

Matter of Collins v New York State Div. of State Police
2024 NY Slip Op 35409(U)
March 18, 2024
Supreme Court, Albany County
Docket Number: Index No. 909786-23
Judge: Peter A. Lynch
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

CHRISTOPHER E. COLLINS,

Petitioner,

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

DECISION
And ORDER
Index No. 909786-23
(Lynch, J.)

-against-

NEW YORK STATE DIVISION OF STATE
POLICE and the NEW YORK STATE DIVISION
OF CRIMINAL JUSTICE SERVICES,¹

Respondents.

INTRODUCTION

This is an article 78 proceeding, in which Petitioner seeks reinstatement of his New York State Police Officer Basic Training Certificate, issued on June 12, 2023, but rescinded on July 17, 2023.

By Decision and Order dated February 2, 2024, incorporated herein and made a part hereof by reference, this Court denied Respondent's motion to dismiss the proceeding.²

Respondent moved to reargue the motion to dismiss.³

¹ Hereinafter referred to as NYSP and DCJS.

² NYSCEF Doc No. 31.

³ NYSCEF Doc No.33.

SINGLE-MOTION RULE

Petitioner claims that subject motion is barred by the single-motion rule. I think not!

First, in the Notice of Motion, Respondent cites only CPLR § 403 (b) and R 3211 (8), which speaks to personal jurisdiction.⁴ Yet, in the Memo of Law, Respondent states:

“It is respectfully submitted that the Court should grant Respondents’ Motion to Dismiss the Verified Petition in its entirety based upon Petitioner’s **failure to exhaust his administrative remedies** (see CPLR 3211 [a] [2], [7]; 7804 [f]).”⁵ (Emphasis added)

Despite the single reference to failure to exhaust administrative remedies, there is a reference to failure to state a cause of action under CPLR 3211 (a) (7). A mixed bag!

CPLR R 3211 (e) provides, inter alia:

(e) Number, Time and Waiver of Objections; Motion to Plead Over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) of this rule, **and no more than one such motion shall be permitted.** (Emphasis added)

(See also, Oakley v County of Nassau, 127 A.D.3d 946, 946-947[2d Dept. 2015], where the Court held,

Contrary to the Supreme Court’s determination, **the defendant was barred by the single-motion rule from making a second.** The purpose of the single-motion rule is not only to prevent delay before answer, but also to protect the pleader from being harassed by repeated CPLR 3211 (a) motions and to conserve judicial resources. **The defendant provided no reason for not including CPLR 3211 (a) (7) as an alternative basis for relief in its prior motion.** Even though the defendant may not raise the defense of failure to state a cause of action in another CPLR 3211 (a) motion, it may be later raised in another form, such as a summary judgment motion pursuant to CPLR 3212.”) (Internal quotations and citations omitted; emphasis added)

⁴ NYSCEF Doc. No. 22 – Notice of Motion.

⁵ NYSCEF Doc. No. 23 – Memo of Law p. 3.

Contrary to Petitioner's claim, the instant re-argument motion speaks to the issues broadly raised in the first motion and does not constitute a second CPLR R 3211 motion on different grounds.

MOTION TO REARGUE

CPLR R 2221 (D) provides:

(d) A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or **law allegedly overlooked or misapprehended** by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals. (Emphasis added)

A motion to reargue is directed to the discretion of the Court. (See Mayer v. National Arts Club, 192 A.D.2d 863, 865 [3d Dept. 1993], where the Court held,

“A motion for leave to reargue pursuant to CPLR 2221 is addressed to the **sound discretion of the court** and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision. **The motion is not designed to afford an unsuccessful party successive opportunity to reargue issues previously decided** or to present arguments different from those originally asserted.”) (Emphasis added; internal citations omitted)

In this Court's view, there was inconsistency in the record which justifies the re-argument motion, i.e., the effective date that the necessity of pending disciplinary charges was eliminated to establish removal for cause.

Respondent claims,

“...the Court **misapprehended the law** when it found that a disciplinary proceeding is necessary to substantiate removal for cause under the relevant regulation.”⁶ (Emphasis added)

Not quite! This Court cited the inconsistency in Respondent’s papers relative to the effective date of the amendment of 9 NYCRR § 6056.2 applicable to the challenged resignation, as either November 2, 2022, or October 16, 2021. As noted, “This issue needs to be addressed once the issue is fully joined.”⁷ Respondent has done so.

As of Petitioner’s resignation on October 28, 2022, the record established there was some type of pending investigation, but no disciplinary charges were filed. Based on the amendment to 9 NYCRR § 6056.2 effective October 16, 2021, resignation in the face of an investigation of misconduct, even in the absence of pending disciplinary charges, constitutes a rational basis to find removal for cause pursuant to 9 NYCRR Part 6056.2(h)(2)(b). Thus, the pendency of disciplinary charges was no longer required to establish removal for cause as of October 28, 2022. That does not, however, end the inquiry. To the contrary, it necessitates a determination of the nature of any pending investigation.

Removal for cause based on Petitioner’s resignation exists only if misconduct as defined in 9 NYCRR § 6056.2 (h) (1) was known or should have been known or was being investigated, to wit:

(h) Removal for cause of a full-time or part-time police officer or peace officer means when an officer has an **interruption in service** as defined in paragraph (2) of this subdivision subsequent to and in connection with **allegations of misconduct as defined in paragraph (1) of this subdivision** which are known or should be

⁶ NYSCEF Doc. No. 34 – Memo of Law p. 1.

⁷ NYSCEF Doc No. 31 – Decision and Order dated February 2, 2024, fn. 26.

known to the employer or any officer or employee of the employer agency or is being investigated by another agency or entity.

(1) Misconduct, includes:

(a) Criminal activity, whether criminally charged or prosecuted, regardless of where the act took place if said conduct would constitute an offense in New York, which is defined as:

- (i)** Any felony offense;
- (ii)** Any sex offense or sexually violent offense as defined in article 6-C of the Correction Law;
- (iii)** All serious offenses as defined in subdivision 17 of section 265 of the Penal Law;
- (iv)** Crimes involving official misconduct and obstruction of public servants as defined in article 195 of the Penal Law; crimes involving bribery of a public servant as defined in article 200 of the Penal Law; crimes involving perjury as defined in article 210 of the Penal Law; offenses relating to judicial proceedings as defined in article 215 of the Penal Law;
- (v)** Crimes involving forgery as defined in article 170 of the Penal Law; crimes involving false written statements as defined in article 175 of the Penal Law; crimes involving fraud as defined in article 190 of the Penal Law; or
- (vi)** Crimes involving assault and menacing as defined in article 120 of the Penal Law; crimes involving obscenity as defined in article 235 of the Penal Law; crimes against public sensibilities as defined in article 245 of the Penal Law.

(b) Dishonesty which is defined as:

- (i)** False statements or conduct that subverts or attempts to subvert the:
 - (A)** Employment application process; or
 - (B)** State certification process defined in General Municipal Law section 209-q.
- (ii)** Conduct involving dishonesty, fraud, deceit, or misrepresentation.

(c) Use of excessive force which is defined as:

- (i)** Force which violates the use of force policy required under Executive Law section 840(4)(d)(3).

(d) Abuse which is defined as:

- (i)** Inappropriate conduct of a sexual nature, civil or criminal, regardless of adjudication;
- (ii)** Engaging in sexual conduct while on duty; or

(iii) Engaging in sexual conduct with someone detained or in the custody or control or under the supervision of a police or peace officer.

(e) **Conflicts of interest** which is defined as:

(i) Acts constituting gross negligence: where the police or peace officer's act or failure to act creates a danger or risk to persons, property, or to the efficient operation of the department, recognizable as a gross deviation from the standard of care that a reasonable police or peace officer would observe in a similar circumstance; and

(ii) Acts constituting gross misconduct: in determining what constitutes incompetence or gross misconduct, the department may take into account practices generally followed in the profession, current teaching at public safety training facilities, and technical reports and literature relevant to the field of law enforcement.

(2) **Interruption from service includes separation:**

(a) pursuant to:...

(b) by an employee's **resignation** or retirement... (Emphasis added)

Thus, once issue is joined, a merits determination will be made as to whether the record supports a determination of removal for cause or not.

Respondent's motion to dismiss the Petition is denied.

CONCLUSION

For the reasons more fully stated above, Respondent's motion to reargue and to dismiss the Petition is denied, and it is further,

ORDERED, ADJUDGED, AND DECREED, that Respondent's time to file an Answer and certified transcript of the record is extended in accord with the schedule listed below in accord with CPLR § 7804 (f), and it is further,

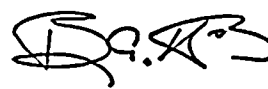
ORDERED, ADJUDGED, AND DECREED, that the following schedule is established for the filing of papers, to wit:

1. Respondent shall file and serve its Answer and certified record on or before April 5, 2024; and
2. Petitioner shall file and serve his Reply papers on or before April 19, 2024; and
3. The return date for this Article 78 Proceeding is April 22, 2024.

This memorandum constitutes the decision and order of the Court.⁸

Dated: Albany, New York
March 18, 2024


PETER A. LYNCH, J.S.C.



PAPERS CONSIDERED:

03/18/2024

All e-filed Pleadings and exhibits.

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⁸ Compliance with CPLR R 2220 is required.