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| Matter of Salerno v Kelly |
| 2011 NY Slip Op 30693(U) |
| March 21, 2011 |
| Sup Ct, NY County |
| Docket Number: 110024/10 |
| Judge: Alice Schlesinger |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 110024/2010
SALERNO, SARA
VS.
KELLY, RAYMOND
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~~ Article 78 petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

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).

MAR 21 2011

Dated: _____

Alice Schlesinger
ALICE SCHLESINGER 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

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

SARA SALERNO,

Petitioner,

Index No. 110024/10
Motion Seq. No. 001

-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 and THE BOARD OF TRUSTEES of the
Police Pension Fund, Article II, NEW YORK CITY
POLICE DEPARTMENT,

Respondents.

UNFILED JUDGMENT
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B)---X

-----X
SCHLESINGER, J.:

Before the Court is a petition brought pursuant to Article 78 of the CPLR to review and annul the decision of the Board of Trustees of the Police Pension Fund which denied Sara Salerno an Accident Disability Retirement (ADR) allowance pursuant to the Administrative Code §13-252.1 (the WTC Disability Law). The petition also asks for an order pursuant to §2307(a) of the CPLR directing respondent to serve copies of the Internal Affairs Bureau Roll Call reports and command logs, which reflect petitioner's work sites for the period from September 11, 2001 through September 12, 2002; copies of petitioner's time records and overtime reports for this same period; and copies of the minutes of each meeting of the Board of Trustees at which Ms. Salerno's application was discussed.

Ms. Salerno was appointed to the uniformed force of the NYPD on June 30, 1995. She retired on December 31, 2006, on an Ordinary Disability Retirement after sustaining

an injury to her right knee on June 7, 2000. However, on November 20, 2006, under the recently enacted World Trade Center (WTC) Law, codified at New York Retirement Social Security Law §2, subd. 36(a)(i), she filed a Notice of Participation in the World Trade Center Rescue, Recovery & Clean-up Operation and requested ADR benefits. In her application, she swore that she had participated in security and recovery efforts on September 11-13, September 15-21, September 23-28, September 30 and October 1, 2001. The petitioner, because of her knee injury, had been on restricted duty before the September 11th attack and was assigned to the Internal Affairs Bureau at 315 Hudson Street.

Pursuant to the WTC Law, an officer must first be recommended for ADR by the Medical Board before the Pension Fund will get involved to review and verify work at the site. Therefore, in the first instance, Ms. Salerno submitted an application for ADR reclassification on April 21/22, 2009.¹ There she alleged that she suffered from gastroesophageal reflux disease (GERD), laryngitis, vocal cord disease, sinusitis, and lupus as a result of her WTC exposure. On July 10, 2009, the Medical Board, after a careful review of past medical records and a physical examination and interview, did recommend approval of Ms. Salerno's application for Accident Disability Retirement pursuant to the WTC Law. Their final diagnosis was Vocal Cord Problems Secondary to World Trade Center Exposure.

The matter then was referred to the Board of Trustees where Ms. Salerno stated she had worked at the WTC site for at least 40 hours in the year following September 11,

¹The petition says April 21, 2009, while the answer says the filing was April 22, 2009. The application itself seems not to have a date. The precise date here does not really matter.

2001, as was required by the WTC Disability Law. She also supplemented her application by submitting a letter dated September 2, 2009, from her commanding officer Inspector Joseph Pfister. It said:

To Whom It May Concern:

Former Detective Sara Salerno, Tax #916625, was assigned to the Internal Affairs Bureau from 12/07/00 through 12/31/06, at 315 Hudson Street, New York, NY.

A review of Department records, including Employee Time Records and Overtime Reports, reveal that former Detective Salerno performed various duties related to the September 11, 2001, terrorist attacks in the vicinity of 315 Hudson Street, New York, NY and lower Manhattan. Records indicate that she worked World Trade Center duties from 9/11/01 through October 1, 2001.

For your information.

Sincerely,
Joseph J. Pfister
Inspector

Also on September 2, 2009, in a memo format with attachments addressed to Detective Endowment Association, Lieutenant Richard E. Beshlian provided seven dates from September 11, 2001 to October 1, 2001 with tours that was a "payroll verification of Scheduled Tours and Overtime performed by Detective Sara Salerno at the World Trade Center vicinity and the area surrounding 315 Hudson Street."

Ms. Salerno's case first came before the Board on September 9, 2009. It was labeled for additional verification on that date, as well as on October 14, 2009, November 9, 2009, December 9, 2009, January 13, 2010, February 25, 2010 and March 10, 2010. The related minutes of those meetings are included in respondent's answer.

At the eighth meeting of the Board, on April 14, 2010, there was a fuller discussion. Specifically, Sergeant Patrick Boughton was asked to summarize the efforts that had been made to verify the petitioner's work in September and October of 2001. He referred to the two letters from Inspector Pfister and Lieutenant Beshlian. He pointed out to the members that while both supervisory police officials wrote that Detective Salerno had worked in the vicinity of the World Trade Center and the area of 315 Hudson Street, there was no specific location provided. Additionally, there was a UF-49 dated November 19, 2001 and signed by Captain John McDermott that was faxed to the Board on September 9, 2009. This form dealt with petitioner's claimed overtime since September 11, 2001 and showed that Salerno had earned over 90 hours in overtime. However, this document also was not specific as to where the overtime was earned.

Sergeant Boughton further stated that he had requested additional information from Lieutenant Beshlian as to the exact location where Detective Salerno had worked after the events of September 11, 2001, but that the employee time records and overtime slips that were sent were also inconclusive. The Sergeant also noted a possible inconsistency between Salerno's statement on her Notice of Participation, where she stated she did "security/recovery", and the overtime slips which listed "C/C", referring to Command and Control at the Internal Affairs Bureau where she was assigned, or simply "IAB".

He concluded his summary by saying that after further searching for any additional documentation:

we have nothing to indicate Detective Salerno had worked at the World Trade Center. All records indicate that she worked at 315 Hudson Street, which is north of Canal Street, not in a qualifying area as it pertains to the World Trade Center Bill.

Following this, the members decided to vote, despite a request communicated to them by Ms. Salerno's attorney that the matter be tabled yet again because he wanted to write something. However, it was pointed out that there had been seven previous "tables". So by two votes of 6-6, the motions for a further "table" and to award Accident Disability Retirement to Ms. Salerno were both denied.

Counsel for petitioner now argues that the denial of the application for ADR was arbitrary, capricious, unreasonable, unlawful, and contrary to the constitution of the United States and various New York statutes, laws and rules. Further, he urges that the Board failed and refused to use the proper legal test of entitlement to an ADR pension applicable in these circumstances. Finally, counsel maintains that Salerno has met her burden to prove that she worked the requisite hours at the WTC, making the action of the Board contrary to the competent evidence.

The World Trade Center Law specifically mandates that to qualify for ADR, after first being found medically qualified by the Medical Board, a member of the force must prove that he/she participated in rescue, recovery or clean-up operations for a minimum of 40 hours during the year following September 11, 2001 or during any period within the 48 hours after the first plane hit.

Also, a specific geographical WTC site is described. This area, where this work had to be performed, is below a line starting from the Hudson River and Canal Street that runs east on Canal Street to Pike and south on Pike to the East River to the southern tip of Manhattan. There are other sites, such as in Staten Island, but these are not relevant here [See New York Retirement and Social Security Law §2(36), subd. (e), (f) and (g)].

Respondents argue, in opposition to the petition and in support of their position that the petition should be dismissed, that Ms. Salerno has failed to meet her burden twice. In the first instance, she has failed to show that she did in fact participate in WTC rescue operations at the statutorily defined sites. In this regard, a review of Department records suggests that she performed her duties at the Internal Affairs Bureau Command and Control office located at 315 Hudson Street, which is north of Canal Street and outside the statutorily defined area.

Further, pursuant to the above, respondent claims Ms. Salerno has been unable to show that the Pension Board acted arbitrarily or capriciously. Rather, counsel for respondents argue, the denial is supported by a rational basis.

In the competing briefs and at oral argument (and even after argument with the Court's permission), the attorney's submitted cases in support of their respective positions.² The cases cited were *Velez v Kelly*, Slip Op. Index No. 101597/09 (October 19, 2009) and *McGrath v Kelly*, Slip Op. Index No. 113535/08 (June 10, 2009), both decided by other judges in this court. Both cases are distinguishable on their facts from our case, although in *Velez*, similar to this matter, the officer was unable to prove to the Board that he had worked the requisite hours at the WTC site. There, the presiding judge dismissed the petition, finding that the officer had failed to establish his entitlement to ADR.

²At and before argument, over the objection of counsel for respondents, the attorney for petitioner submitted another statement, this time from a co-worker Detective Candace Baker, corroborative of Ms. Salerno's position. Also in court, counsel with his client asked the Court to view certain photographs, also supporting Ms. Salerno's position that she did work at the WTC site. However, the Court is not permitted to consider evidence outside the record. As is well known, this Court's sole function is to decide on the record before it whether the Board acted reasonably or not in denying the application.

In *McGrath*, the judge did remand the matter back to the Board, but it was because she had found that the Board had failed to consider relevant evidence. In other words, though the Board had searched extensively, it had done that in the wrong places and not where the evidence appeared to be located. Therefore, it was understandable that corroborative records could not be found and the matter was remanded so that a proper search could be conducted.

I cannot make a similar finding here. The facts here are much more like those in *Velez*. Ms Salerno submitted letters from her superior officers, not even affidavits as in *Velez*. However, all these letters did was suggest that Ms. Salerno had performed work related to WTC duties in and around the WTC vicinity and the area surrounding 315 Hudson Street. This documentation was not enough for the Board to find that Ms. Salerno had met the requirements of the law. Further, the work was not defined as "rescue, recovery or clean-up" work. But more importantly, there is no convincing proof that Ms. Salerno had worked at the requisite site. In fact, it could be argued that she had worked at her assignment at 315 Hudson Street, which is outside the defined area.

Therefore, I find that the Board acted reasonably on the basis of the evidence before them, noting that it was the petitioner's burden to prove that she qualified. Therefore, the petition is denied.

However, having said the above, it certainly may be the case that Ms. Salerno did in fact work at or near the WTC in the days after the attack on September 11, 2001. Further, it certainly may be the case that her medical disability, which has been established, was a result of her work there. So I urge the parties to revisit this controversy by Ms. Salerno, in the first place, asking the Board to hear her case again and providing it with

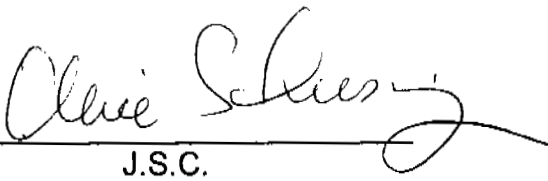
additional evidence. Then I believe the Board should approach such an appeal in an open and fair manner. What is so problematic here is the inability of the Department to come up with all the records that must have once existed, although probably lost in the chaotic period that followed the attack, which show the assignments of their members. Here in its answer, respondents do indicate that they have provided all the records regarding Ms. Salerno that they could find. But I emphasize, though the petitioner has failed to meet her burden this time, the Board while not lessening its obligation to follow the mandates of the law, should give Ms. Salerno every opportunity to show that she actually worked at or near the site on the requisite days.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed, without prejudice to the further proceedings discussed herein and without costs or disbursements to any party.

Dated: March 21, 2011

MAR 21 2011



J.S.C.

ALICE SCHLESINGER

UNFILED JUDGMENT
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