

<b>Bologna v Civilian Complaint Review Bd. of the City of N.Y.</b>
2013 NY Slip Op 32996(U)
November 22, 2013
Supreme Court, New York County
Docket Number: 157845/13
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

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In the Matter of the Petition of

ANTHONY BOLOGNA,

Index No.: 157845/13

Petitioner,

**Decision, Order and  
Judgment**

for a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

- against -

CIVILIAN COMPLAINT REVIEW BOARD of the  
CITY of NEW YORK and TRACY CATAPANO-FOX,  
acting in her official capacity as Executive Director of the  
Civilian Complaint Review Board of the City of New York,

Respondents.

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**JOAN B. LOBIS, J.S.C.:**

Anthony Bologna petitions for an order permanently enjoining Respondents Civilian Complaint Review Board of the City of New York ("CCRB") and Tracy Catapano-Fox, its Executive Director, from questioning him relating to allegations that he used excessive force in discharging pepper spray on demonstrators. Respondents have filed an answer, opposing the petition. For the following reasons, the petition is denied.

On the afternoon of September 24, 2011, the Petitioner, Anthony Bologna, who is a Deputy Inspector for the New York City Police Department ("NYPD"), discharged his Department issued O.C./Pepper Spray. The incident occurred during a demonstration by Occupy Wall Street protestors in the vicinity of East 12th Street and University Place, which is located in the 6th Precinct. The CCRB relates that over the course of the next several days it received 467 civilian

complaints regarding Deputy Inspector Bologna's use of pepper spray.

Several investigations of Deputy Inspector Bologna's conduct followed the incident. The CCRB relates that the New York County District Attorney's Office asked the CCRB to postpone its investigation pending a criminal investigation by the District Attorney. The NYPD Internal Affairs Bureau also investigated the conduct, interrogating Mr. Bologna on October 7, 2011. At the conclusion of its investigation, on October 18, 2011, the Bureau found the following charge substantiated: Mr. Bologna "did discharge his Department issued O.C./Pepper Spray outside of Department Guidelines (PG 212-95)." It proposed as a disciplinary action that Deputy Inspector Bologna forfeit ten vacation days. On October 19, 2011, Bologna accepted the Bureau's finding and its proposed disciplinary action. In accepting these, Bologna acknowledged that "[a]ny decision arrived at relative to this case is apart from and does not preclude further exercise of management prerogative such as reduction in grade, assignment, etc."

The CCRB indicates that earlier this year, on April 26, 2013, the District Attorney's Office informed the CCRB that the District Attorney would not pursue criminal charges against Mr. Bologna. As a result of that notification, the CCRB proceeded with its investigation of the hundreds of complaints that it had received arising out of the pepper spray incident, which it had consolidated under CCRB Case Number 201112644. In August, the CCRB scheduled an appearance by Mr. Bologna. Mr. Bologna appeared with counsel, refusing to testify. He now brings this petition.

Petitioner Bologna proceeds under Section 7803(2) of the Civil Practice Law and

Rules. He claims that, in seeking to interview him, the Respondents are acting without or in excess of jurisdiction. He contends that the investigation is time barred under Section 75(4) of the Civil Service Law, which generally precludes commencement of removal or disciplinary proceedings for civil servants' conduct occurring more than eighteen months earlier.

Respondents dispute Petitioner's contentions. They claim that they are acting within their jurisdiction in investigating Mr. Bologna's use of pepper spray. They cite the exception under Section 75(4) for proceedings where the alleged conduct "would, if proved in a court of appropriate jurisdiction, constitute a crime." In this instance, Respondents aver that the finding that Bologna "did discharge his Department issued O.C./Pepper Spray outside of Department Guidelines (PG 212-95)" would constitute assault in the third degree, which crime appears at Section 120.00 of the Penal Law. Additionally, Respondents contend that even if the CCRB were to lack jurisdiction, the petition should be denied since Petitioner has failed to exhaust his administrative remedies. Any adverse disciplinary determination resulting from the CCRB investigation may be appealed.

A writ of prohibition under Section 7803(2) "is available only where there is a clear legal right, and only when an officer acts without jurisdiction or in excess of powers in a proceeding over which there is jurisdiction 'in such a manner as to implicate the legality of the entire proceeding.'" Doe v. Axelrod, 71 N.Y.2d 484, 490 (1988) (quoting Rush v. Mordue, 68 N.Y.2d 348, 353 (1986)). A writ of prohibition is not available to a party who "has 'an adequate remedy in his right to institute an article 78 proceeding following a final agency determination.'" Doe, 71 N.Y.2d at 490 (quoting Rainka v. Whalen, 73 A.D.2d 731, 732 (3d Dep't 1979), aff'd, 51 N.Y.2d 973

(1980)).

Section 440 of the New York City Charter creates a Civilian Complaint Review Board, which is comprised solely of members of the public, to investigate allegations of police misconduct. Id. § 440(a). That law expressly provides that “[i]t is in the interest of the people of the city of New York and the New York city police department that the investigation[s] . . . be complete, thorough and impartial.” The CCRB is empowered to “receive, investigate, hear, make findings and recommend action upon complaints by members of the public” alleging police misconduct “involving excessive use of force, abuse of authority, discourtesy, or use of offensive language . . . .” Id. § 440(c)(1).

Title 38-A of New York City Rules and Regulations contains the rules of the CCRB. As part of the fact-finding process, Section 1-23(b) authorizes investigators to interview a “subject officer” as well as complainant and any other witnesses. Interviews of officers are compulsory. Id. § 1-24(d). A refusal to testify will subject the officer to Police Department charges that could lead to dismissal. Id. An officer’s statement cannot be used against that officer in any subsequent criminal proceedings, but may be used against the officer in subsequent Police Department charges. Id.

Following an investigation, a panel or the plenary board shall review the materials and prepare a report of its findings and recommendations. Id. § 1-32(a). Findings are based on a “preponderance of the evidence” standard. Id. § 1-33(a). These findings and recommendations are

transmitted to the Police Commissioner, who retains the authority and discretion to make final disciplinary determinations. Id., §§ 1-33(c), -45(a).

Based on the facts in this case, this Court finds that Petitioner has failed to establish a “clear legal right” to preclude the CCRB from interviewing Deputy Inspector Bologna. 68 N.Y.2d at 353. This Court rejects any contention that the CCRB’s investigation is time barred under Civil Service Law Section 75(4). The record reflects that the CCRB appropriately deferred its investigation pending the District Attorney’s criminal investigation. While the District Attorney did not file criminal charges, there has been no judicial determination on any merits regarding Deputy Inspector Bologna’s conduct. See, e.g., MacFawn v. Kresler, 88 N.Y.2d 859, 860 (1996). Assault is criminally sanctionable under Penal Law 120.00, among others. This Court finds that the allegations contained in the CCRB complaints that Deputy Inspector Bologna’s discharge of pepper spray constituted excessive use of force “would, if proved in a court of appropriate jurisdiction, constitute a crime.” Civ. Serv. Law § 75(4); see, e.g., Scott v. Kelly, 305 A.D.2d 273, 274 (1st Dep’t 2003). Section 75(4) on its face, moreover, is broadly worded to apply to “a crime;” the crime need not be a felony. E.g., Velez v. N.Y. City Transit Auth., 175 A.D.2d 132, 133 (2d Dep’t 1991) (denying writ of prohibition to prevent suspension of transit police officer two years after conduct that would constitute petit larceny). Accordingly it is ORDERED that the petition is denied, and the proceeding is dismissed.

Dated: November 22, 2013

  
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JOAN E. LOBIS, J.S.C.