

Matter of Kost v City of New York

2008 NY Slip Op 30331(U)

January 28, 2008

Supreme Court, New York County

Docket Number: 0112865/2007

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT: _____ J.S.C.

PART Part 5

Index Number : 112865/2007

KOST, DANUTA

vs

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

1
2, 3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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 1415).

Dated: January 28, 2008

EILEEN A. RAKOWER 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
COUNTY OF NEW YORK: PART 5

-----X

In the Matter of the Application of
DANUTA KOST
Petitioner,

Index No.
112865/07

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules,
- against -

DECISION
and ORDER

CITY of NEW YORK and NEW YORK CITY POLICE
DEPARTMENT,
Respondent.

-----X

HON. EILEEN A. RAKOWER

Petitioner was hired by the New York City Police Department (NYPD) as a Traffic Enforcement Agent (Level I)(hereinafter, TEA) in November, 1999. In October, 2001, petitioner was transferred to the Brooklyn North Command. By memo dated February 25, 2005, her commanding officer requested that charges and specifications be filed against her because she had received four substandard interim evaluations due to her excessive absences between September, 2002 and September, 2004. On June 17, 2005, two specifications were lodged against petitioner alleging that

1. Said Traffic Enforcement Agent, Danuta Kost, assigned to the Traffic Control Division, during the eighteen (18) month period between October 1, 2003 and March 18, 2005, (she) demonstrated her unfitness for service with the Department, to wit: she was excessively absent, reporting sick on 38 occasions for a total of 103 days, and such absences prevented her from performing her assigned duties on a regular basis.

...
2. Said Traffic Enforcement Agent, Danuta Kost, assigned as stated in Specification #1, demonstrated that she is incompetent to continue in service for the New York

City Police Department, in that she was rated "Below Standards" during the following periods:

- a. September 16, 2003 to December 15, 2003
- b. December 16, 2003 to June 15, 2004
- c. September 16, 2004 to December 15, 2004

On August 17, 2005, Specification 2 was amended to add two additional time periods for which petitioner was rated "Below Standards," namely, the period from December 16, 2004 to March 15, 2005 and March 16, 2005 to June 15, 2005.

On September 21, 2005, a hearing was held regarding the specifications against petitioner. Issuing his determination the same day, the hearing officer found petitioner guilty of the specifications against her. He recommended that as her penalty she should resign from her position as a TEA. Petitioner declined to resign and instead elected to exercise her right to a Grievance Proceeding, in accordance with the collective bargaining agreement between her union and the City of New York (City).

On December 14, 2005, petitioner, her union representative and an NYPD Labor Relations Lieutenant met to discuss petitioner's options now that she had been found guilty of the specifications against her. The Lieutenant informed petitioner that she could either sign an agreement under which she would a) forfeit twenty days of annual leave and b) serve a twelve month probationary period during which she could be discharged for any misconduct or, if she refused to sign, she would simply be discharged.

Petitioner states that she objected to the terms of the agreement because all of her absences were the result of legitimate medical problems. She avers that she asked the Lieutenant to review the documentation that she had brought to the meeting so he could see that her absences were "approved," however, he refused to do so. Petitioner states that her union representative advised her to sign the agreement because, he stated, if she refused to do so she would be discharged and he was uncertain that the union's efforts to get her reinstated would be successful.

On January 12, 2006, petitioner, the union and the NYPD, each represented by counsel, entered into a "Stipulation of Agreement"(stipulation) in which petitioner agreed to forfeit twenty vacation days and be placed on a one year "dismissal probation." The stipulation specifically states that petitioner "understands that any further misconduct by [her] during that period may result in termination." On

February 10, 2006, petitioner signed a memo from the NYPD's Chief of Personnel in which she acknowledged that she had been found guilty of the specifications against her, had been subject to dismissal but, as a result of the stipulation that she entered into, the penalty was held in abeyance during the one year period of the dismissal probation that she agreed to.

On April 25, 2006, petitioner's commanding officer requested that further charges and specifications be filed against her because since the beginning of her dismissal probation "she received three consecutive below standard monthly dismissal probation profile reports due to her excessive absences and below squad average work performance." Petitioner also had two minor violations where she had received verbal warnings from her supervisor. In July, 2006, two specifications, dated June 20, 2006, were lodged against petitioner alleging that

1. Said Traffic Enforcement Agent, Danuta Kost, assigned to T-301, demonstrated that she is incompetent to continue in service for the New York City Police Department, in that she was rated "Below Standards" during the following periods:

- a. January 12, 2006 to February 11, 2006
- b. February 12, 2006 to February 28, 2006
- c. March 1, 2006 to March 31, 2006

...

2. Said Traffic Enforcement Agent, Danuta Kost, assigned to as stated in Specification #1, on or about January 18, 2006 and February 17, 2006, did wrongfully engage in conduct prejudicial to the good order, efficiency, and discipline of the Department, to wit: said Traffic Enforcement Agent failed to report for ordered overtime duty.

In August, 2006, petitioner met with her union representative, two NYPD representatives and the same Labor Relations Lieutenant she met with before to discuss the June 20, 2006 specifications. Petitioner was informed by the Lieutenant that due to her continued poor work performance she could be terminated. She states that the Lieutenant informed her that her evaluation reflected that she had not issued enough summons between January and March and she did not report for mandatory overtime. She avers that she was able to provide sufficient proof to the Lieutenant so

as to convince him that she should not be discharged.

On January 10, 2007, petitioner attended a hearing with her union representative and the Lieutenant with respect to the new specifications pending against her. She was found guilty of these charges and she was informed that she must enter into another Stipulation of Agreement (second stipulation) under which her dismissal probation would be extended for six months and the penalty of discharge would continue to be held in abeyance. The second stipulation specifically states, as did the first stipulation, that petitioner "understands that any further misconduct by [her] during that period may result in termination." Petitioner objected to the extension of her dismissal probation but claims that the Lieutenant told her not to worry about dismissal because he "had determined that she was actually performing rather well." Petitioner signed the second stipulation.

In April, 2007, petitioner attended another hearing with her union representative and the Lieutenant regarding petitioner's job performance. The Lieutenant presented petitioner with unfavorable monthly evaluations for February and March, 2007 and informed petitioner that she was going to be discharged. Petitioner objected and showed him copies of summonses that she had written along with copies of performance evaluations which she believed were favorable. Petitioner states that the Lieutenant showed her internal evaluations that she had never seen before as the basis of her termination. She claims that he told her that he was going to investigate the matter further.

In early May, 2007, petitioner received a phone call from her union representative to tell her that she had two weeks to submit her resignation or else she would be discharged. Petitioner refused to resign. By letter dated May 25, 2007, petitioner was dismissed from her employment as a Traffic Enforcement Agent. Thereafter, petitioner filed this Article 78 proceeding arguing that her discharge was arbitrary, capricious, irrational, unlawful and that the reasons proffered for it were factually unfounded. She seeks an order from the court vacating, annulling and setting aside NYPD's decision to discharge her, reinstating her to her former position with back pay, interest on those monies, benefits, seniority and costs, including attorney's fees.

Petitioner argues that she was discharged on the basis of internal confidential evaluations that were inconsistent with the evaluations that she actually received from her supervisors. She argues that this is indicative of bad faith on the part of the NYPD.

She states that she was never informed about the number of summonses that she was expected to issue. She argues that she was never given the supervisory attention that her reviews state that she needed and any deficiencies in her performance were not pointed out to her. Petitioner avers that she was not even asked to work overtime on one of the dates listed in the June 20, 2006 specifications as a date that she failed to appear for ordered overtime. Petitioner argues that, after she signed the first stipulation, she “performed her duties in a highly competent and professional manner.”

NYPD argues that its actions were legal and proper. It states that petitioner was given not one, but two opportunities to demonstrate that she could perform the duties of a Traffic Enforcement Agent. However, she failed to do so. It states that she received evaluations finding her to be “Below Standards” even after she signed the second stipulation that extended her dismissal probation. NYPD argues that its actions were reasonable, in conformity with all applicable laws and regulations, and were neither arbitrary or capricious.

A court may only interfere with the determination of an administrative agency if there is no rational basis or foundation in fact for the action complained of, and the exercise of discretion is arbitrary and capricious. Where a reviewing court finds that the administrative body has not acted arbitrarily but within its lawful authority, the court has no alternative but must confirm the determination. (*Matter of Pell v. Board of Educ.*, 34 NY2d 222. (1974)). The reviewing court may not substitute its judgment for that of the agency’s determination but must decide if the agency’s decision is supported on any reasonable basis. (*Matter of Clancy - Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency’s determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269 [1972]).

Moreover, absent a showing of bad faith, a petitioner on dismissal probation may be terminated for virtually any reason (*Cipolla v. Kelly*, 26 AD3d 171 [1st Dept. 2006]). Additionally, the penalty of termination will be upheld where discharge is explicitly stated as the consequence of a violation of the terms of a stipulation of agreement which imposed of dismissal probation. (*Newman v. The Fire Department of the City of New York*, ___ NYS2d ___, 2008 WL 110378, 2008 NY Slip Op. 00172, NYPD 1st Dept. January 10, 2008).

Here, it was petitioner's record of absenteeism that led to the first stipulation of agreement that placed her on dismissal probation. During that one year period of dismissal probation petitioner continued to receive "Below Standards" evaluations. Petitioner's complaints that she was not given proper supervision and was unaware of her deficiencies as recorded in the internal confidential evaluations are unavailing. These "Below Standards" evaluations are specifically referred to in the June 10, 2006, charges and specifications lodged against petitioner.

Petitioner's claim of bad faith on the part of the NYPD is conclusory and unsupported by the facts. Petitioner was on dismissal probation for just over three months when she had a second set of charges and specifications filed against her. Still, petitioner continued to take sick days in a pattern that her supervisor characterized as a "propensity to extend her weekends." Thereafter, NYPD gave petitioner a second opportunity to improve her job performance by extending her dismissal probation rather than simply discharging her. Nonetheless, petitioner's absenteeism continued, as did her poor work performance. Both commanding officers who supervised petitioner during her tenure note that her unsatisfactory work performance "burdens co-workers," "destroys overall morale" and "has a negative effect on this command (sic) ability to meet Department Goals . . ." This behavior is not indicative of one who performs work duties in a "highly competent and professional manner." NYPD had ample reason to exercise its option with respect to petitioner's dismissal probation and terminate her employment. (*Cipolla v. Kelly, supra*). Under the circumstances of this case, it cannot be said that the NYPD's decision to discharge petitioner was arbitrary, capricious, irrational, unlawful or factually unfounded. Wherefore, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

All other relief requested is denied.

Dated: January 28, 2008



EILEEN A. RAKOWER, J.S.C.

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 1415).