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

PRESENT: HON. PAUL G. FEINMAN PART 52
Justice

In the Matter of the Application of
Luis Nierves-Diaz

- v -

The City of New York, etc.

INDEX NO. 117956/2004
MOTION DATE 8-3-2005
MOTION SEQ. NO. 001
MOTION CAL. NO. 12

The following papers, numbered 1 to 12 were read on this motion to/for Article 78.

	PAPERS NUMBERED
Notice of Petition — Affidavits — Exhibits	1-5
Notice of Cross Motion	6-7
Opposition to Cross Motion-Affidavits — Exhibits	8-9
Replying Affidavits	10
Verified Answer & Memo of Law in Support	11-12

Cross-Motion: ■ Yes ☐ No

Upon the foregoing papers, it is ordered that this petition and cross motion are decided in accordance with the annexed decision, order and judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: November 14, 2005

Paul G. Feinman
J.S.C.

Check one: ■ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X

In Re Application of
DETECTIVE LUIS NIEVES-DIAZ,
Petitioner,

against

THE CITY OF NEW YORK, and RAYMOND W. KELLY as Police Commissioner of The City of New York,
Respondents.
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Index Number 117956/2004
Mot. Submit Date August 3, 2005
Mot. Seq. No. 001
Mot. Cal. No. 12

DECISION, ORDER AND JUDGMENT

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Papers considered in review of this petition to annul hearing :

Papers	Numbered
Notice of Petition, Petition, Memo of Law, and Affidavits	1-5
Notice of Cross Motion and Memo of Law	6-7
Petitioner's Affirmation and Memo of Law in Opposition	8-9
Respondent's Reply Memo of Law	10
Verified Answer & Memo of Law in Support	11-12

PAUL G. FEINMAN, J.:

By interim decision and order dated May 4, 2005, the petition and the cross motion to dismiss were held in abeyance pending the filing of a verified answer and supplemental papers. The parties were informed at the time of the oral argument on May 4, 2005, that the papers, when fully submitted, would be treated as a motion for summary for judgment pursuant to CPLR 3212. The respondent, a former NYPD detective, seeks to annual the determination of the Deputy Commissioner of Trials and the New York City Police Department to terminate his employment. For the reasons stated below, the petition is denied, and the proceeding is dismissed. The court notes that it has not engaged in a substantial evidence review, and in light of the court's determination, transfer to the Appellate Division

is not necessary.

Petitioner was formerly employed by the New York City Police Department, having entered the police academy in 1986 and been promoted to Detective in 1992 (Ver. Pet. ¶ 1). On June 14, 2004, he was charged with four specifications involving "prohibited conduct," and one specification involving "performance on duty–general." (Ver Ans. Ex. 3, "Charges and Specifications). On July 7, 2004, a departmental trial was held during which petitioner pleaded guilty to five specifications, after which it was recommended that he be dismissed from the Department but that the dismissal be held in abeyance for a one year period "during which time he remains on the force at the Police Commissioner's discretion and may be terminated at any time without further hearings." (Ver. Ans. Ex. 2, "Disposition of Charges," dated July 28, 2004).

On August 2, 2004, petitioner was charged with specifications of grand larceny in the second degree (PL § 155.40[1]) and "bogus shield," and on August 13, 2004 he was additionally charged with two specifications of prohibited conduct (Ver. Ans. Ex. 4, "Charges and Specifications"). A departmental trial took place on August 13, 16, and 19, 2004 (Ver. Ans. Ex. 1, Memo of Aug. 26, 2004, Dailey to Police Commissioner). By decision dated August 27, 2004, he was found guilty of grand larceny and pleaded guilty to carrying a bogus shield and, because he was on Dismissal Probation until July 28, 2005, it was recommended that he be dismissed from the Department (Ver. Ans. Ex. 1, Decision, p. 27). He was terminated on the same day (Ver. Pet. Ex. A).

Petitioner moves pursuant to CPLR 7803(4) to annul the determination of respondent Commissioner of Trials for the New York City Police Department which resulted in his termination from his position as a detective as of August 27, 2004 (Ver. Ans. Ex. 1). Petitioner argues that the proceeding was conducted in violation of lawful procedure, that he was denied the fundamentals of a

fair hearing, and that there was insufficient evidence to find him guilty (Not. of Pet. p. 1). More specifically, he contends that he was given inadequate notice and specification of the charges against him (Ver. Pet. ¶¶ 31-35, 43-44) and not allowed full discovery nor meaningful cross-examination of the witnesses, and was therefore deprived of his right to a fair hearing (Ver. Pet. ¶¶ 38-42). He also argues that there was insufficient evidence to find him guilty (Ver. Pet. ¶¶ 15-27).

Respondents cross-move to dismiss the petition for failure to state a cause of action pursuant to CPLR 7804(f) and 3211(a)(7), which as noted above the court has directed to be converted to a cross-motion for summary judgment. Respondents argue that at the time of the August hearing, petitioner was on dismissal probation and could be terminated at any time, and had no right to a hearing before being terminated. They further allege that the proceeding afforded petitioner was legal and proper and in conformity with all applicable laws and regulations, and that petitioner was afforded "more than the process due him" under constitutional, statutory, or case law (Ver. Ans. ¶¶ 91-92). They also allege that the penalty of termination was proper and that there was sufficient evidence to convict him (Ver. Ans. ¶¶ 93-94).

Pursuant to CPLR 7804(g), this court must first dispose of the "objections as could terminate the proceeding. . . without reaching the substantial evidence issue" (CPLR 7804[g]). Accordingly, this decision addresses the cross-motion to dismiss and petitioner's other claims.

In determining a motion pursuant to CPLR 3211(a), the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *accord Campaign for Fiscal Equity, Inc. v State of N.Y.*, 86 NY2d 307, 318 [1995]). The test is "whether the proponent of the pleading as a cause, not whether he has stated one."

(*Leon v Martinez, supra*).

In contrast, a decision to grant summary judgment is proper when there are no issues of triable fact (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1963]). "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." (*Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]).

The relevant section of Article 78 at issue in this proceeding states:

> The only questions that may be raised in a proceeding under this article are:
>
> * * *
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, *pursuant to direction by law* is, on the entire record, supported by substantial evidence.

(CPLR 7803[4] emphasis added). The relevant sections of the law concerning disciplining and termination of police officers are found at section 891 of McKinney's Unconsolidated Laws which states that police officers "shall not be removed from [their] position except for incompetency or misconduct shown after a hearing upon due notice upon stated charges," and the section of the New York City Administrative Code concerning the disciplining of police officers which requires that,

> Members of the force, except as elsewhere provided herein, shall be . . . 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. . .upon such reasonable notice to the member . . . ..

(NYC Admin. Code § 14-115[b]). The Court of Appeals has held that a tenured officer forfeits a hearing where he or she has been convicted of a felony or an "oath of office" crime and can be automatically dismissed (*Matter of Foley v Bratton*, 92 NY2d 781 [1999]). A probationary employee,

however, may be discharged "without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law" (*Matter of York v McGuire*, 63 NY2d 760, 761 [1984]). The argument that probationary as well as tenured police officers can only be terminated for misconduct after a hearing based on section 891 of McKinney's Unconsolidated Laws, has been soundly rejected by the courts (*see, e.g., Matter of Williams v Safir*, 265 AD2d 182 [1st Dept. 1999], *lv denied*, 94 NY2d 758 [2000]; *Matter of Wilson v Bratton*, 266 AD2d 140, 141 [1st Dept. 1999]). Petitioner bears the burden of establishing bad faith in his dismissal while on probation (*Matter of Weir v Bratton*, 4 AD3d 160, 160 [1st Dept.]; *lv denied* 3 NY3d 611 [2004], *cert. denied* ___ U.S. ___, 125 S. Ct. 2970 [2005]).

In what appears to be a case of first impression, the issue here involves a probationary officer who, instead of being terminated without a hearing, was given a hearing which he now challenges on the ground of insufficient due process, among other grounds. Neither party has cited an analogous case and the court's research did not find any reported decisions with this fact pattern. Respondents argue that because there was no requirement for a hearing under either statutory or internal departmental rules, given that he was on dismissal probation, there is no basis for the petition. They argue that petitioner, an employee on probation, had no property interest in continued employment and could be terminated for any reason as long as there was no violation of a constitution, statute, or decisional law (Resp. Memo of Law in Supp. of Cross-Mot. pp. 14 et seq.). They further argue that he was provided with notice of the charges and specifications and given a full administrative disciplinary hearing at which he was represented by counsel, and he was permitted to cross-examine witnesses and to present evidence of his own. He was also permitted to submit opposition to the recommendation addressed to the Police Commissioner that he be terminated. This, respondents argue, was in fact the process that

would be due a tenured employee, and more than sufficient for a probationary employee.

Ultimately the court need not decide the issue presented and it need not transfer this matter to the Appellate Division for a "substantial evidence" review. Although respondents chose to afford the petitioner a hearing on the August 2004 charges, the fact remains that at the time these proceedings were brought, petitioner was a mere probationary employee as a result of the July 2004 proceedings that placed him on probation through July2005. As such, he could be discharged at the Commissioner's will provided the reason was not unlawfully motivated in violation of the federal or state constitutions or some statute. There is simply no allegation, let alone evidence, of an unlawful motivation. Applying the summary judgment standard, now that respondents have answered, it is clear that the petition cannot succeed given his at-will employment status at the time of the challenged proceedings and determinatnion. Accordingly, the cross-motion to dismiss the petition for failure to state a cause of action is granted. It is therefore

ORDERED and ADJUDGED that the petition is denied and the cross motion to dismiss granted. It is further

ORDERED and ADJUDGED that the petition is dismissed.

This is the decision, order and judgment of this court. Courtesy copies of this decision are being mailed to counsel.

E N T E R :

Dated: November 14, 2005
New York, New York

J.S.C.