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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

PRESENT:

PART 5

Index Number : 105486/2011

PALLESCHI, MICHAEL

vs

CASSANO, SALVATORE

Sequence Number : 001

ARTICLE 78

INDEX NO. 105486/11

MOTION DATE 9/13/11

MOTION SEQ. NO. 001

CAL # 8

or vacate/arbitration award

	No(s). 1
Answering Affidavits — Exhibits	No(s). 2
Replying Affidavits	No(s).

Upon the foregoing papers, it is ordered that this motion is

FILED

DEC 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/1/11

DEC 01 2011

BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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In the Matter of the Application of
MICHAEL PALLESCHI,

Petitioner,

Index No. 105486/11

Motion Date: 9/13/11
Motion Seq. No.: 001
Calendar No.: 80

DECISION & JUDGMENT

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

-against-

SALVATORE CASSANO, Commissioner of the New York City Fire Department and the NEW YORK CITY FIRE DEPARTMENT,

Respondents.

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BARBARA JAFFE, JSC:

For petitioner:
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For respondents:
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By notice of motion dated May 9, 2011, petitioner brings this Article 78 proceeding seeking an order annulling respondents' decision to terminate his employment or, in the alternative, transferring the matter to the Appellate Division on the ground that the decision was not supported by substantial evidence. Respondents assert affirmative defenses and also request transfer to the Appellate Division.

I. BACKGROUND

In 1998, petitioner was appointed by respondent New York City Fire Department (FDNY) as an emergency medical technician, and in 1999, was promoted to paramedic. (Pet., Exh. A). In 2008, he was promoted to lieutenant. (*Id.*).

On April 8, 2010, at 4:07 a.m., when petitioner was on duty, an individual called 9-1-1 seeking emergency medical attention. (*Id.*). Details of the call appeared on the mobile data terminal in petitioner's vehicle, including the caller's address and telephone number and the nature of her emergency, "vaginal swelling [and] . . . burning." (Ans., Exhs. 3, 5D). Using his mobile telephone, petitioner photographed the terminal's display and unsuccessfully attempted to exclude the caller's address and number. (*Id.*, Exhs. 3, 5D). He then posted the photograph on his Facebook page such that his 460 Facebook friends could see it, noting that "[he] [c]an't make this up." (*Id.*, Exhs. 3, 5E).

On April 27, 2010, the FDNY preferred disciplinary charges against petitioner, specifying, in pertinent part, as follows:

> On or about 4/8/10, Lieutenant Michael P. Palleschi, Station 39, violated the Fire Department's EMS Operating Guide Procedure Number 101-01 Section 4.2.1 when he used confidential and privileged information concerning a patient suffering from a gynecological emergency to amuse members of an online social forum. . . . The member photographed a mobile data terminal displaying this privileged information, which included responding member[s'] names and shield numbers, medical information, call location, and callback number of a patient and posted the photograph on the external online social forum.

(*Id.*, Exh. 1).

On May 10, 2010, pursuant to the collective bargaining agreement between the FDNY and petitioner's union, a Step I disciplinary hearing was held. (*Id.*, Exh. 2). On June 14, 2010,

the hearing officer issued his decision, determining that the FDNY proved all of the charges by a preponderance of the evidence and recommending the following penalty: a 60-day pay fine, reassignment to another division, 18 months of "Tour II" deployment, confidentiality training, restriction from patient care until completion of same, and 24 months of probation. (*Id.*).

Petitioner appealed this decision, and on October 12, 2010, a hearing was held before an administrative law judge. (*Id.*, Exh. 3). Petitioner testified on his own behalf, admitting that he had photographed the display and posted it on Facebook, that it contained confidential information, and that he was prohibited from disclosing such information but claiming that he attempted to exclude the confidential information from the photograph. (*Id.*). He also offered into evidence his counseling records from 2004 to the date of the hearing, claiming that health problems had contributed to his conduct. (*Id.*, Exhs. 3, 4).

On December 20, 2010, the administrative law judge issued her report and recommendation, sustaining all of the charges and recommending that petitioner be terminated. (*Id.*, Exh. 4). She found based on petitioner's admission that he had impermissibly disclosed confidential patient information by posting the photograph on Facebook, and in describing his conduct, noted that:

> [o]ther inane and smutty material denigrating women and full of sexual innuendo was included in the messages [petitioner] exchanged with his friends in the weeks leading up to this incident. . . . I am not considering these earlier, silly Facebook entries as misconduct, as [petitioner] was not charged for posting these, but mention them simply to show how reckless he was in his public postings on the web.

(*Id.*).

Although the administrative law judge acknowledged that petitioner had expressed remorse for his actions and had a satisfactory work history, she determined that termination is an

appropriate penalty given "his position as a role model," his awareness that what he was doing was wrong, and the egregiousness of his conduct. (*Id.*). She also noted that his counseling records disclosed no diagnosis that could have caused petitioner to act as he did. (*Id.*).

By letter dated December 30, 2010, the Assistant Commissioner of the FDNY informed petitioner that the administrative law judge had issued her report and recommendation, annexing a copy of it thereto, and that he had until January 7, 2011 to provide a statement regarding his penalty to the FDNY Commissioner. (*Id.*, Exh. 6). By letter dated January 13, 2011, petitioner claimed that termination was an inappropriate penalty in light of his employment history and lack of malice, and requested a less severe penalty. (*Id.*, Exh. 7).

By letter dated January 13, 2011, respondent Salvatore Cassano, Commissioner of the FDNY, informed petitioner that he concurred with the administrative law judge's report and recommendation and that his employment would be terminated effective January 21, 2011. (*Id.*, Exh. 8).

II. CONTENTIONS

Petitioner contends that the administrative law judge's decision is arbitrary and capricious and was affected by an error of law, as she improperly considered evidence outside of the record, petitioner's prior Facebook posts and his friends' comments thereon, and that the penalty of termination shocks one's sense of fairness. (Pet.). Alternatively, he claims that the evidence offered at the hearing was insufficient to support the administrative law judge's findings of guilt, and thus, that the matter should be transferred to the Appellate Division. (*Id.*).

Respondents claim that petitioner has failed to state a cause of action, denying that the decision was arbitrary or capricious and that termination is an excessive penalty. (Ans.). They

also assert that, as there exist issues of substantial evidence, the matter must be transferred to the Appellate Division. (*Id.*).

III. ANALYSIS

When an administrative determination is made following a hearing required by law, and a claim of substantial evidence 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[, and] [i]f the determination of the other objections does not terminate the proceeding," the matter must be transferred to the Appellate Division. (CPLR 7803[4], 7804[g]; Siegel, NY Prac § 568 [4th ed]). As respondents object to the petition on the ground that it fails to state a cause of action, it must first be addressed. (*See Matter of Burgess v Selsky,* 270 AD2d 736 [3d Dept 2000] [trial court erred in failing to consider motion to dismiss petition before transferring matter to Appellate Division]; *Matter of Spry v Delaware County*, 253 AD2d 178 [3d Dept 1999] [motion to dismiss for failure to state of cause of action considered objection that could terminate proceeding]).

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Posner v Lewis*, 80 AD3d 308 [1st Dept 2010]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Harris v IG Greenpoint Corp.*, 72 AD3d 608 [1st Dept 2010]).

Judicial review of an administrative agency's decision is limited to whether the decision

"was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR 7803[3]). The standard for reviewing a penalty imposed after an administrative hearing is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

Here, petitioner claims that the administrative law judge's decision is arbitrary and capricious and was affected by an error of law in that she improperly considered evidence outside of the record, and he maintains that his termination shocks one's sense of fairness. Accepting these allegations as true, and liberally construing the petition, petitioner has stated a cause of action pursuant to CPLR 7803(3).

Consequently, as my determination on respondents' motion to dismiss does not terminate the instant proceeding, and as the parties agree that there exist issues of substantial evidence, I may not consider the merits of the petition, and this matter must be transferred to the Appellate Division. (CPLR 7804[g]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that, pursuant to CPLR 7804(g), the application by petitioner seeking to annul a determination by respondents Salvatore Cassano, Commissioner of the New York City Fire Department, and the New York City Fire Department is respectfully transferred to the

Appellate Division, First Department, for disposition. This proceeding involves an issue as to whether a determination made after a hearing held pursuant to direction of law and at which evidence was taken is, on the entire record, supported by substantial evidence (CPLR 7803[4]); and it is further

ORDERED, that petitioner serve a copy of this order with notice of entry upon the County Clerk (Room 141B), who is directed to transfer the file to the Appellate Division, First Department.

ENTER:

Barbara Jaffe, JSC

DATED: December 1, 2011
New York, New York

DEC 0 1 2011

BARBARA JAFFE
J.S.C.

FILED

DEC 05 2011

NEW YORK
COUNTY CLERK'S OFFICE