

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D25836  
W/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - December 21, 2009

PETER B. SKELOS, J.P.  
RUTH C. BALKIN  
JOHN M. LEVENTHAL  
PLUMMER E. LOTT, JJ.

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2009-06828

DECISION & JUDGMENT

In the Matter of Jerry Prioleau, petitioner, v Brian  
Murphy, etc., et al., respondents.

(Index No. 6824/09)

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James M. Rose, White Plains, N.Y., for petitioner.

Edward P. Dunphy, Corporation Counsel, White Plains, N.Y. (Daniel K. Spencer of  
counsel), for respondents.

Proceeding pursuant to CPLR article 78 to review a determination of Brian Murphy, as Acting Commissioner of the White Plains Department of Public Works, dated February 19, 2009, which adopted the recommendation of a hearing officer dated June 25, 2007, made after a hearing, inter alia, finding the petitioner guilty of misconduct and incompetence, and terminated his employment as an Assistant Sanitation Superintendent, and to compel the City of White Plains to compensate the petitioner for back pay and benefits from June 28, 2007, through February 19, 2009.

ADJUDGED that the branch of the petition which was to compel the City of White Plains to compensate the petitioner for back pay and benefits from June 28, 2007, through February 19, 2009, is granted, on the law, without costs or disbursements, to the extent that the matter is remitted to the respondents to compute the amount of back pay and benefits, if any, owed to the petitioner in accordance herewith, and to pay him that amount, the petition is otherwise denied, the determination is otherwise confirmed, and the proceeding is otherwise dismissed on the merits.

Contrary to the petitioner's contention, the challenged determination was supported by substantial evidence in the record (*see* CPLR 7803[4]; *Rainer N. Mittl, Ophthalmologist, P.C. v*

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*New York State Div. of Human Rights*, 100 NY2d 326, 331; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). Moreover, the penalty imposed is not so disproportionate to the offenses as to be shocking to one's sense of fairness (see *Matter of Waldren v Town of Islip*, 6 NY3d 735, 736; *Matter of Kreisler v New York City Tr. Auth.*, 2 NY3d 775, 776; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233).

Nevertheless, the petitioner correctly contends that he is entitled to back pay and benefits for any period of suspension in excess of 30 days, including the period commencing with an earlier determination terminating his employment, which was annulled by this court on procedural grounds (see *Matter of Prioleau v Nicoletti*, 54 AD3d 768), up to the determination challenged herein, excluding any delay occasioned by him, and less any compensation derived from other employment during that period and any unemployment insurance benefits received for that period (see Civil Service Law § 75[3]; *Matter of Gomez v Stout*, 13 NY3d 182; *Matter of Sinicropi v Bennett*, 60 NY2d 918). Thus, the matter must be remitted to the respondents to calculate the amount of back pay and benefits to which the petitioner is entitled, and to pay him that amount.

The parties' remaining contentions are either improperly raised in this proceeding or without merit.

SKELOS, J.P., BALKIN, LEVENTHAL and LOTT, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court