

Toolasprashad v Kelly
2007 NY Slip Op 32075(U)
July 9, 2007
Supreme Court, New York County
Docket Number: 0109964/2006
Judge: Marilyn Shafer
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

Index Number : 109964/2006
TOOLASPRASHAD, RUDRANAU
 VS.
KELLY, RAYMOND W.
 SEQUENCE NUMBER : 001
 ARTICLE 78

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*denied
present to attached item*

FILED
JUL 13 2007
NEW YORK COUNTY

SHAFER
J.S.C.

Dated: 7/9/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

-----X,
RUDRANAU TOOLASPRASHAD,
Petitioner,

INDEX NO. 109964/06

-against-

MOTION DATE

RAYMOND KELLY, as the Police Commissioner of the
City of New York, the NEW YORK CITY POLICE
DEPARTMENT and THE CITY OF NEW YORK,

MOTION SEQ. NO. 1

Respondents.

-----X
The following papers were read on this petition under CPLR §78:

Papers Numbered

Notice of Petition
Verified Answer and Exhibits

FILED
JUL 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

1
2

Upon the foregoing papers, it is ordered that the petition is granted in part.

Pursuant to Article 78, Detective Rudranau Toolasprashad (Toolasprashad) moves to annul and set aside the final determination of the Assistant Deputy Commissioner (the Report) by respondents Raymond Kelly, the New York City Police Department and the City of New York (together, respondents), as arbitrary and capricious and in violation of Civil Service Law. Toolasprashad was employed by the NYPD from 1992 through the time of his termination on April 3, 2006. Based on what he alleges is his wrongful dismissal, Toolasprashad asks that he be reinstated and receive all salary and retirement benefits retroactive to the date of his termination. Pursuant to CPLR §2307(a), Toolasprashad also requests that the respondents turn over all NYPD documents obtained in connection with the investigation of his alleged misconduct, along with transcripts from his case in the NYPD trial room. The gravamen of the petition is that respondents failed to effectuate notice on Toolasprashad reasonably calculated to apprise him of the charges against him, resulting in his trial in absentia and summary dismissal.

In reply, respondents maintain that they made reasonable efforts to serve Toolasprashad, that his right to pension benefits is not absolute, and that in any event, the instant proceeding should be transferred to the Appellate Division since it raises issues of substantial evidence, pursuant to CPLR §7804(g).

Discussion

It is well settled that judicial review in an Article 78 proceeding is limited to a determination of whether the administrative action complained of is “arbitrary and capricious, or lacks a rational basis” (*In re Application of Chelrae Estates, Inc. v State Division of Housing and Community Renewal, Office of Rent Administration*, 225 AD2d 387, 389 [1st Dept. 1996]). “An Article 78 proceeding is limited to consideration of the evidence and arguments raised before the agency when the administrative determination was rendered and ‘[t]he function of the court . . . is to determine . . . whether the determination had a rational basis in the record’” (*In re Application of HLV Associates v Aponte*, 223 AD2d 362, 363 [1st Dept. 1996]; *citing Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1st Dept. 1982]).

Pursuant to CPLR §7803 (3), the only questions that may be raised in a proceeding under Article 78 are “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed. . .” The Court of Appeals has defined arbitrary and capricious action as “action without sound basis in reason and generally taken without regard to the facts” (*Pell v Board of Education of Union Free School District*, 34 NY2d 222, 231 [1974]). An agency acts arbitrarily and capriciously when it fails to conform to its own rules and regulations (*Brooks v Forsythe*, 189 Ad2d 26, 32 [3rd Dept 1993]).

It is also firmly established that an individual facing a disciplinary type hearing is entitled to notice of the charges and an opportunity to respond (*Matter of Ackerman v Ambach*, 142 AD2d 842 [1988], *affd* 73 NY2d 323 [1989]).

Substituted service is adequate so far as due process is concerned if the substituted service is reasonably calculated to provide actual notice of the proceedings and an opportunity to be heard. If it is, "traditional notions of fair play and substantial justice implicit in due process have been satisfied" (*Milliken v Meyer*, 311 US 457, 463, citing *McDonald v Mabee*, 443 US 90).

As provided by 38 RCNY §15-04(d),

If the respondent fails to appear at the Hearing personally or by authorized representative, without good cause, the Deputy Commissioner of Trials may conduct a Hearing in the respondent's absence. If the respondent does not appear, the Deputy Commissioner of Trials shall determine whether to hold an Inquest Hearing or proceed upon written submissions of the parties. Additionally, the Deputy Commissioner of Trials may determine that no further proceedings may be necessary.

As provided by 38 RCNY §15-03(c),

If Charges and Specifications are served personally, the respondent shall have the opportunity to reply to them within eight days of service. If Charges and Specifications are served by mail, the respondent shall have the opportunity to reply to them within thirteen days of their mailing date. Upon good cause shown, the Deputy Commissioner of Trials may fix different time periods within which to reply.

The record reveals that on March 6, 2006, Toolasprashad appeared at his Command, where he submitted seven Leave of Absence Reports (leave reports) requesting vacation from March 8th through April 15th. At that time he also filed for vested retirement from the NYPD effective April 5th. The Report confirms that Toolasprashad noted on six of the leave reports, in a section labeled "Location During Absence" – described in NYPD nomenclature as "the back of his 28" (Answer, Exhibit 3, p 39) – that over the course of his vacation he could be found at

Dante 863 Surquino, Lima, Peru. The Report also confirms that all of Toolasprashad's leave reports were approved by respondent NYPD.

Soon after Toolasprashad left for Lima, respondent NYPD brought charges against him including attempted grand larceny; receiving unlawful gratuities; giving unlawful gratuities; corruption; conspiracy; off-duty employment; and various forms of official and prohibited conduct. Each of these charges constitutes a violation of NYS Penal Law.

Knowing that Toolasprashad was located in Lima, respondents nevertheless attempted personal and substituted service at Toolasprashad's residence in Queens, where there was no response to an NYPD investigator's knock at the door (Verified Answer, Exhibit 1, p 6). The investigator posted a copy of the charges on the door, leaving another with Toolasprashad's Command and returning March 13th and 14th to affix additional copies of the charges to the same door, followed by certified mail to the Queens address.

One week before the trial date, on March 13th, an investigator express mailed the charges to Toolasprashad at his location in Peru, though proof of service is not on the record before this court. Meanwhile, on or after March 10th, acting on a request from the IAB, the Department of State (DOS) asked its Regional Security Officer in Peru to contact Toolasprashad in Lima (Verified Answer Exhibit 1, p 7). At some point thereafter, DOS agents visited Dante 863 Surquino, Lima, where somebody on location told them the address was a barbershop, and where agents encountered neither Toolashprashad himself nor anyone aware of his existence. Respondents do not deny that a residential apartment is located on the second floor above the barbershop where, according to the petition, Toolasprashad had taken a lease over his vacation (Verified Petition, ¶69).

It is not disputed that over the course of 2005 Toolasprashad had been the subject of official department interviews by the Internal Affairs Bureau (IAB) concerning allegations of official misconduct and that he was last interviewed by the IAB on March 2, 2006. No charges were brought against Toolasprashad in 2005 or at any time prior to his resignation. In fact, charges against Toolasprashad were first presented to his attorney at an eleventh hour pre-trial conference on March 14th, after Toolasprashad had filed for retirement on March 6, 2006 and left for vacation (Verified Answer, Exhibit 1). At that conference, Toolasprashad's attorney stated that he had not been in contact with his client since March 2nd, and the Commissioner noted that the respondent had probably not seen the charges (*id.*, 12).

For ethical reasons Toolasprashad's attorney asked to be excused from representing Toolasprashad at trial, since his client was neither present nor aware of the charges against him, and he had thus been unable to discuss the charges with Toolasprashad prior to trial or prepare a defense. An expedited two day trial was commenced and concluded in Toolasprashad's absence on March 20th and 21st at which Toolasprashad was found guilty of 8 charges of official misconduct. A final order of dismissal signed by respondent Police Commissioner Ray Kelly took effect on April 3rd.

The Assistant Deputy Commissioner of Trials states two reasons in the Report for his determination that Toolasprashad was without good cause in his failure to appear for the hearing. First, the Report states that respondents were diligent in their efforts to notify Toolasprashad of the charges against him, after the conference on March 14, 2006 and before trial on March 20th. The Report asserts that the location given by Toolasprashad in Lima was not residential and that he had failed to furnish contact information on his leave reports in a section labeled "addresses

where applicant can be communicated with during absence” and “telephone numbers.” Second, the Report states that “since the Respondent’s vested retirement from the Department is effective as of April 5, 2006, a trial regarding these Charges and Specifications should be commenced immediately” (Verified Answer, Exhibit 1, p 9).

An individual facing a disciplinary type hearing is entitled to notice of the charges and an opportunity to respond (*Matter of Ackerman v Ambach*, 142 AD2d 842 [1988], *affd* 73 NY2d 323 [1989]). Service at Toolasprashad’s residence in Queens could not have been reasonably calculated to give him actual notice and an opportunity to be heard, since respondents were fully aware that Toolasprashad had left the country at the time of said service. Even had Toolasprashad left contact information on his leave reports in a section labeled “addresses where applicant can be communicated with during absence” and “telephone numbers,” information largely redundant since it had been provided by Toolasprashad on the back of his 28s, it is unlikely that this would have resulted in actual notice of the proceedings. Respondents’ hasty attempt to send an agent to Toolasprashad’s location in Lima where they claim to have found no more than a barbershop and quickly gave up, does not rise to the level of due diligence such as would satisfy traditional notions of fair play and substantial justice (*Milliken v Meyer*, 311 US 457). Accordingly, Toolasprashad’s failure to appear at trial was for good cause.

The second reason, that Toolasprashad’s expedited trial in absentia was necessary since Toolasprashad was on the verge of retirement, is conclusory to say the least. Not only did respondents accept Toolasprashad’s application for retirement, but it is respondents’ burden to file charges against him in a timely manner. Accordingly, this does not constitute good cause, Toolasprashad was denied due process, and the final determination is arbitrary and capricious

and without sound basis in reason.

This court does not take lightly the allegations of serious criminal misconduct by a public servant, much of it on duty, against Toolasprashad by respondent NYPD. However, Toolasprashad is entitled to the protection of due process unless his failure to answer and appear is without good cause shown.

As this court need not reach the issue of substantial evidence, the instant proceeding is not transferred to the Appellate Division, First Department.

Conclusion

It is established law that “. . . judicial examination of an administrative decision should be limited to a review of the record for substantial evidence that supports a rational and lawful basis for that determination” (*Reingold v Koch*, 111 AD2d 688, 691 [1st Dept. 1985]). Based on a review of the administrative record, this court finds that the final determination of respondent NYPD is without a rational basis in the record. Accordingly, the matter is remanded to the respondent for a full hearing, on proper notice to petitioner Toolasprashad, consistent with this opinion.

For the aforementioned reasons, it is hereby

ORDERED that the petition is granted only to the extent that the matter is remanded to respondent NYPD for disposition consistent herewith; and it is further

ORDERED that the respondents are directed to serve and file all reports, recommendations, investigative notes and any other documents obtained by the NYPD IAB in connection with the investigation of petitioner Toolasprashad’s alleged misconduct in the underlying proceeding; and it is additionally

ORDERED that the respondents are directed to serve and file copies of pretrial and trial transcripts in connection with Toolasprashad's case in the NYPD trial room.

This reflects the decision and order of this court.

Dated: 7/9/07

~~NEW YORK STATE~~
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED
JUL 13 2007
NEW YORK
COUNTY CLERK'S OFFICE