

Matter of Pacheco v Kerik

2002 NY Slip Op 30130(U)

July 15, 2002

Supreme Court, New York County

Docket Number: 120114/00

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

PACHECO

INDEX NO.: 120114/00

Plaintiffs,

MOTION DATE:

MOTION SEQ. NO.: 001

- v -

MOTION CAL. NO.:

KERIK

Defendants.

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~~ *proceeding is determined in accordance with the annexed decision, order and judgment.*

Dated: July 15, 2002

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

..... X

In the Matter of the Application of Police Officer
DAVID PACHECO, Tax No. 902159

INDEX NO. 120114/00

Petitioner,

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

- against -

BERNARD KERIK, as Police Commissioner of the
City of New York, the POLICE DEPARTMENT OF THE
CITY OF NEW YORK, and THE CITY OF NEW YORK,

Respondents.

..... X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner David Pacheco, seeks an order: 1) annulling the determination of respondent Police Department of the City of New York (“NYPD”), suspending him from his position as a police officer; 2) permanently removing and expunging the “unfounded allegations” set forth in the charges and specifications; 3) in the alternative, mandating that respondents conduct a name-clearing hearing so that the “unfounded allegations” are permanently removed from his personnel record and the Central Personnel Index; and 4) awarding petitioner back pay from June 15, 2000, the date of his suspension, to June 22, 2000, the last day of his employment as a New York City police officer.

Background

On November 6, 1999, petitioner arrested Carlisle Hall, who was accused of robbery on the false complaint of a female friend. Petitioner prepared the paperwork for the arrest and asserts that he properly vouchered \$3,500 that was in Hall’s possession at the time of the arrest, after

counting the money in front of another officer. Petitioner alleges that the vouchered money was put in a sealed envelope, which was placed in the desk officer's desk at the 47th Precinct.

Petitioner states that a superior told him that the money would remain in the desk until another officer could take it to a laboratory for a fingerprint analysis. Two days later, on November 8, 1999, when Hall returned to the precinct to retrieve the \$3,500, it could not be located.

On April 18, 2000, the NYPD's Internal Affairs Bureau ("IAB") interviewed petitioner about the procedures he used to voucher the \$3,500. On May 22, 2000, petitioner tendered his resignation with the NYPD, effective June 22, 2000. Three weeks after petitioner tendered his resignation, on June 15, 2000, the NYPD filed nine charges against him relating to the missing money, and suspended him from duty without pay, pending a trial of the charges.¹ After petitioner resigned as of June 22, 2000, respondents conducted no further investigation, proceeding or hearing. On June 26, 2000, respondents issued a memorandum administratively filing the charges and specifications against petitioner.

Petitioner commenced this proceeding on or about September 25, 2000, alleging that he

¹The charges and specifications allege that: 1) petitioner failed to deliver property and completed worksheet to Desk Officer of command of record; 2) petitioner failed to notify the Desk Officer that he had taken property in the amount of \$3,500 into custody; 3) petitioner wrongfully caused false entries to be made in the Property Index Log; 4) petitioner wrongfully caused false entries to be made in the Security Envelope Log; 5) petitioner failed to present to the Desk Officer a completed property voucher; 6) petitioner wrongfully made false statements during an official department investigation, in that he stated that he counted \$3,500 in the presence of Lt. Nieves, when in fact he did not; 7) petitioner wrongfully made false and misleading statements during an official department investigation, in that he stated that Lt. Evans was made aware that \$3,500 was present at the Desk, when in fact he was not; 8) petitioner wrongfully made false and misleading statements during an official department investigation in that he stated that the Desk Officer signed and sealed \$3,500 on November 6, 1999, when in fact she did not; and 9) petitioner made false and misleading statements during a department investigation in that he stated that after having a short conversation with Lt. Nieves, he was instructed by said Lieutenant to send the \$3,500 to the lab for analysis, when in fact she did not.

left the NYPD to accept a higher-paying position with AT&T with a regular 9-5 work day, so he could care for his 18-year-old sister. He maintains that his resignation, after eight years on the force, was not related to the charges or the investigation of the missing money, and that he tendered his resignation without any knowledge that the NYPD was about to charge him. Petitioner maintains that the charges are unfounded and should be removed from respondents' records, and that he is entitled to back pay for the period of his suspension.

By an interim decision and order dated July 2, 2001, this court denied respondents' pre-answer motion to dismiss the petition. Respondents argued that the court lacked subject matter jurisdiction, as petitioner's suspension pending a hearing was not a "final determination" within the meaning of CPLR 7801(1). Relying on the authority of Matter of Figueroa v New York Thruway Authority, 251 AD2d 773 (3rd Dept 1998), this court specifically rejected this argument and held that petitioner's resignation did not terminate the proceedings concerning the pending charges, and that if the charges were found to be without merit, petitioner would be entitled to an award of back pay for the period of his suspension.

In their answer and their memorandum of law, respondents assert once again that this court lacks subject matter jurisdiction and that the court's reliance on Matter of Figueroa v New York Thruway Authority was "erroneous." Respondents also assert that as a result of petitioner's resignation before a hearing could be held on the charges, he waived his right to such a hearing. Respondents also assert that petitioner has failed to establish his right to name-clearing hearing or to an award of back pay. Specifically, respondents allege that petitioner was aware, from January 4, 2000, that he was a suspect in the investigation of the missing money. Respondents posit that, based on his employment history with the NYPD, petitioner had reason

to believe that a finding of misconduct in connection with the missing funds would result in his dismissal. Respondents allege that petitioner deliberately tendered his resignation while the investigation was ongoing, and before formal departmental charges were brought against him, to avoid dismissal. .

Discussion

At the outset, the court declines to reconsider the issue of subject matter jurisdiction, as that issue was explicitly considered and determined in the prior decision and order denying respondents' motion to dismiss.

The court concludes that pursuant to Civil Service Law §75(3-a) and Administrative Code of the City of New York §§14-115 and 14-123, petitioner is entitled to a hearing on the charges and specifications, and would be entitled to an award of back pay for the one-week suspension, if he is not convicted. Matter of Montella v. Bratton, 93 NY2d 424, 431 (1999); Matter of Fiaueroa v New York Thruway Authority, *supra* at 775.

Section 75(3-a) of the Civil Service Law provides as follows:

3-a. Suspension pending determination of charges and penalties relating to police officers of the police department of the city of New York. Pending the hearing and determination of charges of incompetency or misconduct, a police officer employed by the police department of the city of New York may be suspended without pay for a period not exceeding thirty days. If such officer is found guilty of the charges, the police commissioner of such department may punish the police officer pursuant to the provisions of sections 14-115 and 14-123 of the administrative code of the city of New York.

As relevant, sections 14-115 and 14-123 of the Administrative Code provide as follows:

§ 14-115 Discipline of members. * * *

b. Members of the force . . . shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them,

after such charges have been examined, heard, and investigated by the commissioner. . .

§ 14-123 Suspension of member of force. The commissioner shall have power to suspend, without pay, pending the trial of charges, any member of the force. If any member so suspended shall not be convicted by the commissioner of the charges so preferred, he or she shall be entitled to full pay from the date of suspension, notwithstanding such charges and suspension.

Here, in accordance with the authority conferred by these provisions, on June 16,2000, respondents issued a “Report of Suspension/Modified Assignment” stating that petitioner was “Suspended from Duty Without Pay Pending Trial of Charges Pursuant to the Administrative Code.” While petitioner’s resignation became effective just a week later on June 22, 2000, he is nevertheless entitled to hearing on the charges, as his “resignation neither terminated the proceedings with respect to these pending charges, nor . . . ‘obviated adjudication’ of them.” Matter of Figueroa v New York Thruway Authority, *supra* at 775 (quoting Matter of Brooklyn Audit Co. v. Department of Taxation & Finance, 275 NY 284,285-286). Furthermore, if after a hearing, petitioner is not convicted of the charges, Administrative Code §14-123 provides that he would be entitled to back pay for the one-week period of his suspension. *Id.*

Contrary to respondents’ contentions, the holding in Figueroa is directly applicable to the instant proceeding. Figueroa involved a state employee who, pursuant to Civil Service Law §75(3), was suspended without pay pending determination of certain charges, and who resigned before a hearing was held on those charges. Here, as a police officer, petitioner is covered by the specific provisions of Civil Service Law §75(3-a), which incorporate by reference Administrative Code §§ 14-115 and 14-123. As the Court of Appeals explains, section 75(3-a) “mirrors subdivision (3) with respect to suspension pending determination of charges.” Matter of Montella v. Bratton, *supra* at 431. Administrative Code § 14-123 and Civil Service Law §75(3)

are likewise identical with respect to the right to back pay for the period of the suspension, in the event the employee or police officer is not convicted of the charges. The fact that the employee in Figueroa was suspended as a disciplinary penalty after a hearing, while here, petitioner was suspended pending a determination of charges, is a distinction without a difference, as both the Civil Service Law and the Administrative Code simply speak of a “suspension” without any qualifying or limiting language.

Respondents also argue that petitioner waived his right to a hearing by deliberately resigning before the NYPD could file or resolve the charges and specifications, in an effort to avoid imminent dismissal. This unsubstantiated speculation is insufficient to establish that petitioner waived his right to a hearing on the charges and specifications. See Matter of Figueroa v New York Thruway Authority, supra at 775.

Respondents further argue that petitioner’s claim for back pay is insufficient because any entitlement to back pay is predicated on a failure to convict at a hearing and petitioner “frustrated” a hearing, by resigning. This argument is without merit. As part of the relief sought in this proceeding, petitioner has specifically requested a hearing on the charges, and he acknowledges that his claim for back pay is necessarily conditioned upon a determination in his favor at that hearing. Moreover, it cannot be said that petitioner “frustrated” his right to a hearing by resigning. Just as here, the employee in Matter of Figueroa v New York Thruway Authority, resigned before a hearing on the charges could be held, and the Appellate Division Third Department found that the employee was still entitled to a hearing, and that the resignation did not serve to terminate the proceedings, or eliminate the need to adjudicate them. Id at 775; see also Borges v McGuire, 107 AD2d 492 (1st Dept 1985) (employee cannot avoid the

consequences of an adverse determination in properly commenced proceedings by retiring during their pendency).

Therefore, in accordance with Civil Service Law §75(3-a) and Administrative Code §§14-115 and 14-123, petitioner is entitled to a hearing on the charges and if he is not convicted, he is entitled to back pay for the week during which he was suspended and any further remedies permitted thereunder. The Court notes, however, that petitioner specifically states in his Memorandum of Law in Opposition to Respondents' Answer, that he is not seeking a name-clearing hearing under the rule of Matter of Swinton v. Safir, 93 NY2d 758 (1999).


Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted to the extent that in accordance with Civil Service Law §75(3-a) and Administrative Code §§14-115 and 14-123, respondents are directed to hold a hearing on the charges filed against petitioner, and if he is not convicted of those charges, he is entitled to back pay for the week during which he was suspended and any further remedies permitted thereunder.

This constitutes the decision, order and judgment of this court.

Dated: July 15, 2002

ENTER:



J.S.C.