

Matter of McEvoy v Oyster Bay Fire Co. No. 1.

2012 NY Slip Op 30826(U)

March 27, 2012

Supreme Court, Nassau County

Docket Number: 18049-11

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

In the Matter of the Application of the

ROBERT W. MCEVOY,

Petitioner,

-against-

OYSTER BAY FIRE COMPANY NO. 1,
OYSTER BAY FIRE DEPARTMENT, CHIEF
ANTHONY DECAROLIS, CHIEF FRANK
MANTEGARI, III, CHIEF ROY JOHANSON
and OYSTER BAY FIRE COMPANY NO. 1
DISCIPLINARY REVIEW BOARD,

Respondents.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 18049-11

MOTION SUBMISSION
DATE: 2-3-12

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

- Notice of Petition, Verified Petition X
- Verified Answer and Exhibits X
- Verified Reply and Exhibits X

This is an Article 78 wherein petitioner is seeking, *inter alia*, an order vacating and annulling the determination of the respondents' dated September 28, 2011 which suspended petitioner for a period of one year effective August 29, 2011; and reinstating petitioner to his position as a volunteer firefighter for he Oyster Bay Fire Company No. 1 and the Oyster Bay Fire Department, with full rights and privileges, *nunc pro tunc*, August 29, 2011.

Petitioner has been a volunteer firefighter for the Oyster Bay Fire Department, Oyster Bay Fire Company No. 1 for more than nine years and is over the age of 18.

On August 29, 2011, petitioner responded to an emergency call for an ambulance at Theodore Roosevelt Memorial Park in Oyster Bay. As a result of this call, respondent preferred six charges against petitioner (see letter dated September 6, 2011). Thereafter, petitioner consulted with and retained a lawyer, Frank Scalera. By letter dated September 22, 2011, Mr. Scalera denied each and every claim made against petitioner, and formally requested that Chief DeCarolis recuse himself as to any hearing or proceeding in this matter. By letter dated September 24, 2011, respondents' attorney, James Cammarata, Esq., denied petitioner's request and noted the Department's disciplinary process. By letter dated September 28, 2011, respondents suspended petitioner for a period of one year based upon multiple acts and omissions including: "endangered the crew responding on unit 5516; potentially endangered the safety other firefighters responding to the scene; misleading the Nassau County Fire Communications Center about the true nature of the alarm and in doing so misleading the Chiefs and other personnel responding to the alarm; ignoring a direct order of a Chief

Officer; and acting disorderly and in manner unbecoming a member of the Oyster Bay Fire Department.”

Thereafter, petitioner appealed that decision to the Disciplinary Review Board pursuant to the Constitution and By-Laws of Oyster Bay Fire Company No.

1. Specifically, in his letter dated October 3, 2011, Mr. Scalera stated in pertinent part: “Please allow this letter to serve as Mr. McEvoy’s formal demand under Article V of the Constitution and By-Laws for a hearing before the Disciplinary Review Board for the purpose of reviewing the matter” and demanded certified copies of various documents. By letter dated November 3, 2011, Mr. Cammarata advised Mr. Scalera that “[t]he Disciplinary Review Board has agreed to a final adjournment of this matter to November 15, 2011 at 6:00 PM at Fire Headquarters.”

At the Disciplinary Review Board hearing, petitioner was allegedly denied his rights to present witnesses and evidence on his behalf, to cross-examine respondents’ witnesses, and to question the accuracy, relevance, and probative value of respondents’ evidence. Further, respondents did not proceed with its burden of proof, no stenographic minutes were taken nor a record created. In addition, petitioner’s attorney’s request for the documents, writings, statements, and recordings supporting the charges was denied.

The Disciplinary Review Board affirmed and modified the one year suspension as follows: six month suspension from active duty from August 29, 2011 to February 28, 2012, followed by another six month suspension from Fire Department social functions and fund raisers from March 1, 2012 to August 31, 2012.

On December 29, 2011, petitioner filed the within Article 78 petition.

In support thereof, petitioner asserts that “[r]espondents patently denied petitioner due process before and during the disciplinary proceedings . . . and respondents’ acts, collectively and individually, were and remain unlawful, arbitrary and capricious.” (¶ 18 of Petition).

In their answer, respondents allege that: the respondent corporation is neither a political subdivision or a special district as described under the Civil Service Law and as such, any requirement under Section 15 is inapplicable to the matter; the discipline imposed was not made in violation of any lawful procedure or error in law; and was neither arbitrary or capricious; and petitioner was not denied the right to cross-examine witnesses.

Section 7803 provides, in part, that the only questions that may be raised in a proceeding under this article are: . . . (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and

capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.

In reviewing an administrative determination, a court must ascertain whether there is a rational basis for the action in question, or whether it is arbitrary and capricious (*see Matter of Pell v Board of Ed. of Union Free School Dist. No 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *see also Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *Matter of Deerpark Farms, LLC v Agricultural and Farmland Protection Board of Orange County*, 70 AD3d 1037 [2nd Dept 2010]). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, supra*; *see Matter of Birch Tree Partners, LLC v Town of East Hampton*, 78 AD3d 693 [2nd Dept 2010]). Thus, “[i]f the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency” (*Matter of Peckham v Calogero, supra*; *see Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). Consequently, “courts must defer to an administrative agency’s rational

interpretation of its own regulations in its area of expertise” (*Matter of Peckham v Calogero, supra*).

“As a general rule, a court will not interfere with the internal affairs of a not-for-profit corporation, including a labor union, absent a showing of fraud or substantial wrongdoing.” *Matter of Gilheany v Civil Service Emp. Ass’n Inc.*, 59 AD2d 834 [3rd Dept 1977]; *New York State Soccer Football Ass’n v United States Soccer Football A’ssn*, 18 Misc2d 112, 116 [1958].

Initially, the Court finds that petitioner is entitled to all the rights granted by law to volunteer firefighters, including those set forth in Civil Service Law § 75. Civil Service Law § 75 grants to an exempt volunteer firefighter (as defined by General Municipal Law § 200) the protection of a hearing with due process prior to the imposition of discipline. *See, Mahon v Baron*, 154 Misc 291, 292 [4th Dept 1935].

Civil Service Law § 75 states the following:

1. Removal and other disciplinary action.
A person described in . . . paragraph (b) . . . of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

* * *

(b) a person . . . who is an exempt volunteer firefighter as defined in the general municipal law, . . .

General Municipal Law § 200 states:

An exempt volunteer fireman is hereby declared to be a person who as a member of a volunteer fire company duly organized under the laws of the state of New York shall have at any time after attaining the age of eighteen years faithfully actually performed service in the protection of life and property from fire within the territory immediately protected by the company of which he is a member, and while a *bona fide* resident therein, for a period of five years. . . .”

General Municipal Law § 100 defines a fire company as follows:

2. “Fire Company” means:

b. A fire corporation the members of which are volunteer firemen and which was incorporated under or is subject to the provisions of section fourteen hundred two of the not-for-profit corporation law, . . . or recognized as a fire corporation by, the governing board of a city, town, village or fire district, . . .

New York State Volunteer Firefighters’ Benefit Law § 3 adds:

As used in this chapter:

1. “Volunteer fireman” means an active volunteer member of a fire company.

2. “Fire Company” means:

b. A fire corporation incorporated under or subject to the provisions of article ten of the membership corporations law, [Now Not for Profit Corporation Law] . . . or recognized as a fire corporation by, the governing board of a city, town, village or fire district, . . .

As noted above, petitioner has been a volunteer firefighter for the Fire Department for more than nine years and is above the age 18. Hence, petitioner satisfies the requirements of General Municipal Law § 200 for an exempt volunteer firefighter.

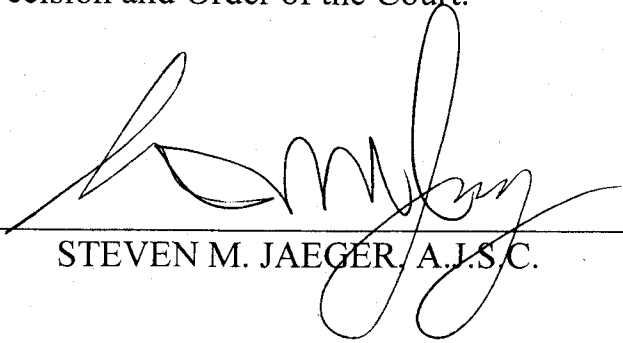
The procedure established by Civil Service Law § 75(2) conforms to the essentials of due process. *See Marsh v Hanley*, 50 AD2d 687 [3rd Dept 1975]; *Goldberg v Kelly*, 397 U.S. 254 [1970]. “Due process requires that an individual be afforded an opportunity to be heard at a meaningful time and in a meaningful manner” (*Smith v Board of Education*, 221 AD2d 755 [3rd Dept 1995], *lv denied*, 87 NY2d 810 [1996]; *Mitchell v Administrative Review Board*, 302 AD2d 635 [3rd Dept 2003]).

Civil Service § 75 clearly provides, *inter alia*, that an employee may not be subjected to a disciplinary reprimand without a formal hearing and other due process safeguards. *See*, Civil Service § 75 (1-3) *Civil Service Employees Ass’n v Southold Union Free School District*, 204 AD2d 445 [2nd Dept 1994].

In the instant matter, the record does not substantiate respondents’ contention that they comported with due process. *Michael D’Angelo v Scopatta*, 81 AD3d 820 [2nd Dept 2011]. Accordingly, the matter is remanded for further proceedings and respondents are directed to conduct a hearing in accordance with Civil Service Law § 75.

This constitutes the Decision and Order of the Court.

Dated: March 27, 2012



STEVEN M. JAEGER, A.J.S.C.

ENTERED
MAR 28 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE