Matter of Seiferheld v Kelly
2013 NY Slip Op 33425(U)
November 25, 2013
Supreme Court, New York County
Docket Number: 100138/2012
Judge: Kathryn E. Freed

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT *Justice* PART 5

Index Number : 100138/2012
SEIFERHELD, JAMES J.
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

Cal: #76

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). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

FILED
DEC 05 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 11-25-13

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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 5

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In the Matter of the Application of

JAMES J. SEIFERHELD,

Petitioner,

-against-

RAYMOND KELLY, as the Police Commissioner of the City of New York, and as the 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.

DECISION/ORDER
Index No. 100138/2012
Seq. No. 002

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HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF PETITION AND AFFIDAVITS ANNEXED	1-2
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	3
REPLYING AFFIDAVITS	
EXHIBITS	
OTHER	4-15

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Respondents move pursuant to CPLR §2221(d), for leave to reargue that part of this Court's previous Decision/Order dated May 9, 2013, which stated that "the Board's last recommendation that petitioner be returned to work in the capacity of police officer be upheld," and upon such re-argument, to reverse said decision. Petitioner opposes.

After a review of the papers submitted, all relevant statutes and case law, the Court **denies** the motion.

Petitioner asserts that throughout his papers, he has requested to be reinstated numerous times. Therefore, he asserts that respondents are in error when they allege that he never argued to be given his old job back, and that this Court's previous decision should stand.

The Court notes that upon review of the papers submitted herewith, it is clear that in both the original motion and the instant motion to reargue, neither side provided it with complete underlying papers as is procedurally required (see *Biscone v. JetBlue Airways Corp.*, 103 A.D.3d 158 [2nd Dept. 2012], *lv dismissed* 20 N.Y.3d 1084 [2013]). The Court also notes that rather than delay this matter any further, it has *sua sponte*, obtained the necessary underlying papers, including the previous decisions of both the Appellate Division and the Court of Appeals. Additionally, due to the convoluted nature of this matter, the Court also found it necessary to order the complete record from archives, all of which only served to further delay this decision.

The Court will not reiterate the entire history of the instant matter except to note, that in its Decision/Order of May 9, 2013, it agreed with respondents that it was not authorized to order the Board of Trustees to either suspend or revoke petitioner's pension benefits. Additionally, the Court found that once the Medical Board certifies that an applicant is not medically disabled for duty, the Board of Trustees of the Police Pension Fund is bound by that determination (see *Matter of Borenstein v. New York City Employees' Retirement System*, 88 N.Y.2d 756, 760 [1996]; *Lewis v. Kelly*, 22 Misc.3d 1137(A), 209 Slip Op. 50477(U) (Sup. Ct. New York County 2009)). However, as was succinctly stated by the Appellate Division, in *Matter of Sieferheld v. Kelly,* 70 A.D.3d 460 [1st Dept 2010], *affd* 16 N.Y.3d 561 [2011], "the 'suspension' or revocation of petitioner's disability benefits by the Police Pension Fund was without statutory authority, because it was not directed by

the Board of Trustees" (*id* at 462). Thereafter, the Appellate Division determined that the Board of Trustees could reduce the amount of disability pension for an employee pensioner by the amount earned by that pensioner (see Administrative Code §13-254 [a]). That Court also found that the Board of Trustees had failed to take said action, holding that "[t]he last determination issued by the Board in this matter was that petitioner was not disabled and should be returned to work as a police officer," (*id.* at 462). In its May 9, 2013 Decision/Order, this Court found that this determination should stand. Respondents now reargue, based on the fact that petitioner, now having been found to have cocaine in his system, is ineligible to return to duty as a police officer.

The Court of Appeals in *Matter of Seiferheld v. Kelly*, 16 N.Y.3d 561[2011],also acknowledged the dilemma created in this matter, due to the somewhat inadequate language of New York City Administrative Code §13-254, which it referred to as a "safeguards statute." (*Id.* at 565). This statute apparently did not contemplate a situation such as the instant one, wherein the employee to be reinstated, based on the fact that he has been found to be no longer disabled, has through his own actions, suddenly become ineligible for re-employment. The Court of Appeals notes in that instance "the statute seems to contemplate a pension reduction"(*id.* at 567), and permits the Board of Trustees to deduct from the disability pension, the amount that the employee is earning through other employment. However, the Board took no such action.

The Court of Appeals affirmed the decision of the lower court, holding that only the Board of Trustees can act to suspend petitioner's pension pursuant to the Administrative Code. Furthermore, the Court of Appeals stated that "the case as a whole is very troubling" since it could reasonably be interpreted as allowing the petitioner to recoup benefits that he was not entitled to, for seven years. The Court also states that "we do express the hope that the Pension Fund's Board of Trustees will generally act to protect the Fund and the public with more efficiency than it has

displayed in this case." (*Id.* at 568). Regrettably, the Board of Trustees continues to fail to act more efficiently in this matter.

Petitioner, in his original petition, moved for the renewal of his benefits based on the decision of the Court of Appeals, which held that termination of benefits was illegal because it was not pursuant to a vote by the Board of Trustees. That argument is still meritorious, however, those benefits remain suspended. Although asked to affirmatively decide to discontinue petitioner's benefits based on the Medical Board's finding that petitioner is no longer disabled, the Board has twice failed to act. In fact, a vote taken at its July 2011 meeting, pursuant to the Police Commissioner's motion to terminate petitioners benefits, resulted in a 6 to 6 tie. Although the matter was again raised at the April 2012 meeting, the Board continued to take no action.

Respondents argued in their original opposition to the petition and now reiterate in the instant motion, that the only result of the Court of Appeals decision was that the Board of Trustees had the discretion to terminate or reduce the original reward to petitioner. Although it is axiomatic that, if the Medical Board determines that the petitioner is no longer entitled to benefits and the Board of Trustees has no discretion but to adhere to the Medical Board's determination, then the benefits must be terminated. Indeed, while the Board of Trustees' response to the Medical Board was to vote that petitioner is no longer disabled and must be returned to work, they did not vote to terminate his benefits.

It is clear that such determination must actually be made by a vote of the Board of Trustees. That is what the language of the Administrative Code directs and that is what the Court of Appeals has held. The Court of Appeals even referred to the possibility that petitioner was entitled to receive all of the back benefits based on the Board's failure to affirmatively terminate them. Finally, as this Court has stated, it has no ability to direct the Board of Trustees to affirmatively act in this matter.

In its previous decision, this Court referred to and relied on the final order of the Court of Appeals, which affirmed the decision of the Appellate Division. Hence this Court's Decision/Order of May 9, 2013, directed that petitioner be allowed to return to work. Unfortunately, the situation has not changed, in that in April 2007, the Board of Trustees voted to rescind the ADR benefits and restore petitioner to work. Two superior courts have now held that the Board of Trustees never specifically voted to direct the Police Pension Fund to revoke petitioner's disability benefits, they only voted that he be returned to work. Additionally, the Court of Appeals has already determined that it is not merely a ministerial decision to have the Board of Trustees affirmatively vote to either revoke and/or reduce petitioner's benefits. Since the Board of Trustees has refused to remedy this situation by making such a determination, the status quo remains. Nothing in respondent's papers alters this situation. It is a matter of obvious fact that this Court may not rewrite the Administrative Code, in that any problems in its language must be addressed legislatively.

A motion for leave to reargue, pursuant to CPLR§ 2221(d), "shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the proper motion." Such motion "is addressed to the sound discretion of the court" (*William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 [1st Dept.1992], *lv dismissed*, 80 N.Y.2d 1005 [1992], *rearg denied* 81 N.Y.2d 782 [1993]). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept. 1984]), or to present arguments different from those originally asserted (*Foley v. Roche*, 68 A.D.2d 558; *William P.Pahl Equip. Corp. v. Kassis*, 182 A.D.2d at 24; *Amato v. Lord & Taylor, Inc.*,10 A.D.3d 374 [2d Dept. 2004]). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (see *Macklowe v. Browning School*, 80 A.D.2d 790 [1st Dept. 1981]). Professor David Siegal in N.Y. Prac, § 254,

at 434 [4th ed], succinctly instructs that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

In the case at bar, the Court finds respondents have failed to proffer arguments sufficient to warrant this Court's reversal of its previous decision. The City, in fact, raised no new arguments nor proffered any legal basis to convince the Court to change its original determination. The City's only argument was that petitioner never asked to be returned to his previous employment. The Court has already noted that petitioner did in fact raise this in his papers. The only way for this "stalemate" to be resolved is by a vote of the Board of Trustees.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that petitioner's motion to reargue and to reverse its Decision/Order dated May 9, 2013, be denied; and it is further

ORDERED that respondents shall serve a copy of this order on petitioner and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: November 25, 2013

ENTER:

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT