

Matter of Bertram v Metropolitan Transp. Auth.

2023 NY Slip Op 33092(U)

September 8, 2023

Supreme Court, New York County

Docket Number: Index No. 150357/2023

Judge: Erika M. Edwards

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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. ERIKA M. EDWARDS

PART 10M

Justice

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INDEX NO. 150357/2023

In the Matter of the Application of

MOTION DATE 08/03/2023

JAMES BERTRAM,

MOTION SEQ. NO. 001

Petitioner,

- v -

**DECISION + ORDER ON
MOTION**

METROPOLITAN TRANSPORTATION AUTHORITY,

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

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

Upon the foregoing documents, in addition to the reasons stated on the record during oral argument held before the court on August 3, 2023, the court denies Petitioner James Bertram’s (“Petitioner”) Verified Petition as against Respondent Metropolitan Transportation Authority (“Respondent”) and the court dismisses the Verified Petition without costs to any party.

Petitioner, a retired Police Sergeant who was employed by Respondent, commenced this Article 78 proceeding seeking an order compelling Respondent to promote him to the rank of Lieutenant, retroactive to June 16, 2021, with all back pay and other benefits.

Petitioner alleges in substance that Respondent failed to promote him to Lieutenant and failed to follow its policy and practice of promoting Sergeants to Lieutenants in strict rank order based on the examination promotional rankings. Petitioner further alleges in substance that he ranked 13th out of 26 individuals ranked on the promotional list based on a promotional Personnel Order issued on May 8, 2020. Petitioner further alleges in substance that he was the only eligible interested Sergeant from that examination pool who was not promoted. Petitioner

further argues in substance that although he had open Notices of Intent to Discipline (“NID”) pending against him, he should have been promoted because there were no findings against him and he was ultimately cleared of most of the allegations made against him. Additionally, Respondent failed to negotiate a resolution to the NIDs, which was contrary to its regular practice. Therefore, Petitioner argues in substance that Respondent’s failure to promote him to Lieutenant was arbitrary, capricious, irrational, in bad faith, an abuse of discretion and contrary to Respondent’s own policies and practices.

Respondent opposes Petitioner’s Verified Petition and argues in substance that Respondent’s decision not to promote Petitioner was entirely discretionary and that the court should defer to Respondent and its Chief’s discretion. Respondent further argues that the decision was rationally based and consistent with the Metropolitan Transportation Authority Police Department’ (“MTAPD”) policies and procedures not to promote anyone to Lieutenant who has any open disciplinary matters. Respondent further argues that Petitioner failed to demonstrate that the decision not to promote Petitioner was an abuse of discretion, arbitrary, or capricious. Additionally, Respondent argues in substance that the Petition is untimely as to two of the promotional orders.

Respondent further argues in substance that the Collective Bargaining Agreement entered into between MTAPD and the Police Benevolent Association requires promotions to be made based on the examination and on “the ability to plan, lead, direct, regulate and coordinate the work of others” and only requires one lieutenant among the top three highest employees on the promotion list to be promoted based on those factors. The MTAPD Chief has the discretion to promote others from the list of eligible officers who obtained qualifying scores on the promotional examination. Therefore, Respondents argue that Petitioner is incorrect in claiming

that Respondent's policy is to promote Sergeants to Lieutenant based solely on their promotional rank, as only one in the top three must be promoted.

Respondent further argues that since Petitioner's Lieutenant Promotional List was issued on May 8, 2020, Petitioner was subject to four NIDs for improper behavior or actions and at least one was open at all times from October 23, 2020 to December 9, 2022 when the promotions were made. During this time, four Personnel Orders were issued promoting others to Lieutenant, but Petitioner was not the only interested eligible person on the list who was not promoted. Respondent argues in substance that Petitioner was not promoted because he had at least one NID open at the time of each promotion.

Respondent argues in substance that on October 23, 2020, Petitioner was issued a NID for allegedly placing a colleague in a choke hold and refusing to release him until a supervisor ordered him to do so. On October 29, 2020, he was issued a NID for allegedly failing to notify a supervisor that a subordinate created a "Wanted" Poster of another MTAPD employee and for not being truthful about possessing the poster. After an arbitration hearing was held, the arbitrator upheld some of the charges and assessed a penalty against Petitioner of 80 hours of accrued leave.

On February 24, 2021, Petitioner was issued a NID for allegedly making disrespectful statements about a lieutenant to his colleagues on a recorded work telephone line while Petitioner was on duty. After an arbitration hearing, the arbitrator upheld one of the charges and assessed Petitioner a penalty of three working days' suspension.

On September 14, 2021, Petitioner was issued a NID for allegedly failing to conduct the responsibilities of a Patrol Supervisor by failing to follow the instructions from the Deputy Chief

and Petitioner remained in the Atlantic Terminal for his entire tour. After an arbitration hearing, the arbitrator found that the charges could not be substantiated.

Respondent further argues in substance that MTAPD's practice is not to promote its members to the rank of Lieutenant or higher while they have any disciplinary action pending and that such practice is rationally based. Respondent further argues in substance that Petitioner voluntarily retired from the MTAPD on January 27, 2023, so his requests for relief of back pay and benefits are without merit. Finally, Petitioner argues that the first two orders are untimely because the applicable Statute of Limitations expired.

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; and *Scherbyn v BOCES*, 77 N.Y.2d 753, 757-758 [1991]). In reviewing an administrative agency's determination, courts must ascertain whether there is a rational basis for the agency's action or whether it is arbitrary and capricious in that it was without sound basis in reason or regard to the facts (*Matter of Stahl York Ave. Co., LLC v City of New York*, 162 AD3d 103, 109 [1st Dept 2018]; *Matter of Pell*, 34 NY2d at 231). Where the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010]). When a court reviews an agency's determination it may not substitute its judgment for that of the agency and the court must confine itself to deciding whether the agency's determination was rationally based (*Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.*, 72 NY2d 753, 763 [1st Dept 1988]).

Furthermore, an agency is to be afforded wide deference in the interpretation of its regulations and, to a lesser extent, in its construction of the governing statutory law, however an agency cannot engraft additional requirements or assume additional powers not contained in the enabling legislation (*see Vink v New York State Div. of Hous. and Community Renewal*, 285 AD2d 203, 210 [1st Dept 2001]).

Here, the court finds that Petitioner failed to demonstrate that Respondent's decision not to promote him to Lieutenant was in violation of its lawful procedures, nor that it was arbitrary or capricious, or affected by an error of law. The court agrees with Respondent and finds that the decision was well with Respondent's discretion and was rationally based. The determination that Petitioner was not eligible to be promoted because he had one or more open NIDs at the time of each promotional order was consistent with Respondent's practice and such practice was not an abuse of discretion or arbitrary or capricious. The court finds that Petitioner failed to meet his burden and that his arguments to the contrary are unpersuasive.

In light of the court's decision, there is no need to address the timeliness of Petitioner's Verified Petition as to two of the promotional orders.

Therefore, the court denies Petitioner's Verified Petition and dismisses it without costs to any party.

The court has considered all additional arguments raised by the parties which were not specifically discussed herein and the court denies any additional request for relief which was not expressly granted herein.

As such, it is hereby

