[* 1]

MEMORANDUM

COPY

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 10

In the Matter of the Application of
THOMAS J. TRIOLA,

Petitioner,

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

- against -

RICHARD F. DAINES, M.D., Commissioner, State of New York Department of Health, and STATE OF NEW YORK DEPARTMENT OF HEALTH,

Respondents.

By: Jones, J.S.C.
Dated: April 9, 2012

Index No. 10-43821
Mot. Seq. #001 - MD; CDISPSUBJ

Return Date: January 12, 2011
Adjourned: December 7, 2012

WOLIN & WOLIN
Attorney for Petitioner
420 Jericho Turnpike, Suite 215
Jericho, New York 11753

ERIC T. SCHNEIDERMAN, ESQ.
Attorney General of the State of New York
By: Susan M. Connolly, Esq.
300 Motor Parkway, Suite 205
Hauppauge, New York 11788

In this article 78 proceeding, the petitioner seeks the entry of judgment (i) annulling and rescinding the determination of the respondents which terminated the petitioner, prior to the completion of his probationary term, from his employment as a senior medical conduct investigator with the New York State Department of Health, Office of Professional Medical Conduct (OPMC), in the Metropolitan Area Regional Office, Central Islip, New York, (ii) directing the respondents to reinstate him to that position, together with all the rights and privileges attendant thereto, (iii) restoring to him any back pay, seniority, and other benefits lost as a result of the termination, and (iv) affording him an opportunity to clear his name, through hearing or otherwise.

The petitioner alleges in his verified petition that he is a former criminal investigator and special agent with the U.S. Department of the Treasury, U.S. Customs Service, having retired on June 30, 2001 after 25 years of service. He was employed by the respondents on March 8, 2010. After one week of training in the New York City office, he reported to the Central Islip office on March 15. He was initially assigned several cases, one of which involved a completed case by a co-worker with respect to which the co-worker was to demonstrate the process by which to present the case for possible administrative prosecution. On April 2, his supervisor, Judith Pilgrim, falsely accused him and the co-worker of having worked together for four days on the assignment when, in fact, they had only worked one full day and an

additional hour and a half on it. Believing that the accusation was improper, he reported it to upper management by e-mail on April 5. Thereafter, according to the petitioner, Pilgrim treated him in an unjustified, illegitimate, bad faith and retaliatory manner consisting of a series of attacks on his work performance, all of which was causally related to the disclosure he made and which culminated in his termination. The petitioner makes similar allegations relative to a "counseling memorandum" which Pilgrim read to him on May 28 and probation reports dated June 1, July 9, and July 27, to wit, that they were replete with false and inaccurate comments, and were not reflective of his true performance; that his responses, which accused Pilgrim of making false allegations and false reports intended to create an inaccurate record of his performance, prompted Pilgrim to unleash further unwarranted attacks on his performance, culminating in his termination; that several of his responses were communicated to managers in his local chain of command; and that his responses constitute "disclosures" protected by whistleblowing statutes and regulations, including Civil Service Law § 75-b. On August 6, the petitioners' employment was terminated. The petitioner claims that the unlawfulness of his termination is evidenced by the "barrage" of the probation reports and other evaluations which he received, the respondents' failure to extend his probationary period so as to properly assess his progress or to assign him to another supervisor, and his performance on the statewide test for the position of supervising medical conduct investigator after just three months as a senior medical conduct investigator. The petitioner further claims that in failing to extend his employment for the maximum probationary period of 52 weeks, or to offer a second probationary term lasting between 12 and 26 weeks in a different assignment and with a different supervisor, or to recommend termination at least four weeks prior to the requested termination date, or to give "adequate expectations of job performance," the respondents violated their own policy as set forth in the Department of Health's Administrative Policy and Procedures Manual. Finally, the petitioner claims that his reputation as a former criminal investigator and special agent has been tarnished by the respondents' actions, and that he should be permitted an opportunity to clear his name.

The respondents, in their answer, deny the material allegations set forth in the petition. The respondents also submit the affidavits of Judith Pilgrim and Debra A. Hotaling, the Department of Health's director of personnel, in opposition to the petition.

According to Pilgrim, she met with the petitioner on March 16, 2010, the day after he first reported to the office, to explain the goals and expectations of him as a senior medical conduct investigator. The petitioner also received a manual defining his role as an investigator, detailing how to perform the job and the expectations for the position. Nevertheless, his job performance was problematic from the onset of his employment. He was unable to handle the workload assigned to him and he had ongoing issues regarding adherence to the chain of command, making independent decisions without prior discussions with his supervisor and failing to follow instructions given by his supervisor. On April 2, she met with the petitioner to discuss his failure to meet a deadline to present a case. The petitioner took offense to criticism presented at this meeting. On May 20, she conducted a review of the petitioner's assigned cases and determined that, of the 23 cases which he had been assigned, six had not been worked on, and in 22 of the cases, the petitioner had not followed her written instructions. On May 28, she initiated a counseling session with the petitioner regarding his failure to meet investigative deadlines and issued a counseling memo regarding his failure to meet investigative deadlines. On June 2, she met with the petitioner to conduct his first evaluation and to discuss his first probation report, dated June 1, 2010, which contained

"unsatisfactory" ratings in all applicable categories: work quality, work quantity, initiative/resourcefulness, reliability, and interpersonal relations. On June 15, she conducted a follow-up review of the petitioner's assigned cases and determined that, of the 26 cases which he had been assigned, three had not been worked on (including two which had been assigned in March), five had not been worked on for a month or longer, and only three could be considered on target. On June 30, she was first made aware of the petitioner's accusations concerning her and was shown the petitioner's memorandum to her supervisors in regard to their April 2 meeting as well as his response to her May 28 counseling memo. On July 1, she conducted a follow-up review of the petitioner's assigned cases and determined that, of the 28 cases which he had been assigned, one, which had been assigned in March, still showed no documented work, and only 12 were on target or up to date while 16 were not meeting supervisory and program deadlines. On July 6, she initiated a counseling session with the petitioner regarding his work performance. On July 12, she met with the petitioner to discuss his second probation report, dated July 9, 2010, which contained "unsatisfactory" ratings in the categories of work quantity and initiative/resourcefulness. On July 16, she conducted a "total" review of the petitioner's assigned cases and determined that, of the 29 cases which he had been assigned, at least 15 reflected no work done since the prior review on July 1. On July 26, she conducted another "total" review of the petitioner's assigned cases and determined that numerous cases reflected no activity for an extended period of time and inadequate documentation to show what work, if any, had been done, and that the petitioner had not closed any of his cases. On July 27, she prepared a final probation report containing "unsatisfactory" ratings in the categories of work quantity, initiative/resourcefulness, and interpersonal relations, and recommending the petitioner's dismissal. The petitioner's termination became effective on August 6.

Hotaling states in her affidavit that all new permanently appointed employees must complete a probationary period as set forth in the Department of Health's Administrative Procedures and Policy Manual, which is consistent with Civil Service Law § 63 and Rule 4.5 of the Civil Service Rules (4 NYCRR 4.5), the latter of which explicitly provides that "[i]f the conduct or performance of a probationer is not satisfactory, his or her employment may be terminated at any time after eight weeks and before completion of the maximum period of probation." When, after training, coaching, and other interventions an employee is not meeting the standards of his or her position, and it appears that the employee is not going to be successful in the position, the employee may be terminated prior to completion of the probationary period. In the petitioner's case, after a review of all relevant submissions, it was determined that the petitioner was not going to be successful in his probationary period, despite efforts to make it a success. Contrary to the petitioner's assertion, there is no maximum number of probation reports an employee can receive, and a supervisor has discretion to issue such reports more frequently to address a probationer's progress or lack thereof. Probation reports are filed in the probationer's personnel file. When a regional office recommends dismissal of a probationary employee, the personnel administrator responsible for that office reviews the contents of the employee's personnel file, as well as any documentation and justification presented by the program in support of its recommendation and any comments provided by the employee. Here, Denise Fiendel, an assistant director of personnel and a member of Hotaling's staff who had previously reviewed the petitioner's probation reports and determined that the petitioner's supervisor had provided an adequate explanation for all the "unsatisfactory" ratings received by the petitioner, reviewed the request for the petitioner's dismissal and recommended approval in a memorandum dated July 29, 2010. As to the petitioner's claim that he was not afforded an opportunity to serve a second probationary term, Hotaling noted that such an opportunity

is rarely allowed, and only where there is strong documentation that an employee has exhibited attributes that could possibly lead to success in a new assignment with a new supervisor. While reassignment of the petitioner to a different office was considered by Fiendel in her memorandum, she determined that because senior medical conduct investigators are only classified in the OPMC program, and because expectations for that position were the same throughout the program regardless of the location of the assignment, reassignment to a different supervisor or program area did not appear to be a viable option for the petitioner, particularly considering that his performance continued to be unsatisfactory. Fiendel's recommendation was approved by Hotaling and by John R. Conroy, who was then the Department of Health's director of human resources and operations. As to the petitioner's claim that the respondents failed to comply with the four-week notification period relative to the termination of a probationary employee, Hotaling noted that this period is for the benefit of personnel management staff to allow them sufficient time to obtain and review information and to make determinations; where, as here, all required steps had been taken and personnel had been made aware of the actions taken throughout the petitioner's probation, the full four weeks was not necessary to process and review the termination request.

"A probationary employee may be discharged without a hearing and without a statement of reasons in the absence of any demonstration that the dismissal was in bad faith, for a constitutionally impermissible or an illegal purpose, or in violation of statutory or decisional law" (***Matter of Barry v City of New York***, 21 AD3d 551, 800 NYS2d 594, 595-596 [2005]). Judicial review of a determination to discharge a probationary employee is limited to an inquiry as to whether the termination was made in bad faith or for an improper or impermissible reason (***Matter of Swinton v Safir***, 93 NY2d 758, 697 NYS2d 869 [1999]; ***Matter of Johnson v Katz***, 68 NY2d 649, 505 NYS2d 64 [1986]; ***Matter of Shabazz v New York State Dept. of Correctional Servs.***, 63 AD3d 1253, 879 NYS2d 832 [2009]). The petitioner bears the burden of establishing bad faith, violation of law, or the unconstitutional or illegal reasons by competent proof (***Matter of Santoro v County of Suffolk***, 20 AD3d 429, 798 NYS2d 508 [2005]). Neither the mere assertion of bad faith without the presentation of evidence demonstrating it (***Matter of Soto v Koehler***, 171 AD2d 567, 567 NYS2d 652, *lv denied* 78 NY2d 855, 573 NYS2d 644 [1991]) nor speculative or conclusory allegations of misconduct or unlawfulness (***Matter of Robinson v Health & Hosps. Corp.***, 29 AD3d 807, 815 NYS2d 222, *appeals dismissed* 7 NY3d 845, 823 NYS2d 774 [2006]; ***Matter of Cooke v County of Suffolk***, 11 AD3d 610, 783 NYS2d 392 [2004]) are sufficient to meet this burden.

The Court finds that the petitioner failed to meet his burden. As to his claim that he was terminated in retaliation for his written responses to various memoranda and reports prepared by his supervisor concerning his work performance, the petitioner failed to demonstrate that Pilgrim was even knowledgeable of those responses in time to effect such retaliation; according to her affidavit, it was not until June 30 that she was first made aware of his responses to the April 2 meeting and the May 28 counseling memo. Nor does it support the petitioner's claim that Pilgrim's initial criticism of his job performance predated his responses. The petitioner likewise presented no competent proof that the expectations imposed on him were unreasonable. To the extent the petitioner claims that he was dismissed in retaliation for his alleged whistleblowing, it suffices to note that the petitioner failed to allege the violation of any law, rule or regulation which was the subject of his "disclosures" (*see* Civil Service Law § 75-b [2] [a]; Labor Law § 740 [2] [a]).

In any event, upon review of the record, the Court finds that the respondents' determination was rationally based, *i.e.*, that the petitioner's dismissal was not motivated by bad faith but rather by unsatisfactory job performance–primarily, his inability to manage his workload. As for the petitioner's claim that the respondents acted in bad faith by deviating from their own written policies, it appears that the respondents complied with their obligations to provide the petitioner with periodic updates as to his progress and to provide one week's notice prior to the effective date of his termination (*see* 4 NYCRR 4.5 [b] [5] [iii]; ***Matter of Scott v Workers' Compensation Bd. of State of N.Y.***, 275 AD2d 877, 713 NYS2d 571 [2000]), and that the respondents offered reasonable explanations for their failure to extend the petitioner's probation for the maximum term, to offer a second probationary term in a different assignment and with a different supervisor, and to recommend termination at least four weeks prior to the requested termination date.

The petitioner also failed to establish his entitlement to a name-clearing hearing, which is warranted only if the reasons for the dismissal may be said to affect the petitioner's good name, reputation, honor, and integrity, and such reasons are publicly disclosed by the respondents (***Matter of Cardo v Murphy***, 104 AD2d 884, 480 NYS2d 726 [1984]). The Court finds that the reasons for the petitioner's dismissal are not so stigmatizing as to support his request for such a hearing (*see* ***Matter of Swinton v Safir***, *supra*).

The Court has reviewed the petitioner's remaining claims and finds them to be without merit.

Accordingly, the petition is denied and the proceeding is dismissed.

Submit judgment.