

Matter of Papadoniou v Kelly

2008 NY Slip Op 32470(U)

September 8, 2008

Supreme Court, New York County

Docket Number: 0103358/2008

Judge: Walter B. Tolub

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

PRESENT: 10203

Justice

PART 15

Index Number : 103358/2008

PAPADONIOU, ANDREW

vs

KELLY, RAYMOND W.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
SEP 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/8/08

WALTER B. TOLUB 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: IAS PART 15

-----x
In the Matter of the Application of
Police Officer ANDREW PAPADONIOU,
Tax Number 939171,

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

Index No.103358/08
Mtn Seq.001

-against-

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

FILED
SEP 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----x
WALTER B. TOLUB, J.:

Petitioner seeks an order annulling the determination of the
Police Commissioner of the City of New York which terminated
Petitioner from his position as a police officer with the City of
New York. Petitioner also seeks an order directing that he be
reinstated to his position.

Facts

Petitioner was appointed as a New York City probationary
police officer on July 11, 2005.

On or about May 21, 2006, Petitioner, who was on the New
York Police Department's (NYPD) football team, played a football
game against the New York City Fire Department. Petitioner
claims that he was hit hard in the head during the game.

After the game, Petitioner claims that he went to his

girlfriend/fiancee's house in Queens to rest. When he woke up at 3:30 a.m., he decided to go back to his home in Long Island. Petitioner claims that he decided to take the 20 minute drive home even though he still felt disoriented from the hit he received during the football game. When Petitioner was 3 blocks from his home, he claims to have lost consciousness. At that time he drove through a fence at the house located at 654 Benris Avenue, Franklin Square, and destroyed the fence, a tree and an air conditioning unit. After the incident, Petitioner claims he woke up and fled the scene.

The next day Petitioner went to see the owners of the home and the damage he caused. Petitioner later contacted his insurance company to report the accident and within a few weeks the damage was repaired.

An investigation by Lieutenant Richard Tully (Lt. Tulley), of the Brooklyn South Investigative Unit, determined that Petitioner had been involved in a "serious motor vehicle accident during which he caused considerable damage to another person's property." (Respondents Ex. 1). Accordingly, it was requested by the investigative unit that Charges and Specifications be brought against the Petitioner.

On January 4, 2007, Petitioner was charged with violating department regulations, including but not limited to, property damage, wrongfully leaving the scene of an accident and charged

with violating Patrol Guide 203-10 (Respondents' Ex. 4). On April 12, 2007, a Probationary Monitoring Committee (PMC) was convened and voted unanimously to terminate Petitioner from the NYPD (Respondent Ex. 5). The PMC based their recommendation on Petitioner's "surreptitious actions, which in the opinion of the committee, indicated that he had something to hide" and suspected that Petitioner had been drinking at the time of the accident. (Id.). Rafael Pineiro, the NYPD Chief of Personnel, disagreed with the PMC recommendation stating that there was no evidence that Petitioner had been drinking prior to the accident, that Petitioner left the scene because he was scared and that Petitioner had made appropriate financial restitution. Chief Pineiro deemed Petitioner's termination to be unwarranted and that a different remedy should have been imposed.

On or about June 7, 2007, George A. Grasso, NYPD First Deputy Commissioner, forwarded to Police Commissioner Raymond Kelly his endorsement of Chief Pineiro's recommendation to serve Charges and Specifications upon Petitioner, and recommended that Petitioner's entry level probation be extended for a period of six months and that he be referred to the Medical Division for alcohol evaluation (Respondents' Ex. 6). On or about June 19, 2007, Petitioner signed a document indicating that he understood that his initial probationary period was being extended by six months (Respondents' Ex. 7).

By memorandum dated August 31, 2007, the Office of the Police Commissioner directed the Brooklyn South Investigations Unit to address several issues regarding the circumstances and investigation of Petitioner's incident, including an interview of Petitioner's fiancée, the circumstances surrounding the response of the Nassau County Police Department and Petitioner's claim that he had been injured or sick prior to the incident's occurrence (Respondents' Ex. 8).

By memorandum dated September 12, 2007, the Commanding Officer of the Patrol Borough Brooklyn South Investigations Unit, responded to the issues raised in the August 31, 2007 memorandum. He noted that during a follow up Patrol Guide 206-13 interview, Petitioner was questioned regarding the head injury he claimed had caused the accident. The memorandum also indicated that Petitioner's fiancée refused to speak with or answer any questions.

On or about November 30, 2007, Commissioner Kelly forwarded to Commissioner Grasso his disapproval of the First Endorsement and directed that Petitioner be dismissed from the NYPD while on entry level probation (Respondents' Ex. 10 "Second Endorsement").

On or about December 3, 2007, Commissioner Grasso forwarded his Third Endorsement to the Chief of Personnel and noted the Police Commissioner's approval to have the Petitioner dismissed from the NYPD (Respondents' Ex. 11). Petitioner's services as a

Probationary Police Officer in the NYPD were terminated as of 1500 hours on December 3, 3007 (Respondents' Ex. 12). Following his termination, Petitioner commenced this action to review and challenge the NYPD determination to have him terminated.

Discussion

Pursuant to CPLR §7803[3], judicial review of an administrative determination entails the examining of whether a determination was arbitrary and capricious, in bad faith, affected by an error of law, or without a rational basis (Heintz v. Brown, 80 NY2d 998 [1992]). However, when dealing with probationary employees, a different standard of review is applied.

A probationary employee may be dismissed "without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law. [Matter of York v. McGuire, 63 NY2d 760, 761]. Judicial review of such a determination "is limited to an inquiry as to whether the termination was made in bad faith" [Matter of Johnson v. Katz, 68 NY2d 649, 650]. The burden of raising and proving such "bad faith" is on the employee and the mere assertion of "bad faith" without the presentation of evidence demonstrating it does not satisfy the employee's burden [Matter of Cotrijo v. Ward, 158 AD2d 345].

(Soto v. Richard Koehler, as New York City Correction Commissioner, 171 Ad2d 567 [1st Dept 1991]).

[* 7]

Petitioner argues that he was terminated in bad faith based on sheer speculation that he was drunk during the time of the incident and because of a personality conflict with a supervisor. However, a review of the record indicates that early on, after an investigation into the incident by the Patrol Borough Brooklyn South Investigations Unit, on November 9, 2006, the Commanding Officer requested Charges and Specifications be brought against the Petitioner. Thereafter the PMC voted to terminate Petitioner's probationary employment. This decision was not implemented because of the recommendation of the Chief of Personnel Rafael Pineiro, who wanted Petitioner to be served with Charges and Specifications and that the case be referred to the Department Advocate's Office. Based on Chief Pineiro's recommendation, the First Deputy Commissioner recommended that Petitioner's's entry level probationary period be extended six by six months. The Deputy Commissioner's recommendation was forwarded to the Police Commissioner who then directed that more information be presented regarding the accident and the investigation that followed.

After receiving all of the requested information, Commissioner Kelly decided that he did not agree with Chief Pineiro and the Deputy Commissioner's recommendation, and instead decided that Petitioner must be terminated.

Petitioner has failed to meet his burden of proving that his

termination was improper or in bad faith (Beacham v. Brown, 215 AD2d 334 [1st dept 1995]). The City Police Commissioner's termination of a probationary police officer is not in bad faith, unlawful, or for an impermissible reason when the termination is primarily based on officer's conduct while off-duty, clearly calling into question his ability to competently perform his job, and there is no issue as to officer's probationary status at time of his termination (Garnes v. Kelly, 51 Ad3d 538 [1st dept 2008]). Here, the record indicates that Respondents' decision to terminate Petitioner was directly related to his involvement in the May 21, 2006 accident.

A hearing pursuant to CPLR 7804(h) is not required since the reasons for Petitioner's termination, Petitioner's conduct while off-duty, constitutes instances of bad judgment or incompetent performance of duties and thus Petitioner has not raised an issue of fact requiring a trial or hearing on the matter (CPLR §7804[h]; (Garnes v. Kelly, 51 Ad3d 538 [1st dept 2008])). There is no issue of a substantial nature that Petitioner's termination was due to something other than his failure to perform satisfactory service during his probationary period. The very purpose of a probationary period is to ascertain the fitness of the probationary officer and to give him a reasonable opportunity to demonstrate his ability to perform the duties of an officer (Tomlinson v. Ward, 110 AD2d 537 [1st Dept 1985]).

Here, the Petitioner fled the scene of an accident in which he caused considerable property damage. The NYPD interprets Petitioner's actions as demonstrative of Petitioner's inability to meet or maintain the standard required of the NYPD justifying Petitioner's termination. Furthermore, Petitioner failed to adhere to the NYPD Patrol Guide 212-13, regarding off-duty incidents involving police officers, when he fled the scene of the accident and failed to notify the NYPD of same.

Given the discretion held by Commissioner Kelly to terminate a probationary employee, and because Petitioner's termination was not in bad faith, the Petition is dismissed.

Accordingly, it is

ORDERED that the Petition is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

9/8/08


HON. WALTER S. TOLUB, J.S.C.

FILED
SEP 11 2008
COUNTY CLERK'S OFFICE
NEW YORK