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

PRESENT: Hon Joan B. Madden PART 11

Index Number : 113549/2008

RAMOS, JOHN

VS.

STARK, MARTHA

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE ~~3/26/09~~

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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~~ cross-motion ~~is decided~~ this cross-motion and petition are decided in accordance with the annexed Memorandum Decision, Order & Judgment.

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 141B).

Dated: July 21, 2009

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 11

----------X Index No. 113549/08

In the Matter of the Application of JOHN RAMOS,

Petitioner,

Decision Order & Judgment

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

-against-

MARTHA STARK, as Commissioner of the New York City Department of Finance, NEW YORK (B), CITY DEPARTMENT OF FINANCE, et al,

Respondents.

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Joan A. Madden, J.:

In this Article 78 proceeding, petitioner John Ramos ("Petitioner") seeks (1) an order and judgment annulling the determination of the respondent New York City Civil Service Commission ("CSC"), which affirmed the determination of the respondent New York City Department of Citywide Administrative Services ("DCAS") to decertify Petitioner as qualified for the position of Deputy City Sheriff and of Respondent New York City Department of Finance ("DOF"), through the Office of Sheriff, to terminate Petitioner. Petitioner also seeks reinstatement to the position of Deputy City Sheriff with retroactive pay, or in the alternative, (2) an order pursuant to CPLR 7804(g) transferring the petition to the Appellate Division of the Supreme Court of the State of New York, First Department. Respondents have not interposed an answer, but cross-move pursuant to CPLR 7804(f) and 3211(a)(7) to dismiss the petition for failure to state a cause of action.

Background

The following facts originate from the verified petition, which the Court, for the purposes of this motion to dismiss, must accept as true, Matter of Marlow v. Tully, 79 A.D.2d 546, 547 (1st Dep't 1980), Matter of Scott v. Comm. of Correctional Services, 194 A.D.2d 1042 (3d Dep't 1993), and where indicated from the documentary evidence that the parties have submitted, Biondi v. Berkman Hill House Apartment Corp., 257 A.D.2d 76, 81 (1st Dep't 1999) (citing Blackgold Realty Corp. v. Milne, 119 A.D.2d 512, 513 (1st Dep't 1986)); see CPLR 3211(c), CPLR 7804(f).

On July 13, 2007 Petitioner applied to become a Deputy City Sheriff with DOF after serving for two years as a New York City Parks an Recreations Patrolman. On October 17, 2007, the DOF appointed Petitioner as a Deputy City Sheriff. The probationary period was for two years, commencing October 9, 2007. The DOF accepted Petitioner"[a]fter [he] successfully complet[ed]an open competitive Civil Service Examination and passing numerous mental and physical tests, and after a through background investigation of history and character . . . ."

In applying for this position, Petitioner answered "No" on an application form's question which asked whether the applicant had any arrests that did not result in conviction.

Petitioner had previously answered "No" on a similar question on such a form when he applied for his Parks and Recreation position sometime in 2005. In response to an investigation by DCAS regarding his response to the question concerning prior arrests, Petitioner wrote a letter to DCAS dated February 13, 2006, which states he "misread the question at the time," and "recollect[s] a question in one of the applications at the

personnel office concerning 'Arrest [sic] & Convictions[.'] [Petitioner] believe[s] the question was[']If you were arrested but not convicted, Mark No['].'' He added that his ''error was not an intentional one to evade said question concerning arrest history.'' He also noted that in his application of January 8, 2006, for Special Patrolman status, he answered a similar question appropriately yes.

The arrest at issue was in 2003, in connection with possession of a counterfeit federal parking placard and making false statements to federal agents. In April, 2004, a jury had found Petitioner not guilty for possession of a counterfeit federal parking placard, and the trial court, on motion of the government dismissed the other count, for making false statements to federal investigators.

Petitioner applied to the FBI at an undisclosed date, apparently pursuant to his application for a position as a Deputy City Sheriff, for clearance to purchase his own firearm. In a letter dated June 11, 2008, the FBI denied Petitioner such clearance, citing its computer search results which identified Petitioner as ''[a] person who has been adjudicated as a mental defective or who has been committed to a mental institution.'' However, further appeal of the FBI denial revealed that the denial was based instead on the 2003 arrest for which Petitioner was acquitted. Respondents ''are aware'' that the FBI denial was for the prior arrest and not for mental problems. In pursuing his appeal with the FBI, Petitioner submitted evidence to the FBI that the court dismissed one count of his indictment and that a jury acquitted him on the other.

While the FBI denied Petitioner's right to purchase a firearm, Petitioner alleges he nonetheless remains qualified for his position since this denial does not revoke his status as a New York State Peace Officer which gives him the right to use and possess a

firearm. Petitioner cites a DCAS notice that states, "Appointees must qualify and remain qualified for firearms usage and[ ]possession as a condition of employment for the duration of their employment."

On June 12, 2008, DOF terminated Petitioner's probationary Deputy Sheriff status without explaining the basis for the termination.

As to the reasons for his termination, Petitioner points to a September 22, 2008, DOF letter to the New York State Department of Labor Unemployment Insurance Division that which states that although "[o]ne of the qualifications for the title is Peace Officer Status, which requires the individual to possess a firearm . . . [, Petitioner] was denied a gun permit and upon investigation it was revealed that [Petitioner] had pending federal charges against him. [Petitioner] falsified his job application when he failed to disclose this, as on the job application, [he] answered 'NO' to Question 5 (all 3 parts)."

Petitioner alleges that Respondents had three asserted grounds to fire him, each of which comprises bad faith. First, Petitioner claims that DOF terminated him because he could not obtain the FBI's permission to purchase firearms ("the firearms ground"). Petitioner cites the Notice of Examination for Deputy City Sheriff to show that his position requires only that he "must qualify and remain qualified for firearms usage and possession as a condition for employment for the duration of their employment." Secondly, Petitioner asserts that DOF terminated him for failing to disclose his prior arrest on his two employment-application questionnaires, one in connection with the instant job application and one in his 2005 application for a Parks and Recreation position ("the questionnaire ground"). Petitioner claims that this ground was in bad faith as he had submitted the February 13, 2006 memorandum that explained his answer and

disclosed his arrest. Petitioner claims that the Respondents "fail[ed] to adequately investigate . . . their own Departmental records" when they contemplated this ground. Finally, Petitioner alleges that DOF terminated him under the erroneous and ungrounded belief that he had pending federal charges against him.

In response to the claim that the firearms ground was in bad faith, Respondents argue that they had a good-faith belief that deputy city sheriffs must purchase firearms to remain employed, pointing to a sentence in the Deputy Sheriffs' Guide from DOF that indicates that Deputy Sheriffs must purchase their own firearms.

In response to the claim that the questionnaire ground was in bad faith, Respondents note that Petitioner's February 13, 2006 memorandum apparently "admits to failing to report his arrest on his [2005] employment application," thus providing good-faith grounds to terminate Petitioner. Moreover, Respondents argue, even if the Respondents' belief that Petitioner failed to report his arrest were false, "[a] reasonable, but ultimately incorrect belief that petitioner caused false representations to be made on a job application is a permissible basis for terminating a probationary employee."

Respondents have not addressed Petitioner's claim that the pending-charges ground was in bad faith. Respondents also argue that the Court should deny Petitioner's request for a CPLR 7804(g) transfer to the Appellate Division, First Department, since Petitioner has not had a hearing pursuant to law that could raise a substantial-evidence question.

Discussion

In determining a motion to dismiss a petition seeking Article 78 relief for failure to state a cause of action, the court may not look beyond the allegations in the petition,

which must be accepted as true. Marlow v. Tully, 79 A.D.2d at 547. However, the allegations of the petition are not accepted as true when such allegations are "negated beyond substantial question" by documentary and other evidence. Biondi v. Berkman Hill House Apartment Corp., 257 A.D.2d at 81.

A body or officer of government may terminate or demote a probationary employee "'for almost any reason, or for no reason at all,'" Matter of Swinton v. Safir, 93 N.Y.2d 758, 762-63 (1999) (quoting Matter of Venes v. Cmty. School Bd. of Dist. 26, 43 N.Y.2d 520, 525 (1978)), unless the government unit acted "in bad faith or for an improper or impermissible reason," id. at 763. Moreover, in an Article 78 proceeding, "it is the petitioner who bears the burden of demonstrating respondent's bad faith or illegal or arbitrary action." Matter of Rainey v. McGuire, 111 A.D.2d 616, 618 (1st Dep't 1985).

Applying this standard, the Court concludes that Petitioner has not met his burden of establishing bad faith. Although the pending-charges ground lacks support in the record, there is sufficient proof that Respondents did not act in bad faith regarding the questionnaire ground, and thus the court need not reach whether the same is true with respect to the firearms ground. In the 2007 questionnaire Petitioner completed when he applied to become a DOF Deputy City Sheriff, Petitioner answered "No" to question 5(c) which asked if Petitioner had ever been arrested. The Court rejects Petitioner's explanation that he believed the question referred to the period since he last completed such an application, based on a statement on the top of the form that reads, "[t]his is an update of the information in your personnel folder . . . ." The question asks, "if, in your new position, you will be designated . . . a Peace Officer . . . , have you had ANY arrests in your lifetime that did not result in a conviction?" A reader cannot reasonably interpret

this phrasing to mean "since you last completed a questionnaire." Furthermore, in Petitioner's 2005 application, Petitioner answered "No" to a similar question and sent a letter explaining he misread the question as limited to arrests which resulted in conviction. Based on the foregoing, the court concludes that Petitioner has failed to establish respondents acted in bad faith. Under these circumstances, the court need not reach Petitioner's argument regarding the firearms ground.

Finally, respondents are correct that there is no basis for a transfer of this action to the Appellate Division pursuant to CPLR 7804(g). Such transfers are available to parties to challenge "determination[s] made as a result of a hearing held . . . pursuant to direction by law [a]s, on the entire record, [not] supported by substantial evidence." CPLR 7803(4); see CPLR 7804(g). Here, no allegation or evidence exists that a hearing occurred. Further, even if a hearing did take place, it would not have occurred "pursuant to direction by law" under CPLR 7803(4). See Rainey, 111 A.D.2d at 618 ("[P]robationary employee[s] may be discharged without a hearing . . . ."). Thus, the Court lacks a basis to transfer this action to the Appellate Division.

Conclusion

In view of the above, it is

ORDERED that the cross motion to dismiss is granted; and it is further

ORDERED and ADJUDGED that the petition be denied and dismissed.

Dated: July 2, 2009

J.S.C.