SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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JESSICA WALKER

Petitioner,

- v -

CITY OF NEW YORK,

Respondent.

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INDEX NO. 161986/2023

MOTION DATE 09/06/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for ARTICLE 78.

The petition to set aside petitioner's termination is granted to the extent described below.

Background

Petitioner started working for the New York City Department of Correction ("DOC") on January 17, 2023 with the title of community associate. She contends that on July 10, 2023, she was promoted to community coordinator. The promotion letter petitioner received from DOC stated that "this appointment is subject to a three-month probationary period from your date of appointment" (NYSCEF Doc. No. 29). Under a plain reading of that letter, petitioner's probationary period in her new position would expire on or about October 10.

Petitioner details issues with coworkers at her assigned correctional facility (petitioner worked at a facility that housed young detainees aged 17-18) starting in October 2023. She claims she found a correction officer sleeping, reported it, and that officer was subsequently reassigned. Petitioner contends that the following week she was suspended without pay for 30 days. The notice of suspension, dated October 20, 2023, only cited a "confidential investigation"

as the reason for the suspension (NYSCEF Doc. No. 3). Petitioner speculates that the suspension arose out of an unfounded complaint by the correction officer whom petitioner had reported for, essentially, not doing her job. She contends that officer alleged that petitioner had brought contraband into her work location.

Petitioner alleges that on November 7, 2023, she was delivered a memo dated November 2, 2023 in which she was fired effective November 6, 2023 (well after the purported probationary period had ended). Petitioner contends that one of the DOC employees who delivered this memo insisted that DOC did not need to do an investigation into petitioner's discharge because she was still a probationary employee.

Respondent contends that petitioner was still a probationary employee despite the promotion letter. It argues that the default probationary period for petitioner's position, a non-competitive title, is six months and that this can only be altered by the Commissioner of the Department of Citywide Administrative Services. Respondent also details its investigation into petitioner and contends that petitioner passed contraband to a person in custody at the facility. It includes photographic stills of video surveillance and reports exploring petitioner's purported misconduct.

Respondent asks that this Court ignore the letter petitioner received from DOC indicating a three-month probationary period and hold petitioner to the six month period; respondent claims that the letter was not binding. It claims that the relevant Personnel Rules and Regulations is binding regardless of what DOC sent to petitioner. Respondent also contends that petitioner should be estopped from arguing that she was a tenured employee because she knew her promotion was to a non-competitive position. It asserts that the doctrine of equitable estoppel

applies here because all parties knew what was intended by the promotion letter and petitioner should not be permitted to take advantage of DOC's mistake.

In reply, petitioner argues that respondent must be bound by its written representation.

Discussion

The central question in this proceeding is whether petitioner was a probationary employee at the time DOC purported to terminate her employment. The essential facts on this question are undisputed[1]: petitioner received a promotion letter signed by the Assistant Commissioner for Human Resources at the DOC that explicitly stated that there was a three-month probationary period as of July 10, 2023 (NYSCEF Doc. No. 43). The promotion letter cites to Personnel Rules and Regulations of the City of New York 5.2.1(a) as the basis for this probationary period (*id*.).

That rule provides that: "(a) Every appointment and promotion to a position in the competitive or labor class shall be for a probationary period of one year unless otherwise set forth in the terms and conditions of the certification for appointment or promotion as determined by the commissioner of citywide administrative services. Appointees shall be informed of the applicable probationary period."

Obviously, as respondent admits, that was not the correct rule to cite. Instead, respondent contends that the applicable rule here, as petitioner was promoted to a non-competitive position, was actually 5.2.1(b), which states that:

> "Every original appointment to a position in the non-competitive or exempt class shall be for a probationary period of six months unless otherwise set forth in the terms and conditions for appointment as determined by the commissioner of citywide administrative services. Appointees shall be informed of the applicable probationary period. However, such probationary period may be terminated by the commissioner of citywide administrative services or by the agency head before the

[1] The Court recognizes that the parties vigorously dispute whether or not petitioner passed contraband to a person in custody. But the merits of that issue are not before this Court.

> end of the probationary period, and the appointment shall thereupon be deemed revoked. Nothing herein shall be deemed to grant permanent tenure to any non-competitive or exempt class employee."

It is unclear from this record how respondent arrived at the three-month probationary period or why it cited to 5.2.1(a) instead of subsection (b). But the fact is that this promotion letter unambiguously informed petitioner that she was subject to a three-month probationary term. Therefore, this Court must consider whether respondent is bound by this letter.

The Court finds that respondent is subject to its own words and petitioner was subject to a three-month probationary period. First, the letter containing the shortened probationary period was petitioner's formal notice of her promotion. It detailed the start date of her promotion, provided information about her new salary and when this salary increase would be reflected in her paycheck (NYSCEF Doc. No. 43). This letter was not a tangential document that contained an error nor were there other contradictory documents submitted on this record that might have given petitioner notice about this error. The Court cannot embrace respondent's position that certain portions of this letter should be disregarded because, as it turns out, respondent made a few crucial mistakes.

Second, respondent's reliance on a First Department case involving this regulation does not compel a different outcome. In that case, *Yan Ping Xu v New York City Dept. of Health and Mental Hygiene*, 121 AD3d 559, 995 NYS2d 23 [1st Dept 2014], the City argued that the six-month probationary period in the Personnel Rules and Regulations did not apply and that the petitioner was subject a longer, one-year probationary period found in the relevant collective bargaining agreement. The First Department noted that the collective bargaining agreement did not set a probationary period for noncompetitive employees, such as the petitioner in that proceeding (*id*. at 560).

Of course, respondent is correct that the relevant rules require that only the Commissioner of DCAS can modify the applicable probationary period. But the Court observes that this same rule, 5.2.1(b), required that "Appointees shall be informed of the applicable probationary period." That did not happen here; respondent admits it did not inform petitioner of the relevant probationary period and now wants to enforce a probationary period that was never mentioned and in fact conflicts with the probationary period that was mentioned.

The Court rejects respondent's argument that petitioner is somehow equitably estopped from asserting that she is entitled to a three-month probationary period. Respondent curiously contends that petitioner knew, or possibly should have known, that she was being promoted to a non-competitive position and, therefore, a six-month probationary period applies regardless of the promotion letter. This Court cannot find that petitioner should have known the relevant regulation when respondent apparently also doesn't know the correct probationary period. To insist that petitioner should have a better understanding of the relevant rules than respondent strains credulity.

Summary

In this proceeding, the Court merely finds that respondent is bound by its own specific words. Respondent admits it sent an essential document, a formal promotion letter signed by an assistant commissioner, that included multiple errors. The Court recognizes that mistakes happen and this Court has no intention of being overly pedantic. Unfortunately, the errors here misrepresented the terms of petitioner's employment and only after respondent attempted to fire petitioner did respondent suddenly attempt to claim that it is not bound by this letter. And while there may be situations in which it would be unreasonable for an employee to rely upon a document from respondent, this is not that type of circumstance. Petitioner was entitled to rely

upon this letter; it was not self-evident that the letter had errors. And respondent did not send a letter correcting its errors– it basically ignored the fact that it set a three month probationary period until it wanted to fire petitioner, and then tried to shrug off this important representation.

The Court also emphasizes that, because she was no longer a probationary employee, petitioner is entitled to due process under Civil Service Law § 75. Respondent believes that petitioner passed contraband to a person in custody and nothing prevents it from taking the appropriate action, including seeking termination, as long as petitioner is provided with the required due process. The Court declines to award petitioner any damages (petitioner demands punitive damages).

To be clear, the Court makes no finding that petitioner committed any wrongdoing. It merely finds that respondent must utilize the applicable disciplinary procedures afforded to permanent employees. In other words, the Court finds that it would be premature to award petitioner any back pay. The Court observes that petitioner was suspended at the time she was fired and so it is not clear on this record how much, if any, back pay petitioner might be entitled to receive. Petitioner is therefore reinstated to the status she was apparently in prior to termination—suspension without pay as indicated in NYSCEF Doc. No. 3. Petitioner is not entitled to legal fees as she did not cite a basis upon which she can recover such fees. This Court declines to award any damages.

Accordingly, it is hereby

ADJUDGED that the petition is granted only to the extent that petitioner's termination is annulled and she is entitled to the protections afforded to tenured employees and she is also

entitled to costs and disbursements as against respondent upon presentation of proper papers to the County Clerk.

9/12/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE