

**James v Doherty**

2009 NY Slip Op 31703(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 102596/2009

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMOND

PART 35

Justice

Index Number : 102596/2009

**JAMES, MICHAEL**

VS.

**DOHERTY, JOHN**

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 7/21/09

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

this motion to

**FILED**

PAGES NUMBERED \_\_\_\_\_

JUL 31 2009

COUNTY CLERK'S OFFICE

NEW YORK

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  
The instant application and cross motion are decided in accordance with the annexed  
Memorandum Decision. It is hereby

ORDERED that the application and cross motion are denied at this juncture as premature;  
and it is further

ORDERED that respondents shall serve an Answer within twenty days of service of this  
order; and it is further

ORDERED that counsel for all parties shall appear for a Preliminary Conference before  
Justice Carol R. Edmead, Supreme Court, New York County, Part 35, 60 Centre Street, Room  
438 on **Tuesday, September 29, 2009 at 3:00 p.m.**; and it is further

ORDERED that counsel for petitioners shall serve a copy of this order with notice of  
entry within twenty days of entry on counsel for respondents.

This constitutes the decision and order of this court.

Dated: 7/29/09

*[Signature]*

HON. CAROL EDMOND

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

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

\_\_\_\_\_  
MICHAEL JAMES, KEVIN MAURICE and  
WALTER GILBERT,

x

Petitioners,

-against-

JOHN DOHERTY, as Commissioner of the  
Department of Sanitation of the City of New York,  
The Office of Administrative Trials and Hearings  
and the City of New York,

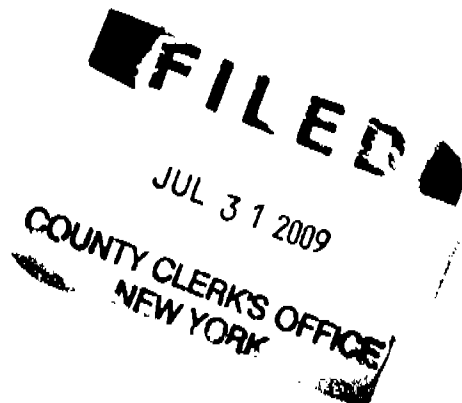
Respondents.

x

\_\_\_\_\_  
EDMEAD, J.S.C.

Index No. 102596/2009

**DECISION/ORDER**



**MEMORANDUM DECISION**

Petitioners Michael James (“James”), Kevin Maurice (“Maurice”) and Walter Gilbert (“Gilbert”) (collectively “petitioners”) move for an order and judgment (1) prohibiting respondent Commissioner Doherty (the “Commissioner”) from prosecuting the petitioners on Department of Sanitation (“DOS”) Complaint numbers S-134987, S-134997 and S-134998 (the “Complaints”), and (2) prohibiting respondent Office of Administrative Trials and Hearings (“OATH”) from conducting a hearing as to the allegations contained in the Complaints.

Respondents cross move for an order dismissing the Petition, pursuant to CPLR §§ 7804(f) and 3211(a)(7). And, in the event the instant Petition is not dismissed, respondents reserve the right pursuant to CPLR § 7804(f) to serve and file an Answer to th Petition.

*Background*

On or about September 11, 2005, James was appointed to the DOS from a competitive list and commenced work as a probationary Sanitation Worker (“SW”); on or about August 27,

2001, Maurice was appointed to the DOS from a competitive list and commenced work as a probationary SW; and on or about July 12, 1993, Gilbert was appointed to the DOS from a competitive list and commenced work as a probationary SW. Each petitioner became a tenured employee one year from the date of his appointment. Consequently, each petitioner can only be removed from his position after being charged with misconduct or incompetence and has been found guilty after a hearing.

On various dates during the summer of 2005, petitioners were observed and videotaped by investigators for the New York City Department of Investigation, collecting trade waste from numerous restaurants in Brooklyn, New York. Petitioners were then served with charges in July 2007 for said misconduct and a hearing was scheduled to be held at the OATH offices.

Maurice has been charged by the DOS under Complaint # S-134987, with committing certain acts of misconduct that occurred on June 26, 2005 and July 19, 2005. Said charges were first written on June 4, 2007 and were served upon Maurice on or about July 10, 2007. James has been charged by the DOS under Complaint # S-134997, with committing certain acts of misconduct that occurred on June 28, 2005, July 19, 2005 and August 23, 2005. Said charges were first written on June 4, 2007 and were served upon James on or about July 19, 2007.

Gilbert has been charged by the DOS under Complaint # S-134998, with committing certain acts of misconduct that occurred on August 23, 2005. Said charges were first written on June 4, 2007 and were served upon Gilbert on or about July 10, 2007.

Upon notification of the hearing, petitioners moved to dismiss the charges on Statute of Limitations grounds.

*Petitioners' Contentions*

The instant charges against all three petitioners were served beyond the 18-month Statute of Limitations that applies to disciplinary matters. ALJ Richard misinterpreted the facts and the law regarding the Statute of Limitations.

The DOS must allege a set of facts in the disciplinary complaints that spell out the commission of a crime. If they fail to do so, the complaints may not go forward. None of the petitioners is charged with any acts that are in violation of the New York State Penal Law. And, there is no allegation that any of the petitioners received compensation or gratuity from a third party. Since the taking of trade waste is not a crime, the DOES attempted to set forth a theory that collecting trade waste is a conflict of interest under NYC Charter §2604(b)2, (b)3 and (b)13.

Violations as charged herein can result in the loss of employment for members of sanitation if they are brought up on disciplinary charges and are found guilty. However, these charges do not fall within the confines of violating the conflict of interest rules.

*Respondents' Contentions*

Because petitioners may have engaged in conduct that may constitute a crime, the commencement of disciplinary charges is not barred by the Statute of Limitations. Petitioners were placed on reasonable notice that a crime was alleged. The charges against petitioners could then proceed since they were not barred by the Statute of Limitations.

Analysis

Section 75(4) of the Civil Service Law provides that

"...no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges...provided, however, that such

limitations shall not apply when the incompetency or misconduct complained of and described in the charges would, if proved in a Court of appropriate jurisdiction, constitute a crime.”

Sanitation Workers are covered by the New York City Administrative Code. Pursuant to a lawsuit commenced by Harry Nespoli, as President of the Uniformed Sanitationmen’s Association against respondent-Commissioner John Doherty, under Index No. 104520/05, a settlement was reached between Harry Nespoli and the City of New York that provided as follows:

Paragraph 7 - “No removal or disciplinary proceeding shall be commenced against any Sanitation Worker more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges...provided, however, that such limitations shall not apply when the incompetency or misconduct complained of and described in the charges would, if proved in a Court of appropriate jurisdiction, constitute a crime.”

The agreement requires that Sanitation Workers will be governed by the Administrative Code in the same manner as civil servants are treated under §75 of the Civil Service Law.

At this juncture, it is premature to rule in favor of either party. It cannot be said with certainty at this juncture that petitioners engaged in conduct that may constitute a crime, thereby resulting in the conclusion that the commencement of disciplinary charges is not barred by the Statute of Limitations. A further analysis of the actual conduct undertaken by petitioners is warranted to determine if the petitioners’ conduct may be criminal. Whether, what petitioners did was engaging in any action that actually violated the relevant sections of the City Charter cannot be assessed at this juncture. Likewise, whether the Penal Law has been violated by petitioners cannot be ascertained at this juncture.

Discovery and further submissions are warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application and cross motion are denied at this juncture as premature;  
and it is further

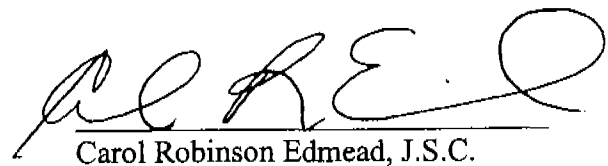
ORDERED that respondents shall serve an Answer within twenty days of service of this  
order; and it is further

ORDERED that counsel for all parties shall appear for a Preliminary Conference before  
Justice Carol R. Edmead, Supreme Court, New York County, Part 35, 60 Centre Street, Room  
438 on **Tuesday, September 29, 2009 at 3:00 p.m.**; and it is further

ORDERED that counsel for petitioners shall serve a copy of this order with notice of  
entry within twenty days of entry on counsel for respondents.

This constitutes the decision and order of this court.

Dated: July 29, 2009



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**

JUL 31 2009

**COUNTY CLERK'S OFFICE  
NEW YORK**