SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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JASON BENJAMIN,

Plaintiff,

- v -

CYNTHIA BRANN, THE NEW YORK CITY DEPARTMENT OF CORRECTION, THE CITY OF NEW YORK

Defendant.

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INDEX NO. 154730/2020

MOTION DATE 06/26/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Jason Benjamin (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents Cynthia Brann, as Correction Commissioner of the New York City Department of Correction, the New York City Department of Correction and the City of New York (motion sequence number 001) is granted, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with Notice of Entry, on all parities within twenty (20) days.

In this Article 78 proceeding, petitioner Jason Benjamin (Benjamin) seeks a judgment to overturn the order of the respondent New York City Department of Correction (DOC) that terminated his probationary employment, while the DOC cross-moves to dismiss the petition (together, motion sequence number 001). For the following reasons, the petition is denied, the cross motion is granted and this proceeding is dismissed.

FACTS

Benjamin was employed as a corrections officer by DOC from January 8, 2018 until his termination on January 6, 2020, during which time he was primarily assigned to the Brooklyn Detention Complex on Rikers Island. *See* verified petition, ¶¶ 5, 34; notice of cross motion, exhibit 3. Benjamin admits that he was terminated within the two-year probationary period that applied to his job title. *Id.*, ¶¶ 5, 37. However, he asserts that the DOC terminated his employment in bad faith. *Id.*, ¶¶ 6-46.

Benjamin commenced this Article 78 proceeding on June 26, 2020. *See* verified petition. He asserts that his petition is timely, despite having been filed beyond the normal 120 day statute of limitations, because of the orders of the Chief Administrative Judge of the Courts that extended the statute of limitations for certain nonessential, including Article 78 proceedings, during the Covid-19 national pandemic. *Id.*, ¶ 4. Rather than file an answer, the DOC submitted a cross motion to dismiss Benjamin's petition on October 22, 2020. *See* notice of cross motion. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

Normally, the court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether a challenged agency determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free*

School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). An agency's determination will only be found arbitrary and capricious where it is "without sound basis in reason, and in disregard of the facts." *Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. Conversely, if there is a rational basis in the administrative record that supports the agency's determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232. However, this Article 78 proceeding does not require judicial review using the normal arbitrary and capricious analysis.

In the context of corrections officers similarly situated to Benjamin, the Appellate Division, First Department, has long and consistently held as follows:

> "A probationary employee may be dismissed for almost any reason, or for no reason at all, and the employee has no right to challenge the termination in a hearing or otherwise, absent a showing that he or she was dismissed in bad faith or for an improper or impermissible reason. The burden falls on the petitioner to demonstrate by competent proof that bad faith exists, or that the termination was for an improper or impermissible reason."

Matter of Castro v Schriro, 140 AD3d 644, 647 (1st Dept 2016), citing *Matter of Swinton v Safir*, 93 NY2d 758, 762–763 (1999), *Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 (1st Dept 2006); *see also Wilson v City of New York*, 100 AD3d 453 (1st Dept 2012); *Matter of Turner v Horn*, 69 AD3d 522 (1st Dept 2010). Here, Benjamin's termination by the DOC was presumptively justified as he admits that it occurred during the two-year probationary period that followed his hiring on January 8, 2018. *See* verified petition, ¶¶ 5, 37.

Benjamin nevertheless argues that the DOC terminated his employment in bad faith. *See* verified petition, ¶¶ 6-46. As just observed, Benjamin bears the burden of proof to demonstrate that the DOC acted in bad faith. *Matter of Castro v Schriro*, 140 AD3d at 647. The DOC argues that he failed to meet that burden of proof. *See* respondent's mem of law at 11-14. After carefully considering the evidence, the court agrees with the DOC.

Benjamin asserts that the incident that led to his termination occurred on July 2, 2019, and involved an attempt to restrain an inmate at the Brooklyn Detention Complex. *See* verified petition, ¶¶ 6-21. After reviewing the video record of the altercation, the DOC concluded that Benjamin had violated DOC "use of force" guidelines by spraying the inmate's face with a chemical agent several times, and then punching the inmate in the head several times while the inmate was on the ground being restrained by three other corrections officers. *Id*., ¶¶ 22-32; notice of cross motion, exhibit 2. Benjamin asserts that the DOC acted in bad faith in reaching this conclusion, however, because the disciplinary guideline which applies to use of force incidents provides that the penalty of termination is improper "in situations where the Staff Member's actions were objectively reasonable in light of the facts and circumstances confronting the Staff Member." *Id*., ¶ 33; exhibit B. Benjamin argues that his use of force during the July 2, 2019 incident was "objectively reasonable," and that the DOC acted in bad faith to find otherwise. *Id*., ¶¶ 34-46. To support his argument, Benjamin cites the unpublished decision by this court (Kotler, J.) in *Matter of Henry v New York City Dept. of Housing Preservation and Development* (Index No. 150518/19), which vacated the agency's order that terminated the petitioner's employment. *Id*., exhibit D. However, that petitioner was not a corrections officer, and the court further found that she was not a probationary employee. Moreover, the court applied the "arbitrary and capricious" standard in *Henry*, and did not discuss the issue of bad

faith. Therefore, the court finds that the *Henry* decision is factually inapposite and does not support Benjamin's bad faith argument.

The DOC argues that, by merely alleging bad faith, but failing to provide any evidence of it, Benjamin's argument fails as a matter of law. *See* respondent's mem of law at 9-10. This correctly states the rule of interpretation observed in the Appellate Division. *See e.g.*, *Matter of Francois v Walcott*, 136 AD3d 434 (1st Dept 2016); *Matter of Shabazz v New York State Dept. of Correctional Servs.*, 63 AD3d 1253 (3d Dept 2009); *Matter of Witherspoon v Horn*, 19 AD3d 250 (1st Dept 2005). The DOC also argues that the evidence shows that it had a "good faith" basis for terminating Benjamin's employment, because he admits that his conduct violated DOC "use of force" procedures, and only challenges his punishment. *See* respondent's mem of law at 11-14. The court observes that the DOC's use of force guidelines permit employee termination for "[d]eliberately striking, kicking or using chemical agents on an inmate in restraints, in a matter that poses a risk of serious injury to the inmate." *See* verified petition, ¶ 33; exhibit B. The court also observes that the relevant portion of Benjamin's petition alleges as follows:

> "25. The investigators asked Petitioner to explain the punches he threw to inmate Brito's head when Brito was on the ground restrained by other staff. 26
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> 26. Petitioner explained that by the time he threw punches, Officers Samuels, Guerrero and Petitioner had each deployed their chemical agent within a short time of each other in the immediate vicinity. The spray blurred Petitioner's vision, an undisputable side effect, causing him to be unaware that a third officer, Lysius, had joined in attempting to restrain inmate Brito.
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> 27. The video clearly showed the effect that the chemical agent had on the Petitioner. For example, after Petitioner deployed his chemical agent, he stepped back, turned around and put his arms up toward his face because his eyes were burning and forced shut. For a period of time, Petitioner could not open his eyes to see what was going on after inmate Brito charged toward Officer Guerrero. When Petitioner jumped back in to assist Officer Guerrero, he did not have a clear view of what transpired."

Id., ¶¶ 25-27. These allegations plainly describe Benjamin "striking" and "using chemical agents" on an inmate that was being restrained on the floor by three other corrections officers. Therefore, the court credits the DOC's assertion that Benjamin "admitted" that he had violated

its use of force guidelines, even if he did not state this in so many words. Because the pleadings do allege that Benjamin violated the DOC's use of force guidelines, however, the court cannot equally credit Benjamin's assertion that the DOC's decision to terminate him was made in bad faith. *See e.g.*, *Matter of Medina v Sielaff*, 182 AD2d 424 (1st Dept 1992). In this circumstance, Benjamin was obligated to "provide[] a factual predicate for his allegations." *Matter of Castro v Schriro*, 140 AD3d at 647. He has not done so. Therefore, the court finds that his mere allegations of bad faith are insufficient to meet his burden of proof in this instance. Accordingly, the court concludes that Benjamin's Article 78 petition should be denied as meritless.

The DOC's cross motion asks the court to dismiss Benjamin's petition for failure to state a cause of action, pursuant to CPLR 3211 (a) (7). *See* respondent's mem of law at 9-14. Since the court has found that Benjamin's petition fails as a matter of law, the court also finds that the DOC's cross motion should be granted, and that this Article 78 proceeding should be dismissed.

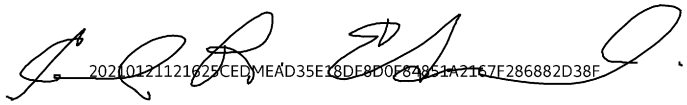
CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Jason Benjamin (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents Cynthia Brann, as Correction Commissioner of the New York City Department of Correction, the New York City Department of Correction and the City of New York (motion sequence number 001) is granted, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with Notice of Entry, on all parities within twenty (20) days.



1/21/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE