

Matter of Weller v Kelly
2010 NY Slip Op 31581(U)
June 18, 2010
Supreme Court, New York County
Docket Number: 109357/06
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16
PART 16

Waller, J

INDEX NO. 10084110

- v -

MOTION DATE _____

Kelly, Raymond

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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~~

Article 78
petition is granted in accordance with
the accompanying memorandum decision.
The Clerk shall proceed accordingly.

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: JUN 18 2010

Alice Schlesinger
ALICE SCHLESINGER 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 16

-----X
In the Matter of the Application of

JEAN WELLER,

Petitioner,

Index No. 109357/06
Motion Seq. No. 003

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

- against -

RAYMOND KELLY, as the Police Commissioner of
the City of New York, and as Chairman of the Board
of Trustees of the Police Pension Fund, Article II,
THE BOARD OF TRUSTEES of the Police Pension
Fund, Article II, NEW YORK CITY POLICE
DEPARTMENT and THE CITY OF NEW YORK

UNFILED JUDGMENT
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1418).

Respondents.

-----X
SCHLESINGER, J.:

This is the third time that this matter has come before this Court. The controversy revolves around petitioner Jean Weller's attempt to be awarded line of duty retirement benefits, or Accident Disability Retirement (ADR) benefits, as they are known. The first two times that this Court entertained an Article 78 petition with regard to this matter involved adverse medical decisions as to Detective Weller's application.

Some background is necessary here before discussing the instant related Article 78. The following is an undisputed recitation of the events that occurred on July 7, 2000, which form the predicate for Detective Weller's ADR application.

While Detective Weller was on her way home from work traveling east on the Grand Central Parkway with Sergeant Steven Borchers, the officers came upon an obviously deranged individual who had earlier jumped out of a moving vehicle on the highway,

causing cars to swerve around him. This man ran toward the driver's side of the officer's vehicle and began punching the Sergeant through the open window, even as the Sergeant was backing up the car. The Sergeant reacted by driving forward and accidentally hit a taxi. The deranged man then ran behind the officer's vehicle. Meanwhile, the Sergeant had exited the vehicle and displayed his badge and gun. At this point, the deranged individual ran to the passenger side of the vehicle where Detective Weller was sitting with the door open. The man jumped on top of Detective Weller and began punching and kicking her. She then fired her revolver three times, and the Sergeant fired his once. The man was hit and died shortly thereafter as a result of the gunshot wounds. After an investigation, the Queens District Attorney's Office found that this was a justifiable homicide.

In my first decision dated February 23, 2007, in addition to describing this incident, I discussed Detective Weller's reaction to it. It was her contention, supported by multiple medical and police records, that she was suffering from Post Traumatic Stress Disorder as a result of this event. The Medical Board, however, found otherwise and recommended retirement on ordinary disability. I remanded the matter to the Medical Board, finding that their decision omitted any serious discussion of the relevant evidence and their conclusion lacked a rational basis.

The next time this case was before me was via a second Article 78 petition brought by Detective Weller. She had again been denied ADR benefits by the same Medical Board that had denied her earlier application. Thus, in my decision of March 31, 2009, I again found (among other things) that the Medical Board's conclusion lacked a rational basis. I pointed to specific deficiencies in the Medical Board's decision, which I directed the Board to address. Further, since I found that the Board had failed to correct the deficiencies

noted in my prior decision, "either from intention or preconceived bias," this time I remanded the matter to the Medical Board with a direction that a fresh Board review and consider the matter anew.

The new Medical Board found that Detective Weller did, in fact, suffer from Post Traumatic Stress Disorder relating back to the July 7, 2000 incident. Therefore, from a medical perspective, the Medical Board on June 26, 2009, after a full discussion of the incident and its aftermath, rescinded its previous decision and recommended approval of the Detective's application for ADR benefits. The Board found as their final diagnosis "Panic Disorder, Anxiety Disorder, Depressive Disorder NOS, and Post Traumatic Stress Disorder". They further stated that the competent causal factor was the line of duty incident of July 7, 2000.

The new finding and recommendation then went to the Trustees. After tabling this matter on a number of occasions, the Trustees made a decision (by a tie vote of 6-6) on November 9, 2009 that petitioner was not entitled to ADR benefits. (Pet. Exh. Q). They made this decision pursuant to their finding that the July 7th incident was not an "accident" as defined by law. Such a finding is a necessary predicate for an award of ADR, pursuant to §13-252 of the Administrative Code of the City of New York. Respondent argues that this decision was rational and neither arbitrary nor capricious. On this basis respondent's counsel argues that the decision must be upheld by this Court, citing *Matter of Kehoe v. City of New York*, 81 NY2d 815 (1993).

However, I disagree and do in fact find the opposite, that the decision was arbitrary and capricious and lacks a rational basis. I further find that the cases cited by the Board in the first instance and by respondent's counsel in opposition to this Article 78 petition can all be distinguished on their facts.

For example, respondent cites to the case of *Berbenich v. Regan*, 81 AD2d 732 (3rd Dep't 1981). There, a police officer went to investigate a burglar alarm call at the Dutch Reformed Church in the neighborhood. While the petitioner and his partner were investigating, they found a broken pane of glass, and unlocked doors at the back of the building. The two officers entered the church but were concerned that someone might still be on the premises. Therefore, they proceeded to check the rooms. When they entered the darkened kitchen, its lights went on. Officer Tomlin signaled to the petitioner that he heard sounds on the other side of the wall. He moved to open the door and signaled to the petitioner to cover him. Petitioner drew his gun. The door flew open unexpectedly and petitioner's gun discharged and killed the pastor of the church.

Petitioner there, as a result of the tragic events, became emotionally disabled from performing his duties as a police officer. However, the Comptroller in Suffolk County, where these events happened, found that the disability was not based on an "accident" within the meaning of their Retirement and Social Security Law. The Comptroller appears to have reasoned that the petitioner's injuries resulted from his expected and foreseeable duties in investigating a possibly ongoing burglary and thus were not accidental in nature.

Another case cited by respondent, also from the Third Department, is *Taylor v. Regan*, 103 AD2d 884 (1984). Here the police officer argued that he was suffering from serious psychological trauma as a result of two line of duty occurrences. Those involved an incident in which the officer, from a distance of about twenty feet, shot an armed man who earlier that same day had killed his common-law wife and a police officer. The second incident, occurring eight years later, involved the petitioner who this time shot and killed an escaped convict who was holding a gun to a head of a hostage. Petitioner there was

denied ADR benefits because the Comptroller again reasoned that the two incidents had arisen in the regular course of duty, were within petitioner's training and were reasonably expected and foreseeable.

None of these things could be said for the situation involving Detective Weller here. While she was serving as a Detective for the preceding five years, she had been assigned to the precinct doing inside clerical work. In fact, shortly before the incident she had been on medical leave for a hysterectomy. When this bizarre event occurred on July 7th, she was neither investigating a burglary nor attempting to apprehend a killer or an escaped convict. She was merely driving home with another police officer in the car. No one could convincingly claim that what occurred was reasonably expected or foreseeable. In the Court of Appeals' opinion, *Lichtenstein v. Board of Trustees*, 57 NY2d 1010, 1012 (1982), the Court said the following:

Although the term "accident" is not specifically defined by the statute, we adopt the common sense definition of a sudden, fortuitous mischance, unexpected, out of the ordinary and injurious in impact.

Frankly, this Court is hard-pressed to find an occurrence which so aptly fits into this definition as what occurred on July 7, 2000. The Detective was on her way home from work. She was confronted by a deranged individual who assaulted her. This was a sudden and fortuitous mischance. It was certainly unexpected and out of the ordinary, and the Medical Board ultimately decided that it had an injurious impact upon her.

As stated earlier, this event occurred in July 2000. It is now almost ten years later. The Detective has been suffering from severe emotional injuries and has been on medication throughout all those years. She should not have to wait any longer for a

determination to which she is entitled. In fact, and pursuant to law, I find she is entitled to ADR benefits based on an accidental injury. Finally, since I am making this finding based on the law [*Matter of Canfora*, 60 NY2d 347 (1983)], I see no reason to delay this determination any further by remanding the matter to the Board. Therefore, I am directing that petitioner Weller be awarded ADR benefits retroactively.

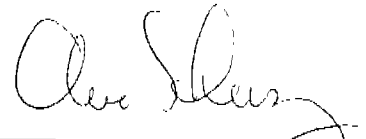
Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent that the determination of respondent The Board of Trustees of the Police Pension Fund, Article II, dated November 9, 2009, which denied petitioner Jean Weller Accident Disability Retirement benefits on the ground that the subject incident did not constitute "an accident", is vacated and annulled, and petitioner is awarded Accident Disability Retirement benefits retroactive to the date of eligibility based on her initial application.

Dated: June 18, 2010

JUN 18 2010

ENTER:



J.S.C.

ALICE SCHLESINGER

UNFILED JUDGMENT

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