UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| LORRAINE WETZEL,<br><br>Plaintiff,<br><br>v.<br><br>TOWN OF ORANGETOWN, AND ITS TOWN BOARD<br><br>Defendants. | 08 Civ. 8948 (SCR)<br><br><br><br><br>OPINION AND ORDER |

**STEPHEN C. ROBINSON, United States District Judge:**

Plaintiff, Lorraine Wetzel, brings this action against the Town of Orangetown ("Town") and the Town Board of Orangetown ("Board"), asserting various federal and state claims relating to the Board's adoption of Resolution No. 456, which sets out the procedures for the conduct of police disciplinary hearings in the Town of Orangetown. Currently pending before the Court is Defendants' Motion to Dismiss the Complaint.

## I. BACKGROUND

Plaintiff, a veteran of the Town of Orangetown Police Department, alleges that she is the victim of due process violations stemming from the adoption of Resolution No. 456 for the conduct of police disciplinary hearings.

On June 23, 2008, the Board adopted Resolution No. 456, which sets out the procedures for the conduct of disciplinary proceedings. The Resolution states in pertinent part:

> 1. Any member against whom charges are made or preferred shall have the right to a public hearing and trial and to be represented by counsel. Any such member and/or his representative must provide not less than seven (7) days prior notice to the Town Board of the Town of Orangetown (the "Town Board") of such request for a public hearing.

2. No person who shall have made or preferred charges shall sit as a judge at such hearing and trial;

3. The burden of proof in any such hearing and trial shall fall upon the Town Board, or the entity or person designated by the Town Board to make or prefer charges (the "Charging Party");

4. The technical rules of evidence shall not be applicable at such hearing and trial;

5. The Charging Party shall have the right to call witnesses and offer evidence into the Record.

6. The member and/or his/her chosen representative shall have the right in such a hearing and trial to call witnesses and to cross-examine witnesses called by the Charging Party. The member and/or his/her representative is solely responsible for producing witnesses to testify on his/her behalf. The member and/or his/her representative is required to subpoena any witnesses unwilling to voluntarily appear as a witness at the hearing of such charges. The member and/or his/her chosen representative is required to comply with the applicable provisions of the New York Civil Practices Rules and Laws concerning service of subpoenas and appropriate subpoena fees.

7. The Charging Party shall have the right to cross-examine witnesses called by or on behalf of the member.

8. Either party (the member or the Charging party) wishing a transcript at a hearing and trial may provide for one, at its own expense.

9. If a hearing officer is appointed to hear the evidence at the hearing and trial, that hearing officer shall be limited to making recommendations regarding guilt or innocence and the appropriateness of the proposed penalty to the Town Board. The Town Board shall be the final decision making authority regarding guilt or innocence and the appropriate penalty, if any.

10. The Charging Party shall be required to provide a transcript of the hearing and trial to the hearing officer and/or Town Board.

Resolution No. 456. The terms of Resolution No. 456 build on the provisions and requirements of Section 7 of the Rockland County Police Act, which states in pertinent part:

> Except as otherwise provided by law, a member of such police department shall continue in office unless suspended or dismissed in the manner hereinafter provided. The town board shall have the power and authority to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police department. Except as otherwise

> provided by law, no member or members of such police department shall be fined, reprimanded, removed or dismissed until written charges shall have been examined, heard and investigated in such manner or by such procedure, practice, examination and investigation as the board, by rule and regulations from time to time, may prescribe. Such charges shall not be brought more than sixty days after the time when the facts upon which such charges are based are known to the town board. Any member of such police department at the time of the hearing or trial of such charges shall have the right to a public hearing and trial and to be represented by counsel; no person who shall have preferred such charges or any part of the same shall sit as judge upon such hearing or trial. Witnesses upon the trial of such charges shall testify thereto under oath. . . . The conviction of a member of such police department by the town board shall be subject to review by certiorari to the supreme court in the judicial district in which such town is located, provided that application therefore be made within thirty days from the determination of such conviction by the town board.

R.C.P.A. § 7.

Plaintiff was the subject of a disciplinary proceeding conducted pursuant to R.C.P.A. § 7 in 2006. In an earlier related case, this Court dismissed Plaintiff's due process claims finding that the 2006 disciplinary proceeding, conducted pursuant to R.C.P.A. § 7, was sufficient to satisfy the requirements of due process. *See Wetzel v. Town of Orangetown*, No. 06 Civ. 6117(SCR), 2010 WL 743039, at *6 (S.D.N.Y. March 2, 2010).

In this case, Plaintiff challenges Resolution No. 456 on the grounds that it will not afford her adequate due process protection at her disciplinary hearing on the charges related to a July 4, 2004 incident. The disciplinary hearing that forms the basis of Plaintiff's objections in this case has yet to take place, and the July 4, 2004 charges are still pending.

## II. DISCUSSION

### A. Legal Standard

Pursuant to Federal Rule of Civil Procedure 12(b)(6), in order to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (quoting *Bell Atlantic*

*Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In evaluating a motion to dismiss, a court must "view all allegations raised in the complaint in the light most favorable to the non-moving party . . . and 'must accept as true all factual allegations in the complaint.'" *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 662 (2d Cir. 1996) (quoting *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 164 (1993)) (citation omitted). Nevertheless, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 129 S.Ct. at 1950. Furthermore, if allegations taken as true are consistent with plaintiff's claim, but there is an "obvious alternative explanation" the court will find that the plaintiff's claim is not plausible. *Twombly*, 550 U.S. at 567. The Court is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). Because the Complaint must allege facts which confer a cognizable right of action, "'[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *York v. Ass'n of the Bar of the City of New York*, 286 F.3d 122, 125 (2d Cir. 2002) (citations and internal quotation marks omitted).

**B. Plaintiff's Due Process Claims Are Dismissed**

As a general matter, the Court has already determined that the procedures provided for in R.C.P.A. § 7, as applied to Plaintiff during her 2006 disciplinary hearing, were sufficient to satisfy due process requirements. *See Wetzel v. Town of Orangetown, et. al.*, No. 06 Civ. 6117 (SCR), 2010 WL 743039, at *6 (S.D.N.Y. March 2, 2010). In that opinion, the Court considered the application of R.C.P.A. § 7 during Wetzel's 2006 disciplinary hearing and found that Plaintiff's "Complaint makes clear that Plaintiff has received all the procedural due process to which she is entitled," *Id.* at *6, notice of the charges and an opportunity to be heard concerning

them. *See Locurto v. Safir*, 264 F.3d 154, 173-74 (2d Cir. 2001). A hearing conducted pursuant to Resolution No. 456 would involve all of the same protection of R.C.P.A. § 7 in addition to the specifications that the Resolution adds, mainly that the burden of proof lies on the charging party and that the member who is the subject of the hearing has a right to call witnesses and present evidence and cross-examine the charging party's witnesses. It is noteworthy that these additional provisions of Resolution No. 456 were in fact provided to Plaintiff as part of her 2006 disciplinary hearing. Plaintiff has offered no evidence to suggest that a hearing pursuant to Resolution No. 456 would involve less protection than that afforded to her during her 2006 disciplinary proceeding. On the face of the Complaint, it is clear that the provisions of Resolution No. 456 in conjunction with the provisions of R.C.P.A. § 7, under which Plaintiff's pending disciplinary charges would be heard, are sufficient to satisfy the requirements of the Due Process Clause and Plaintiff's first and third claims for procedural due process are therefore dismissed. Similarly, Plaintiff's fourth claim for substantive due process claiming that the procedures provided for in Resolution No. 456 are irrational, arbitrary and wrongful is also dismissed.

Plaintiff's second claim alleges a due process violation in that the procedures established by Resolution No. 456 impair her constitutional right to an adequate name-clearing hearing. Where an individual asserts a claim based on loss of reputation it will only be actionable if that loss of reputation is coupled with "the deprivation of some 'tangible interest' or property right"; this two-pronged requirement is commonly referred to as a "stigma plus" claim. *DiBlasio v. Novello*, 344 F.3d 292, 302 (2d Cir. 2003); *see also Segal v. City of New York*, 459 F.3d 207, 209 n.1 (2d Cir. 2006). "Thus, for example, the theory does not come into play unless a government employee is slandered in the course of having his employment terminated . . . ." *Patterson v.*

*City of Utica*, 370 F.3d 322, 328 (2d Cir. 2004). Plaintiff's second claim meets neither the slander requirement nor the injury requirement of a stigma-plus claim and is therefore dismissed.

**C. Plaintiff's First Amendment Claim Is Dismissed**

This Court has twice dismissed Plaintiff's various attempts to claim that her First Amendment Rights will be violated by the Town of Orangetown at some future time. *See Wetzel v. Town of Orangetown, et. al.*, No. 06 Civ. 5144 (SCR)(MDF), 2007 WL 3009999, at *2-3 (S.D.N.Y. Oct. 12, 2007); *Wetzel v. Town of Orangetown, et. al.*, 08 Civ. 196 (SCR), 2010 WL 743039, at *6 (S.D.N.Y. March 2, 2010). The same result is required here. As previously decided, Plaintiff's potential speech in addressing the Board about personal injustices done to her as part of her disciplinary hearing is not protected speech under the First Amendment because it is not a matter of public concern.

**D. Plaintiff's Fifth Claim For Article 78 Relief Is Dismissed**

Plaintiff's fifth claim for Article 78 review is hereby dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Federal courts are courts of limited jurisdiction, which is to say that a federal court must have valid subject matter jurisdiction over a party's claim or claims in order for it to adjudicate the case or controversy. *See Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir. 2006) ("federal courts are courts of limited jurisdiction which thus require a specific grant of jurisdiction."). New York law vests jurisdiction over Article 78 proceedings solely in state courts. *See* N.Y. C.P.L.R. § 7804(b). Plaintiff's fifth claim for Article 78 review is therefore dismissed for lack of subject matter jurisdiction.

### E. The Court Declines To Exercise Supplemental Jurisdiction Over Plaintiff's State Law Claims

In addition to dismissing Plaintiff's federal claims, this Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims. *See* 28 U.S.C. § 1367(c)(3).

## III. CONCLUSION

For the foregoing reasons the Court hereby grants Defendants' Motion to Dismiss the Complaint dismissing Plaintiff's Complaint in its entirety.

The Clerk of the Court is directed to close the case and term any outstanding motions.

*It is so ordered.*

Dated: May 10, 2010
White Plains, New York

Stephen C. Robinson
United States District Judge