

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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:
MICHAEL A. CUNNINGHAM, :
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Petitioner, :
:
-against- :
:
NEW YORK STATE DEPARTMENT :
OF LABOR, :
:
Respondent. :
:
For Judgment Pursuant to Article 78 :
Of the Civil Practice Law and Rules :
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Index No. _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. This Article 78 proceeding seeks to vindicate the right of New York government employees to be free from unconstitutional, warrantless invasions of their privacy using Global Position Service (GPS) tracking devices. GPS is a satellite-based technology capable of tracking one's precise location and movement twenty-four hours a day, creating a detailed record of a person's daily activities, habits, and interests. Because this technology creates great potential for government to monitor the private details of individuals' lives, the New York Court of Appeals recently ruled in *People v. Weaver*, 12 N.Y.2d 433 (2009), that evidence gathered using GPS must be excluded from criminal proceedings.

2. As part of an investigation into workplace misconduct, the New York State Department of Labor (DOL) placed a GPS tracking device on Petitioner Michael A. Cunningham's personal car. The device tracked the daily movements of Mr. Cunningham and

his family at all times for one month, including evenings and weekends and while they went on a long-planned, weeklong family vacation out of state.

3. Based on evidence gathered by the GPS tracking device, DOL sought to dismiss Mr. Cunningham. At the hearing to determine the validity of that dismissal, the presiding hearing officer considered the GPS evidence over Mr. Cunningham's objection and, relying on that evidence, determined that termination was appropriate.

4. Under the New York State Constitution, the GPS tracking initiated and authorized by DOL is a search and is unconstitutional unless justified by a warrant or an exception to the warrant requirement. Because no warrant was sought here and because the intrusiveness of the search cannot be justified under the limited exception to the warrant requirement allowed for searches of government employees, the Court should vacate the Hearing Officer's decision and hold that the evidence obtained from the GPS search should have been excluded from consideration.

VENUE

5. Pursuant to CPLR 7804(b) and 506(b), venue in this proceeding lies in Albany County, the judicial district where the agency decision challenged in this case was made.

PARTIES

6. Petitioner Michael A. Cunningham was a New York State Department of Labor employee for 30 years. He served as the Director of the Staff and Organizational Development from 1988 until he was terminated by DOL on August 24, 2010, following the August 16, 2010 decision challenged herein.

7. Respondent New York State Department of Labor (DOL) is a New York state agency and was Mr. Cunningham's employer for 30 years.

FACTS

8. On June 3, 2008, at approximately 10:00 a.m., investigators Carroll and Patwell from the Office of the State Inspector General (OSIG) placed a GPS tracking device on the personal, family car of Petitioner Michael Cunningham.

9. The placement of the GPS device was at the behest of the New York State Department of Labor (DOL), as part of an investigation of Petitioner Cunningham for suspected workplace misconduct.

10. DOL placed the device on the Cunningham family car for the purpose of investigating whether Mr. Cunningham failed to accurately record work absences.

11. Mr. Cunningham and his family were not aware of the placement of the device, nor were they informed of it until after the device had been removed from the car.

12. DOL does not notify its employees that they and their families may be subject to such monitoring and surveillance.

13. Neither the OSIG nor DOL applied for or obtained a warrant to place the GPS device on the Cunningham family's car.

14. Agents from the OSIG removed and downloaded the data from the GPS device on June 11, 2008, and replaced the device with a new device on that date.

15. Agents again removed, downloaded, and replaced the GPS device on June 20, 2008.

16. On July 3, 2008, the GPS device ceased operation, but it was not removed from the Cunningham family's car until July 8, 2008.

17. In all, the Cunningham family's car was tracked from June 3, 2008, to July 3, 2008.

18. The GPS device made a record of all movements of the Cunningham family in their personal car, including their movements after business hours and overnight.

19. The GPS device operated at all times, including the weekends of June 7-8, 14-15, 21-22, and 28-29.

20. The GPS device also operated from June 30, 2008-July 3, 2008, a period of annual leave approved in advance by DOL, during which time the Cunningham family was vacationing in Massachusetts.

21. On March 25, 2009, DOL issued a Notice of Discipline involving Petitioner Cunningham.

22. On January 14, 2010, a Section 75 proceeding concerning the March 25, 2009 Notice of Discipline commenced.

23. This proceeding was followed by hearings on February 3, March 9, April 27, and April 29 of 2010.

24. In the January proceeding, Petitioner Cunningham objected to the introduction of the GPS evidence, admitted by DOL as Exhibits 25 and 30, and the Hearing Officer requested that both parties file briefs concerning the admissibility of the evidence.

25. On March 3, 2010, the Hearing Officer issued an Evidentiary Ruling finding that the GPS evidence was not barred from admission, as the GPS evidence was not obtained in violation of the New York State Constitution and would not be excluded from admission even if it had been.

26. In the final decision approving termination of Petitioner Cunningham, the Hearing Officer found DOL had met its burden on 11 of the 13 charges of misconduct. The majority of

the charges rested exclusively on GPS evidence. The Hearing Officer referenced the GPS data more than 20 times in his findings.

27. On August 24, 2010, DOL issued a Notice of Termination to Petitioner Cunningham.

CAUSES OF ACTION

28. The Hearing Officer's decision is not on the record as a whole supported by substantial evidence under CPLR 7803(4) because it was based on evidence that should have been excluded as the product of search that was unconstitutional under Article I, Section 12 of the New York State constitution.

PRAYER FOR RELIEF

WHEREFORE, the Petitioner requests the following relief:

- 1) A declaration that Respondent's attachment of a GPS tracking device to Petitioner's personal, family car was a violation of the New York State Constitution's guarantee against unreasonable searches and seizures.
- 2) A declaration that the Hearing Officer should have excluded from consideration evidence obtained from a search in violation of the New York State Constitution.
- 3) An order vacating the decisions of the New York State Department of Labor that resulted in Petitioner having been terminated from his position as Director of the Staff and Organizational Development on the grounds that evidence obtained from the unconstitutional GPS search should have been excluded from consideration.
- 4) An order permitting the Petitioner to return to his position as Director of the Staff and Organizational Development at the New York State Department of Labor.
- 5) Such other and further relief as may be necessary, appropriate and equitable.

Respectfully submitted,



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Counsel for Petitioner

Dated: December 3, 2010
New York, New York

* Not yet admitted; admission pending pursuant to Third Department student practice plan, Judiciary Law §§ 478, 484, and the Rules of the Appellate Division, NYCRR 805.5.

VERIFICATION

State of New York)
) ss:
County of Albany)

I, Corey Stoughton, being duly sworn, state that I represent the Petitioner Michael A. Cunningham in this proceeding and that the foregoing Petition is true to my own knowledge based on the record that was before Hearing Officer Jeffrey M. Selchick.



COREY STOUGHTON

Sworn to before me this
third day of December, 2010

ADRIANA CECILIA PINON
Notary Public, State of New York
No. 02P16223552
Qualified in New York County
Commission Expires 06/14/14



NOTARY PUBLIC