

Matter of Zajda v Kelly
2007 NY Slip Op 31645(U)
June 8, 2007
Supreme Court, New York County
Docket Number: 0116952/2006
Judge: Leland G. DeGrasse
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LELAND DEGRASSE
Justice

PART 25

Zajda, M

INDEX NO. 116952/06

MOTION DATE 2/23/07

MOTION SEQ. NO. 01

MOTION CAL. NO. 153

- v -

Kelly, R

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

Motion is decided in accordance with accompanying Memorandum Decision.

FILED

JUN 15 2007

COUNTY CLERK'S OFFICE
NEW YORK

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

JUN 08 2007

Dated: _____

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

-----X
 In the Matter of the Application of Police Officer :
 MAMIANNE ZAJDA, Tax Number 917201 :
 : Index No.: 116952/06
 Petitioner, :
 : Cal. No.: 153 of 2/23/07
 For a Judgment Pursuant to Article 78 :
 of the Civil Practice Law and Rules, :
 - 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. :

-----X
DeGRASSE, J.:

In this Article 78 proceeding, petitioner Mamianne Zajda seeks to reverse and annul the determination of respondents Raymond W. Kelly, as Police Commissioner of the City of New York (the "Police Commissioner"), and the Police Department of the City of New York (the "NYPD"), which terminated her employment as a police officer. Petitioner seeks an order directing respondents to reinstate her with back pay and benefits, or in the alternative, a hearing pursuant to CPLR 7804 (h). Respondents cross-move, pursuant to CPLR 3211 (a) (7), to dismiss the petition for failure to state a cause of action.

The petition alleges that petitioner was appointed to the position of police officer with the NYPD on July 18, 1996. On March 9, 2006, petitioner and respondents entered into a negotiated settlement agreement whereby petitioner pled guilty to certain disciplinary charges and specifications sustained against her by the NYPD. Pursuant to the agreement, petitioner agreed to be placed on

suspension for a period of 30 days, beginning December 17, 2005 to January 16, 2006, and to forfeit all time, pay, and benefits while under suspension. Petitioner also agreed to be placed on dismissal probation for a period not to exceed one year and to commence upon the Police Commissioner's approval which became effective May 1, 2006.

On March 15, 2006, petitioner filed documents with the Richmond County Clerk's Office concerning a change to the deed of the premises that she allegedly owned. Petitioner claims that she "was letting her family and a brother live in the home" and was "planning to either sell or refinance the home." Upon learning of petitioner's intentions, her family filed a complaint against her with the NYPD Internal Affairs Bureau (the "IAB") alleging grand larceny and other acts of misconduct. The claims against petitioner were investigated by the IAB and the NYPD Staten Island Investigations Unit. As a result of the investigations, petitioner was arrested on June 22, 2006, and charged with criminal possession of a forged instrument in the second degree and criminal solicitation in the fifth degree. The charges have yet to be proven, as the case is currently pending. On July 11, 2006, while on probationary employment status, petitioner was terminated from her position as a police officer for no stated reason. Petitioner now seeks to annul respondents' decision to terminate her employment on the grounds that it was arbitrary and capricious and made in bad faith.

Petitioner claims that after being diagnosed with a congenial heart defect, the NYPD, on petitioner's behalf, submitted an application for ordinary disability retirement benefits to the Medical Board Police Pension Fund Article II (the "Medical Board") and the Medical Board unanimously recommended approval of her application in June 2006. Petitioner further claims that she was scheduled to appear before the Board of Trustees Police Pension Fund (the 'Pension Board') "on July

14, 2006 to finalize her [o]rdinary [d]isability [r]etirement pension.” It is petitioner’s contention that by discharging her on July 11, 2006, approximately three days before she was allegedly scheduled to appear before the Pension Board, respondents purposely frustrated her right to receive a disability retirement pension. Petitioner further contends that respondents’ decision to terminate her employment was arbitrary and capricious and made in bad faith “because it was premised on a baseless arrest,” as petitioner denies any guilt of the criminal charges filed against her. Additionally, petitioner claims that such charges are “plainly unrelated to her work as a police officer.”

It is well established that absent a showing of bad faith, police officers on disciplinary probation may be dismissed for any or no reason, and without a hearing or statement of reasons (*Matter of Dillon v Safir*, 270 AD2d 116, 117 [2000]). This standard is applicable to tenured employees who are serving probationary periods in resolution of disciplinary charges (*see Matter of Wilson v Bratton*, 266 AD2d 140 [1999]). The burden of raising and proving bad faith is on the employee, and a mere assertion of bad faith without demonstrable evidence does not satisfy the employee’s burden (*Matter of Negron v Jackson*, 273 AD2d 241 [2000]; *Matter of Leskow v Office of Ct. Admin.*, 248 AD2d 1004 [1998]). It is equally well established that this court’s review of an administrative agency’s determination is limited to an inquiry as to whether it was made in bad faith and was therefore arbitrary and capricious (*Matter of King v Sapier*, 47 AD2d 114, 116 [1975], *affd* 38 NY2d 960 [1976]; *Matter of Johnson v Katz*, 68 NY2d 649 [1986], *affd* 68 NY2d 649 [1986]).

Applying these principles, the court grants respondents’ cross motion to dismiss the petition. Petitioner’s conclusory and unsubstantiated allegation that her termination was undertaken in bad faith with the purpose of frustrating her right to a disability pension fails to establish a claim of bad faith (*see Matter of Cortijo v Ward*, 158 AD2d 345 [1990]; *Matter of Leskow*, 248 AD2d at 1005).

Petitioner was not given any reason for her termination. In response to the petition, respondents assert that petitioner's arrest provided ample justification for her termination because "the very core of petitioner's arrest [was] her alleged dishonesty" which "clearly bear[s] a nexus to her work as a police officer." At the time of her termination, petitioner was on dismissal probation in resolution of disciplinary charges that had been brought against her. In accordance with the terms of the negotiated settlement, petitioner agreed that while on probation, "the Police Commissioner may impose punishment of [d]ismissal or any lesser penalty he deems appropriate at any time during such period." Thus, absent bad faith, "petitioner could be terminated for virtually any reason or for no reason at all" (*Matter of Cipolla v Kelly*, 26 AD3d 171, 171 [2006]), as petitioner acknowledged when she signed the agreement to dismissal probation. During her probationary period, petitioner was arrested and charged with criminal possession of a forged instrument in the second degree and criminal solicitation in the fifth degree. Accordingly, the record before the court shows that respondents had a good faith basis for terminating petitioner's employment and respondents' determination was neither arbitrary nor capricious (*id.* at 171; *Matter of Castro v Safir*, 291 AD2d 212 [2002]).

While, as petitioner alleges, the Medical Board may have found petitioner unfit for duty and recommended her for an ordinary disability pension, this is insufficient to show that petitioner's termination, which occurred after the Medical Board had issued its recommendation, was undertaken in bad faith with a view toward frustrating her pension application (*id.* at 212). The record clearly shows that petitioner agreed to be placed on dismissal probation on March 9, 2006, well before the Medical Board's June 2006 recommendation. That petitioner was terminated three days before her application for disability retirement was allegedly scheduled to be finalized by the Pension Board

does not satisfy petitioner's burden of establishing that she was terminated in bad faith as the record shows that petitioner's dismissal on July 11, 2006 followed in reasonably short order of her June 22, 2006 arrest (*id.* at 212-213). The fact that the criminal charges against petitioner were still pending at the time of her termination is also unavailing (*see Oberson v City of New York*, 232 AD2d 172 [1996]; *Matter of Brown v Condon*, 186 AD2d 43 [1992]).

Petitioner's request for an evidentiary hearing is denied. No evidence has been submitted sufficient to raise a triable issue of fact as to whether respondents' decision to terminate petitioner's employment was arbitrary and capricious or was taken in bad faith (*see Matter of York v McGuire*, 99 AD2d 1023 [1984], *affd* 63 NY2d 760 [1984]).

Accordingly, respondent's cross motion is granted.

The Clerk shall enter judgment dismissing the petition.

DATED: JUN 15 2007



J.S.C.

HON. LELAND DeGRASSE

FILED

JUN 15 2007

COUNTY CLERK'S OFFICE
NEW YORK