

**Matter of Rodriguez v County of Albany**

2013 NY Slip Op 32170(U)

September 16, 2013

Sup Ct, Albany County

Docket Number: 43882-13

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

GABRIEL G. RODRIGUEZ,

Petitioner,

-against-

**DECISION and ORDER**  
**INDEX NO. 4388-13**  
**RJI NO. 01-13-111003**

THE COUNTY OF ALBANY, THE ALBANY COUNTY  
SHERIFF'S OFFICE, and CRAIG D. APPLE, SR., in his  
official capacity as ALBANY COUNTY SHERIFF,

Respondents.

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Supreme Court Albany County All Purpose Term, September 6, 2013  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Petitioner commenced this CPLR Article 78 proceeding seeking an order "dismissing the Notice of Intent to Discipline and Notice of Charges, dated June 5, 2013" (hereinafter "June 2013 Notice"). He alleges that the June 2013 Notice is barred by the applicable statute of limitations

and by the related doctrines of res judicata, collateral estoppel, and law of the case. He also seeks a monetary award, to recover ten days of back pay. Respondents opposed the petition, without objecting to the type of proceeding commenced. Because, on this record, Petitioner demonstrated his entitlement to dismissal of the June 2013 Notice by operation of the res judicata doctrine, his petition is granted and he is awarded the back pay he seeks.

Before examining the current law and facts, a background explanation is necessary. It is uncontested that, on January 28, 2010, Petitioner surreptitiously recorded a meeting he attended with then Undersheriff Craig Apple. Such recording was allegedly distributed to others and the media, before Respondents discovered it. Because Petitioner received no authorization to record the meeting and then allegedly distributed it, he was charged with two counts of misconduct (hereinafter “2011 Charges”). As is relevant here, charge one alleged that Petitioner’s January 28, 2010 recording violated Albany County Sheriff’s Office General Order 29-SD-93(I)(KK).<sup>1</sup>

Petitioner challenged the 2011 Charges in a prior proceeding before this Court (hereinafter “2011 Litigation”). Petitioner alleged, in part, that the 2011 Charges were barred by Civil Service Law §75(4)’s 18 month statute of limitations. Respondents opposed the petition relying, in pertinent part, on Civil Service Law §75(4)’s “constitute a crime” exception to the statute of limitations. Applying such exception, this Court’s January 4, 2012 Decision and Order denied the petition to the extent it sought dismissal of Charge One. (Rodriguez v. County of Albany, 2012 NY Slip Op 30000[U] [Sup Ct, Albany County 2012]). The Appellate Division, however, modified and found “that [C]harge [O]ne is barred by the statute of limitations.”

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<sup>1</sup> Such General Order prohibits the use of a recording device without prior authorization. This charge will hereinafter be referred to as “Charge One.”

(Rodriguez v County of Albany, 105 AD3d 1124, 1125 [3d Dept 2013]). Importantly, in determining the applicability of the “constitute a crime” exception the Appellate Division specifically “refer[red] - by statutory directive - only to the allegations of misconduct ‘complained of and *described in the charges.*’” (Rodriguez v County of Albany, supra at 1126, quoting Civil Service Law §75[4][emphasis and quotation marks in original opinion]).

Turning now to the instant petition, Petitioner failed to demonstrate that the June 2013 Notice is barred by the statute of limitations.

The applicable statute of limitations states that “no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges... provided, however, that such limitation[] shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.” (Civil Service Law §75[4]). Moreover, as the Appellate Division made clear, the above statute of limitations exception “inquiry is limited to the allegations contained in the charges and specifications, without consideration of the proof or papers submitted in petitioner’s subsequent judicial proceeding (or at any ensuing disciplinary hearing) challenging the charges as untimely.” (Rodriguez v County of Albany, supra 1126).

Here, because of the above statute of limitation’s exception, the June 2013 Notice was timely served. Just as Petitioner’s January 28, 2010 surreptitious recording formed the basis of Charge One in the 2011 Litigation, it now underpins the challenged June 2013 Notice and thereby this proceeding. The underlying conduct is exactly the same, and occurred well beyond eighteen months from service of the June 2013 Notice. Changed, however, is the June 2013

Notice's description of the charge. It alleges that:

“On January 28, 2010 with intent to obtain a benefit, [Petitioner] committed an act relating to [his] office constituting an unauthorized exercise of [his] official functions knowing that such act was unauthorized, to wit: On January 28, 2010, in the course of [Petitioner's] duties as an Investigator with The Albany County Sheriff's Office, [Petitioner] attended a meeting held by Craig Apple, Undersheriff at that time. This meeting was attended by several other employees of the Sheriff's Office. With intent to benefit [him]self, [Petitioner] intentionally concealed a recording device on [his] person and recorded the contents of this meeting without authorization knowing that the recording was not authorized by the Sheriff or Undersheriff.”

Such description tracks closely the language of Penal Law §195.00(1), Official Misconduct, and sets forth all of its elements. (People v Feerick, 93 NY2d 433 [1999]; People v Lucarelli, 300 AD2d 1013 [4th Dept 2002]). Although stated in largely conclusory terms, the charge sufficiently apprises Petitioner of the allegations against him because, in light of the circumstances, it enables him to prepare a defense. (Matter of Block v Ambach, 73 NY2d 323 [1989]; Mangini v Christopher, 290 AD2d 740 [3d Dept 2002]). Referring “only to the allegations of misconduct complained of and described in the charges” (Rodriguez v County of Albany, supra at 1126, quoting Civil Service Law §75[4][emphasis and internal quotation marks omitted]), because the crime of Official Misconduct would be established if the June 2013 Notice's allegations were proved in court, Civil Service Law §75(4)'s 18 month statute of limitations does not apply.

Accordingly, that portion of the petition seeking dismissal of the June 2013 Notice on a statute of limitations theory is denied.

Turning next to Petitioner's res judicata, collateral estoppel, and law of the case theories, although his collateral estoppel and law of the case claims are unavailing he established his entitlement to dismissal of the June 2013 Notice due to the 2011 Litigation's res judicata effect.

First, the law of the case doctrine is wholly inapplicable. Such doctrine prohibits only “relitigating an issue decided in an ongoing action.” (Briggs v Chapman, 53 AD3d 900, 901 [3d Dept 2008], quoting Town of Massena v Healthcare Underwriters Mut. Ins. Co., 40 AD3d 1177, [3d Dept 2007][internal quotation marks omitted]). Here, it is uncontested that the 2011 Litigation is final. It concluded with the Appellate Division’s Memorandum and Order, dated April 4, 2013. This proceeding is simply not a continuation of such prior litigation. As such, no issues decided in the 2011 Litigation are being relitigated in an ongoing action, and the law of the case doctrine does not apply.

Similarly, collateral estoppel does not prohibit Respondents’ June 2013 Notice.

“Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity.” (Corporate Woods 11, LP v Bd. of Assessment Review of Town of Colonie, 83 AD3d 1250, 1251 [3d Dept 2011] lv to appeal denied, 17 NY3d 707 [2011], quoting Buechel v. Bain, 97 NY2d 295 [2001][quotation marks omitted]). “[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding.” (Parker v Blauvelt Volunteer Fire Co., Inc., 93 NY2d 343, 349 [1999], quoting Ryan v New York Tel. Co., 62 NY2d 494 [1984]).

Although the parties and facts underlying this proceeding and the 2011 Litigation are identical, Petitioner failed to demonstrate the identity and decisiveness of the statute of limitations issue in both proceedings. As the Appellate Division explained, the issue decided in the 2011 Litigation was premised on a statute of limitations analysis “limited to the allegations

contained in the [2011 C]harges.” (Rodriguez v County of Albany, supra 1126). Here, however, the 2011 Charges are relevant only for background. The new charge at issue, the June 2013 Notice, wholly modified Charge One’s description of the charge. Such change fundamentally alters the statute of limitations analysis, i.e. the decisive issue in the 2011 Litigation. Because the statute of limitations analysis necessarily depends on each charges’ description, and the current charge’s language is different from the 2011 Litigation’s Charge One, the issues in the two proceedings are not identical. As such, collateral estoppel does not apply.

Petitioner demonstrated, however, the applicability of the res judicata doctrine.

“Res judicata will bar litigation of a claim that was either raised, or could have been raised, in a prior [proceeding] provided that the party to be barred had a full and fair opportunity to litigate any cause of action arising out of the same transaction and the prior disposition was a final judgment on the merits.” (Feldman v Planning Bd. of Town of Rochester, 99 AD3d 1161, 1162-63 [3d Dept 2012], quoting Kinsman v Turetsky, 21 AD3d 1246 [3d Dept 2005]). As is specifically applicable here, “[t]he dismissal of a claim on the ground that the statute of limitations has run is a determination on the merits for res judicata purposes.” (Hae Sheng Wang v Pao-Mei Wang, 96 AD3d 1005 [2d Dept 2012]; Marinelli Assoc. v Helmsley- Noyes Co., Inc., 265 AD2d 1 [1st Dept 2000]; Daved Fire Sys. Inc. v New York City Health and Hospitals Corp., 46 AD3d 364 [1st Dept 2007]; Sosa v JP Morgan Chase Bank, 33 AD3d 609 [2d Dept 2006]; Ferranti v New York City Prop. Clerk's Off., 6 AD3d 178 [1st Dept 2004]; Smith v Russell Sage Coll., 54 NY2d 185 [1981]).

On this record, Petitioner established each element of the res judicata doctrine. It is uncontested that this proceeding is based upon the same claim as the 2011 Litigation, Petitioner’s

January 28, 2010 surreptitious recording. The parties too are identical, and neither alleges that they were previously deprived of a full and fair opportunity to litigate. Lastly, case law deems the 2011 Litigation's statute of limitations dismissal to be "on the merits." (Id.). Respondents' characterization of the prior defect as a pleading deficiency is simply unavailing, in light of the overwhelming "on the merits" precedent cited above. As such, Petitioner established that the June 2013 Notice is barred by the res judicata effect of the 2011 Litigation.

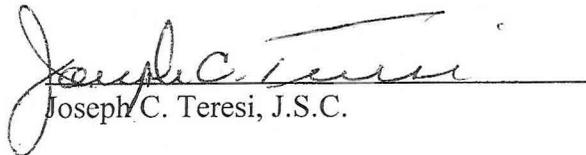
Because Petitioner demonstrated his entitlement to dismissal of the June 2013 Notice, he is correspondingly entitled to the ten days back pay he seeks. (Gardner v Coxsackie-Athens Cent. School Dist. Bd. of Educ., 92 AD3d 1093 [3d Dept 2012]).

Accordingly, the petition is granted.

This Decision and Order is being returned to the attorneys for the Petitioner. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
September 16, 2013

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Petition, dated August 2, 2013; Verified Petition, dated August 2, 2013, with attached exhibits A-F.
2. Verified Answer, dated August 29, 2013.