

Matter of Ward v Kelly
2010 NY Slip Op 30894(U)
April 14, 2010
Supreme Court, New York County
Docket Number: 109467/09
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JANE S. SOLOMON**

PART 55

Justice

Index Number : 109467/2009

WARD, MICHAEL

vs.

KELLY, RAYMOND W.

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 109467-09

MOTION DATE 12/16/09

MOTION SEQ. NO. 1001

MOTION CAL. NO. _____

were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-6

7

Cross-Motion: Yes No

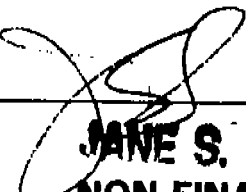
Upon the foregoing papers, it is ordered that this motion petition is
decided in accordance with the annexed
Memorandum decision and judgment.

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 141B).

Dated: 4/14/10


JANE S. SOLOMON J.S.C.
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 55

-----X
In the Matter of the Application of Police Officer
MICHAEL WARD, Tax Number 941255,

Petitioner,

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

Index No. 109467/09

DECISION AND JUDGMENT

-against-

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,

Respondents.

UNFILED JUDGMENT
has not been reviewed by the County Clerk
appear in person at the Judgment Clerk's Desk (Room
141B).

-----X
JANE SOLOMON, J.:

Petitioner, a former police officer with the respondent The Police Department of the City of New York, (NYPD) brings this Article 78 proceeding to annul a determination of the respondent NYPD which terminated petitioner's employment as a Probationary Police Officer as of March 11, 2009. Respondents cross-move to dismiss the petition.

Petitioner Michael Ward was originally appointed as a probationary police officer on July 10, 2006. Thereafter, on January 20, 2008, Ward resigned from his position as a probationary police officer with the NYPD in order to join the New York City Fire Department (FDNY). Less than one month later, on February 13, 2008, Ward resigned from the FDNY and reapplied to the NYPD on that same day.

Upon his re-application to the NYPD, Ward was required to sign a document, entitled "Police Officer Terms of Probation." That document, which respondents annex to moving

papers, states that Ward "hereby attest[s] that [he] has been informed of the fact that [his] forthcoming appointment to probationary Police Officer in the New York City Police Department will be twenty four (24) months." Ward was thereafter appointed as a probationary police officer in the NYPD on February 21, 2008. Ward alleges that, upon his re-appointment to the NYPD, he was told that he was not beginning a new two year probationary period, but rather, that his two-year probationary period, which began upon his initial appointment date, would be extended for 32 days, which was the time period during which he left the NYPD.

On December 14, 2008, Ward was arrested for assault, menacing and harassment. Although the charges were eventually dropped, his employment as a probationary employee was thereafter terminated on March 11, 2009.

Ward argues that his initial 18 months as a probationary police officer, from July 2006 to February 2008, should have been counted towards his two year probationary period and that his probationary period therefore ended in August 2008, several months before his arrest. As a result, since he was no longer a probationary employee, he was entitled to a disciplinary hearing prior to termination.

The Personnel Rules and Regulations of the City of New York provide that, where a probationary employee has been separated from service, for any reason other than fault or delinquency, and is thereafter re-appointed by the same agency, the length of his prior probationary term shall be deducted from his current probationary term.

Specifically, Rule 5.2. 6. (a) provides, in pertinent part, that:

A probationer separated from service for any reason other than fault or delinquency may be restored by, and at the discretion of, the commissioner of citywide administrative services to the

eligible list from which selected, if it be in existence . . . provided that

...

(a) the time during which such person has actually served shall be deducted from the probationary term if such person be again selected by the same agency head . . .

(55 RCNY App. A, 5.2.6 [a]).

Section 5.2.6 (a) is not discretionary, and, although an agency head may seek to extend an employee's probationary period, he must do so in writing, explaining his reasons therefor, and obtain the written consent of the probationer.

Rule 5.2.8 provides, in relevant part, that:

(a) Notwithstanding the provisions of paragraph 5.2.1, upon the written request of the agency head setting forth the reasons therefor and with the written consent of the probationer, the commissioner of citywide administrative services may authorize the extension of the probationary term for one or more additional periods not exceeding in the aggregate six months . . .

(55 RCNY App. A, 5.2.8)

Respondents argue that, on February 13, 2008, when Ward reapplied for the position of probationary police officer, and signed the "Police Officer Terms of Probation Statement," he in essence, agreed to extend his probationary period.

As an initial matter, that document is not sufficiently clear that Ward, in signing it, was knowingly waiving his right to a probationary period limited under the above rule. Second, the document does not set forth, as required by law, the NYPD's reasons for extending Ward's probationary period and is therefore insufficient to extend his probationary period. Moreover, the Rule would permit an extension of no more than six months. Ward's arrest was

almost ten months after his reappointment.


Accordingly, for the foregoing reasons, it is

ADJUDGED that the petition is granted and the determination of respondent New York City Police Department, dated March 11, 2009, terminating petitioner as a probationary police officer, is vacated and annulled and petitioner is reinstated to said position with back pay and benefits from March 11, 2009, subject to such other disciplinary procedures applicable to him as a non-probationary police officer on December 14, 2008; and it is further

ADJUDGED that the cross motion to dismiss the petition is denied.

Dated: April 14, 2010

ENTER:



J.S.C.

JANE S. SOLOMON

UNFILED JUDGMENT
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