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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ROBERT E. TORRES / JUDGE Justice

PART 29

Index Number : 108275/2011
JOHNSON, KIMMI
vs.
SCHRIRO, DR. DORA B.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 108275/2011
MOTION DATE 11/14/2011
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1
Answering Affidavits — Exhibits ____ | No(s). 2
Replying Affidavits ____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

FILED
APR 11 2012
COUNTY CLERK'S OFFICE
NEW YORK

decided in accordance with the attached decision.

This Constitutes the Decision and Order of the Court.

Dated: 4/10/2012

ROBERT E. TORRES, J.S.C.
JUDGE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☒ SUBMIT ORDER
☒ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 29
PRESENT: HONORABLE ROBERT E. TORRES, J.S.C.

In the Matter of the Application of
KIMMI JOHNSON,

Petitioner,

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

DR. DORA B. SCHRIRO, Commissioner of the New York City Department of Correction, NEW YORK CITY DEPARTMENT OF CORRECTION, and CITY OF NEW YORK,

Respondents.

INDEX NUMBER:108275/2011

Present:
HON. **ROBERT E. TORRES**

Petitioner brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules seeking to move this Court to issue a mandate annulling DR. DORA B. SCHRIRO's (hereinafter "Schriro"), Commissioner of the New York City Department of Correction, NEW YORK CITY DEPARTMENT OF CORRECTION's (hereinafter "department), and CITY OF NEW YORK's (hereinafter "City'), (hereinafter collectively "Respondents") decision to terminate petitioner's employment as a correction officer, or, in the alternative, an Order requiring a hearing pursuant to N.Y. C.P.L.R.§ 7804(h). Specifically, petitioner argues that respondents' decision to terminate petitioner was "affected by an error of Law" because they considered illegal evidence improperly.

Respondents opposes the instant petition on the grounds that the amended verified petition fails to state a cause of action; that respondents' actions were not arbitrary, capricious or an abuse of discretion; the finding against the petitioner was supported by the record and was reasonable, lawful, and proper, and not arbitrary, capricious or irrational; the penalty imposed was lawful, reasonable, and proper; and that this matter should be transferred to the Appellate Division pursuant

to C.P.L.R. § 7804(g).

The relevant record herein reveals that petitioner began her employment with the respondents as a correction officer in 1989. Pursuant to directive 7507R-A, petitioner was randomly selected for a drug test and provided the requisite urine sample on or about July 15, 2010. Petitioner's sample tested positive for morphine. Departmental policy provides that when an officer tests positive for opiates or morphine at a level between 300 and 2000 nanograms per milliliter, said officer has the opportunity to take a subsequent test rather than face immediate disciplinary charges. On August 18, 2010, petitioner was told to report to the toxicology trailer where she signed a consent form and completed a food and drug questionnaire before providing an actual hair sample. The lab report of petitioner's hair test showed a positive for cocaine at 26 milligrams per milliliter. Subsequently, respondent department filed and served a disciplinary charge against petitioner. Petitioner then requested a disciplinary hearing pursuant to N.Y. CIV. SERV.L. § 75.

On January 24, 2011, an administrative hearing was held before Administrative Law Judge John. B. Spooner (hereinafter "ALJ Spooner"). At that hearing, petitioner was represented by Peter Troxler, Esq. and the respondent department was represented by agency attorney Paul R. Miller, Esq.. Petitioner's attorney objected to the result of the second drug test coming in as evidence on the grounds that petitioner should have been, but was not, provided with the union representation at the time of said test as mandated by NY CIV. SERV. L. § 75(2). As such, petitioner's attorney argues that since the results of the test is evidence obtained from an employee who was not provided with union representation, it should be excluded. Upon conducting said hearing, ALJ Spooner gave the parties an opportunity to submit post-hearing memoranda on the issue of the legality of the second drug test sand whether petitioner's *Weingarten* rights were violated. See, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

On February 28, 2011, ALJ Spooner issued an eight page Report and Recommendation to respondent Schriro. ALJ Spooner detailed his proposed findings of fact and recommended penalty with respect to the charge brought against petitioner. ALJ Spooner also addressed the issue of the legality of the second drug test by finding that it was properly admitted evidence. Moreover, ALJ Spooner found that petitioner's right to union representation under *Weingarten* was not violated during the second drug test because said rights only attach when an employee is subject to

interrogation and not prior to undergoing a drug test. See, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

On March 21, 3011, respondent Schriro adopted ALJ Spooner's Report and Recommendation and terminated petitioner herein. Petitioner subsequently filed the instant petition.

Article 78 of the CPLR provides for limited judicial review of administrative actions. Administrative agencies enjoy broad discretionary power when making determinations on matters they are empowered to decide. Section 7803 provides in relevant part that "[t]he only questions that may be raised in a proceeding under this article are... 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

In deciding whether an agency's determination was supported by substantial evidence or was arbitrary, capricious or an abuse of discretion, the reviewing court is limited to assessing whether the agency had a rational basis for its determination and may overturn the agency's decision only if the record reveals that the agency acted without having a rational basis for its decision. See, Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992) citing Pell v. Board of Education, 34 N.Y.2d 222, 230-31 (1974); Sullivan County Harness Racing Association v. Glasser, 30 N.Y.2d 269, 277 (1972). Substantial evidence is more than "bare surmise, conjecture, speculation or rumor" and "less than a preponderance of the evidence." 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176, 180 (1978). Substantial evidence consists of "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." Id. See, also Consolidated Edison v. New York State DHR, 77 N.Y.2d 411, 417 (1991). Where the Court finds the agency's determination is "supported by facts or reasonable inference that can be drawn from the record and has a rational basis in the law, it must be confirmed." American Telephone and Telegraph Co. v. State Tax Commissioner, 61 N.Y.2d 393, 400 (1984).

Petitioner's Article 78 petition must be denied as the respondents' decision was supported by substantial evidence, was not made in violation of lawful procedure, was not affected by an error of law, nor was it arbitrary and capricious or an abuse of discretion. On Article 78 review, this Court

is limited to assessing whether the agency had a rational basis for its determination. These records are more than sufficient to make a showing of "substantial evidence" and for a finding that the respondents' determination was not without foundation. Since respondents' decision is "supported by facts or reasonable inferences that can be drawn from the record and have a rational basis in the law, it must be confirmed." American Telephone and Telegraph Co., 61 N.Y.2d 393, 400 (1984). Accordingly, the petition is denied and dismissed.

This constitutes the decision and order of this Court.

Dated: April 10, 2012

Hon. Robert E. Torres