

**Patrolman's Benevolent Assn. of Southampton  
Town, Inc. v Town of Southampton**

2009 NY Slip Op 32660(U)

October 29, 2009

Supreme Court, Suffolk County

Docket Number: 30840-2007

Judge: Melvyn Tanenbaum

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SHORT FORM ORDER

INDEX No.  
30840-2007

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:

Hon. MELVYN TANENBAUM  
Justice

OTION #002-CASE DISP  
R/D: 103007  
S/D 052609

PATROLMAN'S BENEVOLENT ASSOCIATION  
OF SOUTHAMPTON TOWN, INC.,

Petitioner,

- against -

TOWN OF SOUTHAMPTON AND  
SOUTHAMPTON POLICE DEPARTMENT,

Respondents.

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Upon the following papers numbered 1 to 26 read on this motion for an order pursuant to CPLR Section 7803(3)  
Notice of Motion/Order to Show Cause and supporting papers 1-10 ;  
Notice of Cross Motion and supporting papers \_\_\_\_\_ Answering Affidavits and supporting papers 11-13,14-19,20-22  
Replying Affidavits and supporting papers 23-24, 25-26 Other \_\_\_\_\_  
\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this CPLR Article 78 petition of PATROLMAN'S BENEVOLENT ASSOCIATION OF SOUTHAMPTON TOWN, INC. ("PBA") seeking a judgment in the nature of mandamus declaring respondents TOWN OF SOUTHAMPTON ("TOWN") and SOUTHAMPTON POLICE DEPARTMENT ("SPD") in violation of Civil Service Law Section 64, Suffolk County Department of Civil Service Rules and Procedures and New York State Constitution Article V, Section 6 and compelling respondents to appoint and compensate police officers as required by law is determined as follows:

Beginning in 2006 and 2007 two Southampton Town police sergeants were placed on indeterminate leaves of absence due to illness and/or injury. The absent sergeants were regularly assigned as "duty officers". During this period respondent "TOWN's" Chief of Police assigned police officers as "duty officers". The replacement officers received additional compensation for each tour.

On or about May 22, 2007 petitioner "PBA" filed a grievance with the "TOWN's" Chief of Police claiming that the assignment of police officers to work as duty officers normally staffed by a sergeant was

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an "out of rank" performance violating the terms of the "PBA/TOWN" collective bargaining agreement. By letter memorandum dated May 28, 2007 the Police Chief denied petitioner's grievance. After a May 30, 2007 meeting between the Chief and the PBA president, the Chief issued an inter-office memorandum dated June 2, 2007 to the PBA president which stated: "This communication is to formally advise you that my written response to your organization's group grievance, 07-03 date (sic) May 28, 2007, remains my position." The "PBA" president filed a grievance with the Town Clerk seeking review by the Southampton Town Board. No response was issued by the Board. Petitioner commenced this CPLR Article 78 proceeding seeking a judgment following the lack of a response by the Town Board.

The petition sets forth causes of action alleging that: 1) respondents violated Civil Service Law Section 64 by assigning officers who were not candidates on the active eligible list for sergeant to fill sergeant positions for periods in excess of three months (first cause of action); 2) respondents violated the Suffolk County Civil Service Department rules and procedures (second cause of action); and 3) respondents violated New York State Constitution Article V, Section 6 by failing to make competitive appointments based upon merit and fitness. In support of the petition, the petitioner submits affidavits from two police officers who were assigned as duty officers. Both officers claim that they performed "acting sergeant" duties and they were not on the November 10, 2005 eligible list for promotion to sergeant.

Respondents submit two affidavits from the Town Chief of Police in opposition to the petition. Although no formal motion pursuant to CPLR Section 7804(f) has been submitted, the relief sought by respondents seeks dismissal of the petition based upon: 1) petitioner's failure to exhaust administrative remedies; 2) petitioner's lack of standing; 3) expiration of the 4 month limitations period to commence this proceeding; 4) failure to state any viable claims against the respondents; and 5) subsequent permanent appointments rendered this action moot. Respondents claim that the PBA/Town collective bargaining agreement provides a mechanism for submitting unsettled grievances to binding arbitration and petitioner therefore failed to exhaust administrative remedies prior to commencing this action. Respondents also claim that the "PBA" does not have standing to challenge police officer assignments and non-promotional decisions based upon a conflict of interest since it represents all uniformed officers and cannot seek benefits for some members which would adversely affect the interests of other members. Respondents assert that the petition is also time barred by the CPLR Section 217 four month limitations period since the "TOWN's" determination denying petitioner's grievance (the Chief's written statement denying the grievance) was made on May 28, 2007. Respondents argue that petitioner's more than 18 month delay in challenging the Police Chief's duty officer assignments bars the "PBA" from maintaining this proceeding. Respondents also claim that Civil Service Law Section 64 has not been violated since the temporary assignment of police officers as duty officers did not require that a police officer act out of title as a sergeant since the duties performed were those of a police officer. Respondents contend that the Chief's March, 1996 memorandum created and described the duties of a duty officer which could be performed by a sergeant or a police officer. It is respondents position that the duty officer assignment is not supervisory in designation or nature and therefore the officers assigned to that position were not required to be sergeants or acting sergeants.

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Respondents claim that the "TOWN" did not violate any provision of the Civil Service Law, the Suffolk County Department of Civil Service rules and procedures or the State Constitution. Respondents assert that mandamus does not lie to compel the "TOWN" to make temporary appointments or to conditionally promote candidates to the rank of sergeant since such decisions are within the discretion of the Town. Finally respondents contend that the petition is moot since the "TOWN" has promoted two sergeants in compliance with Civil Service Law Section 61(1) based upon an assessment of current staffing needs.

Petitioner "PBA's" Reply includes affidavits from two police officers assigned as "duty officers" and an affidavit from the "PBA" president. Petitioner claims that "duty officers" act as supervisors and perform the duties of a higher ranking officer, namely a sergeant. It is the "PBA's" position that the more than 18 month assignments to perform sergeant's duties violated civil service law since the statute requires such appointments be made from the established civil service "eligible list" for sergeant. Petitioner contends that it exhausted all administrative remedies prior to commencing this proceeding and claims that the "PBA" has standing on behalf of its aggrieved members. Petitioner asserts that the "PBA" has authority to enforce provisions of the "PBA/TOWN" collective bargaining agreement relating to out of rank performance of duties and to ensure respondent's adherence to the Civil Service Law. Petitioner also claims that this petition was timely commenced within four months of the Town Board's June 19, 2007 failure to respond to their grievance. Petitioner contends that respondent's failure to comply with Civil Service appointments is also a continuing violation alleging that the "TOWN" has a longstanding practice of assigning police officers to out-of-title positions.

Standing is a threshold determination resting in part on policy considerations that a person should be allowed access to the courts to adjudicate the merits of a particular dispute (Society of Plastics v. County of Suffolk, 79 NY2d 761, 570 NYS2d 778 (1991)). An aggrieved party must sustain an injury in fact— an actual legal stake in the matter being adjudicated— and the injury asserted must fall within the zone of interest sought to be promoted or protected by the statutory provision under which the agency has acted (Society of Plastics v. County of Suffolk, supra.; Sun Brite v. North Hempstead Zoning Board, 69 NY2d 406, 515 NYS2d 418 (1987)). Moreover the petitioner must show for standing purposes that the harm or injury suffered is in some way different from that of the public at large (Schultz v. NYSDEC, 186 AD2d 941, 589 NYS2d 370 (3<sup>rd</sup> Dept., 1992) appeal denied 81 NY2d 704, 595 NYS2d 398 (1993)).

Petitioner "PBA" is an organization formed to represent police officers under the parties collective bargaining agreement. Petitioner has standing to maintain this proceeding since individual members may have suffered injury-in-fact based upon claimed violations of Civil Service Law and the New York State Constitution and since the claimed injury falls within the zone of interests protected by the statute and the Constitution.

The doctrine of exhaustion of administrative remedies requires litigants to address their complaints initially to administrative tribunals, rather than to courts, and to exhaust all possibilities of obtaining relief

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through administrative channels before appealing to the courts (Plummer v. Klepak, 48 NY2d 486, 489 (1979) cert. denied, 445 US 952 (1980); YMCA v. Pure Waters District, 37 NY2d 371, 372 NYS2d 633 (1975)). The doctrine prevents a reviewing court from usurping an agency's function so as not to deprive an agency of the opportunity to consider the matter, make its ruling and state the reason for its action (YMCA v. Pure Water District, supra. at 375 citing Unemployment Commission v. Aragon, 329 US 143, 67 SCT 245, 91 LED 136 (1946)).

Article X of the "PBA/TOWN" collective bargaining agreement provides the mechanism for resolving a grievance. The agreement sets forth a three stage procedure in which a written grievance is initially filed with an immediate supervisor, then filed by a "PBA" employee with the Chief of Police, and finally submitted to the Town Board. Section E provides that "grievances which have not been settled through the third stage shall be referred to binding arbitration, if either party serves written notice on the other requesting arbitration."

Article X (1), paragraph F provides:

Binding Arbitration- If the grievance to be settled involves issues directly related to the interpretation, application or enforcement of the provisions of this agreement, it shall be referred to binding arbitration. However, the following shall not be subject or submitted to binding arbitration; provisions of the agreement which relate to or in any manner affect the obligation of the EMPLOYER as intended by State statute; any matter which is covered by state statute relating to the operation and jurisdiction of the Municipal Civil Service Commission, including rules which the Commission is authorized to promulgate; the elimination or discontinuance of any job.

The petition claims that respondents violated a state statute (Civil Service Law Section 64) and the New York Constitution. Such claims are not subject to the binding arbitration provisions in the "PBA/TOWN" collective bargaining agreement (Art. X(1)F recited above). Accordingly petitioner exhausted its administrative remedies upon submitting its grievance to the Town Board. No basis exists therefore to dismiss the petition based upon a failure to exhaust administrative remedies.

CPLR Section 217 provides that an action to challenge a determination of a body or officer must be commenced within four months of the final determination. The four month period begins to run from the time the determination to be reviewed becomes final and binding upon the petitioner (Smith v. City University of New York, 92 NY2d 707, 685 NYS2d 910 (1999)). A determination becomes final and binding when the aggrieved party receives notice of the determination (NY State Association of Counties v. Axelrod, 78 NY2d 158, 573 NYS2d 25 (1991)). In circumstances where the party would expect to receive notification of a determination but has not, the limitations period begins to run when the party knows or should have known that it was aggrieved by the determination (Kan v. NY City Environmental Control Board, 262 AD2d 135, 691 NYS2d 500 (1<sup>st</sup> Dept., 1999) appeal dismissed 94 NY2d 857, 604 NYS2d 530

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(1999)).

Petitioner exhausted its administrative remedies when the Town Board failed to respond to its grievance within 15 days after service on the Town Clerk. Having completed the third and final stage of the bargaining agreement's grievance procedure, the four month limitations period commenced on June 19, 2007. Petitioner's commencement of this CPLR Article 78 petition on October 2, 2007 was therefore timely (CPLR Section 217). The gravamen of petitioner's allegations is that the "TOWN" instituted a continuing practice in assigning Town police officers to out-of-title sergeant's duties for more than 18 months in violation of Civil Service Law and the State Constitution. Such actions, if proven true, constitute a continuing wrong which are not time barred (see PBA v. Goldin, 266 AD2d 294, NYS2D (2<sup>nd</sup> Dept., 1999)) or barred by laches, waiver or estoppel.

New York Civil Service Law Section 64 provides:

#### Temporary appointments

1. Temporary appointments authorized; duration. A temporary appointment may be made for a period not exceeding three months when the need for such service is important and urgent. A temporary appointment may be made for a period exceeding three months under the following circumstances only:

(a) when an employee is on leave of absence from his position, a temporary appointment to such position may be made for a period not exceeding the authorized duration of such leave of absence as prescribed by statute or rule;

(b) a temporary appointment may be made for a period not exceeding six months when it is found by the state civil service department or appropriate municipal civil service commission, upon due inquiry, that the position to which such appointment is proposed will not continue in existence for a longer period; provided, however, that where a temporary appointment is made to a position originally expected to exist for no longer than six months and it subsequently develops that such position will remain in existence beyond such six-month period, such temporary appointment may be extended, with the approval of the state civil service department or municipal civil service commission having jurisdiction, for a further period not to exceed an additional six months;

(c) when the department of civil service or appropriate municipal civil service commission of any city containing more than one county finds that a reduction or abolition of positions in the state service or such city service is planned or imminent and such reduction or abolition of positions will probably result in the suspension or demotion of permanent employees, such department or commission may authorize temporary instead of permanent appointments

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to be made for a period not exceeding one year in positions in state service or such city service to which permanent employees to be affected by such abolition or reduction of positions will be eligible for transfer or reassignment. Successive temporary appointments shall not be made to the same position after the expiration of the authorized period of the original temporary appointment to such position.

2. Temporary appointments from eligible lists. A temporary appointment for a period not exceeding three months may be made without regard to existing eligible lists. A temporary appointment for a period exceeding three months but not exceeding six months may be by the selection of a person from an appropriate eligible list, if available, without regard to the relative standing of such person on such list. Any further temporary appointment beyond such six month period or any temporary appointment originally made for a period exceeding six months shall be made by the selection of an appointee from among those graded highest on an appropriate eligible list, if available.

3. Temporary appointments without examination in exceptional cases. Notwithstanding the provisions of subdivisions one and two of this section, the civil service department or municipal commission having jurisdiction may authorize a temporary appointment, without examination, when the person appointed will render professional, scientific, technical or other expert services (1) on an occasional basis or (2) on a full-time or regular part-time basis in a temporary position established to conduct a special study or project for a period not exceeding eighteen months. Such appointment may be authorized only in a case where, because of the nature of the services to be rendered and the temporary or occasional character of such services, it would not be practicable to hold an examination of any kind.

4. The state and municipal civil service commissions may, by rule provide for the extension of some or all of the rights and benefits of permanent status to an employee who is appointed or promoted, after having qualified therefor in the same manner as required for permanent appointment or promotion, to a position left temporarily vacant by the leave of absence of the permanent incumbent thereof. Such rights and benefits shall be subject to such conditions and limitations as may be prescribed in the rules.

Suffolk County Department of Civil Service Rules and Procedures are substantially similar to the Civil Service Law Section 64 and require that contingent permanent appointments be made from an eligible list for appointments exceeding six months.

Article V, Section 6 of the New York State Constitution provides:

Appointments and promotions in the civil service of the State and all of the civil divisions

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thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive.

CPLR Section 7803(3) provides:

The only questions that may be raised in a proceeding under this article are:

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed....

In a proceeding in the nature of mandamus to review a court examines an administrative action involving the exercise of discretion. Mandamus to review resembles certiorari except that in a certiorari proceeding a quasi-judicial hearing is required and the reviewing appellate court has the benefit of a full record. The standard of review in such a proceeding is "substantial evidence"(CPLR Section 7803(4)). "In a mandamus to review proceeding no hearing is required; the petitioner need only be given an opportunity to be heard and to submit whatever evidence he or she chooses and the agency may consider whatever evidence is at hand, whether obtained through a hearing or otherwise. The standard of review in such a proceeding is whether the agency determination was arbitrary and capricious or affected by an error of law." (CPLR Section 7803(3); Scherbyn v. Wayne-Finger Lakes Bd. Of Co-op., 77 NY2d 753, 757-758, 570 NYS 2d 474 (1991)).

The pertinent facts are not in dispute. Beginning in February, 2006 and through November, 2007 two Southampton Town sergeants assigned as duty officers were on leaves of absence due to injury or illness. The Police Chief assigned police officers to act as duty officers and they were paid additional compensation. None of the police officers assigned as duty officers was eligible for appointment as a sergeant from the then County Civil Service November 10, 2005 sergeants candidates list.

The Police Chief issued two memoranda dated March 25, 1996 entitled "Duties/Responsibilities-Squad Sergeants" and "Responsibilities of Duty Officer". The three page, twenty two paragraph memorandum for squad sergeants sets forth the responsibilities and duties of the sergeant which includes supervision of "all police officers assigned to their respective squad" and responsibility "for those assigned police officers performance of duty, appearance and training (paragraph 11, page 2). The three page, twenty two paragraph memorandum sets forth the responsibilities and duties imposed upon the "duty officer" assignment. The duty officer is required to maintain a presence in the police building and to review, assist and report work conducted by other police officers and civilian personnel.

It is the petitioner's contention that the 18 month s duties performed by the assigned officers were sergeant's duties and therefore the "TOWN" had an obligation to make contingent permanent appointments from the list of eligible candidates who had scored highest on the civil service examination for promotion

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to sergeant. It is respondent's position that assignment of police officers as "duty officers" was not work required to be performed by a sergeant. Respondent claims that the Police Chief must retain discretion to determine the most efficient and responsible means of conducting police business and his decision to temporarily appoint police officers most familiar with communications and dispatching emergency radio calls was reasonable.

In a proceeding seeking judicial review of administrative action, the court must determine whether there is a rational basis for the decision or whether it is arbitrary and capricious (Matter of Warden v. Board of Regents, 53 NY2d 186, 194, 440 NYS2d 875 (1981)). A review of the evidence submitted by the parties shows that a "duty officer" was clearly an assignment to a supervisory position, the function and responsibility of a police sergeant. The Police Chief's March 25, 1996 "duty officer" memorandum clearly provides duties and responsibilities for a superior officer. Moreover the "TOWN's" payment of additional compensation to police officers assigned as "duty officers" evidences respondents implicit recognition of a supervisory position. In this instance the record is clear that the Police Chief appointed police officers as "duty officers" for more than 18 months who were not on the eligible sergeants candidate's list. His decision to deny petitioner's grievance was therefore arbitrary, capricious and a violation of law since Civil Service Law Section 64 clearly mandates that appointments in excess of three months under these circumstances must be made from an existing eligible sergeant's list. The "PBA's" petition must therefore be granted to the following extent:

**ORDERED, ADJUDGED AND DECREED** that the petition seeking a writ of mandamus is granted. Respondents actions appointing police officers for a term of more than three months to supervisory positions known as "duty officers" is hereby declared to be in violation of the Civil Service Law Section 64 and the New York State Constitution Article V, Section 6. All police officers appointed "duty officers" from February, 2006 until November, 2007 shall, if not already, be fully compensated for work performed at the same rate and with the identical benefits granted a sergeant pursuant to the terms of the collective bargaining agreement in effect during this period. Such compensation and benefits shall be made and/or credited within twenty days of service of a copy of this Judgment.

Dated: October 29, 2009

  
\_\_\_\_\_  
J.S.C.  
**IRVYN TANENBAUM**