

**Matter of Crane v Board of Fire Comms. of the E.
Moriches Fire Dist.**

2012 NY Slip Op 30410(U)

February 6, 2012

Supreme Court, Suffolk County

Docket Number: 04351-11

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

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In the Matter of the Application of

ALAN CRANE,

Petitioner,

-against-

For a Judgment pursuant to Article 78 of the Civil
practice law and Rules

-against-

BOARD OF FIRE COMMISSIONERS OF THE EAST
MORICHES FIRE DISTRICT,

Respondent.
-----x

CALENDAR DATE: August 31, 2011
MNEMONIC: MD; C/Disp

PLTF'S/PET'S ATTORNEY:

Ernest R. Maler, Esq.
64 East Roe Boulevard
Patchogue, New York 11772

DEFT'S/RESP ATTORNEY:

Board of Fire Commissioners of the East Moriches Fire
District
9 Pine Street
East Moriches, New York 11940

Upon the following papers numbered 1 to 32 read on this Article 78 proceeding _____;
Notice of Motion/Order to Show Cause and supporting papers 1-13 _____; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 14-30 _____; Replying
Affidavits and supporting papers 31-32 _____; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this Article 78 proceeding brought by the petitioner, Alan Crane,
seeking to vacate, annul and set aside a determination and decision by the respondent,
Board of Fire Commissioners of the East Moriches Fire District, dated October 18, 2010 and
filed on October 19, 2010, is denied in its entirety and the petition is dismissed.

The petitioner (hereinafter Crane) seeks to overrule, vacate and set aside a
determination made by the respondent, Board of Fire Commissioners (hereinafter
Commissioners) of the East Moriches Fire District (hereinafter Fire District) on October 18,
2010 which terminated Crane's membership in the East Moriches Fire Department
(hereinafter Fire Department) for "conduct unbecoming a member." This termination decision
was filed on October 19, 2010. On May 17, 2010 the Fire District adopted three (3) charges
against Crane arising from his felony convictions for Grand Larceny and defrauding the
government arising from Crane's involvement with a separate entity, East Moriches
Community Ambulance (hereinafter Community Ambulance), in which the acts of theft took
place.

Crane was a volunteer member of both the Community Ambulance and the Fire
Department which were separate and independent entities. Crane entered pleas of guilty to
Grand Larceny and defrauding the government. He admitted that, as a member of the
Community Ambulance, he altered expense receipts (Transcript of the Hon. David H. Fischler

hearing p.93) [hereinafter T. for reference to transcript of hearing]. Crane was sentenced on March 12, 2010 and placed on five (5) years probation, fined \$6800.00 and required to do 420 hours of community service based upon the entry of his pleas of guilty. (T.94)

On October 21, 2010, Mr. Justice Doyle of this Court amended Crane's terms of probation which prevented him from participation with any non-profit organization to include language "except East Moriches Fire Department or District while disabled" (T.99-100). However, it is acknowledged that the Fire District was not notified of the request to amend the sentencing provisions. It is also acknowledged that Crane has been on permanent disability since June 5, 2006 as a result of a line of duty injury suffered while working on a fire boat and was receiving certain "length of service award program credits" until his termination (T. 121-122).

The Fire District through its Commissioners brought disciplinary proceedings against Crane as a result of his convictions in a three (3) charge document pursuant to General Municipal Law §209-I, dated May 19, 2010, alleging in specification "A" conviction of the two (2) felony charges; specification "B" conduct unbecoming a fireman in violation of standing orders of the Chief of the Fire Department; and specification "C" inability to perform firematic duties. Crane was suspended and a hearing was conducted on July 29, 2010 before a hearing officer, Hon. David H. Fischler (hereinafter Fischler), into the charges alleged. Fischler, in a fifteen (15) page decision, dated October 3, 2010, dismissed the specification of charges "A" and "C" but upheld charge "B" finding that

"Mr. Crane's felony convictions are violations of the Chief's Standing Orders Number 1 in that Mr. Crane engaged in conduct unbecoming a member of the department which is misconduct. Additionally, Mr. Crane's criminal actions are prejudicial to the good order and efficiency of the East Moriches Fire Department. The violation of the Chief's order is considered insubordination, an act of misconduct. As the hearing officer, I recommend that Mr. Crane be removed as a member of the East Moriches Fire Department."

The Commissioners met on October 18, 2010 and upheld Fischler's findings of fact and conclusions of law which recommended termination of Crane's membership with the Fire Department. This Article 78 proceeding was thereafter commenced by Crane seeking to set aside, vacate and annul the Commissioners' resolution, dated October 18, 2010 and filed on October 19, 2010. Crane argues that the action of termination of his membership in the Fire Department was arbitrary, capricious, illegal, invalid and an abuse of discretion. The respondent opposes the requested relief.

For the following reasons, Crane's Article 78 petition is denied in its entirety and the petition is dismissed.

The proper standard for a reviewing court is whether the challenged administrative ruling lacked a rational basis for the action taken and was arbitrary and capricious. As stated by the Court in Matter of Halperin v. City of New Rochelle, 24 AD3d 768, 809 NYS2 98 (2nd

Dept. 2005);

"In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was 'arbitrary, unreasonable, irrational or indicative of bad faith' (*Matter of Cowan v. Kern*, 41 NY2d 591, 599; see *Matter of Pell v. Board of Educ.*, 34 NY2d 222, 231 ["Arbitrary action is without sound basis in reason and is generally taken without regard to the facts"]).

Here, in the case at bar, this Court is called upon to review the Commissioners' determination to terminate Crane's membership in the Fire Department because of his felony convictions as a member of the Community Ambulance. In *Ware v. Board of Fire Com'rs of Roosevelt Fire Dist*, 32 Misc3d 781, 927 NYS2d 746 (2011), the Court stated:

"As in the case of the police force, in matters concerning the discipline of fire fighters, 'great leeway' must be accorded to the Fire Commissioner's determinations concerning the appropriate punishment, for it is the Commissioner, not the courts, who 'is accountable to the public for the integrity of the Department' (*Kelly v. Safir*, 96 NY2d 32, 38, 724 NYS2d 680, 747 NE2d 1280; *Trotta v. Ward*, 77 NY2d 827, 828, 566 NYS2d 199, 567 NE2d 241; *Matter of Berenhaus v. Ward*, 70 NY2d 436, 445, 522 NYS2d 478, 517 N.E.2d 193). Thus, this Court will not strike down a penalty simply as being too harsh unless the penalty can be considered an abuse of discretion (*Billings v. St Lawrence County*, 139 AD2d 809, 526 NYS2d 677). The standard of review for a penalty imposed is whether, under the circumstances, the penalty imposed was so disproportionate to the offense as to be shocking to one's sense of fairness or shocks the judicial conscience (*Kelly v. Safir*, supra; *Vazquez v. Kelly*, 48 AD3d 285, 852 NYS2d 72)."

While Crane argues that the act of the Commissioners in terminating his membership was an "ultra vires, arbitrary, capricious, without a rational basis" and "unsupported by substantial evidence, an abuse of discretion and illegal", the Court finds otherwise. The fact that the Court sentenced Crane to probation and thereafter amended the terms of his probation forbidding membership in any non-profit organization, to specifically exempt the Fire Department by adding "except East Moriches Fire Department or District while disabled" does not have any preclusory effect preventing the respondent from disciplining its members. The sentencing Court did not review or seek any Fire Department or Fire District input and merely acquiesced in Crane's request to exclude the Fire Department or Fire District of which at that time he was still a member, albeit suspended.

As stated in **Gramatan Avenue Associates v. State Division of Human Rights**, 45 NY2d 176, 408 NYS2d 54 (1978),

“generally speaking, upon judicial review of findings made by an administrative agency, a determination is regarded as being supported by substantial evidence when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably... . The concept of substantial evidence, a term of art as related to administrative decision making, is rather easily verbalized, but when put to use in respect to a particular determination, frequently causes difficulty and disagreement. It is related to the charge or controversy and involves a weighing of the quality and quantity of the proof... . Essential attributes are relevance and a probative character. Marked by its substance, its solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture, speculation, or rumor. More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence, or evidence beyond a reasonable doubt... . Whether an administrative agency determination is shored up by substantial evidence is a question of law to be decided by the courts, it having been stated with some frequency that insufficient evidence is, in the eyes of the law, no evidence... . The reviewing court should review the whole record to determine whether there is a rational basis set forth in its findings of fact supporting the agency’s decision.” See also, **Mooney v. Board of Fire Commissioners of Bethpage Fire District**, 79 AD3d 941, 912 NYS2d 885 (2nd Dept. 2011).

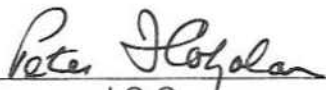
In a case similar to this one, the Court in **Matter of Kurot v. East Rockaway Fire Dept.**, 61 AD3d 760, 876 NYS2d 523 (2nd Dept. 2009) found that the penalty of termination of membership in the fire department was not improper where it was determined Kurot lied to his superiors, fabricated documents to hide his misconduct and failed to follow departmental policy. Crane pled guilty to defrauding the government and grand larceny in a sister agency and as the respondent reminded both the hearing officer and this Court, Crane as a fireman (even disabled at this point) would be called upon to enter people’s houses and secure valuables at both the scene and at the firehouse. This Court finds nothing within the charges and specifications or the punishment of termination to constitute an abuse of discretion, nor is the punishment of terminating Crane’s membership in the Fire Department “so disproportionate to the offense as to be shocking to one’s sense of fairness.” **Mooney v. Board of Fire Commissioners of Bethpage Fire District**, *supra* at 942. See also, **Foster v. Aurelius Fire District**, 90 AD3d 1585, 935 NYS2d 788 (2nd Dept. 2011). This Court, even had it disagreed with Crane’s termination (and it does not), should not substitute its judgment for that of the administrative process charged with hearing such disciplinary matters absent arbitrariness, capriciousness or an abuse of discretion, none of which is present in this case.

The Court notes that, before Fischler, the hearing officer, Crane attempted to undermine his criminal convictions for theft and defrauding the government at the Community Ambulance by portraying his conduct as innocent, a set up by another ambulance employee (T.93), and an attempt to avoid a trial and certain jail time. (T. 95). Notwithstanding his plea of guilty and allocution to the crimes pled (T.97), Crane attempted to disavow such conduct. (T.98, 104) Clearly, the respondent has the right and obligation to terminate a member who has committed theft and defrauded the government at a sister agency in the community he was committed to serve and the fact the conduct occurred outside of Crane's fire duties is of no legal significance to the disciplinary proceeding conducted for such conduct. **Black v. Board of Fire Com'rs of Seaford Fire District**, 191 AD2d 551, 595 NYS2d 692 (2nd Dept. 1993) citing to **Passano v. McKenna**, 120 Misc2d 536, 466 NYS2d 231 (1983). The Court does not find the Commissioners' action in terminating Crane from his Fire Department membership was arbitrary, capricious or an abuse of discretion, nor does the punishment imposed seem so disproportionate as to shock the Court's "sense of fairness" considering the theft, defrauding the government, wilfully filing false paperwork at the Community Ambulance to cover up the expenditures and then attempting to minimize his criminal conduct. **Matter of Kurot v. East Rockaway Fire Fire Dept.**, *supra*.

Accordingly, Crane's Article 78 petition seeking to set aside, annul and vacate the Commissioners' determination and resolution, dated October 18, 2010, filed on October 19, 2010, which adopted Fischler's findings of fact and conclusions of law in terminating Crane's membership in the Fire Department is denied in its entirety and the petition is dismissed.

The foregoing constitutes the decision of the Court.

Dated: February 6, 2012



J.S.C.