

**Matter of Titone v Rocky Point Fire Dept.**

2010 NY Slip Op 33037(U)

October 25, 2010

Supreme Court, Suffolk County

Docket Number: 2009-50209

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT OF THE STATE OF NEW YORK**  
**IAS PART XXI - COUNTY OF SUFFOLK**

**COPY**

PRESENT:

**HON. JEFFREY ARLEN SPINNER**  
 Justice of the Supreme Court

In the matter of the Application of  
**JOSEPH A TITONE,**

Petitioner,

**INDEX NO.: 2009-50209**

For a Judgment pursuant to CPLR Article 78  
 in the nature of mandamus to compel,

MTN SEQ NO: 001 - CASEDISP  
 ORIG MTN DATE: 01/19/10

- against -

MTN SEQ NO: 002 - CASEDISP  
 ORIG MTN DATE: 03/10/10

**ROCKY POINT FIRE DEPARTMENT, BOARD  
 OF COMMISSIONERS, JOHN CELENTANO**

FINAL MTN DATE: 10/13/10

(Chief of Rocky Point Fire Department),

Respondents.

UPON the following papers numbered 1 to 10 read on these Motions:

- Petition [001] (Papers 1-2);
- Respondents' Opposition (Papers 3-4);
- Petitioner's Reply (Papers 5-6);
- Respondents' Order to Show Cause [002] (Papers 7-8);
- Petitioner's Opposition (Papers 9-10);

it is,

**ORDERED**, that the application of Petitioner [001] is hereby granted in all respects; and the application of Respondents [002] is hereby denied in all respects.

Petitioner moves this Court [001] for an Order, pursuant to CPLR Article 78:

1. Rescinding Petitioner's suspension on August 26, 2009, as being contrary to his rights as the Captain of the Company One; and
2. Annulling the determination of Respondent BOARD and vacating, expunging and/or lifting the suspension from Mr Titone's record.

Respondents move this Court [002] for an Order granting Respondents leave to file a late answer.

Petitioner was the Captain of the Rocky Point Fire Company One for approximately 8 months prior to his suspension, having risen through the ranks of the Rocky Point Fire Department over a 22 year period, serving during that time as a Firefighter, Emergency Medical Technician, elected Second Lieutenant and elected First Lieutenant, before being elected Captain in 2009.

Respondent ROCKY POINT FIRE DISTRICT (Respondent DISTRICT) is a governmental subdivision under the laws of the State of New York, providing fire and ambulance service to a specific area of Suffolk County, overseen by Respondent BOARD OF COMMISSIONERS (Respondent BOARD, and Respondent CELENTANO was the Chief of the Rocky Point Fire Department at the time of the occurrence that are at the heart of this Article 78 proceeding.

On August 25, 2009, Petitioner wrote a letter to Respondent CELENTANO regarding return of a rescue boat, and repair another rescue apparatus with warning sirens. Petitioner alleges that, prior to issuing the letter, Company One had made several requests, in various forms, for repair of said equipment, and that the lack of action led to issuance of the letter on behalf of Company One, all said actions conforming with the established practices of the Department. The letter made the following points:

1. The rescue boat, a critical piece of equipment, was taken out of service for three weeks without a date certain for its return, work that should have been performed “off season; and handling said repairs in this manner was gross negligence and complete disregard for the safety of the public;
2. That permitting the tower ladder fire truck to remain in service without operational mechanical or electrical sirens caused Company One grave concern, because apparatus operators could no longer audibly warn those on public roadways of the presence of an emergency vehicle, creating a danger to both the crew members of the truck and the public when approaching intersections (their non-functioning status having been confirmed with the Captain of Company Two).

On August 26, 2009, Respondent CELENTANO summarily suspended Petitioner from the Department, effective immediately, “...under section 26.1 of the By-Laws...” for improper conduct, without prior warning, notification or a hearing on the matter, Petitioner alleges that he was verbally informed that the letter led to his suspension, with no formal charges presented to him.

On September 2, 2009, Petitioner filed a complaint with the New York State Department of Labor, alleging safety and health discrimination in the workplace, pursuant to Labor Law § 27-a(10). On September 16, 2009, the members and officers of Company One issued a letter to The Respondent BOARD, informing it of their disapproval of Petitioner’s suspension; that said suspension was inappropriate; that said letter was issued with the approval of Company One; that it accurately stated the concerns of the members of Company One, addressing their “...serious concerns pertaining to the safety of the community...”; and that “...those are concerns that should have been able to express freely and openly to the Board, without fear of repercussions.”.

On September 16, 2009, Respondent BOARD, by letter issued by its Chairmen, reinstated Petitioner to active duty as Captain of Company One, but warned that any further infractions would result in his dismissal from the Department. Petitioner complains that said letter failed to specify the reason for the suspension; failed to state any final determination regarding the suspension; failed to state what conduct would be considered a further infraction; failed to indicate the period of time for which Petitioner would essentially be treated like a probationary member of the Department, after over two decades of unblemished service; and failed to address the effects of the 27 day suspension (such as potentially preventing him from seeking any elective office for the following three years, pursuant

to Department By-Laws.

On September 25, 2009, Petitioner wrote a letter to Respondent BOARD requesting a written explanation of what would be considered an infraction, and for what period of time this warning would be in effect. Respondent BOARD did not answer Petitioner's letter, and did not expunge the suspension. Petitioner points out that the equipment in question was in fact serviced and returned to use two days after his suspension, finally addressing the concerns of Company One.

Due to the fact that said suspension was never expunged, Petitioner was not eligible to run for office the following year, and his application to run again Captain was rejected by the Nominating Committee Chairperson. The membership of Company One, disregarding said ineligibility, re-elected Petitioner to the position of Captain, but he was not permitted to assume said position.

Thereafter this Article 78 proceeding [001] was commenced. In reaction, Respondents filed an Affirmation in Opposition, devoid of the requisite Answer or Return. The Court further notes that a review of Respondents' Opposition fails to provide the Court with a copy of section 26.1 of the By-Laws, under which said suspension was allegedly implemented, for its review. In fact, the only documentation attached to said Affirmation that would qualify for inclusion in a return were: Petitioner's letter of August 25, which began the actions under review herein; Respondent CELENTANO's suspension letter of August 26; and Respondent BOARD Chairman's letter of September 23, reinstating Petitioner. The only other exhibits attached thereto are two affidavits created in response to this proceeding, and therefore could not be part of the record considered by Respondents in support of their actions.

What Respondents' Opposition does allege is that Petitioner's improper conduct allegedly consisted of writing a factually false and inaccurate defamatory letter to Respondent CELENTANO. They support this contention with the affidavits of Respondent CELENTANO and the District Mechanic for Respondent DISTRICT.

Respondent CELENTANO's reply states that Petitioner's letter falsely accused the Fire Company of maintaining unsafe equipment, and then goes on to make statements about conditions of the equipment that most members of the public might logically consider unsafe, such as "intermittently" functioning electronic sirens. However, most notable about Respondent CELENTANO's affidavit are that, first, there is nothing in Petitioner's letter of August 25 that accuses the "Fire Company" of anything, and, secondly, he makes much of the point that the ladder fire truck in question is housed and belongs to Company Two, not Company One, as though that makes it less critical that it possessed at the least malfunctioning equipment. Petitioner later responds to this allegation by pointing out that any member of the three fire companies can complain to the chief about rescue equipment, and when responding to emergency calls, any firefighter of Respondent DISTRICT can ride on any apparatus to aid in rescues. Furthermore, the Court further notes that this affidavit wholly fails to address the rescue boat.

The Affidavit of the District Mechanic also admits to "intermittently" functioning equipment, and

then goes on to allege that he inspected ladder fire truck in August and September, explained why it was acceptable to keep it in service with malfunctioning equipment (how comforting), and states that he ordered the proper electrical siren to fix it. The Court is struck by the fact that, simply stating that he inspected the equipment in August and September (when August was when Petitioner finally had to resort to his letter on behalf of this Company in order to get proper action) and failing to state when he finally order the replacement siren, does nothing to refute the validity of the concerns and subsequent complaints of Petitioner and his Company. Furthermore, the Court further notes that this affidavit also fails to address the rescue boat.

In reply, Petitioner's Counsel exposes Respondents failure to interpose an Answer to the Verified Petition herein, and asserts that it is wee settled law, under both statute and case law, that statements of pleadings that are not denied are deemed admitted (*see: Human Development Services of Port Chester Inc v Zoning Board of Appeals of Port Chester*, 67 NY2d 702 [1986]; *Mooney v PCM Development Co*, 218 AD2d 487 [2 dept 1997]; CPLR 3018(a)).

Respondents react with their Order to Show Cause [002], seeking leave to file a late Answer that, unfortunately, simply serves to compounds their original error. In opposition, Petitioner's Counsel raises numerous issues of concern to this Court, including:

1. The conflicting claims in the Affirmation of Counsel submitted in support of Respondents' Motion, the Affirmation of a partner in the law firm of Respondents' Counsel alleging that Opposition "inadvertently" did not have an answer attached, as opposed to the Affirmation of an associate in said firm that she was "unaware" that an answer had to be attached;
2. The dating of the proposed Answer attached to the Motion being dated February 2, 2010, when the Reply Affirmation of Petitioner, exposing the failure to serve an Answer that the Attorney handling the matter was unaware was necessary, was not served until February 9, 2010;
3. Respondents' failure to attach an affidavit of merit to their Motion, which is fatal to an application to compel acceptance of a late pleading (*see: Tewari v Tsoutsouras*, 75 NY2d 1);
4. The attachment of the Petition to Respondents' Motion as Exhibit A, failing to attach the Verification of Petitioner thereto, potentially leading the Court to the mistaken believe that the Petition was not verified, and then attaching to said Motion as Exhibit an Answer that is not verified, which in fact renders said Answer inadequate, and missing the opportunity to correct the failure to attach an affidavit of merit (*see: A&J Concrete Corp v Arker*, 54 NY2d 870).

The Court is inexorably drawn to the conclusion that Respondents have completely failed to satisfy the good cause standard delineated in CPLR 2004, or any other excuse for permitting the late filing of an Answer herein, and that therefore Respondents' Motion must be denied in all respects, but still further, the Court has determined that, even if an Answer were permitted, the Court's review of the facts herein, as well as applicable law, would not have tendered the possibility of a determination in favor of the Respondents, as set forth herein below.

It is well settled law in the State of New York that a Court may not substitute its own judgment for that of the reviewing board (*see: Janiak v Planning Board of the Town of Greenville*, 159 AD2d 574 [2 Dept], *appeal denied*, 76 NY2d 707 [1990]; *Mascony Transport and Ferry Service v*

*Richmond*, 71 AD2d 896 [2 Dept 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 [3 Dept 1990]; *Pecoraro v. Board of Appeals of Town of Hempstead*, 814 NE2d 404 [2004]). It is, therefore, indisputable that the standard of review for determinations of Respondents is whether the decision rendered is arbitrary, capricious and/or unlawful.

Nowhere do Respondents demonstrate that they made any inquiry whatsoever into the facts before rendering their decision to suspend Petitioner, making their actions indisputably arbitrary and capricious, in the event that a timely or proper Answer and Return had been interposed. Petitioner's Counsel adeptly points out that, rather than investigating the fact that rescue equipment was in need of repair, they rushed to punish Petitioner for abiding by his oath to protect and serve the public. This Court is most perplexed by how legitimate concern for the safety of the firefighters volunteering to respond to emergencies and the taxpayers the Respondents serve comes to be characterized as defamation. In fact, the discipline imposed by Respondents was so disproportionate to the alleged offense committed that it is shocking to one's sense of fairness (*see: Empire Hook & Ladder Co No 1 v Nyack Fire Dept*, 176 Misc 2d 616 [1998]).

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

**ORDERED**, that the above referenced application of Petitioner is hereby granted in all respects, and this matter is hereby remanded to Respondents for the purposes of:

1. Rescinding, forthwith, Petitioner's suspension on August 26, 2009, as being contrary to his rights as the Captain of the Company One; and
2. Annuling, forthwith, the determination of Respondent BOARD and vacating, expunging and lifting the suspension from Petitioner's and Respondents' records;

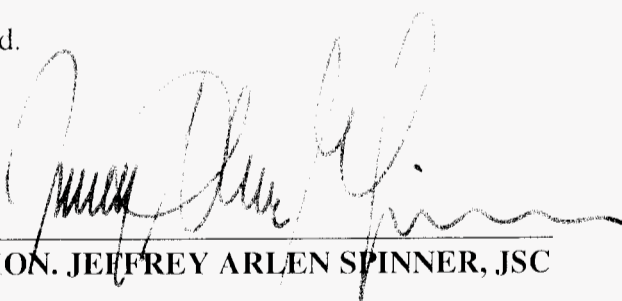
and it is further

**ORDERED**, that the above referenced application of Respondents is hereby denied in all respects; and it is further

**ORDERED**, that Part 21 hereby retains jurisdiction over this proceeding, for all purposes; and it is further

**ORDERED**, that this matter is hereby disposed.

**Dated: Riverhead, New York  
October 25, 2010**



HON. JEFFREY ARLEN SPINNER, JSC

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

**TO:**

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