

<b>Matter of Brown v Kelly</b>
2011 NY Slip Op 31644(U)
June 15, 2011
Supreme Court, New York County
Docket Number: 110136/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C.  
Justice

PART 5

Index Number : 110136/2010

**BROWN, RALPH C.**  
vs.  
**KELLY, RAYMOND**

SEQUENCE NUMBER : 001

ARTICLE 78

*CAL # 5*

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for article 78

PAPERS NUMBERED

1, 2

3, 4

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

JUN 20 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/15/11 \_\_\_\_\_ J.S.C.  
*JUN 15 2011* *BARBARA JAFFE*

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  
In the Matter of the Application of RALPH C. BROWN,

Index No. 110136/10

Petitioner,

Motion Date: 4/5/11

Motion Seq. No.: 001

- against -

**DECISION & JUDGMENT**

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

Respondents.

For a Judgment pursuant to Article 78, CPLR, to review and annul the determination made by respondents denying petitioner a pension of three quarters of petitioner's salary as required by Administrative Code § 13-252, and for a further order directing payment of such pension retroactive to the date of petitioner's retirement, and for such other appropriate relief.

-----X  
BARBARA JAFFE, JSC:

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**JUN 20 2011**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

**For respondents:**  
Karen J. Seemen, ACC  
Michael A. Cardozo  
Corporation Counsel  
100 Church St., Room 5-143  
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212-788-1197

By notice of petition and verified petition dated July 16, 2010, petitioner brings this Article 78 proceeding seeking an order reviewing and annulling respondents' denial of his application for an accident disability retirement and directing respondents to retire petitioner retroactive to the date of his service retirement or, in the alternative, directing a hearing on the issues raised therein or directing respondents to permit him to present evidence at a hearing

before them. Respondents oppose the petition.

### I. BACKGROUND

Petitioner commenced his employment with the New York City Police Department (NYPD) on January 13, 1992 and remained continuously employed with the NYPD until his retirement. (Verified Petition, dated July 26, 2010 [Pet.]). While employed, petitioner was a member of the NYPD's Pension Fund. (*Id.*).

On October 26, 2005, while petitioner was on duty and changing into his police uniform in the station house locker room, petitioner's service weapon became caught while he was attempting to place it in its holster and it discharged, causing a bullet to penetrate his right hand. (*Id.*, Exh. A). A line of duty injury report from that day reflects that petitioner was the "victim of an accidental firearm discharge" when his "weapon suddenly and unexpectedly discharged." (*Id.*, Exh. B). As a result, two of petitioner's fingers were broken along with other injuries to his hand. (*Id.*, Exh. C).

In a final investigation report dated February 9, 2006, the NYPD concluded that petitioner exercised poor care of his firearm and deemed the incident an "Accidental Discharge, Violation." (*Id.*, Exh. G).

By accident disability examination order dated March 3, 2009, the NYPD requested that the Medical Board examine petitioner to determine whether he was permanently disabled and should be retired, indicating that his disability was a right hand derangement. (*Id.*, Exh. J).

On March 18, 2009, surgery on petitioner's hand was performed given the significant tightness across his index and long fingers and his inability to bend his fingers adequately. (*Id.*, Exh. K).

Sometime thereafter, petitioner applied for an accident disability retirement (ADR), alleging that as a result of the gunshot wound to his hand, he was unable to perform full police duties. (*Id.*, Exh. L).

On November 20, 2009, respondents' Medical Board examined petitioner and reviewed his medical records and found unanimously that:

In summary, [petitioner] suffered a gunshot wound to his right hand. It is the [Medical Board's] opinion that it is not in their purview to decide whether this was incidental to his duties or truly accidental. However, it is clear that the officer's marked stiffness and decreased strength preclude him from performing the full duties of a New York City Police Officer. In giving [petitioner] the benefit of doubt that this is indeed a line of duty injury, it is the opinion of the . . . Medical Board to recommend approval of the officer's own application for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement.

(*Id.*, Exh. M).

On May 12, 2010, respondents' Board of Trustees determined that petitioner's injury resulted from the routine performance of his duties and did not rise to the level of an accident, and thus denied petitioner's ADR application by a six to six vote. (*Id.*, Exh. N).

On September 20, 2010, petitioner retired from the NYPD. (*Id.*, Exh. O).

## II. CONTENTIONS

As it is undisputed that he is physically disabled from performing his full police duties and that his disability was caused by the gunshot incident in October 2005, given his allegation that his disability is the natural and proximate result of an accidental injury as his injury was caused suddenly and unexpectedly by a fortuitous mischance that was out of the ordinary, petitioner maintains that respondents' denial of his ADR application was arbitrary and capricious and unlawful. (Petitioner's Mem. of Law, dated Nov. 8, 2010).

Respondents maintain that petitioner has failed to establish, as a matter of law, that his disability was caused by an accident as defined by the New York City Administrative Code for the determination of an ADR application as petitioner's injury was not so out of the ordinary or unexpected as to constitute an accidental injury and was part of the ordinary risks of his police duties. (Respondents' Memo. of Law, dated Oct. 25, 2010).

### III. ANALYSIS

#### A. Applicable law

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1<sup>st</sup> Dept 1996]). Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1<sup>st</sup> Dept 2007], *affd* 11 NY3d 859 [2008]).

Pursuant to Administrative Code § 13-252, a police officer may retire with an ADR upon application to the commissioner stating that the applicant:

is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that

such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired.

And, upon a medical examination and investigation showing that the applicant is physically or mentally incapacitated

as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith.

The determination of an ADR application requires consideration of two factors. First, the Medical Board decides whether the applicant is disabled and should be retired. (*Matter of Meyer v Bd. of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 144-145 [1997]). It must then decide whether the disability resulted from a service-related accident, and certify its recommendation on this issue to the Board of Trustees. (*Id.* at 144-145). The Board of Trustees must then determine whether the disability was caused by a service-related accident. (*Id.*).

The Board of Trustees is bound by the Medical Board's determination as to whether an ADR applicant is disabled but must make its own determination as to whether the disability was caused by a service-related accident. (*Matter of Canfora v Bd. of Trustees of Police Pension Fund of Police Dept. of the City of N.Y., Art. II*, 60 NY2d 347 [1983]). If the Board of Trustees' determination to deny an ADR application is reached by a six to six tie vote, the determination may be set aside only if "it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident." (*Id.*).

An accident in this context has been defined as a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" and thus "an injury which occurs

without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury . . .” (*Matter of Lichtenstein v Bd. of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 NY2d 1010, 1012 [1982]).

B. Was the Board of Trustees’ determination arbitrary and capricious?

In *Matter of McCambridge v McGuire*, the Court of Appeals further clarified that an accidental injury is not an injury “sustained while performing routine duties but not resulting from unexpected events” and that the critical determination is whether there was a “precipitating accidental event.” (62 NY2d 563 [1984]). Thus, in *Matter of Starnella v Bratton*, the Court found that one petitioner’s injury, caused when he slipped on a pool of water in the bathroom, was accidental as it arose from a sudden and unexpected event, while the other petitioner’s injury, caused when he fell down a flight of stairs, was not an accidental injury as “[a] fall down the stairs as a result of one’s own misstep, without more, is not so out-of-the-ordinary or unexpected as to constitute an accidental injury as a matter of law.” (92 NY2d 836 [1998]).

The courts have thus distinguished between accidents caused by a sudden and unexpected external factor or event and those resulting from a own misstep or action, and have upheld determinations denying ADR applications where the injuries occurred due to a person’s own actions without any precipitating and unexpected event or factor. (*See eg Matter of Bisiani v Kelly*, 39 AD3d 261 [1<sup>st</sup> Dept 2007] [absent dispositive evidence showing that there was crack in station house floor, it could not be said as matter of law that petitioner’s fall was caused by crack rather than own misstep]; *Matter of O’Shei v Hevesi*, 26 AD3d 585 [3d Dept 2006] [petitioner injured when he sat on bench in locker room and it tipped over due to his own miscalculation and

no evidence that bench was defective]; *Matter of Dalton v Kelly*, 16 AD3d 200 [1<sup>st</sup> Dept 2005], *lv denied* 10 NY3d 705 [2008] [petitioner's catching of gun belt in police vehicle door was not sudden unexpected event]; *Matter of Gray v Kerik*, 15 AD3d 275 [1<sup>st</sup> Dept 2005] [petitioner hurt knee while stepping out of patrol car to direct traffic]; *Matter of Gamman v Kelly*, 11 AD3d 389 [1<sup>st</sup> Dept 2004] [petitioner moved chair away from desk and it slid backwards out from under her, causing her to fall, and there were no visible hazards in office or evidence that chair had broken back]; *Matter of Doyle v Kelly*, 8 AD3d 125 [1<sup>st</sup> Dept 2004] [petitioner did not prove that his tripping over wire in office was result of accident rather than misstep absent evidence that he was unaware of wiring prior to fall]).

Here, while the discharge of petitioner's gun was sudden and unexpected, the cause of or the event which led to the discharge was his own mishandling of the gun while he was attempting to holster it and there was no outside factor or unexpected event which caused him to mishandle it. Thus, petitioner has failed to establish, as a matter of law, that his injury arose from an accident rather than his own "misstep." (See *Matter of Dilello v DiNapoli*, 83 AD3d 1361 [3d Dept 2011] [upholding determination that petitioner's injury was not caused by accident as it arose after he attempted to rise from chair and butt of his gun became caught on armrest, and when he tried to dislodge himself, his feet tangled in wheels and he lost balance and fell]; *Matter of Hopp v Kelly*, 4 AD3d 176 [1<sup>st</sup> Dept 2004] [petitioner failed to show injury arose from accident as claimed incident did not constitute "sudden mischance over which he had no control"]).

And, having failed to demonstrate that his injury resulted from an accident, petitioner has also failed to demonstrate that respondents' determination was arbitrary and capricious. (See


*Matter of Walsh v Scopetta*, 73 AD3d 1192 [2d Dept 2010], *lv granted* 15 NY3d 715 [as cause of injury not unexpected, determination that injury not caused by accident was rationally based and not arbitrary and capricious, and court properly found that it could not determine as matter of law that petitioner's disability resulted from service-related accident]; *Matter of Fragale v D'Alessandro*, 55 AD3d 607 [2d Dept 2008] [as determination was based on credible evidence that petitioner's injury resulted from misstep and not accident, it was neither arbitrary nor capricious]; *Hipple v Ward*, 146 AD2d 201 [1<sup>st</sup> Dept 1989], *lv denied* 74 NY2d 614 [as petitioner did not prove that disability was caused by accident, denial of ADR application sustained]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

ENTER:

  
 \_\_\_\_\_  
 Barbara Jaffe, JSC  
**BARBARA JAFFE**  
 J.S.C.

DATED: June 15, 2011  
 New York, New York

**JUN 15 2011**

**FILED**  
**JUN 20 2011**  
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