

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CARIOL J. HORNE,

Petitioner

Index No. 010228-2008

vs.

CITY OF BUFFALO, A Municipal Corporation

and

MON. DENNIS E. WARD, J.S.C.

CITY OF BUFFALO POLICE DEPARTMENT

Respondents

Appearances:

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DECISION & JUDGMENT

Petitioner Carole Horne was terminated from her employment as a City of Buffalo Police Officer after she intervened in 2006 to stop another officer from applying excessive use of force in effectuating an arrest. The subject litigation was commenced in October, 2020, seeking to vacate Supreme Court's prior ruling from 2010 sustaining the termination. The petition seeks reinstatement, *nunc pro tunc*, for a two-year period, which would allow her to achieve sufficient credit to qualify for a full pension based on 20 years of service.

Recent events in the national news, including the death last year in the City of Minneapolis of George Floyd, who died from unreasonable physical force being applied to him for over nine minutes, have sparked national outrage over the use of this practice. In the case of Mr. Floyd, the police officer's actions were recorded by a concerned bystander using her cell phone. That video was subsequently seen around the world, sparking national demonstrations against such excessive use of force in police interactions generally.

One of the issues in all of these cases is the role of other officers at the scene and particularly their complicity in failing to intervene to save the life of a person to whom such unreasonable physical force is being applied. The Floyd case as well as another notable case in New York State, concerning Eric Garner, both involved multiple officers who either did nothing or actually assisted the officer applying the physical force, even while the individual was crying out that he "could not breathe".

In the wake of a renewed national and local awareness of the problem of excessive force, and with police officers who intervene now being seen as heroes,

much local support was generated to rectify the penalty that was imposed on Officer Horne, who had been terminated from her employment and whose termination was upheld in the original Article 78 proceeding brought in Supreme Court in 2010. To her credit, Officer Horne did not merely stand by, but instead sought to intervene, despite the penalty she ultimately paid for doing so.

As a result of the local support generated for Officer Horne, on September 29, 2020, the Buffalo Common Council adopted a law known as "Cariol's Law: The Duty to Intervene". The new legislation creates a duty to intervene when an officer observes force that he/she "reasonably believes to be clearly beyond that which is objectively reasonable." (Docket #38, §13-21 [A]). The bill also creates a cause of action, with a twenty-year statute of limitations, for officers who have been terminated for reporting or intervening to stop the use of excessive force (Docket #38, §13-21.5).

Two days after the Common Council adopted the new law, but before it had been signed into law, the subject litigation was commenced by the filing of a petition and then a notice of motion on October 2, 2020 seeking to vacate the original order and judgment of this court. The original Petition had been brought in 2010 pursuant to CPLR Article 78, seeking to vacate the hearing officer's findings and recommendation.¹ The motion in support of the petition was predicated on the court's inherent authority to set aside its own determinations (Docket #5-6).

¹ The original notice of motion sought the following relief: "an Order annulling the Findings and Recommendation of Hearing Officer Thomas N. Rinaldo, Esq. and directing Respondents to fully restore Petitioner Cariol J. Horne to her position with full payment of any loss of wages and benefits effective May 8, 2008 through the date of this Court's 2010 decision pursuant to New York common law.

On October 28, 2020, the Mayor signed the bill into law amending the charter of the City of Buffalo. The Petitioner then filed an amended notice of motion, seeking to add a second cause of action predicated on the now-adopted charter amendment known as Cariol's Law (see Docket #25-26).

In sum, as sought in the petition, and by way of the amended motion, the Petitioner seeks to:

1. Vacate the prior order and judgment of this court;
2. Annul the findings and recommendations of hearing officer Thomas H. Rinaldo; and
3. Vacate the termination of Petitioner's employment as a Buffalo Police Officer by the Respondent City of Buffalo; and
4. Be reinstated to her former position and rank with back pay and benefits for the period of termination of May 8, 2008 through August 4, 2010.

The Respondent filed an affirmation in response to the motion, noting various facts surrounding the subject incident and summarizing the extensive 12-day hearing that had been conducted. The Respondent attached exhibits, including the hearing officer's extensive 47-page "Findings and Recommendations" (Docket #45) and a May 4, 2008 Memorandum from the District Attorney's Office concluding that there was no basis to find perjury or criminal conduct by the officers who testified (Docket #46). The opposing papers close by stating: "In deciding the instant motion, the City respectfully asks the Court to reach a fair, just, and proper result, in light of all the facts and

circumstances involved, including the record presented to the Court for review" (Docket #44, ¶17).

The matter came on for oral argument on February 26, 2021, and the court permitted each side to file supplemental written submissions. Petitioner filed an additional submission on March 12, 2021, and the Respondent notified the court it would decline the opportunity for further submissions.

DISCUSSION

The facts were succinctly stated by the Respondent's affidavit. On November 1, 2006, Officer Horne responded to a call of an officer in need of assistance. Upon her arrival, Petitioner witnessed a fellow officer, Gregory Kwiatkowski, engaged in a physical struggle with a suspect, Neal Mack, as Kwiatkowski attempted to escort Mack to a patrol vehicle incident to Mack's arrest. Petitioner intervened in the arrest by coming into contact with Kwiatkowski. Petitioner claims that it was necessary for her to intervene to stop Kwiatkowski from using a chokehold on Mack, who was handcuffed in the front. (Docket #44, ¶3).

As noted above, Officer Horne had disciplinary charges and amended charges filed against her on January 25, 2007 and May 30, 2007. The matter came on for a hearing in accordance with the provisions of Article XII of the 1986 to 1988 Collective Bargaining Agreement between the City of Buffalo, New York and the Buffalo Police Benevolent Association ("PBA"). Hearings were held at Buffalo Police Headquarters before the Hearing Officer on July 12, 16, 19, November 5, 6, 19, December 10, 27 and

28, 2007, January 24 and February 27, 2008 (Docket #45, p. 1). At the conclusion of the hearing, the Hearing Officer recommended termination, which was then adopted and sustained in an Article 78 proceeding brought in Supreme Court, Erie County. It should be noted that the hearing officer, while recommending the termination of Officer Horne found that such penalty was only supported by the actions in the six charges related to the physical altercation with Officer Kwiatkowski (Docket #45).

Relevant to this inquiry and unknown to the hearing officer and to the court in 2010, Officer Kwiatkowski had also been involved in the arrest of four African-American teenagers in 2009 where his conduct was alleged to have been excessively violent, including slamming the heads of those arrested into a car. Five years later, long after this case had been heard and decided, Officer Kwiatkowski pleaded guilty in Federal District Court for the deprivation of their civil rights, for which he was sentenced to four months in jail and terminated as a City of Buffalo police officer.

I. **Request to Vacate Prior Judgment:**

As stated by Justice Brandeis in his oft-quoted dissent, in reviewing the government's use of its police power: "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy" (*Olmstead v. United States*, 277 US 438 [1928], *overruled in part, Katz v. United States*, 389 U.S. 347 [1967], J. Brandeis, dissenting).

The Petitioner's original application sought to vacate this court's decision dated July 10, 2010 and the subsequent order and judgment, dated August 4, 2010. The unique factual situation presented here does not fit well into any of the statutory grounds

under CPLR 5015 upon which this court could base a decision to vacate. However, a court also possesses the inherent authority and discretion to vacate its own judgment, beyond that granted by statute, where appropriate (*Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

A specific statutory restriction may operate as a prohibition on the court's exercise of such discretion (see, *Matter of City of Utica (Martin)*, 175 AD3d 1047 [4th Dept. 2019]). There is, however, no such specific statutory provision applicable here. In fact, it would appear that the specific provision of the City's recently enacted ordinance provision, §13-21.5 "Retroactive Protection for Officers" actually provides the authority for the court to exercise such discretion in this particular case.

The original determinations in this case by both the hearing officer and this court, lacked significant information about the conduct of Officer Kwiatkowski and his (mis)use of physical force in effecting arrests. Likewise, the current societal view toward the use of chokeholds and physical force in effecting arrests along with the City of Buffalo's expression of specific disapproval of such force by legislative enactment, has altered the landscape.

The court will therefore grant the Petitioner's request to vacate the original determination made by the hearing officer upon which the City based its decision to terminate Officer Horne. Likewise, the City's termination of Officer Horne's position as a member of the City of Buffalo Police Department must be vacated as well, reinstating her as an officer for the period of July 26, 2008 through August 4, 2010.

II. Request for Relief Under the Newly Enacted Charter Amendment:

Although the petition and motion were originally predicated on the court's inherent relief to vacate its own decisions, the amended affidavit and the supplemental submission ask the court to also rely upon the new cause of action created by the City of Buffalo's 2020 legislation. That legislation states as follows:

§ 13-21. 5 Retroactive Protection for Officers.

Any police officer found to have been terminated for reporting the objectively unreasonable use of force against a civilian or intervening to stop the use of objectively unreasonable force by a fellow officer within the twenty year period preceding the adoption of this law, may have said finding reviewed by a court with competent jurisdiction.

The Respondent City of Buffalo has thus already created a cause of action to specifically address Petitioner's situation. Furthermore, the Respondent City of Buffalo, through its legislative and executive branches, has already determined that Officer Horne intervened appropriately. The legislation passed by the City Council and signed into law by the Mayor, state as follows:

Whereas, in 2006, Police Officer Cariol Horne intervened to save a civilian from being harmed by a fellow police officer and had her employment terminated; Now Therefore Be It Resolved that the City of Buffalo codifies the Duty to Intervene: Cariol's Law.

(Docket #38, §3).

The City of Buffalo, through its legislative and executive branches, has thus already determined that Officer Horne intervened to save the life of a civilian. Further, the City having already acknowledged that Officer Horne is entitled to a finding that she acted properly, has not opposed the relief requested in the motion.

Enforcement of this "cause of action" that the City created by legislative enactment is more appropriately the subject of a plenary action and not as an additional request for relief attached to an Article 78 special proceeding. However, under CPLR 103(c), the court has the authority to consider the relief being requested and to treat such pleadings as compliant. For the proper prosecution of this civil case, the court will deem this a hybrid special proceeding and plenary action to expedite a just and fair resolution (*Matter of Town Bd. of Town of Brighton v. West Brighton Fire Dept., Inc.* 126 AD3d 1433, 1435 [4th Dept. 2015]).

The same relief granted to the Petitioner under the Article 78 petition is likewise granted to the Petitioner under the provisions of the charter amendment by which the City of Buffalo has created a cause of action for a terminated officer in the position of Officer Horne. Because the City has enacted the ordinance and has acknowledged the claim of Officer Horne, the court may make a summary determination on the undisputed facts and the law.

CONCLUSION:

Quoting the words of Dr. Martin Luther King, Jr., "the time is always right to do right"². The City of Buffalo has recognized the error and has acknowledged the need to undo an injustice from the past. The legal system can at the very least be the mechanism to help justice prevail, even if belatedly. While the Eric Garners and George Floyds of the world never had a chance for a "do over", at least here the correction can be done.

It is therefore the decision of this court as follows:

1. The Petitioner's original motion to vacate the decision of this court, dated July 26, 2010 and the order and judgment thereof, dated August 4, 2010, is GRANTED.
2. The findings and recommendations of the hearing officer are hereby ANNULLED.
3. The termination of the Petitioner as a City of Buffalo Police Officer based upon such findings and recommendations is hereby VACATED; and,
4. The Petitioner's amended motion for a cause of action under the newly enacted City Charter provision is likewise GRANTED.
5. The court finds the Petitioner would have been physically capable of performing her duties during the time period for which she is seeking relief, and the Petitioner is therefore reinstated as a police officer with the City of Buffalo *nunc pro tunc*, for the period of July 26, 2008 through August 4, 2010 and shall be entitled to back wages and benefits for such period.

² Commencement Address, Rev. Martin Luther King, Jr., June, 1965, published at <https://www2.oberlin.edu/external/EOG/BlackHistoryMonth/MLK/CommAddress.html>

6. The Respondent City of Buffalo is directed to make an award of back pay in the proper amount, to make any required pension contributions for that period of time, and to take such other steps as are necessary to implement this Decision and Judgment.

It is so Ordered and Adjudged.

DATED: April 13, 2021



Dennis E. Ward, J.S.C.
HON. DENNIS E. WARD, J.S.C.