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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 08-04388 CW

JAMES SELVITELLA,

Plaintiff and Petitioner,

v.

CITY OF SOUTH SAN FRANCISCO, et al.,

Defendants and Respondents.

ORDER GRANTING
DEFENDANTS AND
RESPONDENTS' MOTION
TO BIFURCATE THE
CLAIMS AND STAY
DISCOVERY ON THE 42
U.S.C. § 1983 CLAIMS

United States District Court
For the Northern District of California

Defendants and Respondents City of South San Francisco,
Personnel Board of the City of South San Francisco, South San
Francisco Fire Department, Barry M. Nagel, Marty Van Duyn and
Phillip White¹ move pursuant to Federal Rule of Civil Procedure
42(b) to bifurcate the claims in this lawsuit. Defendants ask the
Court first to rule on the petition for writ of mandate under
California Code of Civil Procedure § 1094.5, before considering the
second cause of action alleging civil rights violations under 42
U.S.C. § 1983. Defendants also move to stay all discovery until
the Court resolves the petition for writ of mandate. Plaintiff
James Selvitella opposes the motion. Having considered all of the
papers filed by the parties, the Court grants Defendants' motion.

BACKGROUND

Plaintiff James Selvitella had worked twenty-five years for
the South San Francisco Fire Department. At the time of his

¹Hereinafter, all Defendants and Respondents will be referred
to as "Defendants."

1 termination, he held the position of Battalion Chief. Before the
2 events leading to the present lawsuit, Plaintiff had never been
3 subject to official disciplinary action. After receiving
4 information from an unidentified firefighter that Plaintiff was
5 engaged in illegal gambling activities while on duty and had
6 facilitated the involvement of a subordinate firefighter, Devin
7 Flannery, in these illegal gambling activities, the City of South
8 San Francisco conducted an administrative and criminal
9 investigation into the matter.

10 On November 14, 2007, Defendant South San Francisco Fire Chief
11 Phillip White issued a notice of proposed discipline to Plaintiff
12 recommending that Plaintiff be terminated because he (1) engaged in
13 a substantial number of illegal gambling and bookmaking activities
14 while on duty, (2) encouraged and assisted subordinates to
15 participate in this illegal activity and (3) made untruthful
16 statements and in some instances refused to cooperate fully with
17 investigators.

18 White's notice was based on a South San Francisco Fire
19 Department internal investigation report prepared by Lieutenant Roy
20 Varney. According to the report, Devin Flannery stated that he was
21 involved in gambling with Plaintiff and that in the last two years
22 he had lost approximately \$30,000 to Plaintiff in sports gambling.
23 Plaintiff collected losses and paid winnings on Flannery's gambling
24 transactions. The report relied on information obtained in the
25 criminal investigation. For instance, the report listed as
26 evidence relied upon: copies of betting sheets obtained pursuant to
27 a search warrant; transcripts of the interrogation of Devin
28 Flannery on July 26, 2007 and Plaintiff on September 24, 2007; and

1 a "gambling/bookmaking ring" chart made by a police officer
2 assisting in the investigation.

3 In response to White's notice, Plaintiff requested a
4 Skelly hearing.² Assistant City Manager Martin Van Duyn conducted
5 the Skelly hearing on January 7, 2008. The City upheld the
6 proposed decision to terminate Plaintiff's employment. Plaintiff
7 appealed the decision to the City's Personnel Board. Prior to the
8 Personnel Board hearing, Plaintiff requested materials connected to
9 the criminal and administrative investigations into his gambling
10 activities. Specifically, Plaintiff sought the audio recordings
11 and transcripts from interviews related to those investigations.
12 The City produced approximately three hundred pages of documents,
13 but refused to produce documents relating to the ongoing criminal
14 investigation.

15 On the first day of the Personnel Board hearing, Plaintiff
16 moved the Personnel Board to compel the City to turn over the
17 following documents and materials: (1) all tapes, transcripts
18 and/or notes pertaining to investigative interviews of Devin
19 Flannery by all South San Francisco City agencies; (2) the complete
20 file pertaining to the investigation of Plaintiff, including
21 investigative documents, search warrant affidavits and statements;
22 and (3) the identity and statements of an "informant," who
23 initially disclosed the gambling to the Fire Chief. The Board
24 denied Plaintiff's motion and concluded that the information sought
25 was not relevant to the proceedings. The Board stated:

26
27 ²A Skelly hearing refers to a proceeding required under Skelly
28 v. State Personnel Bd, 15 Cal. 3d 194 (1975), and it occurs when a
public employee faces a potential deprivation of his or her
property interest as an employee.

1 There has been testimony that the City has produced all
2 materials relied on by the City in reaching the decision to
3 terminate Mr. Selvitella on the grounds stated. In City
4 Manager Nagel's Final Notice of Termination, Mr. Nagel wrote
5 that, "I conclude that your conduct of engaging in repeated
6 instances of gambling on duty and using City facilities to
7 gamble, standing alone, warrants your termination. I also
8 find that your conduct in encouraging, promoting and
9 facilitating gambling on duty by your subordinate, Devin
10 Flannery, standing alone, is sufficient grounds for your
11 termination." The information Mr. Selvitella seeks from the
12 criminal investigate conducted . . . is not relevant to this
13 Hearing.

14 AR 23-24. Plaintiff also filed a separate request under the
15 California Public Records Act, which was refused on the ground that
16 these documents were exempt from disclosure because they were part
17 of an ongoing criminal investigation.

18 The hearing before the Personnel Board lasted five days.
19 Ultimately, the Board voted unanimously to uphold the City's
20 decision to terminate Plaintiff's employment. The Board noted that
21 the termination was warranted based on Plaintiff's "acknowledged
22 repeated instances of illegal conduct while on duty." AR(2)-88.

23 Plaintiff's first cause of action in the present lawsuit is a
24 petition for a writ of mandate under California Code of Civil
25 Procedure § 1094.5, seeking to invalidate the Personnel Board's
26 decision to uphold his termination. The second cause of action is
27 brought under 42 U.S.C. § 1983 for deprivation of Plaintiff's
28 substantive and procedural due process rights. Plaintiff alleges
29 that Defendants denied him access to materials that provided the
30 foundation for adverse reports and testimony presented to the
31 Personnel Board. Plaintiff asserts that these documents would have
32 been "material to mitigation or a reduction of discipline." Compl.
33 ¶ 28.

34 Since the opening of discovery, Plaintiff has taken four

1 depositions, and served deposition subpoenas on five more
2 individuals. On the same date that Defendants filed the instant
3 motion, they notified Plaintiff that they would not produce any
4 other witnesses for depositions or respond to any further discovery
5 requests until this motion is decided. Defendants have also
6 refused to comply with Plaintiff's discovery request to produce
7 information related to the pending criminal investigation.
8 Discovery motions related to this case are currently pending before
9 Magistrate Judge Brazil.

10 DISCUSSION

11 Defendants move, pursuant to Federal Rule of Civil Procedure
12 42(b), to bifurcate the trial of Plaintiff's petition for a writ
13 under § 1094.5 from his § 1983 claims. Rule 42(b) provides, in
14 relevant part, "The court, in furtherance of convenience or to
15 avoid prejudice, or when separate trials will be conducive to
16 expedition and economy, may order a separate trial of any claim
17 . . ." Fed. R. Civ. P. 42(b). The bifurcation issue has
18 essentially already been addressed by the Court in its January 16,
19 2009 case management order. Plaintiff is to file by August 14,
20 2009 a brief regarding the writ of mandate and include his motion
21 for summary judgment on any other issue for which full discovery is
22 not required. Further, under § 1094.5(a), the Court will decide
23 the mandamus claim without a jury. Thus, the § 1094.5 claim will
24 be decided before any trial on the § 1983 claim. Accordingly, the
25 motion to bifurcate is granted to that extent.

26 The remaining issue before the Court is whether discovery on
27 the § 1983 claim should be stayed until the Court decides the
28 § 1094.5 claim. If the Court denies the writ petition and upholds

1 the Personnel Board's decision, Plaintiff's § 1983 claim may be
2 barred on the basis of collateral estoppel. "Pursuant to the
3 doctrine of issue preclusion, the judgment 'operates as an estoppel
4 or conclusive adjudication as to such issues in the second action
5 as were actually litigated and determined in the first action.'" Mata v. City of Los Angeles, 20 Cal. App. 4th 141, 149 (1993). In
6 the Ninth Circuit, state administrative adjudications of legal as
7 well as factual issues have preclusive effect in federal court as
8 long as the state proceeding satisfies the requirements of fairness
9 outlined in United States v. Utah Construction & Mining Co., 384
10 U.S. 394 (1966). Miller v. County of Santa Cruz, 39 F.3d 1030,
11 1032-33 (9th Cir. 1994). Those fairness requirements are "(1) that
12 the administrative agency act in a judicial capacity, (2) that the
13 agency resolve disputed issues of fact properly before it, and
14 (3) that the parties have an adequate opportunity to litigate."
15 Id. (citing Utah Construction, 384 U.S. at 422).

17 Here, Defendants assert that these requirements are met
18 because the Personnel Board acted in a judicial capacity when it
19 heard and adjudicated Plaintiff's appeal of his termination. The
20 Board conducted a five-day hearing, during which Plaintiff
21 subpoenaed, examined and cross-examined witnesses. Further, both
22 parties offered hundreds of pages of exhibits into evidence. At
23 this juncture, the Court will not decide whether the Utah
24 Construction requirements have been satisfied because the issue of
25 collateral estoppel is not presently before the Court. However,
26 the § 1094.5 claim may have a preclusive effect on the § 1983
27 claims.

28 Plaintiff's § 1983 claim that the Personnel Board violated his

1 procedural and substantive due process rights is likely duplicative
2 of his claim for relief under § 1094.5. The Court's inquiry on a
3 petition for a writ under § 1094.5

4 shall extend to the questions of whether the respondent has
5 proceeded without, or in excess of jurisdiction; whether
6 there was a fair trial; and whether there was any prejudicial
7 abuse of discretion. Abuse of discretion is established if
8 the respondent has not proceeded in the manner required by
9 law, the order or decision is not supported by the findings,
10 or the findings are not supported by the evidence.

11 Cal. Code Civ. Proc. § 1094.5(b). Plaintiff's § 1983 claim that he
12 was denied due process because the Personnel Board denied his
13 motion to compel involves the issue of whether he received a "fair
14 trial" and whether there was any "prejudicial abuse of discretion."
15 Moreover, the facts underlying Plaintiff's § 1983 claim that
16 Defendants terminated him as a form of retaliation, for complaining
17 about the manner in which Chief White promoted individuals, was
18 presented to the Personnel Board. Therefore, the Court's
19 resolution of the § 1094.5 claim may collaterally estop the § 1983
20 claim.

21 Plaintiff argues that he needs to conduct more discovery to
22 support his § 1094.5 claim. Although judicial review pursuant to
23 § 1094.5 is generally confined to the administrative record,

24 [w]here the court finds that there is relevant evidence that,
25 in the exercise of reasonable diligence, could not have been
26 produced or that was improperly excluded at the hearing before
27 respondent, it may enter judgment . . . remanding the case to
28 be reconsidered in the light of that evidence; or, in cases in
which the court is authorized by law to exercise its
independent judgment on the evidence, the court may admit the
evidence at the hearing on the writ without remanding the
case.

29 Cal. Code Civ. Proc. § 1094.5(e). This section "has been
30 interpreted to allow limited posthearing discovery provided the
31 moving party shows that such discovery is reasonably calculated to

1 lead to evidence admissible under section 1094.5." Pomona Valley
2 Hosp. Medical Ctr. V. Superior Court, 55 Cal. App. 4th 93, 102
3 (1997) (emphasis in original). "In an ordinary civil action,
4 discovery is not limited to questions which may lead to admissible
5 evidence, but includes inquiries relevant to the subject matter of
6 the action which may be helpful in preparation for trial. An
7 administrative mandamus action, on the other hand, reviews the
8 administrative record which should contain all evidence the parties
9 consider necessary to the resolution of contested issues." City of
10 Fairfield v. Superior Court of Solano, 14 Cal. 3d 768, 775 n.6
11 (1975) (internal citation omitted). Thus, discovery under
12 § 1094.5, "unlike general civil discovery, cannot be used to go on
13 a fishing expedition looking for unknown facts to support
14 speculative theories." Pomona Valley, 55 Cal. App. 4th at 102.

15 Plaintiff argues that he was denied a full and fair
16 administrative review of his termination because he was not allowed
17 to see evidence which he believes could have "resulted in
18 impeachment of the City's case against [him] or imposition of
19 discipline less severe than termination." Opposition at 16. This
20 evidence includes all documents that relate to the criminal
21 investigation of Plaintiff and Devin Flannery. However, Plaintiff
22 has not proffered any plausible theory as to what evidence could be
23 available that could exculpate him, especially in the light of his
24 own admissions. Nor does he hypothesize any manner in which this
25 additional evidence could support a theory that he did not receive
26 a "fair trial" in front of the Board or that the Board committed a
27 "prejudicial abuse of discretion." Cal. Code Civ. Proc.
28 § 1094.5(b). Neither has Plaintiff provided any other explanation

1 as to how this evidence could be relevant to his writ petition.
2 The Court cannot determine definitively whether Plaintiff must be
3 allowed to pursue discovery under the § 1094.5(e) exception until
4 it reviews the entire record in the context of the § 1094.5 claim.
5 Discovery outside of the administrative record may not be necessary
6 to determine whether the Court should issue the writ. Therefore,
7 in the interest of judicial economy and to defer costly and
8 possibly unnecessary discovery regarding the § 1983 claim, the
9 Court will stay discovery on the § 1983 claim and proceed with the
10 writ petition first.

11 As noted in the January 16, 2009 case management order,
12 Plaintiff must file by August 14, 2009 his brief regarding the writ
13 of mandate and include his motion for summary judgment on any other
14 issue that is ripe for determination at this time. Defendants'
15 opposition and any cross-motion (contained within a single brief)
16 will be due on September 11; Plaintiff's reply/opposition to the
17 cross motion will be due one week later; Defendants' reply to the
18 cross motion will be due one week thereafter. The Court will hear
19 the matter on October 8. Any other case dispositive motions shall
20 be noticed to be heard on December 10. A further case management
21 conference will be held on December 10 whether or not dispositive
22 motions are filed.

23 IT IS SO ORDERED.

24 Dated: 7/20/09



CLAUDIA WILKEN
United States District Judge

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