Naranjo v Brann
2021 NY Slip Op 31698(U)
May 20, 2021
Supreme Court, New York County
Docket Number: 156949/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

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WALDO NARANJO,

Plaintiff,

- v -

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

Defendant.

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INDEX NO. 156949/2020

MOTION DATE 08/31/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 12, 13, 22, 23, 24, 25, 26, 27, 28

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 Waldo Naranjo (motion sequence number 001) is granted, the May 6, 2020 decision of the respondent New York City Department of Corrections to terminate petitioner's employment is vacated, and this matter is remanded to the respondent for further proceedings consistent with the court's decision; and it is further

ORDERED that counsel for respondent New York City Department of Corrections shall serve a copy of this order along with notice of entry on all parities within ten (10) days.

In this Article 78 proceeding, petitioner Waldo Naranjo (Naranjo) seeks a judgment to overturn the decision of the respondent New York City Department of Corrections (DOC) which terminated his employment (motion sequence number 001). This petition is granted to the extent set forth below.

FACTS

Naranjo was employed as a corrections officer by DOC from August 25, 2011 until his termination on May 6, 2020. *See* verified petition, ¶ 2. Although he had achieved tenured status, Naranjo states that he surrendered for a year it as part of a Negotiated Plea Agreement (NPA) which he executed with DOC on October 25, 2019 in order to settle certain disciplinary charges that DOC had brought against him. *Id*., ¶¶ 3-4; exhibit A. The relevant portion of the NPA provides as follows:

> "I have been advised that the penalty recommended for the charges and specifications sustained against me is as follows:
> "Said Respondent agrees to the forfeiture of 55 days to be taken in compensation time and agrees that in the event there are insufficient compensation leave balances then the remainder will be taken from annual leave balances.
> "Said officer agrees to one (1) year limited probation limited to violations of directions, rules and regulations regarding sick leave violations.
> "Upon the APPROVAL of the terms of this settlement by the [DOC] Commissioner, the effective date of the probation (IF ANY) shall then be deemed to have commenced retroactively as of the date of execution of this agreement (on the date signed by the Trials Division Attorney). I further acknowledge that any violation of the terms of probation which may occur following the date of execution of this agreement but prior to the final approval by the Commissioner may be considered by the [DOC] as a violation of the terms of probation, notwithstanding the fact that I may also have been subject to other disciplinary measures on the basis of the same events."

Id.; exhibit A.

As previously mentioned, DOC summarily terminated Naranjo on May 6, 2020. *See* verified petition, ¶ 20. Naranjo admits that he had used "more than 100 sick days during the first seven months of his one-year limited probation," but he asserts that these were "disability-related absences" caused by the need to seek medical treatment for his hypertension, rather than "sick

leave violations." *Id.*, ¶¶ 13-20. Naranjo has presented 12 notes from physicians at DOC's Health Management Division (HMD) which correspond to five hypertension-related absences in 2019 and seven in 2020. *Id.*; exhibit 3. He further states that he was often unable to attend other HMD appointments due to physicians' concerns about the Covid-19 national pandemic. *Id.*; verified petition, ¶¶ 13-20. For its part, DOC has presented copies of: 1) Naranjo's May 4, 2020 "Personnel Determination Review"; 2) the termination letter it sent to Naranjo on May 7, 2020; 3) the NPA; 4) its employees "Absence Control/Uniformed Sick Leave Policy" directive; 5) Naranjo's entire "Sick History Report" from 2012 to 2020; and 6) its employees "Reasonable Accommodations" directive. *See* verified answer, exhibits 1-6.

Following his termination, Naranjo commenced this Article 78 proceeding on September 1, 2020. *See* verified petition. After stipulating to several extensions, respondents eventually filed an answer on February 3, 2021. *See* verified answer. 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.

The Appellate Division, First Department, has long and consistently upheld DOC decisions to terminate the employment of corrections officers who the agency finds (without a hearing) to have engaged in conduct that violated the terms of an NPA. *See e.g.*, *Matter of Bradford v New York City Dept. of Correction*, 56 AD3d 290 (1st Dept 2008); *Matter of Fortner v New York City Dept. of Correction*, 280 AD2d 381 (1st Dept 2001); *Matter of Tankard v Abate*, 213 AD2d 320 (1st Dept 1995). Judicial review of such termination decisions is necessarily limited by the rule that "an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to great deference, and must be upheld if reasonable." *Matter of Partnership 92 LP & Mgt. Co. Inc. v State Div. of Hous. and Community Renewal*, 46 AD3d 425, 429 (1st Dept 2007), *affd* 11 NY3d 859 (2008), citing *New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75, 80-81 (1st Dept 2006). Here, DOC has presented a copy of its "Absence Control/Uniformed Sick Leave Policy" directive, the relevant portion of which provides as follows:

> "10. Disciplinary Sanctions
> a. A member who reports sick on twelve (12) or more work days during a twelve (12) month period may be subject to disciplinary sanctions.
> b. Termination
> i. A member who reports sick forty (40) or more work days within a twelve (12) month period may be subject to termination.
> ii. A member who reports sick on fifteen (15) or more occasions within a twelve (12) month period may be subject to termination
> c. Mitigation

> Before a disciplinary or termination action is commenced, the following mitigating factors shall be considered:
> i. The members use of sick leave since joining the Department;
> ii. Whether the sick leave is the result of a verified line-of-duty injury;
> iii. Whether the use of sick leave precedes or follows pass days and holidays;
> iv. Whether the use of sick leave is associated with ordered overtime; and
> v. The nature of the illness."

See verified answer, exhibit 4. DOC has also presented a copy of Naranjo's "Personnel Determination Review," dated May 4, 2020, which shows that he had accumulated over (90) documented sick occasions and one documented lateness during his post-NPA limited probationary period at that point. *Id.*; exhibit 1. Finally, DOC has presented a copy of the NPA which provides that his "limited probation [is] limited to violations of directions, rules and regulations regarding sick leave violations." *Id.*; exhibit 3. After reviewing these documents, the court concludes that it was reasonable for DOC to find that Naranjo's 90+ absences during his one-year limited probation period contravened its "Absence Control/Uniformed Sick Leave Policy" directive, and thus constituted a violation of his NPA for which termination was an appropriate sanction. The court notes that Naranjo himself admitted that he had used "more than 100 sick days during the first seven months of his one-year limited probation," and that the First Department has found that such employee admissions afford a sufficient ground to uphold a DOC termination decision. *Matter of Santiago v Horn*, 37 AD3d 307 (1st Dept 2007); see also, *Matter of Tankard v Abate*, 213 AD2d at 321. The court also notes that the First Department has held that the penalty of termination for violating an NPA is not one which "shock[s[the judicial conscience." *Matter of Fortner v New York City Dept. of Correction*, 280 AD2d at 382. As a result of the foregoing, the court concludes that DOC has demonstrated that its termination decision had a rational basis in the administrative record, which would normally be sufficient to

warrant dismissal of Naranjo's Article 78 petition. Naranjo's situation warrants further analysis, however.

The First Department case law regarding NPA-based DOC terminations allows for reversal of a termination decision where an employee can "establish[] by competent evidence that his termination as a correction officer was in bad faith or for illegal reasons." *Matter of Santiago v Horn*, 37 AD3d at 307, citing *Matter of Swinton v Safir*, 93 NY2d 758, 762–763 (1999). Here, Naranjo argues that his termination was unlawful because it violated the provisions of the New York City Human Rights Law (NYCHRL) that forbid discrimination based on disability; specifically, New York City Admin Code §§ 8-107 and 8-108. *See* verified petition, ¶¶ 28-59. Naranjo asserts that his hypertension meets the NYCHRL's definition of a "disability," and that it was incumbent on DOC to afford him a "reasonable accommodation" rather than to dismiss him for "disability-related" absences. *Id*. Naranjo has also identified several First Department cases holding that an employment termination which is based on "disability-related absences" raises an inference of unlawful discrimination. *See e.g.*, *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140 (1st Dept 2009); *Phillips v City of New York*, 66 AD3d 170 (1st Dept 2009). The court notes that the 10 of the 12 HMD notes which Naranjo produced set forth a diagnosis of hypertension. *See* verified petition, exhibit C. The court also notes that the NYCHRL (NYC Admin Code § 8-102 [16] [a]) expansively defines a disability "purely in terms of impairments: 'any physical, medical, mental or psychological impairment, or a history or record of such impairment.'" *Vig v New York Hairspray Co., L.P.*, 67 AD3d at 147. It is therefore possible that Naranjo's documented hypertension may constitute a disability under the NYCHRL's lenient definition of that term. If Naranjo's hypertension is determined to constitute a disability, then DOC was obliged to consider it as one of the mitigating factors listed in the

"Absence Control/Uniformed Sick Leave Policy" directive (i.e., 10 [c] [v] - "the nature of the illness"). It is therefore also possible that DOC might have found that this factor mitigated against terminating Naranjo's employment. More importantly, however, a determination that Naranjo suffers from a "disability," as defined in the NYCHRL, would give rise to an "inference of discrimination," should he also establish that his termination was predicated on "disability-related absences." As a result, the court concludes that the most provident course is to vacate DOC's May 6, 2020 termination order, and to permit DOC to consider Naranjo's allegations concerning his purported disability and/or to identify any "disability-related absences" (if any) which took place during his one-year limited probation period.

DOC objects that it has a "Reasonable Accommodations" directive in place to address the needs of its disabled employees, but that Naranjo never submitted a request that he be considered for an accommodation. *See* respondents' mem of law at 3-6. Naranjo responds by citing the unreported 2016 decision of this court (Stallman, J.) in *Matter of Cruz v Schriro* (51 Misc 3d 1203[A], 2016 NY Slip Op 50363[U] [Sup Ct, NY County 2016]), which held that the NYCHRL "requires an employer to 'engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested,'" and that "[e]ven in the absence of a specific request by an employee, an employer generally has an independent, affirmative duty to investigate feasible accommodations." 51 Misc 3d 1203[A], *8-9 (internal citations omitted). The court finds that these arguments miss the point. In *Jacobsen v New York City Health & Hosps. Corp.* (22 NY3d 824 [2014]), which partially overturned *Phillips v City of New York*, the Court of Appeals rejected the notion "that a good faith interactive process is an independent element of the disability discrimination analysis under . . . [the] City HRL which, if lacking, automatically compels a grant of summary judgment to the employee or a verdict in the

employee's favor." 22 NY3d at 838. In other words, the fact that DOC did not conduct an inquiry into whether or not Naranjo is disabled and whether or not it could provide him with a "reasonable accommodation" for his disability does not mean that Naranjo must automatically prevail on his disability claim, or that he is automatically entitled to have his termination vacated and be reinstated to DOC employment. However, the *Jacobson* decision indicates that DOC should have conducted these inquiries as part of the disciplinary process after Naranjo presented some evidence that he is disabled, and that some of his absences were "disability-related."

Accordingly, the court concludes that Naranjo's Article 78 petition should be granted, that DOC's May 6, 2020 termination decision should be vacated, and that this matter should be remanded to DOC for the inquiries mandated by law, specifically, by the NYCHRL, and by its own "Reasonable Accommodations" directive.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Waldo Naranjo (motion sequence number 001) is granted, the May 6, 2020 decision of the respondent New York City Department of Corrections to terminate petitioner's employment is vacated, and this matter is remanded to the respondent for further proceedings consistent with the court's decision; and it is further

ORDERED that counsel for respondent New York City Department of Corrections shall serve a copy of this order along with notice of entry on all parities within ten (10) days.

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5/20/2021
DATE

CAROL R. EDMEAD, J.S.C.

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