

**Matter of Wojciechowski v Sharon Springs Joint Fire
Dist.**

2018 NY Slip Op 34460(U)

July 24, 2018

Supreme Court, Schoharie County

Docket Number: Index No. 17-0288

Judge: James H. Ferreira

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(First Cause of Action); (2) respondent denied petitioner her right as a public employee to due process of law by denying her, among other things, her right to counsel and her right to defend herself from the charges against her (Second Cause of Action); (3) respondent violated its own bylaws in removing her (Third Cause of Action); and (4) respondent's decision to remove her is not supported by substantial evidence (Fourth Cause of Action). Petitioner seeks reinstatement to her former position with the Department with any and all benefits of same retroactive to her last day of employment, and such other relief as the Court deems proper. Respondent filed an answer to the petition, and the Court heard oral argument on February 9, 2018.

FACTS

The record reflects the following facts, which are not in dispute. Prior to her removal, petitioner had been a member of the Department since 2010. Petitioner had received promotions at the Department and had been elected as captain of the emergency medical technicians each year between 2013 and 2016. In that capacity, she also oversaw the rescue squad. On or about March 14, 2016, petitioner was re-elected as captain. Shortly thereafter, Brenda Jonker, a member of the rescue squad, made accusations against petitioner alleging fraud, forgery and misappropriation of funds. Petitioner thereafter resigned her position as captain but remained an active member of the Department.

On April 8, 2016, petitioner received a letter stating that she was suspended from the Department. Petitioner retained counsel, who thereafter communicated with respondent's counsel with respect to respondent's investigation into allegations against petitioner. Almost one year later, by letter dated March 14, 2017, respondent served petitioner with a "Notice of Special Meeting" and "Charges for Removal" (see Verified Petition, Exhibit E). The Notice of Special Meeting informed petitioner that a Special Meeting for her removal as a member of respondent, pursuant to Article III,

Section 8 of the Department's Constitution and Bylaws, would occur on March 25, 2017 and that the basis for her removal was "check forgery and mishandling of department funds" (id., at Notice of Special Meeting). The Notice advised that petitioner would have "every opportunity to defend [herself]" during the Special Meeting, and that she had the right to present the testimony of witnesses and other evidence in her defense, as well as question any witnesses presented against her (id.). The Notice further stated that she had the right to be accompanied by an attorney at the Special Meeting to provide her with "legal advice and guidance" but that the meeting was not a hearing and her counsel would not be permitted to be an active participant (id.).¹ The "Charges for Removal" contained three separate counts. Count one alleged "[f]orgery, conversion, misuse of department process, abuse of trust, conduct unbecoming a member of the department, unacceptable behavior concerning the reputation of the Fire Department, and unacceptable behavior concerning the welfare of the Fire Department" (id., at Charges for Removal). Counts two and three alleged mishandling of Department funds.

By letter dated March 16, 2017, counsel for petitioner advised that he would be appearing at the March 25, 2017 meeting and requested various documents and reports relevant to the charges, including copies of the checks referred to in the Charges for Removal, treasurer's reports and any audit reports relied upon by respondent. Respondent declined to provide the requested documents prior to the date of the Special Meeting but offered petitioner the opportunity to review any available materials two hours prior to the commencement of the proceeding on March 25, 2017.

The Special Meeting commenced at 10:07 A.M. on March 25, 2017. The minutes of the Special Meeting reflect that petitioner and her attorney were present. Also present were five

¹ The Notice of Special Hearing was unsigned and apparently was issued by an entity called the "Board of Directors of the Sharon Springs Fire District." The Department's Constitution and Bylaws include no reference to such a Board.

members of the Department's Membership Committee, respondent's counsel, Brenda Jonker, the member who presented the charges, and Greg Baxter, a member against whom similar charges had been brought who was also represented by petitioner's counsel.² Ms. Jonker read the charges against petitioner and Mr. Baxter. It is not disputed that the charges read at the Special Meeting differed from the charges alleged in the Charges for Removal. Specifically, petitioner alleges, and respondent admits, that the charges read at the Special Meeting referred to specific checks and alleged misconduct that had not been included in the charges provided to petitioner on or about March 16, 2017 (see Verified Complaint ¶¶ 24, 29; Verified Answer ¶¶ 24, 29).³ Petitioner's counsel was permitted to make a statement and petitioner was permitted to read a prepared statement. It appears from the minutes that petitioner presented documents in support of her position. Various witnesses gave statements, and petitioner was permitted to ask questions of the witnesses. Counsel for petitioner was directed that he was "only here to advise" (Certified Record, at Minutes), and was not permitted to ask questions or cross-examine any of the witnesses, and his request to make a closing statement was denied. The Membership Committee went into Executive Session at 12:32 P.M. By 12:42 P.M., the Committee had returned with the results of their secret ballot vote, deciding that petitioner should be expelled (Certified Record, at Minutes).⁴ On or about April 5, 2017, respondent's Board of Fire Commissioners upheld the Committee's decision and issued a decision

² The Membership Committee ultimately voted to reinstate Mr. Baxter as a member.

³ Notably, Ms. Jonker states in an affidavit that the charges announced at the special meeting included violations of the Code of Ethics; the written "Charges for Removal" do not reference the Code of Ethics.

⁴ The official Special Meeting Ballots completed by the Membership Committee are included in the certified record. A review of those five paper ballots indicates that: (1) two members voted "no" as to whether petitioner violated the Department Constitution and ByLaws; (2) two members voted "yes" as to petitioner's violation of the Department Constitution and ByLaws, with a recommendation for exclusion; and (3) one member voted for expulsion without indicating whether he or she found that petitioner violated the Department Constitution and ByLaws.

removing petitioner as a member of the Department. Petitioner thereafter commenced this CPLR article 78 proceeding.

ANALYSIS

As an initial matter, to the extent that petitioner argues that the charges against her should be dismissed and she should be reinstated because there was insufficient evidence presented to sustain the charges against her, the Court finds that it cannot determine this issue on the record before it. As noted above, it is undisputed that the charges read at the hearing were different from the charges alleged in the "Charges for Removal" which were served on petitioner prior to the hearing. Apparently, no stenographic transcription of the Special Meeting was made. The only record of what occurred at the Special Meeting is the minutes, which amount to notes taken during the meeting. These minutes do not reflect what charges were read at the meeting. As such, the administrative record does not reflect what petitioner was specifically charged with at the meeting and therefore the Court cannot make a determination on this record as to whether the determination is arbitrary and capricious or constitutes an abuse of discretion in light of the evidence presented against petitioner.⁵

Nevertheless, upon review, the Court finds that the determination must be annulled and the matter remitted to respondent for a hearing pursuant to General Municipal Law § 209-1. General Municipal Law § 209-1 governs the removal of volunteer members and officers of fire departments and fire companies. In relevant part, it states that volunteer members of fire departments and fire

⁵ The Court notes that, although petitioner argues that respondent's determination is not supported by "substantial evidence," this Court is not required to transfer this proceeding to the Appellate Division because the determination was not made "as a result of a hearing held . . . pursuant to direction by law" (CPLR 7803 [4]). This Court's review is limited to whether respondent's determination is arbitrary and capricious or constitutes an abuse of discretion (see Matter of Pawlowski v Big Tree Volunteer Firemen's Co., Inc., 12 AD3d 1030, 1031 [4th Dept 2004]).

companies “shall not be removed from office, or membership, as the case may be, by such authorities or by any other officer or body, except for incompetence or misconduct” (General Municipal Law § 209-1 [1] [emphasis added]). The statute further states that “[r]emovals on the ground of incompetence or misconduct, except for absenteeism at fires or meetings, shall be made only after a hearing upon due notice and upon stated charges and with the right to such officer or member to a review pursuant to article seventy-eight of the civil practice law and rules” (General Municipal Law § 209-1 [1] [2]), and provides a variety of procedural requirements for such hearings. In an unnumbered sentence at the end of the statute, the statute states: “The provisions of this section shall not affect the right of members of any fire company to remove a volunteer officer or voluntary member of such company for failure to comply with the constitution and by-laws of such company” (General Municipal Law § 209-1). The Court of Appeals has emphasized that General Municipal Law § 209-1 “only grants volunteer officers and volunteer members of fire departments the right to a hearing (upon written notice of charges) before being removed on the ground of incompetence or misconduct. The Legislature did not intend thereby to interfere with the disciplining of volunteer firefighters in connection with the conduct of the internal affairs of a fire company” (Armstrong v. Centerville Fire Co., 83 N.Y.2d 937, 939 [1994]).

Petitioner argues that she was entitled to a hearing pursuant to General Municipal Law § 209-1 because the charges against her amounted to “misconduct.” Respondent contends that General Municipal Law § 209-1 does not apply because the charges against petitioner arose under the Department’s bylaws, which removed this matter from the ambit of General Municipal Law § 209-1 pursuant to the final sentence of that statute. Specifically, respondent argues that petitioner was removed for “unacceptable behavior, concerning Safety, reputation, or welfare of the Fire Department” in violation of Article III, Section 8 of the Department’s Constitution and Bylaws and

not for “misconduct.” Section 8 states, in its entirety:

“In case a member is charged, in writing, by a member in good standing, with an infraction of any Article or section of this Constitution or unacceptable behavior, concerning Safety, reputation, or welfare of the Fire Department, a special meeting of the Membership Committee shall be called with a majority of the members present. At that special meeting, after the evidence has been presented and the defendant has had every opportunity to defend themselves, a secret ballot shall be taken. Expulsion from the Fire Department shall require a majority vote of said ballot” (Certified Record, Constitution and Bylaws, Article III, Section 8).

Upon review, the Court finds that, under the circumstances of this case, petitioner was charged with misconduct within the meaning of General Municipal Law § 209-1 and was thus entitled to a hearing. As noted above, it is unclear from the record what charges were read at the meeting. It appears from the minutes of the meeting that the charges primarily involved allegations that petitioner had forged signatures on checks. Importantly, nothing in the Department’s Constitution and Bylaws specifically addresses such conduct, and nothing therein requires certain behavior with respect to issuing checks or expending Department funds. Therefore, notwithstanding how respondent has couched the charges against petitioner – charging petitioner with violating a general “catch-all” provision of the Bylaws – the Court finds that, because the Bylaws do not specifically address the conduct charged, the charge(s) allege misconduct within the meaning of General Municipal Law § 209-1 (see Matter of Pawlowski v Big Tree Volunteer Firemen's Co., Inc., 12 AD3d 1030, 1032 [4th Dept 2004] [holding that a member was not entitled to a hearing on a charge that the member violated the bylaws with respect to fuel use, but was entitled to a hearing on a charge that the member lied, as such conduct was not addressed in the bylaws of the fire company]; compare Leahy v Jordan, 207 AD2d 385 [2d Dept 1994] [no hearing required for volunteer firefighter removed from his position based upon excessive absenteeism]; Empire Hook & Ladder Co. No. 1 v Nyack Fire Dept., 176 Misc 2d 616, 618 [Sup Ct, Rockland County 1998] [no hearing

required for member charged with violating a rule requiring an individual to obtain permission from the fire chief before communicating with any village body]).

While “[t]he Legislature did not intend [General Municipal Law § 209-1] to interfere with the disciplining of volunteer firefighters in connection with the conduct of the internal affairs of a fire company” (Matter of Armstrong v Centerville Fire Co., 83 NY2d at 939), the Court does not believe that the Legislature intended for a fire district to be able to avoid the procedural requirements of General Municipal Law § 209-1 simply by charging a member under a general “catch-all” provision of its bylaws.⁶ Such a reading of the statute would allow the final sentence of General Municipal Law § 209-1 to swallow the entire statute and render ineffective the provision requiring a hearing for a member charged with incompetence or misconduct. As such, the Court annuls respondent’s determination and remits the matter for a hearing on the charges pursuant to General Municipal Law § 209-1 (see Matter of Richards v Board of Fire Commrs. of Brentwood Fire Dist., 117 AD3d 836, 837 [2d Dept 2014], lv denied 24 NY3d 912 [2014]).

As a final matter, the Court notes that, even if it were to find General Municipal Law § 209-1 inapplicable, it would nonetheless remit the proceeding on due process grounds. “A volunteer firefighter must be afforded due process in disciplinary proceedings” (Matter of McEvoy v Oyster Bay Fire Co. No. 1, 117 AD3d 953, 954 [2d Dept 2014], quoting Matter of Greene v Medford Fire Dept., 6 AD3d 705, 706 [2d Dept 2004]; Matter of Bigando v Heitzman, 187 AD2d 917, 918 [3d Dept 1992]). Moreover, respondent’s own Bylaws provide that members will have “every opportunity to defend themselves” at a special meeting (Certified Record, Constitution and Bylaws, Article III, Section 8). Here, it is undisputed that the charges presented against petitioner at the

⁶ The Court notes that the legislative history of General Municipal Law § 209-1 does not provide any meaningful insight into the final sentence of the statute and its interplay with the rest of the statute.

special meeting were different than the charges provided to her counsel eleven days prior to the meeting. Moreover, documents which purportedly formed the basis for her removal were either not provided to her or were shown to counsel two hours prior to the meeting. Under these circumstances, due process was not satisfied (see Matter of Bigando v Heitzman, 187 AD2d at 918-919).

Accordingly, it is hereby

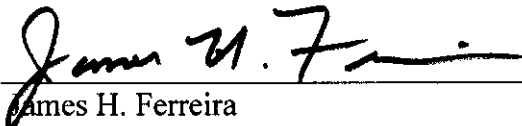
ORDERED AND ADJUDGED that the petition is granted inasmuch as the determination removing petitioner as a member of the Department is annulled and the matter is remitted for a hearing pursuant to General Municipal Law § 209-1.

The foregoing constitutes the Judgment of the Court. The original Judgment is being returned to counsel for petitioner. A copy of the Judgment and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this Judgment, and delivery of a copy of the Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED

ENTER.

Dated: Albany, New York
July 24 2018


James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

1. Notice of Petition, dated July 25, 2017;
2. Verified Petition, dated July 25, 2017, with attached exhibits;
3. Memorandum of Law in Support by Michael W. Macomber, Esq., dated July 25, 2017;

4. Verified Answer, dated August 24, 2017, with Certified Record;
5. Affidavit in Opposition by Lawrence Molinaro, sworn to August 16, 2017;
6. Affidavit in Opposition by Brenda Jonker, sworn to August 16, 2017;
7. Affidavit in Opposition by Ann Marie Kyes, sworn to August 17, 2017;
8. Affidavit in Opposition by Shirley Slater, sworn to August 15, 2017;
9. Affidavit in Opposition by Ardyth Kutzscher, sworn to August 16, 2017; and
10. Memorandum of Law in Opposition by Corey J. Vincent, Esq., dated August 24, 2017.

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M. Andica Jayson

FILED SEP 17 2018