

Matter of Fox v City of New York
2011 NY Slip Op 33184(U)
December 12, 2011
Sup Ct, NY County
Docket Number: 109733/11
Judge: Carol E. Huff
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **CAROL E. HUFF**
Justice

PART 32

FOX, MICHAEL J.

INDEX NO. 109733/11

MOTION DATE _____

THE CITY OF NEW YORK,
ETAL.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

DEC 13 2011

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this ~~motion~~

NEW YORK
COUNTY CLERK'S OFFICE

with accompanying memorandum decision

Dated: DEC 12 2011

CAROL E. HUFF

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 32

-----X
In the Matter of the Application of : Index No. 109733/11
MICHAEL J. FOX,

Petitioner, :

For a Judgment Pursuant to Article 78 of the Civil Practice :
Law and Rules,

- against - :

THE CITY OF NEW YORK and RAYMOND W. KELLY:
as COMMISSIONER of the NEW YORK CITY POLICE
DEPARTMENT, :

Respondents. :

FILED

DEC 13 2011

-----X
CAROL E. HUFF, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this Article 78 proceeding, petitioner seeks a writ of mandamus compelling respondents to rescind their revocation of his grant of a twelve-month paid leave of absence and scholarship to Hunter College's masters program in urban affairs.

The facts leading up to the award of the scholarship are not in dispute. Petitioner was sworn in as a New York City Police Department ("NYPD") police officer on August 31, 1998. Prior to his appointment as sergeant in February 2011, working largely in administrative positions, he received numerous commendations and outstanding evaluations with no disciplinary charges or citizen complaints. While working full time as a recruit instructor in the Police Academy he earned a B.A. in forensic psychology and a master's degree from John Jay College, with high grade point averages.

In January 2011, petitioner applied for a scholarship offered by NYPD. The scholarship

recipient was to receive a twelve-month paid leave of absence while he attended Hunter College to obtain a masters degree in urban affairs. He would be required to pay full tuition and to be accepted by Hunter under its general admission criteria. Petitioner was selected for the scholarship in May 2011.

On February 15, 2011, petitioner had been promoted to Sergeant in the NYPD, subject to the completion of a twelve-month probationary period. After attending a period of classroom training, he was assigned on March 7, 2011, to a Manhattan precinct for operational training.

In petitioner's first performance evaluation as a sergeant in training for the period four months prior to June 24, 2011, prepared by his supervisor, Platoon Commander Lieutenant Roger Lurch, he received a below-standards overall rating with an average of 2.5 out of 5. The narrative sections of the review contained a number of strongly negative evaluations. By letter dated August 4, 2011, petitioner was informed that his scholarship had been revoked.

Although petitioner was not informed at that time what the grounds for revocation were, he did know about his negative review. It was discussed with him in July by the then precinct commanding officer, Kathleen O'Reilly, who states in her affidavit that "Petitioner exhibited a flippant attitude, stating that in the scheme of things it didn't matter because his prior evaluations were above standards." O'Reilly Aff., ¶ 12. In an affidavit submitted by Wilbur L. Chapman, NYPD Deputy Commissioner for Training, Chapman states, "In my opinion, this [was] the worst evaluation of a newly promoted sergeant I have seen. . . . After reading the evaluation, I became concerned that if petitioner were permitted to take a leave of absence, the Police Department would not have the opportunity to continue to evaluate whether petitioner can develop and demonstrate the necessary performance skills to satisfactorily complete his mandatory probation

period and become permanent in the rank of sergeant. . . . During a briefing session with the Police Commissioner, I brought the matter to his attention, and he ordered petitioner's scholarship to be revoked." Chapman Aff., ¶¶ 18, 22.

Petitioner disputes the accuracy of several of the evaluation's negative accounts and contends that Lieutenant Lurch was prejudiced against him. In his Reply affidavit, petitioner states: "It was clear to me from the beginning that as I had never worked in the same tough precincts as he had, I would never be a 'real' cop in Lt. Lurch's eyes." Michael J. Fox Aff., ¶ 24. He also contends that respondents are contractually bound by the Scholarship Award Agreement, dated May 16, 2010, which sets forth the conditions of his scholarship.

The NYPD determination to revoke petitioner's scholarship will be upheld unless it is shown that the determination "was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The test is whether the determination is "without sound basis in reason and is generally taken without regard to the facts." Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974). 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." Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), *aff'd* 11 NY3d 859 (2008). Moreover, decisions affecting the personnel of a police department, a quasi-military organization whose first concern is public safety, are entitled to special consideration. See, e.g., Incorporated Vil. of Malverne v Malverne Police Benevolent Assn., 72 AD2d 795 (2d

Dept 1979).

By these standards the petition must be denied. Using its own mechanisms for review of a probationary sergeant, respondents' determination that petitioner could not afford a year's leave of absence was reasonably based. Notably, petitioner did not lose his job or his opportunity to succeed as a sergeant and apply again for the scholarship.

To the extent petitioner makes an argument based on contract, it is not relevant to an Article 78 proceeding. Finally, petitioner's request to transfer this case to the Appellate Division as a substantial evidence issue is denied. No hearing was held at which evidence was taken. See CPLR 7804(g).

Accordingly, it is

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

Dated:

DEC 12 2011

FILED

DEC 13 2011

NEW YORK
COUNTY CLERK'S OFFICE


CAROL E. HUFF
J.S.C.