Matter of Shammas v Kelly
2012 NY Slip Op 32607(U)
October 12, 2012
Sup Ct, New York County
Docket Number: 102146/12
Judge: Doris Ling-Cohan
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SCANNED ON 10/16/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

In the Matter of the Application of Police Officer GEORGE SHAMMAS, Tax Number 935730,

Petitioner,

INDEX NO. 102146/12

MOTION SEQ. NO. 001

RAYMOND KELLY, as Police Commissioner of the City of New York, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

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).

The following papers, numbered 1-4 were considered on this Article 78:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits ____	1, 2
Answering Affidavits — Exhibits ____	____
Replying Affidavits ____	____
Cross-Motion: [X] Yes [ ] No (memorandum of law)	3, 4

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided as indicated below.

Petitioner brings this Article 78 Proceeding to annul the determination of respondents, which terminated him from his position as a police officer. He seeks reinstatement to that position with full back pay, benefits and seniority, together with interest. Respondents jointly cross-move to dismiss the petition for failure to state a cause of action upon which relief may be granted.

BACKGROUND

Petitioner, George Shammas, was hired as a probationary police officer by respondent New York City Police Department (NYPD), sued as The Police Department of the City of New York, in January 2004. After completing the police academy, petitioner was assigned to a precinct in Staten Island in June 2007. On May 19, 2010, after a multi-day trial by NYPD Assistant Deputy Commissioner of Trials John Grappone, petitioner was found guilty of several NYPD disciplinary charges and specifications

related to an on-duty incident. Honorable Grappone recommended petitioner be dismissed from respondent NYPD, but that the dismissal to be held in abeyance for one year, during which time petitioner could be terminated at any time without further proceedings. Based on Honorable Grappone's recommendation, respondent NYPD imposed a penalty on petitioner, on August 13, 2010, wherein he forfeited 30 vacation days and was placed on one year dismissal probation. Such probation was to be extended by any period of time in which petitioner was on suspension, modified assignment, restricted duty, limited duty, sick leave, leave of absence, or annual sick leave.

Thereafter, petitioner was placed on modified duty, on August 15, 2011, in connection with the loss of his NYPD summons book. On November 15, 2011, petitioner was informed, by letter, that he was dismissed from respondent NYPD[1]. This Article 78 proceeding followed, and respondent NYPD cross-moves to dismiss the petition, pursuant to CPLR 3211(a)(7), on the ground that the petition fails to state a cause of action.

DISCUSSION

The New York Constitution, Article V §6 furnishes the guiding principle for all civil service appointments. That provision states that "[a]ppointments and promotions in the civil service of the state and all of the civil divisions thereof...shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which...shall be competitive". The purpose of the probationary period is to provide a trial period to ascertain an individual's merit and fitness to perform on the job, after passing a competitive examination. *See Matter of Professional, Clerical, Tech. Empl. Assoc. v Buffalo Bd. of Educ.*, 90 NY2d 364, 375 (1997); *Matter of Albano v Kirby*, 36 NY2d 526, 531 (1975).

When considering the termination of Civil Service employees, the extent of the court's review

[1] Petitioner mistakenly states that he was dismissed, by letter, from respondent NYPD on November 15, 2012. *See* Petition at ¶ 10. However, November 15, 2012 has yet to pass, and no such dismissal letter is attached to Exhibit C of the Petition as indicated in ¶ 10.

differs according to the status of the employees. *See Soto v Koehler*, 171 AD2d 567, 567 (1st Dep't 1991). A tenured employee protected by the full panoply of rights accorded by the Civil Service Law must be given a hearing before termination or any other disciplinary action is taken. *Civil Service Law* § 75. However, when dealing with the termination of probationary employees, as in the instant case, a different standard of review is to be applied. *See Soto*, 171 AD2d at 567.

"It is well settled that a probationary employee may be discharged without a hearing and without a statement of reasons in the absence of any demonstration that [the] dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law." *Matter of York v McGuire*, 63 NY2d 760, 761 (1984)(citations omitted); *see also Soto*, 171 AD2d at 568; *Matter of Talamo v Murphy*, 38 NY2d 637, 639 (1976). The Court of Appeals has also held that "the probationary term is extended by the number of days when the probationer does not perform the duties of the position, for example: limited duty status, annual leave...". *Matter of Garcia v Bratton*, 90 NY2d 991, 992 (1997). The scope of judicial review "is limited to an inquiry as to whether the termination was made in bad faith." *Matter of Johnson v Katz*, 68 NY2d 649, 650 (1986); *see also Soto*, 171 AD2d at 568. As such, a probationary employee has "no right to challenge the termination by way of a hearing or otherwise, absent a showing that [the dismissal was] in bad faith or for an improper or impermissible reason." *Swinton v Safir*, 93 NY2d 758, 763 (1999)(citations omitted); *see also Anonymous v Codd*, 40 NY2d 860, 860 (1976).

The burden is on the petitioner who seeks reinstatement to a probationary position to demonstrate that the termination was made in bad faith. *See Matter of Cortijo v Ward*, 158 AD2d 345, 345 (1st Dep't 1990). The petitioner must present legal and competent evidence to establish a deprivation of rights, an abuse of discretion or bad faith so as to render the termination arbitrary and capricious. *See Haberman v Codd*, 48 AD2d 505, 508 (1st Dep't 1975). A mere belief of bad faith, without the presentation of evidence, does not satisfy the employee's burden or warrant a hearing. *Matter of Cortijo*, 158 AD2d at

345-46 (citing *D'Aiuto v Dep't. of Water Resources*, 51 AD2d 700 [1st Dep't 1976]); *Matter of Rehill v New York City Housing Auth.*, 203 AD2d 75, 75 (1st Dep't 1994).

"[A] bad-faith determination is defined as one based on constitutionally impermissible purpose or in violation of statutory or decisional law." *Matter of Card*, 154 Misc 2d 239, 244; *See Matter of York*, 63 NY2d 760, 761. The Court of Appeals has held that "a probationary employee may be fired for any reason, or no reason, but cannot be fired for a discriminatory reason." *Matter of Card*, 154 Misc 2d at 244 (citing *Matter of State Div. of Human Rights v County of Onondaga Sheriff's Dept.*, 71 NY2d 623 [1988]). Evidence of termination due to, *inter alia*, unsatisfactory performance, absenteeism or lateness, establish good faith on the part of respondent. *See Johnson v Katz*, 68 NY2d 649, 650 (1986); *Dolcemaschio v City of New York*, 180 AD2d 573, 575 (1992); *Ferone v Koehler*, 160 AD2d 572, 572 (1st Dep't 1990).

Here, petitioner argues that his one year probationary term was scheduled to end on August 13, 2011, when he was placed on modified duty on August 15, 2011 in connection with the loss of his summons book. Between August 15, 2011 and November 15, 2011, petitioner was not formally interviewed or brought up on administrative charges of misconduct. Petitioner states that respondent NYPD acted in bad faith by putting him on modified duty just as his probationary period was ending. Petitioner contends that the timing of respondent NYPD's actions demonstrates that respondent NYPD acted in bad faith, and with the intent to frustrate petitioner's desire to continue in his employment.

Respondents cross-move to dismiss, arguing that petitioner has the burden to allege facts to show that the termination decision was arbitrary and capricious, or made in bad faith. Respondents further argue that petitioner fails to support its claims with any evidence, and thus, fails to state a cause of action. Respondents contend that the decision to terminate petitioner was not made in bad faith as petitioner received charges and specifications a number of times. Specifically, respondents allege, and

petitioner does not dispute, that petitioner received charges and specifications: (1) in July 2006, for his failure to remain on post, failure to make activity log entries, and failure to carry his Department-issued tactical response hood; (2) in October 2006, for failure to report being involved in a police incident, failure to carry his shield while armed, and wrongfully operating or parking a vehicle with an expired certificate of inspection; and (3) in January 2009, for failure to promptly notify the patrol supervisor of the precinct of the occurrence of a motor vehicle accident involving a department vehicle as required, for being discourteous to NYPD Lieutenant John Lomando, and wrongfully engaging in conduct prejudicial to the good order, efficiency or discipline of the department by suggesting to the civilian driver involved in such motor vehicle accident that she would receive a traffic summons if she chose to file an accident report. Further, respondents claim that petitioner was still a probationary employee at the time of his dismissal, as the probationary term was extended day to day due to petitioner's modified duty status.

Applying the above principles to this Article 78 proceeding, respondent NYPD had ample justification for terminating petitioner's employment as a probationary police officer, based upon petitioner's numerous charges and specifications throughout his employment. Petitioner has failed to sustain his burden to establish that respondent NYPD terminated his employment in bad faith. To support his allegation, petitioner proffers only the Amended Charges and Specifications for the motor vehicle incident which occurred in 2009, the Report and Recommendation stemming from such incident, and the Disposition of Charges for such incident. Aside from petitioner's conclusory statements, and the documentation relating to the 2009 motor vehicle incident, petitioner fails to provide any evidence tending to show that respondent NYPD acted in bad faith in terminating petitioner's probationary employment, and thus, respondents cross-motion to dismiss is granted.

Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that, within thirty days of entry, respondents shall serve upon petitioner a copy of this decision, order and judgment, together with notice of entry.

This constitutes the decision and judgment of the Court.

Dated: 10/12/12

DORIS LING-COHAN, J.S.C.

Check one: [X] **FINAL DISPOSITION** [ ] **NON-FINAL DISPOSITION**

Check if Appropriate: [ ] **DO NOT POST**

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