

Reed v Medford Fire Dept., Inc.

2009 NY Slip Op 32403(U)

October 5, 2009

Supreme Court, Suffolk County

Docket Number: 19931/2008

Judge: Joseph Farneti

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY


PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 MICHAEL P. REED,

Petitioner,

For a Judgment under Article 78 of Civil
 Practice Law and Rules,

-against-

MEDFORD FIRE DEPARTMENT, INC., and
 BOARD OF FIRE COMMISSIONERS OF
 THE MEDFORD FIRE DISTRICT,
 MEDFORD, NEW YORK,

Respondents.

ORIG. RETURN DATE: AUGUST 12, 2008
 FINAL SUBMISSION DATE: DECEMBER 11, 2008
 MTN. SEQ. #: 002 (001)
 MOTION: MOT D

PLTF'S/PET'S ATTORNEY:

JOSEPH C. STROBLE, ESQ.
 40 MAIN STREET
 P.O. BOX 596
 SAYVILLE, NEW YORK 11782
 631-244-8297

DEFT'S/RESP ATTORNEYS:

ZAKLUKIEWICZ, PUZO & MORRISSEY, LLP
 2701 SUNRISE HIGHWAY - SUITE 2
 P.O. BOX 389
 ISLIP TERRACE, NEW YORK 11752
 631-859-0300

Upon the following papers numbered 1 to 5 read on this petition _____
FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CPLR _____.

Notice of Petition and supporting papers 1-3; Answering Affirmation and supporting papers 4,
5; it is.

ORDERED that this petition for a judgment, pursuant to Article 78 of the CPLR, reviewing the decisions and findings of respondents MEDFORD FIRE DEPARTMENT, INC. and BOARD OF FIRE COMMISSIONERS OF THE MEDFORD FIRE DISTRICT ("respondents" or "Fire Department"), dated March 8, 2008, dismissing petitioner as a member of the Department, and, in refusing to comply with petitioner's Freedom of Information ("FOIL") request, upon the grounds that these determinations are not supported by substantial evidence, are illegal, arbitrary, capricious, unjust, contrary to law, an abuse of discretion, and in violation of the United States and New York Constitutions, FOIL, and New York State's General Municipal Law, is hereby **GRANTED** to the extent provided hereinafter.

The petitioner herein was a member of respondent Fire Department. Based upon an incident of alleged misconduct that occurred on February 3, 2008, while petitioner was present at a Super Bowl party located at the main firehouse, petitioner was dismissed as a member of the Fire Department. Also present at the party was Kathleen Zaugg, the wife of firefighter Warren Zaugg. Ms. Zaugg alleges that petitioner put one arm around her and groped her buttocks with his other hand. On February 8, 2008, Ms. Zaugg made a formal written complaint to the Fire Department with respect to the incident. Ms. Zuagg indicated that she was "sexually harassed" by petitioner, and that she "would like to have action taken against" him.

On or about February 20, 2008, petitioner was suspended from duty with the Fire Department based upon the incident. Thereafter, respondents sent to petitioner a "Notice of Charges and Disciplinary Hearing," dated March 7, 2008, which described the charges against petitioner, to wit: conduct unbecoming a member of the Fire Department in public and engaging in an act which reflects unfavorably on the Fire Department, and set the matter down for a hearing, pursuant to General Municipal Law § 209-I and the by-laws of the Fire Department, on March 26, 2008, "to determine the sufficiency of the charges against [petitioner]." The notice further provided that "[t]he hearing will be held in accordance with the by-laws of the Medford Fire Department in an open meeting with the president presiding and the members present, acting as the jury. The hearing will conclude with a secret ballot by the members present to determine a verdict of guilty or not guilty."

Notwithstanding the foregoing Notice of Hearing, petitioner alleges that by letter dated March 8, 2008 from respondents' counsel, petitioner was notified that he was dismissed from the Fire Department without a hearing. The letter stated that at a meeting of the regular membership on March 7, 2008, the membership voted to cancel the hearing based upon petitioner's alleged admission to the conduct complained of to all three Chiefs of the Department. Petitioner denies having made any such admissions. Thus, petitioner argues that he was deprived of the due process afforded him pursuant to the United States and New York State Constitutions, General Municipal Law § 209-I, and the Fire Department's by-laws. Further, petitioner argues that the punishment is disproportionate to the alleged offense. Finally, petitioner claims that respondents have violated FOIL by denying his request for a copy of the minutes of the meeting wherein he was dismissed.

In opposition, respondents argue that petitioner was terminated for violating the Fire Department's zero tolerance policy against sexual harassment. Respondents allege that after the Fire Department received Ms. Zaugg's written complaint, a meeting was held with Chief Franklin Rivera, Assistant Chief Norman Melcher, Assistant Chief William Wyche, and petitioner. Respondents allege that at such meeting, petitioner admitted that he "patted Ms. Zaugg's rear end" as she is a longtime friend, but denied actually groping her buttocks. Respondents further allege that at the general meeting on March 7, 2008, the membership voted to cancel the hearing as there was no disagreement that petitioner touched, in some manner, Ms. Zaugg's buttocks. Respondents indicate that Chief Rivera did not participate in the Executive Committee's vote with respect to the penalty of dismissal imposed upon petitioner.

Respondents argue that under the facts herein, they were in full compliance with General Municipal Law § 209-I and the Fire Department's by-laws when they removed petitioner without a hearing, as petitioner was charged with violating the Fire Department's by-laws which does not mandate a hearing. Furthermore, respondents allege that the voting procedure did not violate petitioner's due process rights, as Chief Rivera abstained from the voting. Moreover, respondents have provided petitioner with the transcript of the meeting he requested, thereby rendering his allegation of a FOIL violation moot.

In a proceeding under Article 78 of the CPLR when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 43 AD3d 921 [2007]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*).

Moreover, it is well-settled that a Court may not substitute its own judgment for that of a reviewing board (see *Janiak v Planning Board of the Town of Greenville*, 159 AD2d 574 [1990], *appeal denied* 76 NY2d 707 [1990]; *Mascony Transport and Ferry Service v. Richmond*, 71 AD2d 896 [1979], *aff'd* 49 NY2d 969 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (see *Castle Properties Co. v Ackerson*, 163 AD2d 785 [1990]). Mandamus to compel the performance of an official duty may only be granted where the act sought to be compelled is ministerial in nature and involves no exercise of discretion, and where the applicant has demonstrated a clear legal right thereto (see *Savastano v Prevost*, 66 NY2d 47 [1985]; *Jordan's Partners v Goehringer*, 204 AD2d 453 [2d Dept 1994]; *Cohalan v Caputo*, 94 AD2d 742 [2d Dept 1983]).

General Municipal Law § 209-1 provides that the “authorities having control of fire departments” may not remove a volunteer officer or member of a fire company “except for incompetence or misconduct” (General Municipal Law § 209-1 [2]). The statute specifically requires that removal on either of these grounds can only be accomplished “after a hearing upon due notice” (General Municipal Law § 209-1 [3]). After specifying further due process requirements, the last sentence of the statute states, “[t]he provisions of this section shall not affect the right of members of any fire company to remove a volunteer officer or voluntary member ... for failure to comply with the constitution and by-laws of such company” (General Municipal Law § 209-1).

Here, the parties’ dispute centers around whether a hearing is required by statute and the Department’s by-laws under these circumstances. Petitioner argues that he is entitled to a hearing pursuant to General Municipal Law § 209-1, while respondents contend that a hearing was not required as petitioner was charged with a violation of the Department’s by-laws. This Court agrees with petitioner.

As discussed, General Municipal Law § 209-1 requires that a hearing be held prior to a member being removed on the basis of misconduct (General Municipal Law § 209-1 [2]), which is the basis herein for the removal of petitioner. Even assuming, *arguendo*, that petitioner was removed merely for a violation of the Department’s by-laws, the by-laws similarly require a hearing be held prior to the removal of a member. Specifically, Section 3 of the by-laws delineates the acts which may be grounds for removal, including subdivision 3 (A) thereof,


"[c]onduct unbecoming a member of the department in public ... which reflects unfavorably on the department" (Fire Department's by-laws, 2007, Section 3 [A]), the charge asserted against petitioner herein. Section 4 of the by-laws provides that "all charges shall be tried in an open meeting with the President presiding and the members present acting as the jury. Both the accused and the department shall be entitled to select counsel. Vote will be by secret ballot. Two-thirds (2/3) of the valid ballots cast shall be in favor of guilty in order to determine a verdict of guilty" (Fire Department's by-laws, 2007, Section 4 [emphasis supplied]). While respondents argue that a hearing is unnecessary as petitioner admitted the conduct complained of herein, petitioner has now denied such admission. As such, petitioner is entitled to a hearing, with the due process afforded to him by General Municipal Law § 209-I and Section 4 of the Department's by-laws, prior to any disciplinary action being taken against him. Notably, petitioner was not present at the March 7, 2008 meeting wherein the membership voted to cancel the hearing and dismiss petitioner.

In view of the foregoing, the Court finds that the decision by respondents to dismiss petitioner from the Fire Department without a hearing was arbitrary and capricious, and without a rational basis in fact and law (see *Pell v Board of Education*, 34 NY2d 222, *supra*; cf. *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057, *supra*; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473, *supra*).

Accordingly, this verified petition for a judgment reviewing the decision of respondents, dated March 8, 2008, dismissing petitioner as a member of the Fire Department, is **GRANTED** to the extent that the matter is remanded to respondent Fire Department to conduct a hearing with respect to the allegations which served as the basis for petitioner's removal, in compliance with General Municipal Law § 209-I and Section 4 of the Fire Department's by-laws, within sixty (60) days of the date of service of the within Order upon respondents with notice of entry.

The foregoing constitutes the decision and Order of the Court.

Dated: October 5, 2009



HON. JOSEPH FARNETI
Acting Justice Supreme Court