

Matter of Lomando v Kelly

2005 NY Slip Op 30229(U)

August 24, 2005

Supreme Court, New York County

Docket Number:

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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In the Matter of the Application of Police Officer
ARTHUR LOMANDO, Tax Number 906655,

Petitioner,

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

Index No. 113961/04

-against-

RAYMOND W. KELLY, 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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LING COHAN, J.:

In this Article 78 proceeding commenced by petitioner Arthur Lomando against respondents Raymond W. Kelly, as Police Commissioner of the City of New York (Commissioner), the Police Department of the City of New York (NYPD), and the City of New York, petitioner seeks: (1) annulment of the Commissioner's determination to terminate him from his position with the NYPD; (2) reinstatement of his former position as a police officer with the NYPD; and (3) certification to retire with an ordinary disability pension.

Petitioner was born on September 3, 1971 and appointed a police officer with the NYPD on or about February 28, 1994. Between July and October of 2000, he was involved in three separate incidents of misconduct. As a result, on December 15, 2000, the NYPD issued four charges and specifications against him for the following: (1) refusing a sergeant's order to sign a notification form for an overtime detail; (2) making false statements to a sergeant that he was on scheduled vacation for an overtime detail when he was not; (3) insubordination; and (4) a fifteen-

minute unauthorized absence from his assignment. On December 19, 2000, petitioner was placed on modified duty pending the outcome of his disciplinary charges. The charges and specifications were amended on May 10, 2001 to include a fifth charge of misconduct for making false and misleading statements during an official department investigation.

On November 11, 2001, petitioner was placed on restricted duty following complaints that he suffered from depression. In response to petitioner's complaints regarding his mental health, the NYPD Psychological Evaluation Unit (PEU) began to monitor him on November 13, 2001 (Verified Answer, Exhibit 3). Assistant Deputy Commissioner of Trials, Robert W. Vinal, held a hearing on December 4 and 5, 2001, wherein petitioner pleaded guilty to the first two charges lodged against him. In a report and recommendation dated March 28, 2002, petitioner was found guilty of the remaining three charges. Vinal recommended that he forfeit thirty vacation days and that he be dismissed from the NYPD. Moreover, Vinal also recommended that the penalty of termination be held in abeyance pursuant to Section 14-155 (d) of the Administrative Code, for a probationary period of one year (*id.*, Exhibit 4). The Commissioner adopted Vinal's findings and placed petitioner on probation on April 27, 2002.

Petitioner's application for retirement for ordinary disability was submitted on September 18, 2003, stating that he was unable to perform his duties as a police officer because he suffered from depression, insomnia, and fatigue. On September 23, 2003, departmental psychologist Jacqueline Farris determined that he was psychologically fit and recommended that he be restored to full duty. As a result, the PEU did not support his application (*id.*, Exhibit 5). On October 31, 2003, petitioner reported sick for psychological reasons and was directed to report to the Medical Division on November 3, 2003. On that day, petitioner was interviewed by Dr. Arthur Knour, Director of the PEU, and department psychologist Lukisha Sewell. Following that

examination, Dr. Knour requested that the NYPD's Absence Control and Investigations Unit (ACIU) conduct an investigation of petitioner. Shortly thereafter, petitioner was diagnosed with major depressive disorder and panic attacks. Subsequently, petitioner appeared before the Medical Board of the Police Pension Fund Article II (Board) on December 12, 2003 and the Board approved his application for retirement for ordinary disability with a final diagnosis of "Personality Disorder NOS" (*id.*, Exhibit 5, ¶¶ 10-11).

On or about January 27, 2004, after a case review by the Office of the Chief of Personnel, the ACIU investigation was reopened and returned to the NYPD's Medical Division for a follow-up investigation to ascertain whether petitioner worked an off-duty job while on sick leave from October 30, 2003 until November 5, 2003 (*id.*, Exhibit 6). On March 10, 2004, the Board of Trustees of the Police Pension Fund Article 1 and 2 (Trustees) convened. At the request of the NYPD's Office of the Chief of Personnel (OCP) and the Board, petitioner's application for retirement for ordinary disability was remanded to the Board for new evidence and a determination as to whether petitioner was in fact disabled and unable to perform the full duties of a police officer (*id.*, Exhibit 6).

The Board reconvened on April 30, 2004 and reaffirmed its original decision that petitioner could not perform the duties of a police officer (*id.*, Exhibit 8, ¶ 5). On May 19, 2004, the ACIU investigation of petitioner was completed. The results of that investigation was forwarded to the OCP. On June 8, 2004, the Chief of Personnel and the Commanding Officer of the NYPD Medical Division recommended that petitioner be terminated. On July 6, 2004, that recommendation was adopted by the Commissioner and petitioner was terminated on July 7, 2004.

Petitioner contends that the NYPD's termination of his employment, days before his

ordinary disability retirement was to take effect, was in bad faith and with the intent to frustrate his disability retirement.

In opposition, respondents argue that petitioner is not entitled to vacatur of the Commissioner's determination because it was made in conformity with all applicable laws, rules, and regulations, and was neither arbitrary, capricious, nor an abuse of discretion. Moreover, respondents argue that they had a good faith basis to terminate petitioner because he made false and misleading statements to his commanding officer during an official departmental investigation, and as such, his termination was not effected with a view toward frustrating his application for disability retirement.

Upon review of the submitted papers, the petition is dismissed. The conclusory allegations of petitioner are insufficient to sustain his burden inasmuch as they failed to raise genuine factual issues proving that his termination was in bad faith and with an intent towards frustrating his disability retirement (*see Matter of Medina v Sielaff*, 182 AD2d 424, 427 [1st Dept 1992]). In the instant matter, petitioner was terminated while on disciplinary probation pursuant to the Administrative Code of the City of New York § 14-115 (d). A probationary employee can be dismissed without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was in bad faith or for an improper or impermissible reason (*Matter of Swinton v Safir*, 93 NY2d 758, 762-63 [1999]; *Matter of Garcia v Bratton*, 90 NY2d 991, 994 [1997]). The burden of raising and proving such bad faith is on the employee (*see Matter of Sheridan v Ward*, 125 AD2d 274, 275 [1st Dept 1986], *appeal denied* 69 NY2d 609 [1987]). Evidence in the record of disciplinary problems, other than those underlying the probation, include: (1) confrontational behavior, (2) misrepresentations, (3) misleading statements, and (4) insubordination (Verified Answer, Exhibit 6). All of the above supports the conclusion that the

termination was not made in bad faith (*see Matter of Johnson v Katz*, 68 NY2d 649 [1986]).

Petitioner contends that the NYPD's termination of his employment after the Board found him to be mentally incapacitated for the performance of duty on two separate occasions and approved his application for retirement for ordinary disability constitutes evidence of bad faith. Courts have held that a loss of a pension and length of service might be significant in the consideration of whether a penalty shocks one's sense of fairness, where there is no grave moral turpitude and grave injury to the agency involved or to the public weal (*Matter of Kelly v Safir*, 96 NY2d 32, 39, *rearg denied* 96 NY2d 854 [2001]). However, this is not such a situation. The sanction of dismissal will be upheld if respondents establish that petitioner has demonstrated that he lacks the necessary qualifications for the position in question (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 235 [1974]). Respondents purport that petitioner is unqualified to serve as a police officer because he lacks the credibility necessary for the office. According to respondents, petitioner indicated to the department psychologist that he wanted to retire on a psychological pension, and in an effort to resist being restored to full duty, the petitioner deliberately made false statements to his commanding officer during a departmental investigation. On October 30, 2003, following two years of therapy and close monitoring, Dr. Farris recommended that petitioner be restored to full duty. During his two years of therapy, petitioner never mentioned to Dr. Farris that he maintained off-duty employment of up to twenty hours per week or that he worked, at times, a ten-hour shift while also working in the police department with only a two-hour break to sleep (Verified Answer, Exhibit 8, ¶ 5). Moreover, when questioned about his off-duty employment during his probation and modified assignment, petitioner informed a superior officer that he was not performing his off-duty employment due to his condition; in a subsequent investigation by the NYPD, however, it was revealed through surveillance tapes, interviews, and

petitioner's own admissions that he engaged in off-duty employment as a delivery truck driver (*id.*, Exhibit 8, ¶¶ 3-6). Petitioner confessed that he needed the additional income to support his family (*id.*, Exhibit 6, ¶ 9 and Exhibit 8, ¶ 5).

Petitioner contends that the department was aware of his off-duty employment pursuant to an application he submitted detailing his work, and thus there was no misrepresentation to the department (Affirmation of Arthur Lomando, dated March 1, 2005, Exhibit BB). However, as discussed above, the record reveals that petitioner was not forthcoming during departmental interviews and investigations regarding when he engaged in his off-duty employment.

Petitioner also argues that the timing of his termination in relation to his submission of an application to the Board for retirement for ordinary disability and the meeting of the Trustees was proof of bad faith and therefore warrants his reinstatement. This argument, however, is unavailing. Pursuant to the Administrative Code of the City of New York § 13-206 (g), the granting of a pension on severance from service for fault or delinquency shall not be a matter of right, but such a pension may be granted in consideration of special circumstances by the board of trustees and a vote of at least two-thirds of the whole number of votes authorized to be cast by all the members of such board. There is ample support in the record to demonstrate that petitioner's severance from service was for cause. As discussed above, petitioner was placed on probation in April 2002, and submitted an application for retirement for ordinary disability on September 18, 2003. Petitioner's employment with the NYPD was terminated in July, 2004. Respondents conducted medical examinations, departmental investigations, and mental evaluations regarding petitioner and concluded that he should be terminated from the police force. In matters concerning police discipline, courts have accorded the Commissioner great leeway concerning the appropriate punishment for police officers following disciplinary hearings

and determinations, for it is the Commissioner, not the courts, who is accountable to the public for the integrity of the department (*Matter of Kelly v Safir*, 96 NY2d 32, 38 *supra*). Furthermore, the very purpose of the probationary period is to ascertain the fitness of the probationer and to give the probationer a reasonable opportunity to demonstrate the ability to perform the duties of the office (*see Matter of Tomlinson v Ward*, 110 AD2d 537, 538 [1st Dept], *affd* 66 NY2d 771 [1985]). Despite conflicting opinions as to the advisability of retirement for ordinary disability, there was a rational basis for the determinations of the Commissioner and, accordingly, the action taken was neither arbitrary nor capricious (*see Matter of Talamo v Murphy*, 38 NY2d 637, 639 [1976]).

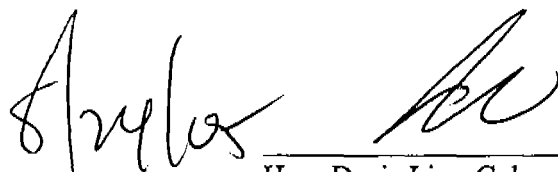
Accordingly, it is

ORDERED that the petition is denied and the proceeding dismissed; it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this decision/order, respondents shall serve a copy upon petitioner with notice of entry.

Dated:



Hon. Doris Ling-Cohan, J.S.C.

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