Matter of Stevens v Schriro
2013 NY Slip Op 32095(U)
August 16, 2013
Sup Ct, New York County
Docket Number: 118045/09
Judge: Lucy Billings
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[* 1] SCANNED ON 9/9/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. — Justice PART 46

Index Number : 118045/2009
STEVENS, TIAJWANA
vs.
SCHIRO, DR.DORA
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to 2, were read on this motion to/for reargument or permission to appeal

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

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

The court denies respondents' motion to reargue the petition and to appeal the order dated 10/18/12, pursuant to the accompanying decision. C.P.L.R. §§ 2221(d), 5701(c).

FILED
SEP 09 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/16/13

Lucy Billings, J.S.C.
LUCY BILLINGS J.S.C.

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 NEW YORK: IAS PART 46

In the Matter of the Application of
TIAJWANA STEVENS,

Petitioner,

Index No. 118045/09

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

-against-

DECISION AND ORDER

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

Respondents

FILED
SEP 09 2013
COUNTY CLERK'S OFFICE
NEW YORK

APPEARANCES:

For Petitioner
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For Respondents
Benjamin Traverse, Assistant Corporation Counsel
100 Church Street, New York, NY 10007

LUCY BILLINGS, J.:

Respondents move to reargue the petition, C.P.L.R. § 2221(d), which the court determined, when supplemented by petitioner's admissible evidence and considered with respondents' administrative record and affidavits, raised genuine issues, to be resolved by a trial, whether respondents' termination of petitioner's probationary employment was unlawful, in bad faith, or arbitrary. C.P.L.R. § 7804(h). Alternatively, respondents move for leave to appeal that non-final order. C.P.L.R. §

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5701(c). For the reasons set forth on the record May 30, 2013, and further explained below, the court denies both forms of relief.

I. <u>REARGUMENT</u>

Setting aside whether the petition qualifies as a "motion," to which respondents seek to apply the standards for reargument, C.P.L.R § 2221(d), rather than the standards for vacating an order or judgment, C.P.L.R § 5015(a), which would not dictate vacating the court's prior determination of this proceeding, that determination does not in any event meet the standards for reargument.

A. <u>Respondents Do Not Show a Basis in the Record or a Principle of Law That the Court Overlooked or Misapprehended</u>.

First, respondents contend that the court overlooked or misapprehended that the record demonstrated a material basis for their conclusion that petitioner, a probationary correction officer, submitted a false report concerning a fellow correction officer's use of force in an altercation with a detention center inmate September 20, 2008. <u>See</u>, <u>e.g.</u>, <u>Claudio v. Abate</u>, 213 A.D.2d 188, 189 (1st Dep't 1995). Petitioner has never contended, nor has the court ever determined, that, if petitioner's submission of a false report in fact was the reason for her discharge, supported by a material basis, respondents' reasoning and findings nonetheless would be unlawful, in bad faith, or arbitrary. Instead, the court twice determined, first based on petitioner's evidence, and then based on that evidence

considered with respondents' record and affidavits, that she raised genuine issues whether her submission of a false report in fact was the reason for her discharge, due in part to the evidence respondents selectively relied on and did not rely on. In so holding, the court expressly recognized that, even if respondents' reasoning and findings were mistaken, as long as they were not a pretext for an unlawful reason, bad faith, or irrational action, mistakes would not warrant a trial concerning petitioner's discharge. Turner v. Horn, 69 A.D.3d 522, 523 (1st Dep't 2010); Bradford v. New York City Dept. of Correction, 56 A.D.3d 290, 291 (1st Dep't 2008).

In particular, respondents relied on accounts of the inmate involved in the altercation, Dennis Ricks, a known ringleader among the inmates, and 14 other identified inmates, regarding the use of force incident. These accounts all are reported or summarized by respondents' investigators; none is executed by an inmate. Nor have respondents ever indicated whether their employees or officials obtained any further statements of those 14 inmates or interviewed any other inmates and obtained their accounts about the use of force incident. A focus of the investigation was whose actions incited the altercation: (1) Ricks exiting his cell through manipulation of its lock or (2) Officer Strunkey summoning Ricks from his cell after unlocking it. Yet respondents' evidence does not reveal whether the inmates respondents present as witnesses to Ricks's exit from his cell and his encounter with Officer Strunkey in fact were in a

position to observe either of them. Petitioner, by contrast, was in a position to observe the emergency release bar, which Ricks and his fellow inmates insisted Officer Strunkey used to open Ricks's cell, in her station throughout the incident.

Finally, respondents did not compile these accounts until more than six months after the incident, allowing, as petitioner pointed out, "ample occasion for Ricks to have intimidated or cajoled the inmates in the detention center's gang-affiliated, violent, and highly classified inmate housing area" to support his version or risk their survival. Decision and Order at 8-9 (Oct. 18, 2012). Respondents offer no explanation why on the day after the incident their "canvas for witness was conducted . . . to no avail," and one of the two statements obtained candidly admitted: "We were lock in. Did not see anything." V. Answer Ex. 5, at 4. Yet 6-9 months later respondents' canvas yielded 14 witnesses, but no further statement from either inmate from whom respondents reported a statement September 21, 2008. Even disregarding these circumstances, respondents fail to recognize that no inmate would reveal a cell door in a condition permitting manipulation.

Fully accepting these accounts, respondents also do not explain their disregard of all five consistent accounts by each of the correction officers other than Officer Strunkey who were in a position to observe all or part of the incident and would have risked their jobs by misrepresenting or concealing what occurred. Respondents' only other support for the inmates'

accounts is the investigators' own unsuccessful attempt, described as "almost three hundred pounds" of forceful pulling, to open Ricks's cell door without the emergency release bar. V. Answer ¶ 79; Aff. of Investigator Rhonda Young (Oct. 26, 2010) ¶ 10. Despite petitioner and the court repeatedly pointing out the absence of any indication in the record whether the investigators were familiar with the manipulative techniques or makeshift instruments used to open locked cells without a release bar or other DOC mechanism, respondents do not respond with any affidavit or other evidence to that effect.

These omissions are significant in the face of petitioner's evidence regarding respondents' unwillingness to recognize a persistent condition that allowed inmates to manipulate their cell locks. Particularly when respondents offer no other reason why respondent New York City Department of Correction (DOC) and the New York City Department of Investigations (DOI) credited the inmates and wholly discredited petitioner and her fellow correction officers, see Swinton v. Safir, 93 N.Y.2d 758, 762 (1999), this evidence suggests that a true reason was to conceal those facts that reflected negatively on DOC: a serious weakness in security at the highly classified inmate housing area.

In sum, respondents explain little of the delay in, omissions from, or rationale for their investigation, discussed more extensively in the prior decision. The point is not that respondents' delay, omissions, or rationale necessarily demonstrates any unlawfulness, bad faith, or irrationality. The

point is that, absent explanations for their delay, omissions, and facially inexplicable investigative methods, it was impossible to determine from their evidence that the unlawful reasons for and bad faith involved in their discharge of petitioner, which her evidence previously had supported, were not necessarily so. See Turner v. Horn, 69 A.D.3d at 523; Bradford v. New York City Dept. of Correction, 56 A.D.3d at 291.

B. Respondents Do Not Show That the Court Shifted the Burden of Proof to Them, Became the Factfinder, or Drew the Court's Own Conclusions Regarding Petitioner's Discharge.

Respondents misapprehend the court's focus on their evidence in reaching its more recent decision as shifting the burden to raise substantial issues of unlawfulness or bad faith from petitioner to respondents. As referred to above, in a decision dated August 27, 2010, the court denied respondents' motion to dismiss the petition based in its failure to state a claim that their termination of petitioner's employment was unlawful, in bad faith, or arbitrary. C.P.L.R. §§ 3211(a)(7), 7804(f). In that decision, the court already determined that her evidence did raise substantial, genuine issues whether respondents' termination of her employment was unlawful and in bad faith. Respondents did not move to reargue their motion or to appeal that decision.

Respondents' answer, supplemented by their administrative record and affidavits, provided respondents an opportunity to address, explain, or rebut the serious questions petitioner's evidence had raised. C.P.L.R. § 7804(e). Had respondents done

so, had they shown a plausible good faith reason, albeit disputed by petitioner, albeit mistaken, for terminating her in the absence of any disciplinary action against Officer Strunkey, the court would have denied her petition without a trial. C.P.L.R. §§ 409(b), 7806. Therefore the court scrutinized respondents' evidence for that purpose.

As also discussed extensively in this second prior decision, respondents' evidence raised more questions than it answered: evidence respondents point to again in their current motion. They refer, for example, to the absence of use of force reports from any of the witnessing correction officers in the DOC investigative file when, approximately a month after the incident involving use of force, DOI assumed responsibility for investigating the incident. Initially, records of petitioner's Unemployment Insurance claim reflected that her failure to submit such a report immediately after witnessing a use of force incident was a basis for her employer contesting the claim and terminating her employment: an entirely permissible reason for the termination, weakened only by the multiple layers of hearsay from which the reason derived. Rather than presenting first-hand support for such a reason in their answer and administrative record, respondents revealed that either none of five witnessing officers had submitted a use of force report, or DOC had lost all such reports immediately submitted, like the report petitioner claims she submitted. No disciplinary charges related to the incident ever were instituted against any other officer who had

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not submitted a use of Force report until ordered to do so.

Respondents' own evidence on this point further reveals that, in fact, petitioner was not responsible for initiating a use of force report. Instead:

> It shall be the duty and responsibility of all facility commanders and/or field command unit heads or their designees, to report promptly and properly via telephone to the C.O.D. ["Central Operations Desk"], all unusual incidents that occur within their jurisdiction.
>
> . . . C.O.D. will advise the facility and/or the commander currently in-charge, to immediately gather or to order the immediate gathering of information that may be required by the Office of Public Information.

V. Answer Ex. 9, at 3 (emphasis added).

> The written report of the unusual incident shall be submitted on an Unusual Incident Report (Form 168 . . .). The unusual incident report shall be accompanied by reports/statements obtained from employees . . . .
>
> . . . .
>
> . . . The original report must be signed by the Deputy Warden for Security and the Commanding Officer of the facility/division.

Id. at 8 (emphases added). As also set forth in the prior decision, the report eventually requested from petitioner is on neither an Unusual Incident Report Form, id. at 3, nor a "Use of Force Witness Report" form she attests she and her fellow correction officers used when they reported the use of force shortly afterward. V. Pet. Exs. D and F. The later report is simply petitioner's narrative memorandum to the Warden, according to the Directive's procedures.

More delay ensued in respondents' compilation of these accounts. DOI did not request any use of force reports until

March 31, 2009. Then, after petitioner immediately complied with the order to submit a report March 31, 2009, DOI did not interview her until August 20, 2009.

C. Respondents' Entitlement to Rely on DOI's Findings Is Limited.

Last, respondents assume they are entitled to concur in and rely on DOI's recommendation that respondents terminate petitioner's employment, no matter how unlawful, in bad faith, or arbitrary DOI's reasons for its conclusion are. Such a conclusion would allow DOC to wash its hands of an investigation, transfer responsibility, and then accept the result, even when DOC knows that result was reached for an unlawful purpose, in bad faith, or through arbitrary decisionmaking.

Here, moreover, the principal investigator, Rhonda Young, was a DOC employee. Young Aff. ¶ 1. It was she who wanted petitioner to change her use of force report to recount that Officer Strunkey stabbed Ricks and gave her a few days to reconsider and comply, after which, when she refused to change her account, her discharge immediately ensued. Even were it DOI whose actions were unlawful, in bad faith, or arbitrary, however, petitioner seeks relief not just against respondent DOC and its Commissioner, but also against respondent City of New York.

More significantly, whether by DOI or DOC, the principal reason given for discharging petitioner is nonsensical on its face. She gave "false and misleading testimony to defray her involvement in the incident." V. Answer ¶ 115 and Ex. 13, at 2. The record contains not the remotest suggestion that petitioner

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was ever, in any way, involved in the use of force. Her alleged "false testimony" is not that she was uninvolved when in fact she was involved, or that she observed nothing when in fact she did observe the use of force, or that no use of force occurred when in fact use of force did occur. She testified that Ricks opened his cell himself, approached Officer Strunkey from behind, and refused to return to his cell, precipitating an altercation between Ricks and the officer, in which any use of force was the minimum necessary to halt Ricks's aggression. Whether she testified as she did or as DOI conveyed that it wanted, that Officer Strunkey locked Ricks out of his cell, directed him to a bridge area, and beat and stabbed him, to target the officer, would not involve her in the incident any more or less. Nor does anything in the record indicate how petitioner otherwise sought to minimize her involvement in the incident or how her testimony was "misleading" in any way. Id.

Respondents encounter equal difficulty connecting to the use of force incident or to her discharge a year later petitioner's admission that, hours before the use of force incident, she had left her post to assist another officer temporarily, while still keeping her post within view. Petitioner's admitted departure from her post, in violation of DOC rules, would constitute a rational basis for her discharge, to be sure. Respondents have never cited to any rule that such conduct violated, however, Bradford v. New York City Dept. of Corrections, 56 A.D.3d at 291, nor claimed it constituted a dereliction of duty, was committed

for a prohibited purpose, or posed a risk to security. See Medina v. Sielaff, 182 A.D.2d 424, 427 (1st Dep't 1992). Nor have they cited to any evidence of a reprimand, caution, or slightest mention about this conduct to petitioner before or afterward, until when she was discharged it suddenly surfaced as a reason along with the other reasons related to the use of force. If, as respondents, maintain, this conduct were sufficient by itself to discharge petitioner, they fail to explain why DOI's further, lengthy investigation of her conduct related to the use of force was necessary. While respondents rationally might add her departure from her post to other reasons for her discharge related to the use of force, were this reason also related, no such connection is discernible.

As set forth above, if the facts respondents relied on to terminate petitioner's employment emerge as untrue, that mistake is insufficient to establish bad faith or unlawfulness and reverse the termination. If the good faith or lawful reasons respondents relied on to terminate her employment, however, are not the true reasons, then they are not in good faith and lawful: if, for example, respondents discharged petitioner not because she testified falsely as they maintain, but because she refused to testify falsely and implicate Officer Strunkey. So far, this reason is the only comprehensible explanation for the undisputed fact that the statements from inmates, so critical to respondents' conclusions, were insufficient to discipline Officer Strunkey, but, somehow, were sufficient to discharge petitioner.

II. PERMISSION TO APPEAL

Respondents had the opportunity to move to appeal the August 2010 decision denying their motion to dismiss the petition, chose not to do so then, and still have the opportunity to appeal that decision and the October 2012 decision after a final disposition here. C.P.L.R. § 5501(a)(1); Hebel v. West, 25 A.D.3d 172, 175 n.1 (3d Dep't 2005); Defreestville Area Neighborhood Assn., Inc. v. Planning Bd. of Town of N. Greenbush, 16 A.D.3d 715, 719 n.3 (3d Dep't 2005); Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ., 299 A.D.2d 640, 641 (3d Dep't 2002), aff'd as modified, 4 N.Y.3d 225 (2005); Jacoby, M.D., P.C. v. Loper Assocs., 249 A.D.2d 277, 278 (2d Dep't 1998). See Thorne v. Grubman, 14 A.D.3d 433, 434 (1st Dep't 2005); Children's Vil. v. Greenburgh Eleven Teachers' Union Fedn. of Teachers, Local 1532, AFT, AFL-CIO, 232 A.D.2d 357 (2d Dep't 1996). Their current motion is the third time respondents have insisted that the petition fails to state a claim that their termination of petitioner's employment four years ago, based on events five years ago, was unlawful, in bad faith, or arbitrary, each time based largely on the same evidence, and each time only exposing more weaknesses in their position. C.P.L.R. §§ 3211(a)(7), 7804(f). A trial now will impose the heaviest burden of proof on petitioner and no obligation on the factfinder to view the evidence in her favor and will provide respondents the fullest opportunity to present their position persuasively, before any more memories fade or any more witnesses or other

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evidence is lost.

The most expeditious way to conclude this proceeding is to reach a final disposition here where, given petitioner's heavy burden, respondents may well never be aggrieved. E.g., Matter of Ronald Anthony G., 60 A.D.3d 482, 483 (1st Dep't 2009); Jimenez v. Brenillee Corp., 48 A.D.3d 351, 352-53 (1st Dep't 2008). See City of Newark v. Law Dept. of City of N.Y., 8 A.D.3d 152, 153 (1st Dep't 2004); Beharry v. Guzman, 33 A.D.3d 741, 742 (2d Dep't 2006); Sloboda v. Sloboda, 24 A.D.3d 533, 534 (2d Dep't 2005); Kaplan v. Rosiello, 626, 627 (2d Dep't 2005). Yet, if they are, then they may appeal based on a full record and seek review of both the August 2010 and the October 2012 decisions. Had the termination of petitioner's employment occurred a year or two ago, respondents' request might be more persuasive. An appeal now will only compound the delay.

III. CONCLUSION

For all the reasons explained above, on the record May 30, 2013, and in the order dated October 18, 2012, the court denies respondents' motion to reargue the petition, C.P.L.R. § 2221(d), and to appeal that order. C.P.L.R. § 5701(c). The parties shall appear for jury selection September 16, 2013, at 10:30 a.m., to be followed by the trial, as previously scheduled. This decision constitutes the court's order. The court will mail copies to the parties' attorneys.

DATED: August 16, 2013

LUCY BILLINGS, J.S.C.

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