

**Matter of Volpitta v Kerik**

2002 NY Slip Op 30077(U)

January 31, 2002

Supreme Court, New York County

Docket Number: 0104908/2001

Judge: Diane A. Lebedeff

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DIANE A. LEBEDEFF

PRESENT:

PART 8

Justice

PO CHRISTOPHER VOLPITTA

INDEX NO.

104908/01

MOTION DATE

11/19/01

MOTION SEQ. NO.

001

MOTION CAL. NO.

21

- v -

BERNARD B. KERIK

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

Art. 78

Notice of <sup>Petition</sup> Motion/ Order to Show Cause — Affidavits — Exhibits ...

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

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

PAPERS NUMBERED

} 1-5

Cross-Motion:  Yes  No

SCANNED

Upon the foregoing papers, it is ordered that this motion

FEB 05 2002

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated:

JAN 31 2002

*DR*

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: I.A.S. PART 8

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In the Matter of the Application of Police Officer  
CHRISTOPHER VOLPITTA, Tax Number 924593,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil  
Practice Law and Rules,

-against-

Index No. 104908/01  
Mot. Seq. No. 001

BERNARD B. KERIK, as Police Commissioner of the City  
of New York, THE POLICE DEPARTMENT OF THE  
CITY OF NEW YORK, and THE CITY OF NEW YORK,

Respondents.

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**DIANE A. LEBEDEFF, J.:**

In this Article 78 proceeding, petitioner Christopher Volpitta seeks an order and judgment (i) annulling his termination by the Police Commissioner of the City of New York as a probationary police officer, (ii) directing that he be reinstated, with full back pay, benefits and seniority restored, (iii) clearing his record of unfounded charges used to terminate him, and (iv) directing that the Police Department must prove any allegations of misconduct at an administrative hearing before seeking to terminate him in the future. Alternatively, petitioner seeks a hearing pursuant to CPLR 7804(h) on whether respondents acted in bad faith.

## Facts

Petitioner was appointed a Police Officer on July 7, 1999. Three weeks later, his mother died suddenly and unexpectedly from a blood infection. Petitioner took off only the days allotted for bereavement time. In the following months, while still pursuing his training at the Police Academy, he acted as administrator of his mother's estate.

On February 4, 2000, when he was feeling despondent in the months following the sudden death of his mother, petitioner went to the Guidance and Counseling Unit of the Police Academy and voluntarily turned in his gun. Petitioner alleges that he was following Police Department policy, conveyed to him in lectures and literature while he was at the Police Academy, which emphasizes that police officers have the option to seek counseling and to turn in their weapon at a time of great emotional upheaval without the threat of dismissal.

Specifically, a memorandum issued by the Police Department shows that the Police Department had taken affirmative steps to develop a policy to respond to the "dramatic increase in the number of suicides attempted or completed by members of the service" (Petition, Exhibit A, "Police Student's Guide – Behavioral Science, Line Organization Referrals," revised, April, 1999). The memorandum states that the Commissioner had concluded that an "important but often overlooked" element preventing officers from seeking assistance is that "many times in the past when a member sought help it resulted in a change of duty status (for instance, firearms being removed) and fear that the incident would become part of the member's permanent record" (*id.*). As a result, the Line Organization Referral procedure was established "in order to encourage the member

experiencing difficulty to come forward and avail him/herself of the various helping units in the Department, without the apprehension of negatively impacting on career advancement opportunities” (*id.*). The memorandum states that once a member utilized the procedure, the Early Intervention Unit would arrange for counseling “and ensures that all matters are kept in confidence, including, but not limited to firearms removal from, and hospitalization of, the member concerned” (*id.*).

Petitioner also received an Advisory Unit Orientation Booklet of the Police Academy, which states “we stress that if something comes up in your life that will affect your performance, you come or call us as soon as possible” and emphasizes that in cases of self-referral “Confidentiality is at a maximum level,” unless the matter involves criminal or serious misconduct, domestic incidents, discrimination or life threatening situations (Petition, Exhibit B).

As a result of his meeting with the Guidance and Counseling Unit of the Police Academy on February 4, 2000, petitioner was assigned to perform administrative functions and directed to seek counseling at the Police Department Psychological Services. Thereafter, he reported on February 7, 2000, as directed, to the Police Department Psychological Services in Queens for an appointment with a Dr. Proper. Petitioner alleges that, after waiting for five hours, he was seen for approximately 15 minutes by a Dr. Robin MacFarlane of the Psychological Evaluation Unit, who told petitioner to see a therapist.

Following Dr. MacFarlane’s direction, petitioner then began counseling with a Dr. Alfred Martorelli, who met with him once or twice a month, and soon concluded that petitioner did not need continued therapy. On March 24, 2000, petitioner went to see Dr.

MacFarlane without an appointment to ask her how he could be returned to full duty. She told him she would see him for a check-up in a few months and indicated that it was possible he could return to full duty in November. On April 11, 2000, Dr. Martorelli wrote to Dr. MacFarlane that petitioner “appears normal, without depression and ready to resume all duties. I think he had a reactive depression due to his mother’s death and has resolved these issues in his life” (Petition, Exhibit C).

Petitioner saw Dr. MacFarlane for the third time in June, 2000, for an appointment which petitioner alleges lasted two minutes at most, and consisted solely of her asking him “How are you?” and his responding “I am fine,” to which she replied “OK, we’re done.” Respondent alleges that they also discussed petitioner’s ongoing therapy, participation in hockey, and that petitioner denied being depressed or suicidal (Answer, para. 17).

When petitioner still had not been returned to full duty in November, he discussed the matter with his delegate at the Policemen’s Benevolent Association, who called Dr. MacFarlane’s supervisor to find out when petitioner would be cleared for full duty. On November 8, 2000, Dr. MacFarlane called petitioner and asked him to come to her office on November 15th. According to petitioner, at their meeting Dr. MacFarlane made clear that she was upset that petitioner’s PBA delegate had contacted her supervisor and told him that no decision would be made as to whether he could continue with the Police Department until February, 2001. When petitioner asked how the determination could be made without anyone from the Police Department Psychological Services examining him, she responded that “she did not have to tell him anything” and that “if he cause[d] trouble for her, it will

only cause trouble for him” (Petition, para. 21).<sup>1</sup> Petitioner was terminated later that same day when he returned to his administrative position (Exhibit D).

Respondent relies primarily on a three-sentence psychological evaluation dated September 22, 2000, prepared by the Director of the Psychological Evaluation Unit, Arthur Knour Ph.D., which it alleges was prepared following “psychological evaluations [sic] sessions with Dr. MacFarlane in February, March, April, and June of 2000” (*id.*, para. 35).

In full, the evaluation states:

“Probationary Police Officer Christopher Volpitta was referred to the Psychological Evaluation Unit for evaluation on February 4, 2000. The PPO did appear to be depressed and was placed on restricted duty. Given the facts of this case PPO Volpitta appears to be too psychologically fragile for continuance as an [sic] New York City Police Officer.”

Dr. Knour never met with petitioner himself and there is no indication in the evaluation or in the Verified Answer of the basis for the “fragile” conclusion, other than petitioner’s condition on February 4, 2000, when he first appeared for counseling.

Respondent also alleges that petitioner had not graduated from the Police Department at the time of his termination “[d]espite his appointment some fourteen months earlier” (Answer, para. 38). However, petitioner has submitted a February, 2000, certificate which appears to have been issued to him by the Police Department stating that petitioner

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Respondent’s Answer, verified by an attorney of the Police Department based solely on review of books and records of the Department, denies the allegation and “affirmatively state[s] that Dr. MacFarlane and petitioner discussed petitioner’s psychological condition.” Respondent’s Memorandum of Law, without any evidentiary support, states that petitioner became “volatile and accusatory regarding the basis of his referral to the Psychological Evaluation Unit.”

Although respondent was invited to submit a full record, it did not submit records from its Psychological Evaluation Unit.

had satisfactorily completed training (Reply Affirmation, Exhibit A). There is no allegation that petitioner was ever late, or that he ever violated any of the Department's rules or regulations, or that the performance of his duties as a probationary officer was in anyway unsatisfactory.

### Discussion

There is no question that the Police Department has "broad discretion in terminating probationary employees at any time, without a hearing and without stating the reasons for the discharge" (*Kroboth v. Sexton*, 160 A.D.2d 126, 129 [1st Dept. 1990]). There is only a narrow exception to this rule "providing for judicial review of the termination of a probationary employee where there is an issue regarding whether the termination was made in bad faith" or was "arbitrary and capricious" (*id.*, citing *Matter of Johnson v. Katz*, 68 N.Y.2d 649, 650 [1986]).

A hearing may be required under CPLR 7804(h) "where an issue of substantial nature is raised that the termination was not due to the failure to perform satisfactory service during the probationary period, but was due to causes unrelated to work performance" (*Matter of Beacham v. Brown*, 215 A.D.2d 334 [1st Dept.], lv. app. den. 87 N.Y.2d 801 [1995]; *Matter of Micciota v. McMickens*, 118 A.D.2d 489, 491 [1st Dept. 1986]; *Matter of Ramos v. Department of Mental Hygiene*, 34 A.D.2d 925 [1st Dept. 1970]). Petitioner bears the burden of raising and proving bad faith (*id.*, at 130, citing *Matter of Bergamini v. MABSTOA*, 62 N.Y.2d 897, 899 [1984]).

Petitioner has met his burden of raising an issue of "substantial nature" requiring a hearing on the reason for his termination. Notwithstanding the breadth of discretion vested

in those empowered to discharge probationary employees, the termination of probationary employees has been annulled in cases, similar to this one, where it appeared that the employee was being penalized for participating in employer-sponsored treatment programs (see *Kroboth v. Sexton*, 160 A.D.2d 126, 129 [1st Dept. 1990], annulling termination of probationary sanitation worker based on absenteeism on day he sought treatment and one subsequent day; see also *Singleton v. Kerik*, 282 A.D.2d 682 [2d Dept. 2001], annulling termination of a probationary correction officer who sought treatment for alcoholism on grounds that action violated the Human Rights Law, Executive Law § 296[1]).

In *Kroboth v. Sexton*, *supra*, the First Department held that the Department had not acted in good faith when it terminated petitioner for availing himself of a departmental program whose “very purpose ... was to permit an individual who has an alcohol abuse problem to be rehabilitated and to begin anew and become a productive employee without fear of retribution” (160 A.D.2d at 130). The Court observed that the effectiveness of such programs, which are beneficial “not only [to] the individuals assisted, but the employer and society as well,” is undermined by the “chilling message” sent to “others who would seek help, but fear the stigma and retribution associated with admitting” a disability, when a person who has voluntarily sought out treatment is terminated (*id.*). As noted above, the Police Department itself has recognized that fear of stigma and adverse job consequences is a significant factor in deterring officers from voluntarily seeking help for psychological issues (Petitioner’s, Exhibit A).

In the instant case, there is no contention that petitioner performed unsatisfactorily in any manner. As set forth above, respondent relies solely on a three-line evaluation by the

Director of the Psychological Evaluation Unit who, never having met petitioner, reported that petitioner had been depressed seven months earlier when he initially came in for treatment, and then concluded, without setting forth any basis for the conclusion, that petitioner was “too psychologically fragile” to continue as a police officer. Respondent attempts to bolster the basis for the decision by characterizing it as based on “nine months of evaluation” by trained psychologists, but there is no factual contradiction of petitioner’s claim that such evaluation consisted of no more than three meetings totaling less than one hour. Moreover, petitioner’s therapist, who met with petitioner regularly for counseling sessions, concluded in April, 2000, that petitioner had recovered from his depression which had been a reaction to his mother’s death. Thus, petitioner has presented evidence that he was terminated solely because he voluntarily followed departmental policy by seeking therapy for his depression following his mother’s death and turning in his gun.

The court further observes that respondent’s stated reason for terminating petitioner, *i.e.*, that he suffered from depression, implicates the protection provided by the Human Rights Law, Executive Law § 296[1] [a], for persons suffering from mental disability, which includes “a condition regarded by others” as an impairment<sup>2</sup> (compare, *Menes v. CUNY University of New York*, 92 F.Supp.2d 294, 305 [S.D.N.Y. 2000], holding

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The term "disability" is defined as: (a) a physical, mental or medical impairment ... which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory techniques, or (b) a record of such an impairment, or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held. N.Y. Exec. Law § 292(21).

that termination of an accounting employee who suffered from depression did not violate New York Human Rights Law because “even when he had been provided with a reasonable accommodation for his disability -- a three-day work week -- he could not perform his job at a minimum standard of acceptability”). Petitioner’s termination because of a perceived mental disability, absent any contention that his work performance was adversely affected, would violate his rights and is arbitrary.

Finally, the evidence presented by petitioner raises an inference that an individual in the Psychological Evaluation Unit instigated petitioner’s dismissal after their November 15th meeting, for reasons unrelated to a good faith belief in petitioner’s inability to perform his job.

Accordingly, the petition is granted to the extend that the Court directs a hearing on the issue of whether petitioner’s termination was made in bad faith, arbitrarily or capriciously.

This decision constitutes the order of the court.

Dated: January 31, 2002

  
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J.S.C.