

Vrettos v City of New York

2011 NY Slip Op 30536(U)

March 2, 2011

Supreme Court, New York County

Docket Number: 110625/10

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFÉ
J.S.C.

PART 5

Index Number : 110625/2010
VRETTOS, NICHOLAS
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78
CAL # 102

INDEX NO. _____
MOTION DATE 1/11/11
MOTION SEQ. NO. _____
MOTION CAL. NO. 102

this motion to/for _____

Notice of Motion/^{pet}Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits motion to DISMISS
Replying Affidavits _____

PAPERS NUMBERED
1
2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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: 3/2/11

[Signature]
BARBARA JAFFÉ J.S.C.

MAR 02 2011

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 : PART 5

-----X

NICHOLAS VRETTOS,

Plaintiff,

-against-

Index No. 110625/10

Motion Date: 1/11/11
Motion Seq. No.: 001
Calendar No.: 102

DECISION & JUDGMENT
UNFILED JUDGMENT

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THE CITY OF NEW YORK and
THE FIRE DEPARTMENT OF THE CITY OF NEW YORK

Defendants.

-----X

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Petitioner seeks, pursuant to CPLR 7803, an order vacating a decision by the commissioner of the Fire Department of the City of New York (FDNY) denying his request for reinstatement as a firefighter, and an order directing reinstatement, or, in the alternative, a hearing. By notice of motion dated October 22, 2010, respondent moves pursuant to CPLR 7804(g) and 3211(a)(7) for an order dismissing the petition. Petitioner opposes. For the reasons that follow, the motion is granted and the petition is dismissed.

I. ALLEGED FACTS AND PERTINENT PROCEDURAL BACKGROUND

Petitioner was denied reinstatement as a New York City Firefighter upon his voluntary resignation following his conviction for falsely reporting a fire.

Petitioner alleges that he had been with the Fire Department for seven years, has worked

in the City Island firehouse since March 2008, and had an otherwise commendable record. (Notice of Petition, dated July 27, 2010 [Pet.], Exh. 1.) On December 4, 2009, in an apparent effort to call attention to the pending closure of the City Island firehouse, petitioner called 911 and falsely reported a fire in a school cafeteria. (*Id.*) The record reflects that petitioner encouraged others to place similar calls, and the Fire Department responded. (*Id.*, Exh. 4). On December 10, 2008, petitioner turned himself in, and was suspended from service by FDNY on December 11, 2008. (Pet.). On May 4, 2009, petitioner voluntarily submitted his resignation effective that day. (*Id.*, Exh. 1). On May 13, 2009, petitioner pleaded guilty to falsely reporting an incident, a class A misdemeanor. (*Id.*) He was sentenced to a conditional discharge and fined one-hundred dollars. (*Id.*)

On March 26, 2010, petitioner obtained a certificate of relief from disabilities, and on January 11, 2010, a certificate of good conduct from the New York City Police Department. (*Id.*)

On April 19, 2010, petitioner asked to be reinstated as a firefighter. (*Id.*, Exh. 1). His application included a signed and notarized statement apologizing for his misconduct and taking full responsibility for it, and was accompanied by numerous statements from former colleagues, superiors, and close acquaintances speaking of his good character and dedication as a public servant. (*Id.*) By letter dated April 28, 2010, the FDNY commissioner notified petitioner that he could not be considered for reinstatement, as “in 2002, the FDNY Administration adopted a no-reinstatement policy,” and since that time “there had no been no reinstatements to the uniform force from retirement or resignation.” (*Id.*, Exh. 2).

By letter dated May 5, 2010, petitioner’s counsel sought a copy of the no-reinstatement policy and suggested that the policy might not be uniformly enforced. (*Id.*, Exh. 3). By letter

dated June 3, 2010, FDNY advised that there is no written policy, but that FDNY retains discretion over reinstatement and has, in its discretion, denied all regular applications for reinstatement since 2002. (*Id.*, Exh. 4). The commissioner also informed petitioner that in his April 28 letter, he had not wished to call attention to petitioner's misconduct, and in any event, the denial constituted a reasonable exercise of discretion given the incidents leading to petitioner's resignation. (*Id.*). This petition followed.

II. CONTENTIONS

Petitioner contends that FDNY is barred from taking disciplinary action against him absent timely notice, adherence to statutory procedures, and a hearing on the charges of misconduct; that FDNY has no discretion to circumvent these procedures; and that numerous factors including his previously unblemished record and support from other firefighters justify his reinstatement. (Pet.). In support, he submits his request for reinstatement including his acknowledgment of responsibility, statements from firefighters, superiors, and other friends speaking on his behalf, and, for the first time in support of this petition, statements from FDNY lieutenants who, while acknowledging petitioner's misconduct, urge his reinstatement. (*Id.*, Exhs. 1, 5).

In support of its motion to dismiss, FDNY maintains that petitioner has failed to show that the denial of reinstatement was arbitrary and capricious or affected by an error of law, that the decision to reinstate is within the discretion of the FDNY commissioner, and that petitioner is not entitled a hearing. (Memorandum of Law in Support of Respondents' Cross-Motion to Dismiss the Verified Petition, dated Oct. 22, 2010).

III. ANALYSIS

On a pre-answer motion to dismiss a petition pursuant to CPLR 7804(f), only the petition is considered, and all of the allegations contained therein are deemed true. (*Matter of 1300 Franklin Ave. Members, LLC v Board of Trustees Incorp. Village of Garden City*, 62 AD3d 1004, 1006 [2d Dept 2009]; *Matter of DePaoli v Board of Ed., Somers Cent. School Dist.*, 92 AD2d 894 [2d Dept 1983]; *211 West 56th St. Assocs. v Dept. of Housing Preservation*, 78 AD2d 793, 794 [1st Dept 1980]). The court may deny the motion, order respondent to submit an answer, and permit a hearing upon request. (CPLR 7804[f]).

Reinstatement to the Fire Department is governed by the Personnel Rules and Regulations of the City of New York (PRR), which provide that an employee who has resigned may be reinstated by the commissioner so long as “the separation from employment was without fault or delinquency on the employee’s part and the head of the agency to whom the employee has applied for such reinstatement is willing to reinstate the employee.” (55 RCNY § 6.2.1[b]). The FDNY commissioner is authorized, pursuant to Administrative Code § 15-113, to punish an employee by dismissal. (*Von Essen v New York City Serv. Commn.*, 4 NY3d 220, 224 [2005]). Thus, the decision to reinstate is within the complete discretion of the commissioner, and there is no entitlement to reinstatement where a voluntary resignation results from an applicant’s misconduct. (*See McGill v D’Ambrose*, 58 AD2d 604, 624 [2d Dept 1977] [“resignation is a voluntary exercise which absolutely severs the employment relationship;” reinstatement is within discretion of officer and not for courts]). In an Article 78 proceeding, the court may only determine whether the decision not to reinstate is arbitrary or capricious or affected by an error of law. (CPLR 7803[3]).

It is deemed true that before petitioner falsely reported a fire, his seven-year record as a firefighter was commendable, that he feels passionately about his service as a firefighter, that his apology is genuine, and that the voluminous supporting affidavits submitted by his colleagues and former superiors are sincere. Nevertheless, as the decision to reinstate is within the complete discretion of the FDNY commissioner, statements in petitioner's favor are immaterial. (*Cf York v McGuire*, 99 AD2d 1023 [1st Dept 1984]; *affd* 63 NY2d 760 ["the fact that petitioner received some favorable evaluations as well as some unfavorable ones . . . is not sufficient to raise a triable issue of fact"]).

As the decision whether to reinstate petitioner is within the commissioner's discretion, it is rational, whether based on a department-wide policy of non-reinstatement or on his misconduct (*cf Silverzweig v Doherty*, 76 AD3d 915, 916 [1st Dept 2010] [reinstatement discretionary]; *Salas v New York City Police Dept.*, 63 AD3d 468 [1st Dept 2009], *lv denied* 13 NY3d 844 [rational basis for decision not to reinstate]), and petitioner alleges no facts to establish that, even if FDNY had reinstated other firefighters, it was arbitrary or capricious to deny him reinstatement, given his admittedly illegal and dangerous conduct.

Lepore v Safir does not warrant a contrary result. (NYLJ, July 23, 2001, at 29, col 2 [Sup Ct, New York County 2001]). There, the petitioner, a police officer, was compelled to resign as a result of the department's "zero tolerance policy" on drug use. (*Id.*). The officer denied having used illegal drugs, and there was credible evidence that the high testosterone levels reflected on his drug test resulted from legal over-the-counter dietary supplements. (*Id.*). Nevertheless, following an investigation into his alleged drug use, he resigned with no charges pending against him, and his resignation form reflected that he could be reinstated within one year with the police

commissioner's approval. (*Id.*). The petitioner was denied reinstatement on the ground that he had resigned due to his "fault or delinquency." (*Id.*). In light of the credible evidence that the charges against him were false, as he had no chance to establish his innocence, and as he was led to believe that he could be reinstated, the court found that the decision not to reinstate him was arbitrary and capricious, and thus ordered the police commissioner to conduct a fair review of his application. (*Id.*).

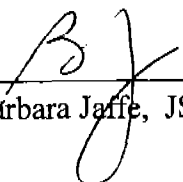
Here, by contrast, petitioner's guilt is established by his plea and acknowledgment of his wrongdoing, and he was not assured reinstatement following his voluntary resignation. *Silberzweig v Doherty* is also distinguishable, and, in any event, it has been reversed on appeal. (23 Misc 3d 618, 2009 NY Slip Op 29061 [Sup Ct, New York County 2009], *revd.*, 76 AD3d 915 [1st Dept 2010] [rational basis for termination based on violations]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the motion to dismiss is granted and the proceeding is dismissed.

This constitutes the decision and order of the court.



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: March 2, 2011
New York, New York

MAR 02 2011

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6