

Starks v Brann

2022 NY Slip Op 34107(U)

December 6, 2022

Supreme Court, New York County

Docket Number: Index No. 160472/2019

Judge: Debra A. James

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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. DEBRA A. JAMES PART 59

Justice

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MICHAEL STARKS,

Petitioner,

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

INDEX NO. 160472/2019

MOTION DATE 01/14/2021

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) 2, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28

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

ORDER

Upon the foregoing documents, it is

ORDERED that the cross motion of respondents to dismiss the petition pursuant to CPLR 3211(a)(7) is denied; and it is further

ORDERED that respondents are directed to serve an answer to the petition within thirty (30) days after service of a copy of this order with notice of entry; and it is further

ORDERED that post joinder of issue, counsel are directed to appear for oral argument by Microsoft Teams on January 19, 2023, at 10:00 AM.

DECISION

As argued by petitioner, respondents concede that as a probationary correction officer, petitioner had no remedies to exhaust, as the collective bargaining agreement did not pertain to his status as a probationary employee. See Kahn v City Dept of Education, 18 NY3d 457, 462 (2012). Therefore, respondents' cross motion to dismiss pursuant to CPLR 3211(a)(7) on the ground of failure to exhaust administrative remedies fails.

This court disagrees with respondents that the petition otherwise lacks merit. As stated by the Appellate Division, First Department, in Castro v Schriro, 140 AD3d 644 (1st Dept 2016), aff'd 29 NY3d 1005 (2017) (bold added):

A probationary employee may be dismissed for almost any reason, or for no reason at all, and the employee has no right to challenge the termination in a hearing or otherwise, absent a showing that he or she was dismissed in bad faith or for an improper or impermissible reason (see Matter of Swinton v. Safir, 93 N.Y.2d 758, 762-763, 697 N.Y.S.2d 869, 720 N.E.2d 89 [1999]). The burden falls on the petitioner to demonstrate by competent proof that bad faith exists, or that the termination was for an improper or impermissible reason (see Matter of Che Lin Tsao v. Kelly, 28 A.D.3d 320, 321, 812 N.Y.S.2d 522 [1st Dept.2006]).

This case presents the unique procedural scenario where DOC sought to dismiss this article 78 petition at the pre-answer stage on the sole ground that the petition fails to state a cause of action. **We disagree with Supreme Court's determination that the petition fails to sufficiently state a claim of improper termination of a probationary correction officer. On the contrary, petitioner alleges that his termination was arbitrary and capricious, and in bad faith. In addition, petitioner provides a factual predicate for his**

allegations. In sum and substance, the petition avers that despite serving as a correction officer who acted in complete accord with DOC's rules and proper protocol, pursuant to orders from his supervisor, and in full cooperation with the investigation of inmate Echevarria's death, which lead to Captain Pendergrass' indictment, **Officer Castro was inexplicably terminated.**

The Castro court found that "uncontradicted allegations present[ing] a substantial issue of bad faith" constituted a factual predicate that stated a meritorious claim. Likewise, in the case at bar, this court agrees with petitioner that he has put forward uncontradicted allegations supported by specific uncontradicted factual statements. Such assertions comprise his attendance records that showed that he took fourteen days of sick leave and had "perfect punctuality", over the two year period, which absences were well within the respondents' sick leave policy. Therefore, as in Castro, petitioner herein established a meritorious claim that the fourteen days of sick leave was a pretextual basis upon which respondents acted in bad

faith in terminating his probationary employment. Unlike the claims in Paul v Brann, 2021 NY Slip Op 30184(U), the assertions of petitioner herein were not made "upon information and belief", but include documentary proof of the precise dates and years in which petitioner took sick leave.

Debra A. James

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12/6/2022

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE