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| Matter of Quire v City of New York |
| 2019 NY Slip Op 31487(U) |
| May 30, 2019 |
| Supreme Court, New York County |
| Docket Number: 155690/2018 |
| Judge: Melissa A. Crane |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 15**

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In the Matter of:
BRIAN QUIRE,

Petitioner,

-against-

Index No. 155690/2018
Motion Sequence 001

Decision and Order

CITY OF NEW YORK; and NEW YORK CITY
POLICE DEPARTMENT,

Respondents.

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CRANE, J.S.C.:

In this Article 78 proceeding, petitioner Brian Quire, a former New York City Police Department (NYPD) detective, challenges the February 2018 decision of respondents that dismissed him from the police force. Respondents, in addition to opposing the petition, request a transfer to the Appellate Division, First Department (First Department) in accordance with CPLR § 7804. Petitioner argues that threshold issues exist that this court must determine. For the reasons below, the court reaches the burden of proof issue and finds that there was no legal error. The court transfers the remainder of the proceeding to the First Department.

Petitioner had been an officer at NYPD since 2006, and according to the complaint had a stellar record and no history of positive drug test results or other signs of drug use (NYSCEF Doc. No. 1 [Petition], ¶¶ 6-8). Around April 28, 2016, however, NYPD administered a random drug test to petitioner. Psychemedics Corporation, a drug testing company, conducted the test, using a hair analysis based on two hairs taken from petitioner’s leg, and found that petitioner tested positive for methamphetamine. Psychemedics notified NYPD of the result around May 6, 2016 (*id.* ¶¶ 8-10). Upon its receipt of the results, NYPD sent a third hair of petitioner’s – which it also had taken

from petitioner on April 28, 2016 – to Quest Diagnostics for confirmation of the result. This third sample also tested positive for methamphetamine (NYSCEF Doc. No. 3 at *5 [ADC Weisel findings]).

Pursuant to NYPD procedure, a medical review officer, Police Surgeon Joseph Ciuffo, interviewed petitioner on May 10, 2016. Petitioner allegedly informed Dr. Ciuffo that he took several prescription medications which might have triggered a false positive, and he supplied a list of his prescriptions along with written verification from his doctor. Dr. Ciuffo determined that the positive test results were accurate (Petition, ¶¶ 17-20). Accordingly, the Internal Affairs Bureau (“IAB”) took over the investigation. On May 19, 2016, IAB charged petitioner with methamphetamine use and conduct that harmed the order, efficiency, or discipline of NYPD (*id.* ¶¶ 20-21). In response, NYPD suspended petitioner on June 16, 2016 and on July 11, 2016 it demoted him from detective to police officer (*id.* ¶ 24-25). These were interim measures pending the outcome of a mandatory hearing before the Office of Administrative Hearings and Trials (OATH).

Assistant Deputy Commissioner of Trials David S. Weisel (ADC Weisel) of OATH conducted petitioner’s hearing on April 3, 2018, April 4, 2018, May 1, 2018, May 8, 2018, and May 15, 2018. ADC Weisel heard from several witnesses for both petitioner and NYPD, including experts, character witnesses and the petitioner, and he considered the documentary evidence such as petitioner’s drug test result and peer-reviewed studies that petitioner’s expert submitted regarding the unreliability of the hair-testing method. Around July 13, 2017, ADC Weisel asked NYPD for further information regarding the hair analysis procedure (*id.* ¶¶ 66-67). The trial officially concluded on September 25, 2017 (*see* NYSCEF Doc. No. 3 at *2).

ADC Weisel issued his Report and Recommendations (the report) on January 24, 2018 (*id.*). The report noted that the ADC's role is to determine 'whether or not the scientific evidence proved, by a preponderance of the evidence, that [petitioner] wrongfully possessed and ingested methamphetamine' (*id.* at *6). In addition to its discussion of the evidence and testimony, the report addressed and rejected petitioner's defenses to the charges against him. In its conclusion, the report stated that there were "no irregularities that would impact on [the drug test] findings" and therefore petitioner should be found guilty (*id.* at *34). The report further recommended that petitioner's employment be terminated because, despite "the attestations to [petitioner's] good character and excellent work history, [NYPD] has a strong interest in not employing individuals who ingest and possess illegal drugs such as d-methamphetamine" (*id.* at *35). In support of this recommendation, the report considered two prior cases in which officers with 13-year and 19-year unblemished histories were discharged for drug use (*id.*).

The draft order (NYSCEF Doc. No. 27) was sent to each party. Each party sent a response to the Deputy Commissioner of Trials, which in turn forwarded the comments to the Police Commissioner along with the Trial Commissioner's report and recommendation. Daniel E. Maurer, Assistant Department Advocate at NYPD noted his concurrence with the findings (NYSCEF Doc. No. 28), and the First Deputy Commissioner approved Maurer's endorsement (NYSCEF Doc. No. 30). In addition to his evidentiary challenges, petitioner argued in its January 23, 2018 response that "ADC Wiesel {sic} failed to hold [NYPD] to its burden in the instant matter" (NYSCEF Doc. No. 29 at *8).

The Commissioner adopted the report's findings and recommendations on February 16, 2018 (*id.* at *2), and as a result petitioner was fired. The decision became final on February 22,

when petitioner received a copy of the Commissioner's order (Petition ¶ 1). On June 15, 2018, petitioner filed his petition.

The current proceeding raises three challenges. First, it argues that respondents' decision was not supported by substantial evidence. Second, it asserts that respondents applied the wrong burden of proof under Civil Service Law § 75 because respondents determined whether it was plausible that petitioner used drugs rather than whether NYPD had established drug use by a preponderance of the evidence. Third, the petition contends that the penalty of termination is so disproportionate to the offense, in light of petitioner's otherwise admirable record, that it shocks the conscience (Petition, ¶¶ 86-110). As relief, petitioner seeks reinstatement to the position of detective, along with full back pay, benefits, seniority status, and attorney's fees and costs.

In their answer, respondents argued that the petition did not set forth a valid claim; that respondents followed all applicable laws, and the decision was not arbitrary and capricious; that the report was supported by substantial evidence; and that the penalty of termination was reasonable. It noted that petitioner had the opportunity to submit its challenges to the Commissioner, who rejected petitioner's arguments. In addition, respondents requested the transfer of the entire petition to the First Department under CPLR §§ 7803 (4) and 7804 (g). (NYSCEF Doc. No. 14).

Petitioner acknowledges in his reply that "transfer to the Appellate Division is appropriate to determine . . . whether the Order of Dismissal was supported by substantial evidence" (NYSCEF Doc. No. 35 at *2). First, however, this court must address his argument that the report and subsequent order of dismissal are "predicated on an error of law" (*id.* at *5). In particular, petitioner states, this court must consider whether the report utilized the applicable preponderance of the evidence standard. Petitioner notes that the drug test report outweighed the testimony of

petitioner's peers and supervisors, who attested to his exceptional work and stated that they had never witnessed him using drugs. Petitioner states that the report applied the wrong standard of proof, because it determined only that it was "plausible that [petitioner's] methamphetamine use was limited to those times when he was off duty" and did not weigh the evidence (*id.* [quoting NYSCEF Doc. No. 15 at *30]). Second, petitioner states that the report's statements that (1) OATH conducted "a de novo hearing on the merits" and (2) the charges must be sustained because there were no "irregularities that would impact on its findings" also ignored the preponderance of the evidence standard (NYSCEF Doc. No. 35 at *5 [quoting NYSCEF Doc. No. 15 at *33]).

Petitioner is correct that it is the responsibility of this court to decide certain issues prior to a transfer to the appellate court. As CPLR § 7804 (g) explains:

"Where the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and *res judicata*, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced."¹

Accordingly, petitioner's contention that ADC Weisel applied the wrong standard of review is properly before this court, because it alleges that the decision was "affected by an error of law." The preponderance of the evidence standard applies to this court's analysis. It requires a higher level of scrutiny than the substantial evidence standard (*Matter of Guzman v Bratton*, 161 AD3d 591, 592 [1st Dept 2018]). "[T]he trier of fact [must] weigh the conflicting testimony and

¹ Under CPLR § 7803 (4), courts have the power to evaluate "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

proof” (*Matter of Joel P. v Bane*, 214 AD2d 506, 507 [1st Dept 1995], *affd*, 87 NY2d 699 [1996], *rearg denied*, 88 NY2d 920 [1996]). Petitioner bears the burden of proof on this issue (*see Matter of Community United to Protect Theodore Roosevelt Park v City of New York*, - AD3d -, 2019 NY Slip Op 02965 [1st Dept 2019]).

Upon examination, the court finds that when ADC Weisel evaluated petitioner’s case, he applied the proper burden of proof. For one thing, ADC Weisel reiterates his role on more than one occasion – stating that he reviewed the evidence before him and assessed the witnesses’ credibility (NYSCEF Doc. No. 15 at 3), and also that the issue before him is whether a preponderance of the evidence supports NYPD’s findings and determination (*id.* at *5). Further, the ADC’s analysis applied this standard. The 33-page report, which ADC Weisel wrote following five days of hearings, presents and explains all the testimony and evidence and includes a discussion of petitioner’s challenges at each juncture. The fact that the ADC found one of NYPD’s positions “plausible” does not alter this fact, as he made this statement in the context of a larger and more nuanced analysis. In addition, the statement that petitioner was found guilty because there were no irregularities that affected NYPD’s findings does not demonstrate a failure to consider the preponderance of the evidence. Indeed, the comment comes after a detailed discussion and evaluation of the testimony and other evidence presented to him.

The court transfers the remainder of the case to the First Department. The issue of the proportionality of the penalty of termination is part of the substantial evidence review (*see, e.g., Matter of Jones v Kelly*, 111 AD3d 415 [1st Dept 2013] [where trial court transferred the matter, appellate court found that determination that petitioner, a police officer, used cocaine was supported by substantial evidence and termination was not a disproportionate penalty]; *Guzman*, 161 AD3d at 592 [vacating trial court order that reviewed termination of police officer’s

employment and considered the matter de novo, as matter should have been transferred]). At oral argument, petitioner raised additional so-called legal arguments, such as that ADC Weisel wrongfully relied on the Psychemedics test, that the decision was issued a year after the suspension, and that the testing process was unreliable. The ADC and the Commissioner considered and rejected the majority of these arguments. Almost all of them relate to evidentiary issues. The only potential legal argument, the conclusory statement that the year-long delay between the drug test results and the petitioner's termination was prejudicial, was mentioned at oral argument for the first time and therefore is not properly before the court (*see Matter of Lowinger v New York State Div. of Hous. & Community Renewal*, 161 AD3d 550, 551 [1st Dept 2018]).

Accordingly, it is

ORDERED that the prong of the petition seeking a determination that respondents applied the incorrect standard of proof is denied; and it is further

ORDERED that, pursuant to CPLR 7804 (g), the remainder of the application, that involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence, is respectfully transferred to the Appellate Division, First Department, for disposition (CPLR 7803 [4]; *see Matter of Iverson v New York State Dept. of Motor Vehicles Appeals Board*, 2010 NY Slip Op 32914 [U] [Sup Ct, NY County 2010]).

Petitioner is directed to serve a copy of this order with notice of entry upon the County Clerk (Room 141B), who is directed to transfer the file to the Appellate Division, First Department.

Dated: May 30, 2019

ENTER:



MELISSA ANNE CRANE, J.S.C.
HON. MELISSA A. CRANE
J.S.C.