

Horne v City of Buffalo
2010 NY Slip Op 34109(U)
July 26, 2010
Supreme Court, Erie County
Docket Number: 2008-10228
Judge: Tracey A. Bannister
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STATE OF NEW YORK : COUNTY OF ERIE
SUPREME COURT

CARIOL J. HORNE,

Petitioner,
vs.

Index No. 2008-10228

**MEMORANDUM
DECISION
and
ORDER**

CITY OF BUFFALO,
CITY OF BUFFALO POLICE DEPARTMENT,

H. McCARTHY GIPSON, as Commissioner
City of Buffalo Police Department,

BYRON LOCKWOOD, as Deputy Commissioner
City of Buffalo Police Department

Respondents.

Appearances:

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Bannister, J. :

Petitioner, Cariol J. Horne, filed a motion pursuant to CPLR article 78 to annul the findings and recommendations of the City of Buffalo Police Department's Independent Hearing Officer and to vacate the termination of petitioner's employment as a City of Buffalo Police Officer. Petitioner also seeks reinstatement to her former position with full back pay and benefits.

Petitioner's claim arises out of an incident that occurred on November 1, 2006 in which she responded to a call of "Officer Needs Assistance". Upon arrival, Petitioner observed a fellow police officer attempting to arrest a suspect. It was alleged that instead of helping the officer, petitioner assisted the suspect. As a result of her alleged conduct responding to that call and her conduct thereafter, eleven departmental charges were filed against petitioner. On July 12, 2007, Petitioner attended a formal disciplinary hearing conducted by Independent Hearing Officer Thomas N. Rinaldo regarding this matter. After eleven days of testimony, the hearing officer found petitioner guilty of all but two of the eleven departmental charges. The hearing officer recommended petitioner's penalty be termination and removal from The Buffalo Police Force. Petitioner was terminated by Respondent on May 8, 2008.

On June 12, 2008, Petitioner filed a Motion to Renew by an Order to Show Cause that was denied by Justice Makowski in an Order dated August 21, 2008, (Index No. I-2008-2417). On September 2, 2008

Petitioner filed an Amended Verified Petition under Article 78, alleging, *inter alia*, insufficient due process on the grounds that Hearing Officer Rinaldo lacked jurisdiction to conduct the disciplinary Hearing as a civil proceeding. By Decision dated November 21, 2008, Index No. I-2008-8689, Justice Makowski granted the City's Motion to Dismiss the Amended Verified Petition, holding that the Petitioner was provided with sufficient due process under the City's Collective Bargaining Agreement (C.B.A.). Petitioner also filed a Federal Complaint on February 8, 2008 alleging, *inter alia*, breach of contract and seeking a preliminary injunction and reinstatement pursuant to General Municipal Law § 207-c. The United States District Court for the Western District of New York, (Curtin, J.) dismissed the petition in a decision dated July 7, 2008.

Petitioner brought the instant CPLR article 78 proceeding by Notice of Petition dated September 8, 2008 alleging claims substantially similar to those raised in earlier proceedings, to wit: insufficient due process, lack of subject matter jurisdiction due to improper delegation of authority pursuant to New York Civil Service Law § 75 [2]; Title 3, Chapter 9, § 891 of the New York State Unconsolidated Laws; and Article XII, § 12.2 [c] of the Collective Bargaining Agreement, insufficient evidence to support the findings, use of improper evidentiary standards and bias warranting dismissal of all charges, etc. This petition again seeks petitioner's reinstatement to her position as a police officer with full back pay and benefits, asserting specifically that the penalty is "shocking to one's

sense of fairness.” As specifically limited at oral argument, however, petitioner grounds her instant claims under the theory that the Hearing Officer lacked jurisdiction to make determinations concerning whether petitioner committed the acts of Obstructing Governmental Administration and/or Harassment in the second degree, both criminal in nature. As explained by petitioner’s attorney, “if you are a non-judicial officer you cannot consider—you cannot try a person and you cannot impose a penalty where a violation of a criminal statute [is alleged] because you do not have the jurisdiction [] by law” (Transcript, Oral Argument, p. 7).

Because the departmental charges instituted by respondents include violations of the Penal Law, counsel argued, the standard of proof involved must be “guilt beyond a reasonable doubt” and absent the legal authority to hear the matter, “any determination made by [a] non-judicial officer on a criminal matter would be void” (Transcript, 8). Counsel argued that the entire hearing, even the matters involving non-penal law issues, are “tainted” by the fact that the hearing officer was also considering criminal matters (Transcript, 8). At very least, counsel argued that if matters derived from the penal law were eliminated, the remainder of the charges, including insubordination and unauthorized speaking to the press, would not rise to the level of being sufficient to terminate petitioner's employment.

Petitioner's claim that Hearing Officer Rinaldo conducted the hearing in absence of jurisdiction must be denied. While I agree with the

proposition that a defendant accused of a violation of the Penal Law has a right to a trial before an appropriate judicial officer, this is a civil matter subject to the disciplinary rules of the police department and the procedural rules of the parties' Collective Bargaining Agreement (CBA). The departmental rules permit disciplinary actions premised upon the commission of a felony or other criminal act involving moral turpitude, but the finding of the hearing officer that petitioner committed such act / acts is not a conviction. It is a civil finding that a criminal act, though prohibited by Rules and Regulations of the Department of Police for the City of Buffalo, had been committed. The consequence of violation of this act prohibited by the departmental regulations is not a criminal punishment, but a disciplinary determination that only affects the professional relationship between the petitioner and respondent City of Buffalo Police Department and not the penal interests of petitioner.

The CBA calls for the parties to participate in the selection of an impartial hearing officer. That was done here without any objection by petitioner on the basis that the adjudication of the departmental charges require a judicial officer. Any objection to the adjudication of the disciplinary charges herein by hearing conducted by a hearing officer are considered by this court to have been waived, first by voluntarily entering the subject Collective Bargaining Agreement (see *Guilford v. City of Buffalo*, 177 A.D.2d 971, 971-72 ["due process requirements ... are not relevant when they have been waived by the party seeking to assert them,

as by voluntarily entering into an agreement for the resolution of disputes in a manner which dispenses with one or more of the rights constitutionally guaranteed”) and second, by not raising any such specific objection prior to the conduct of the actual hearing. In fact, numerous cases throughout this state have upheld the termination of police officers accused in departmental disciplinary proceedings with violations of the Penal Law adjudicated by non-judicial hearing officers(see eg *Kelly v Safir*, 96 NY2d 32, 36, 37).

Justice Makowski extensively addressed a multiplicity of other procedural and substantive claims raised by petitioner in his 47-page bench decision of April 11, 2008 and those issues will not be re-addressed by this court. With regard to the penalty imposed the hearing officer and adopted by Respondents, it is well-settled that “an administrative penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness thus constituting an abuse of discretion as a matter of law” (see, *Matter of Pell v Board of Educ.*, 34 NY2d 222, 237; CPLR 7803 [3]). Under the circumstances of this case which were ascertained by the review of the entire transcript of the hearing and by according due deference to the hearing officer's assessment of credibility and veracity, it cannot be concluded as a matter of law that the penalty of dismissal recommended by the hearing officer shocks my sense of fairness.

It should be noted that petitioner's counsel did not wish to specifically assert a claim that the findings of the hearing officer lacked substantial evidence in support of the sustained charges. However, at oral argument, counsel did not wish to waive that argument either. Counsel reserved the right to raise that issue in her post-argument submissions to the court. In reading the post-argument submissions [dated June 21, 2010], I do not discern a "substantial evidence" argument and thus, I will not refer that issue to the Appellate Division.

For the foregoing reasons, it is hereby

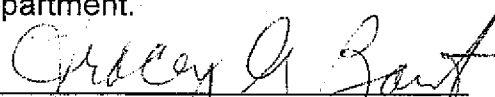
ORDERED that the Petitioner's claims for lack of subject matter jurisdiction and denial of due process is denied in all respects;

and it is also

ORDERED that the Petitioner's claim that the penalty is an abuse of discretion is denied in all respects;

and it is also

ORDERED that there is no discernable claim that the findings of the hearing officer lacked the support of substantial evidence and thus there is no claim that can be reviewed via transfer to the Appellate Division, Fourth Department.



Hon. Tracey A. Bahnister
Supreme Court Justice

Dated: July 26, 2010
Buffalo, New York


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KAREN R. FALZOME
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