

**Matter of Uniformed Firefighters Assn., Local 287 v
City of Long Beach**

2010 NY Slip Op 33581(U)

November 30, 2010

Sup Ct, Nassau County

Docket Number: 11328/10

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/TAS, PART 5
NASSAU COUNTY**

**In the Matter of the
UNIFORMED FIREFIGHTERS ASSOCIATION,
LOCAL 287 and JAY GUSLER,**

Plaintiffs,

-against-

**MOTION SEQ. NO.: 001, 002
MOTION DATE: 7/26/10**

**THE CITY OF LONG BEACH, CHARLES THEOFAN
as City Manager, and COREY KLEIN as Corporation
Counsel,**

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Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Verified Petition.....	1
Affirmation in Support of Verified Petition.....	2
Memorandum of Law.....	3
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Application by the petitioners pursuant to CPLR §7803(2) to nullify the disciplinary hearing held in this matter on May 4, 2010;

Motion by respondents, collectively The City of Long Beach, to dismiss the petition pursuant to CPLR 7804(f).

BACKGROUND

On or about April 20, 2010, disciplinary charges were preferred against Lt. Jay Gusler, a professional firefighter employed by The City of Long Beach, for misconduct. He was notified that he was suspended without pay, effective immediately, pending a disciplinary proceeding. A hearing in the matter was scheduled for May 4, 2010. The specific misconduct charges preferred against Lt. Gusler by Lt. Thomas O'Dowd,

Executive Officer of the Long Beach Fire Department, include: (i) conduct subversive of the good order, discipline or reputation of the Fire Department; (ii) conduct unbecoming a fireman; and (iii) insubordination.

The charges stem from Lt. Gusler's alleged absence from most, if not all, of a workplace violence seminar which took place on April 8, 2010. According to the statement of charges, Lt. Gusler, although ordered to attend Workplace Violence Training, exited the seminar without prior permission before the seminar began. After being "ordered" to return to training, he requested and received permission to attend a seminar later in the day. He arrived at said seminar thirty minutes late thus missing most, if not all, of the portion of the seminar devoted specifically to workplace violence.

The Uniformed Firefighters Association (UFFA) maintains that the charges against Lt. Gusler are purely pretextual and concocted by The City of Long Beach for the sole purpose of subjecting him to the disproportionate and undeserved penalty of suspension without pay. In its April 21, 2010 written response to the charges, the UFFA states, inter alia, that (1) Lt. Gusler was never ordered to attend any of the seminars given on April 8, 2010¹; (2) there was a "mutual understanding" between City Manager Charles Theofan and Lt. Gusler that Lt. Gusler would voluntarily attend a seminar scheduled for later in the day on April 8, 2010 since he did not attend either the 7:00 A.M. or 10:00 A.M. seminars; (3) tardiness to the seminar constitutes *de minimis* misconduct, if that. As such, the disciplinary action imposed – suspension without pay – was disproportionate to the offense.

The disciplinary hearing was held, as scheduled, on May 4, 2010². The instant petition is predicated on the grounds that Corey E. Klein, Corporation Counsel of The City of Long Beach, was improperly designated to preside over the hearing despite objections raised by petitioners and the relevant provision of the CBA. Moreover, petitioners maintain that Mr. Klein's conduct of the hearing was *ultra vires*, and without authority, thereby rendering the proceeding null and void. The reason Mr. Klein was designated to preside over Lt. Gusler's disciplinary hearing was that the City Manager had been served with a subpoena by petitioners' attorney to compel testimony regarding

¹Lt. Gusler arrived late for the 6:30 P.M. seminar which he mistakenly believed was to start at 7:00 P.M.

²Although no transcript has been provided, it is undisputed that the hearing was held on May 4, 2010 and presided over by Mr. Klein, as hearing officer, notwithstanding petitioners' objection to his selection. The UFFA proceeded under protest.

his first hand knowledge with respect to the disciplinary charges at issue. Mr. Theofan did not, however, testify.

ANALYSIS

Civil Service Law § 200 et seq. (The Taylor Law) requires public employers to bargain in good faith concerning all terms and conditions of employment. The public policy of New York State in favor of collective bargaining is strong and sweeping. *City of Watertown v State of N.Y. Public Employment Relations Bd.*, 95 NY2d 73, 78 [2000]. Civil Service Law §75(2) prescribes the basic procedure to be used in connection with hearings dealing with charges of misconduct levied against a civil servant. Among other things, it allows the officer or body having power to remove an employee to designate in writing a deputy or other person for the purpose of conducting the hearing. It further provides that “[i]n case a deputy or other person is so designated, he shall be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendation, be referred to such officer or body for review and decision.” In the absence of a written designation authorizing a deputy or other person to conduct the hearing, the removing board or officer has no basis upon which to act and its determination would, therefore, be arbitrary. *Wiggins v Board of Educ. of City of New York*, 60 NY2d 385, 387 [1983].

In accordance with Article 3 § 20(4) of the Charter of The City of Long Beach, which states as follows: “[t]o perform the duties of the city manager and to exercise his powers during any time when the city manager may be temporarily absent or incapacitated from service, the city manager may designate by a letter filed with the city clerk another qualified administrative officer of the city,” Corey E. Klein was designated to execute the powers of the City Manager, and did, in fact, do so on numerous occasions – when City Manager, Charles T. Theofan, was temporarily absent or incapacitated from serving. A memorandum dated January 8, 2008 states that City Manager Theofan designated “Corporation Counsel Corey E. Klein to execute the powers of the City Manager when (Mr. Theofan was) temporarily absent or incapacitated from serving.” There is no writing, however, specifically designating Mr. Klein to act as hearing officer in the Gusler disciplinary hearing as required under Civil Service Law § 75(2).

Notwithstanding respondents’ assertions to the contrary, the designation of Mr. Klein to act as hearing officer in this matter was improper and contrary to the dictates of the CBA which governs the parties’ relationship with respect to the terms and conditions of Lt. Gusler’s employment, including disciplinary procedures. The City of Long Beach’s reliance on § 20(4) of the Charter is unavailing under the facts at bar.

With respect to disciplinary procedures, pursuant to Article XXIV(2) of the CBA between the International Association of Firefighters ALF-CIO, Uniformed Firefighters Association Local 287 and The City of Long Beach, New York [July 1, 2004 - June 30, 2010]:

“[t]he service of charges and specifications shall be brought by a superior officer (firefighter, lieutenant, executive officer, commanding officer, commissioner) and shall be considered the initiation of disciplinary proceedings. The City Manager shall conduct a hearing and consider the charges *de novo* and make a determination of guilt/innocence and penalty. **If the City Manager does not conduct said hearing the City and Association shall mutually agree upon a designee or shall refer the matter to AAA arbitration.**”

While respondent City of Long Beach argues that the UFFA “knew or should have known that the City Charter permitted the designation of an Acting City Manager with all the same powers and duties as the City Manager” and that “if the UFFA wished to prevent the Acting City Manager . . . from conducting a disciplinary hearing, . . . they should have broached that issue during contract negotiations,” the arguments are unpersuasive given the plain language of the aforementioned provision of the CBA which clearly delineates the procedure to be followed in the event the City Manager does not conduct the disciplinary hearing. When parties set forth their agreement in a clear and unambiguous statement, that writing will be enforced according to its terms. *Baldo v Patton*, 65 AD3d 765, 766 [3rd Dept. 2009].

The City of Long Beach is vested with the power to appoint a hearing officer in disciplinary proceedings of a civil service employee under Civil Service Law § 75(2). The statutory power may, as was done here, be modified or superseded through collective bargaining or negotiation. A public entity may agree to submit disciplinary procedures to arbitration (*Johnson City Professional Firefighters Ass’n, Local 921 v Village of Johnson City*, 75 AD3d 805, 806 [3rd Dept. 2010]), or agree to a procedure whereby a hearing officer is chosen. A claim that the delegation to the hearing officer is invalid may not be waived. *McComb v Reasoner*, 29 AD3d 795, 798 [2nd Dept. 2008].

A disciplinary proceeding will be voided and the *status quo ante* restored when there has been an error that taints the entire proceeding involving jurisdiction or bias of the presiding officer. *Gomez v Stout*, 13 NY3d 182, 188 [2009] (citation and quotation marks omitted). The Court of Appeals has held that it is essential that any determination as to whether misconduct has occurred, and the appropriate penalty to be imposed, be

made by the official in whom the power to remove or mete out discipline resides. *Matter of Simpson v Wolansky*, 38 NY2d 391, 394 [1975]; *Roosa v Before*, 69 AD3d 945, 946 [2nd Dept. 2010].

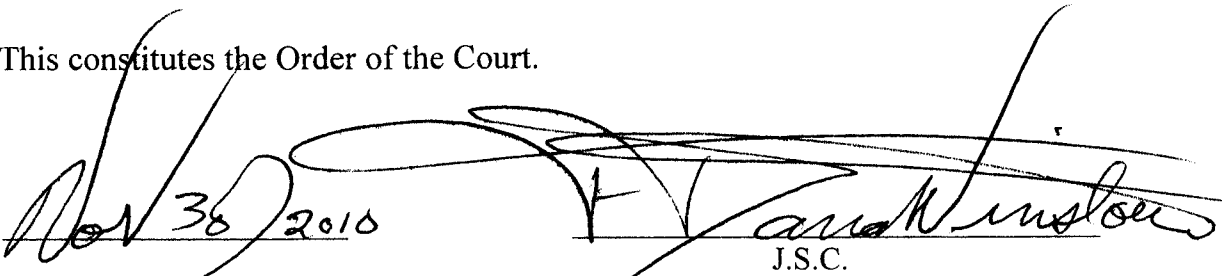
CONCLUSION

The designation of the Corporation Counsel to act as hearing officer in this matter was procedurally improper. Accordingly, it is

ORDERED, that petitioners' application pursuant to CPLR §7803(2) to nullify the disciplinary hearing held in this matter is **granted**. The matter is remitted to the respondent City of Long Beach to conduct a hearing in this matter before a hearing officer who shall be designated in accordance with the dictates of Article XXIV(2) of the CBA; and it is further

ORDERED, that the motion by The City of Long Beach to dismiss the petition pursuant to CPLR 7804(f) is **denied**.

This constitutes the Order of the Court.

Dated: Nov 30 2010 
J.S.C.

ENTERED
DEC 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE