

**Matter of Williams v Kelly**

2009 NY Slip Op 31855(U)

August 19, 2009

Supreme Court, New York County

Docket Number: 101020/2009

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 101020/2009  
**WILLIAMS, JAMES**  
 vs.  
**KELLY, RAYOMND W.**  
 SEQUENCE NUMBER : 001  
 ARTICLE 78

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 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  
 The instant application is decided in accordance with the accompanying Memorandum Decision.  
 It is hereby

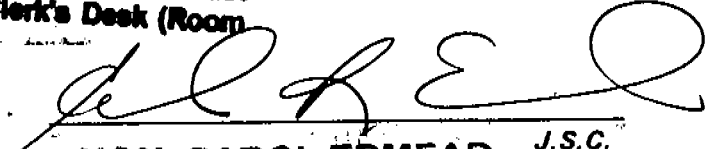
ORDERED and ADJUDGED that the application of Petitioner James Williams for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules (a) annulling the penalty portion of the determination of respondent Raymond W. Kelly, as Police Commissioner of the City of New York ("Commissioner Kelly"), for which petitioner was suspended without pay and benefits for thirty (30) days; and (b) directing that the penalty imposed be reduced, is **denied and the instant Petition is dismissed**, and the Clerk of the Court is directed to enter judgment accordingly. And it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

**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: 8/19/09

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

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check-if appropriate:  DO NOT POST

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 35

\_\_\_\_\_  
In the Matter of the Application of Police Officer X

JAMES WILLIAMS, Tax Number 929363

Index No. 101020/2009

Petitioner

**DECISION/ORDER**

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

-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,

**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).

Respondents.

\_\_\_\_\_  
EDMEAD, J.S.C. X

**MEMORANDUM DECISION**

Petitioner James Williams ("petitioner") moves for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules (a) annulling the penalty portion of the determination of respondent Raymond W. Kelly, as Police Commissioner of the City of New York ("Commissioner Kelly"), for which petitioner was suspended without pay and benefits for thirty (30) days; and (b) directing that the penalty imposed be reduced.

*Background*

Petitioner was appointed as a Police Officer on July 2, 2001, subject to completion of a two year probationary period. On March 30, 2006, petitioner was assigned to Transit District 33. Subsequently, he was transferred to the School Safety Division on January 26, 2004, where he remained until he was transferred to the Quatermaster Section on May 30, 2006, based upon

being placed on modified duty status.

On May 1, 2006, respondent The Police Department of the City of New York ("NYPD") preferred the following two charges against petitioner under case number 81822/06:

1. Said Police Officer James Williams, assigned to the School Safety Division, while off-duty, on or about April 29, 2006, did knowingly associate with a person or organization reasonably believed to be engaged in, likely to engage in or to have engaged in criminal activities.
2. Said Police Officer James Williams, assigned as indicated in Specification #1, on or about April 29, 2006, was wrongfully in possession of an unauthorized duplicate New York City Police Department shield # 29558, without permission or authority to do so.

On September 27, 2007, the NYPD amended the charges against petitioner under case number 81822/06 to dismiss Specification #1, and added two charges, as follows:

**Specification No. 1 shall be dismissed:**

. . . . .

**Specification No. 3 shall be added as follows:**

3. Said Police Officer James Williams, assigned as indicated in Specification #1, on or about and between April 1, 2006 through September 30, 2006, did wrongfully and without just cause engage in off-duty employment without authority or permission to do so.

**Specification No. 4 shall be added as follows:**

4. Said Police Officer James Williams, assigned as indicated in Specification #1, on or about and between April 1, 2006 through September 30, 2006, in the vicinity of 2420 Pitkin Avenue, Kings County, did wrongfully and without just cause engage in off-duty employment in excess of twenty (20) hours per week.

Based on these allegations, the NYPD suspended petitioner without pay beginning on

April 29, 2006. He was suspended without pay for a full thirty (30) days up until May 29, 2006.

Petitioner was kept on modified duty from May 29, 2006 until December 30, 2008.

On December 11, 2007, a pre-hearing conference was held before New York City Police Department Assistant Deputy Commissioner of Trials ("ADCT") Martin G. Karopkin ("ADCT Karopkin"), during which Assistant Department Advocate Michelle Alleyne ("ADCT Alleyne") presented ADCT Karopkin with the Notice of Amendment of Charges, dated September 27, 2007. At said conference, petitioner rejected respondents' plea offer of thirty days suspension already served, and the parties agreed to a date for a mitigation hearing whereby petitioner would plead guilty to the charges against him and testify in mitigation of his misconduct.

After an administrative trial, on June 5, 2008, ADCT Vinal issued his Report and Recommendation: with respect to Specification #1, the Advocate's Office motion to dismiss was granted; with respect to Specifications 2, 3 and 4, since petitioner pled guilty to those specifications, petitioner was found guilty of said Specifications. ADCT Vinal solely rendered a recommendation on the measure of the appropriate penalty. ADCT Vinal recommended that the petitioner forfeit 15 of the 30 suspension days he already served, and that he be restored all time, pay, and benefits lost while on suspension for the remaining 15 days.

By letter dated May 27, 2008, petitioner submitted his comments on the Report and Recommendation, through his attorney, to Commissioner Kelly. Respondents also submitted comments to Commissioner Kelly by letter dated May 23, 2008.

By Memorandum dated October 28, 2008, Commissioner Kelly approved ADCT Vinal's findings as to petitioner's guilt on the charges preferred in Specifications 2, 3 and 4, but disapproved of the recommended penalty. Instead, Commissioner Kelly found that petitioner's

“acts of misconduct, combined with his poor background and performance evaluations, as offered by two separate Commanding Officers, merits the forfeiture of the entire 30 day Suspension day period he has already served.”

*Petitioner's Contentions*

It was an abuse of discretion for Commissioner Kelly to impose the penalty of a thirty (30) day suspension without pay, which was double that recommended by ADCT Vinal and that requested by the Department Advocate in her letter to Commissioner Kelly dated May 27, 2008.

Although Commissioner Kelly has discretion in penalizing New York City police officers, that discretion is not unlimited, and it is subject to an abuse of discretion standard. And, the court has discretion to compare the penalty in the instant case with similar cases to determine if the penalty herein is excessive.

Notwithstanding petitioner's unblemished record as cited by ADCT Vinal, in imposing the thirty (30) day suspension, which was double that recommended by ADCT Vinal, Commissioner Kelly cited to petitioner's "poor background and performance evaluations." But there was nothing at the mitigation trial before ADCT Vinal indicating that petitioner had "poor background and performance evaluations." Therefore, respondents need to supply in their answer the documentation upon which Commissioner Kelly found that petitioner had "poor background and performance evaluations."

*Respondents' Contentions*

Commissioner Kelly had no obligation under the law to accept ADCT Vinal's penalty recommendation. Instead, Commissioner Kelly is vested with the discretion to impose an appropriate penalty so long as the penalty chosen does not shock the conscience. The facts that

petitioner worked for NYPD for seven years and did not have any prior formal disciplinary problems are not dispositive.

In support of his finding, Commissioner Kelly detailed petitioner's specific poor background and performance evaluations"

Specifically, the two separate Commanding Officers rated petitioner's "ability and effectiveness" as 3 out of a possible 10 (10 being "high"). The first evaluation, prepared by Captain Keith Kopinski from the School Safety Division, states that petitioner's "current assignment reveals minimal activity" and "[a]lthough P.O. Williams has been rated at a competent level, he needs close supervision. He does not exercise any initiative. In the past, P.O. Williams has not supported uniformed civilian School Safety Agents in their mission." The second evaluation, prepared by Deputy Inspector Timothy Hogan of the Quatermaster Section ("QMS") states that petitioner "has performed at minimal levels at the QMS, and requires supervision to assure assignments are being completed."

#### Analysis

The law concerning judicial review of a penalty determination by a Police Commissioner is well settled. As articulated by the Court of Appeals in *Kelly v Safir*, 96 NY2d 32, 38 (2001):

Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law (*see, Matter of Featherstone v Franco*, 95 NY2d 550, 554; CPLR 7803 [3])....a penalty must be upheld unless it is "so disproportionate to the offense as to be shocking to one's sense of fairness," thus constituting an abuse of discretion as a matter of law (*Matter of Pell, supra*, 34 NY2d, at 237; *see also, Matter of Featherstone, supra*, at 554-555; *Matter of Verney v New York State Liq. Auth.*, 94 NY2d 779; *Matter of Gillen v Smithtown Lib. Bd. of Trustees*, 94 NY2d 776). This calculus involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency or the public in general (*Pell, supra*, at 234).

In matters concerning police discipline, "great leeway" must be accorded to the Commissioner's determinations concerning the appropriate punishment, for it is the

Commissioner, not the courts, who “is accountable to the public for the integrity of the Department” (*Matter of Berenhaus v Ward*, 70 NY2d 436, 445; *see also*, *Trotta v Ward*, 77 NY2d 827, 828).

Commissioner Kelly’s reliance upon negative Commanding Officer evaluations of petitioner in conjunction with his plea of guilt on Specifications 2, 3 and 4 in determining his penalty does not rise to the level of shocking the conscience to warrant annulling said penalty.

Notwithstanding petitioner’s unblemished record as cited by ADCT Vinal, in imposing the thirty (30) day suspension, which was double that recommended by ADCT Vinal, and the fact that there was nothing at the mitigation trial before ADCT Vinal indicating that petitioner had “poor background and performance evaluations.” as respondents correctly point out, in determining an appropriate sanction for a proven act of misconduct, an officer’s past history, including material that is both laudatory and unfavorable, is relevant and appropriately taken into account. *See Harp v New York City Police Dep’t.*, 96 NY 892, 894 (2001) *citing Pell v Bd. Of Educ.*, 34 NY2d 222, 237 (1974).

Again, under the circumstances of this case, it cannot be concluded that, as a matter of law, that the penalty of the forfeiture of the entire 30 day Suspension day period he has already served imposed by Commissioner Kelly shocks the judicial conscience (*Matter of Kelly v Safir*, 96 NY2d 32, 39-40; *see also*, *Matter of Ansbro v McGuire*, 49 NY2d 872, 874).

#### Conclusion

Based on the foregoing, it is hereby


ORDERED and ADJUDGED that the application of Petitioner James Williams for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules (a) annulling the

penalty portion of the determination of respondent Raymond W. Kelly, as Police Commissioner of the City of New York ("Commissioner Kelly"), for which petitioner was suspended without pay and benefits for thirty (30) days; and (b) directing that the penalty imposed be reduced, is **denied and the instant Petition is dismissed**, and the Clerk of the Court is directed to enter judgment accordingly. And it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: August 19, 2009



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**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).**