

<b>Matter of Wolfe v Kelly</b>
2011 NY Slip Op 32807(U)
September 22, 2011
Sup Ct, Bronx County
Docket Number: 103928/2011
Judge: Robert E. Torres
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PART 291

Index Number : 103928/2011

WOLFE, ERIC

vs

KELLY, RAYMOND W.

Sequence Number : 001

ARTICLE 78

INDEX NO. 103928/11

MOTION DATE 6/24

MOTION SEQ. NO. 1

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	_____	No(s) <u>1</u>
Answering Affidavits — Exhibits	_____	No(s) <u>2, 3</u>
Replying Affidavits	_____	No(s) <u>4</u>

Upon the foregoing papers it is ordered that this motion is

**FILED**

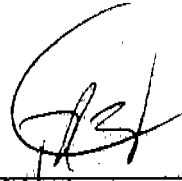
SEP 26 2011

NEW YORK  
COUNTY CLERK'S OFFICE

denied in accordance with the attached decision.

This Constitutes the Decision and Order of the Court.

Dated: 9/22/2011

  
\_\_\_\_\_, J.S.C.  
**ROBERT E. TORRES**  
**JUDGE**

1. CHECK ONE: .....  CASE DISPOSED
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 29  
PRESENT: HONORABLE ROBERT E. TORRES, J.S.C.

In the Matter of the Application of  
ERIC WOLFE,

INDEX NUMBER: 103928/2011

Petitioner,

For a Judgment Pursuant to CPLR  
Article 78

-against-

Present:  
HON. ROBERT E. TORRES

RAYMOND W. KELLY, as Commissioner  
of the New York City Police  
Department, and THE CITY  
OF NEW YORK,

**FILED**

**SEP 26 2011**

Respondents.

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Petitioner brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules seeking to move this Court to issue a directing Raymond W. Kelly and the City Of New York (hereinafter "Respondents") to reinstate the petitioner to his employment as a police officer with the New York City Police Department and directing that said respondents pay petitioner back pay since January 29, 2007. Respondent opposes the instant petition on the grounds that its determinations were not arbitrary, capricious or an abuse of discretion and moves the Court to dismiss it.

The relevant record herein reveals that Petitioner herein joined the New York City Police Department (hereinafter "NYPD") in 1989 and was promoted to detective in 1996 and detective second grade in 2001. On or about June 29, 2006, the NYPD charged petitioner with three specifications alleging violations of NYPD's regulations. Subsequently, a hearing was conducted over a span of four days before Assistant Deputy Commissioner Sarner (hereinafter Sarner) on said specifications.<sup>1</sup> All parties were represented by counsel at the hearing and 6 people testified

<sup>1</sup> The dates were September 27, 2006, September 28, 2006, October 3, 2006 and October 4, 2006.

including petitioner herein.<sup>2</sup> By Report and Recommendation dated February 15, 2007, Sarner found petitioner guilty and recommended his dismissal from NYPD. By Order effective April 1, 2007, respondent RAYMOND W. KELLY dismissed petitioner from NYPD. Thereafter, petitioner commenced an action pursuant to CPLR Article 78 in Supreme Court under Index Number 110171/2007 to annul the determination dismissing him from the Department. By Order dated December 21, 2007, said petition was transferred from the Supreme Court, New York County, to the Appellate Division, First Department. By Decision and Order dated December 21, 2007 entered December 21, 2007, the Appellate Division, First Department, annulling respondent's determination dated April 1, 2007, dismissing Specifications No. 1 and No. 2 against petitioner and remanding the matter for a new penalty on the third specification. By letter dated January 3, 2011, petitioner's attorney advised the NYPD that he was ready to report for duty with NYPD. Additionally, petitioner demanded back pay since January 29, 2007. Respondent RAYMOND W. KELLY reconsidered the penalty in light of the aforementioned decision by the Appellate Division, First Department. By letter dated March 29, 2011, S. Andrew Schaffer, Deputy Commissioner of Legal Matters responded to petitioner's attorney and explained that the matter had been remanded back to NYPD for a determination of a new penalty on the remaining specification. Additionally, the letter informed petitioner's attorney that respondent RAYMOND KELLY determined that the penalty of dismissal was the appropriate penalty for the remaining specification and that said respondent affirmed the previously penalty of dismissal.

On or about March 30, 2011, petitioner commenced the instant petition challenging respondent's reconsideration and reaffirmation of the petitioner's termination and seeking an order directing petitioner to be reinstated and paid back pay. Petitioner argues that respondents' failure to reinstate petitioner and pay back pay is arbitrary and capricious, and violates the due process law under the Constitution of the State of New York and the Fourteenth Amendment of the United States Constitution.

Respondents argue that the Appellate Division never ordered that petitioner be reinstated or

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<sup>2</sup> In addition to testifying on his own behalf, petitioner called Eugene Donnelly, an investigator in the Office of the New York City Special Narcotics Prosecutor. The respondents called the following as witnesses: Julio Vasquez, Freddy Soriano, Griselda Delacruz and Thomas Rachko.

paid back pay and that petitioner is not entitled to either. Finally, respondents maintain that the petition must be dismissed.

Article 78 of the CPLR provides for limited judicial review of administrative actions. Administrative agencies enjoy broad discretionary power when making determinations on matters they are empowered to decide. Section 7803 provides in relevant part that “[t]he only questions that may be raised in a proceeding under this article are... 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.”

In deciding whether an agency’s determination was supported by substantial evidence or was arbitrary, capricious or an abuse of discretion, the reviewing court is limited to assessing whether the agency had a rational basis for its determination and may overturn the agency’s decision only if the record reveals that the agency acted without having a rational basis for its decision. See, Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992) citing Pell v. Board of Education, 34 N.Y.2d 222, 230-31 (1974); Sullivan County Harness Racing Association v. Glasser, 30 N.Y.2d 269, 277 (1972). Substantial evidence is more than “bare surmise, conjecture, speculation or rumor” and “less than a preponderance of the evidence.” 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176, 180 (1978). Substantial evidence consists of “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” Id. See, also Consolidated Edison v. New York State DHR, 77 N.Y.2d 411, 417 (1991). Where the Court finds the agency’s determination is “supported by facts or reasonable inference that can be drawn from the record and has a rational basis in the law, it must be confirmed.” American Telephone and Telegraph Co. v. State Tax Commissioner, 61 N.Y.2d 393, 400 (1984).


Petitioner’s Article 78 Petition must be denied as there was no defacto reinstatement of petitioner’s employment as a result of the Appellate Division, First Department. The Respondent’s decision was supported by substantial evidence, and was not arbitrary, capricious or an abuse of discretion. On Article 78 review, this Court is limited to assessing whether the agency had a rational basis for its determination. Notably, petitioner does not mention any wrong doing on part of the

Respondent that would warrant granting this petition. These records are more than sufficient to make a showing of "substantial evidence" and for a finding that the Respondent's determination was not without foundation. Since Respondent's decision is "supported by facts or reasonable inferences that can be drawn from the record and have a rational basis in the law, it must be confirmed." American Telephone and Telegraph Co., 61 N.Y.2d 393, 400 (1984).

Accordingly, the petition is denied and dismissed.

This constitutes the decision and order of this Court.

Dated: September 22, 2011

  
\_\_\_\_\_  
Hon. Robert E. Torres

**ROBERT E. TORRES**  
**JUDGE**

**FILED**  
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