

<b>Matter of Sefakakis v O'Neill</b>
2017 NY Slip Op 31927(U)
September 12, 2017
Supreme Court, New York County
Docket Number: 160117/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

In the Matter of the Application of ALEX T. SEFAKAKIS, Petitioner,

INDEX NO. 160117/2016

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules

MOTION DATE 09/06/17

-against-

MOTION SEQ. NO. 001

JAMES P. O'NEILL, as Police Commissioner of the City of New York, and as Chair of the Board of Trustees of the Police Pension Fund, Article II, KEVIN HOLLORAN, as Executive Director of the New York City Police Pension Fund, the BOARD OF TRUSTEES of the Police Pension Fund, Article II and the CITY OF NEW YORK, Respondents.

MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this Art. 78 Petition.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: X Yes [ ] No

Upon a reading of the foregoing cited papers, it is Ordered and Adjudged that this Petition seeking to: (i) annul Respondents' decision to deny Petitioner's application for Accidental Disability Retirement ("ADR") benefits pursuant to New York City Administrative Code §13-252 and declare the decision to be arbitrary, capricious, unreasonable and unlawful, and (ii) direct and order Respondents to award Petitioner a line of duty ADR pension retroactive, or in the alternative (iii) direct and order the Respondents to remand and review Petitioner's ADR application, pursuant to Article 78 of the CPLR, is denied. Respondents' cross-motion to dismiss the Petition is granted and the Petition is dismissed.

Petitioner Alex T. Sefakakis was appointed to the uniformed force of the New York Police Department on July 10, 2006 and served continuously as a member until his retirement under Ordinary Disability Retirement on November 12, 2013. On June 21, 2010 the Petitioner sustained severe injuries when his head struck a low-hanging pipe while using his cell phone, during his meal break, in a dark boiler/locker room. The injuries caused Petitioner to be placed on sick leave followed by restricted duty and eventual retirement.

On April 17, 2012 the Police Commissioner and the Medical Board Police Pension Fund Article II ("Medical Board") examined the Petitioner and recommended him for Ordinary Disability Retirement. The Medical Board reaffirmed its decision after two (2) additional examinations. On February 6, 2014 Petitioner filed a separate Article 78 petition, index number: 100147/2014 in New York County, challenging the Board of Trustees decision to refuse to consider his application to upgrade his benefits from Ordinary Disability Retirement to ADR. On July 21, 2015 Justice Joan B. Lobis granted Petitioner's Article 78 Petition

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

remanding the matter back to the Board of Trustees and the Medical Board for his application to be considered *de novo* (Petitioner's Papers Ex. B).

Pursuant to the Order, the Medical Board reviewed Petitioner's application and concluded that it was outside their purview to determine if his injuries were caused by an accident or incident. Following, on August 10, 2016 the Board of Trustees denied his application for ADR benefits.

On November 30, 2016 Petitioner filed this Article 78 proceeding to have the court: (i) annul Respondents' decision to deny Petitioner's ADR application pursuant to New York City Administrative Code §13-252 and declare the action to be arbitrary, capricious, unreasonable and unlawful, and (ii) direct and order Respondents to award Petitioner a line of duty ADR pension retroactive, or in the alternative (iii) direct and order the Respondents to remand and review Petitioner's application. Respondents have submitted a Verified Answer and cross-move to deny the Petition and dismiss this proceeding in its entirety.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious (*Matter of Pell v Board of Education*, 34 NY2d 222, 356 NYS2d 833, 313 NE2d 321 [1974]; *Davis v Hernandez*, 13 AD3d 90, 786 NYS2d 444 [1<sup>st</sup> Dept. 2004]). "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 (*Matter of Arrocha v Board of Education of the City of New York*, 93 NY2d 361 [1999]). "The reviewing court may not set aside the Board of Trustees' denial of ADR resulting from a tie vote unless 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" (*Meyer v Board of Trustees*, 90 NY2d 139, 659 NYS2d 215, 681 NE2d 382 [1997]). "As long as there was any credible evidence of lack of causation before the Board of Trustees, its determination must stand" (*Id.*). To "annul the challenged determination by the Board of Trustees, it had to be established that there was no credible evidence to support the Board's rejection of petitioner's claim for ADR benefits, and that his injuries arose out of a sudden, fortuitous event which is out of the ordinary, and injurious in impact" (*Matter of Starnella v Bratton*, 92 NY2d 836, 699 NE2d 421, 677 NYS2d 62 [1998]).

To apply for ADR benefits an officer must be "physically or mentally incapacitated for the performance of duty and ought to be retired" and the officer's disability must be "natural and proximate result of an accidental injury received in ... city-service" (*Matter of Bitchatchi v Bd. of Trs. of the N.Y.C. Police Dep't Pension Fund*, Art. II, 20 NY3d 268, 958 NYS2d 680, 982 NE2d 600 [2002]). Petitioner must demonstrate that the incident was an "accident" within the meaning of section §13-252 of the Administrative Code of the City of New York (*Hopp v Kelly*, 4 AD3d 176, 772 NYS2d 31 [1<sup>st</sup> Dept. 2004]). An "injury is accidental if it occurs as the result of an unexpected event, rather than as the result of activities undertaken in the performance of ordinary employment duties" (*Matter of Lichtenstein v Board of Trustees*, 57 NY2d 1010, 443 NE2d 946, 457 NYS2d 472 [1982]).

The requirements for receipt of ADR benefits are set forth under New York City Administrative Code §13-252, which states:

Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or her or on his or her behalf in connection therewith shall be made upon the application of the commissioner, or upon the application of a member or of a person acting in his or her behalf, stating that such member 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. If such medical examination and investigation shows that such member is physically or mentally incapacitated for the performance of city-service 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 (NYC Administrative Code §13-252).

The determination of an ADR application involves a two-tier administrative process (Borenstein v New York City Employees' Retirement System, 88 NY2d 756, 650 NYS2d 614, 673 NE2d 899 [1996]). The review by the Medical Board is the first step, who will make a recommendation as to whether the disability was caused by an accidental injury in the performance of police duties, and they are the sole arbiter to decide whether the applicant is "physically or mentally incapacitated" from performing full duty as a police officer (Campazzi v Ward, 181 AD2d 431, 580 NYS2d 756 [1<sup>st</sup> Dept. 1992]). The second step is the consideration by the Board of Trustees, which includes the review of the report and recommendation of the Medical Board, and it has the ultimate authority whether a disability is the result of an accident in the performance of duty (Meyer, supra).

Respondents have shown that the decision to deny Petitioner's ADR application was founded on credible evidence. The administrative record indicates two (2) independent basis for finding that Petitioner's injuries were not the result of an accident that occurred in the performance of police duties (Walsh v Scopetta, 18 NY3d 850, 8 NY3d 850, 939 NYS2d 280, 962 NE2d 771 [2011]). First, the record establishes that at the time of the accident (around 11:10pm), Petitioner was on meal break and entered a dark room to take a personal phone call (Verified Petition ¶ 13). Second, Respondents provide credible evidence that the Petitioner failed to establish, as a matter of law, that his injuries arose out of a sudden, fortuitous event out of the ordinary. Even though the room was dark and unfamiliar to Petitioner, he at the very least exacerbated the danger of hitting his head on the low-hanging pipe by failing to turn on the lights or using a flashlight (Hopp, supra). Petitioner fails to overcome his burden, that must be met to vacate the determination given, as the decision by the Respondents demonstrates credible evidence to deny Petitioner's ADR application and was not arbitrary and capricious considering the circumstances.

Accordingly, it is ORDERED AND ADJUDGED, that the Petition pursuant to Article 78 seeking to have the court: (i) annul Respondents' decision to deny Petitioner's ADR application pursuant to New York City Administrative Code §13-252 and declare the action to be arbitrary, capricious, unreasonable and unlawful, and (ii) direct and order Respondents to award Petitioner a line of duty ADR pension retroactive, or in the alternative (iii) direct and order the Respondents to remand and review Petitioner's application, is denied, and it is further,

ORDERED, that Respondents' cross-motion to dismiss the Petition is granted, and it is further,

ORDERED AND ADJUDGED, that the proceeding is dismissed, and it is further,

**ORDERED, that the Clerk of Court enter judgment accordingly.**

ENTER:

Dated: September 12, 2017

  
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MANUEL J. MENDEZ  
J.S.C.

**MANUEL J. MENDEZ  
J.S.C.**

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST                       REFERENCE