

Ryan v Shea
2022 NY Slip Op 31060(U)
April 4, 2022
Supreme Court, New York County
Docket Number: Index No. 159251/2021
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMEAD PART 35

Justice

-----X

TIMOTHY RYAN,

Petitioner,

- v -

DERMOT SHEA, NEW YORK CITY POLICE DEPARTMENT,
THE CITY OF NEW YORK

Respondent.

-----X

INDEX NO. 159251/2021

MOTION DATE 03/22/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Timothy Ryan (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the cross motion, pursuant to CPLR 3211 (a) (7), of the respondents Dermot Shea, as Police Commissioner of the City of New York, the Police Department of the City of New York (motion sequence number 001) is granted and this proceeding is dismissed; and it is further

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

ORDERED that counsel for respondents shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

In this Article 78 proceeding, petitioner Timothy Ryan (Ryan) seeks a judgment to overturn the decision of the respondents Police Department of the City of New York (NYPD) and Commissioner Dermot Shea (Commissioner) terminating his employment, and respondents cross-move to dismiss his petition (together, motion sequence number 001). For the following reasons, the petition is denied, the cross motion is granted and the proceeding is dismissed.

FACTS

Ryan was employed as an NYPD officer from July 11, 2005 until his dismissal on June 11, 2021. *See* verified petition, Ryan aff, ¶¶ 1, 34. On July 31, 2019, the NYPD filed disciplinary charges and specifications against Ryan for engaging in conduct which violated several NYPD policies. *See* notice of cross motion, exhibit 1. Rather than face a departmental disciplinary hearing on those charges and specifications, Ryan instead executed a negotiated settlement agreement (NSA) with the NYPD which required him to forfeit 30 vacation days, and to be placed on “dismissal probation” for a period of one (1) year, effective November 4, 2020. *Id.*, exhibit 2. The relevant portions of the NSA provide as follows:

“I understand that if this Negotiated Settlement is approved by the Police Commissioner, the penalty against me will be as follows:

“I shall forfeit Thirty (30) vacation days;
“and

“Dismissal from the New York City Police Department; however, judgment is suspended, and I will be placed on Dismissal Probation for a period of one (1) year. I understand that the Police Commissioner may impose punishment of dismissal or any lesser penalty deemed appropriate at any time during such period. This period of probation shall commence upon the approval of this Negotiated Settlement by the Police Commissioner.

* * *

“If this Negotiated Settlement is approved by the Police Commissioner, I accept said decision, and as a condition of accepting such decision of the Police Commissioner, I hereby waive any and all rights granted to me under all applicable laws of the City and State of New York.”

Id.; exhibit 2. Ryan signed both the NSA and a separate letter acknowledging its terms. *Id.*, exhibit 2; verified petition, exhibit B.

On May 4, 2021, during Ryan's period of dismissal probation, the NYPD filed new charges and specifications against him relating to a telephone altercation that he had with a superior officer on February 16, 2021. *See* notice of cross motion, exhibit 3. When he reported to work on June 11, 2021, Ryan was informed that he had been terminated. *See* verified petition, Ryan aff, ¶ 43. He then received a letter from the NYPD Commissioner's office, dated June 12, 2021, that formally dismissed him from employment (the dismissal letter). *Id.*, exhibit C.

Ryan subsequently commenced this Article 78 proceeding on October 8, 2021. *See* verified petition. After stipulating to several extensions, the NYPD filed its cross motion to dismiss on February 15, 2022. *See* notice of cross motion. With the filing of opposition and reply papers, this matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

Normally, the court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether a challenged agency determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). An agency's determination will only be found arbitrary and capricious where it is "without sound basis in reason, and in disregard of . . . the facts." *Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. Conversely, if there is a rational basis in the administrative record that supports the agency's determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck*,

Westchester County, 34 NY2d at 231-232. However, this Article 78 proceeding does not require judicial review under the normal arbitrary and capricious analysis.

The Appellate Division, First Department, recently reiterated the rule that:

“It is well settled that ‘[a] probationary employee may be terminated without a hearing for any reason or no reason at all, as long as the dismissal was not unlawful or in bad faith’ (*Matter of Verma v Department of Educ. of the City of N.Y.*, 192 AD3d 616, 616 [1st Dept 2021]; see *Matter of Mendez v New York City Dept. of Educ.*, 28 NY3d 993, 994 [2016]; *Matter of York v McGuire*, 63 NY2d 760, 761 [1984]). This standard applies where . . . a police officer has been placed ‘on dismissal probation in accordance with a negotiated resolution of disciplinary charges’ (*Matter of Cipolla v Kelly*, 26 AD3d 171, 171 [1st Dept 2006]).”

Matter of Ahmed v O'Neill, 198 AD3d 471, 472 (1st Dept 2021). Here, Ryan was dismissed on June 11, 2021, which date fell during his period of dismissal termination from November 4, 2020 and November 4, 2021. His dismissal was therefore presumptively valid, unless he can demonstrate that the NYPD acted “unlawfully or in bad faith.” The court finds that he has failed to do so.

The First Department has long held that:

“While a hearing may be necessary in those instances where an issue of a substantial nature is raised regarding the probationary employee's dismissal (*Matter of Beacham v Brown*, 215 AD2d 334 [1st Dept 1995], *lv denied* 87 NY2d 801 [1995]; *Matter of Miciotta v McMickens*, 118 AD2d 489, 491 [1st Dept 1986]), the burden falls squarely on the petitioner to demonstrate, by competent proof, that a substantial issue of bad faith exists, or that the termination was for an improper or impermissible reason (*Matter of Cipolla v Kelly*, 26 AD3d 171 [1st Dept 2006]; *Matter of Beacham v Brown*, 215 AD2d at 334), and mere speculation, or bald, conclusory allegations are insufficient to shoulder this burden (*Matter of Green v Bd. of Educ. of the City Dist. of N.Y.*, 262 AD2d 411, 412 [2d Dept 1999]; *Matter of Garcia v New York City Probation Dept.*, 208 AD2d 475, 476 [1st Dept 1994]; *Matter of Cortijo v Ward*, 158 AD2d 345 [1st Dept 1990]).”

Matter of Che Lin Tsao v Kelly, 28 AD3d 320, 321 (1st Dept 2006). Here, Ryan asserts that, on February 16, 2021, he was “under no obligation to call [the NYPD] Absence Control [office] prior to leaving his residence outside his scheduled tour” to take his elderly father to a medical appointment, but that he made the call “out of an abundance of caution as he was worried that he would not be back at his residence” before his daily tour began. See petitioner’s mem of law in

opposition at 4-5. He also asserts that the superior officer who answered the call “ordered [him] to report to the [NYPD’s] Medical Division within thirty minutes,” and that “this order was not based in any legitimate business purpose and set [him] up to fail.” *Id.* Ryan concludes that “[t]his unlawful order was meant to punish [him] for being out sick, and thus was in bad faith.” *Id.* at 1. In the affidavit accompanying his petition, Ryan admits that he used foul and abusive language at the superior officer, which was evidently the basis for the May 4, 2021 charges and specifications that the NYPD filed against him. *See* verified petition, exhibit A (Ryan aff), ¶¶ 25-26. The foregoing allegations are clearly (a) no more than speculative and conclusory claims that his superior officer was acting in bad faith on May 4, 2021, and (b) an acknowledgement that the charges and specifications which the NYPS filed against him as a result of the phone call were accurate. Ryan’s allegations are hardly sufficient to raise a “substantial issue” that the NYPD acted in bad faith. *Matter of Che Lin Tsao v Kelly*, 28 AD3d at 321; *see also Matter of Leka v New York City Law Dept.*, 160 AD3d 497 (1st Dept 2018). In fact, they furnish proof that the NYPD had a good faith basis for terminating his probationary employment. *See e.g., Matter of Foley v O’Neill*, 200 AD3d 609, 610 (1st Dept 2021), citing *Matter of Swinton v Safir*, 93 NY2d 758, 761-763 (1999); *Matter of Morrison v New York City Dept. of Corr.*, 198 AD3d 537 (1st Dept 2021); *Matter of Adelana v New York City Dept. of Educ.*, 194 AD3d 463 (1st Dept 2021). As a result, the court concludes that Ryan has failed to meet the burden of proof specified in the governing First Department precedent, and that his Article 78 petition therefore lacks merit.

Accordingly, the court concludes that Ryan’s Article 78 petition should be denied, and that respondents’ cross motion to dismiss it pursuant to CPLR 3211 (a) (7) for failure to state a claim should consequently be granted.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Timothy Ryan (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the cross motion, pursuant to CPLR 3211 (a) (7), of the respondents Dermot Shea, as Police Commissioner of the City of New York, the Police Department of the City of New York (motion sequence number 001) is granted and this proceeding is dismissed; and it is further

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

ORDERED that counsel for respondents shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.


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<u>4/4/2022</u> DATE					<u>CAROL EDM EAD, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>			<input type="checkbox"/>	FIDUCIARY APPOINTMENT