

Matter of Erdey v City of New York
2014 NY Slip Op 30929(U)
April 8, 2014
Supreme Court, New York County
Docket Number: 100170/13
Judge: Alice Schlesinger
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 100170/2013
ERDEY, RICHARD
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____


Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ^{CROSS-} motion is granted, the petition is denied, and the proceeding is dismissed 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: APR 08 2014



ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

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

-----X
In the Matter of the Application of

RICHARD ERDEY,
Petitioner,
-against-

Index No. 100170/13
Motion Seq. No. 001

THE CITY OF NEW YORK; MICHAEL BLOOMBERG,
as Mayor of the City of New York, THE CITY OF NEW
YORK FIRE DEPARTMENT, and SALVATORE J.
CASSANO, as Commissioner of the City of New York
Fire Department,

Respondents,

UNFILED JUDGMENT

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and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

For a Judgment and Order Pursuant to Article 78 of
the Civil Practice Law and Rules.

-----X
SCHLESINGER, J.:

Petitioner Richard Erdey, an Emergency Medical Technician (EMT) with respondent City of New York Fire Department (FDNY), commenced this Article 78 proceeding for an order compelling respondents to expunge from Erdey's employment personnel file documents related to a finding that he violated the FDNY's Equal Employment Opportunity (EEO) policies in or about December 2011. In the alternative, he seeks a name-clearing hearing. Additionally, petitioner initially sought an order compelling respondents to respond to his request for information pursuant to New York's Freedom of Information Law (FOIL).

Respondents then cross-moved to dismiss pursuant to CPLR §3211(a), subd. (1), (5), and (7), on the grounds that a defense is founded upon documentary evidence, the causes of action may not be maintained because of waiver and release, and the petition fails to state a cause of action. By interim order dated September 18, 2013, the FOIL issues were resolved, but for petitioner's claim for attorney's fees. The Court in its discretion denies that claim at this time. The remaining issues raised in the petition are determined below.

Background Facts

Petitioner Richard Erdey has been an EMT with the FDNY since 1999. In 2005, he was promoted to the rank of Lieutenant. Erdey's tenure was for the most part uneventful until issues arose in 2011. Those issues were resolved in a four-page Stipulation and Agreement dated September 27, 2011 and executed by Erdey, his Union representative, and a representative of the FDNY (FDNY Cross-Motion, Exh A). As relevant here, the Stipulation contains the following provisions:

- Erdey admitted that he had violated six sections of the EMS Operating Guide Procedure 101-01, most of which related to "conduct that is unbecoming of a FDNY member" (§ 6).
- As a penalty, Erdey accepted a fine of six weeks suspension without pay and probation for 24 months (§ 7).
- Erdey agreed that he "waives, with respect to the matters addressed by this Stipulation and Agreement, any and all rights he may have to a hearing, appeal or other proceedings, pursuant to applicable laws, rules and regulations ..." (§ 5).
- Erdey acknowledged his understanding that, during the twenty-four month probationary period that extended through September 27, 2013, "in the event of any violation of [the] agreement and/or any future conduct which is prejudicial to the good order, discipline or efficiency of the Department and/or conduct similar to the above noted violations, ... then he will be demoted one level, and that the Department has the right to demote him without a hearing of any kind, and Lt. Erdey hereby waives any and all rights, including any right to a disciplinary hearing pursuant to Sections 75 and 76 of the Civil Service Law, Article 78 of the Civil Practice Laws and Rules, and any applicable bargaining agreement" (§ 8).

On or about May 31, 2012, about eight months into the probationary period, the FDNY's EEO office directed Lt. Erdey to report for an interview with Rodney L. Pepe-Souvenir concerning allegations that Erdey had engaged in behavior while off duty that violated the FDNY's EEO policy. In her Notice of Investigation, Ms. Pepe-Souvenir advised Lt. Erdey that it had been alleged "by a non-FDNY employee that between December 15, 2011 through December 24, 2011, [Erdey was] heard to make racially disparaging remarks." (Pet. Exh A). It is undisputed that Erdey was not working during that period of time, as he had been suspended beginning December 2 through about December 25, 2011 (Erdey Aff. in Support of Pet. at ¶ 5).

In the Petition and his supporting affidavit, Erdey discusses at length the events leading up to the complaint, but they need only be summarized here. The complainant was an individual named Matthew Alioto; Alioto had maintained a room in the Pennsylvania home of Erdey's father, and he and Erdey had significant contact in December 2011 while Erdey's father was hospitalized before his death. When Erdey suspected that Alioto had stolen money from his father, he confronted him, and the two had an argument. They last spoke two days before Erdey's father died on January 22, 2012. Alioto complained to the FDNY that Erdey had made disparaging remarks directed at Hispanics and people of color, which Erdey adamantly denied during the investigation, noting that his ex-wife was from Brazil and was Hispanic.

The EEO investigagtors called Erdey back to their offices on September 26, 2012. At that time, Erdey was told to sign and acknowledge an EEO Advisory Memorandum (Pet. Exh. F). Although the Memorandum contained no details about the complaint, it indicated that Erdey had been "advised and counseled" that it was "inappropriate, unprofessional,

and a violation of the FDNY EEO Policy” to make “derogatory racial or ethnic remarks about members of the public or stereotypical generalizations about an entire ethnic group.” According to Erdey, he and his Union representative protested signing the Memorandum, but they were assured that the Memorandum was “remedial in nature and that it was not disciplinary.” (Aff. ¶ 34).

Nevertheless, the FDNY’s EEO Office sent Lt. Erdey a letter dated September 28, 2012 (Pet. Exh. E). The letter, sent by Margo Ferrandino as Assistant Commissioner of the Equal Employment Opportunity Office, stated (with emphasis in the original) that:

After conducting a thorough investigation, the EEO Office **Substantiated** the allegations that you made inappropriate comments, in violation of the Fire Department’s Equal Employment Opportunity (“FDNY’s EEO”) policy.

Based on the foregoing, the EEO Office referred this matter to the Fire Department’s Bureau of Investigation and Trials (BITs) for further review and handling.

Shortly thereafter, Erdey filed his FOIL request to obtain copies of all documents in the file related to the investigation. While that request was being processed, this proceeding was commenced.

Discussion

In the first cause of action in his Petition, Lt. Erdey claims that respondent FDNY deprived him of due process of law and acted in a manner that was arbitrary and capricious and contrary to law by finding that he had made inappropriate comments in violation of EEO policy, and by including in his file the September 28, 2012 letter to that effect and the September 26 Advisory Memorandum, without first providing him with a hearing. Thus, Erdey seeks to have the documents expunged from his file. In support of his position, he relies primarily on the decision by the Court of Appeals in *D’Angelo v Scoppetta*, 19 NY3d 663 (2012), a case similar in many ways to the case at bar.

The Court in *D'Angelo* held that petitioner was entitled to have expunged from his file a written letter advising him that he had violated the FDNY's Code of Conduct and EEO Policy by exercising "unprofessional conduct" and making "an offensive racial statement" to another FDNY member. The basis for the holding was the finding that the letter constituted a "formal reprimand" rather than a mere "critical evaluation", thus triggering petitioner's right to a hearing pursuant to Administrative Code § 15-113.

In reaching that determination, the Court noted that the letter reflected the "serious nature of the Department's investigation of the complaint," stating that a "thorough investigation" had revealed that petitioner had made "an offensive racial statement." Further, petitioner was required to sign an EEO Advisory Memorandum and participate in further EEO training, which the Court viewed as "a form of discipline and not, as the Department contends, mere encouragement to comply with EEO policy." Lastly, the Court noted that the EEO's finding "could negatively impact [petitioner's] eligibility for future promotion." 19 NY2d at 669.

As Erdey correctly notes, much of the same can be said here. The September 28, 2012 letter does contain a finding, made after a "thorough investigation", that Erdey made "inappropriate comments" in violation of EEO Policy. Although the comments were not described as "racial" in nature, the Advisory Memorandum that Erdey was compelled to sign around that same time arguably supplied that link in that it counseled Erdey about "derogatory racial or ethnic remarks" even though it contained no findings of fact. On the other hand, *D'Angelo* is distinguishable because the petitioner there was directed to undergo additional training, which was viewed as a form of discipline, while it appears that Erdey simply continued the EEO training that he had already been receiving and was purportedly assured that the Memorandum was remedial in nature, and not disciplinary.

Even if the documents taken together could be viewed as a “formal reprimand”, the FDNY argues that Lt. Erdey waived his right to any type of hearing in the September 27, 2011 Stipulation and Agreement that he signed. The FDNY points to paragraph 5, where Erdey waived “with respect to the matters addressed by this Stipulation and Agreement, any and all rights he may have to a hearing, appeal or other proceedings ...” Additionally, paragraph 8 contains a similarly broad waiver “in the event of any violation of this agreement and/or any future conduct including but not limited to conduct causing disrepute to the Department, conduct which is prejudicial to the good order, discipline or efficiency of the Department and/or conduct similar to the above noted violations ...”

The appellate courts have held that such a waiver of statutory and/or contractual rights to a hearing is enforceable where, as here, the waiver was accepted in consideration for the curtailment of pending disciplinary proceedings. *See, e.g., Nedd v Koehler*, 159 AD2d 344, 345 (1st Dep’t 1990); *Matter of Gallagher v City of New York*, 35 AD3d 858 (2nd Dep’t 2006). Notwithstanding Erdey’s arguments to the contrary, this Court finds that the conduct at issue here falls within the broad waiver language in paragraph 8 that deprives Erdey of the right to a hearing in connection with allegations raised during the probationary period relating to conduct prejudicial to the good order, discipline or efficiency of the FDNY or conduct similar to that at issue in the Stipulation. The conduct here falls within the waiver, even though the Department apparently did not seek to demote Lt. Erdey as the Stipulation seems to permit.

Equally unavailing is Erdey’s alternative request for a name-clearing hearing. To qualify for such a hearing, Erdey must establish “stigma plus”, meaning governmental defamatory action (if the statements alleged are untrue) and likelihood of dissemination

widely enough to damage the employee's standing in the community or to foreclose future job opportunities. *Matter of Swinton v Safir*, 93 NY2d 758, 764 (1999). Should those elements be established, Erdey would have the right to have the documents at issue expunged from his file.

Lt. Erdey is not entitled to such a hearing here for several reasons. First, it appears that such hearings are given only when the employment of a probationary employee has been terminated, making the potential for a negative impact on future job opportunities real. *See, Swinton, supra; see also, Games v Kelly*, 51 AD3d 538 (1st Dep't 2008). Erdey has not offered any cases in which a name-clearing hearing was granted to a long-term employee with vested rights similar to those possessed by him who continued on the job after the incident.

Further, Erdey has not satisfied the "stigma plus" standard in that he has not established the likelihood of widespread dissemination sufficient to have an impact. While the letter was placed in his file and he fears an impact on promotional opportunities within the Department, it is significant that the Department did not use the letter to demote the Lieutenant for a violation of probation as the Stipulation allowed. Erdey's probationary period is now over, and he has not offered any evidence that the letter had, or is having, any impact at all.

In that regard, Erdey's case stands in sharp contrast to cases such as *Knox v New York City Dept. of Educ.*, 85 AD3d 439 (1st Dep't 2011). There, the report of the Special Commissioner of Investigation set forth detailed findings of dishonesty that led to the termination of petitioner's employment and the placement of her name on the Department's widely disseminated list of persons ineligible for future employment. The

report was also disseminated to the Bronx County District Attorney's Office and the State Department of Education.

Lastly, as previously noted, the waiver language in the Stipulation is sufficiently broad to qualify as a waiver of a name-clearing hearing. *See, Gallagher, supra.* Paragraph 8 expressly provides for a waiver of a hearing for future conduct, whether that conduct be deemed "prejudicial to the good order, discipline or efficiency of the Department" or "similar to" the violations that led to the Stipulation.

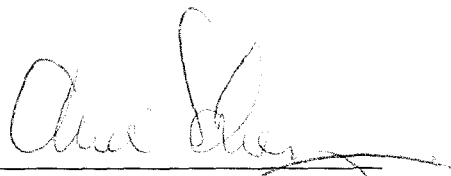
Considering the circumstances as a whole, this Court finds that Lt. Erdey is not entitled to the central relief requested of expungement of the documents from his file or the alternative request for a name-clearing hearing. Accordingly, it is hereby

ORDERED that respondent's cross-motion to dismiss the first cause of action is granted; and it is further

ADJUDGED that, but for the stipulated relief regarding the second cause of action relating to FOIL, the petition is denied and this Article 78 proceeding is dismissed without costs or disbursements to either party. The Clerk may enter judgment accordingly.

Dated: April 8, 2014

APR 08 2014


J.S.C.
ALICE SCHLESINGER

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