

Yarusso v New York City Police Dept.

2019 NY Slip Op 31488(U)

May 28, 2019

Supreme Court, New York County

Docket Number: 155945/2018

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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RICHARD YARUSSO,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT,
NEW YORK CITY POLICE PENSION FUND,
and THE CITY OF NEW YORK,

Respondents.

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CAROL R. EDMEAD, J.S.C.:

DECISION AND ORDER

Index No.: 155945/2018

Motion Sequence 001

MEMORANDUM DECISION

In this Article 78 proceeding, Richard Yarusso (Petitioner) moves for a judgment reversing the determination of the New York City Police Department (“NYPD”) and the New York City Police Pension Fund (“Pension Fund”) (collectively, Respondents) rejecting Petitioner’s application for reinstatement as a member of the NYPD. Respondent cross-moves to dismiss the petition. For the reasons set forth below, the Court denies the petition in its entirety and grants the cross motion to dismiss.

BACKGROUND FACTS

Petitioner is a former member of the NYPD who was discharged in 2011 as a result of his hearing impairment. At the time, the NYPD did not have a policy in place allowing police officers with hearing deficiencies to use hearing aids on duty (NYSCEF doc No. 1, ¶ 9). Petitioner was found to be disabled and was enrolled in disability retirement. Petitioner then filed

a lawsuit in the United States District Court for the Southern District of New York, claiming the NYPD engaged in discrimination in violation of the Americans with Disabilities Act and the New York State and City Human Rights Laws (See *Yarusso v City of New York*, No. 11 CIV. 5895 GB, 2013 WL 772799 [S.D.N.Y. Feb. 27, 2013]). The Southern District dismissed the lawsuit, finding that Petitioner had failed to demonstrate he could adequately perform the duties of a police officer even with a reasonable accommodation (*id.* at 12).

Subsequently, the NYPD amended its policy on hearing aids, and began allowing incumbent NYPD officers to wear hearing aids while on duty provided they passed certain tests (NYSCEF doc No. 3 at 10-11). Petitioner then independently sought testing and submitted his results to the NYPD, along with a request to be reinstated. The request was denied by letter as Petitioner did not file a formal application for reinstatement (NYSCEF doc No. 8). Petitioner later submitted a formal application, which the NYPD redirected to the Pension Fund as Petitioner was on disability retirement (NYSCEF doc No. 12). Petitioner then submitted his application to the Pension Fund, which denied the request by letter dated February 26, 2018, on the grounds that it no longer had jurisdiction over Petitioner's reinstatement, as Petitioner reached service retirement eligibility, meaning he may no longer be restored by the Pension Fund to employment (NYSCEF doc No. 14).

Petitioner commenced this Article 78 proceeding on June 25, 2018, seeking to annul the determination of the Pension Fund. Petitioner also seeks a writ of mandamus compelling Respondents to reinstate Petitioner as a member of the NYPD. In its cross-motion to dismiss the petition, Respondents argues that the Pension Fund's decision is supported by a rational basis as

it was based on the fund's statutory authority and thus meets the standard of review under Article 78.

DISCUSSION

On an Article 78 motion, the Court evaluates whether the determination of an agency was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts" (*Matter of Pell v. Board of Education*, 34 NY2d 222, 231 [1974]; *see also Jackson v. New York State Urban Dev Corp.*, 67 NY2d 400, 417 [on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence"]). The test is thus limited to "whether the administrative action is without foundation in fact" (*Matter of Pell*, 34 NY2d at 230-31). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*id.*). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v. New York City Conciliation and Appeals Board*, 112 AD2d 72 [1st Dept.], *aff'd* 66 NY2d 1032 [1985]). Moreover, where the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (*see Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]).

As a preliminary matter, Respondents correctly note that Article 78 proceedings are governed by a four-month statute of limitations (CPLR § 217). Therefore, only the determination of the Pension Fund is properly before this Court; claims regarding other actions by Respondents that preceded the Pension Fund's decision, including the NYPD's decision to not reinstate Petitioner, are time-barred.

Here, the Pension Fund made a rational determination based on its statutory authority, which is codified by New York City Administrative Code § 13-254. Pursuant to its statutory authority, the Pension Fund "may recall members for medical examination annually until attainment of Service Retirement eligibility" (NYSCEF doc No. 14). The letter concluded that Petitioner's reinstatement would be subject to the discretion of the NYPD. Members become eligible for Service Retirement after 20 years, and as Petitioner became a member of the NYPD in 1994, he reached eligibility for Service Retirement in 2014 (*id.*). Petitioner has introduced no evidence that this determination was arbitrary and capricious or lacked a rational basis. In an affidavit, Petitioner asserted that he never received Service Retirement benefits, claiming that "I do not receive the same benefits as an employee who reached 20 years of service. I have never signed any documents for retirement and in fact refused to do so" (NYSCEF doc No. 41, ¶2). However, the statute restricts the Pension Fund's ability to reinstate after the minimum period for service retirement eligibility, so the question of whether Petitioner ever received benefits is of no moment. Accordingly, as the Pension Fund's interpretation of its own statutory authority had a rational basis, it is not subject to judicial interference.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED and that the application of Petitioner Richard Yarusso is denied in its entirety; and it is further

ORDERED that Respondents' cross motion to dismiss the Petition is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that Respondents shall serve a copy of this order, along with notice of entry, on all parties within 15 days of entry.

Dated: May 28, 2019



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMOAD
J.S.C.