

**Matter of Rodriguez v New York City Hous.
Auth.**

2008 NY Slip Op 31809(U)

June 25, 2008

Supreme Court, New York County

Docket Number: 0107877/2007

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT

PART 17

Index Number : 107877/2007

Justice

RODRIGUEZ, ANTHONY

VS.

HOUSING AUTHORITY

SEQUENCE NUMBER : # 001

OTHER

INDEX NO. 107877-01

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion Be granted & decided
as a matter

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

FILED

JUN 30 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/25/08

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

-----X

In the Matter of the Application of

ANTHONY RODRIGUEZ,

Petitioner,

Index No. 107877/07

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

-----X

Emily Jane Goodman, J.S.C.:

Petitioner Anthony Rodriguez brings this petition, pursuant to CPLR Article 78, for a judgment vacating a determination of respondent New York City Housing Authority (NYCHA) discharging petitioner from the position of Community Coordinator.

Petitioner seeks reinstatement and back pay, should he prevail in this proceeding.

Petitioner has been a Community Coordinator for NYCHA since 1994. In this position, petitioner apparently interviews applicants for public housing. In a letter dated November 10, 2005, petitioner was served with disciplinary charges for various alleged infractions. Petition, Ex. A. On December 13, 2005, a hearing was held, where petitioner agreed that he was guilty of the conduct attributed to him. In a Disciplinary Conference Disposition (Disposition) issued the same day (*id.*, Ex B),

petitioner agreed to accept a suspension from work for 25 days, followed by 12 months of probation, beginning February 13, 2006, and ending February 13, 2007. The Disposition further provided that:

[a]n employee who is subject to a General Probationary Evaluation Period may be terminated from his employment without the service of charges, without a hearing and without further appeal on the basis of incompetency, misconduct or unsatisfactory service during the stipulated General Probationary Evaluation Period, except that said termination may not be arbitrary or capricious.

Petitioner received his Initial Probationary Evaluation Report on May 12, 2006 (*id.*, Ex. C.), in which he received ratings of "satisfactory" in all categories relating to the quality of his work. However, in his Second Quarter Probationary Review, dated August 12, 2006 (*id.*, Ex F), petitioner received an "unsatisfactory" rating in the area of his work quality.

In a meeting on August 28, 2006, petitioner was informed that his "unsatisfactory" rating stemmed from two incidents where, against NYCHA procedures, he interviewed applicants who had not been pre-screened under NYCHA's Housing Authority Tenant Selection System (HATS). At the meeting, petitioner explained that he did so at the instruction of his second-level supervisor Malcom Shelsky (Shelsky), who assured petitioner that, under the circumstances surrounding these two incidents, the applicant could be entered into HATS after the interview, instead of before. Only then did petitioner proceed with the interviews.

Petitioner eventually prevailed upon his superiors to conduct an review of the two incidents.

Petitioner faired even less well on his Third Quarterly Probationary Report (*id.*, Ex. H), receiving an unsatisfactory rating for both the quantity of his work, and his time and leave, stemming from his unapproved leave on August 21, 2006.

Petitioner was docked a day's pay for his absence. As he explained to his superiors in a meeting held on November 3, 2006, petitioner was absent on August 21, 2006 because his plane was delayed one day while petitioner was returning from his vacation. Although NYCHA says that petitioner told them the plane was delayed because of bad weather, petitioner here claims that the delay was actually caused by a terrorism threat. Respondent also notes that the proof submitted by petitioner to support his claim of flight delay indicates that the flight date was changed by one day, but that change was made weeks before the purported delay. Petitioner filed a grievance following NYCHA's choice to dock him for August 21, 2006.

NYCHA also faulted petitioner for this alleged drop in productivity, based on the number of interviews he had conducted in the third quarter of his probationary period. Petitioner denies that he did not meet NYCHA's productivity standards for that period.

NYCHA's initial response to this petition is to list, and

provide evidence of, the charges brought against petitioner which lead to his being placed on probation. This recitation is, however, completely irrelevant to the issue of whether petitioner failed to meet NYCHA standards during the probationary period following the disciplinary hearing, and will not be considered here.

NYCHA conducted an investigation into the matter of the two improper interviews, and determined that petitioner was not at fault. This finding is related in the memorandum issued by NYCHA's Director, Applications & Tenancy Administration Dept. Answer, Ex. 17. NYCHA states that this alleged infraction of the rules played no part in petitioner's termination.

According to NYCHA, petitioner's unexplained or unapproved absences, and his drop in productivity are the basis of his termination. NYCHA finds that petitioner has not adequately explained his absence on that date, as the proof he provided of the plane delay was insufficient. Petitioner is also cited for other infractions of time and attendance. See NYCHA Counseling Memo, Answer, Ex. 16. For instance, petitioner missed two hours of work on January 25, 2007 in order to appear in court. He was found "AWOL" when he failing to inform his superiors that he would be late until the morning of his court appearance. *Id.* He is also cited in the Counseling Memo for several other unacceptable absences, such as a three-hour lunch taken on

November 20, 2006. Petitioner claims he was at the doctor's, but failed to inform his superiors of that fact. NYCHA claims that each infraction of NYCHA's attendance rules served to create a burden on petitioner's co-workers.

On the matter of petitioner's productivity, NYCHA explains its quota system of required interviews, and refers to petitioner's Eligibility Productivity Report (Answer, Ex. 2), allegedly showing that petitioner failed to meet his quota on several occasions, resulting in unacceptable "production deficits." Answer, at 12. Petitioner denies that he failed to meet any of his quotas, producing to a variety of documents purportedly showing petitioner's productivity during the period in question.

" "[J]udicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record, and once it has been determined that an agency's conclusion has a sound basis in reason the judicial function is at an end.' "

Matter of Mankarios v New York City Taxi and Limousine

Commission, 49 AD3d 316, 317 (1st Dept 2008), quoting *Matter of Partnership 92 LP & Building Management Company, Inc. v State of New York Division of Housing & Community Renewal*, 46 AD3d 425, 428 (1st Dept 2007). Specifically, "[j]udicial review of [a] discharge of a probationary employee is limited to whether the

determination was made in bad faith or for an improper or impermissible reason." *Walsh v New York State Thruway Authority*, 24 AD3d 755, 757 (2d Dept 2005). Further, a court may not substitute its judgment for that of the agency "unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [emphasis in original][internal quotation marks and citations omitted]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974). Deference is accorded to an agency applying its own procedures (*Matter of Acunto v New York State Division of Housing and Community Renewal*, 269 AD2d 169 [1st Dept 2000]), and reasonable doubts will be resolved in favor of the agency. *Matter of Bronx Lebanon Special Care Center v DeBuono*, 269 AD2d 195 (1st Dept 2000).

"Absent bad faith, a municipal agency may summarily terminate a probationary employee for any reason." *Matter of Wilson v Bratton*, 266 AD2d 140, 141 (1st Dept 1999). "It is ... well settled that absenteeism or lateness constitute reasonable grounds to terminate a probationary employee." *Matter of Butler v Abate*, 204 AD2d 171, 172 (1st Dept 1994); see also *Matter of Wilson v Bratton*, 266 AD2d at 142 ("[l]ateness is sufficient grounds to terminate a probationer's employment"); see also *Matter of Garrett v Safir*, 253 AD2d 700 (1st Dept

1998) (termination of probationary employee justified when probationary employee "was late in relieving another [employee] of her post"). A probationary employee must show actual "bad faith" on the part of the agency regarding his termination. *Matter of Butler v Abate*, 204 AD2d at 172; see also *Matter of Robinson v Health and Hospitals Corporation*, 29 AD3d 807 (2d Dept 2006).

NYCHA's decision to terminate petitioner's probationary employment was rationally based, and supported by the evidence. The court notes that petitioner's main argument, that he was punished for interviewing two applicants before they were processed in HATS, was not a part of NYCHA's determination. However, this decision should not be taken as a tacit approval of NYCHA's quota system, which dictates that employees must conduct a certain number of interviews in order to be deemed productive. Such a system fails to account for the complexity of the interview and undoubtedly leads to certain applicants being denied proper attention due to the employee's concern that he or she must move on to the next interview as soon as possible or risk a negative evaluation. However, in light of NYCHA's determination that petitioner failed to inform his supervisors in advance of certain absences and in light of his unapproved absence on August 21, 2006 (where petitioner's own proof called into question the validity of his claim), petitioner has failed to

establish that NYCHA acted in bad faith in terminating him.

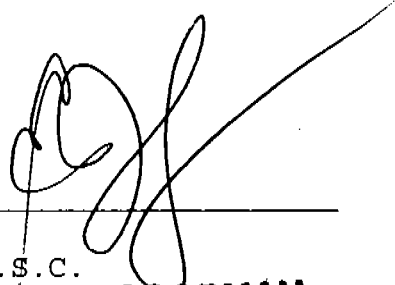
Accordingly, it is

ADJUDGED that the petition is denied, and the proceeding dismissed.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: June 25, 2008

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
JUN 30 2008
COUNTY CLERK'S OFFICE
NEW YORK