

Matter of Goldin v Kelly
2009 NY Slip Op 30646(U)
March 11, 2009
Supreme Court, New York County
Docket Number: 109751/08
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

PART 5

Index Number : 109751/2008

GOLDIN, JON

vs

KELLY, RAYMOND W.

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

1, 2, 3
4, 5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 3/11/09

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

In the Matter of the Application of
JON GOLDIN,

Index No.
109751/08

Petitioner,

-against-

DECISION
and ORDER

RAYMOND W. KELLY, COMMISSIONER
OF THE NEW YORK CITY POLICE DEPARTMENT,

Respondents.

Mot. Seq. 001

-----X

HON. EILEEN A. RAKOWER:

Petitioner Jon Goldin (“Petitioner”) brings the instant Article 78 Petition to set aside the determination of New York Police Department (“NYPD”) Commissioner Raymond W. Kelly (“Respondent Kelly”) to dismiss Petitioner from the NYPD based upon Petitioner’s testing positive for cocaine in a random NYPD-administered drug test using a method known as radioimmunoassay of hair (“RIAH”).

Petitioner was a Police Officer with the NYPD’s Aviation Unit prior to his dismissal, and had been an NYPD Officer for fifteen years when, on September 26, 2006, Petitioner had hair samples collected from his arm pursuant to a random drug test. Petitioner participated in the drug test voluntarily and without protestation of any kind. On October 10, 2006, officers from the NYPD’s Internal Affairs Bureau (“IAB”) conducted a traffic stop of Petitioner’s car while Petitioner was driving home from the Aviation Bureau and informed Petitioner that he had tested positive for cocaine. On October 13, 2006, Petitioner was charged by NYPD with two counts of violating NYPD Department Regulations for the possession and use of cocaine.

On September 11, 2007, October 18, 2007, and October 29, 2007, an NYPD administrative trial (“the trial”) was held in connection with Petitioner’s charges of possessing and using cocaine. At the trial, the Police Department presented testimony

which detailed the random drug testing process from the collection of samples through the interpretation of the data obtained therefrom. Dr. Thomas Cairns, scientific director for Psychomedics Corporation, the entity hired by the NYPD to conduct drug tests of its personnel, testified for the NYPD as an expert in the field of RIAH drug testing.

Dr. Cairns testified that tests on two samples of hair taken from Petitioner's arm had disclosed a cocaine content of 21 nanograms (ng) per 10 milligrams (mg) of hair and 23ng/10mg; and that this was over four times the cutoff point of 5ng/10mg. Dr. Cairns explained that the 5ng/10mg cutoff exists to eliminate potential "false positives;" *i.e.*, persons who may have trace amounts of cocaine in their system through incidental and unintentional contact with cocaine, as opposed to deliberate ingestion. Dr. Cairns testified that not only is the 5ng/10mg cutoff the figure utilized by the NYPD, but is also published in the Federal Register as the proposed cutoff, and is generally accepted in the scientific community as the proper cutoff point. Dr. Cairns also stated that the specific methodology employed by Psychomedics for RIAH testing was also approved by the United States Food and Drug Administration. Dr. Cairns testified that the amount of cocaine found in Petitioner's hair samples "indicate multiple use of cocaine by [Petitioner]." Dr. Cairns further testified that the amount of cocaine found in Petitioner's hair samples rendered Petitioner's theory of involuntary ingestion of cocaine through sexual contact with his girlfriend (an admitted cocaine abuser) implausible.

Petitioner did not contest the results of Petitioner's drug test in any way, but rather sought to prove that the cocaine in his system was the product of "passive ingestion" through sexual contact with his girlfriend Coreen McCarthy.

A number of friends and colleagues in the law enforcement community testified on Petitioner's behalf. These individuals testified that Petitioner was a dedicated police officer who did not even have a casual drink of alcohol at social functions; and further, that he had actually voiced strong opinions against drug and alcohol abuse on numerous occasions. Individuals who worked with Petitioner testified that Petitioner was a reliable police officer who came in early, stayed late, and was rarely absent from work. Petitioner also submitted into evidence numerous letters from friends and colleagues in the law enforcement community which attested to Petitioner's good character, and expressed shock at the allegations of Petitioner's drug use.

Ms. McCarthy testified at the trial that she had been using cocaine since she was about seventeen years old. She and Petitioner first met in the mid-1990s, as both were avid fans of punk rock and hardcore music, and frequently attended the same concert venues throughout New York City and Long Island. They commenced a romantic relationship in or around late 2004-early 2005. Although Ms. McCarthy lived with Petitioner in Petitioner's Long Island apartment, she testified that she never used cocaine in his presence or brought cocaine to Petitioner's residence. Instead, according to Ms. McCarthy, she would use cocaine either in Manhattan while working in a bar, or during the train ride to Petitioner's residence. She further testified that she did not exhibit any abnormal behavior from her cocaine use that would have tipped Petitioner off to her drug use; and that she hid her drug use from Petitioner because she knew that Petitioner was morally opposed to drugs and alcohol, and would not associate with individuals who abused either.

Ms. McCarthy and Petitioner both testified that they would engage in intimate sexual contact with one another approximately three to four times in a given week. Both claimed that their physical intimacy would entail performing oral sex on one another, as well as sexual intercourse.

Petitioner testified that he never suspected Ms. McCarthy of using narcotics until October 10, 2006 - the date he was contacted by IAB regarding his testing positive for cocaine. That evening, Petitioner reportedly confronted Ms. McCarthy about possible drug use, at which point she admitted to using cocaine. Petitioner was angered by this revelation, and ended the relationship; Ms. McCarthy moved out of Petitioner's apartment on her own accord.

Petitioner also offered expert testimony from two witnesses. The first expert was Dr. Stephen Dresnick, a physician who has experience evaluating workplace drug tests. Dr. Dresnick opined that Petitioner's 21ng/10mg and 23ng/10mg test results indicated that Petitioner fell within a content range indicative of a "potential cocaine user," while a cocaine content upwards of 35ng/10mg would indicate to him that the subject was an "active" user of cocaine. According to Dr. Dresnick, test results such as Petitioner's should prompt further investigation. Dr. Dresnick interviewed Petitioner and Ms. McCarthy, and also had a vaginal swab of Ms. McCarthy performed on January 19, 2007, which disclosed the presence of cocaine (though this was not reflective of the time period in which Petitioner and Ms. McCarthy lived together and had intimate contact). These interviews and the vaginal swab results led Dr. Dresnick to conclude that Petitioner's positive drug tests "certainly could have

been” caused by “unintentional exposure” to cocaine through Petitioner’s intimate sexual contact with Ms. McCarthy.

Petitioner also called Dr. Charles Jin as an expert on the psychiatry of drug addiction. Dr. Jin testified that he examined Petitioner by questioning him about his history, his family relationship, and his occupational history, and came to the conclusion that Petitioner is not addicted to narcotics of any kind. Further, Dr. Jin testified that, based on Petitioner’s personality, it would be “inconsistent with his life story” and “personal character” to have used cocaine even once.

On March 4, 2008, Assistant Deputy Commissioner Robert W. Vinal issued a decision to Respondent Kelly, which found Petitioner guilty of both charges of possession and of using cocaine. Commissioner Vinal’s decision was primarily based upon Petitioner’s positive test results for cocaine in RIAH test. Commissioner Vinal considered and rejected the theory, advanced by Petitioner, that Petitioner tested positive for cocaine due to the involuntary ingestion of Ms. McCarthy’s bodily fluids during periods of intimacy between her and Petitioner. In so doing, Commissioner Vinal found that Petitioner “established no more than the mere possibility that his positive test results were the result of unknowing ingestion and because the testimony of the Department’s expert refuted even the possibility that unknowing ingestion could have produced the cocaine levels detected in [Petitioner’s] hair.”

On April 7, 2008, Respondent Kelly approved Commissioner Vinal’s decision and dismissed Petitioner from the NYPD. Petitioner now brings this Article 78 Petition seeking to annul Respondent Kelly’s determination to dismiss Petitioner on two grounds: First, Petitioner claims that the Commissioner’s decision was contrary to the weight of evidence. Second, Petitioner asserts that the drug test of Petitioner’s hair was unlawful, as the First Department held, subsequent to Petitioner’s testing, trial and dismissal, that the manner of administering drug tests was a matter subject to collective bargaining, and that the NYPD could not unilaterally alter its method of drug testing. Accordingly, Petitioner argues that the RIAH evidence was wrongfully introduced at trial and considered by Respondent Kelly.

It is well settled that the “[j]udicial review of an administrative determination is confined to the ‘facts and record adduced before the agency’.” (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency’s determination

but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]). Additionally, if a penalty is imposed by the agency, "the sanction must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." (*Featherstone v. Franco*, 95 NY2d 550, 554 [2000]).

Petitioner argues that his drug test was wrongfully considered at the trial based upon the First Department's October 16, 2008 decision in *City of New York v. Patrolmen's Benevolent Association*, 56 A.D.3d 70 [1st Dept. 2008] ("*City v. PBA*"). *City v. PBA* involved an Article 78 Petition brought to annul the determination of the Board of Collective Bargaining of the New York City Office of Collective Bargaining ("OCB Board") that methods of random drug screening were subject to collective bargaining agreements and could not be unilaterally instituted by the NYPD. The OCB Board determination was made in response to the NYPD's decision to change its method of random drug testing from urinalysis to RIAH testing on August 1, 2005 (*id.* at 71). The NYPD argued that it was authorized to change its drug screening procedures without engaging in collective bargaining pursuant to the NYPD Commissioner's legislative authority to discipline members of the police force, which is not subject to collective bargaining (*see Patrolmen's Benevolent Assoc. v. New York State Pub. Empl. Relations Bd.*, 6 N.Y.3d 563 [2006]).

On December 27, 2007 (after Petitioner's testing and trial but prior to his dismissal), the Supreme Court, New York County (Lottie E. Wilkins, J.) granted the petition and annulled the OCB Board's determination holding the NYPD's unilateral switching to RIAH testing violative of the applicable collective bargaining agreement (*City v. PBA* at 77). By its decision dated October 16, 2008 (six month's after Petitioner's dismissal from the NYPD), the First Department reversed, holding that the change of random drug testing methods is a matter subject to collective bargaining, and is not encompassed within the Commissioner's authority to discipline its police officers (*id.*).

The court finds that consideration of Plaintiff's random RIAH drug test does not invalidate Respondent Kelly's determination to dismiss Petitioner from the NYPD. First, by Petitioner's own admission, Petitioner voluntarily participated in the hair collection process when summoned to do so. He cooperated fully, and did not object to the collection of his hair samples in any way. This is not a matter in which an adverse determination was made against a petitioner for failing to comply with a directive that was unlawful, but rather one where the test subject willingly participated and registered no objections of any kind at the collection stage.

Second, in determining whether to suppress unlawfully obtained evidence in an administrative hearing, the New York Court of Appeals has held that "the application and scope of the exclusionary rule is ascertained by balancing the foreseeable deterrent effect against the adverse impact of suppression upon the truth-finding process... and has declined to suppress relevant evidence if little or no deterrent benefit could be anticipated from the exclusion" (*Boyd v. Constantine*, 81 N.Y.2d 189, 195 [1993]) (citations omitted).

This balancing approach militates against suppression in the case at bar. Though ultimately rejected by the First Department, the NYPD's position regarding its authority to unilaterally change its random drug testing processes was adopted reasonably and in good faith based upon its interpretation of the applicable statutes and case law. This is particularly evidenced by the fact that Justice Wilkins of this court found the NYPD's argument persuasive and annulled the OCB Board's determination, before being overturned by the First Department. Further, this was the state of the law when Respondent Kelly made the determination to dismiss Petitioner.

Accordingly, suppression of Petitioner's drug tests would do little if anything to deter wrongful police conduct in the future, while seriously hindering the truth-finding process by precluding what was found to be highly probative evidence.

In light of the fact that Respondent Kelly's consideration of Petitioner's drug test was proper, the record before the court makes it abundantly clear that a rational basis existed for Petitioner's dismissal. Dr. Cairns testified that samples from Petitioner's RIAH tests disclosed the presence of cocaine in Petitioner's system at a

[* 8]
level four times greater than the 5ng/10mg cutoff level which might indicate inadvertent exposure, leading him to conclude that Petitioner deliberately ingested cocaine. Dr. Cairns further testified to the methodology applied by Psychemedics and its reliability. Petitioner's experts, while arriving at different conclusions than Dr. Cairns, did not present evidence sufficient to render Respondent Kelly's crediting of Dr. Cairns' testimony irrational or arbitrary. Accordingly, this court is powerless to disturb Respondent Kelly's weighing of the evidence and assessment of witness credibility (*see Berenhaus v. Ward*, 70 N.Y.2d 436 [1987]).

Finally, since Petitioner, an officer with the NYPD's Aviation Unit, was found to have possessed and ingested cocaine, the penalty of dismissal is not so disproportionate to the offense as to shock the conscience (*see Boyd*, 613 N.E.2d at 514).

Wherefore, it is hereby

ORDERED that the Petition to annul Respondent Kelly's decision to dismiss Petitioner from the NYPD is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: March 11, 2009



EILEEN A. RAKOWER, J.S.C.

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MAR 16 2009
COUNTY CLERK'S OFFICE
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