

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

In the Matter of the Application of
MICHAEL PALMER.

Petitioner.

For a Judgment pursuant to Article 78 CPLR

Sequence No.: 001

Index No.: 020802/06

- against -

XXX

THE SYOSSET FIRE DISTRICT.

Respondent.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Petition and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

This petition pursuant to Article 78 of the CPLR for a judgment, *inter alia*, annulling the respondent The Syosset Fire District's demotion of petitioner and restoring him to his prior position is denied and this proceeding is dismissed.

The petitioner Michael Palmer is an employee of the respondent The Syosset Fire District. He was hired in 1985 and promoted to Senior Firehouse Maintainer in 1991. On August 11, 2006, he was demoted from Senior Firehouse Maintainer to Firehouse Maintainer, effective immediately, and his salary was reduced from \$72,215 per year to \$55,000 per year. No charges were filed and no hearing was held prior to this disciplinary action. However, a Verified Bill of Particulars setting forth the charges against petitioner was served on or about October 31, 2006 and a hearing was scheduled for January 30, 2007.

Petitioner commenced this proceeding on December 11, 2006, alleging that his demotion was in violation of Section 75 of the Civil Service Law: Disciplinary action was taken against him without notice of the charges or a hearing. Petitioner seeks, *inter alia*, reinstatement to his former position and retroactive salary and benefits.

In response to the Petition, the respondent Fire District has established the following: By letter dated April 13, 2005, the petitioner was reprimanded for behavior evidencing a lack of professionalism and cautioned regarding his future behavior. He was warned in writing that the “[f]ailure to act in a professional manner in the future [would] result in disciplinary charges.” His March 2006 Employee Performance Review revealed an unacceptable performance rating and probation was recommended. Then, on July 14, 2006, petitioner signed a Stipulation placing him on probation for 60 days. Specific guidelines for measuring his accountability were set forth.

“Civil Service Law § 75(1) provides that no permanent employee may be ‘subjected to any disciplinary penalty . . . except for incompetency or misconduct shown after a hearing upon stated charges.’ ” Matter of Bailey v Susquehanna Valley Central School District, 276 AD2d 963, 964 (3rd Dept. 2000) quoting Civil Service Law § 75(1). The plaintiff’s reassignment, which was a demotion, constituted disciplinary action which would ordinarily require compliance with Section 75 of the Civil Service Law. See, Civil Service Law, § 75(3); see also, Matter of Bailey v Susquehanna Central School District, *supra*; Matter of Dombroski v Bloom, 170 AD2d 805, 806 (3rd Dept. 1991); Matter of Borrell v County of Genesee, 73 AD2d 386 (4th Dept. 1980); Ciambriello v County of Nassau, 137 F.Supp.2d 216, 222-223 (E.D.N.Y. 2001), aff’d in part, vac. in part, 292 F.3d 307 (2d Cir. 2002). Moreover, the respondent Fire District’s belated service of charges and scheduling of a hearing did not cure its failure to comply with the Civil Service Law if it applies.

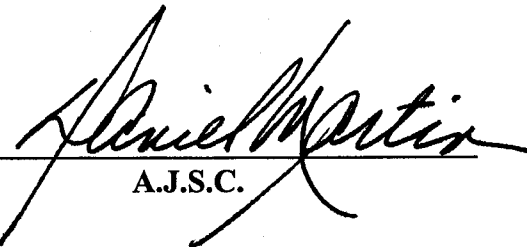
However, Section 75 of the Civil Service Law does not afford any rights to a probationary employee. “ ‘Petitioner, as a probationary employee, may be discharged without a hearing, or statement of reasons, for any reason or no reason at all, in the absence of a demonstration that the dismissal was in bad faith, for a constitutionally impermissible reason, or in violation of the law.’ ” Che Lin Tsao v Kelly, 28 AD3d 320, 321 (1st Dept. 2006), citing Matter of York v McGuire, 63 NY2d 760, 761 (1984); Patel v New York City Housing Authority, 26 AD3d 172, 173 (1st Dept. 2006); Matter of Welsh v Kerik, 304 AD2d 417 (1st Dept. 2003), lv den., 100 NY2d 510 (2003). Moreover, “the burden falls squarely on the petitioner to demonstrate, by competent proof, that a substantial issue of bad faith exists, or that the termination was for an improper or impermissible reason and mere speculation, or bald, conclusory allegations are insufficient to shoulder this burden.” Che Lin Tsao v Kelly, *supra*, at p. 321; see also, Cipolla v Kelly, 26 AD3d 171 (1st Dept. 2006); Walsh v New York State Thruway Authority, 24 AD3d 755 (2d Dept. 2005); Matter of Green v Board of Education of City Dist. of N.Y., 262 AD2d 411, 412 (1999); Matter of Beacham v Brown, 215 AD2d 334 [1995]; Matter of Garcia v New York City Probation Dept., 208 AD2d 475, 476 (1994); Matter of Cortijo v Ward, 158 AD2d 345 (1990). Even employees who would otherwise be entitled to the benefits of Section 75 of the Civil Service Law who have been placed on probation for disciplinary reasons sacrifice the protection afforded by that statute for the duration of their probationary period. Matter of Sepulveda v Long Island State Park and Recreation Commission, 123 AD2d 703 (2d Dept. 1986); see also, In the Matter of Che Lin Tsao v Kelly, *supra*; Cipolla v Kelly, *supra*; Walsh v New York State Thruway Authority, *supra*; Napoleoni v Safir, 277 AD2d 179 (1st Dept. 2000), citing Misir v New York City Housing Authority, 245 AD2d 88 (1st Dept. 1997), app. disp., 92 NY2d 915 (1998) and Matter of Rogers v City of New York Dept. of Correction, 193 AD2d 506 (1st Dept. 1993), app. disp., 82 NY2d

820 (1993); Wright v City of New York, 192 AD2d 411 (1st Dept. 1993).

The petitioner was on probation when he was demoted. The probation was agreed to by him. As a long time employee, petitioner is certainly charged with knowledge of the ramifications of probation. Compliance with Section 75 of the Civil Service Law was not required. Further, petitioner has made no demonstration of bad faith which would lead this court to conclude that respondent's motion should be denied. Compare, Tsao v. Kelly, supra.

Based upon the foregoing, the court hereby denies the application for the relief set forth in the petition and the petition is dismissed.

So Ordered.


A.J.S.C.

Dated: March 23, 2007

ENTERED

MAR 29 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**