

Santos v Sewell

2023 NY Slip Op 32718(U)

August 7, 2023

Supreme Court, New York County

Docket Number: Index No. 151966/2023

Judge: Frank P. Nervo

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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. FRANK P. NERVO **PART** **04**

Justice

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POLICE OFFICER HELDER SANTOS,

Plaintiff,

- v -

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

Defendant.

-----X

INDEX NO. 151966/2023

MOTION DATE 03/01/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 15, 20, 21, 27

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

Petitioner was employed by the NYPD. Following receipt of a promotion, petitioner requested assignment to the Highway Patrol Unit, which required a drug test. The parties do not dispute that the drug test was a non-random, scheduled test. The results of that test were positive for cocaine. Thereafter, petitioner was charged with wrongfully ingesting cocaine and appeared at an administrative trial. Assistant Deputy Commissioner Kleiman found petitioner not guilty of the charged misconduct. Thereafter, Police Commissioner Sewell disapproved the report of Kleiman, finding that “the facts of this particular case remain; Police Officer Santos failed the Department’s drug testing” and terminated his employment (NYSCEF Doc.

No. 32). Petitioner challenges the Commissioner's determination disapproving the report and terminating his employment.

The standard of review of an agency determination via an Article 78 proceeding is well established. The Court must determine whether there is a rational basis for the agency determination or whether the determination is arbitrary and capricious (*Matter of Gilman v. New York State Div. of Housing and Community Renewal*, 99 NY2d 144 [2002]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Peckham v. Calogero*, 12 NY3d 424 [2009]; see also *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]). When an agency determination is supported by a rational basis, this Court must sustain the determination, notwithstanding that the Court would reach a different result than that of the agency (*Peckham v. Calogero*, 12 NY2d at 431).

Here, the determination of Commissioner Sewell is not arbitrary and capricious, and is instead supported by a rational basis. There is no dispute that the operative drug testing at issue here was positive for cocaine and the

NYPD's testing procedures eliminated the possibility that a positive test result occurred due to contamination.

Indeed, it is the report of Assistant Deputy Commissioner Kleiman which is arbitrary and capricious, having no basis in fact. Kleiman's report, beginning with a recitation that "cocaine is all around us" wholly disregards the expert testimony regarding contamination and the testing procedures employed to ensure positive results are not the result of contamination (NYSCEF Doc. No. 31). To wit, hair samples are repeatedly washed; the wash effluent is tested for cocaine, providing a quantitative value of cocaine present on the outside of the hair sample (indicating contamination); and the quantitative result of the effluent testing, if any, is subtracted from the quantitative result of the hair's internal testing (accounting for and removing any contamination from the final result). Simply put, there is no evidence that the hair samples here were contaminated, and the testing procedure employed ensures accurate results even if samples were contaminated.

The record establishes that the drug testing procedures employed here account for external contamination and, when taken as a whole, eliminate the possibility that final positive results are the product of external contamination.

The uncontroverted expert testimony, including that of petitioner’s own expert, did not support petitioner’s theory of external contamination. Thus, a finding that petitioner wrongfully ingested cocaine was supported by the record. To the extent that respondents contend the matter must be transferred to the Appellate Division pursuant to CPLR § 7803, that issue is academic given the foregoing and, in any event, this petition, however characterized, is not one challenging the sufficiency of the evidence, but rather whether the determination was arbitrary and capricious.

Accordingly, it is

ORDERED that the petition is denied in its entirety.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

8/7/2023
DATE


HON. FRANK P. NERVO
J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN