

Vucinaj v City of New York

2022 NY Slip Op 33658(U)

October 24, 2022

Supreme Court, New York County

Docket Number: Index No. 151537/2022

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

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INDEX NO. 151537/2022

MARASH VUCINAJ,

MOTION DATE 08/30/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, KEECHANT L. SEWELL,
JOSHUA KLEIMAN

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 13, 29, 37, 38, 39, 40

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

Upon the foregoing documents, it is

The following Second Amended Petition “requests that the Court annul Respondents’ October 14, 2021 Decision [see NYSCEF Doc. No. 24] which forfeited eight (8) vacation days from Petitioner after he was found guilty of three (3) out of the ten (10) allegations by Executive Agency Counsel Joshua Kleiman who was improperly acting as the Hearing Officer for Petitioner’s [New York Police Department] Disciplinary Trial. In the alternative, Petitioner requests that the Court remand the matter to the [New York Police Department] and Order the [New York Police Department] to hold a new Department Trial where Petitioner’s (sic) and direct that the [New York Police Department] consider and determine the merits of Petitioner’s defense of retaliation, and that the new Department Trial be presided over by either the [New York Police Department]’s Deputy Commissioner of Trials or its Assistant Deputy Commissioner of Trials, as the law requires” (see NYSCEF Doc. No. 14 P. 39).

Respondents answer affirms, “[o]n June 28, 2021, Petitioner appeared at a Department Trial held before Assistant Deputy Commissioner of Trials, Joshua Kleiman. Commissioner Kleiman found Petitioner guilty on three instances of failing to timely report allegations of misconduct” (see NYSCEF Doc. No. 30 Pars. 133, 140).

Respondents memorandum argues:

“Petitioner contends that the disciplinary process was arbitrary and capricious because: (1) that the Hearing Officer, Assistant Deputy Commissioner of Trials Joshua Kleiman, did not have the authority to exercise jurisdiction over Petitioner’s Department Trial; (2) that Commissioner Kleiman did not consider Petitioner’s retaliation defense in violation of Civil Service Law Section 75 – b; (3) that Petitioner had already been reprimanded for two (2) out of the three (3) specifications of which Petitioner was found guilty through Letters of Instruction; and finally (4) that two (2) of the three (3) specifications for which Petitioner was found guilty were outside the 18 month statute of limitations.

Petitioner’s arguments fail because: (1) the Hearing Officer, Joshua Kleiman, was appointed Assistant Deputy Commissioner of Trials on September 8, 2020, prior to this disciplinary action; (2) it is entirely baseless to suggest that Petitioner’s retaliation defense was not considered as Commissioner Kleiman discussed it himself during the Department Trial and gave Petitioner’s counsel significant leeway in exploring that defense; (3) Petitioner did not introduce that Commissioner Kleiman was not authorized to be the Hearing Officer nor that he had already been issued Letters of Instruction at his Disciplinary Hearing and therefore it is outside the scope of an Article 78 hearing; and (4) the reports made to [Internal Affairs Bureau] were within 18 months statute of limitations for commencing disciplinary action” (see NYSCEF Doc. No. 31 Ps. 2 – 3).

“The Court may not upset the agency’s determination in the absence of a finding ... that the determination had no rational basis” (see *Mid – State Mgmt. Corp. v. New York City Conciliation and Appeals Bd.*, 112 A.D.2d 72 [1st Dept. 1985]).

Petitioner’s Reply states, “the Hearing Officer was mandated by law to consider and determine the merits of Petitioner’s defense of retaliation (CVS § 75 – b[3][a]), however, the

Hearing Officer failed to do so, which requires that this Court annul the [New York Police Department] Decision. Further, ... the Hearing Officer was never appointed as the [New York Police Department]'s Assistant Deputy Commissioner of Trials, but was only an [New York Police Department] Executive Agency Counsel, who under the law (see 38 RCNY 15 – 01, and NYC Administrative Code 14 – 115) cannot serve as a Hearing Officer in the Disciplinary Trial of a New York City Police Officer” (see NYSCEF Doc. No. 38 P. 2).

“Commissioner Kleiman allowed Petitioner repeatedly to testify about retaliation against him and his basis for it. [Commissioner Kleiman] further allowed Petitioner’s counsel to question on ‘the 10 instances set forth in the Bill of Particulars,’ meaning the 10 specific instances on which the charges were based” (see NYSCEF Doc. No. 31 P. 7).

Respondents submit the Hearing Transcript (see NSYCEF Doc. No. 34).

“Kleiman was appointed Assistant Deputy Commissioner of Trials on September 8, 2020. As Petitioner correctly argues, the Assistant Deputy Commissioner of Trials is authorized to preside over disciplinary trials and issue reports and recommendations. In any event, this is the first instance that Petitioner is bring this issue to the Court’s attention. It was not brought up to Commissioner Kleiman himself at the Disciplinary Hearing, nor was there any objection to Commissioner Kleiman as Hearing Officer” (see NYSCEF Doc. No. 31 P. 6).

“To authorize a Petitioner to raise these issues for the first time in an Article 78 proceeding, as the Authority urges, would deprive the administrative agency of the opportunity ‘to prepare a record reflective of its expertise and judgment’” (see *Yarbough v. Franco*, 95 NY2d 342 [2000]).

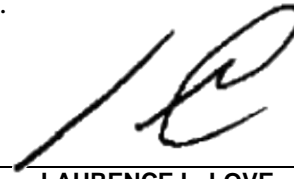
A review of the “Charges and Specifications” (see NYSCEF Doc. No. 24), the Hearing Transcript (see NYSCEF Doc. No. 34) show that Commissioner Kleiman had authority to

preside over said Hearing and a rational basis for his or her decision can be found based upon the facts, circumstances, and application of law.

ORDERED that the Petition is DENIED in its entirety.

10/24/2022

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