

Matter of Ahmed v Kelly
2009 NY Slip Op 32259(U)
September 1, 2009
Supreme Court, New York County
Docket Number: 116906/08
Judge: Nicholas Figueroa
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. NICHOLAS FIGUEROA, JSC Justice

PART 46

Matter of
EIHAB AHMED, Petitioner,
- v -
RAYMOND KELLY, et al.,
Respondents

INDEX NO. 116 906/08
MOTION DATE _____
MOTION SEQ. NO. 001
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
1
1

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

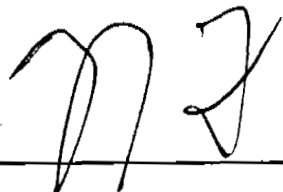
See accompanying Decision and Judgment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.
DATED: _____

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: August 2009


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

-----X

In the Matter of the Petition of

EIHAB AHMED,

Petitioner,

Index No. 116906/08

- against -

**DECISION AND
JUDGMENT**

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,

Respondent,
for a Judgment under Article 78 of the Civil Practice
and Rules.

UNFILED JUDGMENT
This judgment has not been entered by the Court 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).
-----X

Nicholas Figueroa, J.S.C.:

The Article 78 petitioner seeks to annul the New York City Police Department's decision to terminate his employment as a probationary police officer.

Petitioner was appointed a police officer on July 11, 2005. On August 18, 2007, while off duty, he and his wife became embroiled in an altercation in the apartment that they shared with their two young children. According to petitioner, the dispute involved loud shouting and mutual recriminations, but did not sink to the level of physical violence (other than his admitted throwing of a plastic bottle toward his wife, a missile which he asserts did not hit its mark). Petitioner's brother, also a police officer, witnessed some part of the argument. Petitioner's wife eventually left the apartment for a relative's, in the same building. Petitioner for his part remained in the apartment.

Two police officers appeared thereafter as first responders, although (notwithstanding

some intimation in petitioner's papers that he himself had reported the incident) it is not clear whether they had been prompted to investigate by a call from him or, instead, by his wife's 911 call (the latter mentioned in a written Police Department report dated August 19, 2007). The two policemen interviewed his wife and ultimately were joined by several investigators from the police force. According to written police reports of the wife's account, she had told the officers that petitioner had slapped, kicked, and choked her, pulled her around the apartment by her hair, thrown at her a large plastic bottle and an ottoman, and threatened to kill her with a knife if she called the police. The written reports also reflect the officers' observations that she bore marks of physical injury consistent with her account. Petitioner was arrested for second degree assault and various misdemeanors. The next day, he was arraigned in Kings County Criminal Court and suspended from full duty as a police officer. On the same day, a temporary order of protection was issued for his wife.

Between September 2007 and February 2008, the hearing of the case against petitioner was adjourned several times. During that period, his wife spoke to the prosecutor's office at least twice and expressed the wish to withdraw her charges, at some point going so far as to recant her allegations. On February 21, 2008, the case against petitioner was formally dismissed on speedy trial grounds. On September 8, 2008, however, petitioner received a letter from the Police Department notifying him that his employment was terminated effective at 4 p.m. that afternoon. Petitioner thereupon filed this petition.

Petitioner maintains that, on the advice of a friend, his wife (a resident alien) had manufactured an incriminating version of events as a way to avoid deportation and gain custody of the children if he divorced her, which he had threatened to do during their argument. In an

affidavit submitted in support of the petition, his wife avers that, “The version of what occurred between Petitioner and myself on August 18, 2007, did not occur in the manner that the New York City Police Department reported it,” although she does not go so far as to specify the ways in which the Police reports were inaccurate. In another supporting affidavit, petitioner’s brother avers that while witnessing part of the marital dispute he did not see petitioner “hit or strike his wife.”

The special procedural protections attached to a tenured position cannot be claimed by a probationary employee (*see Matter of McKenzie v Jackson*, 152 AD2d 1,8). Indeed, probationary employment “may be terminated at any time without a statement of reason or a hearing” (*Matter of DeFiglia v Ward*, 158 AD2d 411). Thus, in challenging his dismissal, petitioner has the burden of showing that respondents’ action was the product of their bad faith (*see Matter of Johnson v Katz*, 68 NY2d 649, 650; *Matter of York v McGuire*, 63, NY2d 760, 761). Petitioner contends that bad faith is demonstrated by respondents’ failure to investigate the truth or falsity of the Criminal Court case. Such contention, however, is belied by a police report reflecting the Department’s investigation of the matter between September 2007 and March of 2008, including interviews with petitioner, his wife, his brother, the first responders and initial police investigators. In light of the information obtained from such interviews, there was a good-faith basis for the Department’s decision to dismiss petitioner from the police force.

Petitioner nevertheless suggests that the length of time remaining in his probationary period has bearing on whether he may be granted Article 78 relief. In this connection, his petition and supporting affidavits aver that his probationary period had one day remaining. Respondent, on the other hand, maintains that there were a number of days remaining. In the

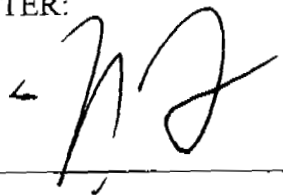
end, however, whether petitioner's calculation, or respondents', is accurate is immaterial, since in either event petitioner was subject to the probationary rules. Petitioner has suggested no authority for the dubious proposition that the line drawn between probationary and tenured status can be allowed to waver for the sake of someone on the wrong side of it (*cf. McNulty v City of New York*, 100 NY2d 227, 234 [*concurring op of Kaye*, Chief J.]).

For the foregoing reasons, the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the court.

Dated: September 1, 2009

ENTER:



J.S.C.

UNFILED JUDGMENT
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