

<b>Matter of Bertone v Kelly</b>
2007 NY Slip Op 31154(U)
May 7, 2007
Supreme Court, New York County
Docket Number: 0115571/2005
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARILYN SHAFER  
*Justice*

PART 8

Bertone, N

INDEX NO. 115571/05

- v -

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

Kelley, R

MOTION SEQ. NO. 02

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 denied  
perant to attached Rem

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

**FILED**  
MAY 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/7/07

[Signature]  
NON. MARILYN SHAFER, J.C.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X

In the Matter of the Application of

NICOLE BERTONE,

Petitioner,

Index No. 115571/05

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

-against-

RAYMOND KELLY, as the Police Commissioner  
of the City of New York, and as  
Chairman of the Board of Trustees of the  
Police Pension Fund, Article II, THE BOARD  
OF TRUSTEES of the Police Pension Fund,  
Article II, NEW YORK CITY POLICE  
DEPARTMENT and THE CITY OF NEW YORK,

Respondents.

-----X

MARILYN SHAFER, J.:

The petitioner Nicole Bertone (petitioner) moves to reargue the court's denial of her Article 78 proceeding for a judgment annulling the action of the respondents Raymond Kelly, The Board of Trustees of the Police Pension Fund, The New York City Police Department and the City of New York (the respondents), denying the petitioner's application for a line-of-duty accident disability retirement allowance pursuant to Administrative Code of the City of New York (Administrative Code) § 13-252, and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and directing the respondents to retire the petitioner with a line-of-

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duty accident disability retirement allowance retroactive to the date of her ordinary disability retirement; or, in the alternative, directing a hearing on the factual issues raised herein; or, in the alternative, directing the Board of Trustees to allow the petitioner to present testimony at a hearing before the Board of Trustees.

The petitioner fails to demonstrate that the court overlooked any relevant fact, misapprehended the law or, for any other reason, mistakenly arrived at its determination (Carrillo v PM Realty Group, 16 AD3d 611 [2d Dept 2005]; Foley v Roche, 68 AD2d 558, 567 [1<sup>st</sup> Dept 1979]).

Detective Bertone was retired on an ordinary disability pension on a finding that she suffers from a psychological disability of anxiety disorder. In support of the petition, Bertone argued that her psychological disability was post-traumatic stress disorder, rather than anxiety disorder, and that it was the natural and proximate result of accidental injuries, entitling her to an accident disability pension as a matter of law. In opposition to the petition, the respondents argued that the denial of petitioner's application for accident disability retirement was supported by credible medical evidence, and therefore, was not arbitrary, capricious or erroneous as a matter of law.

Contrary to the petitioner's assertion on this motion to reargue, the Medical Board's determination, as accepted by the Board of Trustees, is conclusive if it is not irrational, arbitrary, or capricious (Matter of Meyer v Board of Trustees of New York City Fire Dept., Art. 1-B Pension Fund, 90 NY2d 139 [1997]).

Furthermore, the petitioner misconstrues her burden on the underlying Article 78 proceeding. In order to be eligible for retirement on an "accident disability" pension, the

petitioner must establish that she suffered mental incapacitation "as a natural and proximate result of an accidental injury received in ... city-service" (Administrative Code § 13-252; (Matter of McCambridge v McGuire, 62 NY2d 563 [1984]; Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of New York Art. II, 57 NY2d 1010 [1982]; Matter of Hipple v Ward, 146 AD2d 201 [1<sup>st</sup> Dept], appeal denied 74 NY2d 614 [1989]).

Inasmuch as there was credible evidence to support the Medical Board's findings that Bertone's condition, although disabling, was not the natural and proximate result of a line-of-duty injury, Bertone did not suffer a qualifying accident, and the determination of the Board of Trustees was neither irrational nor arbitrary or capricious.

Accordingly, it is

ORDERED that the motion to reargue is denied.

Dated: 5/7/07

ENTER:

  
\_\_\_\_\_  
HON. MARILYN SHAFER, JSC

**FILED**  
MAY 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE