

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - April 5, 2010

PETER B. SKELOS, J.P.
RUTH C. BALKIN
SHERI S. ROMAN
SANDRA L. SGROI, JJ.

2009-04125

DECISION & JUDGMENT

In the Matter of Keith Mason, petitioner, v Board
of Fire Commissioners of Jericho Fire District,
respondent.

(Index No. 20269/08)

Navaretta & Howard, LLP, Syosset, N.Y. (Diana Ruiz of counsel), for petitioner.

Hamburger, Maxson, Yaffe, Wishod & Knauer, LLP, Melville, N.Y. (Richard
Hamburger and Inna N. Cordiale of counsel), for respondent.

Proceeding pursuant to CPLR article 78 to review a determination of the Board of
Fire Commissioners of the Jericho Fire District dated July 10, 2008, which adopted the
recommendation of a hearing officer dated June 27, 2008, made after a hearing, finding the petitioner
guilty of seven charges of misconduct, and terminated his membership with the Jericho Fire District.

ADJUDGED that the petition is granted, on the law, without costs or disbursements,
to the extent that so much of the determination as found the petitioner guilty of charges six and seven
and as imposed a penalty is annulled, the determination is otherwise confirmed, charges six and seven
are dismissed, and the matter is remitted to the Board of Fire Commissioners of the Jericho Fire
District for a new determination as to the penalty to be imposed on the remaining charges.

The petitioner, a volunteer member of the Jericho Fire Department, was found guilty
of seven charges of misconduct and/or incompetence following a disciplinary hearing. The
determination of the Board of Fire Commissioners of the Jericho Fire District (hereinafter the Board)

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OF JERICHO FIRE DISTRICT

that the petitioner was guilty of charges one through five, arising out of an incident on or around May 31, 2007, in which the petitioner removed a primary piece of fire department equipment (a saw) from a front line fire truck, without permission, for personal use, was supported by substantial evidence in the record (*see* CPLR 7803[4]; 300 *Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179; *Matter of D'Alessandro v West Hempstead Fire Dist.*, 53 AD3d 576, 577; *Matter of Rooney v Deer Park Fire Dept.*, 36 AD3d 823).

In contrast, the Board's determination that the petitioner was guilty of charges six and seven, arising out of an incident on June 19, 2007, involving an alleged violation of a "Chief's order," was not supported by substantial evidence in the record, as the petitioner was not on duty at the time of the alleged misconduct (*see Matter of Berger v Board of Fire Commr. of the Jericho Fire Dist.*, 71 AD3d 881; *Matter of D'Alessandro v West Hempstead Fire Dist.*, 53 AD3d 576, 577; *Matter of Ittig v Huntington Manor Volunteer Fire Dept.*, 95 AD2d 829, 830; *see also Matter of Curley v Town Bd. of Town of Ramapo*, 218 AD2d 799).

The petitioner's remaining contention is without merit.

Accordingly, we annul so much of the determination as found the petitioner guilty of charges six and seven and as imposed a penalty, otherwise confirm the determination, dismiss charges six and seven, and remit the matter to the Board for a new determination as to the penalty to be imposed on the remaining charges.

SKELOS, J.P., BALKIN, ROMAN and SGROI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court