

**Matter of McClave v Port Auth. of N.Y. & N.J.**

2014 NY Slip Op 31844(U)

July 16, 2014

Supreme Court, New York County

Docket Number: 100095/14

Judge: Carol E. Huff

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SCANNED ON 7/17/2014

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY  
**CAROL E. HUFF**

Index Number : 100095/2014

MCCLAVE, JOHN

vs

PORT AUTHORITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

PART 32

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 accompanying memorandum decision

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: JUL 16 2014

  
\_\_\_\_\_, J.S.C.  
**CAROL E. HUFF**

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 32

-----X

In the Matter of the Application of : Index No. 100095/14  
JOHN MCCLAVE, :  
Petitioner, :

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

- against -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, and PATRICK FOYE, Executive Director of the  
Port Authority of New York and New Jersey, in his official :  
capacity,

Respondents. :

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks an order annulling the determination of respondent Port Authority of New York and New Jersey, dated September 24, 2013, which terminated his employment as a police captain with Port Authority.

Petitioner was terminated as a result of incidents that occurred on June 10 and September 25, 2012. According to police reports, on June 10 petitioner was approached by local New Jersey police for driving his official Port Authority vehicle erratically. He failed to stop when officers signaled him to stop, until he reached his home. When he refused a field sobriety test petitioner was placed under arrest. At police headquarters his blood alcohol content was measured at .19%, more than twice the New Jersey limit (.08%). When police searched his car

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they found two unsecured loaded handguns in the trunk. Following this incident petitioner was placed on administrative leave without pay.

On September 25, a man named Jonathan Oeftering accused petitioner of assaulting him after calling Oeftering to his house. Oeftering had appeared at petitioner's house the day before in connection with a dispute involving petitioner's son. Oeftering pressed charges against petitioner, who the police charged with simple assault.

On January 15, 2013, petitioner pled guilty to driving while intoxicated. On March 13, 2013, petitioner pled guilty to breach of peace in connection with the Oeftering incident.

On April 24, 2013, petitioner was served with a copy of a memorandum written by the Port Authority Director of Public Safety, Michael Federko, setting forth the facts surrounding petitioner's arrests as well as reports from the Port Authority Office of Investigations. Federko recommended that petitioner be terminated. Pursuant to the Port Authority's internal administrative guidelines (Administrative Instruction 20-1.11), petitioner requested and appeared with counsel at a hearing held on August 8, 2013. Petitioner argued that similarly situated officers had not been terminated, that investigators were biased, that he was receiving professional assistance for alcohol dependency and that termination was an unduly harsh penalty.

The hearing officer, in his report dated September 12, 2013, in response to petitioner's claim of an unblemished record, cites two previous disciplinary sanctions against petitioner, including a 1998 suspension for discharging a weapon in the parking lot of a New Jersey bar. The hearing officer concluded that petitioner had violated Port Authority Rules and Regulations, and Port Authority Police Division Rules of Conduct, that petitioner had not accepted responsibility for his conduct and that termination was an appropriate penalty.

The September 24, 2013, determination will be upheld unless it is shown that it “was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion.” CPLR 7803(3). The test is whether the determination is “without sound basis in reason and is generally taken without regard to the facts.” Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974). An administrative agency, “acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record.” Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1<sup>st</sup> Dept 2007), aff'd 11 NY3d 859 (2008).

Petitioner refers to seventeen instances where purportedly similarly situated Port Authority police officers were treated more leniently. These hearsay reports, however, are distinguishable from the facts presented here, where a commanding officer was involved in multiple instances of illegal and unprofessional conduct.

Petitioner further contends that the penalty of termination should be annulled because of his record of good service and because he is seventeen months short of entitlement to retirement pension and benefits. A penalty is “shocking to one’s sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct of the individual . . . or the harm of risk to the agency. . . .” Pell, supra, at 233. Petitioner has failed to meet his burden here, especially in light of the Pell Court’s further admonition that, “Paramount too, in cases of sanctions for agencies like the police, is the principle that it is the agency and not the courts which, before the public, must justify the

integrity and efficiency of their operations.” Id. at 235.

Because petitioner has failed to show that the determination was arbitrary and capricious or affected by error of law, or that the penalty is shocking to one’s sense of fairness, the petition is denied.

Accordingly, it is

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

Dated: JUL 16 2014

  
**CAROL E. HUFF**  
J.S.C.

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