Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v de Blasio
2015 NY Slip Op 32829(U)
June 18, 2015
Supreme Court, New York County
Docket Number: 153231/2018
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioner,

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

- against -

BILL DE BLASIO, in his official capacity as Mayor of the City of New York; CITY OF NEW YORK; JAMES P. O'NEILL, in his official capacity as Commissioner of the New York City Police Department; and NEW YORK CITY POLICE DEPARTMENT,

Respondents.

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Index Number: 153231/2018

Sequence Number: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 through 3, were used on this cross-motion to dismiss the instant CPLR Article 78 Proceeding:

	Papers Numbered:
Petition and Supporting Papers (Petition, Simkin Affirmation, and Memo of Law)	1
Cross-Moving Papers	2
Opposition Papers (Memo only, denominated "Petitioner's Reply Memorandum," etc.)	3

Upon the foregoing papers, the cross-motion is denied.

SHORT VERSION

The City of New York ("the City") and its Police Department ("NYPD") announced that they would release redacted summaries of the personnel (including disciplinary) records of New York City Police Officers, despite New York Civil Rights Law § 50-a ("CRL 50-a"), which deems such records "confidential." The Patrolmen's Benevolent Association ("the PBA") commenced the instant CPLR Article 78 Proceeding to prevent such release. The City now cross-moves to dismiss the proceeding on the ground that the PBA "has no private right of action to sue for a violation" of CRL 50-a. Based on the law, common sense, and simple justice, the cross-motion is denied. Although a few cases have held that CRL 50-a does not create a private right of action, no case has held that CRL 50-a cannot be the predicate for Article 78 review of a plan to release "confidential" police personnel records. Indeed, the text of CRL 50-a and Article 78, numerous cases, and the whole structure of Anglo-American law indicate that such review is, and must be, available.

LONG VERSION

Background:

As most New Yorkers know, the PBA is, essentially, the union ("collective bargaining representative") representing New York City Police Officers; respondent the City of New York is a rather well-known subdivision of the State of New York; respondent Bill de Blasio is the City's Mayor; respondent James P. O'Neil is the NYPD's Commissioner; and respondent NYPD is a "law enforcement agency" that the City of New York administers.

On or about March 27, 2018 respondents announced that they planned to begin posting redacted summaries of police personnel records, which include disciplinary records, on the City's website, such information to include the officer's rank, number of years on the force, facts at issue, evidence, arguments, findings, and penalties. Approximately two weeks later (April 10, 2018) the PBA commenced the instant CPLR Article 78 Proceeding to annul the decision to release such summaries and to require respondents to comply with CRL 50-a, which deems such records "confidential." On April 11, 2018, this Court issued a temporary restraining order directing respondents not to release the summaries. On or about May 16, 2018, respondents cross-moved, pursuant to CPLR 3211(a)(3) and (7) and CPLR 7804(f), to dismiss the petition "on the grounds that [the PBA] has no private right of action to sue for a violation of [CRL 50-a] and fails to state a cause of action."

Statutory Framework

CRL 50-a provides, as here relevant, as follows:

> All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police . . . department . . . of any political subdivision [of the state] shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order.[1]

CPLR 3211(a) provides, in relevant part, that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... (3) the party asserting the cause of action has not legal capacity to sue; or (7) the pleading fails to state a cause of action .... .

CPLR 7801 provides, in relevant part, that "[r]elief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article.

CPLR 7803 provides, in relevant part, that "[t]he only questions that may be raised in a proceeding under this article are ... 3. whether a determination . . . , was affected by an error of law . . . .

CPLR 7804(f) provides, as here relevant, that "[t]he respondent may raise an objection in point of law ... by a motion to dismiss the petition."

[1] Subsection 4 provides that "The provisions of this section shall not apply to any district attorney . . . attorney general . . . a corporation counsel . . . or any agency of government which requires the records described in subdivision one, in furtherance of their official functions." This clearly means that the specified officials can obtain the records, not that they can release the records.

Discussion

Respondents recognize (cross-moving memorandum at 2), echoing CPLR 7801, that "Article 78 exists as a modern form of relief evolved from the common law writs of mandamus, prohibition, and certiorari to review." Yes, indeed; these ancient writs were a check on governmental authority and power, and a means to require the government to act (mandamus) or not act (prohibition), and to review government decision-making (certiorari).

However, respondents argue, "[i]t is well-established that no private right of action exists under [CRL 50-a]." For this proposition, and in support of their cross-motion, respondents principally rely on: Carpenter v Plattsburgh, 66 NY2d 791, 793 (1985) ("plaintiff's [CRL 50-a] action must fail since there is no private right of action created by the Legislature for violations of that statute"); Simpson v NYCTA, 66 NY2d 1010, 1011 (1985) ("the Legislature did not intend to create a private right of action for violations of [CRL 50-a]"); Poughkeepsie Police Benevolent Ass'n v City of Poughkeepsie, 184 AD2d 501, 501 (2d Dept 1992) (ditto); Reale v Kiepper, 204 AD2d 72, 73 (1st Dept 1994) ("[CRL 50-a] was designed to limit access to said [police] personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination."); and Matter of Doe v City of Schenectady, 84 AD3d 1455, 1459 (3d Dept 2011) ("the legislative intent underlying the enactment of [CRL 50-a] was narrowly specific, to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action").

However, none of these cases are dispositive. Carpenter and Simpson were plenary actions by individual police officers for monetary damages, not CPLR Article 78 proceedings by a police union for injunctive relief. That damages are not available to individuals retrospectively does not mean that injunctive relief is not available to a police cohort prospectively.

Poughkeepsie, relying on Carpenter and Simpson, essentially held that "as the statute seeks to prevent the use of police officers' personnel records to harass or embarrass them if they are called as witnesses in litigation . . . the use of such information by a governmental entity, in furtherance of its official functions, is unrelated to the purpose of [CRL 50-a]." Decided more than 25 years ago by the Third Department, and relying on plenary damage actions, Poughkeepsie was also a plenary action, albeit one for injunctive relief. At a distance, its reasoning appears fatally flawed. The legislature deemed police disciplinary records "confidential," and provided only two exceptions: waiver and court order; there is no exception for municipal advantage or fiat, and there is no exception for "anyone other than a criminal-defense attorney seeking to harass a police officer during cross-examination at a trial." Expressio unius est exclusio alterius (the expression of one thing is the exclusion of the other).

Reale essentially parroted the reasoning in Poughkeepsie. It is almost 25 years old and fails even to mention CPLR Article 78, which provides for special proceedings, which are entirely different from plenary actions. For example, special proceedings have a different, significantly shorter Statute of Limitations (four months, pursuant to CPLR 217(1)); different disclosure rules (none without court permission, pursuant to CPLR 408); a different burden of persuasion (not preponderance of the evidence or clear and convincing evidence); and altogether different analyses. Because of the nature of the beast, all of these differences tend to make life difficult for petitioners, as opposed to plaintiffs.

Finally, in Matter of Doe, transit police officers challenged the City's plan to hold public disciplinary hearings, a far cry from the wholesale release of police personnel records after the fact. "Nothing in [CRL 50-a] mentions the [phrase] disciplinary hearing, let alone requires that such hearings be held in private, and we discern no import from this omission other than the obvious—that the failure of the Legislature to include it within the statute is an indication that its exclusion was intended." Id. at 1458.

Although a bit far afield in subject matter, the general principal embodied in Dairylea Co-op., Inc. v Walkley, 38 NY2d 6, 11 (1975) seems pertinent here: CPLR Article 78 review is unavailable "[o]nly where there is a clear legislative intent negating review." That is not the case here. Simply put, "when a government agency seeks to act in a manner adversely affecting a party, judicial review of that action may be had." Id. at 10.

The idea that if there is no private right of action, there is no CPLR Article 78 review, is debunked by O'Neil v City of New York, 10 Misc 3d 30, 31 (2d Dept 2005) ("There is no indication that there was any legislative intent to confer a private right of action against a government agency through [the statute at issue]; on the contrary, CPLR article 78 was enacted for this purpose"); accord HANYS Servs., Inc. v Empire Blue Cross & Blue Shield, 187 Misc 2d 253, 258 (Sup Ct, Albany County 2001) (plaintiffs without a private right of action "were not without a judicial remedy as witnessed by their 1994 article 78 proceeding.").

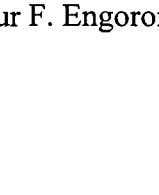
Perhaps the strongest statement supporting petitioner's position is the simplest: "The ability to bring an Article 78 proceeding exists almost universally for someone affected by decisions, actions or inactions of administrative bodies." Fine v State of New York, 10 Misc 3d 1075(A) (NY Ct Cl 2005). Simple justice requires that the PBA be allowed to challenge respondents' decision to release its members "confidential" personnel records. "Where there is a right there is a remedy." McGraw v Gresser, 226 NY 57, 60 (1919).

Although respondents have not challenged the PBA's standing, it is worth noting that "[t]he confidentiality of the statute is designed to protect the police officer, not the department . . . ." Molloy v New York City Police Dept., 50 AD3d 98, 100 (1st Dept 2008); accord Gallogly v City of New York, 51 Misc 3d 296, 300 (Sup Ct, NY County 2016).

Conclusion

Cross-motion denied. Respondents may answer, and the parties may otherwise proceed, as set forth in CPLR 7804(f).

Dated: June, 18 2015



Arthur F. Engoron, J.S.C.