

**Matter of Bey v New York City Civil Service
Commission**

2001 NY Slip Op 30058(U)

December 17, 2001

Supreme Court, New York County

Docket Number: 102551/01

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

BEY

Plaintiffs,

- v -

New York City Civil Service
Commission

Defendants.

INDEX NO.: 102551/01

MOTION DATE:

MOTION SEQ. NO.: 001

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	
Answering Affidavits — Exhibits _____	
Replying Affidavits _____	

Cross-Motion: Yes [] No

Upon the foregoing papers, it is ordered that this ~~motion~~ cross-motion is determined in accordance with the annexed decision and order.

SCANNED
JAN 02 2001

Dated: 12/17/01

J.S.C.

Check one: [] FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X

In the Matter of the Application of
PEDRO RIVERA BEY, OBA HASSAN WATT BEY,
EDWARD EBANKS, HERBERT L. HINNANT, and
MICHAEL NICHOLS,

Index No. 102551/01

Petitioners,

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

- against -

NEW YORK CITY CIVIL SERVICE COMMISSION,
NEW YORK CITY DEPARTMENT OF CORRECTION,
BERNARD KERIK, as Commissioner of
Correction, and the CITY OF NEW YORK,

Respondents.
-----X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioners seek an order: 1) vacating and setting aside the determinations of respondent New York City Civil Service Commission (the "Commission") which affirmed the termination of their employment; 2) vacating and setting aside the determinations of respondent New York City Department of Correction (the "Correction Department") which terminated petitioners' employment based upon a finding that they were guilty of misconduct; and 3) reinstating petitioners to their former positions with full back pay and benefits, plus interest.

In response to the petition, respondents cross-move for an order pursuant to CPLR 3211(a) (5) and 3211(a) (7): 1) dismissing

the petition as against respondents Correction Department and Commissioner Bernard Kerik, as untimely and as barred by Civil Service Law §76(1), (3); and 2) dismissing the petition as against respondent Commission, for failure to state a cause of action. In the event the cross-motion is denied, respondents reserve their right to serve an answer to the petition.

Background

Petitioners Pedro Rivera Bey, Oba Hassan Wat Bey, Edward Ebanks, Herbert L. Hinnant, and Michael Nichols are all former tenured Correction Department officers, who identify themselves as "Black and of Moorish national origin." The petition asserts that "[a]t all times relevant hereto the petitioners had a good faith belief that they were exempt from federal and state taxes." As explained in the ALJ's report and recommendation, petitioners are affiliated with the Moorish Science Temple of America, which teaches that Moors are prohibited from paying taxes on the theory that they are not full citizens of the "corporate" United States. Pursuant to these beliefs, petitioners filed Federal and New York State tax forms, claiming exemptions from income tax withholdings. Some also filed IRS forms for nonresident aliens, or self-made forms, entitled "Certificates of Foreign Status for Moorish Americans."

Petitioners allege that in 1995, 1996, 1997, and 1998, numerous New York City employees, including many employed by the

Correction Department, submitted withholding documents stating that they were exempt from taxes. The City conducted an investigation to determine which employees were claiming tax-exempt status or an excessive number of exemptions. About 1,400 City employees were identified, including petitioners.

The petition alleges that on or about December 3, 1997, petitioners and other Moorish correction officers were suspended for thirty days without pay, pending disciplinary charges. On or about April 3, 1998, the Correction Department served disciplinary charges alleging that the employees engaged in conduct unbecoming an officer by: 1) knowingly submitting Federal and State tax forms falsely claiming exemption from taxation; 2) submitting false tax information with the intent to defraud the State of New York; and 3) violating their oaths of office by submitting documents disclaiming their United States citizenship. The charges also included allegations of criminal violations of federal and New York state laws, but petitioners concede that no criminal charges were brought against them.

The disciplinary charges were referred to the City of New York Office of Administrative Trials and Hearings ("OATH") for a hearing, pursuant to Civil Service Law §75. The cases against 17 Correction Department employees, including petitioners, were consolidated and heard jointly over four days in July and August 1998. Fourteen employees appeared *pro se*, three defaulted and

twelve testified on their own behalf. The Correction Department presented the testimony of three witnesses.

On November 30, 1998, the ALJ issued a 21-page report and recommendation, finding that the Correction Department had sustained its burden of proof with respect to four of the five charges,⁴ and recommended termination. The ALJ determined that there was "no credible evidence to support respondents' assertions that they are entitled to the exemption they claim. Respondents' beliefs, as sincere as they may be, do not present colorable legal claims." Citing numerous federal legal precedents directly on point, the ALJ rejected as without merit, the employees' assertions that the tax system is voluntary, and that Moors are exempt from taxation by virtue of their ethnicity or nationality. The ALJ further noted that "this tribunal has no jurisdiction to rule on respondents' claim of selective prosecution."

The Commissioner of the Corrections Department subsequently approved the ALJ's recommendation, and on December 18, 1998, petitioners' employment was terminated.

⁴The ALJ determined that it "was clear from their [the employees'] testimony that it was not their intent to "disclaim" their United States citizenship, and recommended dismissal of specification 5, which charged the employees with violating their oaths of office by submitting documents disclaiming United States citizenship.

On or about March 16, 2000, petitioners exercised their option to appeal to the Civil Service Commission, pursuant to Civil Service Law §76. By decisions dated October 3, 2000, the Commission affirmed the Correction Department's determinations. The concurring opinion notes that "the issue of selective prosecution raised by appellants may warrant further review in a court of law."

On or about February 2, 2001, petitioners commenced this Article 78 proceeding seeking review of the determinations by both the Commission and the Correction Department.

The petition alleges that "[t]he charges, the hearing procedures and the discharge of the Petitioners violated their statutory and constitutional rights." Specifically, the petition alleges, *inter alia*, that: 1) employees who were not Moorish-Americans and who engaged in the same or similar misconduct, were permitted to change*their W-4s and were not discharged; 2) disciplinary charges were brought against few, if any, employees who were not charged criminally; 3) the ALJ refused to permit petitioners to elicit evidence relating to their claim of selective prosecution; 4) the ALJ refused to consider mitigation of penalty, and the penalty imposed was disproportionate to the misconduct; 5) the record failed to establish that petitioners were guilty of the alleged misconduct; and 6) petitioners did not

have reasonable notice that their misconduct could lead to disciplinary action.

Respondents' Cross-Motion to Dismiss the Petition

On a pre-answer motion to dismiss an Article 78 petition pursuant to CPLR 7804(f), only the petition is to be considered, and the allegations in the petition are to be deemed true and are considered in the light most favorable to petitioner. Parisella v. Town of Fishkill, 209 AD2d 850 (3rd Dept 1994); DePaoli v. Board of Education, 92 AD2d 894 (2nd Dept 1983).

That portion of the cross-motion to dismiss the petition as to respondents Correction Department and Commissioner Bernard Kerik, is granted. As petitioners opted to pursue administrative appeals of the determinations of the Correction Department to the Civil Service Commission, this Article 78 proceeding as asserted against the Correction Department and its officer, Bernard Kerik, is barred by Civil Service Law §76. Turner v. New York City Transit Authority, 252 AD2d 558 (2nd Dept 1998) [citing Civil Service Law §76(1), (3); Matter of Wood v. Cosgrove, 237 AD2d 616 (2nd Dept 1997)].²

That portion of the cross-motion to dismiss the petition for failure to state a cause of action against respondent Commission, is granted in part and denied in part.

²In view of this determination, the Court need not reach the Correction Department's alternative grounds for dismissal, based upon the statute of limitations.

Where as here, an employee chooses to appeal a determination to the Civil Service Commission pursuant to Civil Service Law 576, judicial review pursuant to Article 78 is proscribed by statute and "extremely narrow," limited to whether the Commission or the agency "acted in excess of its authority or in violation of the Constitution or of the laws of this State." In the Matter of New York City Department of Environmental Protection v. New York City Civil Service Commission, 78 NY2d 318, 322-324; see also Turner v. New York City Transit Authority, supra; Mancuso v. Levitt, 210 AD2d 386 (1st Dept), app dism 83 NY2d 952, lv app den 84 NY2d 810 (1994); Matter of Lemoine v. New York City Transit Authority, 227 AD2d 403 (2nd Dept 2996); In the Matter of Saini v. City Civil Service Commission, 186 AD2d 436 (1st Dept 1992); Matter of Griffin v. New York City Department of Correction, 179 AD2d 585 (1st Dept 1992). Judicial review of substantive matters is precluded and neither the merits nor the penalty is reviewable. In the Matter of New York City Department of Environmental Protection v. New York City Civil Service Commission supra at 321-322; Mancuso v. Levitt, supra at 388; Matter of Griffin v. New York City Department of Correction, supra.

Applying this standard and taking the allegations in the petition as true, the petition is sufficient to raise only one

issue subject to judicial review in this Article 78 proceeding -- the constitutional claim of selective prosecution.

In a claim of selective prosecution, "[t]he underlying right asserted by petitioner(s) is to equal protection of the laws as guaranteed by the 14th Amendment and the New York State Constitution . . . [which] forbids a public authority from applying or enforcing an admitted valid law 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances.'" Matter of 303 West 42nd Street Corp. v. Klein, 46 NY2d 686, 693 (1979)(quoting Yick Wo v. Hopkins, 118 US 356, 373-374). "To invoke the right successfully, both the 'unequal hand' and the 'evil eye' requirements must be proven - to wit, there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification." Id.

Here, the petition on its face contains sufficient allegations to withstand respondents' pre-answer motion to dismiss the claim of selective prosecution. The petition essentially alleges that petitioners were singled out based upon their race, religion and/or national origin, because the Correction Department and other City agencies permitted "other employees" who were not "Moorish American" to change their

withholding forms, and no disciplinary charges were filed against them and they were not discharged. Specifically the petition alleges that respondents "brought disciplinary charges relating to the filing of withholding forms against few if any employees who were not charged criminally" and that "[e]mployees who are not Moorish-American were not discharged, although the respondents . . . were aware that they had engaged in the same or similar conduct." Take as true, these allegations are sufficient to state a cause of action for impermissible discriminatory prosecution, and respondents' motion to dismiss is denied as to that claim.

Notwithstanding the foregoing determination, petitioners will not be entitled to an evidentiary hearing unless they make "a strong showing of selective enforcement, invidiously motivated." Id at 693. Petitioners must satisfy a weighty burden and overcome the presumption that the enforcement of laws is undertaken in good faith and without discrimination. Id at 694. "To establish enough of a case to trigger an evidentiary hearing as of right, a petitioner must show on the strength of sworn affidavits and other proof supplying factual detail, that he is more likely than not to succeed on the merits." Id at 695-696.

Turning to the other issues raised in the petition, judicial review is precluded, as they are all addressed to the merits of

the underlying determination and the penalty imposed. In the Matter of New York City Department of Environmental Protection v. New York City Civil Service Commission, supra; Mancuso v. Levitt, supra at 388; Matter of Griffin v. New York City Department of Correction, supra.

Thus, that portion of the motion to dismiss the petition as to respondent Commission is granted to the extent of dismissing all **but** the selective prosecution claim.

Finally, the Court must address petitioners' objections to the ALJ's refusal to permit them to elicit evidence at the hearing to support their claim of selective prosecution. The ALJ correctly concluded that "this tribunal has no jurisdiction to rule on respondents' claim of selective prosecution," which as noted by the Commission's concurring decision, is a matter for the Court. See Matter of Dozier v. New York City, 130 AD2d 128, 135 (2nd Dept 1987).^{*} While a constitutional claim that "hinges upon" factual issues reviewable at the administrative level should initially be addressed to the administrative agency so that a necessary factual record can be established, here, the facts underlying the constitutional claim of selective prosecution are separate and apart from the disciplinary charges determined at the administrative level. Id at 134-135; see also Matter of Schulz v. State of New York, 86 NY2d 225, 232 (1995). Now that petitioners have properly asserted their constitutional

claim of selective prosecution in the context of this Article 78 proceeding, once issue is joined, they may seek leave of Court pursuant to CPLR 408 to conduct discovery as to that claim.

Accordingly, it is hereby

ORDERED that the portion of the cross-motion to dismiss the petition as to respondents New York City Department of Correction and Bernard Kerik is granted and the petition is dismissed as to said respondents; and it is further

ORDERED that the portion of the cross-motion to dismiss the petition as to respondent New York City Civil Service Commission, is granted only to the extent of severing and dismissing all claims as asserted against said respondent, with the exception of the selective prosecution claim; and it is further

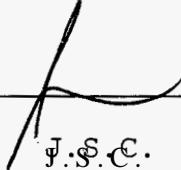
ORDERED the portion of the cross-motion to dismiss the petition as to respondent New York City Civil Service Commission, is denied as to petitioners' claim of selective prosecution, and the balance of this proceeding shall continue with respect to **said claim; and it is further**

ORDERED that pursuant to CPLR 7804(d), respondents New York City Civil Service Commission and The City of New York shall serve and file an answer within 15 days of service of a copy of this order with notice of entry; thereafter, petitioner may serve and file a reply within 10 days of service of the answer; and it is further

ORDERED that the parties are directed to appear for a conference on February 14, 2002, at 9:30 a.m.

DATED: December  , 2001

ENTER:



J.S.C.