

**Matter of Gallogy v Kelly**

2009 NY Slip Op 32283(U)

October 1, 2009

Supreme Court, New York County

Docket Number: 107455/09

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TULUB

PART 15

Index Number: 107455/2009

**GALLOGLY, JOSEPH**

vs.

**KELLY, RAYMOND**

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**  
OCT 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/6/09

WALTER B. TULUB 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 an Article 78 Proceeding  
JOSEPH GALLOGY,

Petitioner,

Index No.107455/09  
Mtn. Seq.001

-against-

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

Respondents.  
-----x

**FILED**  
OCT 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**WALTER B. TOLUB, J.:**

By this application, Petitioner seeks an order annulling and reversing the determination of Respondent discontinuing Petitioner's position as a Police Officer for the New York City Police Department (NYPD).

Facts

After Petition took and passed the Civil Service Examination, he was required to undergo a background investigation to determine whether he possessed the requisite character to become a Police Officer<sup>1</sup>. Petitioner was also required to successfully complete a medical, physical and psychological evaluation to be deemed qualified for the position.

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<sup>1</sup>As part of the pre-employment application, Petitioner signed a notice informing him that any appointment to the position of Probationary Police Officer would be subject to investigation and that if it the post-appointment investigation reveal a materially false statement or omission of fact, it will be cause for disqualification and dismissal from the department. Petitioner also signed notices informing him that the probationary period is two years (Respondents' Ex. 5).

On September 21, 2007, Petitioner completed the written portion of the psychological evaluation which included a Bio-Demographical Questionnaire (Respondents' Ex. 1). Question 35 asks how many physical fights the applicant has been involved in since the age of 13. Petitioner answered "none" to this question (Id.). Question 54 of the Questionnaire ask whether the applicant has ever been arrested or given a non-traffic summons (Id.). Petitioner also responded "no" to this question (Id.).

Petitioner also underwent a psychological evaluation and was found to be psychologically suitable for the Police Officer position by Dr. Helena DeLuca on November 7, 2007 (Respondents Ex. 2).

In December of 2007, Petitioner was required to complete the Personal History Questionnaire (ADP-5) (Respondents' Ex. 3). Question 21 on the ADP-5 asks the applicant to list all arrests. Petitioner disclosed that he received a summons in January 2007 for misconduct which was dismissed (Id.). Additionally, Question 26(a) asks whether the applicant was the subject or a witness or ever questioned during a police investigation in which the applicant was not charged with a crime. Petitioner responded "no" (Id.).

On December 27, 2007, the Applicant Processing Division (ADP) provided newly obtained information and records regarding a criminal court summons Petitioner received on January 5, 2007

[\* 4 ]

(Respondents' Ex. 4). As a result of this information, Dr. DeLuca placed Petitioner on pending status for a second interview (Respondents' Ex. 2) and said interview was conducted on January 3, 2008. Dr. DeLuca reported that Petitioner claimed that he did not know what he was being called back for a second interview and that he had disclosed everything in the first interview. When asked about the criminal court summons from January of 2007, Petitioner stated that he did not know he had to disclose the summons to the Psychological Services since the charges were dismissed (id.). At the end of the second evaluation, Dr. DeLuca found Petitioner to be psychologically suitable for the position of Police Officer (id.).

Petitioner was appointed to the position of Probationary police Officer on January 8, 2008.

On May 6, 2008, Dr. DeLuca received additional information from the APD in the form of a Memo. An APD record search revealed that a complaint report had been filed against the Petitioner in November of 2004, accusing him of assault and damaging property (Respondents' Ex. 6). Dr. DeLuca then conducted a third interview of Petitioner. At the third interview, Petitioner stated that he did not know why he was called in. Petitioner stated that he had been disciplined by the Police Academy for violating the rules and talking on his cell phone while in business attire (Respondents' Ex. 2). Petitioner

denied being in any physical fights other than the one discussed at the second interview. Dr. DeLuca noted that at the third interview, Petitioner appeared hostile and rigid (id.). Dr. Eloise M. Archibald, PhD., NYPD's Director of Psychological Services, also interviewed Petitioner that day. When Petitioner was confronted with the 2004 incident, Petitioner denied that he was involved in a fight (id.).

Following the third interview, Dr. DeLuca was also informed that Petitioner was disciplined by the NYPD's Recruit Discipline Unit on different occasions for four separate infractions.

A fourth psychological interview was conducted on May 22, 2008 by Dr. DeLuca and Dr. Archibald. It was at this interview that petitioner admitted for the first time that he was involved in a fight on November 26, 2004 (id.).

On May 30, 2008, after the fourth interview, Petitioner was placed on restricted duty (Respondents' Ex. 2)

A further investigation of Petitioner by APD was conducted by Police Officer John Vidal.

After reviewing Petitioner's entire file, on November 21, 2008, Dr. DeLuca and Dr. Archibald found Petitioner psychologically unsuitable for full duty police work and recommended termination. The Doctors concluded that the information Petitioner withheld created major concerns regarding his level of judgment, impulse control, anger management and

credibility (id.). The Doctors also found that Petitioner's rigid and hostile presentation during the interviews was inappropriate behavior for a person training to become a police officer (id.). These conclusions coupled with Petitioner being disciplined multiple times at the Police Academy led the Doctors to recommend Petitioner's termination.

On December 12, 2008, the NYPD Employee Management Division Committee convened to review the suitability of Petitioner to continue his position as an NYPD Probationary Police Officer. The Committee recommended that Petitioner be terminated (Respondents' Ex. 8). The recommendation was sent to the Chief of Personnel who recommended that Petitioner be expeditiously terminated (Respondents' Ex. 9).

On January 23, 2009, Petitioner's termination was approved by Police Commissioner Raymond W. Kelly (Respondents' Ex. 10).

Petitioner was notified of his termination by letter dated January 30, 2009 (Respondents' Ex. 11).

By this application Petitioner seeks an order annulling and reversing the determination of Respondents terminating his position as a Police Officer for the New York City Police Department. Petitioner argues, *inter alia*, that his pre-hiring conduct is an impermissible reason to terminate him from his position.

[\* 7]

Discussion

The police Commissioner has the authority to discharge a probationary police officer, such as Petitioner, for conduct committed while serving as a member of the force (Duncan v. Kelly, 9 NY3d 1024 [2008] citing Administrative Code of the City of New York §14-115). "A probationary police officer may be discharged for almost any reason, or for no reason at all, so long as the decision is not in bad faith or for an impermissible reason" (*id.* citing Matter of Swinton v. Safir, 93 NY2d 758 [1999]; Matter of Berenhaus v. Ward, 70 NY2d 760 [1984]).

Here, Petitioner was terminated for his post-hiring conduct. Petitioner omitted information, was not truthful and displayed a lack of good judgment to the Doctors evaluating him while he was on probationary status. Petitioner's argument that he was terminated for pre-hiring conduct is without merit. Petitioner has failed to show that Respondents acted in bad faith or that he was terminated for an impermissible reason.


The Court has considered Petitioner's remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that the Petition is dismissed in its entirety.

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

Dated: 10/2/09

  
Hon. Walter B. Tolub, J.S.C

**FILED**  
OCT 02 2009 6  
COUNTY CLERK'S OFFICE  
NEW YORK