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| Matter of Park v Kapica |
| 2004 NY Slip Op 30368(U) |
| June 23, 2004 |
| Sup Ct, Westchester County |
| Docket Number: 03-19519 |
| Judge: Kenneth H. Lange |
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| FILED AND ENTERED ON <u>June 24</u> , 2004 WESTCHESTER COUNTY CLERK |
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF WESTCHESTER

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 In the Matter of the Application of
 JOHN PARK,

QA

Petitioner,

DECISION & ORDER

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

Index #03-19519

-against-

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

FILED
 JUN 24 2004
 LEONARD N. SPANO
 COUNTY CLERK
 COUNTY OF WESTCHESTER

Respondents.

-----x
 LANGE, J.

This is a proceeding pursuant to Article 78 of the Civil Practice Law and Rules wherein petitioner seeks an order annulling determination by the respondent that petitioner was fit to return to duty based on the respondent's failure to designate a hearing officer in writing, or in the alternative, annulling a determination to retroactively divest petitioner his benefits pursuant to General Municipal Law Section 207-c from April 21, 2003 to July 29, 2003.

Petitioner has been employed as a police officer with

the Town of Greenburgh for approximately 23 years. Since 1994, the petitioner suffered various injuries to his right shoulder in the course of his duties as a Police Officer and as a Police Sergeant. In July of 1996, petitioner underwent surgery to repair a torn rotator cuff in his right shoulder.

In 2001, the condition of the petitioner's shoulder worsened and in June 2002, petitioner underwent additional surgery to his right shoulder. Subsequent to the second surgical procedure, the petitioner was certified by the respondents as disabled pursuant to the provisions of General Municipal Law Section 207-c. He enrolled in a program of physical therapy. The petitioner claims that after participating in physical therapy for eight (8) months, the condition of his shoulder did not improve.

In January 2003, petitioner had surgery for a right carpal tunnel release.

In March 2003, the petitioner was examined at the request of the respondents. The examining orthopedist issued a report stating that the petitioner would never be able to assume full duties of a police officer, was capable of performing work in a sedentary capacity with a restriction to avoid any activity requiring overhead use of the right upper extremity and with further restriction to avoid any activity requiring full grip

strength on the right.

In April, 2003, respondent Kapica, Chief of Police of the Town of Greenburgh, directed the petitioner to report for duty as commanding officer of the department's juvenile aid unit. The letter included a paragraph stating "should you choose to challenge this 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 a letter dated April 18, 2003, to the respondent Chief of Police, the petitioner's attorney stated that petitioner is not capable of returning to a light duty assignment and petitioner is exercising his right to request a due process hearing. Petitioner's attorney also referred the respondent to a case Hayes v. New Rochelle, Supreme Court, Westchester County, (Index No. 01-112678), for the proposition that a municipality may not back charge a police officer who has received General Municipal Law Section 207-c benefits and 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, replied to the letter of the petitioner's attorney stating that he was in the process of retaining a

hearing officer to arrange for a hearing date. The Chief of Police also stated that in his opinion, the decision in Hayes v. New Rochelle, was a "flawed verdict" and indicated that he did not feel bound by that decision. He went on to indicate that the Town would seek to recoup the salary paid to the petitioner from the date he was ordered to return to duty.

Petitioner then brought an Article 78 proceeding before this Court, seeking to enjoin the respondents from going forward with a General Municipal Law Section 207-c hearing before the named hearing officer on the grounds that a hearing should not be held before a hearing officer, but, decided by the Board of Police Commissioners.

By decision and order of this Court dated June 24, 2003, this Court denied the petitioner's request to enjoin the hearing scheduled to be held that day.

On June 24, 2003, a hearing was, in fact, held before the hearing examiner. Petitioner and his attorney chose not to participate in that hearing. At the conclusion of the hearing, the hearing officer found that petitioner "was in fact fit to perform light duty consistent with his status of police officer and his refusal to return to work in a light duty status on April 21, 2003 was without justification." The hearing officer went on to recommend that "the Town seek to recoup the full

amount of regular salary or wages paid to Sergeant Park after April 20, 2003, and continuing until such time as he returns to work."

By a letter dated July 29, 2003, the respondent Chief of Police notified the petitioner that he accepted the findings and recommendations of the hearing officer.

By letter dated August 26, 2003, petitioner notified the respondent Chief of Police that he was retiring from the Greenburgh Police Department. His retirement became effective September 24, 2003.

By decision and order dated October 20, 2003, this Court denied the petitioners first Article 78 proceeding ruling that a due process hearing need not be conducted before the entire Town Board. Petitioner has appealed this decision and order to the Appellate Division, Second Department.

Petitioner now brings this proceeding pursuant to Article 78 of the Civil Practice Law and Rules seeking a judgment annulling the determination that petitioner was fit to return to duty based on the respondent's failure to properly designate a hearing officer in writing as required by law, or in the alternative, annulling the determination retroactively divesting the petitioner of his General Municipal Law Section

207-c benefits from April 21, 2003 to July 29, 2003.

Petitioner's claim that the hearing officer was not appropriately appointed is without merit. A hearing officer was appointed by a written resolution of the Town Board of the Town of Greenburgh dated April 29, 2003. The petitioner was advised of the appointment of the hearing officer by written correspondence.

Respondents argue that petitioner's application for relief precluding the recoupment of General Municipal Law Section 207-c benefits is premature since the Town has not yet sought recoupment. The respondents have on numerous occasions indicated unequivocally that it is their intent to seek recoupment of these benefits. The Court sees nothing to be gained by postponing a determination on the merits of this issue and requiring the petitioner to bring yet a third Article 78 proceeding arising out of the same facts.

Contrary to the position of the respondents, this Court does not find holding the Court in Hayes v. Carroll, (Westchester County Supreme Court, Index No. 01-2678, 2002) to be "flawed" but rather finds it persuasive. As the Court noted, General Municipal Law Sections 207-a and 207-c are similar statutes designed to benefit firemen and policemen injured in the line of duty. These statutes "should be liberally construed

in favor" of the injured firemen or policemen. Hayes v. Carroll, supra, quoting Curley v. Dilworth, 96 AD2d 903 at 904 (2nd Dept. 1983). These benefits constitute a property interest giving rise to procedural due process protections under the fourteenth amendment before these payments can be terminated. See, Cohoes Firefighters v. Cohoes, 94 NY2d 686. Public policy dictates liberal construction of the statute in favor of the police officers that it was designed to protect.

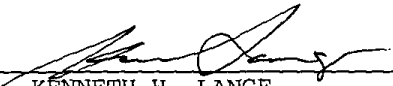
Accordingly, the Court orders that respondents, Police Chief of the Town of Greenburgh and the Town of Greenburgh are ordered not to collect recoupment of General Municipal Law Section 207-c benefits paid to the petitioner, which accrued up to August 4, 2003.

The foregoing constitutes the decision and order of this Court.

The Court considered the following papers in connection with this application: (1) notice of petition dated November 28, 2003, together with petition verified November 28, 2003 and attached exhibits; (2) respondent's answer verified February 2, 2004; (3) respondent's affidavit in opposition to the petition sworn to February 2, 2004, together with attached

exhibits; (4) respondent's memorandum of law in opposition to the petition; (5) petitioner's reply affirmation dated March 10, 2004, together with attached exhibits.

Dated: White Plains, New York
June 23, 2004



KENNETH H. LANGE
Acting J.S.C.

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