

Matter of Maglione v Kelly

2009 NY Slip Op 32303(U)

October 5, 2009

Supreme Court, New York County

Docket Number: 102344/09

Judge: Nicholas Figueroa

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SCANNED ON 10/7/2009

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

PRESENT: HON. NICHOLAS FIGUEROA, J.S.C.

PART 46

Index Number : 102344/2009
MAGLIONE, DOMINIC
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 _____

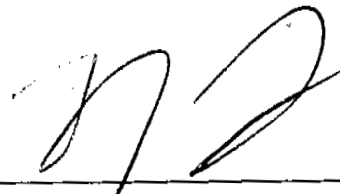
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ proceeding

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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: Oct. 5, 2009



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X
In the Matter of the Petition of

DOMINIC MAGLIONE,

Petitioner,

Index No. 102344/09

- against -

RAYMOND W. KELLY, as Commissioner of the New York
City Police Department,

**DECISION AND
JUDGMENT**

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

UNFILED JUDGMENT
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appear in person at the Judgment Clerk's Desk (Room
141B).*

Nicholas Figueroa, J.S.C.:

The Article 78 petitioner, a Lieutenant in the New York City Police Department, seeks to annul the Police Commissioner's decision to confiscate his badge and gun and to place him on modified duty at a desk in a Brooklyn precinct. Respondent has moved to dismiss the petition as time-barred and as failing to state a cognizable claim for relief (CPLR 3211[a][5], [7]).

On April 25, 2006, petitioner's wife, also a member of the City police force, reported to Police authorities that he had recently begun to exhibit disquieting new behaviors, such as locking himself in a room for more than 12 hours while he prayed, fasting for as much as three weeks at a time, and isolating himself from family and friends. By that time, petitioner, who was then 41 years old and had formerly been physically fit, had lost some 40 pounds within a six-month period and appeared unhealthy to the point of being skeletal. Furthermore, although he was slated to become eligible for retirement in only 26 days, he had been threatening to stop working immediately, at a substantial cost to his pension. He had explained that he would take

such a step if that were the Divine will as he saw it, regardless of how personally destructive doing so might be.

That same day, petitioner was relieved of his badge and the two guns that had been assigned to him. The next day, he was placed on "temporary, non-disciplinary restricted duty" pending a medical evaluation. He was immediately admitted to a psychiatric ward at Bellevue Hospital, for observation, where he remained for 13 days. While there, he exhibited behavior that medical professionals deemed manic. Thus, for example, when asked why his hospital gown had become urine-stained, he explained that he had been too absorbed in prayer to visit a bathroom or use a bedpan. At some point, whether before or after his hospitalization, petitioner expressed the belief that he had seen a demon in a station house.

Upon his discharge from the hospital, petitioner assumed his restricted duties. By July 2007, however, respondent had applied for Ordinary Disability Retirement on petitioner's behalf. Pursuant to section 13-223 of the City's Administrative Code, the application was heard by the Article II Medical Board of the Police Department's Psychological Services Division (PED). In a memorandum to the Board of Trustees of the Police Pension Fund, the Medical Board reviewed petitioner's history, including an evaluation of petitioner by a PED staff psychologist, and also personally interviewed petitioner. On such basis, the Medical Board recommended that the application for disability retirement be denied.

Some eight months later, however, the application was renewed and the matter was remanded by the Board of Trustees to the Medical Board, along with additional documentation not available at the prior hearing. After reviewing the relevant records and interviewing petitioner again, the Medical Board issued a memorandum dated March 21, 2008, rescinding its

[* 4]

prior recommendation and recommending that the application be approved.

Nevertheless, a further Medical Board hearing was scheduled for November 7, 2008, and then adjourned to December 19, 2008, to allow petitioner the chance to submit medical records, if any, indicating that he had seen a psychiatrist and had made actual psychological progress. In a memorandum dated December 19, 2008, however, the Medical Board reaffirmed its March 2008 recommendation.

Petitioner commenced the instant proceeding on February 24, 2009. The petition alleged that respondent had violated petitioner's First Amendment right to practice his religion without penalty and sought "a Judgment under Article 78 ... reversing Respondent's determination and reinstating Petitioner to full duty as a New York City Police Department Lieutenant with the right to carry his official New York City Police Department badge and gun."

Respondent's motion to dismiss the proceeding on statute of limitations grounds is based on the fact that the petition was filed almost three years after petitioner was required to surrender his badge and guns and placed on restricted duty.

As respondent notes, an Article 78 petition must be filed within nine months of the final determination challenged (CPLR 217). Respondent maintains that the steps taken by respondent on April 25, 2006, and April 26, 2006, constituted a "final determination" for purposes of this proceeding.

Indeed, it is well established that, where, as here, mandamus is sought to review an agency's discretionary act, the section 217 limitations period begins when the petitioner can claim to have suffered some actual, concrete injury as a result of the act in question (*see Edmead v McGuire*, 67 NY2d 714, and cases cited therein). That point was clearly reached in this case

when the very acts that petitioner seeks to undo – the removal of his badge and guns and restrictions to limited duty – actually occurred.

This is not to ignore that respondent might eventually have reversed such measures based upon a medical evaluation of petitioner. But, in the meantime, petitioner's injuries, as alleged, would nevertheless have already been suffered, beginning as of April 25th and 26th of 2006.

Nor is this to overlook petitioner's argument that the statute of limitations began to run on December 19, 2008 (the date of the Medical Board's latest memo) and that his petition was therefore timely filed. Such argument is, however, without merit. The issue addressed by that memo (and the two preceding ones) was whether petitioner qualified for disability retirement. The ultimate arbiter of such an issue was the Board of Trustees, not the Medical Board (which was empowered only to make a "recommendation" on the question). Thus, the December 2008 memo was neither "final" nor a "determination" for purposes of Article 78. Even more to the present point, the Medical Board had no authority to weigh in on (much less control or reverse) respondent's decision-making with respect to the terms and conditions of petitioner's duties as a policeman. In other words, the Medical Board's December 2008 memo was not the instrument by which petitioner's alleged injury was inflicted and the memo's issuance thus bears no relation to the timeliness of this proceeding. Indeed, petitioner implicitly acknowledged as much when


he did not join the Medical Board as a respondent.

For the foregoing reasons, it is concluded that the instant petition was untimely, and respondent's motion to dismiss the petition is therefore granted.

This constitutes the decision and judgment of the court.

Dated: October 5, 2009

ENTER:



J.S.C.

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