SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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DARNELL PIERRE,

Plaintiff,

- v -

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

Defendant.

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INDEX NO. 154749/2020

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, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18

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

Upon the foregoing documents and for the reasons set forth hereinbelow, the instant CPLR Article 78 petition by Darnell Pierre against respondents, Cynthia Brann, Correction Commissioner of the New York City Department of Correction; The New York City Department of Correction; and The City of New York, is denied.

Background

On June 19, 2017, respondent The New York City Department of Correction ("DOC") appointed petitioner, Darnell Pierre, as a Correction Officer subject to a twenty-four-month probationary period (NYSCEF Doc. 12).

On February 28, 2019, the Department of Defense ("DOD") ordered petitioner to active military duty (NYSCEF Doc. 3). Accordingly, on March 20, 2019, petitioner commenced military leave. On October 5, 2019, petitioner separated from active military duty following six months and sixteen days of "net active service," as set forth in petitioner's "DD214" form (NYSCEF Doc. 4). Pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), petitioner then took three additional months of leave from DOC. According to petitioner, pursuant to Civil Service Law ("CSL") § 75, petitioner completed his two-year probationary period with DOC during the time in which he was on leave. On January 3, 2020, the date on which petitioner was to return to DOC duty, petitioner called out sick, citing the flu. (NYSCEF Doc. 1.)

On January 7, 2020, DOC terminated petitioner (NYSCEF Doc. 15).

Petitioner asserts that DOC "summarily terminated" him "without affording him any due process rights under CSL § 75, such as charges or [a] hearing." CSL § 75 states, in pertinent part, the following:

> 1. Removal and other disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c), or paragraph (d), or paragraph (e) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.
>
> > (a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or . . .

Petitioner cites to RCNY Rule 5.2.8(b), which states the following:

> Notwithstanding the provisions of paragraphs 5.2.1, 5.2.2 and 5.2.8(a), the probationary term is extended by the number of days when the probationer does not perform the duties of the position, for example: limited duty status, annual leave, sick leave, leave without pay, or use of compensatory time earned in a different job title; provided however, that the agency head may terminate the employment of the probationer at any time during any such additional period.

Petitioner claims that military leave constitutes an exception to Rule 5.2.8.(b)'s requirement that governs extending the probationary period, as Military Law § 243(9) states, in pertinent part, that when an individual is on military duty prior to the expiration of his position's probationary period, "the time [he] is absent on military duty shall be credited as satisfactory service during such probationary period." Petitioner also asserts that the Court of Appeals has held that an individual who completes his/her probationary period without discharge or an extension of his/her probation, receives tenure. (NYSCEF Doc. 1.)

Petitioner thus asserts that, as petitioner had acquired tenure and, thereby, a "permanent appointment" with DOC, CSL § 75 required DOC to provide petitioner with his right to notice and a hearing, inter alia, prior to terminating him. (NYSCEF Doc. 1.)

Additionally, petitioner claims that he has exhausted his administrative remedies in this matter (NYSCEF Doc. 1).

The Instant Special Proceeding

On June 26, 2020, petitioner commenced the instant CPLR 7803(3) special proceeding, seeking a judgment (1) annulling petitioner's termination from DOC; and (2) ordering respondent(s) to reinstate petitioner as a DOC Correction Officer with back pay and benefits, on the ground that DOC violated petitioner's rights pursuant to CSL § 75 in summarily terminating him (NYSCEF Documents 1-2).

In opposition, respondents jointly assert, inter alia, the following: (1) DOC did not extend petitioner's probationary period for the days within which he was on active military leave; and (2) petitioner's unpaid USERRA days increased petitioner's total days on leave to 182 work days (apparently excluding weekends), which, in turn, extended petitioner's probationary term from June 18, 2019 to February 28, 2020. Respondents claim that, as petitioner failed to complete his

probationary term, by terminating him, respondents did not violate CSL § 75. (NYSCEF Documents 12 and 17.)

Additionally, respondents assert that DOC terminated petitioner on the ground of two disciplinary infractions that violated DOC Rules and Regulations. As the subject Personnel Determination Review ("PDR") states, as here relevant: (1) on June 5, 2018, petitioner punched an inmate, and petitioner provided an inaccurate report of that incident; and (2) on February 18, 2019, petitioner pushed an inmate and dispensed his Oleoresin Capsicum (i.e., pepper spray) over the inmate's head, which DOC concluded was unnecessary pursuant to Genetec video surveillance. (NYSCEF Doc. 12.)

In reply, petitioner asserts, inter alia, the following: (1) petitioner's USERRA leave from October 5, 2019 to January 3, 2020 counts as "military duty" that DOC must credit as satisfactory service during his probationary period; (2) respondents' argument that petitioner's USERRA leave does not constitute probationary service because it was "leave without pay" disregards the fact that DOC relies on New York Military Law; (3) thus, petitioner's probationary period concluded on December 3, 2019; and (4) as petitioner is a tenured officer, DOC could not terminate him on the ground of his violation(s) of DOC's rules on uses of force without first serving petitioner with charges and holding a full evidentiary hearing (NYSCEF Doc. 18).

Discussion

CPLR 7808(3) states the following:

> The only questions that may be raised in a proceeding under this article are: … 3. Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed

It is well-settled that in a CPLR Article 78 special proceeding the scope of judicial review is limited to the issue of whether the administrative action is rational. Pell v Board of Educ., 34 NY2d 222, 230-231 (1974). This Court may not disturb respondents' determination unless there is no rational basis for the exercise of discretion or it was arbitrary and capricious. Id., at 231. "The arbitrary or capricious test chiefly relates to … whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. This Court may not simply second-guess respondents.

[A probationary employee] "may be dismissed for almost any reason, or for no reason at all." Venes v Community School Board, 43 NY2d 520, 525 (1978). Additionally, "a probationary employee may be terminated without a hearing and without a statement of reasons in the absence of a demonstration that the termination was in bad faith, for a constitutionally impermissible or an illegal purpose, or in violation or statutory of decisional law." Matter of Lane v City of New York, 92 AD3d 786, 786 (2d Dep't 2012).

This Court finds that DOC's January 7, 2020 termination of petitioner was neither arbitrary nor capricious. Respondents have demonstrated a rational basis for terminating petitioner – namely,

petitioner's disciplinary infractions on June 5, 2018 and February 18, 2019, during his probationary period – by submitting the following: petitioner's USERRA request for October 5, 2019 to January 3, 2020 (NYSCEF Doc. 13); a summary of petitioner's leave usage that outlines the days from which the 182 total arose (NYSCEF Doc. 14); DOC's January 7, 2020 termination letter to petitioner (NYSCEF Doc. 15); and the March 27, 2019 Personnel Determination Review of petitioner about his two aforementioned disciplinary infractions (NYSCEF Doc. 16). Respondents have thus also made out a prima facie case that petitioner remained in his probationary period on January 7, 2020, when DOC terminated him.

Petitioner has failed to submit evidentiary proof that respondents acted in bad faith in terminating him. Witherspoon v Horn, 19 AD3d 250, 251 (1st Dep't 2005) ("The mere assertion of 'bad faith' without presentation of evidence demonstrating it does not satisfy the employee's burden" [to demonstrate said "bad faith."]). Petitioner has e-filed only documentation of DOD's order pursuant to which petitioner entered active military duty (NYSCEF Doc. 3) and petitioner's "DD 214" form (NYSCEF Doc. 4), neither of which establishes that respondents acted in bad faith in terminating petitioner on January 7, 2020.

Additionally, New York City Charter Section 396 states that "all actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of [NYC] and not in that of any agency, except where otherwise provided by law." Therefore, this Court notes that DOC, as an NYC agency, is not a proper party to the instant case (although respondents do not argue this).

This Court has considered petitioner's other arguments and finds them to be unavailing and/or non-dispositive.

Therefore, this Court will deny the instant CPLR Article 78 petition.

Conclusion

Thus, for the reasons stated hereinabove, the instant CPLR Article 78 petition by Darnell Pierre against respondents, Cynthia Brann, Correction Commissioner of the New York City Department of Correction; The New York City Department of Correction; and The City of New York, is hereby denied. Accordingly, the Clerk is hereby directed to enter judgment denying and dismissing the instant CPLR Article 78 petition.

6/2/2021
DATE

ARTHUR F. ENGORON, 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