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SCANNED ON 5/7/2007

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

Index Number : 108881/2006

SEABROOK, NORMAN

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

DISMISS ACTION

PART 62

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision and order.

FILED
MAY 07 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/1/07

KSS

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: PART 62

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NORMAN SEABROOK, individually and as President of the Correction Officers' Benevolent Association, and THE CORRECTION OFFICERS' BENEVOLENT ASSOCIATION, CHESTER WASHINGTON, and all other similarly situated correction officers,

Plaintiffs,

-against-

THE CITY OF NEW YORK, MARTIN F. HORN, as Commissioner of the Department of Corrections of the City of New York, and THE NEW YORK CITY DEPARTMENT OF CORRECTIONS,

Defendants.

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Index No.: 108881/06
Motion Seq.: 001
Motion Date: 3/2/07

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.

The defendants' motion to dismiss plaintiffs' complaint in its entirety is granted, as more fully discussed below.

Plaintiffs, Norman Seabrook, individually and as President of The Correction Officers' Benevolent Association, and The Correction Officers' Benevolent Association, Chester Washington, and all other similarly situated correction officers (hereinafter collectively "plaintiffs"), brought the instant action alleging that defendants, The City of New York, Martin F. Horn, as Commissioner of the Department of Correction of the City of New York, and the New York City Department of Correction (hereinafter collectively "defendants"), violated plaintiffs' right to have the assistance of union representation at investigatory interviews pursuant

to Civil Service Law §75, and violated plaintiffs' privilege against self-incrimination pursuant to Article I, §6 of the New York State Constitution. Defendants now move to dismiss the complaint in its entirety pursuant to CPLR §3211(a)(7) for failure to state a cause of action and, in the alternative, move to dismiss the complaint as against defendant New York City Department of Correction (hereinafter "DOC") as, pursuant to New York City Charter §396, the DOC is not appropriately named as an individual defendant.

In deciding a motion brought pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the complaint should be liberally construed and the facts alleged in the complaint and any submissions in opposition to the dismissal motion accepted as true, according plaintiff the benefit of every possible favorable inference. (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]) (internal citations omitted). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'." (*Id.*).

According to the complaint and plaintiffs' opposition to this motion, the DOC's Inspector General's office, the Division of Investigations, and Division of Trials and Litigation, are authorized by Mayoral Executive Order No. 16 to conduct interviews to investigate alleged wrongful conduct and determine whether formal disciplinary action is appropriate. Prior to such an interview, the DOC serves the correction officer with a written notice to appear for an interview, pursuant to Civil Service Law ("CSL") §75(2), which also informs the officer of his or her right to have union representation at the interview. Beginning in or around October 2005, the DOC,

> established a policy, practice, and pattern of prohibiting or discouraging the union or union's representatives from counseling or providing assistance to correction officers during, and otherwise participating in, interviews conducted by defendants.

Specifically, on April 28, 2006, defendants interviewed plaintiff Chester Washington, who was accompanied by David McGruder of Koehler & Isaacs LLP as his representative. During the interview, Washington was questioned regarding alleged use of force upon an inmate. When McGruder attempted to counsel Washington during a pending question, defendants' investigators informed him that he was prohibited "from counseling or providing assistance to Washington, or otherwise participating in the interview, during a pending question." It is this prohibition against assistance during a pending question which, according to plaintiffs, violates their rights under CSL §75(2) and Article 1, §6 of the New York State Constitution.

Civil Service Law §75(2)

There is no questions that CSL §75(2) affords plaintiffs the right to have a union representative present at any investigatory interview under certain circumstances:

> An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization . . . and shall be notified in advance, in writing, of such right.

The Supreme Court, in *N.L.R.B. v. J. Weingarten, Inc.* (420 U.S. 251 [1975]), held that private sector employees have the right to union representation at an interview which he or she reasonably believes may result in disciplinary action. (*Id.* at 257). In 1993, the New York State Legislature amended the Civil Service Law to extend this same right to public sector employees. (*See Lykes and New York City Transit Authority*, 30 PERB ¶ 4655 [1997], *rev'd on other grounds*, 31 PERB ¶ 3024 [1998] [recognizing that the amendment extended *Weingarten* rights to New York public sector employees]). Plaintiffs contend that this extension of rights includes

the right of an employee to be advised by or to consult with his or her representative not only during an interview but, specifically, while a question is pending and the employee has yet to answer. Defendants argue that such a broad reading of the law has never been found and would interfere with the government's legitimate and important interest in investigating alleged employee misconduct. The Court agrees that plaintiffs' interpretation extends the Civil Service Law's protections beyond the intent of the legislature.

Plaintiffs cite to and include an excerpt of State Senator Nick Spano's Memorandum of Support for CSL §75(2), in which he states that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts" and encouraging employees to "raise extenuating factors and/or circumstances" he or she might not otherwise know to raise. (Senate Introducer's Memorandum in Support, Governor's Bill Jacket, L. 1993, C. 279, at 3). This statement, according to plaintiffs, supports a reading of the statute that permits union representatives to provide such assistance while a question is pending, or at any other time during an investigatory interview. However, Senator Spano's statement does not address the limited issue of assistance during a pending question and does not support plaintiffs' broad reading of the statute. Plaintiffs' reliance on *National Labor Relations Board v. Texaco* (659 F2d 124 [9th Cir. 1981]) is likewise inapposite, as the union representative in that case was not permitted to speak at all or otherwise participate in any way during the interview, which constituted a clear violation of the rights of employees under *Weingarten*. Here, the union representative was allowed to participate in the interview but was restricted from coaching the employee before he answered a pending question. This is a far cry from relegating the union representative to "the role of passive observer," as plaintiffs contend.

Plaintiffs can cite to, and indeed this Court has found, no cases which hold that an employee being interviewed pursuant to CSL §75(2) can be advised or coached regarding his or her answer to a pending question. Defendants point out that even attorneys representing clients at judicial depositions or at trial are generally prohibited from consulting with their client while a question is pending except in very limited circumstances not applicable here. While plaintiffs are correct in arguing that the law governing deposition and trial conduct is not applicable to the case at hand, the policy considerations are the same: the person being interviewed is obliged to answer fully and truthfully. Plaintiffs' contention that the DOC's policy or practice of prohibiting consultation while a question is pending denies employees of their right to representation is unavailing, as there is no support in the law for such a reading. A union representative can "assist the employer by eliciting favorable facts" and encourage employees to "raise extenuating factors and/or circumstances" after the employee answers the question. (Senate Introducer's Memorandum in Support, Governor's Bill Jacket, L. 1993, C. 279, at 3). As such, the facts and allegations stated by plaintiffs fail to state a cause of action for a violation of CSL §75(2) and must be dismissed.

New York State Constitution, Article I, §6

Plaintiffs allege in their complaint that by preventing union representatives to consult with employee interviewees while a question is pending, defendants violate Article I, §6 of the New York Constitution, which guarantees a right to be free from compelled self-incrimination. Defendants move to dismiss this allegation, contending that it fails to state a cause of action because employees have "use immunity" for any information given during the course of the investigatory interview.

Plaintiffs are correct in their assertion that both the New York Constitution and the United States Constitution guarantee the privilege against self-incrimination. The Court of Appeals has stated,

> It would of course offend the guarantee against self-incrimination to require a public servant to answer questions - even those relating to the performance of such servant's official duties - upon the threat of dismissal, and to make use of the incriminating statements in a subsequent criminal prosecution. [Emphasis added].

(*Matt v. Larocca*, 71 NY2d 154, 159 [1987]). The Court went on to note that when a public employee is compelled to answer questions or face removal, as is the case here, the employee's responses are "cloaked with immunity automatically, and neither the compelled statements nor their fruits may thereafter be used against the employee in a subsequent criminal prosecution." (*Id., see Lefkowitz v. Turley,* 414 US 70, 78-9 [1973]; *Gardner v. Broderick*, 392 US 273 [1968]). In this case, plaintiffs are also automatically granted "use immunity" for any responses given during an investigative interview, by virtue of Executive Order 16, section (4)(b) of which states:

> The Commissioner and, with the approval of the Commissioner, the Inspectors General and any person under the supervision of the Commissioner or the Inspectors General, may require any officer or employee of the City to answer questions concerning any matter related to the Performance of his or her official duties . . . after first being advised that *neither their statements nor any information or evidence derived therefrom will be used against them in a subsequent criminal prosecution* other than for perjury or contempt arising from such testimony.

Plaintiffs, in their complaint, admit that the notice sent to officers alerting them to an investigatory interview includes a notification that the officer's statements will not be used in a subsequent criminal prosecution. However, on this motion to dismiss, plaintiffs analogize their own circumstance to that in *Rivera v. Blum* (98 Misc.2d 1002 [Sup. Ct. Suffolk Cnty. 1978]). In

Rivera, the plaintiffs were recipients of public assistance who brought suit against the department of social services for prohibiting them from having legal representation during an investigatory interview. Plaintiffs argue that, as in *Rivera*, "the statements made during the [instant] investigation could result in criminal prosecution," and that plaintiffs should be allowed to confer with counsel while a question is pending because the Fifth Amendment of the United States Constitution and Article I, §6 of the New York Constitution protects against disclosures which the witness believes could be used in a criminal prosecution. Plaintiffs do not, in response to this motion to dismiss, address the fact that employees are granted "use immunity".

Plaintiffs' use of *Rivera* is unfounded. The plaintiffs in *Rivera* were not public employees but recipients of public aid. It is well-settled that "the State 'may compel any person enjoying a public trust to account for his activities and may terminate his services if he refuses to answer relevant questions . . . .'" (*Matt v. Larocca*, 71 NY2d 154, 160 [1987] [internal citations omitted]). This right of the State is balanced against the right of individuals to be free from compelled self-incrimination by the grant of "use immunity," which guarantees that the responses given will not be used for later criminal prosecution. As such, neither the Federal nor State Constitutional privilege against self-incrimination are implicated, as the witness cannot "reasonably believe [their responses] could be used in a criminal prosecution." (*Rivera v. Blum, supra*). Plaintiffs, therefore, fail to allege facts sufficient to state a cause of action under Article I, §6 of the New York Constitution and the instant complaint must be dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of this court.

Dated: May 1, 2007

ENTER:

Hon. Karen S. Smith, J.S.C.