[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

---X

In the Matter of the Application of
EDWARD SILLS,

Petitioner,

Index No. 122389/01

ORDER AND JUDGMENT

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

-against-

002

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

Respondents.

---X

SHERRY KLEIN HEITLER, J.:

Edward Sills, the petitioner, seeks leave to reargue and renew pursuant to Section 2221 of the Civil Practice Law and Rules, (CPLR), this court's decision dated July 3, 2002 and, upon reargument and renewal, petitioner requests that the Court reinstate the petition and direct respondents to serve and file an answer. The respondent opposes this application.

Background

Edward Sills was appointed a New York City Police Officer on January 3, 1983. Before his termination on August 10, 2001, he worked for 19 years as a police officer for the New York City Police Department, (NYPD). On October 12, 1999, petitioner received disciplinary Charges and Specifications for engaging in the following conduct on October 10, 1999: (1) wrongfully operating a motor vehicle while under the influence of alcohol or drugs; (2) wrongfully and without just cause refusing to submit to a breathalyzer test; and (3) being unfit for duty as a result of having consumed an intoxicant. Petitioner was later advised that the recommended penalty for the Charges and

Specifications brought against him was dismissal from the NYPD. Petitioner subsequently pled guilty to all Charges and Specifications, and entered into a negotiated plea agreement, where he agreed to be placed on dismissal probation. Under the terms of the agreement, petitioner agreed to be placed on probation for one year; during said time the Police Commissioner could impose a punishment of dismissal or any lesser penalty he deemed appropriate.

On August 4,2001, during petitioner's dismissal probation period, petitioner finished his midnight tour of duty at 8:00 a.m. Thereafter, petitioner joined a group of fiiends at an outdoor gated parking lot, used by members of petitioner's command from the 72nd Precinct. Petitioner went to the parking lot to celebrate the wedding engagement of a fellow officer. During the celebration, the officers were drinking and petitioner claims to have consumed two beers. Petitioner remained at the parking lot for 2 hours, from 8:00 a.m till 10:00 a.m. Among the officers drinking with petitioner was Officer Joseph Gray. After the celebration was finished, Officer Joseph Gray along with several other officers proceeded to an area strip club. Petitioner, after having consumed two beers, drove home. Petitioner states that at no time was he intoxicated or unfit for duty. Hours later, Officer Gray drove, while under the influence of alcohol and hit and killed a pregnant mother, her child and sister.

On August 7,2001, the NYPD ordered petitioner to answer questions regarding his actions on August 4, 2001. Petitioner fully cooperated with the investigation. On August 10, 2001, the NYPD terminated the petitioner. Thereafter, petitioner commenced an Article 78 Proceeding seeking an order annulling and setting aside the petitioner's termination of employment, directing the respondent, Police Commissioner, to reinstate the petitioner to his position of Police Officer with the NYPD, with all payments of salary, back pay, interest, seniority and emoluments due to him from the date of his termination on August 10, 2001. Respondent opposed the application and cross-

moved for an order dismissing the petition. In a judgment dated July 3, 2002, this court granted respondent's cross-motion and dismissed the petition in its entirety. Through his current attorney, petitioner files a motion for leave to reargue and renew.

Motion for leave to Reargue

Petitioner's grounds for reargument are based on "matters of fact and law," pursuant to Section 2221(d) of the CPLR, allegedly overlooked or misapplied by the Court in determining the prior motion.

A motion for leave to reargue pursuant to CPLR 2221, is addressed to the sound discretion of the court and may be granted only on a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'' Schneider v. Soloway, 141 AD2d 813 (2ND Dept. 1988); William P. Pahl Equipment Corp. v. Kassis, 182 A.D2d 22 (1st Dept. 1992). Reargument is not designed to afford the unsuccessful successive opportunities to reargue issues previously decided. William P. Pahl Equipment Corp. v. Kassis, 182 A.D2d 22 (1st Dept. 1992) or to present arguments different from those asserted. William P. Pahl Equipment Corp. v. Kassis, 182 A.D2d 22 (1st Dept. 1992) citing Folely v. Roche, 68 AD2d ***558*** (1st Dept. 1979). Applying these standards, the court will consider the petitioner's application.

Petitioner's leave to reargue his claim of disability

Petitioner, first requests leave to reargue the court's dismissal of his claim of disablility discrimination under Section 296 of the New York State Human Rights Law, (HRL). Petitioner claims the court applied the wrong test in determining when an alcoholic is protected under the HRL. The petitioner argues the proper test for determining whether **an** alcoholic is protected under the HRL is whether the employee despite his or her alcoholism is able to perform the job in a reasonable

manner. Petitioner supports his claim under the, "Human Rights Law definition of 'disability' contain(ing) the requirement that a disabled employee be able to perform 'in a reasonable manner the activities involved in the job or occupation sought or held' Executive law 6296 (21)."

Respondent opposes this application and argues that the court applied the correct test, and the court had no reason to reach the issue of whether petitioner could reasonably perform his job, because he failed to allege he had a disability protected under the HRL. Since petitioner did not allege a disability protected under the HRL, he failed to state a ***prima facie*** case of disability discrimination sufficient to shift the burden of proof, so as to require respondents to show the petitioner was unable to reasonably perform his job.

Discussion

Petitioner's request for leave to reargue the court's dismissal of petitioner's claim of disability discrimination under Section 296 of the HRL is granted and, upon reargument, the court adheres to its prior decision.

The same standards used to prove disability under the Rehabilitation Act are applied to the Human Rights Law. Dimonda v. New York City Police Department, 1996 U.S. Dist. LEXIS 5286 (S.D.N.Y 1996). In Burka v. New York City Transit Authority, 680 F. Supp. 590,601 (S.D.N.Y 1988), the court extended the scope and meaning of disability under Section 296, ***et seq.,*** of the HRL to include those standards that apply to a disability under Sections 503 and 504 of the Rehabilitation Law. The court found that coverage under section 50 of the Rehabilitation Law was not broader or inconsistent with Section 296 of the Human Rights Law. Rather, the court said, "Section 50 is part of a consistent statutory scheme designed to provide New York's handicapped and disabled persons with protection against warrantless discrimination." ***Id,*** The court further held that section 504, of

the Rehabilitation Act, protects only those otherwise qualified drug abusers who have been or are being rehabilitated. ***Id.*** The court held, "[t]his was consistent with sound public policy. It encourages those abusers of illegal narcotics who have not done so to seek treatment for their problem, but it does not provide those same abusers with the assurance of safe haven in the workplace should they instead choose to continue their illegal activity and ignore help." *Id.* In Burka the court noted in their decision under footnote 18, "Generally, voluntary impairments are not protected under section 503 and 504. Accordingly, voluntary drug use should not become a handicap until it reaches the stage of involuntary impairment, presumably addiction. The statute, for example, does not protect all people who consume alcohol; it protects only alcoholics. One would assume that this reflects the general view that alcoholism, as a disease, erodes or vitiates one's control over alcohol consumption and, thus, constitutes a handicap." Burka. Similar to the general view of alcoholism discussed in Burka, the definition of alcoholism under the Mental Hygiene Law, which constitutes a disability under the HRL, is viewed as a chronic illness where the individual's compulsive ingestion of alcohol goes beyond the control of the sick person to a degree which impairs normal functioning. The court further held, Section 296 of the HRL does extend protection to rehabilitated and rehabilitating drug abusers. ***Id.***

Petitioner's claim is misplaced. The court's interpretation has support in statute and does not represent a misreading of the cases. The Southern District in Burka, made clear that the definition of disability under the New York State Human Rights Law, includes those standards used under the Rehabilitation Act. In the instant case, petitioner failed to establish his ***prima facie*** case by demonstrating he was a member of a protected class. McEniry v. Landi, 84 N.Y.2d 554, (1994). To establish he was disabled by alcoholism petitioner had to prove he was "rehabilitated or

rehabilitating." Burka v. New York City Transit Authority, 680 F. Supp. 590, 601 (S.D.N.Y 1988). According to the evidence presented, the court correctly concluded that petitioner was not disabled as an alcoholic because he did not demonstrate he was rehabilitated or rehabilitating under the *Burka* standard. Since petitioner did not establish a prima facie case for termination based on a disability, the burden did not shift to the respondent, as the employer, to rebut the resulting presumption of discrimination, by introducing evidence which demonstrated a legitimate, independent and nondiscriminatory reason to support its employment decision. Ferrante v. American Lung Ass'n 90 N.Y.2d 623, 665 (1997).

Petitioner's second request for leave is to address previously overlooked issues of law under Labor Law §201-d, known as the Legal Activities Law. Under this law, an employee may not be discharged for engaging in certain legal recreational activities outside of work hours. Petitioner claims he was discharged for drinking two beers while off duty and, as such, a claim under this statute has been presented to the court.

Petitioner's original petition and opposition to respondents' cross-motion to dismiss did not assert a claim under Labor Law 201-d. Instead, petitioner waited to raise a new claim under the labor law in his current motion to renew and reargue. Petitioner's request must be denied because petitioner's claim under the labor law would, "advance arguments different from those tendered in the original application."(See, Folelv v. Roche, 68 A.D.2d 558, 567-68 [1st Dept. 19791 ; see also William P. Pahl Equipment Corp., 182 A.D.2d at 27.) Accordingly, the court declines to consider petitioner's new argument relating to Labor Law.

Petitioner's leave to reargue the court's application of the standard of review under Article 78 proceedings

Finally, petitioner seeks to reargue the court's decision, arguing that the court misapplied the standard of review for Article **78** proceedings. Petitioner asserts CPLR 7803(3) provides four grounds of review: **(1)** violation of lawful procedure; **(2)** affected by an error of law; **(3)** arbitrary and capricious; and (4) abuse of discretion as to penalty. Petitioner argues that the court applied only one review to the exclusion of the others and stated petitioner could only prevail if he established a violation of the Constitution or statute. Petitioner requests reargument on grounds that the termination was carried out in violation of lawful procedure, was arbitrary and capricious and was an excessive penalty.

Section 7803(3) of the CPLR provides:

"The only question that may be raised in a proceeding under the article are:

> **(3)** whether a determination was made in violation of lawful procedure, was affected by an error of lawful procedure, was affected by **an** error of law or was arbitrary and capricious or **an** abuse of discretion as to the measure or mode of penalty or discipline imposed;"

The facts in Soto v. Koehler, **171** A.D.2d **567, (1st** Dept. 1991), are similar to the facts in the instant case. Like the petitioner in this case, the petitioner in *Soto,* a corrections officer, was involved in a automobile accident, allegedly while driving under the influence of alcohol. He entered into a plea agreement with the Department of Corrections in settlement of disciplinary Charges. Under the settlement, the petitioner agreed to a probationary period of one year. Petitioner in *Soto,* was terminated one day before the end of his probationary period. The First Department, on review of an order of the Supreme Court **,** New York County, of a petition brought pursuant to N.Y. C.P.L.R **78** in Soto v. Koehler, **171** A.D.2d **567, (1st** Dept. 1991), held, "When we consider

the termination of Civil Service employees, the extent of our review differs according to the status of the employee. Thus a tenured employee protected by the full panoply of rights accorded by the Civil Service Law must be given a hearing before termination or any other disciplinary action is taken. (Matter of Acosta v. Wollet. 55 NY2d 761,763 [1981]) Further, where we find such substantial evidence supported by a factual determination, our further review of the sanction imposed is restricted to whether the penalty is so disproportionate to the offense as to be shocking to one's sense of fairness (Matter of Pell v. Board of Education, 34 NY2d 222,233 [1974])." The court continued, "However, when we deal with the termination of probationary employees, a different standard of review is to be applied. A probationary employee can be dismissed 'without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law." (Matter of York v. McGuire, 63 NY2d 760, 761 [1984]). Judicial review of such a determination 'is limited to an inquiry as to whether the termination was made in 'bad faith.' "(Matter of Johnson v. Katz, 68 NY2d 649,650 [19861.) The burden of raising and proving such 'bad faith' is on the employee and the mere assertion of 'bad faith' without the presentation of evidence demonstrating it does not satisfy the employee's burden (see. Matter of Cortiio v. Ward, 158 Ad2d 345 [1st Dept. 1990])."

Applying these standards to the instant case, as was previously done in the Court's prior decision and order of July 3,2002, petitioner was a probationary officer. As a probationary officer the NYPD could dismiss him "...without a hearing and without a statement of reasons..." (Matter of York v. McGuire, 63 NY2d 760, 76 1 [19841) as evidenced by his letter of dismissal dated August 10, 2001 (Exhibit D as attached to the Notice of Petition).

Following the proper judicial standard, this court correctly sought to determine whether the

NYPD terminated the petitioner in bad faith. Bad faith is defined as a constitutional or statutory violation. Id., see also. Soto v. Koehler, 171 A.D.2d 567 (1st Dept. 1991). The Court of Appeals in Trotta v. Ward, 77 N.Y.2d 827 (1991), held, "Disciplinary determinations by the Police Commissioner are entitled to substantial deference 'because he, and not the court, is accountable to the public for the integrity of the Department" (Matter of Berenhaus v Ward, 70 NY2d 436,445 [1987]; see, Matter of Purdy v Kreisberg, 47 NY2d 354, 360 [1979]). Petitioner became a probationary employee due to his arrest for *drunk* driving. Petitioner chose to drink and drive during his probationary period. The Commissioner's dismissal of petitioner is not so disproportionate as to be shocking to the senses. Clearly, under both Walton v. Safir, 122 F. Supp.2d 466 (S.D.N.Y, 2000) and Trotta v. Ward, 77 N.Y.2d 827 (1991), courts have established it is within the Commissioner's discretion to make disciplinary determinations.

Petitioner's Motion to Renew

Pursuant to CPLR 2221(e), petitioner seeks leave to present new facts not offered on the prior motion that would change the prior determination. Specifically, petitioner requests that the court consider the fact that respondents continued to employ probationary Officer Mike Gaudio although, like Sills, Officer Gaudio was allegedly drinking beer in the parking lot on August 4, 2001. Petitioner's justification for not presenting this information in his original application is that his original attorney had a conflict of interest, which he did not disclose to petitioner, and which led him to omit facts pertaining to Officer Gaudio's continued employment.

Howard Tanner, Esq., petitioner's former attorney, was retained by the Policeman's Benevolent Association (PBA) to represent petitioner. Petitioner did not pay Howard Tanner. Petitioner asserts that prior counsel failed to argue the comparison between the officers in

the original petition because the PBA would not have wanted Sills' Article 78 proceeding to trigger Officer Gaudio's termination.

Discussion

A motion to renew is based on new facts. Subject to the court's discretion, a motion to renew under CPLR 2221, "...is intended to draw the court's attention to new additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention. William P. Pahl Equipment Corp. v. Kassis, 182 A.D2d 22,558 (1st Dept. 1992) citing Beinv v. Wynyard, 132 AD2d 190 (1st Dept. 1987), dismissed 71 NY2d 994 (1988). The additional facts used to form the basis of a motion to renew, must be material and admissible, **and** not merely cumulative or additional evidence of the same kind as originally submitted. Basset v. Bando Sangsa Co.. Ltd.. 103 A.D. 2d 728, (1st Dept. 1984). A motion to renew must contain a reasonable justification for the failure to present such facts on the prior motion such as mistake, inadvertence, surprise, or excusable neglect. CPLR 2221(e); Folev v. Roche, 68 A.D.2d 558 (1st Dept. 1979); and Haussmann v. Wolf, 187 A.D.2d 371, 589 (1st Dept. 1992).

The renewal aspect of this motion is based on petitioner's claim of a new fact that respondents continued to employ probationary Officer Mike Gaudio although, like Sills, Officer Gaudio was allegedly drinking beer in the parking lot on August 4,2001. However, petitioner clearly states in his affidavit to this court, that he was aware of the fact of the continued employment of Officer Mike Gaudio, and he made his former attorney aware of this fact. Additionally, petitioner was aware his attorney did not include a comparison to Officer Gaudio, as he signed an affidavit dated November 15,2001, which omitted this information. **As** such, this information was certainly not unknown to the petitioner or by his own admission, his attorney. Petitioner presents no offer of proof that he demanded the inclusion of the

information with regard to Officer Gaudio . In addition, in his affidavit of August 15,2002, which was presented with these papers, petitioner does not make any statement relating to his discussion with his attorney regarding this matter except for the fact that he advised him about Officer Gaudio.

The motion to renew must be denied. Additional facts which were available to the petitioner at the time of the original petition will not normally furnish the basis for granting leave to renew. Morgan v. Morgan Manhattan Storage Co.. Inc. 184 A.D.2d 366 (1st Dept., 1992); and William P. Pahl Equipment Corp. v. Kassis, 182 **A.D.** 2d 22, 558 (1st Dept., 1992).

The court notes, however, that even if the court were to consider this new information there is no evidence that Officer Gaudio's circumstances are similar. Further, as has already been discussed, petitioner is a dismissal probationary employee and, as such, the NYPD could terminate him without a hearing and without a statement of reasons in the absence of any demonstration that the dismissal was for constitutionally impermissible purpose. The petitioner failed to support his contention that his termination was made in bad faith and, therefore, the court would not have considered the NYPD's treatment of another officer, even under a similar fact pattem, in its determination. Accordingly this information is not material to the disposition of this matter.

The petitioner's counsel states in her Affirmation in Support:

> 10. **Mr.** Tanner's failure to draw the comparison between Sills and Officer Gaudio could only be explained by the fact that doing so created a conflict of interest. The conflict is created because the PBA would not have wanted Sills' Article 78 proceeding to trigger Officer Gaudio's termination. **Mi-.** Tanner was paid by the PBA, was interested in his continued employment by the PBA and therefore wanted to serve the PBA's interests. Thus, to Sills detriment, **Mr.** Tanner omitted facts pertaining to Officer Gaudio's continued employment.
>
> 11. Thus, Mr. Tanner had a conflict of interest and rendered ineffective assistance to Sills. Mr. Tanner never disclosed his conflict to Sills. Sills Aff. ¶ 6.

(See, Affirmation of Mercedes M. Maldonado, at ¶10 and ¶11.)

Counsel's allegation that petitioner's prior counsel intentionally omitted these facts from the original application (to his client's detriment) is a very serious charge and is unsupported. The court finds that counsel's argument goes beyond accusing former counsel of ineffective assistance of counsel and effectively infers that former counsel colluded with the PBA to the detriment of his client. This theory appears to be premised upon mere conjecture. Such advocacy is questionable.

Plaintiffs motion to renew and reargue is denied in its entirety.

This constitutes the order and judgment of the court.

DATED: OCTOBER 15, 2003

SHERRY KLEIN HEITLER
J.S.C.