

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN S. SMITH

PART 44

Justice

CHRISTIAN WAUGH

INDEX NO. 103546/2005

MOTION DATE 09/16/05

- v -

MOTION SEQ. NO. 001

THE NEW YORK CITY FIRE DEPARTMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this petition pursuant to CPLR Article 78 to review an administrative determination of the respondent to discharge the petitioner from his employment

Notice of Motion/Petition Order to Show Cause - Affidavits - Exhibits ...Memorandum

Notice of Cross-Motion - Answering Affidavits — Exhibits ...Memorandum

Replying Affidavit _____

PAPERS NUMBERED

1

2

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ORDERED that this proceeding pursuant to CPLR Article 78 to review an administrative determination made by the respondent to discharge the petitioner is dismissed and the petition herein is denied.

Petitioner (hereafter referred to as "Waugh") was a firefighter employed by the respondent (hereafter referred to as the "NYCFD"). On or about August 20, 2004, Waugh was on duty at the firehouse for Engine 75/Ladder 33. While Waugh was present at the firehouse, a female individual alleges that she was admitted to the firehouse and several firefighters raped her.

On August 25, 2004, Waugh was directed to and did appear for an interview with the New York City Department of Investigation. Waugh appeared at the interview with his attorney. After Waugh asserted his constitutional right against self-incrimination, the assistant commissioner conducting the interview read from Mayor's Executive Order 16, Section 4, Subsection B, advising Waugh that his testimony would be protected by "use immunity" except for perjury or contempt proceedings arising from the testimony and that his refusal to answer questions constituted cause for his removal from his employment. Nevertheless, Waugh declined to answer any questions. Waugh's counsel contended that, since Waugh was the potential subject of a criminal investigation, he could not constitutionally be compelled to testify at the interview unless he was granted the broader protections afforded by "transactional immunity".

Based upon Waugh's refusal to testify at the Department of Investigation interview, on or about August 30, 2004, he was charged with violations of the NYCFD's Rules and Regulations. The charges alleged that Waugh had failed to answer questions in the course of an Inspector General's investigation, had failed to comply with an Inspector General's investigation, had engaged in conduct unbecoming a firefighter because of such refusal, had engaged in conduct discrediting the NYCFD because of such refusal and had violated his Oath of Office as a firefighter because of such refusal.

On November 5, 2004, a hearing was held before an administrative law judge to consider the charges against Waugh. The administrative law judge was empowered to hear the matter and make a report and recommendation to the Commissioner of the NYCFD. At this hearing, Waugh's counsel again argued that compelling Waugh to testify under the circumstances presented violated Waugh's constitutional right against self-incrimination. By letter dated December 1, 2004, the administrative law judge sent her report and recommendation to the Commissioner of the NYCFD. The administrative law judge found Waugh guilty of the administrative charges and recommended that Waugh be terminated from employment as a firefighter.

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

On or about December 2, 2004, the Commissioner of the NYCFD followed the administrative law judge's recommendation and terminated Waugh.

Waugh filed the Instant Article 78 proceeding to review the Commissioner's determination. Waugh alleges that the Commissioner's determination is arbitrary, capricious and in violation of Waugh's constitutional right against self-incrimination and/or that the penalty imposed upon Waugh was unduly harsh, excessive, arbitrary and capricious given Waugh's record of service with the NYCFD since 1995. Accordingly, Waugh seeks to have the Commissioner's determination vacated and set aside or, in the alternative, to have the penalty imposed against him reduced.

In his petition, Waugh argues that, under circumstances where an individual is the potential target of criminal prosecution, the "use immunity" purportedly conferred by the Department of Investigation is insufficient to protect the potential defendant's constitutional right against self-incrimination and that "transactional immunity" is necessary before such an individual may be compelled to testify or face the prospect of losing his employment as a public employee. Additionally, Waugh argues that the Department of Investigation does not have authority to grant immunity of any variety. Instead, Waugh argues that the District Attorney must offer the immunity and it must be approved by a judge before it will protect the potential defendant from criminal prosecution.

The Court of Appeals has stated:

... when a public employee is compelled to answer questions or face removal upon refusing to do so, the responses are cloaked with immunity automatically, and neither the compelled statements nor their fruits may thereafter be used against the employee in a subsequent criminal prosecution. The resulting immunity that attaches when a witness is ordered to answer such questions, therefore, flows directly from the Constitution, attaches by operation of law, and is not subject to the discretion of the employer. ... It is well settled, however, that the State 'may compel any person enjoying a public trust to account for his activities and may terminate his services if he refuses to answer relevant questions...' ... where a public employee ... refuses 'to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself * * * the privilege against self-incrimination would not [be] a bar to his dismissal'. ... Thus, what is proscribed as unconstitutional is to condition public employment upon a waiver of the privilege against self-incrimination.

(*Matt v Larocca*, 71 NY2d 154, 159-160 [1987]).

§801 of the New York City Charter establishes a Department of Investigation. §803(b) of the New York City Charter provides that the Commissioner of the Department of Investigation; "... is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency." §805 of the New York City Charter provides that the commissioner or deputy commissioner conducting an investigation may compel the attendance of witnesses. §1128 of the New York City Charter provides that no person shall: "prevent, interfere with, obstruct, or otherwise hinder any ... investigation being conducted pursuant to the charter. Any violation of this section shall constitute cause for suspension or removal from office or employment. ... Full cooperation with the commissioner of investigation shall be afforded by every ... employee of the city." §1136(a) of the New York City Charter provides that any individual who becomes an employee of the City of New York must file a written statement with the city clerk indicating that he or she has read and will comply, *inter alia*, with the provisions of §1128 of the New York City Charter.

§15-113 of the Administrative Code of the City of New York empowers the Commissioner of the NYCFD, upon compliance with appropriate procedures, to punish firefighters for; "...any conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer or member, or other breach of discipline...". Additionally, §15-218 of the Administrative Code of the City of New York directs the Commissioner of the NYCFD to investigate and inquire into; "[t]he violation of the regulations ... , for the purpose of discovering any delinquency in the performance of duty or violations of discipline, on the part of any ... employee of the department."

In the matter presently before this court, the New York City Charter compelled Waugh to cooperate with the investigation being conducted by the Department of Investigation or be subject to the potential penalty of the loss of his employment. Even if the Assistant Commissioner had failed to read the provisions of Executive Order 16 to Waugh, "use Immunity" would have applied to his statements in the Department of Investigation interview by operation of law.

Waugh alleges that compelling him to testify without granting him "transactional immunity" violates his constitutional right against self-incrimination. Notwithstanding this contention, the only occasion requiring "transactional immunity" is when an individual is being called upon to testify before a grand jury (cf. *Cortes v County of Nassau*, 248 AD2d 616, 617 [2nd Dept 1998]). Waugh offers no compelling reason to depart from the rule set forth by the Court of Appeals in *Matt v Larocca* (supra). Waugh was not being compelled to waive his constitutional right against self-incrimination. Instead his decision to withhold his testimony represented his assessment of the relative risk of the potential loss of his employment as against the possibility that, in his particular circumstances, his testimony could somehow result in his prosecution for a criminal offense even though the testimony and its fruits could not be used in any such prosecution. Waugh ignores the fact that, at the time of the inception of his employment, one of the terms he agreed to (based upon the provisions of the New York City Charter set forth above) was that he would be obligated to cooperate in any investigations of the Department of Investigation. That agreement, tempered by the protections afforded by "use immunity", did not infringe upon Waugh's constitutionally protected right against self-incrimination (as manifested by the fact that he ultimately did not testify). However, Waugh does not have a constitutionally protected right to continued public employment when he acts in contravention of the terms he agreed to as a condition of that employment.

Turning to the question of whether the NYCFD's determination of Waugh's punishment is harsh or excessive, the appropriate standard is whether the penalty is: "... so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness..." (*Matter of Pell v Board of Education*, 34 NY2d 222, 233 [1974]). The circumstances of the instant matter involve an investigation by the New York City Department of Investigation into serious charges of potentially illegal activities undertaken by one or more public employees while on duty at a facility owned and operated for the public benefit. The public, the public employer and the public employees who are affiliated with the facility involved all have a substantial interest in determining what actually took place. It appears that Waugh has some information to contribute to that determination. Moreover, upon accepting his employment as a firefighter, Waugh agreed to cooperate in any investigation of the Department of Investigation by, among other things, providing sworn testimony concerning his knowledge of the events being investigated. In now refusing to do so, Waugh has repudiated his employment agreement with the City of New York. The New York City Administrative Code grants the NYCFD commissioner the authority to punish employee conduct which is injurious to the public welfare, immoral, unbecoming a member of the NYCFD or another breach of discipline. Under these circumstances, the NYCFD's decision to terminate Waugh's employment based upon his conduct does not shock the court's sense of fairness. Accordingly, it is;

ORDERED, ADJUDGED AND DECREED: that Waugh's petition is denied and the instant Article 78 proceeding is dismissed.

The foregoing constitutes the decision, order and judgment of the court.

Dated: 11/17/05


Hon. Karen S. Smith, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

UNFILED JUDGMENT
This judgment has been filed by the County Clerk
and notice of entry of judgment based hereon. To
obtain entry, a copy of this judgment must
appear in person at the County Clerk's Desk (Room
141B).