

**Chan v Kelly**

2008 NY Slip Op 30150(U)

January 15, 2008

Supreme Court, New York County

Docket Number: 0110513/2007

Judge: Marilyn Shafer

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

PRESENT:

PART 1

Index Number : 110513/2007

CHAN, WILLIAM

vs

KELLY, RAYMOND W.

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read 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

*decided pursuant to attached Deem*

**FILED**

JAN 22 2008

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 1/15/08

*[Signature]*  
HON. MARILYN SHAFER, JSC

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

PRESENT: HON. MARILYN SHAFER PART 8  
Justice

-----X,  
WILLIAM CHAN,

INDEX NO. 110513/07

Petitioner,

-against-

MOTION DATE

RAYMOND W. KELLY, as Commissioner of the New York City Police Department, 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 brought pursuant to CPLR Article 78:

Papers Numbered

Notice of Petition	1
Answer	2
Memo of Law in Support of Answer	3

Upon the foregoing papers, it is ordered that the petition is denied.

Petitioner William Chan (Chan) brings this petition under Article 78 seeking his reinstatement as a police cadet by respondents Raymond Kelly, the New York City Police Department (NYPD), and the City of New York (respondents). Shortly after one in the morning on May 6, 2006, Chan, while off-duty, left the scene of a multiple car accident on the Belt Parkway in which an off-duty police officer was killed. Following an internal investigation, Chan was found to have violated written procedures when he failed to notify a member of the NYPD and a member of the Cadet Corps of the car wreck, for leaving the scene of a fatal accident, and for failing to aid and assist at the location. As a result, Chan was terminated effective June 12, 2007 after some two years as a cadet, and commenced this proceeding on or about July 31, 2007. Chan, then a college sophomore, was an apprentice in the Police Cadet

Corps. Cadets are civilian members of the NYPD and are considered by the NYPD to be “police eligible” (Answer, Exhibit 5).

Chan admits that he left the scene of the accident but states that he was forced by “numerous highway police units” to leave the parkway in his car, and that, not knowing what else to do, he retreated to a friend’s house in Brooklyn (Petition, ¶ 11). Thereafter, Chan says, he obeyed orders to report to the police precinct later that night, answered calls and responded to questions put to him by the NYPD, and otherwise cooperated fully in the investigation. Chan cites a prior performance evaluation as evidence that he was “above standards” as a cadet, and states that his termination was arbitrary, capricious, in bad faith, and shocking to one’s sense of fairness.

Once there has been a final administrative determination, 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 [1<sup>st</sup> Dept. 1996] citing *Matter of Pell v Board of Education*, 34 NY2d 222, 230-231 [1974]). “Courts are not permitted to substitute their judgment for that of the administrative agency where said decision is rationally based on the record” (*In re Application of Royal Realty Co. v New York State Division of Housing and Community Renewal*, 161 AD2d 404, 405 [1<sup>st</sup> Dept. 1990] citing *Fresh Meadows Associates v New York City Conciliation and Appeals Board*, 88 Misc. 2d 2003 [Sup Ct, New York County, 1976]).

The standard of review for termination of a civil servant differs according to the status of the employee (*Matter of Soto v Koehler*, 171 AD2d 567 [1<sup>st</sup> Dept 1991]). It is well settled that a

probationary employee may be discharged without a hearing and without a statement of reasons, in the absence of any demonstration that the dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law (*York v McGuire*, 63 NY2d 760 [1984], *internal citations omitted*). When a probationary employee is fired, judicial review is “limited to an inquiry as to whether the termination was made in bad faith” (*Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]). The mere belief of bad faith does not satisfy the requirement (*Matter of Cortijo v Ward*, 158 AD2d 345 [1<sup>st</sup> Dept 1990]).

Patrol Guide §212-34 governs probationary police officers, and states in part that when a probationary police officer or person eligible for appointment to the NYPD is involved in a police incident, a member of the service must report the incident to a commanding officer (Answer, Exhibit 4). The Police Cadet Corps Handbook states in part, at §105-4, that “[a] police incident not only involves arrests but includes all police incidents” (Answer, Exhibit 5).


While Chan denies he violated written procedure, he does not deny that he left the scene of a serious multi-car accident, that he did not attempt to render assistance, and that he failed to notify a commanding officer. On the basis of these facts, respondents concluded that Chan violated Patrol Guide §212-34 and “failed to demonstrate the integrity, judgment and character required of either a New York City Police Officer or a Police Cadet” (Answer, Exhibit 6).

Petitioner has the burden of showing bad faith (*Matter of Cortijo v Ward, supra*). Chan’s petition does not meet this burden, nor offer any evidence of a constitutionally impermissible purpose or violation of decisional or statutory law by respondents. On the contrary, evidence in the record supports the conclusion Chan was discharged by respondents in good faith on the basis of his unsatisfactory performance (*Matter of Johnson v Katz, supra*).

For the foregoing reasons, it is ordered that Chan's petition pursuant to Article 78 is denied.

This reflects the decision and order of this court.

Dated: 1/15/08

  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
JAN 22 2008  
NEW YORK  
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