

Matter of Molloy v New York City Police Department
2005 NY Slip Op 30243(U)
June 7, 2005
Supreme Court, New York County
Docket Number: 0402382/2004
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER, J.S.C.
Justice

PART 36

Richard Molloy

INDEX NO. 402382/04

- v -

N.Y.C. Police Dept.

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided

per annexed decision

FILED

JUN 13 2005

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/7/05

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

PRESENT: HON. MARILYN SHAFER PART 36
Justice

-----X

In the Matter of the Application of
RICHARD MOLLOY,
Petitioner,

INDEX NO. 402382/04
MOTION DATE
MOTION SEQ. NO. 01

-against-

THE NEW YORK CITY POLICE DEPARTMENT,
RAY KELLY, JONATHAN DAVID, PUBLIC ACCESS
APPEALS OFFICER, LT. MICHAEL PASCUCCI,
NYPD FOIL UNIT LEGAL BUREAU,

Respondents.

-----X

The following papers, numbered 1 to 5, were read on this petition under Article 78 of the Civil Practice Law and Rules:

	<u>Papers Numbered</u>
Verified Petition with Exhibits	1
Affirmation of Respondent	2
Notice of Cross-Motion of Respondent	3
Notice of Cross-Motion of Petitioner	4
Reply Affirmation in Support of Cross-Motion to Dismiss and in Opposition to Purported Motion for Joinder	5

Upon the foregoing papers, it is ordered that this petition is denied and the cross-motion to dismiss is granted.

Background

Petitioner pro se Richard Molloy (Molloy) brings this Article 78 to compel Respondents New York City Police Department (NYPD), Ray Kelly, Commissioner, Jonathan David, Public Records Access Appeals Officer, Lt. Michael Pascucci, and the NYPD FOIL Unit Legal Bureau

(Respondents) to comply with Molloy's FOIL request to produce documents which Molloy claims will establish his wrongful conviction. After a Bronx County bench trial in April of 1999, Molloy was convicted of second degree manslaughter in the shooting death of off-duty officer Patrick Phelan (Phelan), and sentenced to a term of 4 to 12 years. He is currently incarcerated. Molloy maintains that Phelan, in an "alcoholic stupor," committed suicide by "surreptitiously" removing Molloy's service revolver and fatally shooting himself while Molloy, an off-duty NYPD police officer, was attempting to put Phelan to bed in his fiancée's apartment after an evening in a Bronx tavern (Petition, ¶¶ 15-17). Molloy further maintains that approximately six months prior to Phelan's death, Phelan attempted to "surreptitiously snatch" the service revolver of Ray Byrnes (Byrnes), an off-duty detective in the NYPD, while Byrnes and Phelan were patronizing a Bronx tavern (Petition, ¶ 20(a)). Molloy alleges that Byrnes made statements regarding this incident to the NYPD Internal Affairs Bureau (IAB). Molloy also alleges that the prosecution withheld prison records documenting Phelan's attempts at suicide while serving time in a Northern Ireland prison. Molloy maintains that while this information was known to Respondents at the time of his prosecution, it was never provided to him and therefore constitutes exculpatory evidence wrongfully withheld (Petition, ¶¶ 21, 22).

By letter dated March 15, 2004, to the NYPD FOIL Unit, Molloy requested, *inter alia*, all records pertaining to the IAB investigation of Byrnes regarding his contact with Phelan; and, pertaining to Phelan, IAB investigations of Sergeant Lynch and Captain Mason; IAB statements by Byrnes; IAB statements of retired Sergeant Robert Burmeister, IAB statements by civilian Joannie O'Connell; IAB Action Log entries, summary reports, complaints, follow-ups, and supplemental reports; internal memoranda; and statements of Detective Rodriguez. By letter

dated March 31, 2004, the NYPD denied release of the documents because they would “reveal non-routine investigative techniques,” and “identify a confidential source/confidential information.” Molloy appealed this decision by letter dated April 18, 2004. By letter dated August 4, 2004, Molloy was again denied the records he seeks. Having exhausted his administrative remedies, Molloy brings the instant proceeding.

Motion and Cross-Motion

Respondents cross-move to dismiss pursuant to 3211 (a) (1) and (7) on grounds that Molloy has failed to state a claim, and that this Court lacks jurisdiction, since the records sought are protected under NY Civil Rights Law § 50 a (1) and therefore exempt from disclosure under FOIL. Respondents further state that the action should be dismissed for failure to join a necessary party, as required by Civil Rights Law § 50, and pursuant to CPLR § 100 (a). In the alternative, Respondents seek leave to serve and file a verified answer to the petition.

In response to Respondents’ cross-motion, Molloy cross-moves to join Byrnes as a necessary party to the instant proceeding. He requests that the motions be adjourned to allow Byrnes sufficient time to submit papers setting forth his position on release of the records pertinent to him.

In support of their cross-motion and in opposition to Molloy’s cross-motion for joinder, Respondents claim that the documents sought are personnel records removed from the purview of FOIL. Respondents further maintain that the documents sought must be relevant and material to an underlying action and that, since there is no underlying action before this Court, the request for disclosure has no “independent purpose” (Reply Affirmation, ¶ 7). Additionally, Respondents reply that the IAB file contains no record in support of Molloy’s allegation that a

similar incident involving Phelan ever occurred (Reply Affirmation, ¶ 8). Respondents do not deny the existence of prison records showing Phelan's repeated attempts at suicide while incarcerated, but state that it is the District Attorney who has a duty to Molloy under the requirements of *Brady v Maryland*, rather than Respondents (*see Brady v Maryland*, 373 US 83 [1963]). Respondents assert that Molloy is time-barred from joining Byrnes as a necessary party, since over four months elapsed after the final determination and before Byrnes was named as a party to the within action (Reply Affirmation, ¶ 12).

Discussion

Once there has been a final administrative determination, judicial review in an Article 78 proceeding is limited to a determination of whether the administrative action complained of is arbitrary and capricious or lacks a rational basis (*In re Application of Chelrae Estates, Inc. v State Division of Housing and Community Renewal, Office of Rent Administration*, 225 AD2d 387, 389 [1st Dept. 1996] citing *Matter of Pell v Board of Education*, 34 NY2d 222, 230-231 [1974]). An Article 78 proceeding is limited to consideration of the evidence and arguments raised before the agency when the administrative determination was rendered and “[t]he function of the court . . . is to determine . . . whether the determination had a rational basis in the record” (*In re Application of HLV Associates v Aponte*, 223 AD2d 362, 363 [1st Dept. 1996] citing *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1st Dept. 1982]). “Courts are not permitted to substitute their judgment for that of the administrative agency where said decision is rationally based on the record” (*In re Application of Royal Realty Co. v New York State Division of Housing and Community Renewal*, 161 AD2d 404, 405 [1st Dept. 1990] citing *Fresh Meadows Associates v New York City Conciliation and Appeals Board*,

88 Misc. 2d 2003 [Sup Ct, New York County, 1976]).

Civil Rights Law § 50-a (1) states, in relevant part, that all personnel records “used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state” shall be considered confidential and not available for inspection or review without the written consent of such officer, except as mandated by court order. § 50-a (2) states that the Court must review all such requests and give interested parties an opportunity to be heard, and that, further, no order shall be issued without a clear showing of facts sufficient to warrant the Court to request such records for review. § 50-a (3) permits in camera inspection of personnel records and, based on this inspection, if the records are “relevant and material to the action before [the judge],” the Court shall make those parts of the record available to the party requesting their release.

The legislative purpose of § 50-a of the Civil Rights Law was to prevent disclosure of officers’ personnel records “except when a legitimate need for them has been demonstrated sufficiently to obtain a court order, generally upon a showing that they are actually relevant to an issue in a pending proceeding” (*In the Matter of Gazette Company v City of Schenectady*, 93 NY2d 145, 155 [1999], internal citations omitted).

The Court has held that under § 50-a of the Civil Rights Law, two standards must be met to justify disclosure of a police officer’s personnel file. The first, “clear showing of facts” requirement, must be met liberally since “a party seeking discovery will . . . not know precisely what pertinent information is within a personnel record . . .” (*Cox v New York City Housing Authority*, 105 AD2d 663, 664 [1st Dept 1984]). Under the second, a determination of relevance and materiality can be made only “after an in camera examination of the records by Special

Term” (*id.*)

The gravamen of Molloy’s petition is that evidence withheld from him supports his wrongful conviction, namely, that Phelan attempted to “surreptitiously snatch” the service revolver of Byrnes in a tavern, presumably while the two were drinking, that this constitutes an attempt at suicide, and that Byrnes reported the incident to the IAB. Molloy states that he has reason to believe that Phelan was suicidal at the time of his incarceration in Northern Ireland, and attaches a Bronx Homicide Task Force “case active” investigative report stating that the deceased had been “despondent” in the days before his death. He states that Phelan’s prison records have been withheld, along with details of the Byrnes’ incident, and that this is evidence “clearly of an exculpatory nature” (Petition, ¶ 20).

Respondents denied Molloy’s appeal on grounds that the records are barred by statute. On cross-motion to dismiss, Respondents state that the records sought by Molloy are “the records of an NYPD . . . IAB investigation that has recently been concluded,” and that the purpose of the IAB investigation was to “investigate the allegations of misconduct against an individual police detective and by their very nature, were used to evaluate the performance and conduct of the subject detective” (Cross-Motion, ¶¶ 10, 11).

This Court finds substantial evidence to support a rational basis for Respondents’ denial of Molloy’s FOIL request. The records sought by Molloy qualify as NYPD personnel records “used to evaluate performance toward continued employment” within the ambit of Civil Rights Law §50-a (1). Even if, for the sake of argument, Respondents’ final determination lacked rational basis, Molloy has failed to make a predicate showing of clear facts sufficient to warrant in camera review, and to the knowledge of the Court, there is no pending proceeding to which

the records would be relevant. Accordingly, Molloy's petition is denied.

Conclusion


It is established law that "... judicial examination of an administrative decision should be limited to a review of the record for substantial evidence that supports a rational and lawful basis for that determination" (*Reingold v Koch*, 111 AD2d 688, 691 [1st Dept. 1985]).

For the foregoing reasons, it is ordered that Respondents' cross-motion is granted, and Molloy's petition pursuant to Article 78 of the CPLR is denied.

This reflects the decision and order of this Court.

Dated: 6/7/05

Check one FINAL DISPOSITION


HON. MARILYN SHAFER, J.S.C.
 NON-FINAL DISPOSITION

FILED
JUN 13 2005
CLERK OF COURT
COUNTY CLERK'S OFFICE