

<b>Matter of Ward v Kelly</b>
2010 NY Slip Op 33246(U)
November 10, 2010
Sup Ct, NY County
Docket Number: 109467/2009
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Michael Ward

INDEX NO. 109467/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

Raymond Kelly

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits \_\_\_\_\_

4-5

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*petition is decided by the annexed  
memorandum decision order and Judgment.*

**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: 11/10/10

JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 55

-----X

In the Matter of the Application of  
MICHAEL WARD, Tax Numbers 941255 and  
946581,

Index No. 109467/2009  
**DECISION, ORDER &  
JUDGMENT**

Petitioner,

-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.

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141B).

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JANE S. SOLOMON, J.:

This is an Article 78 petition to annul the  
determination of respondent Police Department of the City of New  
York (NYPD) terminating the employment of petitioner Michael Ward  
(Ward), a Probationary Police Officer. Respondents moved to  
dismiss the petition. That motion was denied, and Respondents  
then answered.

In order to be eligible for employment as a police  
officer, an individual must take and pass the civil service  
examination for police officers. Those who pass the exam are  
placed on the eligible list, from where the NYPD draws  
prospective officers. The lists expire after a time. Ward took  
this exam twice, in 2002 (Exam 1049) and 2005 (Exam 4009); with  
Exam 1049 expiring at the end of June, 2006, and Exam 4009  
expiring at the end of June, 2009 (see, Pierre Affidavit,

attached to Verified Answer). He passed each exam.

In June 2006, the NYPD selected Ward from the Exam 1049 eligible list. Ward was appointed as a probationary police officer on July 10, 2006 and was given a tax identification number. NYPD's probationary period is two years. During this period, an officer may be terminated for any reason, barring bad faith, without a hearing (*Duncan v. Kelly*, 9 NY3d 1024, 1025 [2008]).

On January 10, 2008, while still a probationary officer, Ward resigned from the NYPD in order to join the New York City Fire Department (FDNY). On February 13, 2008, Ward resigned from the FDNY and reapplied to the NYPD.

According to Respondents, Ward was no longer eligible to return to service under Exam 1049 (see, e.g., *Deas v. Levitt*, 73 NY2d 525, 534 [1989] ["the rule which requires civil service appointments to be made from a current rather than expired list is constitutionally mandated"]). Instead, he was accepted, *de novo*, under Exam 4009 (Verified Answer, Ex. 2). He was assigned a new tax identification number and resumed his duties on February 21, 2008. Ward alleges that he was told that his prior probationary term would be counted towards the probationary term of his new position, and that he was assigned the new identification number by mistake.

On December 14, 2008, Ward was arrested for assault, menacing and harassment. The charges were eventually dropped,

but his employment as a probationary employee was terminated on March 11, 2009.

Ward argues that his probationary period, which began in July 2006, had ended well before December 2008, and he could not be terminated without a disciplinary hearing. Respondents argue that Ward was reappointed to the NYPD from a different list than the one from which he was originally appointed, and, therefore, he lost his prior probationary standing and was required to perform a new two year probation that would not have expired until 2010.

Respondents rely on Rule 5.2.6 of the Personnel Rules and Regulations of the City of New York (PRR), which provides, as relevant:

Restoration After Separation From Service; Conditions:

A probationer separated from the service for any reason other than fault or delinquency may be restored . . . to the eligible list from which selected, it if be in existence, with the same relative standing thereon . . . 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 . . .

(PPR 5.2.6 [Emphasis added]).

Respondents contend that the plain reading of this rule demonstrates that a probationary employee who resigned from an agency and seeks to reapply to that agency will have the length of his prior probationary term deducted from his current probationary term, but only while that employee is still eligible

to be hired under the same eligibility list from which he was hired initially.

This reading of PPR 5.2.6 is facially correct. The rule serves the goal of requiring probationers who leave the job to timely return, lest they forfeit their accrued probationary time. It also prevents an individual from quitting an agency, returning several years later, and claiming his prior probationary status. Ward's situation (32 days between his resignation and reinstatement, his initial eligibility list expiring before his probationary status ended) is a corner-case; but the rule, nonetheless, seems to apply.

Ward replies that Rule 5.2.6 does not apply to him because it applies only where the eligible list has not expired. He argues that nothing in the rule explicitly states that a probationer whose eligibility has expired must begin a new two year probation. Ward's interpretation would invalidate the express language of the rule, as all probationers would be able to deduct prior probationary time regardless of the expiration of the test from which they were selected.

Next, Ward argues that PPR 5.2.8(a) supports his position that the NYPD could not have required a new two year probation term. It provides:

Extension of Probationary Period.

(a) . . . 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 . . . .

Respondents contend that this provision is inapplicable because the probationary term was a new one, and not an extension of the old one. Respondents are correct. Ward's first probationary term expired upon his resignation, due to the expiration of the Exam 1049 eligibility list. He reapplied under Exam 4009, with a new probationary term.

Ward finally relies on section 14-113 of the Administrative Code of the City of New York (Admin Code), entitled "Computation of compensation of members of the department restored to duty after service in the fire department." This section states:

The time served by a member of the uniformed force of the department, who was appointed pursuant to the rules of the commissioner . . . and thereafter resigned after serving as such, to accept a position in the fire department and is thereafter restored to his or her former position as a member of the department . . . [both] shall be included and counted as service in the department, in determining his or her compensation, promotion, retirement and pension as herein or otherwise provided.

(Admin Code § 14-113)

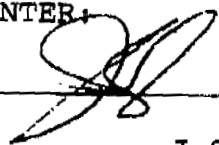
Notably, this section does not address probationary status, and is irrelevant to the instant dispute.

Accordingly, Respondents did not act in an arbitrary or capricious manner, nor did they violate their own rules and regulations when they terminated Ward, a probationary police officer, without a hearing.

In light of the foregoing, it hereby is  
ORDERED and ADJUDGED that the petition is denied and  
the proceeding is dismissed.

Dated: 11-10-10

ENTER:

  
\_\_\_\_\_

J.S.C.

JANE B. SOCOL

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