SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

---X

In the Matter of the Application of Police Officer
DANIEL PANTALEO,

INDEX NO. 100641/19

Petitioner,

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

- against -

NEW YORK CITY CIVILIAN COMPLAINT
REVIEW BOARD, FREDERICK DAVIE, as
Chair of the New York City Complaint Review
Board, JAMES P. O'NEILL, as Police Commissioner
of the City of New York, THE NEW YORK CITY
POLICE DEPARTMENT OF THE CITY OF NEW
YORK, and THE CITY OF NEW YORK,

Respondents.

---X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner moves, by order to show cause, pursuant to CPLR 7803(2) and (3) to enjoin the respondent the New York City Civilian Complaint Review Board ("CCRB") from prosecuting New York City Police Department ("NYPD") disciplinary case number 2018-19274 against petitioner on the grounds that the CCRB lacks jurisdiction to prosecute the case, and that the NYPD's decision not to hold a hearing on the question of CCRB's jurisdiction was arbitrary and capricious. At this stage of the proceeding, petitioners seek an order pursuant to CPLR 6301 and 6311 for a preliminary injunction enjoining the CCRB from prosecuting the case pending a determination by this court as to CCRB's jurisdiction.[1]

---

[1]After hearing argument on the record on April 30, 2019, the court declined to issue a temporary restraining order to prohibit CCRB from prosecuting the NYPD disciplinary proceeding.

Respondents oppose the application.

The trial of the NYPD disciplinary proceeding that is the subject of this application is set to begin on May 13, 2019, and arises out of the July 17, 2014 incident involving the death of Eric Garner after his attempted arrest by petitioner and other NYPD officers in Staten Island, New York ("the Garner incident").

The central issue raised by petitioner is whether the CCRB lacks jurisdiction over the prosecution of this matter which was investigated by the CCRB[2] and led to the issuance of charges and specifications against petitioner arising out of the Garner incident on July 18, 2018.[3] Section 440(c)(1) of the City Charter gives the CCRB "the power to receive, investigate, hear,

---

[2]In her affirmation submitted in support of respondents' opposition, Suzanne O'Hare, Esq., the Deputy Chief Prosecutor of the Administrative Prosecution Unit at the CCRB states "upon information and belief" that the Garner incident was also investigated by NYPD's Internal Affairs Bureau ("IAB"), that IAB found that petitioner used a prohibited chokehold while effectuating the arrest of Mr. Garner, and that on or about January 15, 2015, IAB recommended that charges be referred against petitioner and forwarded its findings to NYPD's Advocate Office ("DAO"). See O'Hare Aff. ¶ 25. She also states that after both the NYPD and CCRB completed their investigations and recommended charges, upon information belief, because of a request from the Department of Justice ("DOJ") that a hold be placed on the matter, the NYPD did not pursue the disciplinary matter or permit the CCRB to draft charges against petitioner. By letter dated July 16, 2018, the NYPD notified DOJ that due to its protracted review of the case, the NYPD could no longer forebear with respect to pursuing the disciplinary case against petitioner, and that if DOJ did not publicly announce its intent to file criminal charges related to the Garner incident by August 31, 2018, the disciplinary proceedings would go forwarded on or shortly after September 1, 2018. Id ¶'s 26-27.

[3]While petitioner seeks to enjoin the CCRB's prosecution of the charges and specifications against petitioner, the crux of petitioner's position is that under section 440(c)(1) of the City Charter, the CCRB lacked jurisdiction to investigate and recommend the charges that underlie the prosecution. Accordingly, respondents' argument that since petitioner seeks to enjoin the prosecution as opposed to the investigation by the CCRB, and that the prosecution is governed by a Memorandum of Understanding ("MOU"), and not City Charter, is not dispositive of the issues here.

make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language...." Petitioner argues that as based on the holding in Lynch v. New York City Civilian Complaint Review Board, (Crane, J), 2019 WL 1475017, 2019 Slip Op 29089 (Sup Ct NY Co. Feb. 27, 2019), the complaint which forms the basis for CCRB's jurisdiction under section 440(c)(1) of the City Charter must be from an eyewitness, the complaint underlying the instant disciplinary proceeding is invalid, or at least requires a hearing as to its validity. Specifically, petitioner asserts that a recording of the complaint which was made by telephone by a Jada Wilson ("Wilson") to the CCRB on July 18, 2014, on the day after the Garner incident, when compared to a video of the incident, provides a good faith basis to believe that Wilson did not witness the Garner incident.

On March 20, 2019, petitioner moved to dismiss the NYPD disciplinary proceeding before the CCRB on the ground that CCRB did not have jurisdiction to prosecute the disciplinary charges filed against him based on the holding in Lynch. By written decision dated April 8, 2019, the Honorable Rosemarie Maldonado, NYPD Deputy Commissioner of Trials ("DCT Maldonado"), denied the motion. DCT Maldonado found that "notwithstanding error in the caller's (i.e. Wilson's) account, the information relayed during the 2014 intake call provided a rational basis to move forward with the investigation." In support of this finding, DCT Maldonado noted that: "The interviewer specifically asked the caller whether they actually witnessed the arrest or whether they were calling on someone's behalf. The caller clearly responded that she had witnessed the arrest. Moreover, although the caller eventually stopped cooperating with the CCRB, the agency did follow up [with Wilson] and in fact had subsequent

contact with [her]."

DCT Maldonado also found that Lynch decision was inapplicable to this matter since it concerned "sua sponte investigations and complaints with insufficient firsthand knowledge of an incident [and that] the Lynch court did not expressly place any new obligations on CCRB with respect to eyewitness complaints.[4]"

In this Article 78 proceeding, petitioner bases his challenge of DCT Madonado's determination on the grounds that alleged errors in Wilson's account of the Garner incident renders her finding that the CCRB has jurisdiction arbitrary and capricious. Thus, petitioner argues a preliminary injunction should issue enjoining the trial.

In opposition, respondents argue that petitioner has not satisfied the three-part test required to obtain a preliminary injunction, including that petitioner cannot show likelihood of success on the merits since DCT Maldonado rationally found that the Lynch decision is inapplicable to this matter.

A preliminary injunctive relief is drastic remedy, and thus should not be granted unless the movant demonstrates "a clear right" to such relief. City of New York v 330 Continental, LLC, 60 AD3d 226, 234 (1st Dept 2009); Peterson v Corbin, 275 AD2d 35 [2d Dept], lv dismissed, 95 NY2d 919 (2000). Entitlement to a preliminary injunction requires a showing of (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of

---

[4]DCT Madonado also found that "the relevant time line renders Lynch inapplicable to the proceeding [since] [t]he February 27, 2019 Lynch decision invalidated a CCRB rule which went into effect in February 2018 [whereas] CCRB's investigation in this case commenced with a July 18, 2014 phone call and concluded in August 2017 [and that][t]herefore the 2019 Lynch decision cannot be applied retroactively to the CCRB investigation of this case."

preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor. CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 (2005); Aetna Ins. Co. v Capasso, 75 NY2d 860 (1990). If any one of these three requirements is not satisfied, the motion must be denied. Faberge Intern., Inc. v Di Pino, 109 AD2d 235 (1st Dept 1985).

"In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious" Matter of Gilman v. New York State Division of Housing and Community Renewal, 99 NY2d 144, 149 (2002); see also CPLR 7803(3)(Article 78 review is limited to "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion...."). Thus, "a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." In the Matter of Pell v. Bd. of Educ., 34 NY2d 222, 230-231 (1974). Furthermore, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise." Peckham v. Calogero, 12 NY3d 424, 431 (2009).

Under these standards, the application for a preliminary injunction must be denied. First, petitioner has not demonstrated that likelihood of success on the merits as he has not adequately shown that the CCRB lacks jurisdiction over this proceeding based on the holding in Lynch. In Lynch the court invalidated certain Revised Rules adopted by the CCRB in 2018,[5] including

[5]While twelve Revised Rules were at issue in the proceeding before the court in Lynch, only Revised Rules 1-11(a)(b) and (c) are discussed below, since these are the only Revised Rules cited by petitioner in support of this application.

Revised Rule 1-11(c),[6] the "Sua Sponte" Investigations Rule, which permitted the CCRB to review incidents without the prerequisite of a civilian complaint, and allowed the CCRB to contact potential victims who may not know of CCRB's existence. The court wrote that as "[t]he [City] Charter (referring to section 440(c)(1)) clearly contemplates that CCRB's jurisdiction is limited to investigations 'upon complaint,' [and as the Revised Rule]...would allow respondents to expand its Charter to solicit complaints actively, rather than 'investigating upon complaint'... [t]he Revised Rule ... goes beyond CCRB's jurisdiction." 2019 WL 1475017, *7. The court also found that Revised Rule 1-11(a) (b),[7] which, *inter alia*, allegedly expanded the individuals who could file a complaint to include non-witnesses was arbitrary and capricious as it was "so broad that there is a serious likelihood that complaints based upon unreliable information will ensue, not to mention the possibility of a mass influx of complaints based on unreliable information." Id *8. In so finding, the court noted that petitioners characterized the

---

[6]Revised Rule 1-11(c) stated that:

> (c) The Board has the power to review incidents involving NYPD officers and investigate cases arising therefrom within the Board's jurisdiction under the New York City Charter.

[7]Revised Rule 1-11(a) and (b) provides:

(a) An Alleged Victim, a parent, a legal guardian or legal representative if the Alleged Victim is a minor, or any individual having Personal Knowledge of alleged misconduct by a member of the New York City Police Department, each have standing to file a complaint.

(b) Complaints of alleged police misconduct filed by Reporting Non-Witnesses may be investigated at the discretion of the Executive Director or Chair of the Board. Among the factors to be considered are: the nature and/or severity of the alleged misconduct, the availably of evidence and/or witnesses, the ability to identify officers and civilians involved, the practicability of conducting a full investigation within the time prescribed by the statute of limitations and the numbers of complaints received by the Board regarding the incident.

Revised Rule 1-11(a)(b) as the "YouTube Complaints rule" since under the Rule, a viewer who watches an incident on YouTube could file a complaint with the CCRB, even though "[t]hat person has no firsthand experience, and no knowledge whether the video is embellished or fabricated. " Id.

Here, it cannot be said that there was no rational basis for CCRB's jurisdiction over petitioner's disciplinary proceeding under section 440(c)(1) of the City Charter based on the holding in Lynch.[8] In this connection, DCT Maldonado rationally found the Lynch decision was inapplicable to this matter since that decision concerns "sua sponte investigations and complaints with insufficient firsthand knowledge of an incident [and that] the Lynch court did not expressly place any new obligations on CCRB with respect to eyewitness complaints." In addition, in addressing Lynch with respect to whether a complaint from an eyewitness is required in order to invoke CCRB's jurisdiction,[9] DCT Maldonado found that the 2014 intake call provided a rational basis to move forward with the investigation, particularly as the caller stated that she witnessed the arrest. Furthermore, any factual issues raised by alleged inconsistencies in the caller's complaint does not provide grounds for finding that CCRB's determination as to its jurisdiction was arbitrary or capricious, or warrant a hearing as to this issue. See Flacke v. Onondaga Landfill System, Inc., 69 NY2d 355 (1987)("where... the judgment of the agency involves factual

---

[8] As DCT Maldonado's decision is at issue and as petitioner primarily relies on Lynch, the principles of Article 78 review apply. Thus, the court need not address respondents' argument that Lynch is inapplicable as it was decided after the completion of the investigation herein.

[9] The decision in Lynch did not specifically hold that a complaint to the CCRB must be by an eyewitness, but rather it invalidated Revised Rules 1-11(a), (b) and (c). In this decision, the court makes no determination as to whether a complaint from an eyewitness is required for CCRB's jurisdiction.

evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference"). Accordingly, petitioner has failed to show a likelihood of success on the merits.[10]

As to the balance of the equities, the court finds that petitioner has not shown that the equities weigh in his favor, particularly as the underlying proceeding which he seeks to stay relates to events that occurred almost five years ago on July 14, 2014. Moreover, the family of Mr. Garner, who lost a loved one, and petitioner, whose career and reputation are at stake, have significant interests in the trial of the issues surrounding the Garner incident going forward at this time, as does the public since the Garner incident raises serious concerns about interactions between individuals in the community and members of the NYPD.

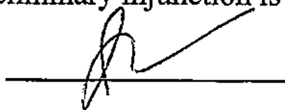
With respect to the requirement that petitioner demonstrate irreparable harm, petitioner's argument is not persuasive that he will suffer irreparable harm as he could be subject to a second trial in the future if this trial proceeds and he is found guilty and, on appeal, it is found that the CCRB lacked jurisdiction.

As petitioner has failed to demonstrate the likelihood of success on the merits, that the equities balance in his favor, or irreparable harm, the motion for a preliminary injunction must be denied.

In view of the above, it is

ORDERED that petitioner's motion for a preliminary injunction is denied.

Dated: May 9, 2019



J.S.C.

HON. JOAN A. MADDEN
J.S.C.

---

[10]It is noted that issues relating to the credibility of the person making a complaint as an eyewitness can be explored in determining whether a complaint is substantiated or unsubstantiated.