

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of the Application of
Nick DiMarco,

Petitioner,

For an Order and Judgment Pursuant to
CPLR Article 78 Annuling a Determination terminating
Petitioner from his position and granting Petitioner
additional relief

DECISION & ORDER

Index No. 2447/12

-against-

Town Board of the Town of Orangetown, and the
Town of Orangetown,

Respondents.
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The following papers numbered 1-14 were considered on this petition: to annul the determinations of the respondent Town Board of the Town of Orangetown ("the Town Board") suspending and then terminating petitioner from his employment position; seeking an order reinstating petitioner retroactively to August 28, 2012 to his paid employment position on the Town payroll, with back pay and benefits; seeking an order requiring the respondents to serve and file records alleged to be evidence of ex parte communications that violate petitioner's rights to a fair hearing and due process; seeking an enlargement of petitioner's time to respond to the newly served and filed records; seeking a trial or hearing on this petition; and seeking an order transferring this matter to the Appellate Division Second Department:

Notice of Petition/Verified Petition/Exhibits (1-7)-1-3
Town Board Resolution Terminating Petitioner dated 8/28/12-4
Town Board Resolution Suspending Petitioner without pay dated 3/15/12-5
Town Board Resolution Suspending Petitioner without Pay dated 12/13/11-7
Petitioner's Response to Charges dated 3/5/12-8
Notice of Charges dated 2/23/12-9
Verified Answer/Exhibits (A-D)-10-11
Reply Affirmation (McNamara)-12
Memorandum of Law (petitioner's)-13
Hearing Record (Volumes I-V)-14

Petitioner's alleges that the hearing officer's post disciplinary hearing Findings of Fact and Recommendation submitted to the Town Board on or about August 17, 2012 was not supported by substantial evidence in the record, that the Town Board's termination of petitioner's employment was an abuse of discretion, and that petitioner's rights to a fair hearing and due process were violated by several alleged ex parte communications between the Town Attorney's office (the "prosecutor") and the Town Board, the ultimate decision making body on the hearing (the "judge").

In his Findings of Fact and Recommendation the Hearing Officer found petitioner guilty of six specifications of misconduct, two specifications of insubordination, and two specifications of incompetence, and; he dismissed two specifications of insubordination and one specification of incompetence. The Hearing Officer recommended petitioner's termination based on the number and level of the infractions.

On August 28, 2012 the Town Board considered the matter and voted to adopt the Hearing Officer's recommendation and terminated petitioner's employment.

The hearing that resulted in the Hearing Officer's Report and Recommendation began on December 13, 2011, was postponed, and was eventually completed on April 25, 2012.

Apparently based on petitioner's testimony at that portion of the hearing that took place on February 16, 2012, at which time petitioner denied conveying confidential computer passwords to a co-worker (Karen Serafin), the Town Supervisor, on February 23, 2012, signed 'additional' charges against petitioner alleging that petitioner provided false testimony on February 16, 2012 by denying his transmittal of those computer passwords in the face of e-mails indicating that he had conveyed them to Ms. Serafin. Petitioner alleges that the only way the information needed to support these 'additional' charges could have found their way to the Town Supervisor, a member of the Town Board, was by improper ex parte communications between the Town Attorney, the "prosecutor", and the Town Supervisor (a member of the Town Board). Inasmuch as the Town did not move forward with a hearing on the 'additional' charges the Town refunded petitioner's salary for the thirty day period he was previously suspended without pay due to those new charges. The 'additional' charges are still pending and the statute of limitations on those 'additional' charges has not yet expired.

The determination of this hearing must be made on substantial evidence [CPLR

§7803(4)]. Substantial evidence is defined as such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact, and is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt. The standard demands only that a given inference is reasonable and plausible, not necessarily the most probable. Where substantial evidence exists to support a decision being reviewed by the courts, that determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions [*Matter of Ridge Rd. Fire dist. V Schiano*, 16 N.Y. 3d 494, 2011].

The Court finds that in each of the ten specifications on which the Hearing Officer found the petitioner guilty there was 'substantial evidence' in the record to support the Hearing Officer's Findings & Recommendations and the Town Board's disposition of the charges. In some of the guilty findings the Hearing Officer made judgments of credibility that led to his conclusions which were contrary to the conclusions urged by the petitioner. In each of those instances the Hearing Officer referred to other evidence contrary to the position of the petitioner which, if unchallenged, met the requirement of substantial evidence.

In an Art. 78 proceeding the Court may review the question of whether or not a determination was made that was an abuse of discretion as to the measure of a penalty or discipline imposed [CPLR §7803(3)]. This statute authorizes the Court to set aside a determination by an administrative agency, such as this respondent, only if the measure of punishment or discipline imposed is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness thus constituting a abuse of discretion as a matter of law [*Matter of Pell v. Board of Education of Union Free School District*, 34 N.Y. 2d 222, 1974; *Matter of Idahosa v Farmingdale State College*, 97 A.D.3d 580, 2012]. The sanction must be upheld unless it shocks the judicial conscience and therefore constitutes an abuse of discretion as a matter of law [*Matter of Featherstone v Franco*, 95 N.Y. 2d 550, 2000].

This Court finds that the record contains substantial evidence supporting the decision to discharge petitioner from his employment. In addition, the termination, in light of the record in support of the termination, does not shock the Court's sense of fairness or conscience [See *Monahan v Doherty*, 34 A.D.3d 346 (1st Dept., 2006); *Shade v Mahon*, 37 A.D.3d 611 (2d Dept., 2007); and, *Willis v Kelly*, 34 A.D.3d 357 (1st Dept., 2006)]. The petitioner was found guilty of multiple offenses that could, and may very well have, impaired the orderly, safe and efficient

operation of the Town and it's departments.

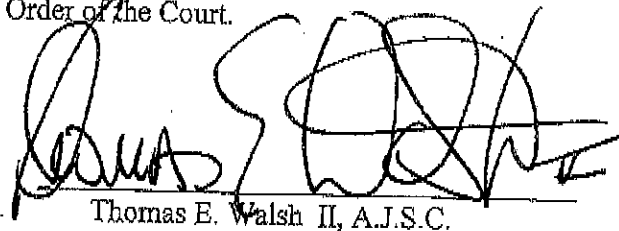
The Court finds that petitioner's claim that the Town Attorney violated petitioner's rights to due process by improperly bringing the 'additional' charges of giving false testimony herein-above referred to and by then improperly bringing them to the attention of the Hearing Officer during the hearing on the specifications sub judice is without merit. It was petitioner's counsel, not the Town Attorney, who brought the 'additional' charges to the attention of the Hearing Officer [Hearing Record pp. 897-899]. In light of the foregoing petitioner cannot now complain of this disclosure. Further, the Town Attorney is not precluded, if it is so advised, from prosecuting the 'additional' charge of giving false testimony in this hearing which presumably will, if ever, be heard by another Hearing Officer, unless that other Hearing Officer decides otherwise in another hearing or the Court in another Art.78 proceeding. The Court hastens to add that a review of the relevant portion of the transcript of the hearing on April 17, 2012 (Hearing Record pp. 897-899) readily discloses that the Hearing Officer had no intention of considering the 'additional' charge when deciding the issues already before him in the hearing then at bar. The Court does not find support in this Record for petitioner's claim that knowledge of this 'additional' charge was brought to the attention of the remainder of the Town Board and impermissibly influenced it's decision.

The Court has examined and considered petitioner's remaining contentions and finds them to be without merit.

Based on the foregoing the relief sought in this petition is denied in it's entirety and the petition is dismissed.

The foregoing constitutes the Decision & Order of the Court.

Dated: New City, New York
May 13, 2013

A handwritten signature in black ink, appearing to read 'Thomas E. Walsh II', is written over a horizontal line.

Thomas E. Walsh II, A.J.S.C.

To:
John S. Edwards, Esq.
Maureen McNamara, Esq.