

**Roman v City of New York**

2012 NY Slip Op 32575(U)

October 5, 2012

Sup Ct, NY County

Docket Number: 100988/12

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13  
*Justice*

JESSICA ROMAN,  
Petitioner,  
  
-against -

INDEX NO. 100988/12  
MOTION DATE 8-08-2012  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

THE CITY OF NEW YORK CITY, NEW YORK CITY  
ADMINISTRATION FOR CHILDREN'S SERVICES,  
  
Respondent.

The following papers, numbered 1 to 3 were read on this petition to/ for Art. 78:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — <del>Answers</del> Exhibits	<del>1</del> <u>1</u>
Answering Affidavits — Exhibits	<del>2</del>
Replying Affidavits	<del>3</del>
Cross-Motion: <u>Yes</u> <del>141B</del> <input checked="" type="checkbox"/> <del>No</del>	

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 3000).

Upon a reading of the foregoing cited papers, it is Ordered and Adjudged that the Petition is denied and the proceeding is dismissed.

In this Article 78 proceeding, Petitioner, Jessica Roman, seeks a judgment vacating and setting aside Respondent's, New York City Administration of Children's Services (ACS), termination of her employment as a juvenile counselor.

Petitioner was hired as a juvenile counselor on or about February 20, 2008, by a New York City Agency that later merged into ACS. At the time of Petitioner's hire, she was advised that she would be serving a probationary period of two years.

Petitioner worked as a juvenile counselor in the Horizon Juvenile Center in the Bronx, New York, (the "Center") assigned to supervise male teenage residents in a prison-like residential setting.

In November 2010, Petitioner was involved in an incident in which at least two residents of the Center engaged in physical violence.

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

Petitioner alleges she was physically assaulted by one of the Center's residents and that another resident, upon hearing the struggle, came to protect Petitioner from her attacker.

The resident that Petitioner alleges attacked her claims that Petitioner brought other residents into his room for the express purpose of assaulting him.

The Director of the Center conducted a preliminary investigation following the incident and concluded that the resident's allegation of child abuse was substantiated, reported the incident to the New York State Office of Children and Family Services ("OCFS"), and recommended that Petitioner be terminated.

OCFS began investigating the allegation of child abuse on November 23, 2010. The OCFS investigator interviewed Center staff and administrators as well as juvenile residents in the vicinity at the time of the incident.

Both the preliminary investigation by the Director of the Center and the OCFS investigation noted that video evidence and interviews suggested that Center regulations which required residents to have been locked in their rooms at the time the incident occurred had not been followed.

The OCFS investigator did not find Petitioner's version of events to be credible.

At the conclusion of the investigation, the OCFS investigator concluded that there was credible evidence to substantiate the allegation against Petitioner. On or about April 26, 2011, OCFS informed ACS that the child abuse allegation against Petitioner was "indicated".

On or about May 18, 2011, ACS held a formal conference with Petitioner to discuss the substantiated child abuse allegation against her and developed a corrective action plan.

Following the formal conference, the ACS Employment Law Unit filed disciplinary charges against Petitioner. On June 22, 2011, a Step I informal conference was held regarding the disciplinary charges. The Step I informal conference resulted in a recommendation that Petitioner be terminated.

Petitioner appealed the Step I informal conference, and a Step II grievance hearing was held on August 24, 2011. The Step II grievance hearing resulted in a finding that the charges against Petitioner were substantiated.

By notice dated September 28, 2011, Petitioner was informed that the Commissioner of ACS had accepted the recommendations from the Center

Director, OCFS investigators, and ACS hearing officers that Petitioner be terminated and that Petitioner was terminated as of the date of the notice.

On or about January 30, 2012 Petitioner commenced the instant proceeding.

Petitioner puts forth two bases for this Article 78 proceeding.

First, Petitioner alleges that her two year probationary period ended in February 2010. Petitioner alleges that she should have been afforded a pre-termination Article 75 hearing before a neutral hearing officer as is afforded permanent civil service employees because she was no longer a probationary employee when the incident occurred in November 2010. Petitioner alleges that ACS's failure to conduct such a hearing means that her termination was arbitrary and capricious.

Second, Petitioner alleges that even if she did not have permanent civil services rights, that the hearings that were conducted were based on a false report motivated by racial bias, and that the report was found to be not credible and without merit by an independent source. To support these allegations, Petitioner submitted a copy of a report, dated February 17, 2012, in which the New York State Division of Human Rights (the DHR) concluded that, "[the DHR's] investigation has uncovered evidence supporting an inference of discrimination sufficient to require a public hearing. The record contains sufficient evidence to cast doubt on [ACS's] excuse for its actions against [Petitioner]." The DHR report makes specific references as to how it came to this conclusion.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974); *Ansonia Residents Ass'n v. New York State Div. of Housing and Community Renewal*, 75 N.Y.2d 206, 551 N.E.2d 72, 551 N.Y.S.2d 871 (1989). Judicial review of an administrative determination under Article 78 is confined to the facts and record adduced before the agency. See *Featherstone v. Franco*, 95 N.Y.2d 550, 742 N.E.2d 607, 720 N.Y.S.2d 93 (2000); *Matter of Rizzo v. New York State Div. Of Hous. and Community Renewal*, 6 N.Y.3d 104, 843 N.E.2d 739, 810 N.Y.S.2d 112 (2005). An agency is to be accorded wide deference in the interpretation of its regulations and governing statutory law, however, it cannot engraft requirements or assume powers not found in the enabling legislation. See *Vink v. New York State Div. Of Hous. and Community Renewal*, 285 A.D.2d 203, 729 N.Y.S.2d 697 (N.Y.A.D. 1<sup>st</sup> Dept., 2001).

Petitioner's contention that the expiration of her probationary period prior to the incident means that she should have been afforded an Article 75 hearing as required before terminating permanent civil service employees has no merit. Provisional appointments do not automatically ripen into full time civil service

positions. See *Matter of City of Long Beach v. Civil Service Empls. Assn., Inc. - Long Beach Unit*, 8 N.Y.3d 465, 867 N.E.2d 389. (2007). Petitioner was made aware that her position would not become permanent at the end of her probationary period in the Provisional Appointment document she signed on March 3, 2008. The document states, “[Petitioner] should register and take the civil service examination for [her] title when it is offered...” In fact, Petitioner followed this advice, presumably in an attempt to attain a permanent civil service position. Included in Petitioner’s papers was a letter from ACS dated September 14, 2011, in which Petitioner was informed that she was certified by ACS for possible appointment to a permanent position and to appear for interviews if she wanted to be considered. Petitioner was never a permanent civil service juvenile counselor, and as such, need not have been afforded the rights and benefits afforded permanent civil service employees.

Petitioner’s request that this Court vacate and set aside ACS’s termination of her because the decision is based solely on a false report motivated by racial bias, and which was found to be not credible and without merit by an independent unbiased Administrative Law Judge must also be denied. In an Article 78 proceeding, a court is limited to a review of the Agency’s decision. A court may not substitute its own judgement over that of the Agency. See *Dash v. Brown*, 199 A.D.2d 41, 604 N.Y.S.2d 108 ((N.Y.A.D. 1<sup>st</sup> Dept., 1993). So long as an Agency’s decision is supported by the evidence and there is a rational basis for the decision, that Agency’s decision must stand.

In the instant case there is evidence to support the Agency’s decision. Accounts of the events given by Center employees and residents were cited as the basis for ACS’s decision. Petitioner does not dispute that all accounts of the incident and physical evidence point to the fact that Center regulations were not being followed at the time of the incident and that residents were roaming free at a time when they were required to be locked in their rooms. Likewise, even if Petitioner disagrees with their version of the incident, numerous individuals were interviewed to ascertain what occurred on the night of the incident. These facts are cited in all of the reports and relied upon in each of the hearings. Therefore this Court can not find that ACS’s termination of Petitioner is not based on substantive evidence.

As to Petitioner’s contention that ACS’s determination was based solely on a false report motivated by racial bias, this Court can not set aside ACS’s determination on this basis. This Court is limited to review the record before the Agency at the time it made its decision. This Court has not been presented with any evidence suggesting that at either the Step I informal hearing, or the Step II grievance hearing that Petitioner raised the argument that any sort of bias influenced the investigation of the incident. The DHR report submitted by Petitioner does raise some interesting questions regarding the thoroughness and accuracy of the investigation into the incident. However, the DHR report merely

concludes that there is probable cause to investigate Petitioner's allegations of racial bias, not that any such bias actually occurred. Also, the fact that the DHR report was published almost six months after Petitioner was terminated means it certainly was not part of the record considered by the Agency and is therefore beyond the scope of consideration for this Article 78 proceeding.

Accordingly, it is the decision and order of this court that the Petition is denied and the proceeding is dismissed.

Accordingly, it is ORDERED and ADJUDGED that the Petition is denied and the proceeding is dismissed.

Dated: October 5, 2012

ENTER:

MANUEL J. MENDEZ  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE