

Robert v Brann

2021 NY Slip Op 30885(U)

March 22, 2021

Supreme Court, New York County

Docket Number: 152963/2019

Judge: Erika M. Edwards

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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. ERIKA M. EDWARDS PART 11

Justice

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INDEX NO. 152963/2019

DOMINIQUE ROBERT,

MOTION DATE 03/20/2019

Petitioner,

MOTION SEQ. NO. 001

- v -

CYNTHIA BRANN, Correction Commissioner of the New York City Department of Correction; THE NEW YORK CITY DEPARTMENT OF CORRECTION and THE CITY OF NEW YORK,

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

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

Upon the foregoing documents, the court denies Petitioner’s CPLR Article 78 Verified Petition and dismisses it in its entirety.

Petitioner Dominique Robert (“Petitioner”) brought this CPLR Article 78 proceeding against Respondents Cynthia Brann, Correction Commissioner of the New York City Department of Correction, The New York City Department of Correction (“DOC”) and The City of New York (collectively “Respondents”) seeking to reverse DOC’s determination, via letter dated November 27, 2018, to terminate Petitioner’s employment as a probationary correction officer with DOC. Petitioner also seeks an order directing DOC to reinstate him to his former position with back pay, seniority and benefits.

Petitioner alleges in substance that DOC’s decision to terminate him was arbitrary, capricious and done in bad faith. Petitioner initially applied for the position in 2015, but he failed the background investigation and was found to be disqualified for the position because of two

arrests and traffic tickets. In 2005, when Petitioner was sixteen years old, he was arrested for driving with a suspended license, but he was released the same day and paid the ticket. In 2010, Petitioner discovered that his brother had used Petitioner's name and received several traffic tickets under his name. Petitioner filed a police report and the tickets were dismissed. In 2012, Petitioner received a ticket for littering, but missed the court date because he was away at college and did not receive the notice. A bench warrant was issued and Petitioner was arrested and returned on the warrant when he was picked up during a random car stop. Petitioner was released the same day and he paid the fine.

Petitioner further alleges that he appealed his disqualification and explained the circumstances of his arrests and tickets. Petitioner's appeal was denied on March 4, 2016, but he was encouraged to reapply. In or about February 2016, Petitioner reapplied for the correction officer position and DOC conducted another background investigation. Petitioner alleges that he met with an investigator on two occasions and fully disclosed the circumstances of his prior disqualification, including discussing his arrests and tickets. Petitioner successfully completed the background investigation and DOC hired him on December 19, 2016 as a probationary correction officer.

Petitioner alleges that for almost two years he worked without incident and never received any disciplinary action, but DOC inexplicably terminated him on November 27, 2018. Petitioner further argues that since he previously disclosed his arrests and driving record during his 2015 and 2016 background investigations and since DOC vetted him and hired him despite this knowledge, his termination was arbitrary, capricious and in bad faith.

Respondents cross moved to dismiss the Petition for failure to state a cause of action primarily because Petitioner was a probationary employee and DOC could terminate him for any

reason or no reason at all as long as its decision did not violate the law or was in bad faith.

Respondents argued that Petitioner failed to sufficiently allege that DOC terminated him in bad faith and that he merely made a conclusory allegation of bad faith without any support. Petitioner opposed the motion. In an Interim Decision and Order, dated December 2, 2019, the court denied Respondents' cross motion to dismiss and ordered Respondents to file an Answer within thirty days. Respondents filed their Answer and Petitioner filed a Reply. Oral argument was held on March 18, 2021.

Respondents deny Petitioner's allegations of bad faith and argue that Petitioner failed to establish that Respondents acted in bad faith when DOC terminated Petitioner. Respondents argue in substance that they acted in good faith because Petitioner failed to disclose material information during his employment investigation and he was warned that any willful misstatement, intentional misrepresentation or if he knowingly provided false information with the intent to defraud on his application material would result in disqualification and possible criminal charges.

Respondents further argue in substance that Petitioner was hired as a probationary correction officer, subject to a 24-month probationary period, and he could be terminated for any reason, or no reason at all, as long as it was not in bad faith or violative of the Constitution or law. DOC acted in good faith when it terminated Petitioner once it was revealed that he omitted important facts during his background and character investigation when he applied for the position in 2016, in that he failed to disclose that he had previously been disqualified from the position because of his extensive driving record and previous arrests.

DOC had previously disqualified Petitioner on April 27, 2015, based on Petitioner's background and character investigation for failing to possess the requisite character for the

position since he had eight moving violations from 2013 and 2015 and two arrests in 2005 and 2012. Petitioner appealed his disqualification and argued that his brother received several tickets in his name and provided the police report that he filed against his brother in 2010, but failed to provide any additional support. Since the tickets were received three years after the report was filed, the police report did not explain the eight tickets that were received by Petitioner which were the subject of the disqualification.

Respondents provided a Personnel Determination Review ("PDR"), dated November 18, 2018, and Petitioner's personnel history booklet that was notarized on September 12, 2016. Respondents argue that although Petitioner disclosed his two arrests, he only disclosed five driving violations between 2013 and 2015, instead of eight. Respondents state that when Petitioner was asked in substance whether he had ever applied for a position or taken a civil service exam with any city or other type of federal or local municipality, Petitioner mentioned three positions, but failed to include that he had previously applied for the correction officer position, or that he had taken the previous civil service exam for the same position. Additionally, Petitioner failed to respond to the question that asked whether he had been disqualified or barred from employment by any city, state or federal agency. Although Petitioner alleged that he verbally discussed these issues with the investigator, the investigator indicated in substance that if an applicant disclosed new information that was not included in his or her booklet, the investigator's practice was to ask the applicant to fill out a particular form and there was no form completed in Petitioner's case.

Respondent further argues that DOC hired Petitioner as a probationary correction officer, but at the end of this period, DOC terminated Petitioner's employment because it discovered that Petitioner failed to disclose pertinent information on his booklet. The Notice of Exam required

that the applicant's good character and satisfactory background were "absolute prerequisites to appointment." Additionally, the application material warned applicants in substance that any willful misstatement, intentional misrepresentation, or failure to present required documents will be cause for disqualification, and it warned of possible criminal penalties. Also, by initialing each page of his booklet, Petitioner acknowledged that he had provided complete and accurate information.

Respondents argue that DOC's actions were rational, lawful, proper, reasonable, constitutional and made in good faith, that Petitioner failed to state a cause of action, and that probationary employees can never be reinstated to any competitive class civil service title, so Petitioner is not entitled to the relief requested.

Petitioner alleges in substance that his failure to include his previous application and disqualification from the position on his 2016 application was an oversight, but he verbally disclosed it to his investigator when they reviewed his application together. He further argues that neither of them realized that Petitioner left the question blank about whether he had previously applied for a position with the City. He also states that the question about his driving history did not have any dates and he included the five infractions which were listed on his driving abstract. Since DOC knew about the prior disqualification, his failure to include it in the written form was not a willful misrepresentation, but simply an oversight.

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991]).

It is well settled that probationary or provisional employees “may be discharged for any or no reason at all in the absence of a showing that his or her dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law” (*Brown v City of New York*, 280 AD2d 368, 370 [1st Dept 2001]; *Matter of Duncan v Kelly*, 43 AD3d 297, 298 [1st Dept 2007]; *Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]).

Here, the court finds that Petitioner failed to meet his burden of demonstrating that Respondents acted in bad faith when DOC terminated his employment as a probationary correction officer for his failure to disclose material information during his background and character investigation and because of his previous arrests and what DOC believed to be a record of excessive moving violations. Although Petitioner alleges in substance that he mistakenly failed to disclose the information on his application, as a probationary employee, he could have been fired for any reason, or no reason at all. Although it is unfortunate that DOC permitted Petitioner to work for two years before firing him, it certainly does not rise to the level of bad faith and it was not arbitrary or capricious.

It is clear that the DOC application material explicitly warned Petitioner that disqualification could result if he willfully or intentionally failed to disclose material information on his application or failed to provide truthful and accurate responses. The Notice of Exam for Petitioner’s application indicated that by signing the document Petitioner certified that the information was true and accurate and that he understood that “any material misrepresentation of fact may be cause for Disqualification.” Additionally, Petitioner’s personnel booklet from his background and character investigation warned of the criminal penalties for making a false statement of material fact on any application or practicing fraud or deception to obtain municipal

employment and cautioned applicants "to answer every question, truthfully, completely and without evasion."

Based on the material facts presented, the court finds that Petitioner failed to demonstrate that DOC's decision to terminate him was in bad faith, or even that it was arbitrary or capricious. Thus, the court finds that Petitioner is not entitled to reinstatement to his former position with back pay, seniority and benefits. The court denies Petitioner's Verified Petition and dismisses it in its entirety.

The court has considered any remaining arguments of the parties and denies any additional relief requested not specifically set forth herein.

As such, it is hereby

ORDERED that the court denies Petitioner Dominique Robert's CPLR Article 78 Verified Petition and dismisses it in its entirety; and it is further

ORDERED that the clerk is directed to enter judgment in favor of Respondents Cynthia Brann, Correction Commissioner of the New York City Department of Correction, The New York City Department of Correction and The City of New York as against Petitioner Dominique Robert without costs, disbursements or reasonable attorney's fees; and it is further

ORDERED that this constitutes the decision and order of the court.

3/22/2021
DATE


ERIKA M. EDWARDS, J.S.C.

HON. ERIKA M. EDWARDS
J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

APPLICATION:

SETTLE ORDER

GRANTED IN PART OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE