

Matter of Patalano v Nassau County

2010 NY Slip Op 33696(U)

December 23, 2010

Sup Ct, Nassau County

Docket Number: 013082-10

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

**In the Matter of the Application of
VICTOR PATALANO,**

Decision and Order

Petitioner,
for a Judgment pursuant to Article 78 CPLR,
-against-

PETITION SUBMITTED:
October 27, 2010
MOTION SEQUENCE:01
INDEX NO. 013082-10

**NASSAU COUNTY and NASSAU COUNTY
SHERIFF'S DEPARTMENT,**

Respondents.

**The following papers and the attachments and exhibits thereto have been read on this
petition:**

Notice of Petition	1
Answer and Objections in Points of Law	2
Memorandum of Law in Support	3
Affirmation in Further Support	4

Background

Petitioner Victor Patalano is a Deputy Sheriff Sergeant with the Nassau County Sheriff's Department (the "Department"), a Respondent herein (Petition at ¶ 6).

At approximately 7:00 a.m. on February 17, 2010, Petitioner drove to 82 Sycamore Drive in Massapequa to serve a Family Court summons (Petition at ¶10; Ex. "B" to Petition).¹ Sycamore Street was icy with large piles of snow on the curb from a recent snow storm (Petition at ¶ 12). Petitioner served the summons on the resident at 82 Sycamore Street and, returning to his vehicle, climbed over a large snow bank into the street, walked towards the driver's side door,

¹ Petitioner's shift on the February 17, 2010, was a 7:00 a.m. to 3:00 p.m. tour (Petition at ¶ 7).

and slipped and fell, injuring his left hip and elbow (Petition at ¶ 14).

Petitioner returned to the family court in Westbury and reported his injury to his supervisors, Lt. Cafiero and Capt. Schnurr (Petition at ¶ 16). After reporting his injury, Petitioner went for treatment at the Nassau University Medical Center (“Hospital”). The Hospital discharged the Petitioner with instructions to visit a private orthopedist (Petition at ¶ 19; Ex. “A” to Petition). On that same day, Petitioner completed various forms related to his fall, including an “Injury Sustained While on Duty” form, a “Report form 85-II” and an “Employer’s Report of Injury/Illness” (Petition at 21; Ex. “B” to Petition). These forms, together with the “Emergency Department Patient Discharge Instructions” were submitted to the Department’s Medical Investigation Unit with the expectation that Petitioner would receive disability benefits pursuant to General Municipal Law § 207-c (Petition at ¶ 21).

On February 22, 2010 Petitioner met with Dr. Robert Lippe, an orthopedist, who recommended rest, ice packs, an anti-inflammatory, and no work for a two-week period until his next medical appointment on March 9, 2010 (Ex. “G” to Petition). On March 9, 2010, Petitioner returned to Dr. Lippe for re-evaluation at which time it was determined that Petitioner could return to work for full duty without restrictions (Ex. “F” to Petition).²

By letter dated March 10, 2010, Petitioner was informed by the Department that he was “not entitled to benefits pursuant to 207C” (Ex. “E” to Petition). Petitioner’s claim was denied for the following reasons: “insufficient evidence that the incident you claim was sustained in the performance of your duties”; and “insufficient documentation” to the extent that witness reports and a tour commander/supervisor report were either missing or incomplete (Ex. “E” to Petition). In essence, the denial of 207-c benefits meant that Petitioner’s injury leave was deducted from his sick leave entitlement.

On March 17, 2010, Petitioner’s Supervisor, Lt. Cafiero wrote a memo to the Department’s Medical Investigation Unit stating that “[o]n February 17, 2010 . . . Deputy Sheriff Sergeant Patalano reported to me that he sustained an injury while performing his field work that morning. He further stated that he would have his injury attended to at NUMC.” (Ex. “H” to Petition).

On March 26, 2010, Dr. Lippe submitted a “Doctor’s Narrative Report” to the Worker’s Compensation Board (Ex. “I” to Petition). The Worker’s Compensation Board thereafter issued an administrative decision that the “claimant Victor Patalano had a work related injury involving the left hip, left elbow” and was accordingly awarded \$2,040 for the time period in which he was out of work (2/18/10 to 3/15/10) (Ex. “J” to Petition).

Based on the Department’s denial of benefits pursuant to GML § 207-c, the Petitioner commenced the instant Article 78 proceeding against the Sheriff’s Department and Nassau

²A Petitioner returned to work March 15, 2010 (Petition at ¶ 29).

County (“County”) (collectively referred to as “Respondents”) asserting that the Respondents, in the absence of a hearing, arbitrarily denied his claim for benefits under GML § 207-c when they deducted 18 days of Petitioner’s injury leave to 18 days of sick leave entitlements. Based on that denial, Petitioner seeks from this court: 1) a declaration that the actions taken by Respondents violate GML § 207-c and 42 USC § 1983; 2) a permanent injunction against the Respondents prohibiting the alleged violations of the aforementioned statutes and from interfering with Petitioner’s lawful employment; 3) the reinstatement of Petitioner’s time and leave, including disability pay, with interest ; and attorneys’ fees.

In response, Respondents contend that Petitioner’s claim for benefits pursuant to General Municipal Law § 207-c was denied due to insufficient evidence that the Petitioner sustained an injury while in the *performance* of his duties (Respondents’ Answer and Objections at ¶¶ 79-81). As to the due process hearing or lack thereof, Respondents assert that covered employees seeking benefits pursuant to General Municipal Law § 207-c are not entitled to a hearing as such employees do not have legitimate vested property interests; rather they have a “mere expectation of these benefits” (Respondents’ Answer and Objections at ¶¶ at 83-84). In sum, Respondents assert that the Department’s determination to deny Petitioner benefits pursuant to General Municipal Law § 207-c was rational, reasonable and proper as a matter of law.

Analysis

Standard of Review in Article 78 Proceedings

It is well settled that the standard for judicial review of a municipal agency’s determination pursuant to CPLR Article 78 is limited to whether the agency acted arbitrarily or capriciously without any sound basis in reason (*Matter of Pell v Board of Education*, 34 NY2d 222, 231-232 [1974]). An agency’s determination must be upheld if the court finds the determination supported by a rational basis (*Matter of Packman v Calogaro*, 12 NY3d 424 [2009]). However, administrative action may be overturned where it is “taken without sound basis in reason or regard to the facts” (*Matter of Wooley v N.Y.S. Department of Correctional Services*, 15 NY3d 275 [2010]).

Eligibility for Benefits Pursuant to GML § 207-c

General Municipal Law § 207-c provides for the payment of the full amount of regular salary or wages to a police officer or other covered municipal employee who is injured “in the performance of his duties” or is taken ill “as a result of the performance of his duties” (GML § 207-c[1]). “These payments continue until the disability has ceased or the disabled employee is granted a disability retirement” (*Theroux v Reilly*, 1 NY3d 232 [2003]). “In order to be eligible for disability benefits pursuant to GML § 207-c, a covered municipal employee need only prove a direct causal relationship between job duties and the resulting illness or injury” (*Matter of Schmidt v Putnam County Office of Sheriff*, 49 AD3d 761 [2d Dept 2008]; see also *Matter of White v County of Cortland*, 97 NY2d 336, 340 [2002]).

There is ample evidence before this court that service of a summons is a duty expressly delineated for Petitioner's position as Deputy Sheriff Sergeant (Ex. "B" to Petitioner's Affirmation in Further Support). Here, it is undisputed that Petitioner was injured as he was returning to his vehicle after serving a family court summons. This fall and resulting injury, however, according to Respondents, was not causally related to the performance of Petitioner's duties as a Deputy Sheriff and, upon that basis, 207-c benefits were denied.

Contrary to the Respondents' contention, "the word 'duties' in GML § 207-c encompasses the full range of a covered employee's job duties" and incorporates that activity in which Petitioner was involved at the time of his fall (*Theroux v Reilly*, 1 NY3d at 240, *supra*; *Matter of Schmidt v Putnam County Office of Sheriff*, 49 AD3d at 761, *supra*).

Dobbertin v Town of Chester (292 AD2d 382 [2d Dept 2002]) is particularly instructive in this regard. In *Dobbertin*, a police officer was called to a residence to investigate a report of a possible intruder. After inspecting the premises, the officer was walking back to her parked vehicle at which time she slipped and fell on ice and snow and injured her hand. Following the denial of her application for benefits pursuant to 207-c, the officer brought a petition to challenge the determination. The Supreme Court affirmed the determination to deny benefits and the officer appealed. The Second Department reversed, finding that:

The denial of the petitioner's application for benefits under General Municipal Law § 207-c was arbitrary and capricious. We disagree with the Supreme Court that the petitioner, who was still at the site of the investigation when she fell, was not engaged in "special work related to the nature of heightened risks and duties." The petitioner was not spatially or temporally removed from the "special work" she had been dispatched to perform, and she was injured in the performance of her duties within the meaning of the statute.

(*Dobbertin v Town of Chester*, 292 AD2d at 384, *supra* [internal citations omitted]).

Like the officer in *Dobbertin*, the Petitioner at bar was not temporarily or spatially removed from the job for which he was called to do, namely, serve a Family Court summons. Petitioner began his work day in the field by serving a Family Court summons at 7:00 a.m., a specifically enumerated job duty required of a County Deputy Sheriff (Ex. "B" to Affirmation in Further Support of Petition). After serving the summons, he immediately proceeded to his car, a county vehicle, and fell (Petition at ¶¶ 9-11). On these facts, this court concludes that Petitioner's fall was causally related to his job duty in serving the summons (*see Matter of White v County of Cortland*, 97 NY2d 336, 340 [2002]).

The petitioner in another slip and fall case, *James v County of Yates Sheriff's Department* (300 AD2d 989 [4th Dept 2002]) sustained a back injury after he slipped and fell on ice and snow while performing a routine building check as part of his patrol duties as a deputy sheriff. The Fourth Department reversed the granting of the petition seeking to compel payment of 207-c

benefits because the routine building check did not involve a heightened risk or duty. The Court of Appeals reversed the Fourth Department, however, based upon an erroneous application of a heightened risk standard in determining 207-c eligibility benefits (*Theroux v Reilly*, 1 NY3d at 244, *supra*).

Based on the foregoing, and in view of the fact that General Municipal Law 207-c is a remedial statute which should be liberally construed in favor of the injured employee the statute was designed to protect, the Respondents' denial was not rationally based upon the evidence presented and thus, the court concludes that the denial was arbitrary and capricious and without any sound basis in reason (CPLR 7803[3]; *Matter of White v County of Cortland*, 97 NY2d at 339, *supra*; *Matter of Schmidt v Putnam County Office of Sheriff*, 49 AD3d at 761, *supra* [petitioner entitled to 207-c benefits where injury sustained from an on-the-job fall was causally related to petitioner's duties]).

As an aside, this court notes that the mere fact that Petitioner was granted worker's compensation benefits does not automatically result in the granting of benefits under General Municipal Law ¶ 207-c. The Court of Appeals has specifically addressed, and rejected this very argument, given that "the two statutory benefit schemes 'follow paths of differential interpretation and application'" for which the Legislature chose different eligibility standards (*Matter of Theroux*, 1 NY3d at 242, *supra* [an officer might qualify for workers compensation benefits but not for 207-c benefits]).³

Petitioner was Not Entitled to a Hearing Prior to the Denial of 207-c Benefits

While it is the opinion of this court that Petitioner was entitled to 207-c benefits, Petitioner was nevertheless not entitled to a hearing prior to Respondents' denial of such benefits. The law is well settled that a due process hearing is not required where 207-disability benefits were denied outright rather than having been revoked or terminated (*Matter of McTigue v Town of Clarkstown*, 21 AD3d 374 [2d Dept 2005]; *Matter of Cole-Hatchard v Sherwood*, 309 AD2d 933 [2d Dept 2003]; compare *Ramos v Alicia Court Enterprises, Inc.*, 58 AD3d 709 [2d Dept 2009] [property interest in disabled officer's right to receive benefits gave rise to procedural due process protection before those payments were *terminated*]; *Kempkes v Downey*, 53 AD3d 547 [2d Dept 2008] [only benefits that have already been conferred constitute a protected property interest and, thus, "the constitutional guarantee of due process requires that a recipient of benefits under General Municipal Law § 207-c be granted an evidentiary hearing *prior to the deprivation* of such benefits"] [emphasis added]; *Matter of DeMasi v Benefico*, 34 AD3d 472, 473 [2d Dept 2006] [Supreme Court properly directed the Village not to *terminate or reduce* 207-c disability benefits without first conducting an evidentiary hearing]; *Park v Kapica* 25 AD3d 801 [2d Dept 2006], *aff'd* 8 NY3d 302 [2007] ["petitioner's disability payments

³ The eligibility standard for workers compensation benefits is "arising out of and in the course of employment," while the eligibility standard for 207-c benefits is "in the performance of his duties" (*Matter of Theroux*, *supra*, at 242).

constituted a property right giving rise to the procedural due process protection of an evidentiary hearing *before they could be terminated*"]; see also *Matter of Raymond v Walsh*, 63 AD2d 1715 [4th Dept 2009]; *Matter of Schenectady County Sheriffs Benevolent Assoc. v McEvoy*, 124 AD2d 911 [3d Dept 1986] [hearings are an indispensable precondition for the *discontinuance* of vested benefits; however, prior to the receipt of benefits, a claimant possesses nothing more than a mere expectation of benefits to which procedural safeguards associated with the termination of a vested property interest need not be observed]).

Petitioner's Claim Pursuant to 42 USC § 1983

The Petitioner claims that Respondents violated 42 USC § 1983 by denying him due process before denying his 207-c benefits. A plaintiff alleging a Section 1983 violation must prove the deprivation of a constitutional or federal statutory right (*Daniels v Williams*, 474 US 327 [1986]). As discussed, the Petitioner was not entitled to hearing prior to the denial of 207-c benefits as Petitioner did not have a vested property interest in such benefits. General Municipal Law 207-c benefits are only protected property interests once it is determined that a covered employee had already been granted such benefits (*Kempkes v Downey*, 53 AD3d 547 [2d Dept 2008] [only benefits that have already been conferred constitute a protected property interest and, thus, "the constitutional guarantee of due process requires that a recipient of benefits under General Municipal Law § 207-c be granted an evidentiary hearing *prior to the deprivation* of such benefits"]; *Matter of McTigue v Town of Clarkstown*, 21 AD3d 374 [2d Dept 2005]; *Matter of Cole-Hatchard v Sherwood*, 309 AD2d 933 [2d Dept 2003]). Accordingly, Petitioner's 42 USC § 1983 claim must fail.

Attorneys' Fees, Costs, Disbursements, and Interest

CPLR 8601 allows for the recovery of attorneys' fees and expenses by certain "prevailing parties" in actions and proceedings against the state and its agencies and officials unless the state's position was substantially justified (*Greer v Wing*, 95 NY2d 676 [2001]). Petitioner's claim for attorneys' fees, which is considered a form of incidental relief in an Article 78 proceeding, is hereby granted as the Respondents' position in denying Petitioner his disability benefits pursuant to General Municipal Law 207-c was not substantially justified.⁴

Petitioner's claim for interest, however, is denied as such relief is not specifically authorized in Article 78 proceedings (*Gordon v Board of Educ. of City of New York*, 52 Misc2d 175 [Sup Ct Kings County 1966] [interest not awarded on an award of back pay in a mandamus proceeding for reinstatement to a civil service position as there was no statutory basis for it]).

Based on the foregoing, it is hereby ordered that the Petition is granted to the extent indicated above and the Petitioner is granted judgment as follows: declaring that the

⁴ Pursuant to the New York State Equal Access to Justice Act (CPLR 8600-04), counsel fees and other reasonable expenses incurred in any civil action against the state are recoverable.


Respondents' determination was in violation of the General Municipal Law § 207-c; Respondents are directed to reinstate Petitioner's sick leave and benefits, including disability; awarding him reasonable attorneys' fees to be determined at an inquest which shall be held on Tuesday, February 8, 2011 at 9:30 A.M.

The Petitioner is directed to file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of the same together with receipt of payment, upon the Calendar clerk of this Court within 30 days of the date of this Order.

In all other respects, the Petition is dismissed.

This constitutes the decision and order of the court.

Dated: December 23, 2010



Hon. Vito M. DeStefano, J.S.C.

ENTERED
JAN 05 2011
NASSAU COUNTY
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