

<b>Matter of Rullan v New York City Dept. of Sanitation</b>
2011 NY Slip Op 30025(U)
January 3, 2011
Supreme Court, New York County
Docket Number: 105823/10
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**SALIANN SCARPULLA**

PART 19

PRESENT:

Index Number : 105823/2010

RULLAN, JUAN

vs

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

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

~~motion~~ and cross-motion are decided in accordance with accompanying memorandum decision.

**UNFILED JUDGMENT**

his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B)

Dated: 1/3/11

Saliann Scarpulla  
SALIANN SCARPULLA J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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



complaint brought by Rullan against respondent New York City Department of Sanitation (“DSNY”). The Division found that there was no probable cause in the record to support Rullan’s allegations that DSNY subjected him to disparate treatment as a result of his disability, or in retaliation for having filed prior complaints. Rullan’s petition alleges that the determination was arbitrary and capricious.

Rullan was appointed to the position of sanitation worker by DSNY on December 11, 1989. Prior to being officially hired, Rullan informed the DSNY Medical Clinic in his medical questionnaire of his previous instances of emotional problems, and that he had twice been admitted to psychiatric care facilities. He was then hired, with DSNY fully aware of his history of psychiatric and mental issues.

At least twice during his tenure at the DSNY, Rullan was referred for professional psychiatric consultations and evaluations. In or around March 2006, DSNY referred Rullan to the DSNY Medical Clinic after a work site incident. A psychiatric consultant met with Rullan and recommended augmented psychiatric and medical treatment, as well as disciplinary action for behavioral disturbances. After another on the job behavioral incident in January 2009, DSNY again referred Rullan to the psychiatric consultant.

On June 26, 2009, Rullan filed a verified complaint with the Division, alleging that the DSNY discriminated against him on the basis of a mental disability related to his post-traumatic stress, anxiety, depression asthma and high blood pressure. Rullan alleged that

he was retaliated against in the form of being sent for random drug testing two (2) times within four (4) months.

When asked to explain why he believed he was being discriminated against, Rullan wrote that the DSNY has “been writing me up, saying I threatened and cursed them, which is a lie. They are trying to mess up my record.” Rullan further alleged in his complaint, in part, that “I am unfairly targeted for being outspoken and supporting the union and safety. There is no respect for seniority. I would always questions things I didn’t think were right. . . . Supervisor E. Mack, Supervisor P. Irby knowingly gave false testimony. They [are] trying to make a paper trail. Nothing has been proven. It’s just allegations. There is a lot of injustice going on in 59<sup>th</sup> MTS.” Rullan further claimed that his “night differential,” or overtime pay for certain shifts, had not been paid for five weeks.

In response to Rullan’s complaint before the Division, the DSNY’s Equal Employment Opportunity division (“EEO”) conducted an investigation. The investigation included conducting interviews of Rullan’s supervisors, reviewing his DSNY record, reviewing an investigation conducted by DSNY Field Investigation Audit Team (“FIAT”) regarding Rullan’s behavior toward his co-workers, and investigating why Rullan was not paid his night differential.

As stated in the order, “After investigation, and following opportunity for review of related information and evidence by the named parties, the Division has determined

that there is NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of.” (Emphasis in original.)

In addressing Rullan’s claims of discrimination, the Division found that Rullan “has a record of exhibiting inappropriate and threatening behavior in the workplace. As per [DSNY’s] policies and procedures, [Rullan] has been issued disciplinary notices, and has infrequently received and accepted appropriate penalties.” The Division further noted that Rullan has received “warnings for disrupting the work environment and the record indicated that many of his co-workers have attested to his cursing and threatening behavior that ‘creates turmoil.’”

The Division concluded its order by stating “Our investigation failed to uncover sufficient evidence to establish a causal nexus between [Rullan’s] treatment by [DSNY] and his being disabled or in retaliation for having filed prior complaints.”

Rullan asserts in his verified petition that he did not have a disability when he began working for the DSNY. He also indicates that his brother died on May 15, 1973 and that his father died on January 15, 1980. In support of his petition, Rullan submits a memorandum to his DSNY Medical File, dated December 10, 2001, with the subject line “World Trade Center Attack – Employee Exposure.” The memorandum indicates that during his employment with the DSNY, Rullan worked in the area of the World Trade Center on or after September 11, 2001, and as a result may have been exposed to asbestos. Rullan also submits medical notes from Bronx Mental Health Services, which

indicate that on March 13, 2006, he met with a mental health professional, complaining of “depression, decrease[d] sleep, memories of 9/11/01 and the death of a colleague in 3/05.” Rullan received a diagnosis of post traumatic stress disorder, and “depressive disorder NOS.” The medical notes further indicate that Rullan could return to work on March 21, 2006. Lastly, Rullan submitted additional documentation detailing the work he did as part of the clean-up of the World Trade Center site in the days and weeks after September 11, 2001.

In opposition to the verified petition, the Division submitted an answer, in which it admits that it issued the determination and order after investigation which found no probable cause to believe that DSNY engaged in the unlawful discriminatory practice alleged by Rullan. The answer further claims that because Rullan and DSNY “are the real parties in interest, the Division will not actively participate in this matter and is submitting on the record.” The Division also submitted the written transcript of all prior proceedings.

The DSNY cross-moves to dismiss Rullan’s petition, arguing that the Division’s determination was not arbitrary and capricious, and that the determination is supported by facts in the record, and was rationally based on a thorough investigation.

### **Discussion**

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of

whether its determination was arbitrary or capricious and has a rational basis in the record. See CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002); *Nestor v. New York State Div. of Hous. & Community Renewal*, 257 A.D.2d 395 (1st Dep't 1999). "In short, '[j]udicial review of an administrative determination is limited to the grounds invoked by the agency.'" *Matter of Rizzo v. DHCR*, 6 N.Y.3d 104, 110 (2005) (quoting *Matter of Aronosky v. Board of Educ., Community School Dist. No. 22 of City of N.Y.*, 75 N.Y.2d 997, 1000 (1990)).

An action is arbitrary and capricious, or an abuse of discretion, when the action is taken 'without sound basis in reason and without regard to the facts.'" *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009); *Matter of Rohan v. New York City Housing Authority*, 2009 NY Slip Op 30177U, at \*6-\*7 (Sup. Ct. N.Y. Co. Jan. 23, 2009) (quoting *Matter of Pell v. Board of Education*, 23 N.Y. 2d 222,231 (1974)).

A petition alleging discriminatory practices is "properly dismissed" if it fails "to allege facts sufficient to show that the Division's determination was arbitrary and capricious." *Gaskin v. Westbourne Assoc., L.P.*, 59 A.D.3d 362 (1<sup>st</sup> Dep't 2009). "Where, as here, a determination of no probable cause is rendered without holding a public hearing pursuant to Executive Law § 297 (4) (a), the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis." *McFarland v. N.Y. State Div. of Human Rights*, 241 A.D.2d 108, 111 (1<sup>st</sup> Dep't

1998) (citing *Matter of Hone v. New York State Div. of Human Rights*, 223 A.D.2d 761, 762 (3d Dep't 1996)).

Additionally, “[t]he Division ‘has broad discretion in determining the method to be employed in investigating a claim.’” *McFarland*, 241 A.D.2d at 111 (quoting *Matter of Bal v. New York State Div. of Human Rights*, 202 A.D.2d 236, 237 (1<sup>st</sup> Dep't 1994), lv denied 84 N.Y.2d 805 (1994)). Accordingly, “a determination of no probable cause ‘will not be set aside unless it is found to be arbitrary and capricious.’” *McFarland*, 241 A.D.2d at 112 (quoting *Matter of Albert v. Beth Israel Med. Ctr.*, 230 A.D.2d 695, 697 (1<sup>st</sup> Dep't 1996)).

Here, Rullan has failed to show that the Division’s determination of no probable cause was arbitrary and capricious or lacking a rational basis. The Division’s determination was premised on the results of the investigation, and supported by ample evidence in the record.

Rullan asserts in his verified petition that he did not suffer from a disability at the time he was hired by the DSNY, and suggests that any depression or other disabilities were the results of deaths in his family and exposure to and involvement in the clean-up efforts at the World Trade Center site after September 11, 2001. However, it is clear from the medical forms in the record before the Division that Rullan has a history of mental health issues which pre-dated his employment with the DSNY, and which was known to the DSNY at the time he was hired.

Further, the record is replete with examples of Rullan's disruptive and inappropriate behavior while on the job. Interviews of supervisors and colleagues detail cursing and threatening outbursts. For example, as part of its investigation, the EEO spoke with Rullan's co-workers. One, who stated he had known Rullan for nearly twenty years, noted that although Rullan does his work, his demeanor was "very confrontational, loud, and he had no respect for authority." A co-worker also stated that "[a]t times, for no reason, he would start cursing at co-workers." One of Rullan's supervisors stated that he had issued two complaints against Rullan, and that while he performed his job well, Rullan would "fly off the handle for no reason, curse people, and has voiced threats to me a couple of times." As noted by the Division, these behaviors were contrary to DSNY policy, and Rullan was disciplined accordingly.

Moreover, there is nothing in the record to indicate that Rullan was being discriminated against or treated unfairly in any way.<sup>1</sup> As reported by the Division in the order, Rullan had a history of disruptive behavior, for which he was appropriately

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<sup>1</sup> With respect to Rullan's claim that he was denied his night differential, the DSNY EEO investigation revealed that Rullan's night differential payment was delayed for five (5) weeks as the result of a clerical error. After discovering its error, the DSNY made the correct payments to Rullan and other affected DSNY's employees six (6) weeks late. There was nothing in the record to suggest that the delayed payments were attributable to any discriminatory animus, or anything other than a clerical error.

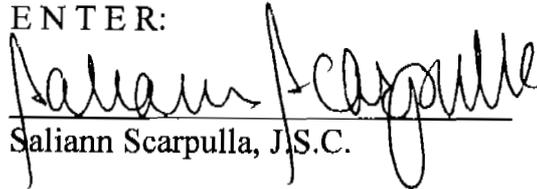
sanctioned. Similarly, there is nothing in the record to support Rullan's claim that the drug tests he was made to undergo were anything but routine and random.<sup>2</sup>

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the verified petition of Juan Rullan to vacate and reverse the March 4, 2010 determination and order of the respondent New York State Division of Human Rights regarding his complaint against respondent New York City Department of Sanitation is denied, and the cross motion by respondent New York City Department of Sanitation to dismiss the verified petition is granted.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York  
~~December~~, 2010  
January 3

ENTER:  
  
Saliann Scarpulla, J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1109)

<sup>2</sup> While not explicitly argued by Rullan, even construing this as an ADA claim, discrimination under the Americans with Disabilities Act ("ADA"), Rullan's petition falls short. To make an ADA claim, Rullan must "present evidence that 'animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive.'" *Regional Econ. Cmty. Action Program v. City of Middletown*, 294 F.3d 35, 49 \*2d Cir. 2002) (quoting *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995)). Rullan has failed to establish that any of the decisions taken by the DSNY were based on any animus against him due to his mental or physical disabilities. Rullan exhibited some disruptive behaviors, for which he was appropriately disciplined. There is nothing in the record to suggest the drug tests he was administered were retribution or punishment of any kind.