

Kuczinski v New York City Conflicts of Interest Bd.
2021 NY Slip Op 32806(U)
December 28, 2021
Supreme Court, New York County
Docket Number: Index No. 156461/2021
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

GREGORY KUCZINSKI,

Plaintiff,

- v -

NEW YORK CITY CONFLICTS OF INTEREST BOARD,
NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS
AND HEARINGS

Defendant.

-----X

INDEX NO. 156461/2021

MOTION DATE 07/19/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 25 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED that, pursuant to CPLR 7804 (g), the application by petitioner Gregory Kuczinski seeking to annul an order of the respondent New York City Conflicts of Interest Board (motion sequence number 001) is respectfully transferred to the Appellate Division, First Department, for disposition pursuant to said subsection. This proceeding 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 by law, is, on the entire record, supported by substantial evidence (CPLR 7803 [4]); and it is further

ORDERED that counsel for Petitioner shall serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Court (60 Centre Street, Room 141B), who is directed to transfer the file to the Appellate Division, First Department; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance

with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Gregory Kuczinski (Kuczinski) seeks a judgment to annul an order of the respondent New York City Conflicts of Interest Board (COIB) which adopted the factual findings and recommendation issued after a hearing held by the co-respondent New York City Office of Administrative Trials and Hearings (OATH; motion sequence number 001). However, because this proceeding involves the question of whether those findings are supported by “substantial evidence,” the court transfers Kuczinski’s petition to the Appellate Division, First Department, pursuant to CPLR 7804 (g).

FACTS

Kuczinski was formerly employed as a Deputy Commissioner of the New York City Department of Correction (DOC), where his job duties include overseeing DOC’s Investigation Division and Correction Intelligence Bureau. *See* verified petition, ¶ 3. On December 28, 2018, the COIB filed a petition with OATH alleging that in 2016 Kuczinski was assigned a DOC take-home vehicle which he “used for personal trips unrelated to his commute or any DOC purpose” in violation of NYC Charter § 2604 (b) (2) and COIB Rule § 1-13. *Id.*, ¶¶ 6-7. OATH administrative law judge Ingrid M. Addison (ALJ Addison) thereafter conducted an investigation and held a lengthy trial at which Kuczinski and DOC both presented evidence and testimony and questioned witnesses, as is summarized in the “report and recommendation” that ALJ Addison issued on April 20, 2020 (the ALJ’s report):

“At a seven-day trial which concluded on January 27, 2020, petitioner [i.e., the COIB] relied on the testimony of Richard Askin, a deputy inspector general with the New York City Department of Investigations (‘DOI’), Eric Richardson, the Deputy Chief Fleet Management Officer at the Department of Citywide Administrative Services (‘DCAS’), and on documentary evidence.

“Respondent [i.e., Kuczinski] testified on his own behalf, presented documentary evidence and relied on testimony from Michael Blake, a former DOC deputy commissioner and Antonio Cruz, another former DOC employee whom respondent hired.

“For the following reasons, I find that on 18 of the 20 occasions charged, respondent used his assigned take-home City vehicle for personal purposes, in violation of section 2604 (b) (2) of the City Charter and section 1-13 (b) of the Board’s rules. In light of respondent’s prior and substantially similar conduct, I recommend a penalty of \$15,500.00.”

Id., exhibit B. On March 12, 2021, the COIB issued its “Final Findings of Fact, Conclusions of Law, and Order” (the COIB order), which stated as follows:

“Upon consideration of all the evidence presented in this matter, and of the full record, and all papers submitted to, and rulings of, the Office of Administrative Trials and Hearings (‘OATH’), including the annexed Report and Recommendation (the ‘Report’) of OATH Administrative Law Judge (‘ALJ’) Ingrid M. Addison dated April 20, 2020, in the above captioned matter, the Conflicts of Interest Board (the ‘Board’) hereby adopts in full the findings of fact and conclusions of law contained in the Report. The Report recommends that the Board impose a fine of \$15,500.00, which recommendation the Board adopts.

“Without limiting the foregoing, and in summary of its findings and conclusions, the Board notes the following:

“Respondent is a former Deputy Commissioner of the New York City Department of Correction (‘DOC’). The Report finds that while employed by DOC, Respondent used his assigned take-home City vehicle for personal purposes on 18 occasions, each in violation of Charter Section 2604 (b) (2), pursuant to Board Rules Section 1-13 (b). Report at 2. The Board makes one correction to these findings: the evidence shows that the destination of Respondent’s trip on July 12, 2016, was to ‘North’ Castle and not to ‘New’ Castle, as was erroneously written in the Report.

“Having found the above-stated violations of the City Charter, and having consulted with the head of the agency formerly served by Respondent as required by Charter Section 2603 (h)(3), the Board determines that the penalty shall be a fine of \$15,500.00.

“WHEREFORE, IT IS HEREBY ORDERED, pursuant to Charter Section 2606 (b), that Respondent be assessed a civil penalty of \$15,500.00 to be paid to the Conflicts of Interest Board within 30 days of service of this Order. Respondent has the right to appeal this Order to the Supreme Court of the State of New York by filing a petition pursuant to Article 78 of the Civil Practice Law and Rules.”

Id., exhibit A.

Kuczinski thereafter commenced this Article 78 proceeding on July 15, 2021 by filing a verified petition that sets forth “causes of action” alleging as follows: 1) the COIB had no authority to impose a fine; 2) the COIB order was arbitrary and capricious because it ignored a prior agency advisory opinion; 3) the COIB order was arbitrary and capricious because it adopted the ALJ’s misreading of the COIB Handbook and COIB Fleet Manual; 4) the COIB order was “affected by an error of law” because it improperly imposed a fine; 5) the COIB order was arbitrary and capricious because it “relied on improper testimony”; 6) ALJ Addison violated Kuczinski’s due process rights by denying his subpoena for the testimony of DOC Commissioner Cynthia Brann; 7) ALJ Addison’s findings were not supported by “substantial evidence”; 8) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on January 13, 2016; 9) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on January 25, 2016; 10) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on February 4, 2016; 11) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on March 24, 2016; 12) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on April 5, 2016; 13) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on April 7, 2016; 14) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on April 19, 2016; 15) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on May 18, 2016; 16) the COIB order was arbitrary and capricious because it incorporated an improper

finding with respect to a trip that Kuczinski made on May 26, 2016; 17) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on July 12, 2016; 18) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on July 13, 2016; 19) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on July 15, 2016; 20) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on August 6, 2016; 21) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on September 5, 2016; 22) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on September 24, 2016; 23) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on October 7, 2016; 24) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on October 12, 2016; 25) the COIB order was arbitrary and capricious because it incorporated an improper finding with respect to a trip that Kuczinski made on October 18, 2016; and 26) the COIB order was arbitrary and capricious because \$15,000.00 was an excessive fine. *See* verified petition. On September 21, 2021, the COIB and OATH filed a joint answer that included the affirmative defenses of: 1) failure to state a cause of action; 2) the evidence demonstrates that respondents' actions were reasonable and legal, not arbitrary and capricious; 3) the ALJ's finding that Kuczinski violated City Charter Section 2604 (b) (2) and Board Rules Section 1-13 (b) was supported by "substantial evidence"; 4) the \$15,000.00 fine was lawful and reasonable; 5) this case involves questions of "substantial evidence" that require it be transferred to the Appellate

Division, First Department; 6) certain of the factual allegations in Kuczinski's petition should not be reviewed by the court because they are based on evidence that he did not present to ALJ Addison; and 7) OATH is not a proper party to this proceeding. *See* verified answer. With the filing of Kuczinski's reply papers, this matter is now fully submitted (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is normally to determine whether, upon the facts before an administrative agency, a challenged agency determination had a rational basis in the record or was arbitrary and capricious. CPLR 7803 (3) *see, e.g., Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). However, this standard of review does not apply where an Article 78 petition challenges a determination "made as a result of a hearing held, and at which evidence was taken" on the ground that that determination was not supported by "substantial evidence." CPLR 7803 (4); *see e.g., Matter of Karol v New York City Off. of Admin. Trials & Hearings*, 190 AD3d 420 (1st Dept 2021). Instead, CPLR 7804 (g) mandates that the trial court transfer such a petition to the appropriate Appellate Division to be reviewed under the "substantial evidence" standard. *Id.*, 190 AD3d at 420, citing *Matter of Dillin v Waterfront Commn. of N.Y. Harbor*, 119 AD3d 429, 429 (1st Dept 2014). In full, the statute provides as follows:

"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. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding.” CPLR 7804 (g).

Review of the pleadings herein confirms that this proceeding primarily involves issues of “substantial evidence,” and is appropriate for transfer. The record established that ALJ Addison conducted a seven-day administrative trial of the petition that DOC had filed against Kuczinski on dates between June 18, 2019 and January 27, 2020. *See* verified answer, exhibits 2, 3. Her April 20, 2020 report recites that both parties presented documentary evidence during the trial, that DOC presented the testimony of three witnesses, and that Kuczinski testified on his own behalf and presented testimony from one other witness. It is thus clear that ALJ Addison’s report, which Kuczinski’s petition seeks to challenge, constitutes a determination “made as a result of a hearing held, and at which evidence was taken.” CPLR 7803 (4).

The court also notes that Kuczinski’s seventh cause of action specifically asserts that “the final order should be annulled because the ALJ’s findings were not supported by substantial evidence.” *See* verified petition, ¶¶ 209-214. His eighth through twenty-fifth causes of action each challenge the evidentiary bases for ALJ Addison’s factual findings with respect to seventeen trips that Kuczinski made in his DOC take-home vehicle, and thus constitute challenges to the “substantiality” of her evidentiary findings. *Id.*, ¶¶ 215-492. Further, respondents’ third affirmative defense asserts that ALJ’s factual findings with respect to Kuczinski’s violations of City Charter Section 2604 (b) (2) and COIB Rules Section 1-13 (b) were supported by “substantial evidence.” *See* verified answer, ¶ 515. Respondents’ fifth affirmative defenses specifically asserts that:

“This proceeding requires the determination of questions related to the sufficiency of the evidence presented at an OATH hearing and therefore, pursuant to CPLR sections 7803 (4) and 7804 (g), transfer of the proceeding to the Appellate Division is mandated.” *Id.*, ¶ 517. It is thus clear that this Article 78 proceeding is one in which the parties have issues of “substantial evidence.” CPLR 7804 (g).

Finally, the court notes that the parties do not raise any “other objections as could terminate the proceeding” which this court might dispose of before transferring it. CPLR 7804 (g). The pleadings do not mention “lack of jurisdiction, statute of limitations [or] *judicata*,” which the statute identified as three (non-exclusive) examples of objections that could terminate a proceeding. The five causes of action in Kuczinski’s petition which do not assert challenges to ALJ Addison’s factual findings instead challenge the legal correctness of her rulings which (a) interpreted City Charter Section 2604 (b) (2) and COIB Rules Section 1-13 (b), and (b) assessed the \$15,000.00 fine against him. *See* verified petition, ¶¶ 118-185, 493-496 (incorrectly numbered as ¶ 121). Were this court to address those challenges, its resulting ruling would not “terminate the proceeding” as a matter of law. Respondents’ affirmative defenses similarly concern only evidentiary or procedural issues, not jurisdictional ones which might justify dismissal. *See* verified answer, ¶¶ 513-519. Therefore, the court concludes that all of the criteria for transfer pursuant to CPLR 7804 (g) are met in this case.

Accordingly, the court finds determines that Kuczinski’s Article 78 petition should be transferred to the Appellate Division, First Department for review under the “substantial evidence” standard.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that, pursuant to CPLR 7804 (g), the application by petitioner Gregory Kuczinski seeking to annul an order of the respondent New York City Conflicts of Interest Board

(motion sequence number 001) is respectfully transferred to the Appellate Division, First Department, for disposition pursuant to said subsection. This proceeding 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 by law, is, on the entire record, supported by substantial evidence (CPLR 7803 [4]); and it is further

ORDERED that counsel for Petitioner shall serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Court (60 Centre Street, Room 141B), who is directed to transfer the file to the Appellate Division, First Department; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



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12/28/2021
DATE

CAROL EDMEAD, J.S.C.

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	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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