

Matter of Casado v Kelly
2011 NY Slip Op 30376(U)
February 16, 2011
Supreme Court, New York County
Docket Number: 107538/2010
Judge: Saliann Scarpulla
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 107538/2010
CASADO, ALVARO
VS.
KELLY, RAYMOND W.
SEQUENCE NUMBER : 001
ARTICLE 78

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

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 is determined in accordance with the accompanying decision/order.

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 given based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 2/16/11

Saliann Scarpulla
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
IN THE MATTER OF THE APPLICATION OF
ALVARO CASADO,

Petitioner,
-against-

Index No.: 107538/2010
Submission Date: 11/10/10

RAYMOND W. KELLY, POLICE COMMISSIONER
OF THE CITY OF NEW YORK AND THE NEW
YORK CITY POLICE DEPARTMENT,

DECISION AND ORDER

Respondents.

-----X
For Petitioner: Eric M. Manganelli
32 Court Street, Suite 1702
Brooklyn, NY 11201
For Respondents: Michael A. Cardozo, Corporation Counsel of the City of New York
100 Church Street, Room 2-314
New York, NY 10007

Papers considered in review of this petition and cross motion to dismiss:

- Petition 1
- Notice of Cross Motion 2
- Replies 3, 4

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).

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Alvaro Casado ("Casado") challenges the determination of respondents Raymond W. Kelly, Police Commissioner of the City of New York and the New York City Police Department ("NYPD") terminating his employment as a probationary police officer. NYPD cross moves to dismiss the petition.

On or about February 21, 2006, Casado entered the service of the Air National Guard ("ANG") as Senior Airman. On or about January 17, 2008, Casado began his employment as a probationary NYPD police officer.

According to the allegations of the petition, on October 3, 2009, Casado was involved in a motor vehicle accident. After the accident, he went to his girlfriend's mother's home, at which he drank Mate de Coca tea to help him relax. On October 4, 2009, Casado underwent a drug test performed by ANG.

On November 2, 2009, NYPD required him to undergo a drug test in conjunction with the anticipated end of his two year term as a probationary police officer. On November 6, 2009, NYPD agents escorted Casado from his home to an NYPD drug testing facility in Queens to undergo another drug test. The next day, ANG agents informed him that the results of his October 4, 2009 drug test indicated that he had tested positive for cocaine. ANG then informed Casado in writing that it was recommending that Casado be discharged from service due to "wrongful use of a Controlled Substance: cocaine, as evidenced by a positive urine test for cocaine." He was given until December 6, 2009 to submit a defense challenging this recommendation to discharge him from ANG.

Thereafter on November 12, 2009, Casado submitted to another drug test performed by a private company at his own expense. All of the November drug tests came back negative for all drugs, including cocaine. However, the NYPD submitted the samples collected from Casado as the result of the November 2, 2009 drug test to be reevaluated. On December 15, 2009, a revised report was issued, indicating the presence of a concentration of .3 ng/10 mg of cocaine metabolites.

By memorandum dated December 5, 2009, Casado submitted a written defense to the ANG challenging the recommendation to discharge him. In the memorandum, Casado explained that the October 4, 2009 positive drug test was likely the result of his consumption of the Mate de Coca tea the day before. He submitted reports and studies which indicated that consumption of Mate de Coca tea may result in a person testing positive for the use of cocaine. He also submitted the affidavit of Steven C. Harris, MD, MPH ("Harris"), who concluded that Casado's consumption of the Mate de Coca tea could have caused his urine to test positive for cocaine metabolites at the concentration found. Harris also maintained that the fact that all three follow-up drug tests came back negative suggests that Casado was not using cocaine in the 2-3 months prior to November 12, 2009.

By letter dated March 9, 2010, Casado was terminated from his probationary employment as an NYPD police officer. He was given no reason for his termination.

By memorandum issued on April 6, 2010, ANG determined that no disciplinary action would be taken against Casado because it concluded that notwithstanding the positive drug test results, his was a case of "innocent ingestion."

Casado now commences this Article 78 proceeding challenging NYPD's determination to terminate his employment as a probationary police officer. Casado maintains that NYPD's determination was arbitrary and capricious because in making the determination to terminate Casado's employment based on the December 15, 2009

revised report, NYPD eliminated its standard threshold of 5 ng/10 mg as the level below which a drug test which tests for the concentration of cocaine metabolites in a subject's urine will be considered as negative and instead considered the concentration of .3 ng/10 mg of cocaine metabolites as a positive test result for the use of cocaine. Casado further maintains that NYPD failed to consider all relevant facts and evidence which demonstrated that he only tested positive for cocaine use on October 4, 2009 because of his ingestion of Mate de Coca tea the day prior.

NYPD cross moves to dismiss the petition, arguing that the petition fails to state a cause of action. NYPD maintains that judicial review of a decision to terminate a probationary employee is limited to a determination of whether the decision was made in bad faith, that is, in violation of the Constitution, a statute or decisional law. NYPD further contends that at the time its decision to terminate Casado's employment was made, none of the evidence concerning his alleged ingestion of Mate de Coca tea was brought to the attention of the NYPD. In any event, any facts that come to light after a decision has been made can not be used to show that the decision was made in bad faith.

NYPD further maintains that no evidence was presented that the NYPD retest resulting in the December 15, 2009 report classified the results as positive for cocaine use or that the retest affected the NYPD's decision to terminate Casado's employment at all.

Discussion

A probationary police officer may be discharged without a hearing for almost any reason, or for no reason at all, as long as the decision is not in bad faith or for a constitutionally impermissible reason, or in violation of statutory or decisional law. The petitioner bears the burden of demonstrating respondent's bad faith by competent evidence, rather than speculation. See *Swinton v. Safir*, 93 N.Y.2d 758 (1999); *Bourne v. New York City Transit Auth.*, 274 A.D.2d 581 (2nd Dept. 2000); *Smith v. Abate*, 212 A.D.2d 449 (1st Dept. 1995); *Cortijo v. Ward*, 158 A.D.2d 345 (1st Dept. 1990); *Rainey v. McGuire*, 111 A.D.2d 616 (1st Dept. 1985). In reviewing Article 78 administrative determinations, the function of the Court "should not be to second guess . . . [but] is simply to determine if petitioner has shown bad faith on the part of the respondent." *Soto v. Koehler*, 171 A.D.2d 567, 569 (1st Dept. 1991).

Here, Casado fails to point to any competent evidence demonstrating that NYPD's determination to terminate his employment was made in bad faith, for an impermissible reason, or in violation of statutory or decisional law. Casado was given no reason for his termination and he has presented no evidence that he was terminated because of the results of one or any of the drug tests he underwent, other than mere speculation. Even if NYPD did terminate Casado's employment based on the October 4, 2009 ANG positive drug test results, Casado has submitted no evidence to establish that such was done in bad faith, for an impermissible reason, or in violation of statutory or decisional law. Casado

[* 7]

submits no evidence indicating that NYPD was notified of his explanation that the October 4, 2009 ANG positive drug test result was due to his consumption of the Mate de Coca tea. Further, ANG did not reach its determination that Casado's was a case of innocent ingestion until nearly a month after NYPD had already reached its determination to terminate Casado's employment.

In accordance with the foregoing it is

ORDERED and ADJUDGED that petitioner Alvaro Casado's petition is denied and the proceeding is dismissed; and it is further

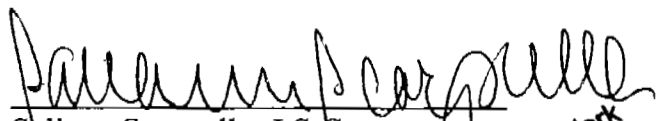
ORDERED that respondents Raymond W. Kelly, Police Commissioner of the City of New York and the New York City Police Department's cross motion to dismiss is denied as moot; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
February 16, 2011

ENTER:


Saliann Scarpulla, J.S.C.

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).