

<b>Matter of Park v Kapica</b>
2003 NY Slip Op 30254(U)
October 20, 2003
Sup Ct, Westchester County
Docket Number: 03/9929
Judge: Kenneth H. Lange
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**FILED**  
OCT 21 2003  
LEONARD N. SPANO  
COUNTY CLERK  
COUNTY OF WESTCHESTER

FILED  
AND  
ENTERED  
ON OCT 21 2003  
WESTCHESTER  
COUNTY CLERK

QA

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----x  
In the Matter of the Application of  
JOHN PARK,

Petitioner,

DECISION & ORDER

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

Index #03/9929

-against-

JOHN A. KAPICA, Police Chief of the Town  
of Greenburgh and TOWN OF GREENBURGH,

Respondents.

-----x  
LANGE, J.

This is a proceeding pursuant to Article 78 of the Civil Practice Law and Rules wherein the petitioner seeks an order of this Court setting aside and annulling a determination of the respondent, police chief of the Town of Greenburgh, unilaterally appointing a hearing officer to determine the petitioner's continued entitlement to salary pursuant to provisions of General Municipal Law §207-c and directing that such evidentiary hearing be heard and decided by the Town Board of the Town of Greenburgh.

Petitioner has been employed as a police officer in the Town of Greenburgh since May 13, 1981. At the time of commencement of this action, he was employed as a police

sergeant with the Town of Greenburgh police department.

On October 30, 1994 the petitioner sustained an injury to his right shoulder while engaged in the performance of his duty. In May, 1995, petitioner sustained further injury to his right shoulder while restraining a prisoner during transport. On January 15, 1996, petitioner reported that the injury to his right shoulder was exacerbated during a training exercise. On July 23, 1996 the petitioner underwent surgery for repair of a torn rotator cuff.

Following the surgery the petitioner was carried as disabled for two weeks after which he performed a light duty assignment for an additional four weeks, before returning to his regular duties.

In 2001, the petitioner experienced a worsening of the condition of his right shoulder. On June 14, 2002, the petitioner had additional surgery to his right shoulder, which consisted of an open rotator cuff repair with excision of the distal clavicle and subacromial decompression. Following the surgical procedure, the petitioner was certified as disabled pursuant to the provisions of General Municipal Law §207-c and enrolled in a program of physical therapy.

In March 2003, petitioner was examined by an orthopedist at the request of the respondents. The orthopedist found "it is my opinion that Sergeant John Park will never be able to assume full duties as a police officer. It is also my opinion that he is capable of performing work in a sedentary

capacity with a restriction to avoid any activity requiring overhead use of the upper right extremity and with further restriction to avoid any activity requiring full grip strength on the right. In addition, he should not be in a position where he would be exposed to contact with persons in custody. As per your cover letter, it's my opinion that he would be capable of performing sedentary tasks, such as completing paperwork and conducting interviews within an office at police headquarters..."

By a letter dated April 11, 2003, the petitioner was advised that in accordance with the recommendation of the orthopedist, the petitioner was being assigned as commanding officer of the department's juvenile aid unit, where his responsibilities would be limited to performing administrative tasks associated with the position of command, such as assignment of personnel, reviewing case files and associated paperwork. He was directed to report for duty on Monday, April 21<sup>st</sup> and given a choice of a tour of duty. The letter also advised the petitioner that should he choose to challenge the order and "the department's position in directing you to report for duty is sustained after a hearing, the Town will seek to recoup the salary paid to you retroactive to the date you were originally directed to return to duty."

By letter dated April 18, 2003, the attorney for the petitioner wrote to the respondent Chief of Police stating that based on the opinion of the petitioner's treating orthopedist,

he was not capable of performing the duties required of him, and requested a due process hearing. The attorney also referred the respondent to the decision of the Hon. Francis A. Nicolai, Westchester County Supreme Court in Hayes v. New Rochelle, (Westchester County Index No. 01/112678). The attorney asserted that the holding of this case was that "a municipality may not 'back charge' a police officer who has received GML §207-c benefits, but is later determined to be capable of returning to a light duty assignment."

In a letter dated April 21, 2003, the respondent, Chief of Police, notified the attorney that he was in the process of retaining a hearing officer who will conduct the "due process hearing." The respondent Chief of Police also opined that he did not believe that the decision in Hayes v. New Rochelle precluded the Town from seeking to recoup salary paid to one who refuses to return to duty if, following a due process hearing, is found physically fit to return to duty.

Subsequently, a hearing officer was retained to determine if the petitioner was fit to perform the duties of commanding officer of the juvenile aid unit as he'd been assigned. A hearing was scheduled.

It is the position of the petitioner that a "due process hearing" must be held before the Town Board of the Town of Greenburgh and the responsibility to conduct such a hearing cannot be delegated. Petitioner further contends that the hearing officer retained by the respondent's has a history of

prejudice and is neither fair nor impartial.

Petitioner first requests that the determination of the respondent, appointing a hearing officer to determine petitioner's continued salary entitlement pursuant to General Municipal Law §207-c be annulled. The court will deny that request. The law does not require that a "due process hearing" be conducted before the entire town board as argued by the petitioner. To the contrary, the appointment of an independent hearing examiner has been upheld by the court. See, Curley v. Dilworth, 96 AD2d 903 (Second Dept., 1983).

A reading of the petitioner's moving papers suggests that the petitioner is requesting the court to rule that the hearing examiner retained by the respondent was prejudiced, that any determination made by this hearing examiner would have to be arbitrary and capricious and could not be fair and impartial and that, assuming the hearing examiner made a determination that the petitioner was physically able to return to duty, any recoupment of pay, which the petitioner received since the order to return to limited duty would be invalid.

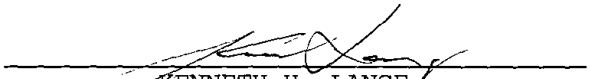
The parties agree that at the time of the filing of this Article 78, these issues were not ripe for determination. There is nothing before the court to support the allegation that the determination of the hearing examiner was arbitrary or capricious or not supported by substantial evidence. Furthermore, there is nothing before the court to indicate that respondent, Town of Greenburgh, has even brought any action to

recoup any payments made to the petitioner, subsequent to April 21, 2003.

The court cannot and will not anticipate any issues which are not before it.

The foregoing constitutes the decision and order of this Court. The court considered the following in connection with this application: (1) order to show cause dated June 24, 2003, together with petition verified June 19, 2003, affirmation in support with attached exhibits; (2) answer verified August 8, 2003, together with attached exhibits; (3) respondent's brief dated August 8, 2003; and (4) reply affirmation of Thomas Troetti, Esq., dated September 6, 2003, together with attached exhibits.

Dated: White Plains, New York  
October 20, 2003

  
KENNETH H. LANGE  
Acting J.S.C.

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