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| <b>Matter of Toolasprashad v Kelly</b>                                                                                                                                                                                           |
| 2012 NY Slip Op 30747(U)                                                                                                                                                                                                         |
| March 21, 2012                                                                                                                                                                                                                   |
| Sup Ct, New York County                                                                                                                                                                                                          |
| Docket Number: 108031/2011                                                                                                                                                                                                       |
| Judge: Saliann Scarpulla                                                                                                                                                                                                         |
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| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

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

PRESENT: \_\_\_\_\_  
Justice

PART 19

Rodrigo Tool as PRASHO

INDEX NO.

108031/11

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

Raymond W. Kelly, ET AL.

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

Article 78 proceeding is decided in accordance with the accompanying memorandum decision.

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: 3/20/12

Salvatore Capullo  
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: CIVIL TERM: PART 19

----- X  
In the Matter of RUDRANU TOOLASPRASHAD,

Petitioner,

Index No.: 108031/2011

Submission Date: 01/25/2011

- against-

RAYMOND W. KELLY, as Police Commissioner  
of the City of New York, NEW YORK CITY  
POLICE DEPARTMENT and the CITY OF  
NEW YORK,

Respondents.

----- X  
For Petitioner:  
Thomas Torto, Esq.  
419 Park Avenue, Suite 504  
New York, NY 10016

For Respondent:  
Michael A. Cardozo, Corporation Counsel of the City of New York  
100 Church Street, Room 2-118  
New York, NY 10007

Papers considered in review of this petition:

Order to Show Cause .....1  
Petitioner's Mem of Law .....2  
Exhibits to Petition .....3  
Aff in Opposition .....4  
Amended Notice of Cross-Motion .....5  
Mem of Law in Support of  
Cross-Motion .....6  
Petitioner's Reply Aff. ....7  
Respondents' Reply Aff. ....8

HON. SALIANN SCARPULLA, J.

In this Article 78 proceeding in the nature of prohibition and mandamus, Rudranu Toolasprashad ("petitioner") seeks an order barring respondents Raymond W. Kelly ("Kelly"), as Police Commissioner of the City of New York, New York City Police Department (the "NYPD") and The City of New York (collectively "respondents") from conducting a disciplinary hearing against petitioner, and compelling respondents to vest

petitioner's pension effective April 7, 2006. Respondents cross-move to dismiss the petition.

Petitioner became a member of the NYPD in June 1992. On or about March 6, 2006, petitioner submitted his application for vested retirement, effective April 7, 2006. That same day, he requested and obtained approval for leave of absence from March 8 until April 15. On his leave request, petitioner noted that he would be in Peru during his leave and provided an address where he could be contacted there.

On March 9, 2006, the NYPD prepared thirteen charges and specifications against petitioner. These charges included attempted grand larceny, receiving unlawful gratuities, giving unlawful gratuities, corruption, conspiracy, and off-duty employment. After attempting unsuccessfully to serve petitioner with notice of the charges, the NYPD conducted a disciplinary hearing, in petitioner's absence, on March 20, 2006 and March 21, 2006. Hearing Officer Robert Vinal ("Vinal") found petitioner guilty of eight of the thirteen misconduct charges and recommended his dismissal from the NYPD. Kelly accepted Vinal's recommendation and on March 30, 2006, Kelly issued a final order of dismissal, effective April 3, 2006.

Thereafter, petitioner brought an Article 78 proceeding challenging the final order of dismissal. Petitioner alleged that the NYPD's attempts to serve him with notice of the charges were inadequate. In this Article 78 proceeding, petitioner sought an order vacating the final order of dismissal, reinstating petitioner to the NYPD retroactively,

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restoring petitioner's retirement benefits, and directing payment to the petitioner of unpaid salary due from the date of his reinstatement to the date of his retirement.

This Court (Shafer, J.) held that respondents' attempts to serve petitioner with notice of the charges were not "reasonably calculated to give him actual notice and an opportunity to be heard . . ." Accordingly, by a decision and order dated July 9, 2007 (the July 9 order"), Justice Shafer granted petitioner relief only to the extent of remanding the matter back to the NYPD for a full hearing after the proper service upon petitioner of the notice of charges.

Respondents subsequently appealed the July 9 order. Petitioner moved to dismiss that appeal as untimely. Following a traverse hearing, a special referee determined that petitioner had not established that he served respondents with notice of entry of the July 9 order. Justice Shafer confirmed the referee's report and respondents then proceeded with their appeal of the July 9 order.

On January 27, 2011, the First Department affirmed the July 9 order (the "Appellate Division order"). See *Toolasprashad v. Kelly*, 80 A.D.3d 530 (1<sup>st</sup> Dept. 2011). On February 5, 2011, petitioner served the Appellate Division order with notice of entry on respondents. On February 16, 2011, respondents moved in the Court of Appeals for leave to appeal the Appellate Division order. The Court of Appeals denied respondents' leave to appeal on May 10, 2011. See *Toolasprashad v. Kelly*, 16 N.Y.3d 714 (2011).

Eleven days later, on or about May 21, 2011, petitioner served upon respondents an order with notice of entry of the Court of Appeals' denial of leave to appeal. Then, in

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accordance with the July 9 order, respondents sought to conduct a second disciplinary hearing against petitioner, pursuant to amended charges dated June 3, 2011.

In this Article 78 proceeding, petitioner requests that the Court permanently enjoin respondents from holding a second disciplinary hearing. Petitioner also requests that the Court compel respondents to process his retirement and vested retirement with an effective date of April 7, 2006 or, in the alternative, March 17, 2011.

Petitioner argues that respondents are acting in excess of their jurisdiction by attempting to hold a second disciplinary hearing because petitioner is no longer a member of the NYPD and his pension has already vested. Petitioner further argues that respondents' failure to timely serve notices of appeal of both the July 9 and the Appellate Division orders bars them from invoking CPLR § 5519(a)(1) to stay enforcement of those orders.

In opposition, respondents argue that petitioner's retirement did not vest automatically on April 7, 2006. Respondents maintain that their appeals of the July 9 and the Appellate Division orders were timely and thus stayed enforcement of those orders. Respondents further argue that the July 9 order granted them the right and the jurisdiction to pursue for a second time disciplinary charges against petitioner.

### **Discussion**

In an Article 78 proceeding seeking a writ of prohibition, the Court must determine "whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction." CPLR § 7803(2). An Article 78 proceeding in the nature of

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mandamus is brought to compel a government entity to perform a purely ministerial duty. *Brusco v. Braun*, 84 N.Y.2d 674, 679 (1994). Prohibition and mandamus only lie where there is a “clear legal right” to the relief sought. *Schumer v. Holtzman*, 60 N.Y.2d 46, 51 (1983) (citations omitted); *Matter of Council of City of N.Y. v. Bloomberg*, 6 N.Y.3d 380, 388 (2006).

Here, petitioner has not demonstrated a clear legal right to either enjoinder of the second disciplinary hearing, or automatic vestment of his pension. Petitioner maintains that upon entry of the July 9 order, respondents had thirty days in which to (i) properly serve misconduct charges on petitioner, (ii) hold a new disciplinary hearing in accordance with the Court’s order, and (iii) render a new order of dismissal. Petitioner argues that because respondents did not render a new order of dismissal within 30 days of the July 9 order, his pension vested effective April 7, 2006, and the NYPD no longer has jurisdiction to conduct a disciplinary hearing against him.

However, petitioner cites no authority, nor does there appear to be any, for the proposition that the NYPD may not appeal a remand and, instead, has only a thirty day window to conduct and conclude a new administrative hearing after remand back to the NYPD by the Court. Though New York City Administrative Code § 13-256 provides that pensions of retiring NYPD members vest automatically upon retirement, this right does not extend to officers who are dismissed. *See* New York City Administrative Code § 13-256(a)(1). As Justice Shafer merely remanded the matter back to the NYPD for a new hearing to determine whether the NYPD would have grounds to dismiss petitioner,

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petitioner's status under § 13-256 is unresolved and he does not have a clear legal right to his pension.

Further, though petitioner cites *Gordon v. Monaghan*, 309 N.Y. 336 (1955) for the proposition that his pension vested on April 7, 2006, that case is inapposite. In *Gordon*, the petitioner police officer was dismissed from the NYPD after the officer filed his application for retirement. When submitting his application for retirement, the officer also obtained initial approval of his application for leave through the effective date of his retirement. After the leave period commenced, the NYPD commissioner disapproved of his petitioner's leave application. The officer's dismissal following a disciplinary hearing in his absence stemmed entirely from his absence after the commissioner disapproved of his leave application. See *Gordon*, 309 N.Y. at 340.

The Court of Appeals reversed the NYPD's determination, ruling that after the officer obtained initial approval of his leave, he was "no longer subject to general administrative regulations or rules reasonably related only to the active performance of duty." *Gordon*, 309 N.Y. at 344. Nowhere did the *Gordon* Court set forth a de facto rule that after a court remands an NYPD disciplinary determination for a new hearing, the NYPD has thirty days from that order to conduct and conclude the hearing. Further, the Court distinguished its ruling from dismissals arising out of an officer's conduct *before* his application for retirement. See *Gordon*, 309 N.Y. at 342.

The charges against petitioner relate entirely to misconduct that allegedly occurred before petitioner applied for retirement. In the July 9 order Justice Shafer did not reverse



the NYPD's determination on the charges but simply vacated and remanded the matter back to the NYPD for a new hearing at which petitioner could be present and submit a defense. Accordingly, respondents are not acting in excess of their jurisdiction by holding a second disciplinary hearing to determine whether petitioner is guilty of the charges leveled against him.

In any event, respondents' subsequent appeals (to which they were entitled) automatically stayed all proceedings to enforce the July 9 order. Pursuant to CPLR § 5519(a)(1), "service by a governmental entity upon the adverse party of a notice of appeal . . . stays all proceedings to enforce the judgment or order appealed from pending the appeal . . ." *Summerville v. City of New York*, 97 N.Y.2d 427, 432-33 (2002) (internal quotations omitted). If the first appeal is unsuccessful, the stay may be continued by making an additional appeal. *See* CPLR §§ 5519(e).

Petitioner argues that enforcement of the July 9 order was not stayed because respondents were late in serving notices of appeal after both the July 9 and January 27 orders. However, Justice Shafer found on October 7, 2009 that there was insufficient evidence that petitioner served respondents with the notice of entry of the July 9 order, thus respondents' appeal was timely. *See* CPLR § 5513(a). Further, though respondents' motion for leave to appeal to the Court of Appeals fell outside the ten day time frame set forth in CPLR §§ 5519(e) and 2103(2) for extending the automatic stay, respondents obtained a new automatic stay when they moved in the Court of Appeals for leave to

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appeal on February 16, 2011. *See Summerville*, 97 N.Y.2d at 433. Thus, any enforcement of the July 9 order was stayed and petitioner's pension has not yet vested.

In accordance with the foregoing, it is hereby

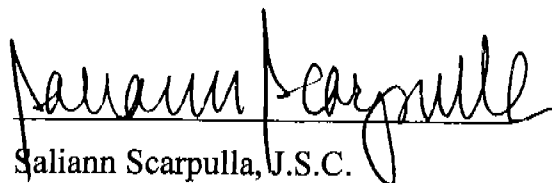
ORDERED and ADJUDGED that the petition of Rudranu Toolasprashad to enjoin respondents from holding a new disciplinary hearing and directing respondents to process Rudranu Toolasprashad's retirement is denied; and it is further

ORDERED and ADJUDGED that the cross-motion by respondents Raymond W. Kelly, as Police Commissioner of the City of New York, the New York City Police Department and The City of New York to dismiss the petition is granted and the petition is dismissed.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York  
March 21, 2012

ENTER:

  
Saliann Scarpulla, J.S.C.