| **Matter of Uniformed EMS Officers Union, Local 3621. v New York City Fire Dept.** |
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| 2017 NY Slip Op 32384(U) |
| November 16, 2017 |
| Supreme Court, New York County |
| Docket Number: 655916/2017 |
| Judge: William Franc Perry |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY, J.S.C. PART 5

In the Matter of an Article 75 Proceeding
UNIFORMED EMS OFFICERS UNION, LOCAL 3621, FDNY, DC 37, AFSCME, AFL-CIO on behalf of itself and EMS CAPTAIN VINCENT WALLA,
Petitioners

- v -

THE NEW YORK CITY FIRE DEPARTMENT and DANIEL A. NIGRO, in his capacity as the Commissioner of the NEW YORK CITY FIRE DEPARTMENT,
Respondents

INDEX NO. 655916/~~2016~~ 2017

MOT. DATE October 17, 2017

MOT. SEQ. NO. 001

The following papers were read on this motion for Temporary Restraining Order and Preliminary Injunction in Aid of Arbitration

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| Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through D | ECFS DOC No(s). 1-16; 1-14 |
| Notice of Cross-Motion/Answering Affidavits — Exhibits 1 through 3 | ECFS DOC No(s). 1-3; 1-20 |
| Replying Affidavits | ECFS DOC No(s). 1-9 |

In this special proceeding, commenced by Order to Show Cause, pursuant to CPLR §§7502(c), 6301 and 6312, petitioners, UNIFORMED EMS OFFICERS UNION, LOCAL 3621, FDNY, DC 37, AFSCME, AFL-CIO on behalf of itself and EMS CAPTAIN VINCENT WALLA, (hereinafter, petitioners and/or Cpt. Walla), request a temporary restraining order and preliminary injunction in aid of arbitration, seeking to restrain and prohibit respondents, THE NEW YORK CITY FIRE DEPARTMENT and DANIEL A. NIGRO, in his capacity as the Commissioner of the NEW YORK CITY FIRE DEPARTMENT, (hereinafter respondents and/or FDNY), from transferring Cpt. Walla from Station 22 in Staten Island to Division 3 in Brooklyn and ordering respondents to transfer Cpt. Walla back to Station 22 pending resolution of an arbitration grievance commenced pursuant to petitioners' Citywide Contract/Collective Bargaining Agreement ("CBA").

Respondents oppose petitioners' motion for a temporary restraining order and preliminary injunction and cross move to dismiss the Petition, alleging that petitioners have failed to meet the legal and evidentiary prerequisites for such orders and because the relief being sought under the guise of temporary and preliminary relief is actually the ultimate relief being demanded in the Petition. The Order to Show Cause and Cross Motion, Sequence No. 001, are consolidated for decision.

## FACTUAL BACKGROUND and CONTENTIONS

Petitioner Local 3621 is a labor organization representing Emergency Medical Service ("EMS") Captains and Lieutenants employed by respondents. [1] Cpt. Walla is an EMS Captain employed by the FDNY. Respondent FDNY is a municipal subdivision of the City of New York. Respondent Daniel A. Nigro is the Fire Commissioner of the FDNY and is named in his official capacity.

[1] The factual background is based on the allegations set forth in the Verified Petition and annexed exhibits, and the Affidavit of Chief James Booth, attached to respondents' Memorandum of Law submitted in opposition to petitioners' motion and in support of respondents' cross motion to dismiss.

Cpt. Walla has been an Emergency Medical Technician ("EMT") since 1998, Lieutenant as of 2005 and an EMS Captain since 2010. He was assigned to Station 22 in Staten Island since April 2016. Cpt. Walla resides in Staten Island. He supervised eight lieutenants who are Local 3261 members. He also supervised approximately 67 EMTs, paramedics and inspectors who are members of Uniformed EMTs, Paramedics and Fire Inspectors Union, Local 2507 (Local 2507). Cpt. Walla is participating in a pilot program in which he works twelve-hour day shifts, alternating between thirty-six-hour work-weeks and forty-eight-hour work-weeks, resulting in eight hours of overtime every two weeks and approximately $700 per week.

On or about August 15, 2017, at Station 22, a Local 2507 EMT doing inspections discovered a rope noose hanging in an ambulance he was inspecting. The incident was reported to the FDNY EEO Office; the EMT who was found responsible was suspended for ten days and his probation was extended six months. Cpt. Walla was on a scheduled vacation from August 15 to September 8, 2017, except for two days. Nonetheless, Cpt. Walla responded to all requests for information relative to the FDNY's investigation of the August 15 incident.

On or about August 29, 2017, the Local 2507 union representative who was tangentially involved in the August 15, 2017 incident, received a threatening email and found a note containing racial slurs and threats of violence in her locker at Station 22. The August 29 incident was reported to the FDNY and eventually to the Police Department(NYPD). Both the FDNY's Bureau of Investigation and Trials ("BITs") and the NYPD Hate Crimes Unit began an investigation into these events. To date, the investigation is ongoing and there has been no finding as to who was responsible for putting the letter into the union representative's locker.

On or about September 8, 2017, Chief Booth (Chief of Operations for the EMS Bureau of the FDNY), at the direction of Chief Leonard (Chief of Department for FDNY), organized the logistical details regarding the administrative reassignments of five individuals, including Cpt. Walla, who were being administratively detailed out of Division 5 as a result of the pending investigation. According to Chief Booth's affidavit, he was told by Chief Leonard that the administrative reassignments were not intended to be permanent, nor are they disciplinary in nature. (Affidavit of Chief Booth, paragraph 10).

According to Chief Booth's Affidavit, the administrative details are in accordance with Section 4.2 of the FDNY EMS Operating Guidelines and Procedures ("OGP") which provides in pertinent part that; "Reassignments may be initiated by Commanding Officers with the approval of the Division Commander for administrative reasons." (Affidavit of Chief Booth, paragraph 11, EMS OGP 104-06 Section 4.2, annexed to Petition as Ex. B). Chief Booth goes on to provide that the transfer or reassignment of an employee, as directed by an administrative unit while an investigation is open and ongoing, is a reasonable managerial action and conforms to Section 4.2 of OGP 104-06, noting that such reassignments are left to the discretion of FDNY Management to protect and safeguard the integrity of a pending investigation. (Affidavit of Chief Booth, paragraphs 12, 13).

On September 9, 2017, the August 15 and August 29, 2017 incidents appeared on the front page of the New York Daily News and in the accompanying news article it was stated that, "Nigro is moving Station 22's chief officers and station captain". (See Ex. A, attached to Petition). On September 19, 2017, the New York Daily News updated its reporting and published a second news article entitled "EMS officer sues FDNY over transfer after station's noose scandal". (See Gurshka Aff., Ex. 1). The New York Post also published a news article on September 19, 2017 entitled "Demoted EMT Boss Says he was Branded a Racist for No Reason". (See Gurshka Aff., Ex. 2).

Upon learning of the administrative reassignments, Local 3621's President Vincent A. Variale (President Variale) spoke to Commissioner Nigro in an attempt to persuade the Commissioner that Capt. Walla should not be transferred as he did nothing wrong and was not involved in the incident being investigated. Commissioner Nigro replied that it was not a transfer, it was a "move" or "detail" and it may be temporary. President Variale said the move would cause Cpt. Walla irreparable damage to his reputation, but Commissioner Nigro refused to rescind the reassignment detail.

On September 14, 2017, Cpt. Walla was reassigned from Division 5 in Staten Island to Division 3 in Brooklyn. His new schedule is eight-hour shifts or 40 hours for each week period (40/40) and not 12-hour tours of 36 (36/48). As such, Cpt. Walla lost his built-in overtime of $700 and he now travels to Brooklyn each day at a cost of $18 a day.

On September 14, 2017, in accordance with the CBA, Article XV, Adjustment of Discipline, Local 3621 filed a grievance seeking to reverse the administrative reassignment. (See Ex. C and D attached to Petition).

Petitioner contends that he is caught in the middle of a serious matter in which he had no involvement. Although he admits that respondents have not accused him of any involvement, Cpt. Walla claims that the act of transferring him from Division 5 to Division 3 makes it appear that he is guilty of wrongdoing and as such, the reassignment is a disciplinary transfer which is expressly prohibited by FDNY's EMS Operating Guide Rule 4.3. Additionally, Cpt. Walla alleges that the front page featured New York Daily News story about the incident has branded him as "being involved and being a racist, subjecting him to humiliation and the appearance that somehow he was a guilty person in this horrible situation." (Petition, paragraph 25).

Respondents contend that petitioners have failed to meet the legal and evidentiary prerequisites for injunctive relief and that the relief sought under the guise of temporary relief is actually the ultimate relief sought in the Petition and as such, the application must be denied. Additionally, respondents claim that petitioners cannot demonstrate clear entitlement to the relief sought, irreparable harm or a balancing of the equities in their favor, and the Petition should be dismissed.

**STANDARD OF REVIEW and ANALYSIS**

CPLR §7502(a) provides in pertinent part that:

> The supreme court in the county in which an arbitration is pending . . . may entertain application for . . . a preliminary injunction in connection with an arbitration that is pending . . . only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

A party seeking injunctive relief must also demonstrate the traditional three-prong factors for such relief as set forth under CPLR Article 63. *Interoil LNG Holdings, Inc. v Merrill Lynch PNG LNG Corp.*, 60 AD3d 403, 404 (1st Dept. 2009). Specifically, petitioners bear the burden of demonstrating a probability of success on the merits, danger or irreparable injury in the absence of a preliminary injunction, and a balance of the equities in their favor. CPLR §6312; *Cohen v State Dep't of Social Servs.*, 37 AD2d 626 (2d Dept 1971, *aff'd*, 30 NY2d 571 (1972).

It is well established that the "the criteria for provisional relief set forth in CPLR articles 62 and 63 are not relaxed when such relief is sought in aid of arbitration pursuant to CPLR § 7502(c)." See *Erber v. Catalyst Trading, LLC*, 303 A.D.2d 165, 165 (1st Dep't 2003) (see *Matter of Cullman Ventures, Inc.*, 252 A.D.2d 222, 230 [1st Dep't 1998]; *New York City Off-Track Betting Corp. v New York Racing Assn.*,

*Inc.*, 250 A.D.2d 437, 440 [1st Dep't 1998]; *Koob v IDS Fin. Servs., Inc.*, 213 A.D.2d 26, 32 [1st Dep't 1995]; and see *SG Cowen Secs. Corp. v Messih*, 224 F.3d 79, 83 [2000]").

Petitioners contend that they have met their heavy burden to satisfy the drastic relief sought by demonstrating that Cpt. Walla's reassignment was not administrative as argued by respondents, but rather was a disciplinary transfer in violation of EMS OGP 104-06 Section 4.2 and the CBA. Moreover, Cpt. Walla contends that the damage to his reputation resulting from the published news reports about the incidents demonstrates that he has suffered irreparable harm that will continue unless respondents are enjoined from transferring him. Finally, petitioners contend that the denial of injunctive relief would render the final judgment through the grievance arbitration ineffectual.

An application for preliminary injunctive relief is addressed to the sound discretion of the Court. See CPLR § 6301. Such relief is a drastic remedy that should not be granted unless a clear legal right to it is established under law. *County of Orange v. Lockey*, 111 A.D.2d 896, 897 (2d Dep't 1985); see also *Graham v. Wisenburn*, 39 A.D.2d 334, 335 (3d Dep't 1972) (preliminary injunction may not be granted unless a party has stated a prima facie cause of action which would justify a permanent injunction); *Rodgers v. Rodgers*, 30 A.D.2d 548, 549 (2d Dept. 1968), *app. denied*, 22 N.Y.2d 643 (1968); *Scotto v Mei*, 219 AD2d 181, 182 (1st Dept. 1996)(proof establishing "elements must be by affidavit and other competent proof, with evidentiary detail"[citation omitted]).

Moreover, "a mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in 'unusual' situations,' where the granting of the relief is essential to maintain the status quo pending trial of the action." *Jones v Park Front Apts., LLC*, 73 A.D.3d 612, 612 (1st Dep't 2010) (citations omitted); see also *Matos v. City of New York*, 21 A.D.3d 936, 937 (2d Dep't 2005).

Mandatory injunctions are a particularly rare form of extraordinary equitable relief and should not be granted absent extraordinary circumstances. *Rosa Hair Stylists v. Jaber Food Corp.*, 218 A.D.2d 793 (2d Dep't 1995). Where a party seeks issuance of a mandatory injunction, the moving party must meet the "heavy burden of proving a clear right" to relief sought. Id. Here, petitioners are seeking an order directing the respondents to change the current status quo by reassigning Cpt. Walla to Station 22, and as such, must satisfy the heavy burden associated with such requests.

Petitioners have simply failed to meet their burden of proof to satisfy the evidentiary and legal requirements to justify the extraordinary relief sought. Contrary to petitioners' conclusory allegations, they have failed to show that an arbitration award would be rendered ineffectual in the absence of the injunctive relief requested. Additionally, petitioners have simply failed to demonstrate that they will suffer irreparable harm in the absence of a preliminary injunction. Furthermore, there is simply no proof that Cpt. Walla's administrative transfer is a "disciplinary" transfer, as petitioners allege.

Respondents have demonstrated that the FDNY has an obligation to safeguard the integrity of the ongoing NYPD investigation and the mechanism to accomplish this is set forth in EMS OGP 104-06 Section 4.2. Respondents have shown that the transfer or reassignment of an employee, as directed by an administrative unit while an investigation is open and ongoing, is a reasonable managerial action and conforms to Section 4.2 of OGP 104-06, noting that such reassignments are left to the discretion of FDNY Management to protect and safeguard the integrity of a pending investigation. (Affidavit of Chief Booth, paragraphs 12, 13).

Similarly, there is no proof that petitioners will suffer irreparable harm in the absence of a preliminary injunction. Petitioners' allegations of harm are purely speculative; Cpt. Walla contends without any proof, that "my transfer likely will brand me as being involved in the threats and being a racist, subject-

ing me to humiliation and the appearance that somehow I am a guilty person." Likewise, petitioners summarily allege that the denial of injunctive relief would render the final arbitral award ineffectual, but offer no proof as to why the CBA's grievance process will not offer sufficient relief for the claims asserted.

Moreover, the relief petitioners seek here as "preliminary relief" is the identical relief sought in the Petition, Cpt. Walla's transfer back to Station 22, and as such is a blatant attempt to fast forward through the arbitration grievance process, without making the necessary evidentiary showing that such relief is warranted. See, *St. Paul Fire & Marine Ins. Co., v. York Claims Serv.*, 308 AD2d 347, 349 (1st Dept. 2003) ("A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and plaintiff would receive the ultimate relief sought, pendent lite.").

Petitioners have not demonstrated through clear and convincing admissible evidence that they are likely to succeed on the merits of their claim, that they have suffered immediate and irreparable harm and that the balance of equities favor their position. See *Platinum Equity Advisors, LLC v SDI, Inc.*, 132 AD3d 420 (1st Dept. 2015). Conversely, respondents have shown that the administrative transfers are temporary and intended solely to safeguard the integrity of the ongoing NYPD investigation that risks being compromised by the return of any of the FDNY Chiefs who were administratively detailed to other Divisions.

While it is understandable that Cpt. Walla has been inconvenienced by the temporary administrative transfer from Staten Island to Brooklyn, and has lost the ability, temporarily, to continue with a schedule that guarantees approximately $700 per week in overtime compensation, petitioners have simply failed to put forth any convincing evidence that these claims cannot be adequately compensated through the grievance process that has been commenced. Additionally, respondents have adequately demonstrated the necessity for these administrative transfers and that such transfers are a reasonable managerial action that conforms to Section 4.2 of OGP 104-06.

Respondents have adequately established that the administrative transfers at issue here were implemented to safeguard the integrity of an ongoing investigation and to ensure that it proceeds efficiently and expeditiously for the overall betterment of the FDNY. (See, Chief Booth Aff.). Even petitioners concede the transfers were precipitated by a "horrible race related incident which has not been resolved". (Cpt. Walla Aff., paragraph 2). Indeed, the inconvenience to petitioners while no doubt real, is only temporary and if petitioners prevail at arbitration they will be compensated for any monetary loss suffered as a result of this temporary administrative transfer.

Petitioners have simply failed to satisfy the prerequisites for the provisional relief sought under CPLR §7502(c). Moreover, the allegations of irreparable harm to Cpt. Walla's reputation and the humiliation he has allegedly suffered as a result of this incident being reported in the newspaper, is purely speculative and does not satisfy the burden of proof necessary to establish the drastic remedy of a preliminary injunction. See, *Temple-Ashram v Satyanandji*, 84 AD3d 1158, 1161 (2nd Dept. 2011); *City of New York v 330 Cont. LLC*, 60 AD3d 226, 234 (1st Dept. 2009) (movant must demonstrate "a clear right to the drastic remedy of a preliminary injunction").

**CONCLUSION**

Petitioners have not demonstrated that an arbitration award would be rendered ineffectual or that they will be irreparably harmed unless a preliminary injunction is granted.

Accordingly, it is

ORDERED, that Petitioners' Order to Show Cause, Sequence No. 001, seeking a preliminary injunction is denied; and it is further

ORDERED, that Respondents' cross-motion, Sequence No. 001, is granted and the Petition is dismissed.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: November 16, 2017

HON.W. FRANC PERRY, J.S.C.

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| **1. Check one:** | ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION** |
| **2. Check as appropriate: Motion is** | ☐**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER** |
| **3. Check if appropriate:** | ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST** |
| | ☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE** |