

Bonifacio v Sewell

2022 NY Slip Op 33692(U)

October 28, 2022

Supreme Court, New York County

Docket Number: Index No. 152332/2022

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

-----X

YONATHAN BONIFACIO,

Petitioner,

- v -

KEECHANT SEWELL, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, THE CITY OF NEW YORK

Respondents.

-----X

INDEX NO. 152332/2022

MOTION DATE 8/10/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31

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

Upon the foregoing documents, the instant petition is resolved as follows:

Petitioner commenced the instant CPLR Article 78 proceeding seeking an Order to, "annul[] the determination of the Police Commissioner of the City of New York that dismissed him from his position as a police officer with the [New York Police Department] ("NYPD"), and directing that he be reinstated to his position as a police officer with the NYPD with full back pay, benefits, and seniority restored."

This Court must review whether pursuant to CPLR 7803(3) (i) whether the decision was arbitrary and capricious, and (ii) whether the penalty imposed is shocking to the conscience.

Respondents submit an answer that highlights the relevant facts:

"In August 2020, Petitioner was employed by the NYPD as a Probationary Sergeant. On August 18, 2020, while employed as a Probationary Sergeant with the NYPD, Petitioner sent a group text message to several subordinate officers in a private Whatsapp chat with a photo of George Floyd dead on the ground with his spirit leaving his body [...]. On August 24, 2020 Petitioner sent a group text message to the same private Whatsapp chat with the captions [...]. On April 29, 2021, Petitioner was demoted. On April 30,

2021, the NYPD brought Charges and Specifications against the Petitioner for this conduct in Disciplinary Case #2020-22670. On June 8, 2021, Petitioner, represented by counsel, entered into a Negotiated Plea Agreement with the NYPD. On August 6, 2021, then Police Commissioner, Dermont Shea, disapproved the Negotiated Plea Agreement. On January 21, 2021, the NYPD adopted a new disciplinary system called the ‘Discipline Matrix.’ On October 15, 2021, Petitioner, represented by counsel, in lieu of contesting the charges in a Department Trial pled guilty to the April 21, 2021, Charges and Specifications. On October 15, 2021, ADCT Kleiman conducted a mitigation hearing to determine the applicable penalty for Petitioner’s guilty plea. On November 1, 2021, the NYPD suspended Petitioner from duty without pay pending review by the Police Commissioner of a recommended penalty of dismissal from the NYPD. On November 17, 2021, in an eight – page written decision, ADCT Kleiman found that no mitigation was warranted and found several aggravating factors to support the dismissal of Petitioner from the NYPD. In particular, ADCT Kleiman found that Petitioner’s supervisory status at the time he sent the text messages, the timing of the text messages in the midst of a summer of political and social unrest, and that his conduct adversely affected the Department warranted dismissal. On December 16, 2021, Commissioner Shea adopted ADCT Kleiman’s findings and approved the Petitioner’s dismissal recommendation upon consideration of the entire record” (see NYSCEF Doc. No. 11 Pars. 27 – 31, 34, 36, 37, 41, 42, 45, 47, 48).

The Police Commissioner’s disapproval of the Negotiated Plea Agreement states in pertinent part:

“After reviewing the facts and circumstances of this case, the Police Commissioner has determined that the negotiated penalty does not adequately address the cited misconduct. Police Officer Bonifacio in sending obviously insensitive text messages had an adverse impact upon the Department with regard to its mission, reputation, credibility and relationship with the community, and impacted public trust. Additionally, it must be taken into account that Police Officer Bonifacio was a supervisor at the time he sent the text messages. Thus, based on the aforementioned aggravating facts, an extraordinary departure from the Disciplinary System Penalty Guidelines (“Matrix”) is warranted.

Therefore, the Police Commissioner has determined that this matter be expeditiously scheduled for a Department Trial, seeking Police

Officer Bonifacio's dismissal from the Department" (see NYSCEF Doc. No. 19).

The Court notes that on January 21, 2021, the NYPD adopted a new disciplinary system entitled the "Discipline Matrix" that was clearly designed to provide guidance and expectation for all concerned of presumptive penalties for various offenses, however that Matrix also states in pertinent part:

"Nothing in these Guidelines shall be construed to limit the discretion of the Police Commissioner to impose discipline. The Police Commissioner, upon a finding or admission of wrongdoing in a disciplinary matter, has the authority to dismiss a member of the service from their employment with the Department" (see NYSCEF Doc. No. 20 P. 6, 19).

The Discipline Matrix addresses a host of offenses and anticipated punishments for same including a section entitled "Equal Employment Opportunity Division" containing a range of punishments for specified offenses. For "Display of Offensive Material Based on Membership in a Protected Class," the presumptive penalty ranges from ten to thirty days of suspension. For "Disparaging Remarks Based on Membership in a Protected Class" presumptive penalty ranges from ten days suspension to dismissal.

ARBITRARY & CAPRICIOUS

In an Article 78 proceeding, one of the applicable standards for judicial review involves "whether [the] determination was made in violation of lawful procedure, was effected by error of law or was arbitrary and capricious or an abuse of discretion" (see CPLR 7803(3)). "Even if the court concludes that it would have reached a different result than the one reached by the agency," the court "must sustain the determination," provided that it is "supported by a rational basis" (see *Arrocha v. Bd. of Educ.*, 93 N.Y.2d 361 [1999]). It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary

and unreasonable and constitutes an abuse of discretion” (see *Mid – State Mgmt. Corp. v. New York City Conciliation and Appeals Bd.*, 112 A.D.2d 72, 76 [1st Dept. 1985]). “The judicial function is exhausted when there is to be found a rational basis for the conclusions approved by the administrative body” (see *Sullivan Cty. Harness Racing Ass’n v. Glasser*, 30 N.Y.2d 269 [1972]).

Respondents affirmation asserts that “no due process violation for Petitioner’s Demotion” exists (see NYSCEF Doc. No. 26). “To the extent Petitioner is challenging his April 29, 2021, demotion from Probationary Sergeant to Police Officer that claim fails because not only would it be time barred, but as a Probationary Sergeant, he did not possess a property interest in his position. As such, this claim must fail. CPLR 217” (see NYSCEF Doc. No. 26 P. 10).

“A probationary employee, may be discharged without a hearing, or statement of reasons, for any reason or no reason at all ...” (see *Tsao v. Kelly*, 28 A.D.3d 320, 321 [1st Dept. 2006]).

As to the officer’s demotion, Respondent is clearly correct that same must be upheld regardless of the outcome of the overarching Petition.

Respondents continue, “[h]ere, the process afforded to Petitioner far exceeded the minimal constitutional requirements mandated by the Due Process Clause. The record evidence is clear that Petitioner received notice of the April 21, 2021, Charges and Specifications, which included allegations that the conduct he was accused of amounted to violations of Patrol Guide 205 – 37 ‘Sexual, Ethnic, Racial, Religious, or Other Discriminatory Slurs through Display of Offensive Material’ and of Patrol Guide 203 – 10, Page 1, Paragraph 5 ‘Public Conduct – Prohibited Conduct General Regulations” (see NYSCEF Doc. No. 26 P. 26).

SHOCK THE CONSCIENCE

Petitioner’s Petitions argues:

“The punishment imposed upon Petitioner of his termination from the NYPD is shocking to the conscience. To ensure a ‘fair and equitable’ disciplinary system, the NYPD adopted a Disciplinary matrix. The goal of the disciplinary matrix was to make ‘presumptive penalties’ ranges that would allow for discipline to be ‘fairly administered [and] reasonably consistent.’ Additionally, the Matrix outlines mitigating factors and aggravating factors that could respectively decrease or increase the penalty. Officer Bonifacio pled guilty to “Display of Offensive Material Based on Membership in a Protected Class.’ The mitigated penalty for that charge is 10 penalty days, the presumptive penalty is 20 penalty days, and the aggravated penalty is 30 penalty days. Because ADCT Kleiman unilaterally changed Officer Bonifacio’s conduct to ‘Disparaging Remarks Based on Membership in a Protected Class,’ ADCT Kleiman was given cover to terminate petitioner as the aggravated penalty for that misconduct is termination. Although the court may have believed that this is a ‘distinction without a difference,’ the two charges are separately penalized under the Matrix and are found to be in separate areas of the Administrative Guide. By disregarding these differences, ADCT Kleiman twisted the Disciplinary Matrix to conform to his desires instead of using the Matrix to promote a fair and equitable disciplinary system. Therefore, the penalty shocks the conscience, so the penalty portion of respondent Police Commissioner’s determination should be annulled and modified to a lesser penalty than termination. See CPLR 7803(3)” (see NYSCEF Doc. No. 1 Pars. 19 – 21).

Petitioner’s Reply concludes with, “[d]espite adopting a disciplinary matrix to ensure a fair and equitable disciplinary system, Respondents violated their own system by terminating Petitioner from the NYPD effective December 16, 2021. Petitioner’s dismissal was not only a Due Process violation, and shocking to the conscience, but is also not supported by any evidence much less than being without a substantial evidence” (see NYSCEF Doc. No. 29 Par. 8).

The “Disciplinary System Penalty Guidelines” provides “presumptive penalties for equal employment opportunities violations” (see NYSCEF Doc. No. 20 P. 48). Said table provides the misconduct type, along with a penalty of a certain number of days up to termination. The administering authorities provide the misconduct alleged and the according penalty.

In the end Petitioner seeks to avert the proposed penalty in this case citing prior cases that resulted in less harsh penalties as well as the claim that Commissioner Kleiman added additional charges that were not present. However, past actions by the Department are not a proper guide as illustrated by the creation of the new Discipline Matrix itself in January of 2021. Furthermore, the NYPD and our society as a whole continue to evolve, recognizing that what was considered acceptable, or at least tolerated, behavior in the past will no longer viewed as such. As to Petitioners argument that commissioner Kleiman improperly determined that the targeted misconduct's distinction between a "display" and "remark" is a distinction without a difference - such argument is not persuasive.

CONCLUSION

The New York Police Department and the City of New York have an obligation to maintain the public trust and ensure that acts of misconduct by police officers will be appropriately punished and rectified. A Disciplinary System Penalty Guidelines was promulgated that involved a collaborative effort with a wide variety of police oversight entities, public interest groups, elected leaders, and other interest parties. The goal of the Disciplinary System is to ensure that discipline is clear and fair. However, as noted by Respondents the Police Commissioner still maintains the absolute right to impose different penalties when deemed appropriate.

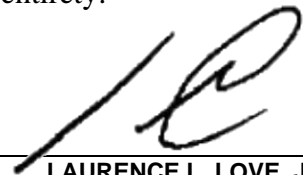
Here, the Court recognizes that Officer Bonifacio had a thirteen year unblemished record, yet at the same time his actions in transmitting two outrageous texts to his subordinates poses a significant violation. Furthermore, the texts, which all would agree were shocking under any circumstances, were not sent in a vacuum. Here they were sent during the height of the Black Lives Matter movement, when daily protests were occurring within our City and around the country. They were not just sent from one police officer to another in a private chat but were sent

from a supervisor to his subordinates. To find that the ramifications of such an act warrant ending a promising career is a sad finding, but certainly far from shocking to the conscience.

Through the application of the facts to the Disciplinary System in place the Respondents reached a decision with a rational basis that was not arbitrary nor capricious. Further, the guidelines allow for a Termination Penalty. As police officers are aware that certain conduct may lead to termination, the Respondents conduct of terminating the Petitioner does not “shock the conscience.”

ORDERED that the instant Petition is DENIED in its entirety.

10/28/2022
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: