

Harrington v City of New York

2013 NY Slip Op 31327(U)

June 21, 2013

Sup Ct, New York County

Docket Number: 106075-2010

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver
Justice

PART 10

HARRINGTON, MICHAEL

INDEX NO. 106075-2010

- v -

MOTION DATE _____

CITY OF NEW YORK

MOTION SEQ. NO. 002

The following papers, numbered 1 to 5, were read on this motion for _____

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|------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|-------------|
| Notice of Petition — Affirmation — Affidavit(s) — Exhibits | 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)s | No./pt. | <u>1, 2</u> |
| Verified Answer — Exhibits — Answer | | No./pt. | <u>3, 4</u> |
| Reply Memorandum of Law — Exhibits | | No./pt. | <u>5</u> |

Upon the foregoing papers, the motion is decided as follows:

Petitioner Michael Harrington ("petitioner") brings this Article 78 proceeding to annul as arbitrary and capricious a determination of the respondents the City of New York and the New York City Police Department ("NYPD") (collectively "respondents") which denied petitioner reinstatement to the NYPD as a police officer. Respondents oppose the petition.

Petitioner avers that he began his employment as police officer with the NYPD on or about July 22, 2002 and served continuously as a police offer for six and a half years. Petitioner avers that his job performance during those six and half years was exemplary and no disciplinary action was ever taken against him. In or about February 2003 petitioner told one of his co-workers at the 75th Precinct, Martin Davis, that he was gay. Petitioner alleges that after this disclosure he was subjected to continuous discrimination and harassment by his employer and co-workers for approximately six years. On September 26, 2007 petitioner commenced a discrimination against respondents by filing summons and complaint in the Supreme Court, New York County. That action is still pending. Petitioner alleges that after he filed the discrimination action the hostile work environment intensified and ultimately led to his resignation from the NYPD on February 11, 2009. After resigning from the NYPD, petitioner moved to California where he worked as police officer in the Newark Police Department. In June 2009 petitioner applied for reinstatement with the NYPD based upon his belief that he could be reinstated within one year of his resignation if he passed a medical and psychological exam. Petitioner alleges that he passed both exams. On or about January 11, 2010 petitioner received a letter from Rafael Pineiro ("Pineiro"), NYPD Chief of Personnel, stating that reinstatement to civil service positions are within the discretion of the employing agency and denying petitioner's request for reinstatement. The letter does not set forth the NYPD's reasons for denying petitioner's request for reinstatement. Petitioner contends that the NYPD's determination was either arbitrary and capricious, in light of his outstanding record as a police officer, or a continuation of the discrimination petitioner was subject to during his final six years as an NYPD officer.

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

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

In opposition, respondents contend that the decision to deny petitioner reinstatement was based on legitimate, non-retaliatory, non-discriminatory reasons and was not arbitrary and capricious. Specifically, respondents contend that verified petition should be denied because petitioner was designated as chronic sick on three separate occasions during the course of his employment; had been terminated from his position as a police officer within the Newark Police Department immediately prior to applying for reinstatement to the NYPD; and intentionally provided false information on his application for reinstatement.

According to respondents, petitioner was designated "chronic A sick" by the NYPD on October 26, 2004, which means that petitioner had been absent four or more times within a twelve month period. Petitioner was thereafter designated "chronic B sick" from March 2, 2005 to October 10, 2005 and from December 12, 2008 until his retirement date, February 11, 2009. "Chronic B sick" means that the petitioner reported sick six or more times within a twelve month period.

With respect to respondents' claim that petitioner intentionally lied on his reinstatement application, question eleven of the application states "[w]ere any legal claims pending at the time you retired/resigned, or have any been initiated since, in which you were in any way concerned?" Petitioner answered "No" to question eleven. However, respondents contend that not only was petitioner's discrimination action in Supreme Court, New York County pending on petitioner's retirement date, but petitioner had also commenced an action against the Newark Police Department in United District Court, Northern District of California, on August 18, 2009.

In a letter dated January 8, 2010 from Pineiro to the First Deputy Commissioner, Pineiro recommended that petitioner's request for reinstatement be denied. Pineiro cited petitioner's designations as "chronic A and B sick", that petitioner "intentionally provided false information regarding lawsuits and failed to be candid regarding two lawsuits" as grounds for denying petitioner's request. Pineiro also cited petitioner's termination from the Newark Police Department during his probationary period. The same letter also notes that petitioner was rated competent on two of his last three evaluations and between competent and highly competent on the other and that reinstatement of petitioner was recommended by his Commanding Officer. The First Deputy Commissioner concurred with Pineiro's recommendation and the Police Commissioner approved the denial of reinstatement on January 8, 2010.

In reply, petitioner reiterates his claim that respondents' denial of his application for reinstatement was either arbitrary and capricious, in light of his outstanding record as a police officer, or was based in part on petitioner's sexual orientation and/or made in retaliation for his commencement of a sexual discrimination lawsuit. In support of these contentions, petitioner submits the deposition testimony of Chief Robert Lucena ("Lucena"). Lucena testified that from 2007 to 2010 he was assigned to the NYPD's Personnel Bureau as executive officer to the Chief of Personnel. Part of his duties as executive officer included reviewing requests by individuals seeking reinstatement by the NYPD. Lucena's responsibilities were to ensure that he reinstatement process was conducted in an expeditious manner and in accordance with NYPD guidelines. According to Lucena, the process for reinstatement begins when an individual makes a written request to be reinstated. The written request is then forwarded to the Chief of Personnel. Lucena would review the reinstatement request and then assign it to a member of the staff services section who then forwards the request to the Employee Management Division. The Employee Management Division would review the case to determine if the individual was eligible for reinstatement. If the individual was eligible, the matter would be sent to the Applicant Processing Division and assigned to an investigator. The investigator would contact the applicant to schedule appointments for medical and psychological screening as well as a background investigation. Upon completion of these components, the matter is referred back to the Employee Management Division. Lucena would then review the reinstatement investigation and make a recommendation to the Chief of Personnel who endorses it to the Commissioner. With respect petitioner's application for reinstatement, the original recommendation from the Employee Management Division was that petitioner be reinstated. However, Lucena sent the recommendation back to Employee Management

Division for reconsideration. In sending that recommendation back, Lucena included a memo in which he noted that petitioner had failed to be candid during his psychological screening, that petitioner intentionally provided false information regarding two lawsuits, that petitioner was terminated by the Newark Police Department and that petitioner failed to be candid regarding his chronic sick designations.

With respect to the petitioner's answer to the reinstatement application question pertaining to lawsuits, Lucena testified that he was not personally familiar with either the lawsuit against the NYPD or the lawsuit against the Newark Police Department. Lucena concluded that petitioner had intentionally lied on his reinstatement application regarding these two lawsuits because the application for reinstatement was the second application petitioner had prepared for the NYPD, the first being his candidate booklet which he presumably completed when he initially applied to be a police officer, and because it was Lucena's understanding, based on his experience as a supervisor with the Applicant Processing Division, that an investigator spends nearly one hour advising an applicant how to complete the application, reading each question to the applicant and explaining the significance of each question to the applicant. Lucena also conceded that applicants sometimes make mistakes when completing the reinstatement application and that it is the responsibility of the Applicant Processing Division to follow up on inconsistencies in the reinstatement application and the reinstatement investigation, including inconsistencies with respect to lawsuits. Lucena testified that it was his duty to make sure NYPD guidelines/regulations are followed with respect to reinstatement applications. However, Lucena admitted that the guidelines/regulations regarding inconsistencies in the reinstatement application were not followed with respect to petitioner because he felt he had enough information to recommend that petitioner not be reinstated.

With respect to petitioner's termination from the Newark Police Department, Lucena testified his understanding was that petitioner was released from employment with the Newark Police Department because he was unfamiliar with its jurisdiction and was unable to adjust to his new area of employment. Lucena testified that the reasons for petitioner's release from the Newark Police Department led him to conclude that petitioner lacked the spacial orientation necessary, or the ability to know where he was at all times and to know his geographic area of responsibility, necessary to be a police officer. However, Lucena also testified that petitioner had met or exceeded the standards for spatial orientation on his previous NYPD evaluations.

As to petitioner's "chronic sick" designations, Lucena testified that his review of petitioner's sick day pattern revealed that petitioner appeared to go out sick on his first tour, which Lucena testified showed that petitioner was attempting to extend his days off. However, Lucena also testified that he was not privy to petitioner's entire sick record, including the documentation establishing the reason for petitioner's absence. Lucena concluded, based upon petitioner's prior "chronic sick" designations, that petitioner was likely to continue to be chronically sick upon reinstatement. Lucena also conceded that petitioner passed the medical exam that was part of process for reinstatement.

Analysis

A resignation constitutes a complete break in service, and the absolute termination of relations. Thereafter, the person resigning has no rights or duties and reentry into the service can be accomplished only by the voluntary act of the person who has power of appointment (*Spurling v Police Dep't of New York*, 49 AD2d 823 [1st Dept 1975]). Reinstatement is governed by the Personnel Rules and Regulations of the City of New York (PRR), which provide that an employee who has resigned may be reinstated by the commissioner so long as "the separation from employment was without fault or delinquency on the employee's part and the head of the agency to whom the employee has applied for such reinstatement is willing to reinstate the employee" (55 RCNY § 6.2.1 [b]). When determining a request for reinstatement, the NYPD is afforded "complete discretion" (*Matter of Harrington v City of New York*, 2010 NY Slip Op 33367[U] [Sup Ct, New York County]), is not required to consider an applicant's job performance or the results of medical and psychological examinations (*see Salas v New York City Police*

Dept., 63 AD3d 468 [1st Dept 2009]), and need not give a reason for denying reinstatement (*Spurling*, 49 AD2d 823). In the context of an Article 78 proceeding, the court may only determine whether the decision not to reinstate was arbitrary or capricious or affected by error of law (CPLR § 7803 [3]; *Vrettos v City of New York*, 2011 NY Slip Op 30536[U] [Sup Ct, New York County]). Applying the above cited legal standards to the record herein, the court is constrained to find that respondents' denial of petitioner's request for reinstatement was a provident exercise of discretion and rationally based.

It is well settled that a misstatement or omission of a material fact on an application for appointment to a civil service position warrants disqualification or dismissal of the applicant or employee (*Smith v Ortiz*, 136 Misc 2d 110 [Sup Ct, New York County 1987]). However, because Lucena admitted that the NYPD's regulations requiring follow-up inquiries to resolve discrepancies in a reinstatement application were not followed in this case, it was arbitrary and capricious for respondents to rely on the omission in petitioner's questionnaire, whether intentionally or negligently made, as a ground to deny him reinstatement and if this had been the only ground cited by respondents, the court would have annulled their determination. As discussed above, however, respondents cited two other grounds for denying petitioner's request.

Respondents' reliance on petitioner's release from the Newark Police Department due to his inability to adjust to his new area of employment and his lack of familiarity with the jurisdiction provided respondents with a rational basis to conclude that petitioner's spatial orientation would affect his ability to perform the functions of an NYPD police officer. While this court would not have held petitioner's spatial orientation issues with the Newark Police Department against him in determining whether petitioner could fully carry out the duties of an NYPD officer, especially since petitioner had previously met or exceeded the NYPD's spatial orientation standards, respondents were not required to consider petitioner's past performance evaluations in making their determination (*see Salas*, 63 AD3d at 469) and the court may not substitute its judgment for that of respondents.

Petitioner's "chronic sick" designations also provided respondents with a reasonable basis to deny petitioner's reinstatement request. Although petitioner contends that his one of "chronic sick" designations was the result of him catching the flu during various midnight shifts, as Lucena testified, police officers are required to work days, nights, weekends and holidays. Police officers are also required to work in all weather conditions. Petitioner also contends that his other "chronic sick" designation was the result of a line of duty injury in which he injured his ankle while exiting his patrol vehicle and ultimately underwent surgery. However, petitioner's ankle injury was later changed to a regular sick designation because petitioner's accident was unwitnessed and there is nothing in the record to indicate that petitioner ever utilized internal NYPD procedures to appeal this "chronic sick" designation. Therefore, in light of petitioner's unchallenged history of being chronically sick, and the fact that respondents were not required to consider the fact that petitioner passed the medical exam portion of the reinstatement process, it was reasonable for respondents to conclude that petitioner, if granted reinstatement, would continue to be chronically sick in the future.

Nor is there anything in the record that establishes that respondents' determination not to reinstate petitioner was based on petitioner's sexual orientation and/or in retaliation for petitioner having commenced a discrimination action against respondents. The court is highly disturbed by the fact that petitioner's reinstatement was supported by his former commanding officer, as well as the medical and psychological personnel and the investigator assigned to his reinstatement case and was recommended by the Employee Management Division until it was derailed by Lucena and ultimately denied by the upper echelon of the NYPD. This in and of itself, however, does not establish that the grounds for denial relied upon by respondents were pretense. Therefore, because the record establishes that respondents had a rational basis to deny petitioner's request for reinstatement and did not abuse their considerable discretion in the matter, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that petitioner is to serve a copy of this order, with notice of entry, upon respondents within twenty days of entry.

Dated: JUN 21 2015
New York County

George J. Silver
George J. Silver, J.S.C.

GEORGE J. SILVER

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).