Matter of Flores v Doherty
2006 NY Slip Op 30789(U)
October 17, 2006
Supreme Court, New York County
Docket Number: 112180/2005
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

In the Matter of the Application of JOSEPH FLORES, Petitioner, For a Judgment under Article 78 of the Civil Practice Law and Rules -against-	Index No. 112180/2005
JOHN J. DOHERTY, as Commissioner of The Department of Sanitation of the City of New York, the Department of Personnel of the City of New York and the City of New York, Respondents.	Seq. 001

FILED
OCT 24 2006
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.:

Petitioner Joseph Flores brings this Article 78 proceeding, seeking judgment vacating and setting aside respondents' termination of petitioner, restoring petitioner to his former position at the same status that existed prior to his termination, directing respondents to pay petitioner all wages and benefits from the date of termination to the date of restoration, and reasonable attorneys' fees. Respondents cross- move, pursuant to CPLR 3211 (a) (7), to dismiss the petition for failure to state a cause of action.

On August 28, 1995, petitioner was appointed to the Department of Sanitation (DOS) from a competitive list and commenced work as a probationary employee. In accordance with Civil Service Law § 75, petitioner became a tenured employee after completion of one year of employment. On December 14, 2004, however, after the DOS received complaints about petitioner, petitioner entered into a plea agreement with DOS which states in pertinent part, as follows:

> "I agree to be placed on one year's probation using the same criteria which ERB [Employee Review Board] uses for probationary Sanitation Workers. Should I violate my probation, I understand I will be terminated without the benefit of a conference and/or hearing."

The agreed upon additional probationary period was to be from December 22, 2004 through and including December 21, 2005.

In a memorandum dated April 22, 2005, the Personnel Management Division of DOS recommended to Joseph DiPiazza, Director of Human Resources for DOS, to terminate petitioner, based on six violations of DOS's time and leave regulations, all of which were committed while petitioner was on probation pursuant to the aforementioned plea agreement. On December 22, 2004, the first day of the probation, petitioner, while out on sick leave, failed to report to the medical clinic as required by DOS regulations. On February 10, 2005 and February 24, 2005, petitioner was absent without leave. On March 26, 2005, petitioner failed to follow DOS guidelines for calling in sick. On March 31, 2005 and April 4, 2005, petitioner was absent without leave.

On April 25, 2005, the E. R. B. voted unanimously to recommend the termination of petitioner based on these same six violations. Later that day, DOS deputy commissioner Lorenzo Cipollina recommended to respondent DOS commissioner John Doherty that petitioner's employment be terminated. In a letter dated May 2, 2005 from Joseph J. Di Piazza, Director of Human Resources of the Dept. of Sanitation, petitioner was terminated, effective, the close of business May 2, 2005.

According to petitioner, "[o]n September 11, 2001 petitioner's best friend, Frank Monahan, died during the attack. As a result of this incident, petitioner began drinking to alleviate the pain of his loss. Petitioner went from a few drinks a night to a fifth of rum." [Petition, paragraph 12].

The DOS has an Employee Assistance Unit (EAU) which is designed to provide treatment to employees who are suffering from substance abuse. Petitioner maintains that prior

to his termination, on May 2, 2005, petitioner approached EAU to seek help for his disability and was scheduled for an assessment on May 3, 2005.

Pursuant to DOS policy, as stated in Policy and Administrative Procedure No. 95.05 (PAP 95.05):

> "Participation in an EAU program which results in recovery from a problem and improved job performance will not affect an employee's future in the department or his or her chances for promotion. The standard against which all employees are measured is job performance. An employee who has been in an EAU program will be judged neither more harshly, nor more leniently than other department employees."

Based on this policy, petitioner claims that it was bad faith and a violation of this policy to terminate him before he had an opportunity to complete the EAU program that he was scheduled to begin May 3, 2005.

Respondent has filed a pre-answer cross-motion to dismiss pursuant to CPLR §7804(f) on the ground that the petition fails to state a cause of action.

On a motion to dismiss a pleading for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory. See Morone v Morone, 50 NY2d 481 (1980); Campaign for Fiscal Equity v. State of New York, 86 NY2d 307, 318 (1995). The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference. Leon v Martinez, 84 NY2d 83, 87 (1994). This standard is applicable to Article 78 proceedings. See Fitzgerald v. Matthews, 244 AD2d 193 (1st Dept 1997); Tucker v. Battery Park City Parks Corp., 227 AD2d 318 (1st Dept 1996).

Here, enough is stated in the petition, and in the supporting papers, to meet the pleading standards set forth in CPLR §3211 and §7804, and to warrant a denial of respondent's

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motion to dismiss for failure to state a cause of action. Whether or not petitioner will ultimately be entitled to the remedy which he seeks is not the issue at this juncture. See Matter of Nowlin v Schriver, 269 AD2d 630 (3d Dept 2000), lv denied 96 NY2d 711 (2001).

Accordingly, it is

ORDERED that respondent's cross motion to dismiss the petitioner for failure to state a cause of action is denied; it is further

ORDERED that respondent is directed to serve and file its answer within five days of service of a copy of this order with notice of entry; failure to timely serve/file an answer may result in the granting of the requested relief upon default; it is further

ORDERED that petitioner shall re-notice this matter upon service of the answer (or move for a default upon expiration of the time to answer) within 30 days of receipt of answer (or expiration of time to anwer), upon seven (7) days notice; and it is further

ORDERED that within 30 days of entry of this order, petitioner shall serve a copy upon respondent with notice of entry.

This constitutes the decision and judgment of the Court.

HON. DORIS LING-COHAN

Dated: 10/17/06

FILED
OCT 24 2006
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Doris Ling-Cohan, J.S.C.

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