SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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In the Matter of the Application of
BRIAN WARD,

Petitioner,

For a Judgment pursuant to Article 78 CPLR

-against-

THE CITY OF LONG BEACH,

Respondent.

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TRIAL TERM PART: 47

INDEX NO.: 022274/08

MOTION DATE:10-15-09
SUBMIT DATE:10-15-09
SEQ. NUMBER - 003

The following papers have been read on this motion:

Re-Notice of Petition, dated 9-14-09,
with supporting papers..... 1
Verified Answer, dated 9-16-09.....2
Affidavit of Corey E. Klein, dated 1-5-09.....3
Affidavit of Edwin L. Eaton, dated 12-31-08.....4
Affidavit of Howard Domitz, dated 2-9-09.....5

This petition pursuant to CPLR Article 78 to vacate the respondent City of Long Beach ("City")'s denial of supplementary disability benefits to petitioner pursuant to General Municipal Law § 207-a(2) and to compel respondent to provide him with such benefits is granted.

The essential facts and procedural history of this matter were summarized in this

Court's decision and order dated February 19, 2009 ("prior order") and will not be repeated here, except as required for clarity.

The issue before the Court is whether the City acted in an arbitrary and capricious manner and without a rational basis in denying the supplementary disability benefits sought under General Municipal Law § 207-a(2). These are payments by the City of the difference between what would have been his regular wages and what he is being paid by New York State as disability payments, until mandatory retirement age. Upon a hearing, the State Comptroller had granted the petitioner's application for a disability pension in November, 2005. This was based on an injury to his knee.

The City denied the supplementary benefits. The final determination and denial in the City's administrative process was a letter from Corporation Counsel Corey E. Klein, dated September 16, 2008. As noted in this Court's prior order, no specific reason was given, but only that it was made on "review of all the records and facts." The explanation for that denial is to be found in Klein's affidavit, and those of Edwin L Eaton (then the City Manager) and Howard Domitz (a detective in the City's Police Department).

As revealed by these statements, the denial was based largely upon the unsolicited report of the petitioner's wife, Beverly Ward, with whom petitioner was then involved in matrimonial litigation. [1] In December 2007, in a meeting conducted in Eaton's office, at which Klein was present, she reported that petitioner had not been injured sliding down a fire

[1] It is not clear whether the divorce action ever was revealed to the City officials to whom she spoke.

pole during the course of employment on October 17, 2003, as he had claimed, but rather while attending his daughter's varsity soccer game at Long Beach High School two days earlier. No description of the accident at the soccer game is provided here. However, according to both Klein and Eaton, Mrs. Ward told them that during the game petitioner had screamed out in pain and had been attended to by several bystanders.

Eaton and Klein believed her. Because she reported actions by petitioner that had criminal implications, Eaton referred the matter to the City's Police Department. An interview with Mrs. Ward was conducted by Domitz, at which no notes were taken and no police reports were generated. Domitz referred the matter to the Nassau County District Attorney's office, but there is no indication that any further action was taken by any law enforcement agency, either by the City or the County of Nassau.

The familiar standard for Article 78 review of a determination such as this, which was not the result of a hearing held at which evidence was taken, was whether or not it was arbitrary and capricious and had a rational basis. *See generally, Gramando v Putnam County Personnel Dept.,* 58 AD3d 842 (2d Dept. 2009); *Brown v Camillus Volunteer Fire Dept.,* 288 AD2d 932 (4th Dept. 2001). Under the circumstances presented here, Court finds the City's determination not to have had a rational basis, and therefore annuls the denial.

The statements by Mrs. Ward were not made under oath. There was no recording made, either electronic or written. She was not asked to submit an affidavit. There is no indication that any investigation was made by any City official to verify the contents of her statements, notwithstanding the fact that the knee injury took place in public, in the presence

of a number of witnesses. There is no proof that any person in law enforcement took any action against petitioner based upon Mrs. Ward's statements. As noted above, there is no description of the accident that allegedly occurred two days before petitioner slid down the pole at the fire department building. In short, Mrs. Ward's statement was wholly unverified.

The City also appears to rely on Klein's personal knowledge of petitioner's playing beach volleyball some time after the injury. However, as the determination to deny benefits was based on the injury not having occurred during the course of employment, and not on any claim that there was no disabling injury at all, it is not material here. In any event, such an observation obviously is made not by a medical professional but by a lay person, who is unable to relate what he saw to the petitioner's ability to function as a firefighter.

Further, while the State determination finding petitioner eligible for disability retirement benefits was not binding on the City (*Matter of Cook v City of Utica,* 88 NY2d 833 [1996]), the record compiled during that proceeding and hearing, including sworn testimony and medical evidence, lends support to petitioner's position that the injury was indeed employment-related. Although Klein states that he reviewed it, he does not explain why it did not change his mind about petitioner's application.

The foregoing renders the City's reliance on Mrs. Ward's untested and unsworn allegations, and its subsequent decision to deny benefits, without a rational basis and thus arbitrary and capricious. The fact that they believed her report because it appeared to be against her own economic interests, and that she told the same story to the police, does little to cure the deficiencies noted above.

Indeed, it is just as reasonable to be suspicious when one spouse undermines another to public officials than not, and there is no indication in the record that either Eaton or Klein ever asked her why she had come forward. Had such an inquiry been made it may have revealed a motive to harm her husband, and that her disclosure was not against her own economic interests. Petitioner states, and it is undisputed, that at the time of her statement to Eaton and Klein she was in divorce litigation with petitioner. She may very well have been advised by an attorney that she was not going to be entitled to equitable distribution of petitioner's job-related accident disability pension, which to the extent it represents compensation for personal injuries, is considered the separate property of the pension beneficiary. *Berardi v Berardi,* 54 AD3d 982 (2d Dept. 2008); *McNelis v McNelis,* 6 AD3d 673 (2d Dept. 2004). However, her story was fully credited, without further investigation, and the denial based largely thereon.

Accordingly, the City's determination should be annulled.

This shall constitute the Decision and Order of this Court.

Settle judgment.

ENTER

DATED: October 30, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
NOV 05 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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