STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
THIRD DEPARTMENT

JASON W. LONGTON, JR.,

Petitioner,

-against-

VILLAGE OF CORINTH and VILLAGE OF CORINTH BOARD OF TRUSTEES, and ROBERT KANE, as Chief of Police for the Village of Corinth, and JAMES BOWEN in his official capacity as Sheriff of Saratoga County and SARATOGA COUNTY,

Respondents.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Appellate Division, Third Department Docket No. 504768
Saratoga County Index No. 20061989

MOTION BY:	Petitioner-Appellant Jason W. Longton, Jr.
DATE, TIME and PLACE:	March 2, 2009, Opening of Court, Appellate Division Third Department, P.O. Box 7288, Capital Station, Albany, New York 12224-0288
SUPPORTING PAPERS:	Memorandum of Law in Support of Motion for Leave to Appeal Affidavit of Ronald G. Dunn with the following Exhibits: EXHIBIT A – Memorandum and Judgment of the Appellate Division, Third Department, dated and entered December 24, 2008;

EXHIBIT B - Notice of Entry of the Memorandum Decision of the Appellate Division, Third Department, dated January 6, 2009; and served by mail on Petitioner-Appellant;

EXHIBIT C - Decision and Order of the Supreme Court, County of Saratoga (Nolan, J.), dated January 29, 2008; and

RELIEF DEMANDED:

An Order Granting Petitioner-Appellant leave to appeal to the Court of Appeals or in the alternative to reargue.

ANSWERING PAPERS:

This motion will be submitted on papers; personal appearance by or on behalf of the Respondents is neither required, nor permitted.

Dated: February 9, 2009
Albany, New York

GLEASON, DUNN, WALSH & O'SHEA

By: _____
Ronald G. Dunn, Esq.
Attorneys for Petitioner-Appellant
Office & P.O. Address
40 Beaver Street
Albany, New York 12207
(518) 432-7511

STATE OF NEW YORK
SUPREME COURT

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Respondents.

AFFIDAVIT IN SUPPORT OF MOTION
Appellate Division, Third Department Docket No. 504768
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STATE OF NEW YORK)
) ss.:
COUNT OF ALBANY)

RONALD G. DUNN, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice law before the Courts of the State of New York.

2. I make this Affidavit in support of the application of the Petitioner–Appellant seeking leave to appeal to the New York State Court of Appeals pursuant to CPLR §5602(a)(i) from a Decision and Order of the Appellate Division or in the alternative seeking permission to reargue.

3. Attached as **Exhibit A** is a copy of the Decision and Order of the New York State Supreme Court, Appellate Division Third Department, dated December 24, 2008. It is this Decision and Order which Petitioner–Appellant seeks leave to appeal to the New York Court of Appeals.

4. On January 6, 2009, the Petitioners–Appellants were served with the Supreme Court, Appellate Division Decision with Notice of Entry. This service was completed by mail delivery. A copy of the Supreme Court, Appellate Division Decision with Notice of Entry is attached as **Exhibit B**.

5. The Appellate Division Decision involved an Order of the New York State Supreme Court for the Court of Saratoga transferring the matter to the Appellate Division, Third Department pursuant to CPLR §7804(g). A copy of the Decision is attached as **Exhibit C**.

6. The New York State Supreme Court Decision was rendered in an action seeking a judgment annulling the Respondents' adoption of a hearing's officer's findings that Respondents should terminate Petitioner-Appellant's employment.

7. For the reasons stated in the attached Brief in Support of the Petitioner–Appellant's Motion for Leave to Appeal to the Court of Appeals, we respectfully request that the Court grant leave to appeal pursuant to CPLR §5602(a)(i).

8. In the alternative Petitioner-Appellant seeks reargument.

RONALD G. DUNN

Sworn to before me this
9th day of February, 2009.

NOTARY PUBLIC

ELIZABETH L. STASIAK
Notary Public, State of New York
Qualified in Schenectady County
No. 01ST6091879
Commission Expires May 5, 20 11

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 24, 2008 504768

In the Matter of JASON W. LONGTON JR.,
Petitioner,
v
MEMORANDUM AND JUDGMENT
VILLAGE OF CORINTH et al.,
Respondents,
et al.,
Respondents.

Calendar Date: November 17, 2008

Before: Cardona, P.J., Carpinello, Lahtinen, Kane and Malone Jr., JJ.

Gleason, Dunn, Walsh & O'Shea, Albany (Ronald D. Dunn of counsel), for petitioner.

Shantz & Belkin, Latham (Randolph Belkin of counsel), for Village of Corinth and others, respondents.

Lahtinen, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Saratoga County) to review a determination of respondent Village of Corinth Board of Trustees which terminated petitioner's employment as a police officer.

Petitioner began working in 2003 as a police officer for the Village of Corinth, Saratoga County. In 2004, he was suspended and charged pursuant to Civil Service Law § 75 with violating various department rules. The most serious charge

involved alleged misconduct and insubordination when he continued to secretly investigate an individual after being given a direct order by respondent Chief of Police of the Village of Corinth not to do so. His employment was terminated following a hearing, but that determination was annulled and the matter remanded for a new hearing because respondents failed to make a proper stenographic transcript of the original hearing.[1] A second hearing resulted in the Hearing Officer recommending termination, which respondent Village of Corinth Board of Trustees adopted. This proceeding ensued.

The standard of review of a determination made following a hearing pursuant to Civil Service Law § 75 is whether the determination is supported by substantial evidence (see Matter of Thibodeau v Northeastern Clinton Cent. School Bd. of Educ., 39 AD3d 940, 941 [2007]; Matter of Eck v County of Delaware, 36 AD3d 1180, 1183 [2007]). Where, as here, conflicting versions are presented, "credibility questions are within the Hearing Officer's sole province" (Matter of Rounds v Town of Vestal, 15 AD3d 819, 822 [2005]; see Matter of Secreto v County of Ulster, 228 AD2d 932, 934 [1996]). "[T]his Court may not substitute its own judgment for that of the [Board], even when evidence exists that could support a different result" (Matter of Clarke v Cleveland, 53 AD3d 894, 896 [2008]).

During a traffic stop in August 2004, petitioner had a quarrel with a local restaurateur, Trevor Downie, whose complaints about petitioner's conduct during the stop were passed on to the Chief of Police. Shortly thereafter, a heated exchanged occurred when petitioner confronted Downie at his restaurant, resulting in Downie threatening litigation against respondent Village of Corinth. Later in August 2004, petitioner reportedly learned that his paramour's 15-year-old daughter, who worked at Downie's restaurant, had been touched on her shoulder and low back by Downie. According to testimony by the Chief of Police, when petitioner arrived at work on the day that Downie's

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[1] A dispute between the parties regarding petitioner's pay while suspended previously reached this Court (Matter of Longton v Village of Corinth, 49 AD3d 995 [2008]).

alleged conduct toward the daughter of petitioner's paramour had been reported, he was calling Downie a "child molester," "pedophile" and "pervert," and stating that he intended to go to the restaurant and arrest Downie.

The Chief of Police testified that he did not believe there was yet sufficient evidence for an arrest and he felt that such an arrest at that time would expose the Village to a lawsuit by Downie. He further believed that petitioner had demonstrated that he lacked impartiality as to any investigation of Downie. The Chief of Police thus ordered petitioner to stop any investigation or contact with Downie, and informed him that another officer would be assigned to the case. Later the same day that the order by the Chief of Police had been given, petitioner went to the residence of another female employee of Downie and, although she did not want to get involved, he obtained a statement from her regarding alleged improper touching by Downie. Rather than file the statement at the police station, he kept it in his personal possession, and he also did not report his activities in the police blotter. The female employee soon requested that the statement be returned and destroyed. There is sufficient proof to establish substantial evidence of insubordination (see Matter of Eck v County of Delaware, 36 AD3d at 1183).

Petitioner's contention that he reasonably believed the Chief of Police's order was unlawful rests upon credibility determinations that the Hearing Officer resolved against him. His assertion that the subsequent investigation of Downie was lackluster, even if true, does not provide an after-the-fact justification for his insubordination. Nor does the fact that, eventually, significant proof surfaced that Downie (who is now deceased) had been improperly touching female employees.

Petitioner contends that the penalty was excessive. The penalty will not be disturbed unless it is "so disproportionate as to be shocking to one's sense of fairness" (Matter of Collins v Parishville-Hopkinton Cent. School Dist., 274 AD2d 732, 734 [2000]; see Matter of Bottari v Saratoga Springs City School Dist., 3 AD3d 832, 833 [2004]). Petitioner, an employee of short duration, disobeyed a direct order almost immediately after it

was given in a matter in which he had a considerable emotional involvement. In doing so, he displayed conduct clearly at odds with the strict discipline necessary to effectively operate a police department (see Matter of Coyle v Rozzi, 199 AD2d 391, 392 [1993]). While a lesser penalty would have been appropriate, we are unpersuaded that the penalty imposed was shocking under the circumstances.

Petitioner's argument that he was denied a fair hearing because the same Hearing Officer was used after reversal and remand as presided at the initial hearing was not preserved by an objection at the time of the second hearing (see Matter of Rice v Belfiore, 15 Misc 3d 1105[A], 2007 NY Slip Op 50511[U], *5). In any event, the record fails to establish merit to this argument (see Matter of Compasso v Sheriff of Sullivan County, 29 AD3d 1064, 1064-1065 [2006]).

Cardona, P.J., Carpinello, Kane and Malone Jr., JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

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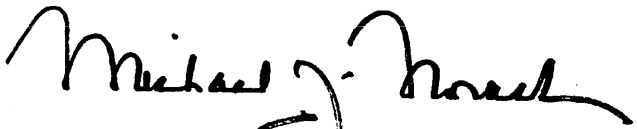

Michael J. Novack
Clerk of the Court

SUPREME COURT
APPELLATE DIVISION — THIRD JUDICIAL DEPARTMENT

JASON W. LONGTON, JR.,

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-against-

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Respondents-Respondents,

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of the Memorandum and Judgment of the Supreme Court, Appellate Division, Third Judicial Department decided and entered with the Clerk of the Court on December 24, 2008.

Dated: January 6, 2009
Latham, New York

SHANTZ & BELKIN

By: _____
TODD C. ROBERTS, ESQ.
Attorneys for Respondents-Respondents
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TO: **RONALD DUNN, ESQ.**
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12110

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 24, 2008 504768

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ORIGINAL

STATE OF NEW YORK

SUPREME COURT COUNTY OF SARATOGA

In the Matter of the Application of
JASON W. LONGTON, JR.,

Petitioner,

-against-

DECISION AND ORDER
RJI No. 45-1-2007-1323
Index No. 2007-2764

VILLAGE OF CORINTH and VILLAGE OF CORINTH BOARD OF TRUSTEES, ROBERT KANE, as Chief of Police for the Village of Corinth and JAMES BOWEN in his Official Capacity as Sheriff of Saratoga County and SARATOGA COUNTY,

Respondents.

PRESENT: **HON. THOMAS D. NOLAN, JR.**
Supreme Court Justice

APPEARANCES: GLEASON, DUNN, WALSH & O'SHEA
Attorneys for Petitioner
40 Beaver Street
Albany, New York 12207-1511

SHANTZ & BELKIN
Attorneys for Respondents, Village of Corinth,
Village of Corinth Board of Trustees and Robert Kane
26 Century Hill Drive, Suite 202
Latham, New York 12110

Following a hearing under Civil Service Law § 75 (3) and Village Law § 8-804, the Village of Corinth Board of Trustees (Board) adopted a resolution terminating petitioner's employment as a village police officer effective May 21, 2007. On September 12, 2007, petitioner commenced this proceeding under CPLR Article 78 seeking a judgment annulling the determination on the ground that the hearing officer's findings, and thus the Board's adoption of them and its termination of petitioner's employment are not supported by substantial evidence

and seeking an order transferring the proceeding to the Appellate Division pursuant to CPLR 7804 (g).

Respondents, Board, Village, and Robert Kane, have filed a certified transcript of the record of the administrative proceeding and an answer raising affirmative defenses, namely that the proceeding is time-barred or alternatively, precluded by the doctrines of law of the case, collateral estoppel, res judicata and judicial estoppel; that petitioner lacks standing or has waived his right to relief; and lastly that the petition is moot because the Village abolished effective June 1, 2007 its police department to which petitioner seeks reinstatement.

Legal proceedings over petitioner's employment as a police officer date back to September 2004 when the Village first filed a notice and statement of charges alleging several instances of petitioner's misconduct and insubordination. The Village's initial termination of petitioner's employment was set aside because the disciplinary hearing held under Civil Service Law § 75 (3) was not stenographically or otherwise recorded in a manner to permit a meaningful judicial review. Matter of Longton v Village of Corinth, Sup Ct, Saratoga County, Index No. 2005-0402, RJI No. 45-1-2005-0219, Decision, Order and Judgment dated June 21, 2006 (Nolan, J.). Then, in a second lawsuit, petitioner was found to be entitled to back pay and other benefits for all but two periods of his extended suspension. Matter of Longton v Village of Corinth, Sup Ct, Saratoga County, Index No. 2006-1989, RJI No. 45-1-2006-1082, Decision and Order dated March 15, 2007 (Nolan, J.).

The instant is the third Article 78 proceeding. As an initial matter, CPLR 7804 (g) requires the disposition of any objections which would justify dismissal of the proceeding - here the Village's affirmative defenses - before a determination of the substantial evidence/transfer

issue. Matter of Coleman v Town of Eastchester, 39 AD3d 855 (2nd Dept 2007); Matter of Collins v Parishville-Hopkinton Cent. School Dist., 256 AD2d 700 (3rd Dept 1998).

In a word, the Village's affirmative defenses lack merit. First, the proceeding was commenced within four (4) months of the Village's adoption of the resolution terminating petitioner's employment and is not time-barred. Civil Service Law § 76 (1); CPLR 217.[1] Next, law of the case, collateral estoppel, and res judicata and judicial estoppel defenses do not apply since the two key issues now presented - whether the findings of misconduct and insubordination are supported by adequate evidence and, if so, whether the penalty imposed was appropriate - were not decided in prior litigation. see Matter of Sickler v Town of Hunter, 3 AD3d 727 (3rd Dept 2004). Petitioner is certainly aggrieved and injured "in fact" by the Village's May 2007 determination to terminate his employment, and thus he has standing to seek judicial review of that determination. Nor has petitioner waived his right to judicial review of the determination. Respondent cites no express waiver and does not present any facts from which a waiver may be construed. Finally, abolition of the Village police department does not render entirely moot this proceeding. Certainly, petitioner's victory, if he were to prevail on the merits, may be partially hollow; yet, he may be entitled to additional damages for lost income and benefits if his termination were annulled and if he were deemed to have been a Village police officer when the

[1]Petitioner alleges (verified petition para 9) that the disciplinary hearing under challenge was held pursuant to Civil Section § 75 (3) and Village Law § 8-804. Village Law § 8-806 fixes a 60 day limitation period to challenge the conviction of a police officer made in a § 8-803 disciplinary proceeding. Here, the Village's notice and statement of charges (Exhibit A to petition) states that the Village was proceeding under § 75 of the Civil Service Law, not § 8-806 of the Village Law. Moreover, the report of the hearing officer likewise states that the hearing(s) were commenced under Civil Service Law § 75. Then, in the first two Article 78 proceedings, all parties agreed that Civil Service Law § 75 was the governing statute. There is no basis to apply the shorter limitation period.

department was dissolved.

The Village's affirmative defenses are dismissed, without costs.

In view of the court's ruling on the Village respondents' affirmative defenses, the petition remains extant and the issue of whether there is substantial evidence to support the determination terminating plaintiff's employment must be transferred to the Appellate Division under CPLR 7804 (g) as petitioner requests and with no opposition from respondents.

The court herewith signs the order of transfer proposed by petitioner.

This memorandum shall constitutes the decision of the court. This decision and order and the order of transfer are returned to petitioner's counsel. The signing of the decision and order(s) shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry. Petitioner should make arrangements to retrieve the pleadings and certified record for transmittal to the Appellate Division.

DATED: January 29, 2008
Ballston Spa, New York

HON. THOMAS D. NOLAN, JR.
Supreme Court Justice