Matter of Isaacs v New York City Civilian Complaint Review Bd.
2022 NY Slip Op 30303(U)
January 24, 2022
Supreme Court, New York County
Docket Number: Index No. 152754/2021
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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INDEX NO. 152754/2021

MOTION SEQ. NO. 001

In the Matter of the Application of
Police Officer WAYNE ISAACS,
Petitioner,

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

-against-

THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD ("CCRB"), FREDERICK DAVIE, as Chair of the New York Civilian Complaint Review Board, JONATHAN DARCHE, as Executive Director of the New York City Civilian Complaint Review Board, DERMOT SHEA, as Police Commissioner of the City of New York, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,
Respondents.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for **ARTICLE 78**.

The facts as alleged in the petition are as follows. On July 4, 2016, petitioner Wayne Isaacs, an off-duty New York City Police Officer, was driving home in his personal vehicle and stopped at a red light at the intersection of Atlantic Avenue and Bradford Street in Kings County. While stopped at the traffic light, another driver, Delrawn Small ("Small"), exited his vehicle and approached petitioner's vehicle, accusing petitioner of cutting him off. Small threatened to kill petitioner and struck petitioner across the face, after which time petitioner drew his weapon and shot Small three times.

The New York State Attorney General, as special prosecutor, and the New York Police Department's ("NYPD") Force Investigation Division ("FID") investigated the matter. A grand jury indicted petitioner on charges of murder in the second degree and manslaughter in the first degree. (NYSCEF Doc. No. 13, *statement by attorney general*). Petitioner was also suspended without pay for thirty (30) days and placed on modified assignment. On September 27, 2016, the NYPD's Department Advocate's Office, in consultation with FID, served petitioner with formal charges and specifications based on the following charges: murder in the second degree (Penal Law § 125.25[1]) and manslaughter in the first degree (Penal Law § 125.20[1].) (NYSCEF Doc. No. 2, *Exhibit A*, *September 2016 charges and specifications*).

The case proceeded to a jury trial in Kings County and, after raising a justification defense, a jury acquitted petitioner of all charges and the criminal complaint was dismissed. Additionally, on November 27, 2017, the Use of Force Review Board, which included the first deputy commissioner, representatives from the chief of department, the legal bureau, deputy commissioner of training, and the commanding office of the firearms and tactics section, met to review the investigation conducted and, having determined that petitioner acted within department guidelines, recommended that he not be subject to disciplinary action. Following all necessary endorsements, including the final stamp from former Police Commissioner James P. O'Neil ("O'Neil") on February 22, 2018, petitioner was restored to full duty on December 12, 2018. (NYSCEF Doc. Nos. 1 ¶ 21; 2, *Exhibit B, endorsements*).

In January 2021, respondent DERMONT SHEA, the Former Police Commissioner of the City of New York ("SHEA")[1] consented to respondent The New York City Civilian Complaint Review Board's ("CCRB") recommendation to bring disciplinary charges against petitioner pursuant to a second set of charges and specifications dated October 22, 2020. These charges and specifications assert that petitioner "intentionally used force, in that he intentionally fired the first of three shots from his gun at . . . Small without police necessity, causing physical injury," in violation of Penal Law § 120.05(2) and the patrol guide's force guidelines 221-01. (NYSCEF Doc. No. 2, *Exhibit C, second charges and specifications*).

Petitioner now moves, pursuant to Article 78, for a judgment declaring that 1) CCRB exceeded its jurisdiction under New York City Charter § 440(a); 2) NYPD exceeded its jurisdiction to proceed with disciplinary proceedings under Civil Service Law § 75(4); 3) CCRB abused its discretion and acted in an arbitrary and capricious manner in bringing forth an investigation against petitioner; and 4) NYPD abused its discretion and acted in an arbitrary and capricious manner in reversing a previously finalized administrative exoneration and bringing a new disciplinary proceeding. (NYSCEF Doc. No. 3, *notice of Article 78 petition*).

Petitioner argues, *inter alia*, that NYPD's decision to bring a disciplinary proceeding, after a jury already determined that he did not commit a crime, is in excess of its jurisdiction because it is past the 18-month timeliness requirement allowed by Civil Service Law § 75(4) to institute removal or disciplinary proceedings. Moreover, he asserts that, insofar as a jury has already determined that his shooting of Small was justified, this same conduct cannot now constitute a crime and, thus, that NYPD is acting beyond its jurisdiction in bringing forth disciplinary charges against him. Petitioner further claims that there is no indication that CCRB considered the factors outlined in 38-A RCNY § 1-15, which is the authority that authorizes the Chair of CCRB, in consultation with the Executive Director, to investigate a complaint. Assuming, *arguendo*, the CCRB Chair and Executive Director contemplated these factors, petitioner maintains that "the resulting decision is [nevertheless] arbitrary and capricious because it was determined without regard to the facts." CCRB also lacks authority, claims petitioner, to recommend to NYPD removal through disciplinary proceedings after the 18-month statute of limitations has run. He also contends that NYPD's reversal in proceeding with disciplinary charges and a disciplinary hearing is arbitrary and capricious because neither NYPD nor Shea have articulated any new developments since the Use of Force Review Board's findings in 2018,

[1] Shea was the Police Commissioner of the City of New York at the time of the filing of this action.

as ratified by O'Neil, that petitioner's conduct was within department guidelines and that no violation of department policy had occurred. (NYSCEF Doc. No. 1, *petition*).

Respondents CCRB; FREDERICK DAVIE, the Chair of CCRB; JONATHAN DARCHE, Executive Director of CCRB since May 2017 and acting executive director from November 2016 through May 2017; SHEA, the former Police Commissioner of the City of New York from 2019 through 2021; and the NYPD, all oppose the instant application. (NYSCEF Doc. Nos. 12, *verified answer;* 16, *memorandum of law in opposition*).

Respondents argue, among other things, that the petition seeking to halt CCRB's investigation is barred by the statute of limitations because petitioner had notice of the investigation since December 2019 when he was interviewed as part of the investigation that was commenced in May 2018 after CCRB received a civilian complaint. Moreover, they claim that "[a]lthough [p]etitioner has framed this proceeding as a hybrid proceeding seeking Article 78 review on an arbitrary and capricious decision or abuse of discretion standard, as well as, a declaratory judgment, it is apparent that the actual nature of [p]etitioner's claim is a claim for a writ of prohibition to halt his disciplinary prosecution." However, the petition, claim respondents, fails on two important fronts: "prohibition is unavailable against administrative decisions to initiate the [i]nvestigation, [p]etitioner's claims to halt CCRB's efforts to prosecute [p]etitioner fall well below the mark necessary to sustain such an extraordinary application." Respondents also note that no final determination has been rendered against petitioner and that, assuming an adverse determination is made against him, petitioner may still avail himself of a broad review process within NYPD, with the ability to pursue further judicial review.

Respondents further assert that they acted well within their respective jurisdictions; that the investigation is timely; and that it is not arbitrary or capricious. Specifically, they argue that CCRB had not only the authority, but an affirmative obligation, to report its findings and recommendations pursuant to New York City Charter § 440(c)(1) and that petitioner's delayed objections in initiating the second investigation amount to a common law laches claim, which does not apply to the facts here since CCRB cannot commence an investigation until a civilian complaint is lodged, and that it nevertheless began its investigation as soon as possible. According to respondents, applying the six-prong factors in 38-A RCNY § 1-15(c) to the facts here, there was a basis for moving forward with the investigation.

Moreover, although disciplinary charges against police officers are generally subject to an 18-month statute of limitations, respondents maintain that, here, the "crime exception" applies insofar as petitioner used excessive deadly physical force in shooting and killing Small, which violated the patrol guide procedures and constituted the crime of assault in the second degree in violation of Penal Law § 120.05. Respondents maintain that petitioner's acquittal in the criminal proceeding does not prevent them from moving forward with its disciplinary proceedings because he was tried on different charges and upon a different standard and by a different litigant. Moreover, petitioner will have the opportunity to challenge the recommended charges before the office of the Deputy Commissioner of Trials and any subsequent appellate process and, thus, should not be allowed to collaterally attack them here.

In reply, petitioner argues, *inter alia*, that its Article 78 proceeding is not time-barred because he was "aggrieved" on January 21, 2020 when he received the disciplinary charges. He also argues that CCRB lacks the authority to investigate and prosecute petitioner because he was off duty at the time of the alleged incident. Petitioner further rejects respondents' claim that he is seeking a "hybrid" remedy and clarifies that he is not seeking a declaratory judgment. Petitioner argues that a writ of prohibition, however, is covered by Article 78 and, that, *assuming*, arguendo, this petition *is* a writ of prohibition, it should be granted because CCRB's investigation was beyond its jurisdiction and it is acting in a quasi-judicial role in prosecuting petitioner. Relying on a case from the Appellate Division, First Department, petitioner asserts that CCRB can make recommendations short of removal and disciplinary proceedings. He also claims that CCRB's citation to assault in the second degree is an end-run around the statute of limitations in this case and that preclusive effect should be given to both previously rendered determinations. (NYSCEF Doc. No. 22, *reply memorandum of law*).

Pursuant to New York City Charter § 440 (c)(1), CCRB is a New York City agency authorized "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." (*Matter of Lynch v NY City Civilian Complaint Review Bd.*, 183 AD3d 512, 513 [1st Dept 2020].) "After investigating the complaint, the CCRB determines whether the complaint is substantiated and, if so, it submits findings and disciplinary recommendations to NYPD's Commissioner." (*Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 17 [1st Dept 2017].)

Civil Service Law § 75(4) provides that: "no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges or, in the case of a state employee who is designated managerial or confidential under article fourteen of this chapter, more than one year after the occurrence of the alleged incompetency or misconduct complained of and described in the charges, provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime."

According to 38-A RCNY § 1-15, in circumstances where a complaint filed with CCRB after the 18-month statute of limitations set forth in Civil Service Law § 75(4) has expired, the Chair, in consultation with the Executive Director, will determine whether to investigate the complaint using the following criteria:

> "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." (38-A RCNY § 1-15[c].)

Here, upon a review of the relevant statutes and case law, the petition is denied and is hereby dismissed. Petitioner does not dispute that this application is, in essence, a writ of prohibition. However, insofar as petitioner has failed to exhaust all of his administrative remedies prior to commencing this Article 78 proceeding and, inasmuch as "relief in the nature of prohibition is not available to [a] petitioner . . . [where] [h]e [or she] has 'an adequate remedy in his [or her] right to institute an [A]rticle 78 proceeding following a final agency determination'" (*Doe v Axelrod*, 71 NY2d 484, 490 [1988], quoting *Matter of Rainka v Whalen*. 73 AD2d 731, 732 [3d Dep't 1979], *aff'd*. 51 NY2d 973 [1980]; see also *Martinez 2001 v NY City Campaign Fin. Bd.*, 36 AD3d 544, 549 [1st Dept 2007]; *Beecher v Brown*, 192 AD2d 495, 495 [1st Dept 1993]), the petition is denied and dismissed as premature.

A recent decision rendered by this court, *Mateo et al v New York City Civilian Complaint Rev. Bd. et al.*, Supreme Court, New York County, 151225/2021(Love, J.), involving comparable facts to the case at bar, is instructive. In *Mateo*, the petitioner raised similar challenges regarding CCRB's decision to investigate an incident that resulted in the shooting of Mohamed Bah, eight years after the incident. Although the incident was previously investigated by the NYPD's Firearms Discharge Review Board and Patrol Borough Manhattan North Investigations Unit, the United States Department of Justice, and the United States Attorney's Office for the Southern District of New York, the court reasoned that the petitioner's claims, including arguments regarding respondents' decision to accept and investigate a late complaint, could be appropriately raised in the administrative proceedings. The court in *Mateo* also rejected similar arguments raised by petitioner here that CCRB has an affirmative obligation to provide petitioner, at this stage, a detailed explanation of the factors under 38-A RCNY § 1-15(c) that were considered in its determination to accept and investigate the late complaint. (NYSCEF Doc. No. 25, *Mateo v CCRB decision and order*).

While this court acknowledges petitioner's acquittal by a jury of second-degree murder, this court cannot ascertain, on this limited record, whether said acquittal establishes a "clear right" preventing respondents from proceeding with its investigation and prosecution as to assault in the second degree and the patrol guide. (*City Council of Watertown v Carbone*, 54 AD2d 461, 467 [4th Dept 1976] ["acquittal cannot be conclusive against a determination of guilt on . . . disciplinary charges"].) Moreover, to the extent petitioner asserts the same alleged criminal conduct underlying the charge for assault in the second degree was subject to the criminal trial and determined on the merits to be lawful (see generally *Bologna v Civilian Complaint Review Bd. of the City of NY*, 2013 NY Slip Op 32996[U], *6 [Sup Ct, NY County 2013], this court notes that nothing prevents petitioner from raising said challenges in the administrative proceedings.

Moreover, it is not lost on the court petitioner's contention that CCRB is limited to the recent decision rendered by the Appellate Division, First Department in *Matter of Lynch v New York City Civilian Review Board*, 183 AD3d 512, 514-515 (1st Dept 2020), wherein the Court stated:

> "Rule 1-15(a) merely authorizes the CCRB to *investigate* a complaint. It does not authorize the commencement of any removal or disciplinary proceedings after the 18-month statute of limitations has expired, which is precisely what is barred by CSL 75(4).

Further, after an investigation, *the CCRB can make recommendations short of removal and disciplinary proceedings, such as instructions or training for the offending officer, which would not implicate CSL 75(4)'s statute of limitations*. Additionally, if the CCRB determines that the misconduct complained of rose to the level of criminal conduct, which is outside of the CCRB's jurisdiction, the CCRB can refer the matter to the appropriate agency for action, which also does not violate CSL 75(4). Moreover, these actions comport with the CCRB's mandate to investigate and 'make findings and recommend action.' Contrary to the dissent's contention, the legislature, in enacting CSL 75(4), could have barred an agency from investigating all complaints and making any recommendation whatsoever after the expiration of the 18-month statute of limitations. However, it did not do so and instead, chose only to bar the commencement of removal or disciplinary proceedings after the expiration of the statute of limitations." (emphasis added).

Lynch, however, does not obviate a different result. Following the rationale in *Mateo*, CCRB's authority as applied to the facts — in this case, its authority to recommend charges and specifications — is among the many subjects that petitioner may raise during his administrative proceedings. All remaining arguments not addressed herein have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that the petition is denied in its entirety and it is hereby dismissed; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondents shall serve a copy of this decision and order, with notice of entry, upon petitioner.

This constitutes the decision and order of this court.

January 24, 2022

HON. VERNA L. SAUNDERS, JSC.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**