

<b>Serrano v New York City Dept. of Sanitation</b>
2022 NY Slip Op 33564(U)
October 17, 2022
Supreme Court, New York County
Docket Number: Index No. 153662-2022
Judge: Lynn R. Kotler
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Melvin Serrano

INDEX NO. 153662-2022

- v -

MOT. DATE

New York City Department of Sanitation, et. al.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for vacatur/annulment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

In this proceeding, petitioner Melvin Serrano (“Serrano”) seeks an order pursuant to CPLR Article 78 annulling the determination made by the respondents, the New York City Department of Sanitation (“DSNY”) and the City of New York (“NYC”; together the “respondents”) that denied petitioner’s application for appointment as a Sanitation Police Officer (“SPO”) and mandating that DSNY reinstate him as an SPO. Petitioner also seeks reasonable attorneys’ fees. The respondents oppose the relief sought and have filed a cross motion seeking to dismiss the petition for failing to state a claim pursuant to CPLR § 3211(a)(7). Respondents also seek reasonable attorneys’ fees.

The relevant facts are as follows. Serrano began his employment as a sanitation worker in August 2004 and was appointed as an SPO on March 13, 2007. On August 6, 2014, Serrano was assigned to the Bronx District 9 as an SPO. During this tour of duty, he spoke to members of the Parkchester Department of Public Safety (“DPS”), a private security force for a housing complex located in District 9, and to a supervisor of the DPS about summonses for littering that DPS had issued against a friend of his, Lidia Lopez (“Lopez”). The substance of what was said in those conversations is disputed. However, Serrano did not report the conversations in his daily activity report and did not mention Parkchester in his activity report at all even though this visit occurred during work hours. Surveillance video in Parkchester confirmed that Serrano was at the DPS office for approximately 20 minutes and left the office at 1:15pm.

Parkchester DPS reported Serrano’s behavior to DSNY who had the Field Inspection Audit Team (“FIAT”) open an investigation. The DSNY FIAT found that Serrano’s conduct in Parkchester constituted multiple violations of the Department rules and presented the violations to the New York City Office of Administrative Trials and Hearing’s (“OATH”). Administrative Law Judge, Kevin F. Casey (“Casey”) heard the issue and decided that Serrano had violated Department Rule 3.2 (conduct prejudicial to good order and discipline); Rule 3.11 (failure to accurately maintain Department forms, reports, and

Dated: 10/17/22

  
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 HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED     NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED <sup>+1 motion</sup>  DENIED <sup>per hon</sup>     GRANTED IN PART     OTHER

3. Check if appropriate:

SETTLE ORDER     SUBMIT ORDER     DO NOT POST  
 FIDUCIARY APPOINTMENT     REFERENCE

records); and Rule 3.22 (failure to act in a courteous and professional manner at all times). Casey recommended that Serrano receive a penalty of 30 days' suspension without pay.

The DSNY Commissioner followed Casey's recommendation, but Serrano appealed the penalty to the New York City Civil Service Commission ("CSC"). The CSC heard oral arguments on May 5, 2016 and issued a decision on July 26, 2016 modifying the penalty to a ten-day suspension without pay and directed that Serrano be reimbursed for the difference between the two penalties. As a result of this incident, Serrano was removed from his SPO unit and returned to his previous position as a sanitation worker.

Separate and apart from the Parkchester DPS incident, Serrano received four administrative violations that occurred on March 21, 2014, January 23, 2016, May 1, 2018, and January 23, 2020. On March 21, 2014, Serrano violated DSNY's Code of Conduct by failing to comply with medical leave regulations and failing to obey direct orders from a superior when he refused to sign and accept copies of his DS 400 and DS 404 after being evaluated at the clinic. On January 23, 2016, Serrano violated the Code of Conduct by notifying work one hour before he was due to resume duty to advise that he was stuck in the snow and would not be resuming his duty. He submitted proof which was deemed unsatisfactory and he was subsequently marked absent. On May 1, 2018, Serrano was cited for failing to remain home while on medical leave as required. On January 23, 2020, Serrano was cited for loitering, lounging or sleeping while on duty. Serrano claims that these charges were retaliatory as a result of him reporting the misconduct of a DSNY supervisor who used a counterfeit placard to illegally park in a fire zone. However, he pled guilty to all four violations.

In September of 2020, Serrano applied to be reinstated to an SPO position. DSNY denied Serrano's application because of his prior violations and advised him to resubmit the application once the administrative violation had been cleared. In October of 2020, the four complaints were resolved at a DSNY hearing that resulted in a 3-day suspension. Following this resolution, Serrano again sought re-appointment as an SPO in September of 2021. Serrano claims that he never received any written notification denying his application, but that on January 28, 2022, he telephoned Lt. Richard Coriasco to inquire as to the status of his application and was informed that it was denied "due to prior discipline in the unit." Serrano claims that other SPOs have engaged in misconduct equal to or worse than his own and have been reinstated. He cites four incidents that he argues are equal or worse than his own.

In the first, Serrano claims that SPOs Claudio and Gringas were removed as SPOs after a firearm was left in Gringas' locker and subsequently disappeared. Serrano claims that Gringas was reinstated about 1.5 years later. However, he admits that Claudio remained as a sanitation worker and was not reinstated. In the second incident, Serrano asserts that in 2014 SPO Lieutenant Corey and SPO Constantino were removed as SPOs for failure to document an incident involving an arrest and that Corey was reinstated as an SPO Lieutenant in 2021 while Constantino remained a sanitation worker. In the third incident, Serrano asserts that before 2014, SPO McFee was arrested for shoplifting from a gas station, but was allowed to continue working as an SPO despite the charge. Finally, Serrano claims that before 2009, SPO Lieutenant Marrero was removed as an SPO for sleeping in his patrol vehicle but was reinstated around 2010.

This Article 78 petition ensued, wherein petitioner seeks: 1) to annul DSNY's determination which denied his application for appointment as an SPO pursuant to CPLR § 7803(3) because the determination was arbitrary and capricious and was an abuse of discretion; 2) to order respondents to appoint Petitioner to the position of SPO; 3) in the case that the court does not order DSNY to appoint the petitioner to the position of SPO as a matter of law, then to remand petitioner's case to DSNY for reconsideration of petitioner's SPO application; and 4) to award costs, disbursements and reasonable attorneys' fees of this proceeding to petitioner.

Respondents oppose the petition and assert a cross motion seeking to: 1) dismiss the petition on the ground that the petitioner has failed to state a cause of action pursuant to CPLR § 3211(a)(7); 2) confirm DSNY's determination; and 3) award costs, fees and disbursements arising from the petition.

## Discussion

The court first considers the respondents' request in their cross motion to dismiss the petition on the ground that the petitioner has failed to state a cause of action pursuant to CPLR § 3211(a)(7). In determining a motion to dismiss pursuant to CPLR § 3211(a)(7), a court must determine whether the allegations in the complaint set forward a cause of action (*Andre Strishak & Associates, P.C. v. Hewlett Packard Co.*, 300 Ad2d 608 [2d Dept 2002]). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must afford the pleading "a liberal construction," accept all facts "as alleged in the [petition] as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83 [1994]; *Matter of Eastern Oaks Dev., LLC v. Town of Clinton*, 76 AD3d 676 [2d Dept. 2010]). In the petition, Serrano alleges that respondents' refusal to appoint him to the position of SPO was unreasonable, arbitrary and capricious and an abuse of discretion because it demonstrated disparate treatment. He argues that other SPOs have committed more serious infractions and were reinstated, so the decision not to reinstate him was arbitrary and capricious. Therefore, petitioner has put forward allegations that are sufficient to support a cause of action. The request to dismiss the petition pursuant to CPLR § 3211(a)(7) is denied. The remainder of the cross motion will be considered with the petition.

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck. Westchester Countv*, 34 NY2d 222, 231 [1974] [emphasis removed]; see also *Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]). An agency's determination lacks rational basis if it departs from agency precedent on similar facts without proper explanation (*In re Charles A. Field Delivery Serv.*, 66 NY2d 516 [1985]; *Klein v. Levin*, 305 AD2d 316 [1st Dept. 2003]). In an Article 78 to annul an administration's determination, the petitioner has the burden of demonstrating that the determination was arbitrary and capricious (see *Matter of Stanton v. Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2d Dept 2007]).

Serrano argues that the determination of the DSNY is arbitrary and capricious and an abuse of discretion because it departed from agency precedent when it denied his application to be reinstated as an SPO while granting the reinstatement applications of other SPOs who had "engaged in misconduct equal to or worse" than his own. Serrano argues that these instances demonstrate that the DSNY has allowed similarly situated SPOs to be reinstated, and thus that its determination to deny his application for reinstatement is arbitrary and capricious and an abuse of discretion.

Respondents argue that the instances of "similarly situated" SPOs provided by Serrano are not supported by any evidence or documentation and are not similar conduct to that of Serrano. Respondents also argue that Serrano fails to identify if and how any violations by another SPO were as severe as his multiple infractions, and to identify if any of these reinstatements were as close in time as the eleven months between Serrano's guilty plea and request for re-appointment. Respondents also argue that an SPO is a Peace Officer and thus the DSNY is entitled to the broadest discretion in SPO employment decisions because of the high level of responsibility of Peace Officers (NYC Crim. Proc. Law § 2.10(56); *Reidy v. Connelie*, 82 AD2d 986 [3d Dept 1981]; *Young v. City of New York*, 618 Misc. 3d 514 [Sup. Ct. of New York County 2020]). Respondents assert that DSNY's determination is not arbitrary and capricious because Serrano failed to attain the higher standards of fitness and character required for an SPO. They assert that Serrano's violations demonstrate a failure to adhere to the core responsibilities and values of an SPO and that the violations alone proffer a reasonable and logical justification for the denial of his application for reinstatement.

The court agrees with respondents. Serrano attempts to compare his violations with those of other SPOs of which he is "aware." But he does not submit any documentation demonstrating that the violations of the other SPOs occurred or that they occurred on the dates that he asserts. New York courts have repeatedly held that, standing alone, hearsay in affidavits is not sufficient to establish facts within an Article 78 proceeding (*R. Bernstein Co. v. Popolizio*, 97 AD2d 735 [1st Dept 1983]). Serrano's statements about the violations of other SPOs are hearsay statements; they are not made from personal knowledge, but rather from what Serrano became "aware" of (*see Bhowmik v. Santana*, 140 AD3d 460 [1st Dept 2016] [asserting that an affidavit not based on personal knowledge is hearsay]). Assuming *arguendo* that Serrano's affidavit testimony about the violations of other SPOs is good evidence, he still fails to prove that the DSNY's determination was arbitrary or capricious because he fails to demonstrate that these incidents share similar facts with his own violations or that they are "equal or worse" than his own.

Regarding the Claudio and Gringas case in which a firearm went missing, the facts are not similar to any of the infractions committed by Serrano. The court is not in the position to determine whether losing a firearm is equal or worse than any of the individual violations or of the sum of violations committed by Serrano. Additionally, the court does not have sufficient facts to compare Gringas' infraction to those of Serrano. Serrano asserts that Claudio's firearm went missing. It is possible that the DSNY found Claudio to be responsible for his own lost firearm, and that Gringas' violation was less severe. Additionally, the DSNY may have found this one violation by Gringas to be less egregious than the multiple violations committed by Serrano. Regardless, Serrano has failed to demonstrate that the denial of his own reinstatement is arbitrary or capricious when compared with the reinstatement of Gringas.

Regarding the Corey and Constantino case in which arrest documentation was not recorded, it is comparable to Serrano's 2014 Parkchester violation in which the DSNY found that he failed to accurately maintain Department forms, reports, and records. However, in the Parkchester incident, Serrano was also found to have demonstrated conduct prejudicial to good order and discipline and to have failed to act in a courteous and professional manner at all times. Additionally, Serrano committed four other violations over the next six years, all to which he pleaded guilty. Comparatively, no other violations are mentioned for Corey. These additional violations may have demonstrated a worrying trend to DSNY as opposed to Corey's single violation. Again, Serrano fails to demonstrate that the denial of his own reinstatement is arbitrary or capricious when compared with the reinstatement of Corey.

Regarding the McFee infraction in which the SPO shoplifted, the facts are not similar to any of Serrano's violations. Additionally, it seems that there was a longer period of time between McFee's violation and reinstatement than between Serrano's various violations and his application for reinstatement. Finally, Serrano never claims that McFee was on duty as an SPO when he/she/they shoplifted. Therefore, this incident does not demonstrate the same abuse of power that makes Serrano's 2014 Parkchester violation so concerning. Serrano fails to demonstrate that the denial of his own reinstatement is arbitrary or capricious when compared with the reinstatement of McFee.

Regarding the Marrero case in which the SPO was caught sleeping while on duty, the facts here are comparable to Serrano's 2020 violation for loitering, lounging or sleeping while on duty. However, Serrano committed five other violations in addition to the 2020 loitering/lounging/sleeping while on duty infraction. The 2020 violation was only the most recent. Therefore, Serrano fails to demonstrate that the denial of his own reinstatement is arbitrary or capricious when compared with the reinstatement of Marrero.

Accordingly, Serrano has failed to allege sufficient facts to support his claim that DSNY's denial of his reinstatement application was irrational, arbitrary or capricious. Rather, the denial of Serrano's application was reasonable in light of his multiple violations which demonstrate a failure to adhere to the core responsibilities and values of an SPO. Therefore, the cross-motion to dismiss is granted, the petition is denied and this proceeding is dismissed.

The parties' requests for attorneys fees, costs and disbursements are denied.

In accordance herewith, it is hereby

**ORDERED** that the cross-motion to dismiss is granted, the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that the parties' requests for attorneys fees, costs and disbursements are denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

10/17/22  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.