

New York City Civilian Complaint Review Bd. v Hepworth
2021 NY Slip Op 32627(U)
December 8, 2021
Supreme Court, New York County
Docket Number: Index No. 453054/2021
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD **PART** **35**

Justice

-----X

NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD

Petitioner,

- v -

JAMES HEPWORTH,

Respondent.

-----X

INDEX NO. 453054/2021

MOTION DATE 10/05/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 8, 12, 13, 15, 16, 17

were read on this motion to/for ENFORCEMENT.

Upon the foregoing documents, it is

ORDERED that Petitioner's application for an order finding that its subpoena dated May 12, 2021 issued to Respondent James Hepworth was authorized and lawfully issued, and compelling Respondent to comply with the subpoena and appear for an in-person or virtual interview and provide testimony regarding the events of June 4, 2020 (Motion Seq. 001) is granted to the extent that Petitioner is directed to serve a new subpoena to Respondent with a witness fee as required by CPLR 2303(a), and Respondent is directed to comply with the new subpoena. It is further

ORDERED that Petitioner shall personally serve the new subpoena upon Respondent at his personal residence on or before January 7, 2021; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

MEMORANDUM DECISION

In this Special Proceeding, Petitioner New York City Civilian Complaint Review Board (CCRB), moves by Order to Show Cause, for an order pursuant to CPLR 2308(b) finding that the CCRB's subpoena issued to Respondent James Hepworth was authorized and lawfully issued, and compelling Respondent to comply with the CCRB's subpoena and appear for an in-person or virtual interview and provide testimony regarding the events of June 4, 2020 (Motion Seq. 001).

Respondent opposes the instant application in its entirety.

BACKGROUND

The CCRB is an agency of the City of New York that is tasked with investigating, making findings, and recommending action on allegations that members of the New York Police Department (NYPD) engaged in excessive force, abuse of authority, discourtesy, or offensive language against members of the public. The CCRB employs a staff of civilian staffers who investigate complaints and make findings and recommendations for each allegation of officer misconduct (NYSCEF doc No. 1 at 4).

On June 8, 2020, at the height of anti-police brutality protests across the nation following the murder of George Floyd, the CCRB received a complaint from a civilian alleging that he observed several NYPD officers beating a group of young African American men in Brooklyn on June 4 (*id.* at 5-6). The civilian was then shoved when he tried to ask the officers to stop (*id.*). The civilian was unable to identify the officer's names or badge numbers, and at least one of the officers had his badge number obscured (*id.*).

During the course of its investigation, the CCRB came to believe that Respondent was on the scene during the June 4 incident and may have been the officer in charge of the scene that day (*id.* at 8). The CCRB learned from interviews with other officers that Respondent was one of

the first people to arrive at the scene, as he was the commanding officer at another incident that arose at a nearby family barbeque (*id.*). The CCRB now seeks to subpoena Respondent to provide testimony as it believes that Respondent has material and relevant knowledge of the June 4 incident. Respondent, who is a witness officer but not a subject of the CCRB's investigation, retired from the NYPD in August 2020 (NYSCEF doc No. 17).

The CCRB served a subpoena seeking to compel Respondent to appear for an interview to take place December 17, 2020 ("the First Subpoena," NYSCEF doc No. 2). The CCRB avers that the First Subpoena was mailed to Respondent, but it is not accompanied by an affidavit of service and Respondent denies that he received it (NYSCEF doc No. 16).

On May 12, 2021, the CCRB personally served a second subpoena upon Respondent's home residence requesting that he appear for an interview on June 2, 2021 ("the Second Subpoena," NYSCEF doc No. 3). Respondent has acknowledged receipt of the Second Subpoena but did not appear on June 2 and did not move to quash or modify the Second Subpoena (NYSCEF doc No. 16).

On September 13, 2021, the CCRB commenced the instant proceeding, seeking an order pursuant to CPLR 2308(b) compelling compliance with the Second Subpoena and ordering Respondent to appear for an interview. The CCRB contends it has met its burden of showing the relevance of Respondent's testimony, and argues it has clear authority to subpoena Respondent and seek judicial enforcement of the subpoena pursuant to its power under the City Charter § 440(c)(3).

In opposition, Respondent argues that the CCRB has not met its burden of demonstrating that Respondent's testimony is necessary for its investigation and has engaged in a fishing expedition that is inherently speculative. Respondent notes that the CCRB did not go through the

proper channels to seek an interview with Respondent while he was still an active officer, which include contacting the Captain Endowment Association's Office Manager of Respondent's union to schedule an interview (NYSCEF doc No. 17). As Respondent is now retired, Respondent argues that the Court should not enforce either subpoena "on the equities" as the CCRB did not follow its own procedure to schedule an interview while Respondent was still employed. Respondent further argues that the Second Subpoena is unenforceable as it was not accompanied by a witness fee pursuant to CPLR 2303(a).

DISCUSSION

The Court's authority to compel compliance with a non-judicial subpoena is set forth in CPLR 2308(b):

"Unless otherwise provided, if a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars."

The CCRB's authority to issue subpoenas is set forth in §440(c)(3) of the City Charter:

"The board, by majority vote of its members, may compel the attendance of witnesses and require the production of such records and other materials as are necessary for the investigation of complaints submitted pursuant to this section."

An agency asserting its subpoena power must show its authority, the relevancy of the items sought, and some basis for inquisitorial action (*See Matter of A'Hearn v Committee on Unlawful Practice of Law of N. Y. County Lawyers' Assn.*, 23 N.Y.2d 916, 918 [1969]). A witness subject to a non-judicial investigative subpoena may challenge it on the ground that the subpoena calls for irrelevant material or subjects to witness to harassment (*Myerson v Lentini Bros. etc.*, 33 NY2d 250 [1973]). To be upheld, the subpoena must be found to have a reasonable foundation related to the subject matter under investigation and the public purpose to be served (*id.*).

Here, the Court finds that the CCRB has met its burden of showing that an interview with Respondent is relevant to its investigation of the June 4 incident. Respondent argues that his testimony would be moot as the CCRB has already interviewed other high-ranking NYPD officers who have denied issuing commands during the events of June 4 (NYSCEF doc No. 15 at 9). However, as discussed, the officers that have been interviewed stated that Respondent was one of the first officers to arrive at the scene as he was working at a nearby barbeque. At the time of the June 4 incident, Respondent was also the Executive Officer at the 71st Precinct, the precinct in which the incident occurred (NYSCEF doc No. 1 at 8). The Court thus finds that the CCRB's decision to subpoena was not unduly speculative as it is reasonable for the CCRB to believe that Respondent may have information relevant to its investigation.

The Court further finds that the subpoenas were duly issued pursuant to the CCRB's authority under §440(c)(3) of the City Charter, notwithstanding the fact that Respondent was no longer an active NYPD member at the time the subpoenas were issued. Nothing in the language of §440(c)(3) suggests that the CCRB's subpoena power is expressly limited to active-duty members of the NYPD, and Respondent cites to no provision of the City Charter or caselaw that would indicate any sort of limitation. Respondent argues that the CCRB "should demonstrate good cause as to why they did not secure an officer's testimony while the officer was still employed," but, again, cities to no caselaw or statutory authority in support of such an obligation (NYSCEF doc No. 15 at 7). The Court further notes that Respondent retired shortly after the June 4 incident, a few months later at the end of August, meaning that the CCRB had a limited time window to schedule an interview with Respondent while he was still an active NYPD officer. As the CCRB has demonstrated that Respondent is a witness who may have material information related to the

June 4 incident, the Court sees no reason why Respondent should not be directed to comply with the CCRB's request for testimony notwithstanding his retirement in August 2020.

While it appears the Second Subpoena was properly personally served at Petitioner's residence, the Court will not order compliance with the Second Subpoena given that the Second Subpoena was not accompanied with a witness fee. Pursuant to CPLR 2303(a), "[a]ny person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day's witness fee." The fees "must be tendered when the subpoena is served or within a reasonable time before it is returnable" (*Jaggars v Scholeno*, 6 AD3d 1130 [4th Dept 2004]). Here, a review of the Second Subpoena does not indicate that the subpoena was accompanied by a witness fee, and Respondent avers that no fees were tendered with the subpoena or in advance of the return date (NYSCEF doc No. 16 at 2).

Accordingly, the Court directs that Petitioner personally serve Respondent with a new subpoena, with witness and traveling fees tendered with service of the new subpoena or at a reasonable time in advance of its return date. For the reasons stated herein, Respondent is directed to comply with the new subpoena and appear for an in-person or virtual interview to provide testimony regarding the events of June 4, 2020.

CONCLUSION

Based on the foregoing, it is hereby

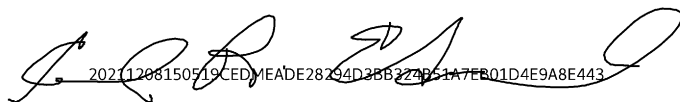
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12/8/2021

DATE

CAROL EDMED, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE