

**Matter of Bylicki v Board of Fire Commrs. of the S.
Farmingdale Fire Dist.**

2011 NY Slip Op 32021(U)

June 30, 2011

Sup Ct, Nassau County

Docket Number: 19345/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Application of

RICHARD BYLICKI,

TRIAL/IAS PART 32
NASSAU COUNTY

Petitioner,

Index No.: 19345/10
Motion Seq. No.: 01
Motion Date: 12/17/10

- against -

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BOARD OF FIRE COMMISSIONERS OF THE
SOUTH FARMINGDALE FIRE DISTRICT by
THOMAS MASTAKOURIS, CHAIRMAN,

Respondent.

For a Judgment pursuant to Article 78, CPLR, to review
and annul the determination made by respondent for such
other appropriate relief.

The following papers have been read on this application:

	Papers Numbered
<u>Notice of Petition, Verified Petition and Exhibits and Memorandum of Law in Support of Petition</u>	<u>1</u>
<u>Affidavit in Support of Verified Petition and Exhibits</u>	<u>2</u>
<u>Affirmation in Opposition to Petition and Exhibits and Memorandum of Law in Opposition</u>	<u>3</u>
<u>Affidavit in Opposition to Petition and Exhibits</u>	<u>4</u>
<u>Affirmation in Opposition to Petition</u>	<u>5</u>
<u>Reply Affirmation to Petitioner's Affidavit in Support and Exhibits</u>	<u>6</u>
<u>Reply Affirmations to Petitioner's Affidavit in Support and Exhibits</u>	<u>7</u>

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioner brings, *inter alia*, this CPLR Article 78 proceeding seeking a judgment: (1)

reviewing and annulling the action of respondent Board of Fire Commissioners of the South Farmingdale Fire District by Thomas Mastakouris, Chairman (hereinafter referred to as "Board"), in rescinding petitioner's Length of Service Awards Plan benefit pursuant to General Municipal Law Article 11-AAAA and declaring said action to be arbitrary, capricious, unreasonable and unlawful since it was not supported by substantial evidence; and (2) directing and ordering that respondent reinstate petitioner's Length of Service Awards Plan benefit retroactive to the date of termination of benefits.

Petitioner is a Fire Commissioner with the South Farmingdale Fire District (hereinafter referred to as "Fire District"). Petitioner brings this CPLR Article 78 proceeding against the respondent Board seeking a judgment reviewing and annulling its action in rescinding his Length of Service Awards Program (hereinafter referred to as "LOSAP") Plan benefit. Petitioner maintains that said action was arbitrary, capricious, unreasonable and unlawful and, therefore, the respondent Board must be directed and ordered to reinstate his LOSAP benefits retroactive to the date of the termination of said benefits.

As best as can be determined, the facts are as follows:

Petitioner became a volunteer firefighter in the Fire District in September 1977. He rose through the ranks and eventually became Chief of the Department. In 2003, petitioner, as a Fire Commissioner with the Fire District, was elected to the respondent Board. The respondent Board is comprised of five individuals elected by the taxpayers of the Fire District. Petitioner remains the Fire Commissioner, a member of the respondent Board and an inactive member of the Fire Department because of his ongoing disability.

On February 24, 1992, the respondent Board, in an effort to recruit and retain individuals

as members of the Fire District, adopted a LOSAP benefit plan for its members (hereinafter referred to the "LOSAP Program"). The LOSAP Program is governed by two documents: the first is entitled "Volunteer Firemen's Insurance Services, Inc. Length of Service Awards Program Master Plan for South Farmingdale Fire District" and the second is an adoption agreement entitled "Volunteer Firemen's Insurance Services, Inc. Length of Service Awards Program of the South Farmingdale Fire District."

The LOSAP Program allows members of the South Farmingdale Fire Department to accrue a pension by earning a year's worth of service award credit for high levels of participation in "firematic" activities. Specifically, each service year earned allowed \$20.00 to go into a member's service award (pension) account. Ultimately, after many years of service, a member of the South Farmingdale Fire Department would receive a small pension as a result of accumulating years of service award credit.

Additionally, inasmuch as is relevant to the determination of petitioner's instant application, the LOSAP Program, defines "disability" as follows:

Disability shall mean a physical or mental condition, or both, of a participant resulting from bodily injury, disease, or mental disorder that renders him totally and permanently incapable of engaging in any occupation or employment for remuneration or profit for a period of at least 6 consecutive months following his last day of employment and for which the participant is receiving disability benefits under the Federal Social Security Act as declared by the Social Security Administration; provided, however, disability shall not include any condition or disorder due to an intentionally self-inflicted injury, injury incurred solely from service in the armed forces of the United States of America, or injury incurred while engaging in or as a result of engaging in criminal activity; *and provided, further that the Committee shall require that the total and permanent disability be confirmed by a qualified physician appointed by it prior to, and at reasonable intervals during, the payment of a disability benefit hereunder. See LOSAP Program, Article II §2.1(G) (emphasis added).*

For the period of 2003 to 2010, petitioner also served as the Plan Administrator for the

Fire District's LOSAP Program. In this role, petitioner had, among other duties, the responsibility to interact with the Fire District's insurance broker and the Fire District's third party administrator to handle administrative work associated with the District's LOSAP Program including bringing any item that impacted the LOSAP Program before the full respondent Board for approval.

Petitioner was a former sergeant in the New York City Police Department from January 26, 1982 through September 21, 2002. On September 11, 2001, he was assigned and working in the New York City Office of Emergency Management, located at 7 World Trade Center ("WTC"), New York, New York. As a result of his work in the rescue and recovery at the WTC in the terror attacks that day, petitioner suffered both physical and emotional trauma.

On June 2, 2006, the Police Pension Fund Medical Board found the petitioner disabled from performing his former occupation as police sergeant with a diagnosis of "Post Traumatic Stress Disorder" resulting from his experiences at the WTC. At its September 13, 2006 meeting, petitioner was awarded accident disability retirement benefits under the WTC Disability Law (City of New York Administrative Code §13-252.1).

At the end of 2006, petitioner stopped responding to alarms as a volunteer in the Fire District.

Also in 2006, petitioner applied for Social Security Disability benefits based on his physical and emotional impairments related to his experiences at the WTC. His application listed an onset date of disability commencing in October 2006. On or about June 6, 2007, petitioner was notified that he was granted Social Security Disability benefits.

In the meantime, on December 12, 2006, while serving as the Plan Administrator for the Fire District's LOSAP Program, petitioner also applied for LOSAP benefits with the Fire

District. Based on his attending physician's statement dated December 20, 2006, petitioner was awarded LOSAP benefits by the Fire District.

Subsequently, on or about January 2010, the respondent Board became aware of problems with the District's LOSAP Program. Specifically, it appeared that certain members of the South Farmingdale Fire Department, whom the Chief's Office did not approve for LOSAP credit, were given said credit. Through the winter and early spring of 2010, the respondent Board continued to review the District's LOSAP Program with regard to this issue. During this process, it was discovered that petitioner (as well as three other individuals) were improperly receiving LOSAP disability benefits. Upon review of each application submitted by the four individuals, the respondent Board discovered that, not only had petitioner solely reviewed the applications (including his own application) and approved them for disability payments, but also that petitioner, without review and the required approval of the respondent Board, amended the provisions of the Master Plan of the LOSAP Program. This action on behalf of petitioner dramatically improved his disability benefit from \$19,975.00 to \$68,204.00.

As these irregularities were uncovered, and given the fiduciary obligations that the respondent Board owed to the taxpayers of the Fire District, upon advice of counsel, the Fire District contacted the Nassau County District Attorney's Office. Apparently, the matter is still under active investigation by the Nassau County District Attorney's Office.

The Fire District also removed petitioner as the Plan Administrator of its LOSAP Program and notified the four individuals who were receiving LOSAP disability payments (including petitioner) that they were no longer eligible to receive these benefits. Specifically, on May 12, 2010, petitioner was notified that he did not meet the definition of "disability" as detailed in the Fire District's LOSAP Program and therefore, his LOSAP benefits were

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rescinded.

By letter dated May 21, 2010, petitioner's attorney appealed respondent Board's denial of LOSAP benefits and requested that they evaluate petitioner's claim based on the PPF and SSA documentation and not rely on a Fire District's physician's cursory physical examination.

In response, by letter dated May 27, 2010, the Fire District's attorney stated that based on petitioner's appeal of the termination of LOSAP benefits, the respondent Board would allow petitioner to undergo "another physical examination" by the Fire District's physician. As a result, on June 9, 2010, petitioner was examined by Jorge L. Gardyn, M.D., a board certified internist for the Fire District. Dr. Gardyn conducted a physical examination and found petitioner limited to Class "C" administrative "firematic duties." This classification allows petitioner to perform administrative duties at the firehouse.

By letter dated June 11, 2010, petitioner's attorney again advised the respondent Board that petitioner is totally disabled from his normal occupation and receives Social Security Disability benefits because he suffers from severe mental impairments related to his experiences at the WTC. Petitioner and his attorney requested that, since Dr. Gardyn did not evaluate petitioner's mental condition as required by the respondent Board's Adoption Agreement and only relied on a physical evaluation to render a decision, the respondent Board should have the petitioner evaluated by a physician who is "qualified" to render a determination of his mental condition.

By letter dated June 23, 2010, the respondent Board noted that it had rendered a final decision based on Dr. Gardyn's June 9, 2010 evaluation and that they would not send the petitioner for another examination.

This determination by the respondent Board led to the instant Article 78 petition.

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In bringing this petition pursuant to CPLR Article 7803(3), petitioner argues that the respondent Board's decision to rescind his LOSAP benefits is arbitrary, capricious, unreasonable and unlawful since it is not supported by any substantial evidence. He argues that because he was found disabled from his former occupation as a NYPD sergeant and the Social Security Administration found him totally disabled from performing any gainful employment on a sustained basis, he has proven by credible evidence that he meets the statutory and the LOSAP Program's definition of "disability." Petitioner submits that the Fire District's reliance on their physician's cursory physical examination is misplaced in that the physician who examined him was not "qualified" to examine his mental and psychological health. Petitioner maintains that the respondent Board's hasty decision to rescind his LOSAP benefits without a qualified physician's examination was arbitrary and capricious because Dr. Gardyn limited his examination to the physical attributes of a Class C fire fighter and did not consider petitioner's mental condition which is the basis of petitioner's claim. Petitioner submits that the respondent Board had a duty to evaluate his LOSAP claim by producing competent medical evidence and they have ignored their duty to act in a fair and equitable manner by simply rescinding his benefits without following the statutory guidelines and their own LOSAP Program.

Initially, it is noted that "[w]here, as here, an administrative agency takes action without an evidentiary hearing, the standard of review is not whether there was substantial evidence in support of the determination (CPLR §7803(4)), but rather, whether the determination had a rational basis and was not 'arbitrary and capricious.'" *Ball v. New York State Dept. of Environmental Conservation*, 35 A.D.3d 732, 826 N.Y.S.2d 698 (2d Dept. 2006). *See also Sasso v. Osgood*, 86 N.Y.2d 374, 633 N.Y.S.2d 259 (1995); *Poster v. Strough*, 299 A.D.2d 127, 752 N.Y.S.2d 326 (2d Dept. 2002). Petitioner's application for relief is predicated upon CPLR §

8] 7803(3). The questions that subdivision 3 lists as permissible in an Article 78 proceeding are:

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 imposedSee CPLR § 7803(3).

Since the determination of the respondent Board was not based on a full evidentiary hearing (nor was it required to), in determining the validity of the respondent Board's determination this Court must examine whether, given the facts, the respondent Board's determination in rescinding petitioner's LOSAP benefits was untenable as a matter of law – *i.e.* “arbitrary and capricious.”

The Court of Appeals has made it clear that “arbitrary and capricious” is action taken “without sound basis in reason and ... without regard to the facts.” *Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaronek, Westchester County*, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974). Moreover, it is well settled that “[i]n a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination” *Ball v. New York State Dept. of Environmental Conservation, supra* at 733. See also *Chemical Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 626 N.Y.S.2d 1(1995). Judicial review of an administrative determination is limited to the grounds invoked by the agency. See *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services*, 77 N.Y.2d 753, 570 N.Y.S.2d 474 (1991). Therefore, the Court's function is not to re-determine the issue or to weigh the evidence the administrative agency had before it.

With these guidelines in mind, the Court turns to the facts at hand. Here, the respondent Board arrived at its determination to rescind petitioner's LOSAP benefits only after its own physicians performed multiple medical examinations. Thereupon, the respondent Board noted

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that its physicians never certified petitioner as “totally or permanently” disabled as required under the LOSAP Program. There is no indication to the Court that the respondent Board did not act after careful and deliberate consideration of the suspicious facts at hand, including the petitioner’s unilateral amendment of the LOSAP Program as the Plan Administrator which resulted in an dramatic improvement in his net disability benefits.

Moreover, even assuming the truth of petitioner’s claim that there is ample evidence on the record that he was “disabled,” in the absence of any competent evidence that the respondent Board’s physician did not act reasonably or responsibly, the Court must defer to the determination of the respondent Board. “It is not for the courts to choose between...diverse professional opinions. That is the function of the proper department heads and as long as they act reasonably and responsibly, the courts will not interfere. And when a department relies on its own medical staff for advice, such reliance per se is not to be considered arbitrary or capricious.” *McCabe v. Hoberman*, 33 A.D.2d 547, 304 N.Y.S.2d 497 (1st Dept. 1969). Since the respondent Board acted only after multiple medical examinations had been performed by its physician, it’s reliance upon said physicians cannot be deemed arbitrary or capricious.

Moreover, it cannot be overlooked by the Court that generally, “[t]he petitioner has the burden of proving the allegations of his or her petition in a CPLR Article 78 proceeding [citations omitted]...just as the plaintiff in an action has the burden of proving the material allegations of the complaint. In a proceeding in the nature of a mandamus to review, the petitioner ‘has an initial burden of presenting factual allegations of an evidentiary nature or other competent evidence’ [citations omitted].” *Poster v. Strough, supra* at 138.

Here, petitioner alleges that he is entitled to LOSAP benefits. However, he fails to submit any competent evidence to support each claim that he would be entitled to LOSAP

benefits under South Farmingdale's LOSAP program. As defined in the LOSAP Program, the petitioner was required to prove that he is (1) totally and permanently incapable of engaging in any occupation or employment for a period of at least six months; (2) receiving disability benefits under the Federal Social Security Act; and (3) examined by a qualified physician appointed by the District and determined to be permanently disabled. *See* LOSAP Program, Article II §2.1(G) - definition of disability, *supra*. This he has failed to do.

Petitioner's original award of LOSAP benefits pursuant to the Program and commencing March 1, 2007 were self-approved. As the Plan Administrator and Sitting Commissioner of the Fire District, petitioner, without submitting his claim to the other four commissioners of the District and relying upon his own physician's statement, approved his own claim. Furthermore, on or about May 2, 2009 and March 30, 2010, the District's physician certified petitioner as a Class "C" firefighter, capable of administrative duties. As a result of the District's physician not certifying him as "totally and permanently" disabled under the definition of the LOSAP Program, the District rescinded his LOSAP benefits.

Notably, the LOSAP Plan's definition of "disability" is consistent with the provisions of the General Municipal Law Article 11-AAAA §219-t(5) which states:

In the event that a participant becomes totally and permanently disabled, as certified by the workers' compensation board *or other competent authority approved by the administrator*, and the disability prevents the participant from pursuing his or her normal occupation, the participant shall be entitled to apply for and receive a supplemental award, regardless of whether the participant has reached entitlement age or has acquired a nonforfeitable right to a service award (Emphasis Added).

Thus, there is no conflict with said statutory provision for supplemental disability benefits and the definition of "disability" within the LOSAP Program which requires, in pertinent part, that the respondent Board "shall require that the total and permanent disability be confirmed by a qualified physician appointed by it."


Furthermore, even assuming the truth of petitioner's argument that the respondent Board's physician, Dr. Gardyn, was not "qualified" to assess his mental and emotional health and that he merely performed a cursory physical examination, petitioner nevertheless has failed to provide any competent evidence that Dr. Gardyn's assessment was "arbitrary and capricious" and that he is in fact "totally and permanently incapable of engaging in any occupation or employment."

Thus, in the absence of petitioner having produced any evidence that he meets all the requirements of the LOSAP Program- specifically that he has been certified as "totally and permanently" disabled by a physician appointed by the Fire District- the Court finds that petitioner has failed to meet his initial burden of proving the allegations of his CPLR Article 78 petition. *See Poster v. Strough, supra.*

For these reasons, petitioner's application for a judgment reviewing and annulling the action of the respondent in rescinding his LOSAP benefits is hereby **DENIED** and the petition is dismissed in its entirety.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

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ENTERED

JUL 06 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Dated: Mineola, New York
June 30, 2011