

<b>Matter of Fong v Kelly</b>
2013 NY Slip Op 33461(U)
December 2, 2013
Supreme Court, New York County
Docket Number: 100969/13
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

*In the Matter of the Application of*  
*TONY FONG,*

Index No. 100969/13

Petitioner,  
For a Judgment Pursuant to Article 78 of the Civil Practice  
Law and Rules  
-against-

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

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

Respondents.

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1-4

Answering Affidavits- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

CROSS-MOTION:  YES \_\_\_\_\_

**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).

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

DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

Dated: 12/2/13

  
**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION \_\_\_\_\_ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X

In the Matter of the Application of  
TONY FONG,  
Petitioner,

For a Judgment under Article 78  
of the Civil Practice Law and Rules.

-against-

Index No. 100969/13

RAYMOND W. KELLY, as Police Commissioner  
of the City Of New York, THE POLICE  
DEPARTMENT OF THE CITY OF NEW YORK,  
and THE CITY OF NEW YORK,  
Respondents.

-----X

**DONNA M. MILLS, J.:**

In this Article 78 proceeding, petitioner Tony Fong, a former police officer in the Uniformed Force of the New York City Police Department ("NYPD"), seeks a judgment reviewing and annulling the determination of respondents Raymond Kelly, as the Police Commissioner of the City of New York, the Police Department of the City of New York, and the City of New York, which terminated him from his position as a police officer with the NYPD. Respondents cross move for an order dismissing the petition on the grounds that the petition fails to state a cause of action pursuant to CPLR sections 7804(f), 404(a), and 3211(a)(7).

Petitioner a former probationary police officer alleges that his termination violated the New York State Human Rights Law, the City of New York Human Rights Law, Title VII of the Civil Rights Act of 1964 and the First Amendment of the U.S. Constitution. Specifically, petitioner alleges that he received low work evaluations and was terminated from the NYPD in April of 2013 in retaliation for testifying at an

administrative hearing in early 2010 against a superior officer and filing a complaint of retaliation in July of 2010 with the NYPD's Office of Equal Employment Opportunity ("OEEO").

The relevant facts are as follows. Petitioner was appointed a probationary police Officer in the NYPD on July 8, 2008. Petitioner remained a probationary police officer for almost five years until his termination on April 8, 2013. At some point in early 2010, while assigned to the 32<sup>nd</sup> Precinct, two female officers at that command accused a sergeant of taking discriminatory action against them on account of their alleged sexual orientation. Related to that accusation, petitioner testified at a hearing conducted by the NYPD's OEEO in support of the female officers. Petitioner alleges that he initially received good NYPD evaluations prior to his OEEO testimony. After giving his testimony at the OEEO hearing, petitioner alleges that he received a below average evaluation.

On or about July 16, 2010, petitioner lodged a complaint of employment discrimination with the NYPD OEEO, asserting that he was being treated unfairly and that his recent evaluation was low because of his OEEO testimony. On November 8, 2010, the OEEO advised petitioner that his complaint did not rise to the level of employment discrimination under applicable federal, state or local laws.

On or about July 29, 2010, while on duty, after having been directed to process an arrest, petitioner allegedly cursed at a superior officer and refused to make the arrest. On the same day, while on duty, petitioner was allegedly absent from his assigned post without notifying the telephone switchboard operator and failed to maintain his Officer's Activity Log. As a result, petitioner was served with two charges

and specifications.

On or about September 12, 2012, petitioner plead guilty to the two specifications. Petitioner entered into a Settlement Agreement with the NYPD wherein Petitioner forfeited forty-five vacation days and was placed on Dismissal Probation. Petitioner was advised that a penalty of dismissal for the NYPD was approved by the Police Commissioner. Petitioner was further advised that the Police Commissioner could impose the penalty of dismissal at any time without further proceedings, pursuant to Administrative Code, Section 14-115(d).

In addition, as a condition of the Settlement Agreement, petitioner agreed to the following general release:

I hereby release and discharge the City of New York, the Police Department of the City of New York, their officers and agents, from all actions, causes of actions, suits, debts, sums of money, covenant, contracts, controversies, agreements (except this Agreement), promises (except those made therein) damages, judgments, executions, claims, and demands whatsoever in law and/or equity that I, my heirs, executors, administrators, successors and assigns ever had, now have or hereafter can have, shall or may have for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of my date of appointment as a New York City Police Officer to and including the date of this release.

Petitioner while on Dismissal Probation initially showed some improvement but subsequently declined. Except for two competent evaluations petitioner initially received from September 20, 2012 through November 30, 2012, petitioner subsequently received four below average monthly evaluations. From December 2012 through March

2013, the period prior to petitioner's termination, petitioner's Commanding Officer gave petitioner an overall low performance evaluation and further described his performance as ineffective. Specifically, the Commanding Officer indicated that petitioner's summons activity was below average within the command, petitioner displayed a lackadaisical attitude and had to be instructed repeatedly to address quality of life and traffic conditions. On April 8, 2013, petitioner was subsequently terminated.

On July 2, 2013, petitioner commenced this special proceeding challenging his termination. Petitioner contends that his termination was retaliatory in violation of federal, state and city laws.

"A probationary employee may be discharged without a hearing and without a statement of reasons in the absence of any demonstration that the dismissal was in bad faith, for a constitutionally impermissible or an illegal purpose, or in violation of statutory or decisional law" ( Matter of Barry v. City of New York, 21 A.D.3d 551, 551 [2d Dept 2005]). "The petitioner bears the burden of establishing bad faith or illegal reasons by competent evidence" ( Matter of Robinson v. Health & Hosps. Corp., 29 A.D.3d 807, 809 [2d Dept 2006]).

In reviewing Article 78 administrative determinations the function of the Court "should not be to second guess' ... [but] is simply to determine if petitioner has shown bad faith on the part of the respondent." ( Soto v. Koehler, 171 AD2d 567, 569 [1<sup>st</sup> Dept 1991]). Here, the record, clearly shows that respondents had ample grounds to terminate petitioner and gave him plenty of time during his probationary period to improve his performance. Moreover, petitioner knowingly and voluntarily signed the negotiated plea agreement, which contained a comprehensive waiver of procedural

rights, placing him on dismissal probation ( see Montiel v. Kiley, 147 A.D.2d 402, 404 [1<sup>st</sup> Dept 1989]).

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied, the cross motion is granted and the proceeding is dismissed.

Dated: 12/2/13

ENTER:

*DM*  
J.S.C.

**DONNA M. MILLS, J.S.C.**

**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).