

Subsequently, on November 21, 2019, Perez voluntarily underwent two more drug tests (a urine test and a hair follicle test) at Quest Diagnostics. On or about November 25, 2019, Perez received negative results for both additional tests. Perez then provided the results of his November 21, 2019 drug tests to NYDS. Perez alleges that while discussing his November 21, 2019 drug test results, an official at NYDS's clinic advised him that the consumption of products containing cannabidiol ("CBD") (a non-intoxicating legal substance) may trigger a false positive result for marijuana use, and that because several users of CBD had tested positive for marijuana use, NYDS issued a bulletin advising workers that CBD use may result in a positive test. Perez alleges that he never received said bulletin and that it was never posted at his work site, but he had learned that on May 9, 2019, the bulletin was allegedly read out loud to employees working the morning shift at the Manhattan 9 garage (where Perez was assigned to work at the time). Perez alleges that he was not present at the morning shift, as he was scheduled to work a 4:00 PM – midnight shift, where the bulletin was neither read nor discussed.

Perez alleges that he discussed his November 14, 2019 positive drug test result and recounted the conversation that he had with the official at NYDS's clinic with his spouse. Perez's spouse advised him that she had recently purchased a CBD supplement to be used in an herbal tea that she and Perez recently consumed, allegedly to replace melatonin, a common drug used to help with sleeping. After learning that he had inadvertently consumed CBD, Perez advised NYDS's health clinic that the November 14, 2019 positive test result was a false positive, which may have occurred because of his inadvertent consumption of CBD. As stated in Perez's opposition papers, on November 27, 2019, Perez's spouse emailed an official at NYDS explaining, inter alia, that she purchased the CBD supplement and that she gave it to Perez without his knowledge.

On January 8, 2020, Perez received notice from NYDS informing him that his employment was terminated effective January 2, 2020. On January 31, 2020, Perez filed an appeal of the termination with the New York City Civil Service Commission. The appeal included a copy of Perez's November 21, 2019 hair follicle drug test result and a notarized statement from Perez's spouse dated January 29, 2020 wherein she explained that she purchased the CBD supplement and that she gave it to Perez without his knowledge. The New York City Civil Service Commission dismissed the appeal due to lack of jurisdiction.

Perez now moves to overturn the decision to terminate his probationary employment or, alternatively, for an order directing that Perez is entitled to a name-clearing hearing.

Respondents cross-move, pursuant to CPLR 3211(a)(7) and 7804(f), to dismiss the petition on the ground that the petition fails to state a cause of action.

Discussion

It is well settled that "a probationary employee may be discharged without a hearing or a statement of reasons, in the absence of a demonstration that [his or] her termination was made in bad faith, for a constitutionally impermissible purpose, or in violation of statutory or decisional law." Turner v Horn, 69 AD3d 522, 522 (1st Dept. 2010); see Wilson v Bratton, 266 AD2d 140, 141 (1st Dept. 1999) ("Absent bad faith, a municipal agency may summarily terminate a probationary employee for any reason"). Thus, judicial review of Perez's termination is limited

to an inquiry of whether his termination was made in bad faith. See Jones v NYC Health & Hosps. Corp., 5 AD3d 338, 338 (1st Dept. 2004) (holding that where petition on its face shows good faith basis for termination, petition challenging termination must be dismissed).

Perez argues that the decision to terminate his probationary employment was made in bad faith because: (1) the November 14, 2019 drug test result was a false positive as a result of his inadvertently consuming CBD; (2) NYDS refused to consider his November 21, 2019 negative drug test results as well as the information provided to NYDS by Perez's spouse; and (3) NYDS treats its employees who have tested positive for drugs inconsistently because, in some cases, NYDS offered individuals who tested positive a "last chance" agreement, affording probationary employees a chance to keep their employment subject to repeated drug testing. Additionally, Perez notes that the reason for his termination was that he was found to be under the influence of drugs or alcohol while at work, a violation of the Substance Abuse Policy. Yet, he argues that the November 14, 2019 drug test does not determine whether an individual is under the influence of drugs at the time the test is taken. In the alternative, Perez argues that he is entitled to a name-clearing hearing, as his employment was terminated based upon the allegation that he used illegal drugs, and said allegation remains in his personnel file, which can be requested and reviewed by other municipal employers. Thus, Perez argues that he is entitled to a name-clearing hearing to ensure that the November 14, 2019 false positive result does not hinder his ability to obtain other city employment.

Respondents argue that there is a good faith reason for Perez's termination, i.e., Perez had a positive drug test result, a violation of the Substance Abuse Policy. Respondents contend that they have no duty to consider Perez's November 21, 2019 test results as evidence that the November 14, 2019 test was a false positive, as Perez failed to avail himself of the Substance Abuse Policy procedures calling for re-testing. Respondents also argue that Perez failed to state a cause of action establishing that he is entitled to a name-clearing hearing, as the petition fails to plead facts sufficient to show that he was deprived a constitutionally-protected property interest and fails to demonstrate that the information contained in his personnel file is stigmatizing, or that the information has been disseminated or has a likelihood of being disseminated.

Perez was subject to the Substance Abuse Policy, which states, "Probationary ... employees ... are entitled to seek voluntary help from the [Employee Assistance Unit] but do not have a right to a disciplinary hearing. Therefore, probationers ... who test positive, ... may be immediately terminated." According to the Substance Abuse Policy, NYDS uses urinalysis to detect illegal drug use. When a urine sample is collected it is divided into two samples, Sample A and Sample B. The initial tests are run on Sample A, and the testing laboratory maintains Sample B for a period of time in the event that it needs to be re-tested. If a urine test results in a positive finding then the employee may, at his or her own expense, request that Sample B be tested by an alternate NYDS contracted laboratory. To date, Perez has failed to avail himself of this mechanism and, thus, has not exhausted his administrative remedies prior to bringing this special proceeding. See Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57(1978) ("It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law."). The Substance Abuse Policy also makes clear that NYDS is not required to consider Perez's November 21, 2019 test results. NYDS was also not required to consider Perez's spouse's email dated

November 27, 2019, as it was an unsworn statement. Furthermore, NYDS was not required to provide Perez with a “last chance” agreement, as the Substance Abuse Policy dictates that NYDS may, in its discretion, not must, offer such an agreement. Thus, it is not mandatory. In any event, the case cited by Perez, Pyant v Doherty, 2007 NY Slip Op 30403 (Sup Ct, NY County 2011), is distinguishable, as it appears that the employee in that case, who had been employed for 15 years, was no longer on probationary status.

Perez’s request for a name-clearing hearing is denied because he has failed to allege the necessary elements, i.e., stigmatization and presumably dissemination. See Generally Garnes v Kelly, 51 AD3d 538 (1st Dept. 2008) (holding that an employee’s dismissal for multiple alcohol-related incidents and other off-duty conduct was not sufficiently stigmatizing in the constitutional sense).

In sum, respondents’ cross-motion to dismiss the petition is granted because respondents did not act in bad faith, as NYDS had a rational basis for terminating Perez and because Perez failed to avail himself of his administrative remedies.

The Court has considered Perez’s remaining arguments in opposition to the cross-motion and finds them to be unavailing and/or non-dispositive.

Thus, the petition is denied, the cross-motion to dismiss is granted, and the Clerk is hereby directed to enter judgment denying and dismissing the instant petition in its entirety.

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<u>3/11/2021</u> DATE					<u>ARTHUR F. ENGORON, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
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