

Matter of Bruscano v Kelly

2010 NY Slip Op 30761(U)

March 31, 2010

Supreme Court, New York County

Docket Number: 110244/09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C.

PART 20

Index Number : 110244/2009
BRUSCINO, SAVERIO L.
 vs.
KELLY, RAYMOND W.
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

in 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

FILED

APR 06 2010

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
 decided in accordance with
 the annexed decision/order
 of even date.**

Dated: 3/31/10

HON. JUDITH J. GISCHE 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: PART 10

-----x

In the Matter of the Application of
SAVERIO L. BRUSCINO,

Petitioner,

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

-against-

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

Respondents.

-----x

Decision/Order

Index No.: 110244/09
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Pet's n/pet w/ exhs	1
Resps' x-mtn to dismiss	2
Pet RGDG affirm in opp	3
Resps' JLM reply affirm	4

Upon the foregoing papers, the decision and order of the court is as follows:

In this Article 78 proceeding, petitioner seeks a judgment annulling the March 23,
2009 determination by the New York City Police Department ("NYPD") which terminated
petitioner's probationary employment as a police officer; petitioner seeks reinstatement.

The respondents are Raymond W. Kelly, Police Commissioner of the City of New
York and the NYPD, and the City of New York. They have appeared in this action and
now cross-move to dismiss, in advance of answering the petition (CPLR § 3211).

Background

The following facts are alleged in the petition and based upon petitioner's sworn affidavit. Petitioner was appointed to the position of probationary police officer with the NYPD on July 8, 2008. As with all applicants with the NYPD, to be deemed qualified for the position of police officer, petitioner was required to undergo a background investigation and to successfully complete all medical, physical, and written/oral psychological evaluations.

Petitioner alleges that he was initially psychologically qualified for employment. On or about December 29, 2008, petitioner was designated to a day tour of duty. However, on or about January 1, 2009, petitioner was designated to restricted duty, relieved of his shield, weapon and ID card and was assigned to the Police Department's Police Academy gym locker room at 235 East 20th Street in Manhattan. At this time, petitioner claims that he was told by a supervisor that "a question had arisen regarding [his] psychological testing."

Petitioner was re-interviewed by respondents' psychiatrist, Dr. Marshall, and consented to the release of all his medical/psychological records. Petitioner states the following in his affidavit concerning the interview with Dr. Marshall:

That said re-interview included questioning regarding a psychiatric evaluation by Robert A. Katz, M.D. of me when I was six (6) years old...

Additionally, I consented to the release of my records with respect to Sagamore Children's Psychiatric Center's... evaluation of me...

That during my re-interview conducted by a Dr. Marshall, he, Dr. Marshall, accused me of withholding information regarding my evaluation by Dr. Katz as well as that of Sagamore.

That I advised Dr. Marshall that due to my age, six (6) years, at the time of

Dr. Katz's evaluation, as well as that of Sagamore in or about the same time period, I did not remember the circumstances causing said evaluation.

That at the time of said evaluations, I was then being raised in an extremely developmentally disadvantaged environment. My then eighty (80) year old grandmother, who only spoke Italian, raised me because my father could not due to his condition of physical disability as well as being deaf and mute. Furthermore, my mother literally abandoned me by her return to Italy; I had been advised that she had died.

On March 23, 2009, petitioner was notified that his employment as a probationary police officer was terminated pursuant to the New York City Department of Personnel Rules and Regulations 5.2.7.

Petitioner claims that he was not notified "as to the facts and/or nature of his designation as an unsatisfactory probationer" and was never issued an unsatisfactory job performance notice. Petitioner maintains upon information and belief that his termination resulted from his alleged non-disclosure of Dr. Katz' and Sagamore's psychiatric evaluations of him during the application process for the police officer position. Therefore, petitioner argues that his termination was arbitrary and capricious.

In their cross-motion to dismiss, the respondents argue that since petitioner was a probationary police officer, petitioner must allege facts sufficient to establish that the termination was made in bad faith. Respondents contend that the petition is devoid of facts demonstrating bad faith, and should be dismissed.

Discussion

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: [1] was made in violation of lawful procedure; [2] affected by an error of law; [2] or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its

exercise of discretion if it lacks a rational basis in its administrative orders. “[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law” (Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Co., 34 NY2d 222, 231 [1974] [emphasis removed]; see also Matter of Colton v. Berman, 21 NY2d 322, 329 [1967]).

A probationary police officer may be terminated for “almost any reason, or for no reason at all” so long as the determination was not made “in bad faith or for an improper or impermissible reason.” (Matter of Duncan v. Kelly, 9 NY3d 1024 [2008]; see also Matter of Swinton v. Safir, 697 NYS2d 869 [1999]; Matter of York v. McGuire, 63 NY2d 760, 761; Matter of Anonymous v Codd, 40 NY2d 860).

For the reasons that follow, the court finds that the petition must be dismissed. Petitioner’s belief that respondents’ terminated him based upon his failure to disclose his psychological history does not demonstrate bad faith. Nor does petitioner’s claim that the subject evaluations conducted when he was six years old are the results of an “incredible misdiagnosis” compel a different result. Based upon the facts alleged, petitioner was not terminated because of his psychiatric history, but rather, because of his failure to disclose his psychiatric history. Therefore, the substance of the evaluations is not at issue. Moreover, petitioner was not entitled to a statement of reasons or hearing as he seems to suggest in the instant petition (see Matter of York v. McGuire, *supra*).

Here, based on these facts, the respondents rationally exercised their discretion by, *inter alia*, considering petitioner’s lack of truthfulness concerning his past psychological history and rejecting petitioner’s explanation as to why he did not do so. It

is no violation of law, and no abuse of discretion, for respondents to have rationally and practically analyzed the NYPD's "potential vulnerability and petitioner's future effectiveness as an armed, full duty officer, in light of foreseeable scrutiny and claims of tort liability which members of the public or fellow police officers might bring," and as a matter of public policy (Matter of Boss v. Kelly, 3 Misc3d 936, 940 [2004]).

Accordingly, the respondents determination to terminate petitioner's probationary employment with the NYPD was not irrational, arbitrary or capricious.

Conclusion

It is hereby:


ORDERED that the respondents' cross-motion to dismiss is granted and the petition is denied.

The Clerk shall enter judgment in favor of respondents against the petitioner

Any requested relief not addressed expressly by the court has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 31, 2010

SO ORDERED:

HON. JUDITH J. GISCHE, J.S.C.

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