

Matter of Seiferheld v Kelly

2013 NY Slip Op 33874(U)

May 9, 2013

Supreme Court, New York County

Docket Number: 100138/2012

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

EA
5/14/13
E

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
PRESENT: JUSTICE OF SUPREME COURT

Justice

PART _____

Index Number : 100138/2012
SEIFERHELD, JAMES J.
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). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**


FILED

JUN - 4 2013

COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
MAY 14 2013
TELETYPE UNIT
NEW YORK COUNTY CLERK'S OFFICE

Dated: 5-9-13
MAY 09 2013


HON. KATHRYN FREED, J.S.
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

-----X
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.

-----X
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:

Petitioner moves for an Order pursuant to Article 78 of the CPLR, reviewing and annulling the action of respondents herein in failing to restore retroactively petitioner to a line of duty accident disability retirement pursuant to Administrative Code §13-352 and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and directing and ordering respondents to restore retroactively petitioner's line of duty accident disability retirement benefits retroactive to the date

of the unlawful revocation, plus interest, or in the alternative, directing a hearing on the factual and/or medical issues raised herein; or in the alternative, directing that the Board of Trustees of the New York City Police Department Article II Pension Fund to allow petitioner and/or his representatives to present such testimony and or evidence as is necessary at a hearing held before the Board of Trustees in order to prove petitioner's entitlement to a line of duty accident disability retirement pursuant to Administrative Code§ 13-352.

Petitioner also moves for an order, pursuant to CPLR§7804(e) and CPLR§2307, directing respondent to serve and file: (a) all reports, recommendations, certificates and all other documents submitted to the Police Department Article II Pension Fund Board of Trustees, in connection with the retirement of petitioner herein; and (b) copies of any and all records, reports or notes relating to petitioner which are on file with the Police Department Article II Pension Fund and/or Police Department.

Respondents oppose. After a review of the papers presented, all relevant statutes and case law, the Court denies the petition.

Factual and procedural background:

Petitioner was appointed as a uniformed police officer on June 30, 1992. On that day he also became a member of the Police Pension Fund. On December 18, 2003, he submitted an application for accident disability retirement pursuant to Administrative Code§13-252. The Police Commissioner submitted an application on petitioner's behalf for ordinary disability retirement hereinafter, ("ODR").

Based on a review of petitioner's records, his medical complaints and subsequent physical examination, the Police Pension Fund, (hereinafter "PPF"), and Medical Board rendered a unanimous opinion finding that petitioner's shoulder injury emanated from performing the full duties associated with being a police officer and that the competent causal factor of his disability was a line

of duty injury. Subsequently, the Medical Board recommended approval of petitioner's application for ADR, but also recommended disapproval for ODR. Petitioner was retired on an accidental disability pension on May 31, 2004.

Thereafter, an investigation was commenced against petitioner in response to a complaint received by the NYPD Internal Affairs Bureau that petitioner was performing construction work, despite his receipt of a disability pension. During the investigation, petitioner was under video surveillance for a period of 27 months. He was observed lifting and installing vinyl siding, without any obvious impediment. Consequently, on November 11, 2004, the NYPD informed the PPF that petitioner "may no longer be disabled." In December 2004, the Pension Fund agreed to reexamine petitioner. More, specifically, petitioner was ordered to undergo a Safeguards medical examination.

On May 24, 2005, the Medical Board reevaluated petitioner, and noted that he had "improved dramatically" since his last Medical Board examination, and voted that he be restored to service as a police officer. The PPF informed the New York City Department of Citywide Administrative Services (hereinafter, "DCAS"), that petitioner would be able to engage in gainful occupation as a police officer. However, the pension fund's trustees took no action on this recommendation for approximately two years, other than to remand the matter on two occasions to the Medical Board, which twice reaffirmed its previous recommendation.

On April 11, 2007, the Pension Fund Board of Trustees voted, despite the dissenting votes of several of them, to invoke New York City Administrative Code § 13-254, entitled "safeguards on disability retirement," wherein a disability pensioner found to be able to work may be returned to city service. On June 27, 2007, DCAS directed the NYPD to place petitioner on a "Departmental Special Preferred List," for the position of police officer.

However, on July 6, 2007, petitioner was informed that he was found "Not Qualified" for the position of police officer, "due to the presence of an unauthorized substance, cocaine, in [his] hair sample" (see Exhibit # 29). On July 12, 2007, the New York City Law Department advised the Pension Fund that "notwithstanding" petitioner's disqualification, "he is no longer deemed to be disabled, and he is no longer entitled to a disability pension." Due to this development, DCAS did not direct that petitioner be placed on any other special preferred lists of civil service titles as he was deemed unqualified. On July 18, 2007, the Pension Fund's Director of Payroll, acting under the direction of the New York City Law Department, notified petitioner that his pension would be suspended, effective that month.

Thereafter, petitioner commenced an Article 78 proceeding in New York State Supreme Court, seeking to annul the determination to suspend his pension benefits. The Appellate Division, First Department reversed, annulling the suspension of petitioner's benefits, and granted leave to appeal to the Court of Appeals.

By decision dated April 28, 2011, the Court of Appeals affirmed the Appellate Division's decision. The Court of Appeals found that pursuant to the safeguards statute, the decision to terminate petitioner's pension was not an administrative one, but instead, one that needed to be made by the Board of Trustees.

On May 6, 2011, via memorandum, the New York City Law Department advised the Board of Trustees that it must either reduce or terminate petitioner's disability pension benefits. The representative of the Police Commissioner made a motion to ratify the July 2007 administrative determination rendered by the PPF to terminate petitioner's pension. The motion was seconded by the representative for the Commissioner of the New York City Department of Finance. The motion was tabled for one month. At the next meeting of the Board of Trustees on July 11, 2011, the Law

Department reiterated its position.

Following extensive discussion, a roll call vote was taken. The trustees for the Police Benevolent Association, the Detective's Endowment Association, the Sergeants Benevolent Association, the Lieutenants Benevolent Association and the Captains Endowment Association all voted against terminating petitioner's pension. However, Trustees for the New York City Mayor's Office, the New York City Department of Finance, the New York City Comptroller's Office, and the New York City Police Commissioner, voted in favor of termination. A tie vote occurred, thereby necessitating the matter again being tabled for an additional month.

At the August 11, 2011 meeting of the Board of Trustees, when the instant matter was revisited, a representative of the Police Commissioner inquired if any other trustee would want to propose an alternative motion to the one voted on the prior month to terminate petitioner's pension by ratifying the July 2007 suspension by the PPF. However, no such alternative was proposed.

At the April 11, 2012 meeting of the Board of Trustees, the Law Department requested that the Board clarify its position regarding the prospective reduction of petitioner's pension. The union side trustees expressed concern regarding the proper statutory mechanism for permitting such a reduction under the Safeguards Act. Thus, they declined to take a definitive position on whether to reduce petitioner's pension. The trustees for the Mayor's Office and Department of Finance stated that they were in favor of termination, not reduction. The trustee for the New York City Police Commissioner again stated that she stood by her prior position and vote that a reduction was not warranted and that termination was the only appropriate vote. Unfortunately, at this time, a majority of the Board of Trustees fails to support either the termination or the reduction of petitioner's pension. Hence, petitioner continues to work as a building contractor.

Positions of the parties:

Petitioner argues that the Court of Appeals decision clearly found an unlawful taking of his pension benefits. Thus, there exists no lawful basis for this Court to continue to withhold or to prospectively diminish said benefits. Petitioner also argues that because the Board of Trustees has specifically rejected a resolution for proposing the termination of his benefits, respondent has no authority in law to continue to deny them. Therefore, its refusal to restore said benefits is arbitrary, capricious and an abuse of discretion.

Respondent argues that petitioner's request to retroactively restore his disability pension necessitates denial because he is not disabled, and thus, is not entitled to an accident disability pension. Respondent also argues that petitioner's request for a hearing and the opportunity to appear before the Board of Trustees should also be denied. It argues that while the Court of Appeals has ruled that to satisfy due process, an applicant must be afforded the opportunity to controvert the conclusions of the Board of Trustees and the Medical Board, the court has never held that it is necessary to allow the applicant to appear before the Board of Trustees.

Conclusions of law:

It is axiomatic that in an Article 78 proceeding, the court's function is to determine whether the action of an administrative agency, had a rational basis or was arbitrary and capricious (*see* Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222, 230-231 [1974]).

However, in the case at bar, it is not up to this Court to unilaterally determine whether petitioner is entitled to his pension benefits or whether the denial of his pension benefits had a rational basis or was arbitrary and capricious. While the parties present significantly different versions of what the Court of Appeals held, a reading of that decision makes it clear that the court

found that the Board of Trustees is solely responsible for determining whether petitioner's disability benefits should be suspended or revoked. "However, 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" (Notice of Petition, Exhibit "A," p. 16).

The Court also stated that "[e]ven assuming, without deciding, that there is a statutory basis for the Board of Trustees to revoke petitioner's disability pension and medical benefits while at the same time not offering him a position in city-service and that such an action would not be arbitrary and capricious under the circumstances presented here, the Board of Trustees did not take that action. Indeed, the Board never considered whether that action should be taken. The 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 p.17).

In contemplation of the aforementioned decision, this Court agrees with respondents that it does not have the authority to order the Board of Trustees to either suspend or revoke petitioner's pension benefits. However, it is well settled 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), 881 N.Y.3d 364 (Sup. Ct. N.Y. Co. 2009)). Thus, since the Board's last known determination was that petitioner was not disabled and should return to work as a police officer, the Court should allow this determination to stand.

The Court also finds that neither petitioner, nor any representative of his, is entitled to appear at a hearing to present evidence to controvert the conclusions of the Medical Board. Indeed, while petitioner should certainly be afforded the meaningful opportunity to present documentary or other evidence in his favor to the Medical Board as well as the Board of Trustees, (*see* Matter of

Meschino v. Lowery, 31 N.Y.2d 772, 774-775 [1972]), due process does not require that petitioner be afforded a full blown adversarial hearing (Matter of Balash v. New York City Employee's Ret. Sys., 34 N.Y.2d 654, 655 [1974]).

Moreover, the Court deems petitioner's application to compel respondents to provide the specified documentation to be premature at this juncture of the proceeding, particularly since it is not clear if the discovery process has even commenced.

Therefore, in accordance with the foregoing, it is hereby

ADJUDGED that petitioner's Notice of Petition be denied; and the Board's last recommendation that petitioner be returned to work in the capacity of police officer be upheld; 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.

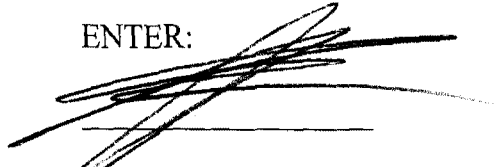
DATED: May 9, 2013

MAY 09 2013

MAY 0 2013

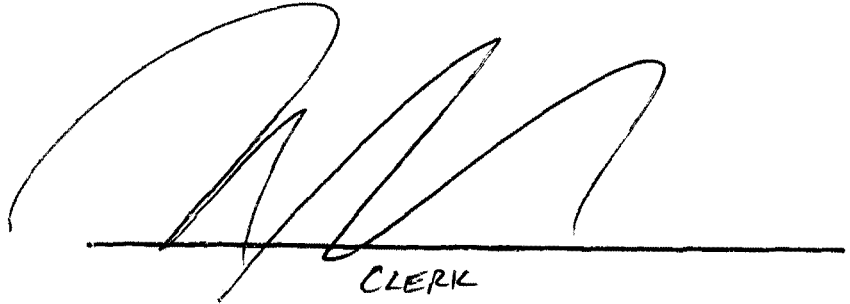
MAY 0 2013

ENTER:



Hon. Kathryn E. Freed

^{J.S.C.}
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT


CLERK

FILED

JUN 4 2013

COUNTY CLERK'S OFFICE
NEW YORK