



Enander v. Kelly

306 A.D.2d 41 (2003) | Cited 0 times | New York Supreme Court | June 5, 2003

This opinion is uncorrected and subject to revision before publication in the Official Reports.

(*1)

Determination of respondent Police Commissioner, dated December 28, 2001, dismissing petitioner from his position as a police officer, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Faviola Soto, J.], entered September 17, 2002), dismissed, without costs.

The finding that petitioner used excessive force in making an arrest is supported by substantial evidence, including the hearsay testimony of a Police Department investigator relating statements by eyewitnesses that petitioner viciously beat the non-resisting complainant about the head with a radio or flashlight, and unrefuted medical testimony that the complainant's surgically repaired multiple facial and skull fractures were consistent with multiple blows to the head and inconsistent with a fall (see *Matter of LaFemina v Brown*, 194 AD2d 405). No basis exists to disturb respondent's finding of credibility rejecting petitioner's claim that the complainant sustained his injuries when he fell once off a curb during the police chase (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444). Petitioner's ineffective assistance of counsel claim is improperly raised for the first time in reply papers (see *Ritt v Lenox Hill Hosp.*, 182 AD2d 560), and, in any event, assuming there is a right to counsel in this type of proceeding, lacks support in the record. The penalty of dismissal does not shock our sense of fairness (see *Matter of Harp v New York City Police* (*2)Dept., 96 NY2d 892), particularly in view of the recent discipline of petitioner in another matter for excessive force resulting in injury.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

