

DePaolis v City of New York

2008 NY Slip Op 32965(U)

October 30, 2008

Supreme Court, New York County

Docket Number: 105546/08

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER, JSC

PART 8

Index Number : 105546/2008

DEPAOLIS, MICHAEL W.

INDEX NO. _____

vs

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided

per court & attached return

Discovery Conference set for TUESDAY,

NOVEMBER 18TH @ 9:30 A.M.

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

FILED
OCT 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/30/08

HON. MARILYN SHAFER, JSC

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 : IAS PART 8

-----X

MICHAEL W. DEPAOLIS,

Petitioner,

-against-

CITY OF NEW YORK, RAYMOND W. KELLY,
COMMISSIONER OF NEW YORK CITY POLICE
DEPARTMENT, RAFAEL PINERO, CHIEF OF
PERSONNEL, NEW YORK CITY POLICE
DEPARTMENT,

Index No. 105546/08

FILED
OCT 31 2008
COUNTY CLERK'S OFFICE
NEW YORK

Respondents.

-----X
MARILYN SHAFER, J.:

Petitioner, Michel W. DePaolis (DePaolis) petitions this court, pursuant to Article 78, for an order compelling respondents City of New York, Raymond W. Kelly, the Commissioner of the New York City Police Department, and Rafael Pinero, Chief of Personnel of the Police Department, to restore petitioner to full active duty, transfer him to an active duty assignment and remove an allegedly false notation in his Central Personnel Index that a charge of larceny against him was substantiated.

PETITIONER'S ASSIGNMENT TO THE VIPER UNIT

DePaolis has been a member of the police force since August 30, 1993. DePaolis alleges that, although he is officially classified as active duty with no restrictions, since September 2006 he has been assigned to the Housing Borough Manhattan's Video Interactive Patrol Enhancement Response (VIPER) unit, which monitors the closed circuit television systems located in public housing developments. DePaolis alleges that the VIPER unit is

staffed exclusively by individuals on modified or limited duty (submitting a document which indicates that as of January 21, 2008, he was the only person in VIPER that was on full duty), and that his continued assignment to that unit constitutes a stigma on his status as a full-duty detective.

DePaolis was initially assigned to the VIPER unit after a criminal complaint was lodged against him and another police officer, Janice Gonzalez, by a former business colleague. According to DePaolis, from June 2001 to July 2002, he and Gonzalez were partners in a real estate company, through which they conducted business when they were off-duty. DePaolis states that at a certain point he and Gonzalez allowed three other people to become associated with their business, but because they believed that the individuals had, among other things, misappropriated escrowed funds, DePaolis and Gonzalez dissolved their company and started a new company.

Nearly a year later, one of the three individuals filed a criminal complaint against DePaolis and Gonzalez, alleging that they had taken commissions that the three individuals had earned, in the amount of \$6,800. In June 2004, DePaolis and Gonzalez were arrested for grand larceny, 3rd degree. Because of the arrest, DePaolis was suspended from work without pay. On July 29, 2004, he was restored to modified duty and transferred to the Manhattan VIPER unit.

According to DePaolis, on the advice of his attorney, he pled guilty to a violation of disorderly conduct (Penal Law § 240.20) and was sentenced to a conditional discharge.

In addition to the criminal charges, departmental charges of grand larceny were brought against him. On December 21, 2004, a departmental hearing was held after the criminal charges were resolved. The hearing was conducted by Lieutenant Thomas Levanti (Levanti).

The day after the hearing, DePaolis filed a departmental complaint against Levanti, alleging that Levanti had falsely accused him of threatening and intimidating witnesses, and had abused his authority by subpoenaing DePaolis's private bank records associated with his real estate business, although they were unrelated to the original charges. DePaolis alleges that at the hearing of his complaint against Levanti, he learned that the tape recording of his hearing had been lost. He contends that Levanti and his Captain were later disciplined for failing to safeguard the tapes.

On March 16, 2006, DePaolis agreed to plead guilty to a lesser departmental charge of "prohibited conduct." That conduct consisted of holding an interest in a company that did business with the city - i.e., that Skyline Realty Group placed tenants in Section 8 housing and, in return, received commission checks from the New York City Housing Authority and the Department of Social

Services. Under the plea agreement, DePaolis agreed to forfeit all of the time and benefits for the period that he was under suspension (June 30, 2004 - July 22, 2004) and forfeit six vacation days.

Effective October 12, 2006, DePaolis was returned to full duty with firearms from his prior modified duty, however, DePaolis continued to be assigned to the VIPER unit. DePaolis contends that until February 2007, he sought unsuccessfully to learn why he was still assigned to the VIPER unit. Then, he went on medical leave due to Non-Hodgkin's Lymphoma from February 2007 to October 6, 2007.

When DePaolis returned to work in October 2007, he was again assigned to the VIPER unit. In December 2007, he filed an official request for a transfer with Captain Edward Britten (Britten), who was the commanding officer of the command over his unit. It is uncontested that Britten recommended his transfer. DePaolis contends that although his request was then sent to Inspector Michael Phipps (Phipps), the Commanding Officer of Housing, Borough of Manhattan, the request was lost.

DePaolis contends that a few weeks later he hand-delivered another request which was, again, approved and forward to Phipps. DePaolis further contends that he later met with Phipps, and was told by him that he would not get out of the VIPER unit. According to DePaolis, Phipps had been told that, as long as

respondent Kelly was Police Commissioner, DePaolis would "rot" in the VIPER unit. Verified Petition, ¶ 22. DePaolis also contends that his colleague, Janice Gonzalez, was returned to regular duty and that he was kept in the VIPER unit in retaliation for his complaint against Levanti.

DePaolis alleges that, in November 2007, he met with the president of his union, who agreed to discuss the matter with Commissioner Kelly. According to DePaolis, his union president reported to him that Kelly's response was positive and that he should expect a transfer shortly. When that did not occur, the union filed a grievance on DePaolis's behalf with Deputy Commissioner John P. Beirne. On April 9, 2008, the grievance was denied in a letter stating:

The Step III grievance submitted by the Detectives Endowment Association on your behalf has been denied. Neither your re-designation to Detective Specialist nor your assignment to Viper Unit 6 is a violation, misinterpretation, or misapplication of the rules or procedures of the Police Department, nor is it a violation, misinterpretation, or misapplication of the current collective bargaining agreement. The assignment of personnel is strictly a managerial prerogative.

Letter from John P. Beirne, Deputy Commissioner, to Michael DePaolis, dated April 9, 2008.

Respondents contend that the Police Commissioner has broad discretion with regard to the internal workings of the Police Department, and that great deference must be given to the Commissioner's decisions because the department is a quasi-

military organization. *Matter of Boss v Kelly*, 3 Misc 3d 936, 938 (Sup Ct, NY County 2004), *affd* 17 AD3d 269 (1st Dept 2005). However, as the court in *Boss* noted, the Commissioner's discretion is not unlimited, in that he may not exercise that discretion in an arbitrary or capricious or illegal manner. *Id.* at 939; see e.g. Civil Service Law § 75-b. Retaliatory Action By Public Employers.

Respondents further contend that in addition to DePaolis's disciplinary history with respect to the original grand larceny charge and his plea to "prohibited conduct," that on or about November 6, 2006, De Paolis was served with charges and specifications for failing to follow VIPER procedures regarding the method of conducting and recording surveillance (improperly checking license plates and making false entries in logs), to which he pleaded guilty on January 8, 2008, and forfeited 15 vacation days. Thus, according to respondents, DePaolis had shown a pattern of poor judgment and conduct unbecoming a uniformed police officer that justified the decision that he remain assigned to the VIPER unit and not be returned to regular duty. According to respondents, DePaolis's additional misconduct constituted justification for treating him differently from Sergeant Gonzalez with respect to their assignments.

With respect to DePaolis's complaint against Levanti, respondents argue that, in fact, the Internal Affairs Bureau

exonerated Levanti of one of the allegations, and found two allegations to be unfounded. Respondents do not respond directly to DePaolis's allegation that Levanti was disciplined for failing to safeguard tapes of DePaolis's hearing. In any case, the question here is not whether DePaolis's complaint against Levanti was successful, but whether his current assignment constitutes retaliation against him for his having made that complaint.

Respondents further state that as of November 24, 2006, DePaolis was placed on Level II Disciplinary Monitoring as a result of his "numerous command disciplines and/or minor violation entries, transfers for cause or placement on modified assignment." Notification of Placement into Level II - Disciplinary Monitoring, Dated November 30, 2006.

In response, DePaolis submits a police department report which indicates that he was one of nine police officers who received charges and specifications for the conduct and recording of surveillance on the day in question. He further states that he was in fact acting as he had been trained to do when the system was down, and states that of the nine who received charges, every one pleaded guilty, and with the exception of one officer who retired from the force after being found guilty of larceny on unrelated charges in criminal court, every other officer has been returned to full active duty except for him.

Finally, DePaolis submits a Police Department memo, dated

January 31, 2008, which reminds all Commanding Officers that "any full duty member currently in one of the Department's Performance Monitoring Programs [including Level II Disciplinary Monitoring] must be assigned to enforcement duties. Daily assignments to administrative and station house duties are to be avoided."

Memo, "Subject: Full Duty Status Members In Performance Monitoring Must Perform Enforcement Duties," dated January 31, 2008. According to DePaolis, the VIPER unit does civilian, not police work and that his continued assignment to the VIPER unit violates the Police Department policy on Performance Monitoring and is a stigma on his status as a detective.

Although DePaolis has not established that his continued assignment to the VIPER unit is a result of unlawful retaliation against him for filing charges against Levanti, he has raised sufficient questions of fact regarding the possibility of such retaliation to overcome respondents' request that the petition be denied and the proceeding dismissed.¹ That request is denied; rather, DePaolis will be given the opportunity to prove his allegations at trial. See *Matter of Montgomery v Board of Assessment Review of Town of Union*, 30 AD3d 747 (3rd Dept 2006) (where petitioners have provided more than mere conclusory statements in support of allegations of discriminatory practices,

¹ Although respondents have not made a formal motion to dismiss, in their Verified Answer they ask that the petition be denied in its entirety and the proceeding be dismissed.

petition should not have been dismissed); *Matter of Rappa v State Univ. of New York at Stony Brook*, 38 AD2d 728 (2d Dept 1972) (proceeding remitted for trial where questions of fact were presented in Article 78 proceeding which should not have been summarily decided by the court).

NOTATION IN PETITIONER'S CENTRAL PERSONNEL INDEX

With respect to DePaolis's personnel records, he contends that the central index contains an entry that states that charges of larceny against him were substantiated, which information, according to DePaolis, is false and defamatory. DePaolis asks that the entry be corrected.

DePaolis submits three different documents which refer to charges against him. The first document, titled "Disposition of Disciplinary Proceedings," states, inter alia, regarding Michael DePaolis:

SPECIFICATION/DISPOSITION

1. GRAND LARCENY OFF DUTY **GUILTY**

Verified Petition of Michael D. DePaolis, Exh. H.

The second document, also titled "Disposition of Disciplinary Proceedings," states

AMENDMENT

So much of P.O. 235 C.S., dated August 17, 2006 as it relates to the Specification for Michael Deapolis [sic], tax no. 80107 and Janice Gonzalez, tax no. 899256 is amended to read: Prohibited conduct. The disposition of GUILTY remains the same.

Verified Petition, Exh. I. Thus, the second document serves as a

correction to the incorrect statement in the first document.

The third document submitted by DePaolis is the Police Department Round Robin Report which states, in pertinent part, as follows:

M.O.S. SUSPENDED
SUSPENDED RE: GRAND LARCENY, 3RD DEGREE, RELATING TO
OFF-DUTY EMPLOYMENT

CHARGES & SPECS. 1.SAID DET. MICHAEL DEPAOLIS ...
IMPROPERLY HELD AN INTEREST IN A
FIRM THAT ENGAGED IN BUSINESS [sic]
DEALINGS WITH THE CITY IN THAT HIS
CORPORATION SKYLINE REALTY GROUP
PLACED TENANTS IN VARIOUS SECTION 8
PROPERTIES AND THEN RECEIVED
COMMISSION CHECKS FROM THE NEW YORK
CITY HOUSING AUTHORITY AND THE
DEPARTMENT OF SOCIAL SERVICES IN
RETURN. *DISPOSITION. 1. GUILTY
(PLEA)

INTERNAL INVESTIGATION: ALLEGATION LARCENY-OTHER
DISPOSITION: SUBSTANTIATED
ALLEGATION: SAM-MODIFIED NOT ARRESTED
DISPOSITION: INFO/INTELL
ALLEGATION: SAM-SUSPENDED ARRESTED SAM-LARCENY
DISPOSITION: INFO/INTELL

Verified Petition, Exh. J.

DePaolis contends that the Round Robin report is incorrect in that it states that the Larceny charge was substantiated. Respondents argue that, because the original charge of Larceny resulted in DePaolis's arrest, the statement that the Larceny charge was substantiated is correct. Respondents further argue that the Charges & Specs portion of the document accurately reflects the amended charge of Prohibited Conduct.

The Round Robin Report can hardly be described as a model of clarity. Neither petitioner nor respondents have provided the court with a definition of "substantiated," as used in Police Department records, however, it is not inaccurate that DePaolis's initial suspension resulted from charges of Grand Larceny. Furthermore, the document accurately indicates that the ultimate charges and specifications were Prohibited Conduct. Thus, DePaolis's request that respondents be ordered to alter the record is denied.

CONCLUSION

Although in an Article 78 proceeding discovery is not available as a matter of right, it is available with leave of the court where necessary for the full prosecution or defense of the proceeding. *Matter of Town of Pleasant Valley v New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 15-16 (2d Dept 1999).

Because there are questions of fact regarding whether respondents have continued DePaolis's assignment to the VIPER unit in retaliation for his complaint against Levanti, DePaolis is entitled to discovery on that issue prior to trial. The parties are therefore directed to appear in Room ^{80 Centre St} 278, for a conference on 11/18/08, ^{at 9:30 a.m.} to establish a discovery schedule.

Dated:

FILED
MARILYN SHAFER
 J.S.C.
 OCT 31 2008
 COUNTY CLERK'S OFFICE
 NEW YORK