

Lomax v Kelly

2010 NY Slip Op 30233(U)

January 28, 2010

Supreme Court, New York County

Docket Number: 115302/2008

Judge: Jane S. Solomon

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SCANNED ON 2/2/2010
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

JANE S. SOLOMON

PART

55

Justice

Index Number : 115302/2008

LOMAX, RICHARD

VS.

KELLY, RAYMOND W.

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO.

115302-08

MOTION DATE

#001

MOTION SEQ. NO.

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

1-3

4

5

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 by the annexed decision and order and judgment

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 1415).

Dated:

1-28-10

JANE S. SOLOMON

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: PART 55

-----x
LOMAX, RICHARD,

Petitioner,

Index No.: 115302/2008

-against-

DECISION, ORDER
AND JUDGMENT

KELLY, RAYMOND W., 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

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
141E).

JANE S. SOLOMON, J.

Petitioner, Richard Lomax, brings this Article 78 proceeding against Respondents, Raymond W. Kelly (Kelly), the Police Department of the City of New York (NYPD) and the City of New York. Lomax was terminated from his position as a probationary Police Officer with the NYPD. He seeks to annul the administrative determination to terminate him and reinstatement to his position with full back pay, benefits and seniority. Respondents cross move to dismiss the petition on the ground that it fails to state a cause of action. The petition is denied for the following reasons.

FACTS

Lomax was a probationary Police Officer of the NYPD. While off duty, on January 20, 2007, Lomax was driving on 10th Avenue when he was involved in a "fender-bender" with a Nissan Maxima. The three occupants of the Nissan exited the vehicle and

assaulted Lomax and his passenger, Robert DeFazio, another Officer. Lomax received a serious head injury. Police arrived and arrested the attackers. Subsequently, Lomax was rushed to St. Vincent's Hospital, where doctors performed emergency surgery on him for swelling and bleeding in his brain; he was in a coma for several weeks before making a full recovery. At the time of the attack, Lomax was not tested for intoxication (although he admits that he had "one or two" drinks that night). The Duty Captain at the scene found Lomax and DeFazio "fit for duty" and noted that "[i]nvestigation determined no misconduct by either officer during this incident. No change in duty status recommended" (Petition, Ex. A, p. 3 and 5).

In the course of building its case against the attackers, the District Attorney's office subpoenaed Lomax's medical records. The records revealed that upon his admission to the hospital, Lomax had a blood alcohol content of .21, nearly three times the legal limit. The assigned assistant district attorney (ADA) conveyed this information to NYPD's Internal Affairs Bureau (IAB) on June 17, 2008, but could not provide IAB with a copy of the records "due to legal constraints" (Petition, Ex. C, ¶4). However, in connection with seeking payment, St. Vincent's billing service independently sent Lomax's medical records to the NYPD Medical Division, and IAB obtained the records from there. Subsequently, on June 23, 2008, the NYPD

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charged Lomax with operating a vehicle while intoxicated, a charge sufficient to terminate a probationary Police Officer's employment. After an investigation, he was summarily terminated on July 24, 2008. This petition followed.

DISCUSSION

Notwithstanding that Respondents label their opposing papers a motion to dismiss, they present broad opposition on the merits of the petition to which Lomax has responded in detail. As a result, the cross-motion is treated as an answer and Lomax's response is deemed his reply. (see, *Chu v. New York State Urban Development Corp.*, 13 Misc3d 1229[A] [Sup Ct, New York County, 2006]).

Lomax argues that the District Attorney's office improperly divulged the information from his medical records to IAB in violation of the Health Insurance Portability and Accountability Act (HIPAA). Specifically, Lomax argues that when private health information is obtained by subpoena in the course of a judicial proceeding, the party receiving the information is prohibited from using or disclosing that information for any purpose other than the litigation. He also contends that it is arbitrary and capricious for Respondents to rely on medical records when they are contradicted by the duty captain's report.

Respondents contend that Lomax was a probationary employee, and as such, could be terminated for any reason, except

one premised on bad faith. It is Respondents' position that Lomax has failed to allege facts showing bad faith. Specifically, they argue that any violation of HIPAA against Lomax was irrelevant because HIPAA does not apply to the District Attorney's Office or the NYPD as they are not "covered entities" within the meaning of the statute, and because the NYPD lawfully and independently received Lomax's medical records from St. Vincent's Hospital. Lomax responds that without the ADA's interference, IAB would never have requested the records from the Medical Division, and argues that the evidence resulting from such interference should have been excluded from consideration.

A probationary employee is subject to termination without a hearing. A municipal agency may terminate a probationary employee during the probation period so long as the termination was not made in bad faith (*York v. McGuire*, 63 NY2d 760, 761 [1984]; *Dillon v. Safir*, 270 AD2d 116, 117 [1st Dept, 2000] ["absent a showing of bad faith, police officers . . . can be terminated for any or no reason"]). Furthermore, Petitioner has the burden of raising a material issue of bad faith (*Barry v. City of New York*, 23 AD3d 551 [2nd Dept, 2005]).

It is uncontested that the NYPD was in lawful possession of Lomax's medical records. The June 17, 2008 memo from the NYPD Medical Division to the First Deputy Commissioner, reads in relevant part:

"[T]he medical division is in possession of medical

[* 6]

records that confirm Police Officer Lomax's state of intoxication at the time of the traffic incident. These medical records have been forwarded to the Medical Division by St. Vincent's Hospital billing service in the hopes of being reimbursed by the Department for Police Officer Lomax's medical stay" (Petition, Ex. C).

HIPAA allows a covered entity, such as a Hospital, to disclose health information to another organization for payment purposes (45 CFR §164.506 [c][1]). NYPD properly received Lomax's records in this manner.

Even assuming, *arguendo*, that the ADA acted improperly in contacting NYPD's IAB, the resulting investigation, itself, was not a violation of HIPAA, as the records it reviewed were legitimately in NYPD's possession. Because IAB's investigation was based upon the information contained in the records supplied to NYPD, Respondents did not violate HIPAA.

Lomax also argues that when the District Attorney's office becomes aware of officer misconduct in the course of a criminal prosecution, it should be unable to inform the NYPD of this misconduct, as such notice would taint even an independent investigation. Such an analysis is flawed. If adopted, Respondents ability to ensure the character and conduct of its officers would be severely hampered, and they and the public would be at risk of misconduct by officers.

Lomax finally argues that Respondents acted arbitrarily and capriciously because they ignored the Duty Captain's report,

which stated that he was "fit for duty." Given his injury at the scene, that conclusion properly was not given much weight.

Courts should not overturn administrative determinations unless they are made without sound basis in reason and without regard to the facts (*County of Monroe v. Kaladjian*, 83 NY2d 185, [1994]). Where the court finds any reasonable basis in fact for the administrative action, the court's function is exhausted (*Hughes v. Doherty*, 5 NY3d 100 [2005]). The medical record indicating that Lomax was intoxicated at the time of the accident is a reasonable basis for investigation. His termination based upon the results of that investigation, did not violate HIPAA, nor was it arbitrary or capricious, or in bad faith.

Accordingly, it hereby is

ORDERED that Respondents' motion to dismiss is denied as moot; and it further is

ORDERED and **ADJUDGED** that the petition is denied, and the proceeding is dismissed.

Dated: January 28, 2010

ENTER:

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 Office (JANE S. SOLOMON, J.S.C. 141B).