

Matter of Pastalove v Kelly

2012 NY Slip Op 32008(U)

July 25, 2012

Sup Ct, NY County

Docket Number: 0111175/11

Judge: Jr., Alexander W. Hunter

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR.
Justice

PART 33

Index Number : 111175/2011
PASTALOVE, ROBERT
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-13

Answering Affidavits — Exhibits _____ | No(s). 14-41

Replying Affidavits _____ | No(s). 42

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

See memorandum decision and judgment annexed hereto.

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

FILED

JUL 30 2012

NEW YORK
COUNTY CLERK'S OFFICE J.S.C.

Dated: 7/25/12

ALEXANDER W. HUNTER JR.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Application of
Robert Pastalove,

Index No.: 111175/11

Petitioner,

Decision and Judgment

For a Judgment Pursuant to C.P.L.R. Article 78

-against-

Raymond W. 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,

Respondents.

-----X
HON. ALEXANDER W. HUNTER, JR.

FILED

JUL 30 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

The application by petitioner for an order pursuant to C.P.L.R. Article 78, declaring respondents' determination to deny petitioner a line of duty accident disability retirement as arbitrary and capricious, is denied and the petition is dismissed.

Petitioner was appointed as a uniformed police officer in the New York City Police Department ("NYPD") on July 7, 1999 and served continuously until he retired on ordinary disability. On April 23, 2008, petitioner responded to a residential fire before the arrival of the New York City Fire Department ("NYFD"). When the FDNY arrived on scene, he was asked to move his radio car ("RMP") since they had begun stretching their hoses to extinguish the fire. Petitioner asserts that he had to step over two hoses in order to get to his RMP. Thereafter, petitioner tripped over the hoses when the hoses were charged with water. He sustained injuries to his right hand and wrist and was treated at Mt. Sinai Medical Center. Several months later, petitioner amended his Line of Duty ("LOD") report to indicate that he had also sustained injuries to his right shoulder.

On August 14, 2008, petitioner lodged a complaint of harassment against Lt. Roger Lurch with the NYPD Office of Equal Employment Opportunity. By letter dated September 16, 2008, the Deputy Commissioner Equal Employment Opportunity informed petitioner that his complaint did not rise to the level of employment discrimination under any application federal, state, or local laws. His case was thereafter transferred to his Commanding Officer for corrective action.

On September 19, 2008, petitioner further injured his right wrist when he tripped while walking up the stairs in front of the 24th Precinct. Petitioner's LOD report was disapproved by

Lt. Lurch. In the LOD report, Lt. Lurch wrote that: “[t]here is a pattern of injuries sustained by this officer in which he is not undertaking any emergent police action and is as a result of his failure to negotiate his surroundings.”

By application dated January 12, 2010, petitioner applied for Accident Disability Retirement (“ADR”) based on the injuries he sustained on April 23, 2008. By application dated October 6, 2010, respondent Raymond Kelly applied on petitioner’s behalf for Ordinary Disability Retirement (“ODR”).

On November 2, 2010, the Medical Board Police Pension Fund Article II (“Medical Board”) reviewed petitioner’s ADR application and performed a physical examination of petitioner’s right hand and wrist. The Medical Board determined that “the objective evidence as well as the clinical findings indicate that the officer is unable to perform the full duties of a New York City Police Officer....[and] the causal factor is the line of duty injury on April 23, 2008.” The Medical Board recommended the approval of petitioner’s ADR application.

On January 12, 2011, respondent Board of Trustees of the Police Pension Fund, Article II (“Pension Fund”) reviewed petitioner’s ADR application, but was unable to reach a majority vote on the issue of whether his April 23, 2008 injury constituted an accident for pension purposes. On February 23, 2011, the Pension Fund remanded petitioner’s case to the Medical Board to determine whether the September 19, 2008 injury aggravated or caused petitioner’s condition. On April 19, 2011, the Medical Board found that there was no evidence to indicate that the September 19, 2008 injury aggravated petitioner’s disability. The Medical Board also reaffirmed its previous determination of recommending approval of his ADR application.

On June 8, 2011, the Pension Fund denied petitioner’s ADR application. The Pension Board was unable to reach a majority vote on the issue of whether petitioner’s April 23, 2008 injury was the result of an accident or a misstep. The Pension Fund was split six to six on whether to approve petitioner’s ADR application. In accordance with City v. Schoeck, 294 N.Y. 559 (1945), petitioner was retired for ODR.

Petitioner avers that the Pension Fund’s denial of his ADR application was arbitrary, capricious, and an abuse of discretion. He argues that he sustained injuries when he tripped over a hose that was unexpectedly charged with water while taking emergent police action. Petitioner maintains that the evidence in the record establishes that his right hand injury resulted from an accident for pension purposes. He further asserts that respondents’ doubts as to his credibility are unfounded.

Respondents argue that the instant application should be dismissed because the record does not support that petitioner is entitled to ADR. Respondents assert that the Pension Fund is not bound by the determination made by the Medical Board as to causation. The Pension Fund further argues that petitioner’s right wrist injury and resulting disability was not caused by an

* 4]
unexpected or out of the ordinary event. Instead, petitioner's disability was the result of a misstep or petitioner's own inattention to his surroundings.

In reply, petitioner asserts that the NYPD Medical Division would not have approved his LOD paperwork for the April 23, 2008 injury if they did not believe that petitioner was not in the proper performance of his duty as a police officer. Petitioner asserts that the water hoses moved unexpectedly after he was instructed by the FDNY to move his RMP. He argues that the record establishes that he tripped and fell as a result of a sudden fortuitous mischance, sustained in the line of duty and therefore is entitled to ADR as a matter of law.

The Pension Fund consists of twelve members and can only act by resolution with a vote of at least seven twelfths of the whole number of votes. **Administrative Code § 13-202(a), (b)**. If a "member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service...and that such disability was not the result of wilful negligence on the party of such member...such board shall retire such member for accident disability forthwith." **Administrative Code § 13-252**.

While the Medical Board's determination as to whether a member is disabled is binding on the Pension Fund, the issue of whether the member is disabled due to a service related injury is left to the Pension Fund to determine. **Matter of Canfora v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II, 60 N.Y.2d 347 (1983)**. An accident for ADR purposes is defined as a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact." **Matter of Lichtenstein v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II, 57 N.Y.2d 1010, 1012 (1982)**.

It is well settled that in the event of a tie vote, a reviewing court may not set aside the Pension Fund's denial of ADR unless "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." **Matter of Canfora, 60 N.Y.2d at 352; see also, Mejia v. Kerik, 301 A.D.2d 385 (1st Dept. 2003); Meyer v. Board of Trustees of the N.Y. City Fire Dept., 90 N.Y.2d 139 (1997); McCormack v. Kelly, 206 A.D.2d 265 (1st Dept. 1994); Quill v. Ward, 138 A.D.2d 305 (1st Dept. 1988)**. Therefore, if there is any credible evidence of lack of causation, this court will not disturb respondents' determination.

There is no question that petitioner is disabled and unable to perform the full duties of police officer. As required by statute, respondent Pension Fund adopted the determination of the Medical Board as to petitioner's disability. However, the Pension Fund was free to reject the Medical Board's recommendation as to the nature and circumstances surrounding the injury.

This court finds that petitioner has failed to establish his entitlement to ADR as a matter of law. Respondents based its determination upon several reports, documents, and statements from witnesses indicating that petitioner tripped over a hose and makes no mention of the hose moving due to an unexpected charge of water. Based on the divergent accounts of what

occurred, the Pension Board was unable to reach a majority vote and so petitioner was retired on ODR. There is also credible evidence in the record that indicates that petitioner's disability was not the result of an accident and instead occurred while he was performing his duties while responding to a fire emergency. Reporting to a fire emergency is part of his ordinary employment as an officer. At the time of the injury, petitioner admits that he was aware that firefighters were using fire hoses to extinguish the fire. It cannot be said that the charging or movement of the fire hoses was an unexpected event to warrant ADR.

Accordingly, it is hereby,

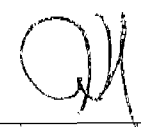
ADJUDGED that the petition is denied and the proceeding is dismissed, without costs and disbursements to either party.

Dated: July 25, 2012

FILED

ENTER:

JUL 30 2012



J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

ALEXANDER W. HUNTER JR