

Matter of McKay-Brown v Kelly
2012 NY Slip Op 30655(U)
March 15, 2012
Supreme Court, New York County
Docket Number: 107779/2011
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JAFFE

BARBARA JAFFE

DECEANT.

PART 5

Index Number : 107779/2011

MCKAY-BROWN, CASSANDRA

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

CAL # 78

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ~~ORDER~~ AND JUDGEMENT.

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).

Dated: 3/15/12

MAR 15 2012

BARBARA JAFFE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
In the Matter of the Application of CASSANDRA
MCKAY-BROWN,

Petitioner,

Index No. 107779/11

Motion Date: 12/6/11

Motion Seq. No.: 001

For a Judgment under Article 78 of the Civil Practice Law
and Rules,

DECISION & JUDGMENT

- against -

RAYMOND KELLY, as the Police Commissioner of the
City of New York, and as Chairman of the Board of
Trustees of the Police Pension Fund, Article II, and THE
BOARD OF TRUSTEES of the New York City Police
Pension Fund, Article II,

Respondents.

-----X
BARBARA JAFFE, JSC:

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By notice of petition and verified petition dated June 27, 2011, petitioner brings this Article 78 proceeding seeking an order reviewing and annulling respondents' denial of her application for an accidental disability retirement and directing respondents to retire petitioner retroactive to the date of her service retirement or, in the alternative, directing a remand for a new determination by respondents pursuant to the proper legal standard. Respondents oppose the petition.

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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).

I. BACKGROUND

Petitioner commenced her employment with the New York City Police Department (NYPD) on July 1, 2002 and remained continuously employed until her retirement. (Verified Petition, dated June 27, 2011 [Pet.]). While employed, she belonged to the NYPD's Pension Fund. (*Id.*).

On January 3, 2008, petitioner was assigned to work as an instructor at the NYPD Police Academy, and, while participating in a grappling training exercise with other instructors, she was injured when she was flipped over by a male instructor and landed on her neck. (Pet.). The Academy's lesson plan or training manual for the exercise provides that NYPD recruits shall participate in wrestling/grappling exercises only with other recruits of the same gender. (*Id.*, Exh. C).

In August 2010, petitioner filed an application for an Accidental Disability Retirement (ADR) based on her injury; the NYPD, however, filed an Ordinary Disability Retirement application (ODR). (Pet.). On September 15, 2010, the Medical Board disapproved both applications. (*Id.*, Exh. D). Thereafter, the applications were remanded to the Medical Board to consider new evidence. (*Id.*).

By decision dated January 12, 2011, the Medical Board reviewed the new evidence and determined that petitioner was disabled from performing the duties of an NYPD officer. It thus rescinded its previous decision and approved her ADR application, finding that "the final diagnosis is Herniated Disc L4-5 with Radiculopathy. The competent causal factor is the line of duty incident of January 3, 2008." (*Id.*, Exh. D).

On May 11, 2011, the Board of Trustees reviewed petitioner's application and, by a "six

to six tie vote,” denied her ADR application on the ground that an accident which occurs during a training exercise does not constitute an “accidental” injury for pension purposes. The Board observed that the training manual provides only that recruits must be paired with others of the same gender and does not address instructors such as petitioner. (Pet.; Verified Answer, dated Oct. 27, 2011 [Answer], Exh. 11).

II. CONTENTIONS

Petitioner alleges that the Board of Trustees’ finding that she did not sustain an injury as a result of an accident was arbitrary and capricious and an abuse of discretion as it occurred from a sudden, unanticipated, and fortuitous event that was unrelated to the ordinary risks of her employment. (Petitioner’s Memo. of Law, dated Oct. 11, 2011).

Respondents contend that petitioner’s injury was an inherent risk of her duty as an instructor engaged in a training exercise, and that as nothing unexpected or out of the ordinary occurred during the exercise, her injury did not result from an accident as defined by the pension rules. Respondents also observe that the guidelines in the training manual are inapplicable as petitioner was an instructor and not a recruit. (Respondents’ Memo. of Law, dated Oct. 27, 2011).

In reply, petitioner reiterates that an injury sustained during a training exercise is not an inherent risk of a police officer’s employment. (Reply Memo. of Law, dated Nov. 8, 2011).

III. ANALYSIS

A. Applicable law

In reviewing an administrative agency’s determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination “is without sound basis

in reason and . . . without regard to the facts.” (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, the determination of 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.” (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

Pursuant to Administrative Code § 13-252, a police officer may retire with an ADR upon application to the commissioner stating that the applicant:

is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired.

And, upon a medical examination and investigation showing that the applicant is physically or mentally incapacitated

as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith.

The determination of an ADR application requires consideration of two factors. First, the Medical Board decides whether the applicant is disabled and should be retired. (*Matter of Meyer*

v Bd. of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund, 90 NY2d 139, 144-145 [1997]).

It must then decide whether the disability resulted from a service-related accident, and certify its recommendation on this issue to the Board of Trustees. (*Id.* at 144-145). The Board of Trustees must then independently determine whether the disability resulted from a service-related accident. (*Id.*).

Thus, although the Board of Trustees is bound by the Medical Board's determination as to whether an ADR applicant is disabled, it must make its own determination as to whether the disability was caused by a service-related accident. (*Matter of Canfora v Bd. of Trustees of Police Pension Fund of Police Dept. of the City of N.Y., Art. II*, 60 NY2d 347 [1983]). If the Board of Trustees's determination to deny an ADR application is reached by a "six to six tie vote," the determination may be set aside only if "it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident." (*Id.*).

An accident in this context has been defined as a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" and thus, "an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury . . ." (*Matter of Lichtenstein v Bd. of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 NY2d 1010, 1012 [1982]). It is not an injury "sustained while performing routine duties but not resulting from unexpected events" and the critical determination is whether there was a "precipitating accidental event." (*Matter of McCambridge v McGuire*, 62 NY2d 563 [1984]).

B. Was the Board of Trustees's determination arbitrary and capricious or an abuse of discretion?

Here, it is undisputed that petitioner's participation in the training exercise on the day of her accident was an ordinary part of her employment duties with the NYPD, and it has been held that an injury that occurs during a routine training exercise does not constitute an accident. (See *Matter of Neely v DiNapoli*, 71 AD3d 1367 [3d Dept 2010] [petitioner fell from ladder during training exercise]; *Matter of Hulse v DiNapoli*, 70 AD3d 1235 [3d Dept 2010] [petitioner injured during bicycle training course; manner in which injury occurred, practicing technique to fall safely off bicycle, not unexpected or unanticipated]; *Matter of Stimpson v Hevesi*, 38 AD3d 979 [3d Dept 2007] [injury resulted from training program that was part of petitioner's ordinary job duties and normal risks arising therefrom]; *Matter of Marsala v New York State & Local Empls. Retirement Sys.*, 14 AD3d 984 [3d Dept 2005], *lv denied* 4 NY3d 709 [petitioner injured during bicycle training course]; *Matter of Becker v Ward*, 169 AD2d 453 [1st Dept 1991] [petitioner injured ankle during routing class exercise when she landed off balance]).

That the injury is caused by another participant in the exercise does not transform the incident into an accident. (See *Matter of Wolak v DiNapoli*, 71 AD3d 1370 [3d Dept 2010] [petitioner bitten by police dog during dog training program]; *Matter of DeLaCruz v DiNapoli*, 67 AD3d 1297 [3d Dept 2009] [petitioner injured during training exercise when other participant stumbled and fell, pulling petitioner to ground and causing her injuries]; *Matter of Felix v New York State Comptroller*, 28 AD3d 993 [3d Dept 2006] [injury occurred when petitioner's partner unexpectedly grabbed her body rather than her arm during training exercise, causing her to fall; that partner may not have performed exercise as instructed or she did not anticipate his movement irrelevant]; *Matter of McKenna v Hevesi*, 26 AD3d 584 [3d Dept 2006] [female

petitioner injured during drill with male partner when two struggled as part of exercise and she fell to ground]; *Matter of Santorsola v McCall*, 302 AD2d 727 [3d Dept 2003] [petitioner tripped over partner's leg during firearms training exercise]).

Petitioner submits no evidence demonstrating that anything sudden, unexpected, or extraordinary happened during the exercise. Rather, the purpose of the exercise was for the participants to practice flipping each other over. In contrast, in *Matter of Carr v Ward*, the sudden and unexpected event which led to the petitioner's injury was a comment by the exercise instructor to her partner that incited him to hit her harder than expected. Thus, the court found that the injury was not caused by the exercise itself. "[T]his was not the ordinary situation faced by the police recruit in a sparring exercise, simply dodging jabs and hooks of varying degrees of force with no personal animus impelling those blows." (119 AD2d 163 [1st Dept 1986]).

And, as the section of the training manual relied on by petitioner pertains only to recruits, it is inapplicable here.


Having failed to demonstrate that the injury resulted from an accident as a matter of law, petitioner has also failed to demonstrate that respondents' determination was arbitrary and capricious or an abuse of discretion. (See *Matter of Walsh v Scopetta*, 73 AD3d 1192 [2d Dept 2010], *affd* 18 NY3d 850 [2011] [as cause of injury not unexpected, determination that injury was not caused by accident was rationally based and not arbitrary and capricious, and court properly found that it could not determine as matter of law that petitioner's disability resulted from service-related accident]).

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: March 15, 2012
New York, New York

MAR 15 2012

UNFILED JUDGMENT

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