

Matter of Lasonde v O'Leary

2011 NY Slip Op 30837(U)

April 6, 2011

Sup Ct, NY County

Docket Number: 100314/11

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 5

CHANDRA LASONDE
- v -
ROBERT O'LEARY

INDEX NO. 100314/11
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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/6/11
APR 06 2011

BARBARA JAFFE *J.S.C.*
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X

In the Matter of the Application of
CHANDRA LASONDE,

Petitioner,

Index No. 100314/11

Motion Date: 3/1/11
Motion Seq. Nos: 001, 002

-against-

DECISION & JUDGMENT

ROBERT M. O'LEARY, ASSISTANT COMMISSIONER
TRIALS & LITIGATION DIVISION FOR THE NEW
YORK CITY DEPARTMENT OF CORRECTION,

Respondent.

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BARBARA JAFFE, JSC:

For petitioner:
Damond J. Carter, Esq.
Carter & Associate Attorneys, PLLC
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For respondent:
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Michael A. Cardozo
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By verified petition dated January 7, 2011, petitioner moves for a judgment quashing respondent's interview of petitioner pursuant to Mayoral Executive Order No. 16 (MEO No. 16). By order to show cause dated February 17, 2011, respondent moves pursuant to CPLR 6314 for an order vacating the temporary restraining order (TRO) dated January 10, 2011 enjoining respondent from conducting the interview, and pursuant to CPLR 7804(f), 3211(a)(5) and 3211(a)(7) for an order dismissing the petition. Petitioner opposes both motions.

I. UNDISPUTED FACTS AND PERTINENT PROCEDURAL BACKGROUND

Petitioner is a corrections officer employed by the New York City Department of Correction (DOC). (Affirmation of Gail M. Mulligan, Esq., dated Feb. 17, 2011 [Mulligan Aff.]).

In a separate proceeding in the Southern District of New York, petitioner and another employee brought claims against the Correction Officer Benevolent Association (COBA), alleging, *inter alia*, that COBA's president falsely accused her of insurance fraud by submitting fraudulent documents on or about October 23, 2009, and forced her to resign from COBA's executive board. (*Id.*, Exh. B). By opinion and order dated July 26, 2010, all claims were dismissed pursuant to Federal Rules of Civil Procedure 12(b)(6). (*Id.*).

Petitioner appealed the July 26, 2010 decision to the Court of Appeals for the Second Circuit, seeking a stay of the district court order as well as injunctive relief enjoining DOC from scheduling an interview pursuant to MEO No. 16. (Mulligan Aff., Exh. C).

By decision and order dated December 7, 2010, petitioner's motions for injunctive relief were denied with the Court declining to consider her arguments as they were raised for the first time on appeal, and finding that she had not shown that moving for injunctive relief in the district would have been impracticable, that she had failed to demonstrate a likelihood of success on appeal, and that her appeal "lacks an arguable basis in law or fact". (*Id.*, Exh. D).

By notice dated December 29, 2010, respondent ordered petitioner, pursuant to MEO No.16, to attend an investigatory interview on January 12, 2011, regarding a confidential matter being handled by the DOC's trial and litigation division. (Verified Petition, dated January 7, 2011, Exh. 2). The notice did not indicate the subject matter of the investigation. Petitioner was notified of her right to be represented by an attorney or other representative. (*Id.*).

By letter dated January 3, 2011, petitioner's counsel requested from respondent the factual and statutory bases for the interview, demanding that respondent answer within three days. (Petition, Exh. 3). On January 7, 2011, having not received an answer to these requests,

petitioner filed the instant petition and TRO. (Petition).

On January 10, 2010, I signed the TRO enjoining the MEO No. 16 interview pending a hearing on the petition. I now modify and vacate that order, and dismiss the petition on its merits.

II. CONTENTIONS

In her petition and motion for a TRO, petitioner argues that respondent's order is a non-judicial subpoena, which is fatally defective as respondent has not provided petitioner with notice of its subject matter and factual basis as requested, and that respondent lacks authority to conduct the interview pursuant to MEO No. 16. (Petition).

Respondent maintains that the TRO should be vacated because plaintiff cannot demonstrate a likelihood on the merits as respondent has been delegated the authority to conduct investigatory interviews, that it has the inherent authority to order members of its department to answer questions, and that the order to appear for an interview is not a non-judicial subpoena. (Mulligan Aff.). He further maintains that petitioner fails to identify any irreparable injury as a result of the interview, as loss of employment does not constitute irreparable damage for purposes of a preliminary injunction or establish that a balancing of equities favors her position, and that her request for injunctive relief is barred as the Second Circuit Court of Appeals held that her claims lack merit. (*Id.*). In support of his motion, respondent submits his affidavit assuring that the alleged fraudulent activity that began on or about October 23, 2009 is the subject of the MEO No. 16 interview. (Affirmation of Robert M. O'Leary, Feb. 17, 2011).

In response to respondent's motion, petitioner argues that her request for a TRO is not barred as the Second Circuit opinion predated respondent's MEO No. 16 order, and reiterates the

arguments in her petition. (Affirmation of Damond J. Carter, Esq., in Response to Respondent's Reply, dated Feb. 28, 2011).

III. ANALYSIS

The commissioner of the Department of Investigations is authorized under MEO No. 16 to conduct investigations into corruption and other unethical conduct of City employees:

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 or any person dealing with the City, concerning such dealings with the city, after first being advised that neither their statements nor any information or evidence derived there from will be used against them in a subsequent criminal prosecution other than for perjury or contempt arising from such testimony. The refusal of an officer or employee to answer questions on the condition described in this paragraph shall constitute cause for removal from office or employment or other appropriate penalty.

(MEO No. 16[4][b]; NY Charter §§ 803, 805). Respondent has been authorized by the commissioner to conduct interviews. (O'Leary Aff., Exh.1).

A City agency does not have "carte blanche in conducting investigations," and may not use its authority as a means to subject a party to harassment. (*Matter of Parkhouse v Stringer*, 12 NY3d 660, 665-666 [2009]). It has the right, however, to compel an employee to testify under the penalty of termination or other discipline, so long as statements obtained under those circumstances are not used in subsequent criminal proceedings. (*Matt v Larocca*, 71 NY2d 154, 159 [1st Dept 1987], *cert denied* 486 US 1007 [1988]).).

The MEO provides authority to delegate the investigative procedures to other entities, and respondent has demonstrated that it is authorized to conduct investigations into criminal or unethical activity. (*Seabrook v City of New York*, 2007 NY Slip Op 31103[U] [Sup Ct, New

York County 2007], *affd* 57 AD3d 232 [1st Dept 2008]). In any event, City agencies have broad rights to compel “any person enjoying a public trust to account for his activities.” (*Matt*, 71 NY2d at 159-160; *Seabrook*, 2007 NY Slip Op 31103[U]). Thus, petitioner’s contention that respondent has no authority to conduct the investigative interview is without merit.

Although the parties dispute whether the investigative interview constitutes a “non-judicial subpoena,” absent any dispute that petitioner’s testimony may not be used against her in criminal proceedings but may otherwise be used for disciplinary actions, the proper terminology is immaterial. On the day I signed the TRO, respondent had neither identified the subject matter of the compelled interview nor set forth its factual basis. To the extent that this constituted a defect warranting the injunction, it is has been cured by respondent’s affirmation clarifying that the forthcoming interview pertains to petitioner’s allegedly fraudulent misconduct on or about October 23, 2009. Thus, petitioner has failed to set forth a basis for quashing respondent’s investigation interview.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the TRO dated January 7, 2011, is vacated; and it is further

ADJUDGED and ORDERED, that the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court.



 Barbara Jaffe, JSC
BARBARA JAFFE
 J.S.C.

DATED: April 6, 2011
 New York, New York

APR 06 2011

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