

Frederique v City of New York

2024 NY Slip Op 33972(U)

November 8, 2024

Supreme Court, New York County

Docket Number: Index No. 155015/2023

Judge: Kathleen Waterman-Marshall

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This opinion is uncorrected and not selected for official publication.

this evidence, Administrative Law Judge Stecura issued a 54-page Report and Recommendation, setting forth finding of facts in which she sustained charges that Mr. Frederique used excessive force on five occasions and submitted false reports on four occasions, but rejected charges that Mr. Frederique failed to secure a door and failed to activate his body-worn camera, and recommended termination as the penalty for the sustained charges.

Mr. Frederique's counsel filed an affidavit of service of the order to show cause which purports to supplement the petition, and includes a 245 page "Special Report by the Nunez Independent Monitor" issued on July 10, 2023, and several OATH Reports and Recommendations in other disciplinary matters, which Mr. Frederique contends mandate annulment of his termination (NYSCEF Doc. No. 13). Respondents urge the Court not to consider this filing (NYSCEF Doc. No. 14 n 1). This affidavit of service improperly seeks to supplement the petition; however, consideration or rejection of this supplemental information is immaterial to this decision.

Neither party has submitted memoranda of law or attorney affirmations in support of their claims. Thus, this matter proceeds on the verified pleadings and exhibits thereto.

Article 78

Article 78 matters which raise the issue of "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence" must be transferred to the Appellate Division, excepting only that originating court must first dispose of objections which could terminate the proceeding, such as lack of jurisdiction, statute of limitations, and res judicata (CPLR 7804[g]; see e.g. *Matter of McDonald v Bratton*, 129 AD3d 489 [1st Dept 2015] [Article 78 challenging police officer's disciplinary hearing transferred to Appellate Division]; *Matter of Joyner v Abate*, 199 AD2d 56 [1st Dept 1993] [Correction Officer's Article 78 challenging dismissal transferred to Appellate Division]). Transfer to the Appellate Division is mandated, no matter how inartfully a question of substantial evidence may be raised (*Matter of Argentina v Fischer*, 98 AD3d 768 [3d Dept 2012]).

Here, Mr. Frederique challenges the recommendation of the Administrative Law Judge, as adopted by the Commissioner, following an administrative trial. It is undisputed that the administrative trial was held pursuant to Civil Service Law Section 75, and evidence taken in accordance with that statute. As previously discussed, evidence and testimony were received at the administrative trial, which Administrative Law Judge Stecura relied upon in making their finding of facts and penalty recommendation. This is precisely the type of quasi-judicial proceeding contemplated by CPLR 7803(4) and 7804(g) (*Matter of Save the Pine Bush v Planning Bd. of City of Albany*, 83 AD2d 741 [3d Dept 1981] ["An issue specified in CPLR 7803 (subd 4) arises only where a quasi-judicial hearing has been held and evidence taken pursuant to law"]). While the petition does not expressly challenge the sufficiency of the evidence relied upon at the administrative trial, instead purporting to challenge respondents' actions as arbitrary and capricious, when taken as a whole, the petition makes clear that Mr. Frederique challenges whether the entire administrative record supports the recommendation. This requires transfer to the Appellate Division (*Matter of Department of Env'tl. Protection of City of N.Y. v Department of Env'tl. Conservation of State of N.Y.*, 120 AD2d 166, 169 [3d Dept

1986] [where petition challenges findings of fact, the petition raises issues of substantial evidence and transfer to Appellate Division is mandated]; *Rivera v Beekman*, 86 AD2d 1 [1st Dept 1982] [Special Term should have transferred Article 78 petition challenging employee's dismissal after administrative hearing as arbitrary and capricious to Appellate Division for review under substantial evidence standard]). Consequently, adjudication by this court of Mr. Frederique's claims that his termination was arbitrary and capricious would be error, as these claims are inextricably linked to the sufficiency of the evidence (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] ["Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard"]). Accordingly, transfer of this matter to the Appellate Division is required.

Assuming, for the sake of argument, that this Court could determine Mr. Frederique's arbitrary and capricious claims and the transfer of these claims to the Appellate Division is erroneous, the Appellate Division is nevertheless empowered to determine the issue upon transfer (*Matter of 125 Bar Corp. v State Liq. Auth. of State of N.Y.*, 24 NY2d 174, 180 [1969]; *Matter of Burrell v Ortiz*, 128 AD2d 391, 392 [1st Dept 1987]). However, the inverse is not true; this Court may not determine issues of substantial evidence (*Matter of Dippell v Hammons*, 246 AD2d 450 [1st Dept 1998] [Article 78 contesting demotion and termination raised question of whether administrative law judge's determination was supported by substantial evidence and matter should have been transferred to Appellate Division for such purpose]).

Before transferring the matter to the Appellate Division for substantial evidence review, this Court must determine any other objections that could dispose of the petition. However, there appears no objection which could dispose of the petition. Respondents, by way of verified answer, assert claims that: the petition fails to state a cause of action; their actions were reasonable and not arbitrary and capricious; their actions were supported by substantial evidence; the penalty imposed was not shocking to the conscience; and the petition raises questions related to the sufficiency of the evidence. Notably there is no motion to dismiss and, in any event, the petition states a cause of action. Respondents' remaining claims are inextricably linked to the substantial evidence issue. Accordingly, transfer to the Appellate Division is proper.

Conclusion

Although the petition does not expressly seek review of "substantial evidence" it seeks, on the whole, to review the findings of a quasi-judicial administrative law hearing. Accordingly, the matter must be transferred to the Appellate Division, First Department, for substantial evidence review unless an objection could otherwise dispose of the matter. As there is no objection which could dispose of this petition, transfer to the Appellate Division is mandated.

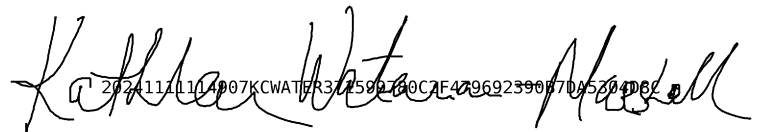
Accordingly, it is

ORDERED that, pursuant to CPLR 7804 (g), the application by Mr. Frederique seeking to vacate and annul a determination by respondents is respectfully transferred to the Appellate Division, First Department, for disposition pursuant to said subsection. This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence

was taken, pursuant to direction by law, is, on the entire record, supported by substantial evidence (CPLR 7803 [4]); and it is further

ORDERED that Mr. Frederique shall serve a copy of this order with notice of entry upon the Clerk of the Court, who is directed to transfer the file to the Appellate Division, First Department; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website).



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11/08/2024
DATE

KATHLEEN WATERMAN-MARSHALL,
J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: