Matter of Goris v Kelly
2014 NY Slip Op 31575(U)
June 20, 2014
Sup Ct, New York County
Docket Number: 101562/2013
Judge: Jr., Alexander W. Hunter

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 101562/2013
GORIS, LUIS
vs
KELLY, RAYMOND W.
Sequence Number : 001
ARTICLE 78

PART 33

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

decided in accordance with the memorandum order and judgment annexed hereto.

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).

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

Dated: 6/20/14

_____, J.S.C.
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

In the Matter of the Applications of

LUIS GORIS,

Petitioner,

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

-against-

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

Respondents.

INDEX NUMBER 101562/2013
Motion Sequence 001
DECISION, ORDER & JUDGMENT

ALEXANDER W. HUNTER, J.:

Petitioner Luis Goris petitions this court for a judgment, pursuant to CPLR Article 78, annulling the determination by respondents Raymond W. Kelly, as Commissioner of the New York City Police Department, the New York City Police Department, and the City of New York to terminate his employment as a School Safety Agent.

Factual Background

Petitioner was employed as a School Safety Agent by the New York City Police Department (NYPD)[1] from August 3, 1998 until August 14, 2103. In response to disciplinary charges served on November 8, 2012 (Petition, exhibit A), petitioner stipulated, on January 7,

[1] "School Safety Agents provide security and ensure the safety of students, faculty and visitors in New York City Public School buildings and surrounding premises." http://www.nypdrecruit.com/inside-nypd/civilian-opportunities (visited June 13, 2014).

2013, to a disciplinary penalty of 30 days suspension without pay, forfeiture of 20 vacation days, and acceptance of a one-year dismissal probation period, commencing January 7, 2013 (*id.*, exhibit B). Terms of conduct for petitioner's dismissal probation were given to him on January 15, 2013, including his "understand[ing] that failure to comply with any of the terms of conduct may be grounds for my dismissal from the New York City Police Department." *Id.*, exhibit C.

Petitioner appeared for a hearing on July 17, 2013, concerning his failure to provide documentation for sick leave. *Id.*, exhibit D. On August 14, 2013, he was notified of his dismissal "[a]s a result of your subsequent violation of the conditions set forth in that [January 7, 2013] agreement." *Id.*, exhibit E.

Discussion

An article 78 proceeding may only ask "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR 7803 (3). "Judicial review of a discretionary administrative determination is limited to deciding whether the agency's actions were arbitrary and capricious. The agency's determination must be upheld if the record shows a rational basis for it, even where the court might have reached a contrary result." *Matter of Kaplan v Bratton*, 249 AD2d 199, 201 (1st Dept 1998) (citation omitted); *see also Matter of Chinese Staff & Workers' Assn. v Burden*, 88 AD3d 425, 429 (1st Dept 2011), *affd* 19 NY3d 922 (2012) ("It is not the role of the court to weigh the desirability of the proposed action or to choose among alternatives, resolve disagreements among experts, or to substitute its judgment for that of the agency").

Petitioner claims that he was terminated in bad faith and that NYPD failed to consider mitigating factors, resulting in a determination that was disproportionate to the charged

misconduct. He states that the initial disciplinary charges lodged against him stemmed from one incident, where he was charged with "using profanity and leaving his post for an hour." Petition, ¶ 18. His subsequent termination was based on a failure to provide documentation for sick leave, which he describes as "conduct and allegations wholly unrelated to those for which he was initially disciplined." *Id.*, ¶ 19. He argues that his termination was "a total aberration from existing caselaw, which clearly demonstrates that termination is appropriate following a demonstrated failure or inability on the probationer's part to conform his or her conduct to that expected by the agency." *Id.*, ¶ 20.

Petitioner refers to several cases with a common thread of recidivist behavior or misconduct: *Walsh v New York State Thruway Auth.* (24 AD3d 755, 756 [2d Dept 2005]) (petitioner "was charged with numerous disciplinary violations"); *Matter of Henderson v City of New York* (12 AD3d 159, 159 [1st Dept 2004]) (petitioner "was verbally abusive and acted in a threatening manner toward his supervisor, . . . [with a] prior disciplinary record, which included a suspension for similarly abusive behavior and a warning that any future such conduct would result in disciplinary proceedings"); *Matter of Wilson v Bratton* (266 AD2d 140, 141 [1st Dept 1999]) ("petitioner was apparently late for duty at least 15 times in the last year of her probation" and at least one hour late for an appointment with NYPD's psychologist); *Matter of Rodriguez v New York City Tr. Auth.* (247 AD2d 250, 250 [1st Dept 1998]) ("petitioner failed to report for duty as directed, failed to report his absence from duty, and submitted false reports in connection with such failures").

Petitioner contends that his behavior, by contrast, does not approach the behavior of those petitioners, who he believes were justifiably terminated. Petitioner maintains that it was bad faith to be treated as seriously as these others, when he simply was less of a troublemaker. This

is not a productive line of reasoning. The court will not calibrate the relative degree of misconduct among the various identified petitioners. Significantly, the instant petitioner shares with the others a breach of the probation agreement freely entered into after a disciplinary action.

Petitioner also argues the discontinuity between his original offense, using profanity and leaving his post for an hour, and his termination for failure to document sick leave. He claims that, since one incident had no relation to the other, it is unfair to treat him as a serial offender, with such a severe penalty. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 NY2d 222, 233 (1974) ("the test is whether such punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness") (internal quotation marks and citation omitted).

Respondents offer a more substantial record of misconduct by petitioner, on and off the job, than that described by petitioner. Verified answer, exhibit A. However, it is his termination for violation of the terms of conduct for his dismissal probation, based on disciplinary charges served on November 8, 2012, that is being challenged here. The court finds no reason to annul NYPD's determination in this matter. Petitioner's agreement with NYPD to accept dismissal probation did not distinguish among possible violations. Having accepted the burden of playing by the rules in order to retain his position, he cannot now ask the court to pick and choose among the rules that should be applied to him. Any attempt to diminish the seriousness of petitioner's admitted offenses may be met by a consideration of the vital public safety role inherent to petitioner's position. As *Pell* found, "in every case there must be sensitive distinction among agencies based upon their responsibilities to the public." 34 NY2d at 241. The court will not conduct a balancing act between misconduct and penalties when the responsible agency had a

rational basis for its determination on a subject that affects the security and welfare of New York City school children. Finally, there is no evidence of bad faith in the manner in which respondents made their determination. The proceedings were conducted in a transparent fashion, with petitioner's compliance throughout.

Accordingly, it is

ADJUDGED that the Petition is denied and the proceeding is dismissed.

DATED: **June 30, 2014**

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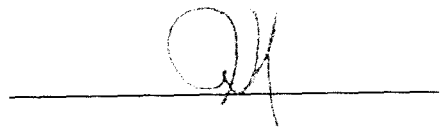

J.S.C.
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