

Mateo v New York City Civilian Complaint Review Bd.

2021 NY Slip Op 31995(U)

August 5, 2021

Supreme Court, New York County

Docket Number: 151225/2021

Judge: Laurence L. Love

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

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 63M

Justice

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EDWIN MATEO, MICHAEL LICITRA,

Petitioner,

- v -

THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW
BOARD, FREDERICK DAVIE, JONATHAN DARCHE

Respondent.

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INDEX NO. 151225/2021

MOTION DATE 5/28/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the Petition and Respondents' Cross-Motion seeking dismissal of the instant Petition are decided as follows:

On February 4, 2021, Petitioners, Edwin Mateo ("Mateo") and Michael Licitra ("Licitra") filed the instant Petition seeking a Judgment, pursuant to CPLR Article 78 and CPLR 3001, (1) declaring invalid, the Civilian Complaint Review Board's ("CCRB") investigation of an incident that occurred on September 25, 2012 and declaring that the CCRB has acted in an arbitrary and capricious manner by accepting a complaint and investigating said incident; (2) declaring that the CCRB has exceeded its limited jurisdiction and powers in an untimely attempt to investigate said incident contrary to New York City Charter § 440 and Rules of the City of New York, Title 38-A Chapter 1, §1-15 (a) - (c); (3) declaring that the CCRB's Chair and Executive Director have abused their discretion and have acted in an arbitrary and capricious manner by accepting said late complaint; and (4) permanently enjoining Respondents from conducting any further investigation.

On April 3, 2021, Respondents cross-moved for dismissal of this action pursuant to CPLR §§ 3211(a)(2), (a)(3), and (a)(7) and 7804(f).

The CCRB investigation at issue concerns the NYPD involved shooting and subsequent death of Mohamed Bah on September 25, 2012. On said date, Oumou Bah, the mother of Mohamed Bah, called 911 to request assistance for Mohamed Bah who was allegedly in an emotionally disturbed state. Police Officers Brian Stanton, Esmeralda Santana, Vincent Johnson and Lieutenant Robert Gallitelli initially responded from the 26th Precinct. Said Officers entered the apartment building located at 113 Morningside Avenue, knocked on the door of apartment 5D, which was opened by a naked Mohamed Bah. At least one Officer observed Bah holding a knife. Bah closed the door, at which time assistance was requested by Lt. Gallitelli, and the NYPD Emergency Service Unit (“ESU”) was dispatched to the scene. Five ESU Officers responded including the petitioners herein, who assumed command of the scene from Lt. Gallitelli. After forty-five minutes to an hour, Mohamed Bah opened the door, still holding a large kitchen knife. Lt. Licitra gave the order to enter the apartment and the ensuing events culminated in the death of Mohamed Bah, which the CCRB now seeks to investigate.

Since the incident, there have been numerous investigations into the facts underlying same. In November 2013, the District Attorney of New York County presented this matter to a Grand Jury. On November 26, 2013, the Grand Jury returned no true bill, declining to approve any criminal charges against Petitioners.

Thereafter, the New York City Police Department Firearms Discharge Review Board and Patrol Borough Manhattan North Investigations Unit investigated the incident, and the found that the discharge of Det. Mateo’s weapon and the subsequent injury were lawful and within the New York City Police Department (“NYPD”) Guidelines. In June 2014, the Firearms Discharge Review

Board, through the Chief of the Department, confirmed that there was no violation of departmental firearms guidelines, and that no disciplinary action would be taken against Det. Mateo.

The subject incident was also investigated by the United States Department of Justice and the United States Attorney's Office for the Southern District of New York. The U.S. Attorney determined that the Petitioner, Det. Edwin Mateo, acted lawfully and properly during the incident in question and closed that investigation on or about August 22, 2017.

In addition, Oumou Bah, as the administrator of the estate of Mohamed Bah, filed a civil action in the United States District Court for the Southern District of New York against the City of New York and the police officers involved. Following an eight-day trial, which commenced on November 1, 2017, the jury returned a verdict in favor of the plaintiff on several causes of action, finding that Mateo had violated decedent's fourth amendment rights and that Lt. Licitra had failed to adequately supervise Det. Mateo. Following post-trial motions, only the fourth amendment claims against Mateo were upheld. Said claims were settled in May, 2019.

In February 2020, Mr. Bah's mother contacted the CCRB to file a complaint against the officers. In November 2020, the CCRB notified Lt. Licitra and Det. Mateo that they would be interviewed by the CCRB. Neither have appeared for said interviews, instead they have filed the instant Article 78 action seeking to declare the CCRB's investigation invalid. Petitioners argue that the CCRB is exceeding its jurisdiction by investigating this matter and that the Chair and Executive Director of the CCRB have abused their discretion and acted arbitrarily and capriciously by accepting a "Late Complaint" pursuant to RCNY §1-15(c).

The CCRB's authority and jurisdiction is established by Chapter 18-A § 440(c)(1) of the New York City Charter, empowering the CCRB as follows:

The board shall have the power to receive, investigate, hear,
make findings and recommend action upon complaints by members

of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs, relating to race, ethnicity, religion, gender, sexual orientation and disability. The board shall also have the power to investigate, hear, make findings and recommend action regarding the truthfulness of any material official statement made by a member of the police department who is the subject of a complaint received by the board, if such statement was made during the course of and in relation to the board's resolution of such complaint.

Pursuant to N.Y. City Charter §§ 440, the NYPD is required to cooperate with the CCRB's investigations, including providing records and ensuring that officers appear for interviews and answer questions as follows:

(d) Cooperation of police department.

1. It shall be the duty of the police department to provide such assistance as the board may reasonably request, to cooperate fully with investigations by the board, and to provide to the board upon request records and other materials which are necessary for investigations undertaken pursuant to this section, except such records or materials that cannot be disclosed by law.

2. The police commissioner shall ensure that officers and employees of the police department appear before and respond to inquiries of the board and its civilian investigators in connection with investigations undertaken pursuant to this section, provided that such inquiries are conducted in accordance with department procedures for interrogation of members.

The CCRB's rules, as codified in Section 38-A of the Rules of the City of New York as they pertain to the acceptance of complaints and late complaints provide as follows:

Rule 1-14 – Referrals of Complaints.

(a) Where the Board receives allegations about persons or matters falling within the sole jurisdiction of another agency (and not that of the Board), the Chair or the Executive Director will refer such allegations to such other agency.

(b) Where the Board receives allegations about persons or matters falling partly within the sole jurisdiction of another agency (and not that of the Board) and partly within the joint jurisdiction of both the other agency and the Board, the Chair in consultation with

the Executive Director may refer the entire complaint to the other agency if in the determination of the Chair, in consultation with the Executive Director, it is appropriate for the entire complaint to be investigated by one single agency.

(c) The Board can investigate any complaint or allegation that falls within the Board's jurisdiction, regardless of whether another agency is investigating or has previously investigated the same complaint or allegation.

Rule 1-15 – Late Complaints.

(a) When a complaint is filed with the Board after the 18-month statute of limitations has expired pursuant to Civil Service Law § 75(4), the Chair in consultation with the Executive Director will determine whether to investigate the complaint.

(b) When a complaint is filed with the Board more than one year after the incident, the Chair in consultation with the Executive Director will determine whether to investigate the complaint.

(c) Among the factors to be considered in determining whether to investigate complaints made after one year or after the 18-month statute of limitations has expired are: the nature and/or severity of the alleged misconduct, the availability of evidence and/or witnesses, the ability to identify officers and civilians involved, the practicability of conducting a full investigation within any applicable limitation period, the reason for the late filing and the numbers of complaints received by the Board regarding the incident.

As an initial matter, it is undisputed that Lt. Licitra retired from the NYPD following the filing of this action and the CCRB withdrew its investigation against that member of service. Therefore, Lt. Licitra lacks standing and all claims against Respondents by Lt. Licitra must be dismissed pursuant to CPLR § 3211(a)(3).

Respondents seek dismissal of this action pursuant to CPLR § 3211(a)(2). As discussed in *Bologna v. Civilian Co. Review Bd. of the City of New York*, No. 157845/13, 2013 N.Y. Slip Op. 32996(U) (N.Y. Sup. Ct. Nov. 22, 2013), “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]). *See also*, *Beecher v. Brown*, 192 A.D.2d 495, 495 (1st Dept. 1993); *Tanico v. McGuire*, 80 A.D.2d 297 (1st Dept. 1981).

Here, Petitioners will have every opportunity to participate in and contest the CCRB’s investigation. As discussed *supra*, Petitioners are required to participate in the CCRB’s investigation pursuant to N.Y. City Charter § 440(d). If Petitioners are unsatisfied with the finding of the CCRB, they may request reopening or reconsideration of a CCRB finding and determination pursuant to 38-A RCNY § 1-36. Thereafter, Petitioners may raise defenses and challenges during an administrative trial, if charges and specifications are issued following the CCRB’s investigation. Petitioners may then further challenge said charges, if any, during the Police Commissioner’s review of any recommendation of the CCRB or trial commissioner prior to the issuance of a final determination pursuant to 38 RCNY §§ 15-17 and 15-18. Respondents argue that then, and only then, is this issue ripe for an Article 78 proceeding. Further, Petitioners cannot establish that they would suffer irreparable harm as the CCRB has no ability to impose any discipline on any police officer, a power granted only to the Police Commissioner.

Petitioner’s opposition to Respondent’s cross-motion centers on Respondent’s alleged abuse of discretion in accepting a late complaint in alleged violation of Section 38-A RCNY Rule 1-15(c). Petitioners contend that “failure to exhaust administrative remedies is not required where an agency’s action is challenged as unconstitutional or wholly beyond its grant of power or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury.” *See Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978); *Laureiro v. New*

York City Dept. of Consumer Affairs, 14 A.D.3d 717, 719 (2nd Dept. 2007). Petitioners are essentially claiming that just the process alone of subjecting Petitioners to the investigation, in and of itself, eight years post-incident is already the equivalent of a final determination and should be reviewable by the Court at this juncture. Petitioners further contend that “an administrative regulation will be upheld only if it has a rational basis, and it is not unreasonable, arbitrary, or capricious.” *NY State Ass’n of Counties v. Axelrod*, 78 N.Y. 2d 158, 166 (1991); see also CPLR § 7803(3). Petitioners correctly assert that RCNY § 1-15(a)-(c) does not confer unfettered discretion upon Respondents to investigate any complaints, but rather, sets out “concrete criteria” requiring Respondents to consider numerous factors as set forth in RCNY § 1-15(c). See *Lynch v New York City Civilian Complaint Review Bd.*, 64 Misc. 3d 315 (Sup Ct 2019) *aff’d as modified* 183 A.D.3d 512, 514-515 (1st Dept.), *lv. denied*, 36 N.Y.3d 901 (2020).

Petitioner has conceded that under RCNY 1-15 there is no formal statute of limitations on commencing a CCRB investigation if the criteria is met. However, Petitioners argue that eight years post-incident is too long, *per se*, on such a fully investigated matter and that Respondents have failed to provide sufficient information illustrating that the criteria enumerated in RCNY 1-15(c) were adhered to. The first argument invokes shades of Supreme Court Justice Stewart’s famous retort on the subject of pornography – “I know it when I see it”. While this court is certainly sympathetic to Petitioners’ argument that eight years post-incident, especially one subjected to multiple Government investigations raises the potential issue of being beyond the pale. However, the Appellate Division has unambiguously found that RCNY § 1-15(a)-(c) is a permissible regulation which allows the CCRB to accept and investigate late complaints without any applicable statute of limitations if the criteria are met.

Pursuant to rule 1.15(c), there are a number of items to be considered by the CCRB prior to accepting a late complaint for investigation. Petitioner claims the Respondent failed to sufficiently articulate that those items were fully reviewed and considered before reaching a decision to investigate. Petitioner points to Respondent's cursory correspondence and the lack of a supporting affidavit from the Chairman and/or Director as part of the instant motion detailing the review process. This Court cannot find a legal requirement compelling the Chairman and/or Director to provide Petitioner, at this stage of the proceedings, a detailed explanation of the basis for accepting the late complaint and pursuing an investigation so long after the incident. Thus, as, Petitioners are required to exhaust all their administrative remedies prior to commencing an Article 78 action, the instant action must be dismissed as premature.

The Court notes that the facts presented here represent an extreme outlier in the jurisdiction of the CCRB. The facts that are the subject of the CCRB's investigation occurred over eight years ago and have been the subject of multiple investigations. As noted *supra*, this matter was put before a grand jury in 2013, the discharge of firearms was investigated by the New York City Police Department Firearms Discharge Review Board and Patrol Borough Manhattan North Investigations Unit 2014, was investigated by the United States Department of Justice and the United States Attorney's Office for the Southern District of New York ending in 2017 and was the subject of a Federal Civil action which was commenced in 2017 and settled after trial in 2019, all before Mr. Bah's mother submitted a complaint to the CCRB in 2020. Without commenting on whether Respondents will be able to establish that they complied with RCNY §1-15(c) in choosing to accept a late complaint, the Court notes that same is among the many subjects that can be raised in the course of Petitioner's administrative proceedings.

ORDERED that Petitioners' Petition is hereby DENIED in its entirety; and it is further

ORDERED that Respondents' cross-motion seeking dismissal of the instant Petition pursuant to CPLR R. 3211(a)(2) and (3) is GRANTED in its entirety and the Petition is dismissed.

8/5/2021
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE