Matter of Linpeng Gao v Caban
2025 NY Slip Op 30870(U)
March 18, 2025
Supreme Court, New York County
Docket Number: Index No. 157935/2024
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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IN THE MATTER OF THE APPLICATION OF POLICE OFFICER LINPENG GAO,

Petitioner,

- v -

EDWARD CABAN AS NEW YORK CITY'S POLICE COMMISSIONER, NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY

Respondent.

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INDEX NO. 157935/2024

MOTION DATE 08/28/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 7, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24

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

Upon the foregoing documents, the petition is denied.

Background

In October 2021, Linpeng Gao ("Petitioner") was appointed to the position of police officer with the NYPD (along with New York City and Edward Caban in his position as NYPD Commissioner, "Respondents"). This position is subject to a two-year probationary period. In July of 2023, a domestic violence report was made against Petitioner. The incident was referred to the Internal Affairs Bureau, who in September 2023 requested that the Petitioner's probation be extended for six months while they completed the investigation. On October 17, 2023, NYPD made a written request to the city's Department of Citywide Administrative Services ("DCAS") seeking approval to extend the probation. Petitioner was notified of the extension, informed that it was because of a disciplinary matter, and signed the notification. DCAS approved the extension in November. During Internal Affairs' investigation, there were charges for allegations

of computer misuse, abuse of department regulations, failure to list location during an absence, and that Petitioner placed a license plate registered to another vehicle on a van he owned. There was a hearing in January of 2024 where Petitioner admitted to all of the allegations against him. On May 10, Internal Affairs recommended that Petitioner be terminated, which he was on May 14, 2024. According to the signature on the notice of termination, Petitioner was notified of the termination on May 17, 2024.

On May 13, 2024, Petitioner was on patrol with his partner when they saw an illegally parked vehicle with an NYC employee identification card inside. Petitioner alleges that as they were issuing a parking summons, the apparent owner of the vehicle approached them and told them that she works for the government and that he was going to lose his job. Then, on May 28, an article reporting on Petitioner's termination appeared in the foreign language online publication China Press. Petitioner provided a Google Translate copy in English, and attests that he is fluent in "Chinese" and the translation is accurate. According to the provided translation, the article claims that "[i]t is reported that the reason for [Petitioner's] dismissal was suspected of improper money transactions." Petitioner filed this timely Article 78 petition, seeking reinstatement with back pay and benefits, as well as several other forms of relief in the alternative. Respondents have answered and oppose the petition.

Standard of Review

A party may bring an Article 78 petition to challenge the final determination of an administrative agency. CPLR § 7801(1). A court must give great deference to the agency's decision and cannot "interfere unless there is no rational basis for the exercise of discretion, or the action complained of is arbitrary and capricious." *Pell v. Board of Education,* 34 N.Y.2d 222, 231 (1974). Judicial review is also available if the agency's determination was "contrary to law

or procedure." *Barrett Japaning, Inc. v. Bialobroda*, 190 A.D.3d 544, 545 (1st Dept. 2021). An action is irrational or arbitrary and capricious if "it is taken without sound basis in reason or regard to the facts." *Matter of A.Z. v. City Univ. of N.Y., Hunter Coll.*, 197 A.D.3d 1027, 1027 (1st Dept. 2021).

Discussion

Petitioner's main argument is that that his probationary extension was improper and therefore he was entitled to the termination procedure protections of a permanent employee. Petitioner also argues that the termination was made in bad faith, pointing to the close temporal proximity of the alleged threats made by an unidentified city employee and his termination. Finally, Petitioner requests a name-clearing hearing and alleges that the China Press article's allegations regarding his termination must have been disseminated by the NYPD. For the reasons that follow, the petition is denied in its entirety.

Petitioner's Probationary Extension Was Valid

55 RCNY Appendix A ¶ 5.2.8(a) states that "upon the written request of the agency head setting forth the reasons therefor and with the written consent of the probationer, the commissioner of citywide administrative services may authorize the extension of the probationary term." Petitioner had made a FOIL request for the written request regarding his probationary extension to DCAS. They informed Petitioner's counsel that they were not able to find the letter. This failure to provide the written request from the agency head, Petitioner argues, means that his probationary extension was not valid, and therefore he was a permanent employee at the time of termination.

Respondents had previously moved to dismiss the petition based on documentary evidence, but this Court denied that motion (because Respondents had not yet been able to locate

the written request from the NYPD to DCAS) and extended the time for Respondents to answer. When Respondents answered, included in the attached exhibits were the NYPD letter to DCAS requesting an extension of Petitioner's probation "due to a disciplinary issue", along with original Internal Affairs memo requesting the extension due to their ongoing investigation, the DCAS approval of the extension, and notification of extension signed by Petitioner. The probation extension was validly made pursuant to the Rules of the City of New York, and therefore at the time of termination Petitioner was a probationary employee.

Petitioner Has Not Established That the Termination Was Made in Bad Faith

A "probationary police officer may be discharged for almost any reason, or for no reason at all as long as it is not in bad faith or for an improper or impermissible reason." *Matter of Duncan v. Kelly*, 9 N.Y.3d 1024, 1025 (2008). Dismissal of a probationary employee does not require a hearing. *Matter of Rodriguez v. Sewell*, 221 A.D.3d 550, 550 (1st Dept. 2023). Petitioner argues that the close temporal proximity between the altercation with the unidentified city employee and his termination indicates that the termination was made in bad faith. A casual connection between a protected activity and an adverse action can operate to indirectly establish proof for a retaliation claim. *Herskowitz v. State of New York*, 222 A.D.3d 587, 588 (1st Dept. 2023). But when protesting the termination of a probationary employee, a petitioner must be able to "demonstrate, by competent proof, that a substantial issue of bad faith exists." *Rodriguez*, at 551; *see also Matter of Duncan v. Kelly*, 43 A.D.3d 297, 298 (1st Dept. 2007)(holding that petitioner failed to meet burden of showing bad faith when misconduct "provided ample basis for his termination").

Here, Petitioner fails to establish a bad faith motivation for his termination. His disciplinary issues, as in *Duncan*, provide a valid basis for his termination. The recommendation

for termination from the Internal Affairs Bureau predates the incident with the city employee. Furthermore, his claim of retaliation instigated by an unidentified city employee is speculative, which fails to overcome the valid basis for termination for misconduct. *See Matter of Verma v. Department of Educ. of the City of N.Y.*, 192 A.D.3dd 616, 616 (1st Dept. 2021). There was a rational basis for terminating Petitioner, and he has not submitted sufficient evidence to show bad faith.

Petitioner Has Not Shown Entitlement to a Name-Clearing Hearing

Alternatively, Petitioner argues that he is entitled to a name-clearing hearing to expunge potentially damaging material from his personnel file. The "sole purpose of a name-clearing hearing is to afford the employee an opportunity to prove that the stigmatizing material in the personnel file is false." *Matter of Johnson v. Kelly*, 35 A.D.3d 297, 298 (1st Dept. 2006). A hearing can also be a remedy when "an employee is terminated along with a contemporaneous public announcement of stigmatizing factors." *Aquilone v. City of New York*, 262 A.D.2d 13, 13 (1st Dept. 1999). Here, Petitioner does not allege that material contained in his personnel file is false, but that the NYPD "must have" disseminated false and stigmatizing material to the China Press organization.

In *Johnson*, the First Department held that the granting of a hearing was improper where the petitioner had not demonstrated that material contained in his file was stigmatizing, did not deny the truth of the factual assertions that formed the basis for termination, and instead "denied facts that were not stated in the report, or denied statements in the report that were, at most, tangential to the central issues." *Johnson*, at 298. Here, Petitioner provides a single, Google-translated article from an online publication that does not cite to any source for the allegations of financial impropriety as his sole proof that the NYPD is disseminating stigmatizing material

about him. The article in question even states that the DCPI "confirmed to reporters that the officer had been terminated, but did not disclose the reason." There is no evidence of public dissemination of stigmatizing material by the NYPD here. Ultimately, Petitioner has nothing but speculation to offer in support of a name-clearing hearing and has failed to show that one is necessary. Accordingly, it is hereby

ADJUDGED that the petition is denied in its entirety.

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3/18/2025
DATE

LYLE E. FRANK, J.S.C.

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**