

**Rodriguez v County of Albany**

2012 NY Slip Op 30000(U)

January 4, 2012

Supreme Court, Albany County

Docket Number: 7014-11

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

GABRIEL G. RODRIGUEZ,

Petitioner,

**DECISION and ORDER**  
**INDEX NO. 7014-11**  
**RJI NO. 01-11-105264**

-against-

THE COUNTY OF ALBANY, THE ALBANY COUNTY  
SHERIFF'S OFFICE, and CRAIG D. APPLE, SR., in his  
official capacity as ACTING ALBANY COUNTY SHERIFF,

Respondents.

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Supreme Court Albany County All Purpose Term, December 6, 2011  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Petitioner commenced this CPLR Article 75 proceeding seeking a preliminary injunction, an order dismissing Respondents' two disciplinary charges against him on statute of limitations grounds and, alternatively if the disciplinary charges are not dismissed, to compel arbitration pursuant to the parties' Collective Bargaining Agreement (hereinafter "CBA"). Respondents

oppose the petition, except to the extent that it seeks arbitration pursuant to the CBA. Because Petitioner failed to demonstrate his entitlement to dismissal of the disciplinary charges or to a preliminary injunction, those portions of this proceeding are denied. However, on consent, the parties are hereby ordered to arbitrate the disciplinary charges pursuant to the CBA.

Respondents' disciplinary notice, received by Petitioner and dated September 16, 2011, charges Petitioner with two acts of misconduct. The first is Petitioner's alleged secret recording, on January 28, 2011, of a meeting he attended with then Undersheriff Craig Apple (hereinafter "Apple") in violation of Albany County Sheriff's Office General Order 29-SD-93(I)(KK). The second charge alleges that Petitioner transferred such recording, on an unspecified date, to other individuals in violation of Albany County Sheriff's Office General Order 29-SD-93(I)(M).

Civil Service Law §75(4) sets forth the applicable statute of limitations by stating 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 limitation[] shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime."

On this record, Respondents established that Civil Service Law §75(4)'s 18 month statute of limitations does not apply to charge one because it alleges conduct which, if proved, would constitute the crime of Official Misconduct. (Penal Law §195.00[1]; Matter of Miele v Safir, 272 AD2d 199 [1<sup>st</sup> Dept. 2000]; Langler v. County of Cayuga, 68 A3d 1775 [4<sup>th</sup> Dept. 2009]; Matter of McFarland v Abate, 203 AD2d 190 [1<sup>st</sup> Dept. 1994]).

Charge one sets forth each element of Penal Law §195.00(1), which states that "[a] public

servant is guilty of official misconduct when, with intent to obtain a benefit... [h]e commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized.” First, it is undisputed that Petitioner is a “public servant” and surreptitiously recorded the January 2010 meeting. His act of recording unambiguously “relat[es] to his office,” inasmuch as the meeting he recorded was held by Apple to increase productivity in the department to which Petitioner was assigned. Such recording was also clearly “unauthorized.” It directly violates Albany County Sheriff’s Office General Order 29-SD-93(I)(KK), which states that “[n]o employee shall... activate any... mechanical device or system capable of recording... conversations... without authorization from the Sheriff or Undersheriff.” Moreover, Petitioner recorded the meeting in an “exercise of his official functions” because he was participating in an official meeting, conducted by his superiors, relative to his employment. He was neither off duty nor otherwise performing a non-official function. Petitioner’s further admission that he recorded the meeting because he feared harassment, implicitly also admits that he recorded the meeting “to obtain a benefit.” Lastly, although Albany County Sheriff’s Office General Order 29-SD-93(I)(A) required Petitioner “to thoroughly familiarize [himself] with the [Sheriff’s Office’s] rules” stated above, he made no claim that he was unaware that he was not authorized to secretly record the January 2010 meeting. Accordingly, in light of the above, Civil Service Law §75(4)’s crime exception is applicable to charge one, which is not barred by the statute of limitations and may proceed to arbitration.

Charge two, however, is not alleged to be a crime and Civil Service Law §75(4)’s 18 month statute of limitations explicitly applies. As such, to the extent that Respondents’ second

disciplinary charge is based upon any acts occurring before March 16, 2010 (i.e. eighteen months prior to Petitioner's receipt of Respondents' notice of discipline) such charge is barred by Civil Service Law §75(4)'s statute of limitations. Respondents are, however, entitled to prove the acts alleged in charge two that occurred after such date at arbitration. (Wojewodziec v O'Neill, 295 AD2d 670 [3d Dept. 2002]; Bayer v New York State Dept. of Labor, 28 AD3d 865 [3d Dept. 2006]).

Turning next to Petitioner's motion for a preliminary injunction, he failed to demonstrate his entitlement to such relief.

CPLR §7502(c) states that this court "may entertain an application for... a preliminary injunction in connection with an arbitration that is pending... but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief..." Here, Petitioner proffered no factual allegations nor legal argument showing how the award he seeks would be "rendered ineffectual without... provisional relief." Without such showing this Court has no basis upon which to grant a preliminary injunction, this portion of the petition is denied. (Winter v Brown, 49 AD3d 526 [2d Dept 2008]).

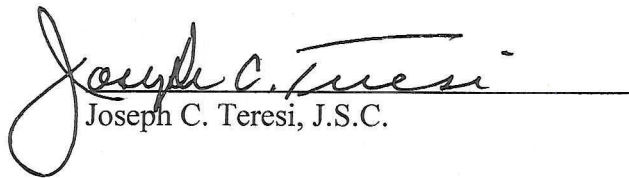
Lastly, because Respondents consented to Petitioner's demand that their notice of discipline be arbitrated pursuant to the CBA's grievance procedure, that portion of this proceeding is granted.

This Decision and Order is being returned to the attorneys for the Respondents. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
January 4, 2012

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause, dated November 7, 2011; Affidavit of Gabriel Rodriguez, dated October 31, 2011; Verified Petition, dated October 31, 2011, with attached exhibits A-G.
2. Verified Answer, dated November 23, 2011; Affidavit of Christine Quinn, dated November 28, 2011; Affidavit of Craig Apple, dated November 23, 2011, with Exhibits 1-6.
3. Reply of Gabriel Rodriguez, dated December 5, 2011.