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| Matter of Mladen v Kelly |
| 2007 NY Slip Op 32063(U) |
| July 6, 2007 |
| Supreme Court, New York County |
| Docket Number: 0104798/2005 |
| Judge: Paul G. Feinman |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. PAUL G. FEINMAN

PRESENT _____

PART 52

Index Number : 104798/2005
MLADEN, LUCIA
vs
KELLY, RAYMOND
Sequence Number : 002
RESTORE ACTION TO CALENDAR

INDEX NO. 104798/05
MOTION DATE 4/11/07
MOTION SEQ. NO. 002
MOTION CAL. NO. 10

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 | |
|-----------------|-------|
| 1, 10 | _____ |
| 2, 3 | _____ |
| 4 | _____ |

Cross-Motion: Yes

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B)

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION / or not / 1000 1000

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

Dated: 7/6/07 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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In the Matter of the Application of
LUCIA MLADEN,
Petitioner,

Index Number 104798/2005
Submission Date April 11, 2007
Mot. Seq. No. 002
Mot. Cal. No. 10

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

- against -

**DECISION, ORDER AND
JUDGMENT**

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

For the Petitioner:
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For the Respondent:
Michael A. Cardozo, Esq.
Corporation Counsel of City of New York
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UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain an entry of judgment, the petitioner must
submit a copy of this judgment to the County Clerk
for filing.

Papers considered in review of this motion to restore and determine:

| | Papers | Numbered |
|----------|--|-----------------|
| Seq. 001 | Notice of Petition, Affidavits..... | <u>1</u> |
| Seq. 002 | Notice of Motion to Restore and Attachments... | <u>1</u> |
| | Verified Answer, Memo of Law..... | <u>2,3</u> |
| | Petitioner's Memo of Law..... | <u>4</u> |

PAUL GEORGE FEINMAN, J.¹:

In this Article 78 proceeding, petitioner seeks to restore the petition to the calendar and upon
restoral, for an order annulling and rescinding the determination of respondents, pursuant to CPLR
7803(3). For the reasons which follow, the unopposed motion to restore is granted, and after

¹ The court gratefully acknowledges the assistance of summer Judicial Intern Adam
Martin.

consideration of the petition on its merits, the petition is granted to the extent that it is remanded back to the Board of Trustees and the Medical Board for further consideration in accordance with this decision.

BACKGROUND

Petitioner was a uniformed member of the New York City Police Department, who was retired from service in 2004 as a result of a determination that she was “mentally disabled from performing the full duties of a police officer.” (Resp. Memo of Law, p. 2). She brings this petition to challenge that decision. Petitioner’s condition was first brought to the attention of the NYPD in December 24, 2001 when petitioner was referred by a Lieutenant with the 24th Precinct to the Psychological Evaluation Unit of the NYPD (PEU). On that date, a psychologist with the PEU, Dr. Mancini, interviewed the petitioner and found that she was “experiencing a psychosis possibly associated with a bipolar disorder.” (Ver. Ans. Exhibit 1, p. 2). Dr. Mancini committed her to Holliswood Hospital for psychiatric evaluation. After being discharged from the hospital three days later, petitioner remained on psychological sick leave. At petitioner’s request to Dr. Mancini on January 7, 2002, she was taken off of sick status and cleared for restricted duty work. (Ver. Ans. Exhibit 1, p.3). However, on February 15, 2002, petitioner was again referred to Dr. Mancini by a Lieutenant of the Manhattan Court Section who reported to Dr. Mancini that petitioner was “not functioning at work.” (Ver. Ans. Exhibit 1, p.3). After interviewing the petitioner, Dr. Mancini again placed her on psychological sick leave and requested her to provide a note from a psychiatrist in order to return to work. Dr. Mancini interviewed the petitioner a further six times between February 26, 2002 and June 25, 2003. As a result of these interviews, Dr. Mancini concluded that the petitioner suffered from a “severe and pervasive psychological disturbance” and that she is

“psychologically unsuitable for full duty police work with the use of firearms.” (Ver. Ans. Exhibit 1, p.5,6). He then submitted his recommendation that she be retired from the Department.

Following Dr. Mancini’s findings, Dr. Arthur Knorr, director of PEU, reviewed the complete file of petitioner and interviewed her on November 13, 2003. (Ver. Ans. Exhibit 3). He found that petitioner “did not present gross bipolar symptoms during the interview, but her defense of her past behavior was certainly not convincing, and there is evidence of residual psychopathology.” (Ver. Ans, Exhibit 3, p.3). Dr. Knorr pointed out that he “did not believe that [petitioner] is now free from symptoms of bipolar disorder” and concurred with Dr. Mancini’s recommendation that she be retired from the NYPD. (Ver. Ans. Exhibit 3, p.3).

Thereafter, on November 18, 2003, the Police Commissioner submitted an application for Ordinary Disability Retirement on behalf of petitioner, due to a psychiatric condition. On April 30, 2004, the Medical Board of the Police Pension Fund, Article II examined the petitioner. Petitioner’s attorney had requested by a faxed letter sent that day that the hearing be postponed in order to allow her doctor responsible for her psychiatric care, Lennart Belok, M.D., to appear at the hearing, and acknowledged that under the rules the doctor would only be allowed to appear at the initial meeting. (Pet. Memo of Law, App. A). The Medical Board apparently denied this request. (Pet. Memo of Law, P.6). However, the Board took note of a neurological evaluation dated February 12, 2003, from Dr. Belok, and that the report stated that petitioner “had intact mental status.” (Not. of Pet Exhibit C, ¶ 5). Nonetheless, the Medical Board determined, based on the materials reviewed and their interview of the petitioner, to unanimously recommend approval of the Police Commissioner’s application for Ordinary Disability Retirement. (Ver. Ans. Exhibit 7, p.3). On December 8, 2004, the Board of Trustees of the Police Pension Fund reviewed her case and noted the Medical Board’s

recommendation that the Commissioner's application for ODR be approved, however, according to the transcript of the proceeding the application for ODR was withdrawn and the petitioner was retired with a retirement status of "Service Retirement." (Ver. Ans. Exhibit 8, p.4; Not. of Pet. Exhibit D). Petitioner then commenced this Article 78 proceeding.

LEGAL ANALYSIS

"In an article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious." *Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756,760 (1996). Further, "a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence... in disability cases the phrase has been construed to require 'some credible evidence.'" *Borenstein* at 760. The function of the court in an Article 78 proceeding is not to substitute its judgment for the judgment of the administrative body, but to ensure that the process of the administrative body was followed and otherwise afforded the parties a fair hearing.

In situations where there is a difference of medical opinion as to the disability of the petitioner, the Medical Board is entitled to rely on its own evaluation and expertise in reaching its conclusion, after considering the views of other medical professionals who treated petitioner. (Resp. Memo of Law p. 13, citing *Borenstein* at 761). It is also settled law that "the trustees are free to determine whether a disability is service connected and in that respect need not follow the findings of the medical board, [however] they are not free to disregard the findings of that board with respect to the nature and the extent of the disability." *Whalen v Monaghan*, 285 AD 884,884 (1st Dept.), *aff'd* 309 NY 929 (1955).

In regards to the decision of the Medical Board here, it appears that it explicitly chose to

hold its hearing without the appearance and testimony of the petitioner's doctor. In *Wright v Safir*, 983 F.Supp 484 (SDNY 1997), the court pointed out that in psychological disability cases, "new procedures require[d] that an officer being surveyed by the Medical Board be given... an opportunity to retain a medical professional to appear before the Medical Board on the officer's behalf." (*Wright* at 486; see also *Campbell v City of New York*, 101 F.Supp 2d 248, 253 [SDNY 2000]). Here, the Medical Board apparently rejected petitioner's April 30, 2004 request to postpone the hearing scheduled for that day in order to allow her medical professional to appear. Petitioner alleges that her treating psychiatrist had not received all of the requested records from the NYPD Psychological Evaluation Unit, and could not testify until after he was afforded time to review these records. (Pct. Memo of Law, App. A). Respondents have not put forward any explanation or justification for refusing petitioner's request for a postponement, but rely on the rule that in a situation where medical professionals have different opinions, the Medical Board can rely on its own evaluation and that "conflicting medical opinion provides no occasion for judicial interference." *Muffoletto v New York City Employees' Retirement Sys.*, 198 AD2d 7 (1st Dept. 1993). However, here the denial of the adjournment request meant that *no* opportunity was given for a conflicting medical opinion to be presented, let alone rejected, given the Medical Board's rule that the petitioner could only have her psychiatrist or psychologist appear at her first appearance before the Board. While, the Medical Board is allowed to form its own opinion of the evidence and then make any lawful determination which flows from that evidence, fundamental concepts of fairness dictate that the petitioner be allowed to at least present evidence to the Board which then may or may not affect its decision.

Secondly, it is unclear whether the Board of Trustees, in reversing the Medical Board's unanimous finding that petitioner qualifies for ODR based on a diagnosis of Bipolar I, Manic

Disorder, improperly failed to take cognizance of the Medical Board's findings, or whether it determined that her disability was non-service related. The record does not indicate the rationale for the Board of Trustee's decision, and only states: "The Medical Board recommends approval of ordinary disability....Withdraw the ordinary, out on service."(Ver. Ans. Exhibit 8, p.4). This record does not sufficiently explain the basis for its decision.

This court will not overturn the findings of the Medical Board or issue an order reinstating the petitioner inasmuch as the result reached by the Board does logically flow from the extant record before it. However, in consideration of the procedures and rights allowed police officers under review, the case is remanded to the Medical Board in order to allow the petitioner's medical professional an opportunity to appear on her behalf or to present a current medical or psychological report and to allow the Board of Trustees to offer an explanation of its decision. Accordingly, it is

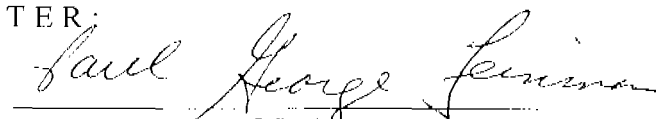
ORDERED that the motion to restore this proceeding to the calendar is granted; and it is further

ORDERED and ADJUDGED that the petition is granted only to the extent that the matter is remanded to the Medical Board for petitioner to present evidence from her doctor, and for clarification by the Board of Trustees of its rationale and is otherwise denied.

This constitutes the decision, order and judgment of this court.

ENTER:

Dated: July 6, 2007
New York, New York


J.S.C.

UNFILED JUDGMENT

his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 413)