

Matter of Buric v Kelly
2008 NY Slip Op 31196(U)
April 15, 2008
Supreme Court, New York County
Docket Number: 0110995/2007
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARCY S. FRIEDMAN

PART 57

PRESENT: _____
Index Number : 110995/2007 Justice

BURIC, JOHN

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered _____

; motion to/for Art 78

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

Answering Affidavits — Exhibits cross-motion

Replying Affidavits _____

PAPERS NUMBERED

1, 1A
2, 2
3, 4
Memos of law
Mr, Mr

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this petition ~~motion~~ and cross-motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.

FILED

APR 24 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4-15-08



Hon. Marcy S. Friedman ^{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):

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

In the Matter of the Application of
JOHN BURIC,
Petitioner,

Index No.: 110995/07

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

- against -

RAYMOND KELLY, as the Police
Commissioner of the City of New York, et al.,
Respondents.

DECISION/ORDER

FILED
APR 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this Article 78 proceeding, petitioner, a retired police officer, seeks to annul a decision of respondent Board of Trustees of the Police Pension Fund, approving the recommendation of the Medical Board Police Pension Fund, Article II ("Medical Board") that petitioner be retired with ordinary disability retirement benefits. Petitioner seeks reinstatement to his position as Police Officer. Respondent cross-moves to dismiss the petition.

Petitioner served as a police officer with the New York Police Department from 1982 until his retirement on April 13, 2007. During the years 1983 through 2003, petitioner was dismissed three times, and as a result of litigation, was reinstated each time. Following his reinstatement in March 2003, petitioner was required to undergo a psychological evaluation. Subsequently, in September 2003, the Police Commissioner applied to have petitioner retired on ordinary disability ("ODR") on the basis of psychological unfitness. The Medical Board examined petitioner in June 2005 and recommended approval of the Police Commissioner's application. After remands, the Medical Board again examined petitioner in February and

* 3] .

September 2006 and made its final recommendation in a memorandum to the Board of Trustees dated November 13, 2006. At a meeting on April 11, 2007, the Board of Trustees denied petitioner's request for a further remand to the Medical Board and concurred with the recommendation of the Medical Board that petitioner was psychologically disabled from performing police work and should be retired on ordinary disability. At this meeting, the Board of Trustees approved petitioner for ordinary disability and stated that petitioner "has to appear, he has to contact us here before the end of the month, if not, he will be retired on an ordinary retirement." (Transcript of April 11, 2007 Meeting, Ex. S to Petition.) Subsequently, in a memorandum dated April 13, 2007, petitioner wrote to the Police Pension Fund ("PPF") that he wished to withdraw his application for ordinary disability in order to file for service retirement.

In their cross-motion, respondents argue that the petition fails to state a claim because there was no final decision to challenge. Respondents also contend that the proceeding is moot because petitioner, in his April 13 memorandum, withdrew the application for ODR and filed for service retirement.

"A challenged determination is final and binding when it 'has its impact' upon the petitioner who is thereby aggrieved." (Matter of Edmead v McGuire, 67 NY2d 714, 716 [1986].) Further, in determining whether an administrative agency decision is final, consideration must be given to "whether the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." (Matter of Essex County v Zagata, 91 NY2d 447, 453 [1998] [internal quotations and citations omitted].)

Here, the court finds that the Board's April 11, 2007 determination was final. As respondents acknowledge in their reply brief, the Board of Trustees made a definitive decision

[* 4]

consistent with the Medical Board's determination that petitioner was psychologically unfit to perform the duties of a police officer. (Reply Brief at 13.) While the Board of Trustees offered petitioner an opportunity to apply for service retirement and thereby to obtain better financial benefits than the ODR authorized by the Board, the Board's decision to retire him on ordinary disability was a final decision on the issue that aggrieved petitioner – namely, that, despite petitioner's desire to continue working as a police officer, the Board found him unfit and denied him employment.

The issue thus becomes whether petitioner's subsequent resignation was voluntary or made under duress. A resignation "which is the result of coercion or duress * * * does not represent a voluntary act and may be nullified." (Matter of Gould v Board of Educ., 81NY2d 446, 451 [1993]. It is well settled, however, that "a threat by an employer to do what the employer has the right to do does not constitute fraud or duress." (Matter of Cacchioli v Hoberman, 31 NY2d 287, 291 [1972][Jasen, J., concurring]; Bachorik v Allied Control Co., 34 AD2d 940, 942 [1st Dept 1970].) Further, "economic reasons alone will not constitute compelling circumstances sufficient to undermine the 'finality [that] must be given to resignations and retirements from service'." (Matter of Donato v Mills, 6 AD3d 966, 968 [3d Dept 2004].)

In an affidavit submitted in opposition to the cross-motion, petitioner claims that on April 12, 2007, after he was notified that the Board of Trustees had voted to retire him with ordinary disability benefits, he was advised by the PPF that if he did not file for a service pension, he would lose a secondary pension provided to police officers with more than 20 years of service. (Buric Aff. in Opp., ¶10.) He claims that he asked to submit a statement that he was filing for

* 5] .

service retirement under duress, but was told he could not note on the letter of resignation that it was under duress or under protest. (*Id.*, ¶¶ 12-14.) Respondents submit an affidavit of Robert Sens-Castet, Deputy Executive Director of the PPF, in which he asserts that it is customary for the PPF to assist an officer filing for service retirement, including typing letters and applications. (Sens-Castet Aff. in Reply, ¶ 9.) He also asserts that it is the policy and practice of the PPF to permit officers to indicate on a retirement application or letter withdrawing an application that the document was signed under duress. (*Id.*, ¶ 11.)

Under these circumstances, in which conflicting affidavits raise issues of fact as to whether petitioner had an opportunity to object, or to note his objection, to filing for a service retirement, a hearing should be held, pursuant to CPLR 7804(h), to determine whether petitioner's resignation was obtained by duress. (See Matter of Cacchioli v Hoberman, 31 NY2d 287, 289 [1972]; Matter of DeMarco v McLaughlin, 69 AD2d 882 [2d Dept 1979], affd 49 NY2d 941 [1980]; Matter of Smith v Ravitch, 121 AD2d 639, 640 [2d Dept 1986].)

Murphy v City of New York (35 AD3d 319 [1st Dept 2006]) is not to the contrary. Although the court found that a hearing on whether an employee was forced to retire was not necessary in that case, the circumstances leading up to the retirement do not appear from the face of the decision. Here, in contrast, there is a sharp dispute about the circumstances under which petitioner applied for retirement benefits.

This is also not a case in which respondents unquestionably had the right to terminate petitioner, as with an at will employee (compare Bachorik v Allied Control Co., 34 AD2d 940, 942 [1st Dept 1970] [court found no duress where at will employee told he would be fired if he did not resign]), or an employee who admittedly violated an agreement providing for discharge.

* 6]
(Compare Matter of Wolfe v Jurczynski, 241 AD2d 88 [3d Dept 1998].) Nor is this a case where the choice to resign was made to avoid disciplinary charges. (Compare Matter of Rychlick v Coughlin, 99 AD2d 863 [3d Dept 1984], affd 63 NY2d 643; Matter of Otero v Safir, 258 AD2d 297 [1st Dept 1999].) Finally, the court does not find as a matter of law that economic reasons alone were the basis for petitioner's resignation, considering the issues of fact as to the choice that was given to petitioner after respondents determined that petitioner was unfit to work as a police officer – namely, issues as to whether petitioner was put in the untenable position of agreeing to resign in order to receive better benefits or to accept respondents' determination of his unfitness with lesser benefits.

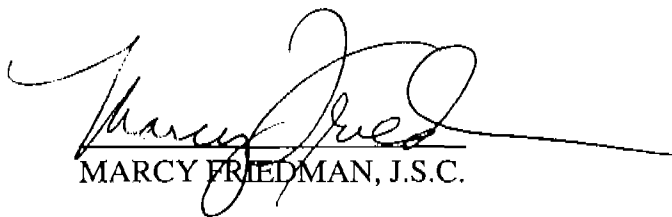
It is accordingly ORDERED that the petition is granted to the extent of directing a trial on the issue of whether petitioner resigned under duress; and it is further

ORDERED that petitioner is directed to file a note of issue within 20 days from the date of entry of this order; and it is further

ORDERED that the parties shall appear for trial in Part 57 (Room 328, 80 Centre St., NY, NY) on May 20, 2008, at 10:00 A.M.

This constitutes the decision and order of the court.

Dated: New York, New York
April 15, 2008


MARCY FRIEDMAN, J.S.C.

FILED
APR 24 2008
COUNTY CLERK'S OFFICE
NEW YORK