

Matter of Graham v Brann
2021 NY Slip Op 30788(U)
March 15, 2021
Supreme Court, New York County
Docket Number: 159707/2018
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES **PART** **IAS MOTION 59EFM**

Justice

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INDEX NO. 159707/2018

In the Matter of the Application of

MOTION DATE 05/24/2019

JOHNEATHA GRAHAM,

MOTION SEQ. NO. 001

Petitioner,

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

- v -

**DECISION + ORDER ON
MOTION**

CYNTHIA BRANN, as COMMISSIONER of the NEW YORK CITY DEPARTMENT OF CORRECTION, and THE CITY OF NEW YORK,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

ORDER

Upon the foregoing documents, it is

ORDERED that,

It appearing to the court that there are triable issues of fact regarding whether respondents' finding that petitioner failed to meet the standards of job performance is a pretext for her termination dated June 27, 2018 and instead, made in bad faith, it is

ORDERED that an immediate trial of the issues regarding whether respondents terminated petitioner, as a probationary

correction officer, in bad faith, shall be had before the court; and it is further

ORDERED that petitioner shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with such Clerk a note of issue and statement of readiness and shall pay the fee therefor, and such Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

DECISION

Respondents' Employees Performance Service Report of November 22, 2018 states in the section entitled "Corrective Interview": "FAILURE TO REPORT". Respondents contend that petitioner failed to meet job performance standards when she failed to report "a verbally unresponsive inmate who appeared injured or sick" in the bathroom of the mental hygiene unit on February 20, 2018, and then made false statements denying same. The record is devoid of any evidence that tends to show that

petitioner, as ESO officer, was imparted any information, either by direct observation or through others, of the health condition of such inmate. During respondent's investigation, the many eyewitnesses, including inmates, Commanding Officer Dyce, and other correction officers, each stated in their interview that the inmate in question never, ever, talked, so his "verbal unresponsiveness" was normal for such inmate. The statement of petitioner during her interview that she saw another inmate carrying yellow gloves is no evidence of an injured or sick inmate. Nor is there any evidence, video or otherwise, that at the time she looked into the bathroom the injured or sick inmate was visible. As petitioner argues, the only evidence that she was told about a sick inmate was the self-serving hearsay statement made during the interview of Commanding Officer Dyce, who, there is no dispute, was present during the entirety of the incident in question. Commander Dyce's statement is further undermined, because during that same interview, she denied directing the four inmates to shower the sick inmate, which is contrary to the finding of respondent's April 18, 2018 Personnel Determination Review of petitioner. As petitioner has thereby raised an issue of fact as to whether respondent terminated her,

as a probationary correction officer, in bad faith, an evidentiary hearing is warranted. See Miciotta v McMickens, 118 AD2d 489 (1st Dept 1986).

Debra A. James

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3/15/2021
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
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