

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

2011 NY Slip Op 32088(U)

July 15, 2011

Supreme Court, Nassau County

Docket Number: 33/11

Judge: Karen V. Murphy

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~~Case # 1111~~

Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 15 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy  
Justice of the Supreme Court**

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**In the Matter of the  
LONG BEACH PROFESSIONAL FIREFIGHTERS  
ASSOCIATION, LOCAL 287,**

**Index No. 33/11**

**Petitioner(s),**

**Motion Submitted: 5/6/11  
Motion Sequence: 001, 002**

**for a judgment pursuant to Article 78 of the CPLR,**

**-against-**

**THE CITY OF LONG BEACH, and CHARLES  
THEOFAN, as City Manager/Fire Commissioner,  
and the LONG BEACH CITY COUNCIL,**

**Defendant(s).**

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The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....X
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....X
- Defendant's/Respondent's.....XX

This Article 78 proceeding arises from the self-appointment by respondent Charles Theofan, the duly appointed City Manager of the City of Long Beach, to the position of Acting Fire Commissioner. By memorandum dated January 12, 2010, City Manager respondent Charles Theofan advised all members of the Long Beach Fire Department

(Volunteer and Uniformed Force) that Fire Commissioner Steven Fraser had resigned from his position effective January 12, 2010 and that he, Charles Theofan, was assuming the duties attendant to the position of Fire Commissioner as of that date.

Respondents seek dismissal of the petition contending that under the *de facto* officer doctrine respondent Charles Theofan's appointment and acts as acting Fire Commissioner are presumptively valid and immune from collateral attack; the City Manager of the City of Long Beach has the power to appoint an individual to the position of Fire Commissioner and/or Acting Fire Commissioner; and the instant proceeding is time barred by reason of the expiration of the statute of limitations. (*CPLR § 217(1)*).

The law is well settled that an article 78 proceeding must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner (*CPLR 217 [1]*). Two requirements for fixing the time when the action is final and binding have been identified by the Court of Appeals. First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. (*Matter of Best Payphones, Inc. v. Dept. Of Info. Tech and Telecom*, 5 N.Y.3d 30, 799 N.Y.S.2d 182, 832 N.E.2d 38 (2005); *Yarbough v. Franco*, 95 N.Y.2d 342, 717 N.Y.S.2d 79, 740 N.E.2d 224 [2000]). A determination generally becomes binding when the aggrieved party is notified (*Biondo v. New York State Bd. Of Parole*, 60 N.Y.2d 832, 458 N.E.2d 371, 470 N.Y.S.2d 130 (1983); *Long Island Sound Oyster LLC, v. Board of Trustees, Town of Southold*, 40 A.D.3d 1098, 837 N.Y.S.2d 281 (2d Dept., 2007)).

With respect to the statute of limitations, respondents contend that petitioners were aggrieved by respondent Charles Theofan's assumption of the duties of Fire Commissioner and self-appointment to the position of Acting Fire Commissioner on January 12, 2010.<sup>1</sup> The four month statute of limitations applicable to this proceeding, therefore, expired on May 12, 2010.

Petitioners maintain that the first time they had any inkling that something might be amiss was at a City Council meeting on September 7, 2010 when respondent Charles Theofan stated that he had appointed himself to the position of Acting Fire Commissioner approximately eight months prior thereto. According to petitioners, the statute of limitations should be measured from either September 7, 2010, when they purportedly learned something was amiss, or October 25, 2010, the date on which they sent a letter to the Corporation Council of the City of Long Beach requesting that the appointment of

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<sup>1</sup>Petitioners do not argue that there are any administrative procedures available to contest the appointment at issue.

respondent Charles Theofan be rescinded and all actions taken by him as Fire Commissioner be annulled.

The argument is unavailing, however, in that it flies in the face of the fact that the petitioners were specifically advised by letter dated January 12, 2010 of the challenged appointment. Indeed, Petitioners do not deny timely receipt of the memo advising that Theofan was assuming the duties of Commissioner of the Department, effective January 12, 2010, but rather now suggest that “assuming the duties of Commissioner of the Department” did not mean that Theofan was acting as, or was, in fact, the Fire Commissioner. Admittedly, “[a]t various times, and in various contexts, since the issuance of the January 12, 2010 memo, Respondent Theofan has referred to himself as ‘Acting Fire Commissioner’ and ‘Fire Commissioner’, interchangeably” (*Verified Petition at paragraph 7*), yet Petitioners claim they only learned that Theofan had been formally appointed fire commissioner in September. Such semantics are insufficient to change the fact that Theofan appointed himself and assumed the duties of acting Fire Commissioner on January 12, 2010 and that Petitioners were aware of same.

Moreover, petitioners, in a separate proceeding before this court<sup>2</sup>, challenged Theofan’s appointment of corporation council as the acting city manager, for the limited purpose of serving as a hearing officer in a disciplinary hearing, in contravention of the collective bargaining agreement. Theofan, brought charges and specifications against one of petitioner’s members on or about April 20, 2010. Theofan appointed the acting city manager due to Theofan being called as a witness by petitioner for the May 4, 2010 hearing, and in so doing, also avoided the untenable position of acting as both Fire Commissioner and City Manager, despite the clear intent that they be separate roles pursuant to a collective bargaining agreement. Theofan’s action with regard to bringing the charges and specifications in his capacity of Fire Commissioner is further evidence that petitioners were on notice of Theofan’s self- appointment, and thus “aggrieved” well before the September hearing, as they now claim. Even assuming *arguendo*, that petitioners were unaware that Theofan was the acting commissioner until May 4, 2010, this proceeding would be untimely.

Petitioners offer no authority to support their alternate theory, which, in the Court’s view, is without merit, that since respondent Long Beach City Council never passed a resolution or ordinance authorizing respondent Charles Theofan to hold more than one title, the four month statute of limitations applicable to Article 78 proceedings does not apply.

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<sup>2</sup> See *In the matter of the Uniformed Firefighters Association, Local 287 and Jay Gusler v. The City of Long Beach, Charles Theofan, as City Manager and Corey Klein as Corporation Council*, (J. Winslow; Index No. 11328/10; Sup.Ct., Nassau Co., November 30, 2010)

Pursuant to the Long Beach City Charter (Article 3 § 20)<sup>3</sup>, the City Manager, as the Chief Executive Officer and Mayor of the City of Long Beach, has the power and authority to call out and command the police and firemen of the City whenever, in his discretion, he shall deem it necessary to do so. He has the duty to exercise constant supervision and oversight over the conduct of all City officers, departments, boards and commissioners. As set forth in the Code of Ordinances of the City of Long Beach, Article 2 § 11, all appointive officers of the City of Long Beach, including the Fire Commissioner, shall be appointed by the City Manager who is appointed by a vote of the majority of all Council persons for an indefinite term. With respect to the Fire Department, Article 10 § 160 provides that the City Manager may appoint a Fire Commissioner and a Deputy Fire Commissioner. While the City Council may, pursuant to Article 2 §8, provide for the holding of two or more such offices by the same person, there is no section requiring that the Council take any affirmative action to do so, nor is there any provision explicitly prohibiting the self-appointment complained of herein.

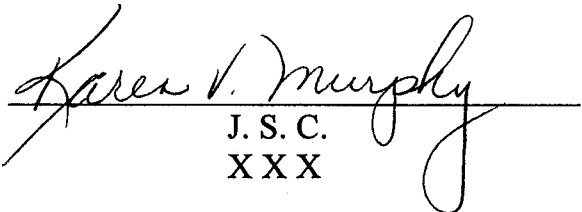
The Court finds that the January 12, 2010 self-appointment of Theofan to the position of acting Fire Commissioner is the appropriate and controlling date from which to measure the four month statute of limitations. The administrative action, which triggered the running of the statute of limitations was respondent Charles Theofan's self-appointment, which occurred on the very date petitioners were advised of his action, January 12, 2010.

Therefore, the application by petitioner Long Beach Professional Firefighters Association, Local 287 and petitioner International Association of Firefighters, AFL-CIO, Uniformed Firefighters Association, Local 287 (collectively petitioners) to annul the self-appointment of respondent Charles Theofan to the position of Fire Commissioner/Acting Fire Commissioner and to rescind all actions taken by said respondent in that position is denied.

Furthermore, the motion by respondent City of Long Beach to dismiss the petition is granted on the basis that this proceeding, commenced on January 3, 2011, is untimely, and therefore, the Petition is dismissed pursuant to *CPLR 217 (1)*.

The foregoing constitutes the Order of this Court.

Dated: July 15, 2011  
Mineola, N.Y.

  
J. S. C.  
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<sup>3</sup>Article 3 § 20(3) provides that the City Manager may be removed by a majority vote of all the Council persons at any time for any reason(s) the City Council may deem sufficient.

**ENTERED**  
JUL 21 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE