

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ULSTER

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In the Matter of the Application of  
CHRISTOPHER REA,

Petitioner,

**NOTICE OF  
PETITION**

-against-

Index No.  
RJI No.

THE CITY OF KINGSTON and SHAYNE R. GALLO,  
in his official capacity as Mayor,

Respondents.

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**APPLICATION BY:**

Petitioner, Christopher Rea.

**DATE, TIME AND PLACE:**

December 19, 2014, at the Ulster County  
Courthouse, 285 Wall Street, Kingston, New  
York 12401

**PAPERS RELIED UPON:**

Petition verified November 21, 2014 and all  
prior pleadings, papers and proceedings.

**RELIEF DEMANDED:**

An Order and Judgment pursuant to CPLR  
§7803 (1) vacating the Decision of  
Respondents to terminate Petitioner; (2)  
directing a decision adopting the  
recommended findings of fact and  
conclusions of law issued by Hearing Officer  
John Trela; (3) dismissing the charges against  
Petitioner with prejudice; (4) reinstating  
Petitioner to his position as Assistant Fire  
Chief in the Kingston Fire Department; (5)  
Awarding petitioner full back pay and other  
emoluments associated with the position of  
Assistant Fire Chief, retroactive to February 9,  
2012; (6) awarding Petitioner the costs and  
disbursements associated with this  
proceeding; and (7) awarding Petitioner such  
other and further relief this Court deems just  
and appropriate.

**ANSWERING PAPERS:**

Pursuant to CPLR §7804(c) answering papers including a certified transcript of the proceedings under consideration shall be served at least five (5) days before the return date of this motion.

**VENUE:**

This application is venued in the County of Ulster based upon the residence and/or office location of all of the parties.

DATED: November 21, 2014  
Albany, New York

Yours, etc.,

**GLEASON, DUNN, WALSH & O'SHEA**

By:



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In the Matter of the Application of  
CHRISTOPHER REA,

Petitioner,

**VERIFIED  
PETITION**

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Index No.  
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THE CITY OF KINGSTON and SHAYNE R. GALLO,  
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Respondents.

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Petitioner, Christopher Rea, by his attorneys, Gleason, Dunn, Walsh and O'Shea, as and for his Verified Petition, respectfully alleges as follows:

**INTRODUCTION**

1. This proceeding is brought pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") challenging the acts of The City of Kingston ("City") and Shayne R. Gallo ("Gallo"), in his official capacity as Mayor ("Mayor") (collectively "Respondents") in rejecting the recommendation of a hearing officer and terminating Petitioner. This proceeding seeks to vacate and annul the decision terminating his employment, reinstate Christopher Rea to the position of Assistant Fire Chief for the City of Kingston and immediately reinstate him to the payroll with full back pay and benefits.

2. Petitioner also asserts that it was an error of law for Gallo to issue the ultimate decision thus Gallo's decision is arbitrary and capricious and not based on substantial evidence.

3. Petitioner asserts that he was denied the elements of a fair hearing based upon the bias and prejudice of the decision maker.

4. In addition, petitioner asserts that the respondents failed to meet their burden to prove any of the charges upon which respondent Gallo found him guilty, that the charges did not state facts upon which discipline could be based and that the penalty of termination shocks the conscience.

### PARTIES

5. Petitioner, Christopher Rea (“Rea” or “Petitioner”), was an employee of the City of Kingston Fire Department, holding the permanent Civil Service title of Assistant Fire Chief until Mayor Gallo modified the Opinion and Recommendation of the hearing officer and terminated Rea’s employment effective October 14, 2014.

6. The position of Assistant Fire Chief for the Kingston Fire Department is a permanent position in the competitive Civil Service.

7. On information and belief, the City is a municipal corporation and/or a political subdivision duly formed and existing pursuant to the laws of the State of New York with offices in Kingston, New York.

8. On information and belief, Shayne Gallo is the elected Mayor of the City of Kingston. Gallo is being sued in his official capacity as Mayor. Upon information and belief, Gallo, as Mayor, is the appointing authority for the City of Kingston for positions in the Kingston Fire Department including the position of Assistant Fire Chief.

9. Mayor Gallo signed the Disciplinary Decision against Petitioner, which is the subject of this proceeding.

10. The City is the employer of Petitioner.

## RELEVANT STATUTES

11. CSL §75(1) provides that:

A person described [in paragraphs a-e of this subdivision] shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

12. CSL §75(1)(a) provides as follows:

A person holding a position by permanent appointment in the competitive class of the classified Civil Service.

13. Petitioner is entitled to the protection of CSL §75 by reason of his permanent position in the competitive class as an Assistant Fire Chief.

14. CSL §75(2) provides in relevant part that:

The burden of proving incompetency or misconduct shall be upon the person alleging the same.

## FACTS

15. On February 9, 2012, Petitioner was suspended without pay effective February 9, 2012. Attached as **Exhibit A** is a copy of that February 9, 2012 Suspension.

16. Once the City suspended Rea, it failed and refused to issue charges pursuant to Civil Service Law §75. That caused Rea to commence a proceeding seeking to compel Respondents to issue charges or reinstate Rea. With an Order dated August 3, 2012, the Respondents were compelled to issue charges or reinstate Rea. A copy of that Order is attached as **Exhibit B**.

17. On August 22, 2012, a Notice of Discipline and Notice of Charges (“First Notice of Discipline”) was served upon Rea charging him with twenty separate counts of misconduct and

seven counts of dereliction of duty. A copy of the First Notice of Discipline is attached as **Exhibit C**.

18. The First Notice of Discipline was signed by Mayor Gallo, and dated August 22, 2012. (See **Exhibit C**).

19. Rea served his Answer to the charges on August 30, 2012. A copy of the August 30, 2012 Answer is attached as **Exhibit D**.

#### SUSPENSION

1. CSL §75(3) provides in relevant part that:

Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom the charges have been preferred may be suspended without pay for a period not exceeding thirty days.

2. Despite repeated demands the City refused to restore Rea to the payroll pending a hearing.

3. The continuation of the suspension without pay in excess of 30 days beyond February 9, 2012, violates Civil Service Law §75(3).

#### UNTIMELY CHARGES

4. CSL §75(4) provides in relevant part that:

Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges . . . provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a Court of appropriate jurisdiction, constitute a crime.

5. Civil Service Law §75 does not permit the issuance of charges for conduct that occurred more than 18 months prior to the date of the charges absent criminal.

## PRIOR COURT PROCEEDINGS

6. Petitioner commenced a proceeding challenging both the timeliness of the charges and the suspension.

7. The Appellate Division issued a Decision in October 2013 finding Petitioner presumptively entitled to his compensation as Assistant Fire Chief until the determination of the disciplinary charges. A copy of that Decision is attached as **Exhibit E** and reported at 110 AD3d 1227 (3d Dept. 2013). The Decision also directed that two of the Specifications must be dismissed as untimely; Charge 2, Specifications 4 and 5.

8. On remand, the Supreme Court issued a Decision dated December 18, 2013 directing Respondent to conduct a hearing within 30 days, reinstate Petitioner to his permanent position as Assistant Fire Chief and immediately pay Petitioner his retroactive pay without reduction. A copy of that Decision is attached as **Exhibit F**.

9. The City appealed from the December 18, 2013 Supreme Court Decision. A copy of the City's Notice of Appeal is attached as **Exhibit G**.

10. On or about November 27, 2013, the City served additional charges. A copy of the additional charges is attached as **Exhibit H**. All 36 new specifications in the supplemental charges allege conduct which occurred more than 18 months prior to the date of the charges. None of the new conduct contained in the charges, even if proven, constitutes a crime and as such, all are barred by Civil Service Law §75(4).

11. Rea served an Answer to the supplemental charges on December 4, 2013. A copy of the December 4, 2013 Answer is attached as **Exhibit I**.

12. Despite the Supreme Court Decision of December 18, 2013, the City continued to deny Petitioner reinstatement as Assistant Fire Chief and refused to compensate Petitioner his back pay.

### HEARING

13. The City appointed Hearing Officer John Trela (“Trela”) to conduct the hearing.

14. Hearings were eventually conducted by Hearing Officer Trela over the course of five (5) separate hearing days (December 9, 2013, February 21, 2014, March 21, 2014, April 3, 2014 and April 11, 2014).

15. At the hearing, the City formally withdrew the following charges:

Charge 1

Specification 36  
Specification 46  
Specification 47  
Specification 48

Charge 2

Specification 2  
Specification 4  
Specification 5

16. At the close of the hearing, Trela afforded the parties the opportunity to submit a brief.

17. Trela issued an Opinion and Recommendation dated July 18, 2014. A copy of that Opinion and Recommendation is attached as **Exhibit J**.

18. The Opinion and Recommendation of Trela recommended that each of the remaining charges and specifications be dismissed and that Rea be restored to his position as Assistant Fire Chief with full back pay and benefits.



**TRELA'S RECOMMENDED DECISION CONCERNING  
MAYOR GALLO'S INVOLVEMENT IN REA'S EMPLOYMENT AGREEMENT**

19. One issue in the discipline case involved a question concerning the Employment Agreement Rea entered into in 2010 between Rea, on behalf of himself, and then Kingston Mayor James Sottile, on behalf of the City of Kingston. Specifically, the hearing officer found facts that there was a mutual mistake of fact in the execution of the Employment Agreement and that Gallo was involved in creating the mutual mistake. (See Exhibit J, pp. 42-48)

20. Both Rea and former Mayor Sottile were called as witnesses in the hearing. Both Rea and Mayor Sottile testified about the negotiation and review of a draft employment agreement, a copy of which was admitted at the hearing as Rea Exhibit 2. That draft agreement is attached here as **Exhibit K**. The relevant clause addressed by Trela is the Union benefits clause and provides as follows:

“The Assistant Fire Chief will receive all benefits that are provided to members of the Kingston Professional Firefighters Association under the City’s contract with the KPFFA and any additional memorandum they may form.” (See Exhibit K)

The record facts at the hearing established that this same clause was contained in Rea’s prior Employment Agreement.

21. The record facts established, without dispute, that the Union benefits clause in the draft Employment Agreement has the practical effect of sweeping into Rea’s agreement the right to receive supplemental pay and the right to flexible work hours, two clauses mentioned in the KPFFA agreements. (See Exhibit J, p. 28)

22. In the Opinion and Recommendation, Trela made specific findings of fact based on the undisputed testimony of Rea and Sottile that then Assistant Corporation Counsel Shayne Gallo apparently oversaw the removal of a relevant clause of the Employment Agreement after

Rea and Sottile reviewed and agreed upon a draft contract that contained the relevant clause. Trela found that based on the undisputed testimony that neither Rea nor Sottile noticed the removal of the clause in the final agreement before they signed it. Trela found that the undisputed testimony established that then Assistant Corporation Counsel Shayne Gallo was responsible for the preparation of the final document. (See Exhibit J, pp. 42-48)

23. Trela found that the undisputed testimony and exhibits admitted at the hearing revealed that the Employment Agreements of the Fire Chief, Police Chief and Deputy Police Chief all have, and continue to have the same or similar clause in their employment agreements and that this was consistent with the intention that all supervisors have consistent agreements.

24. The City introduced no testimony or exhibits to contest or dispute the testimony of Rea or Mayor Sottile concerning the mutual mistake of fact concerning the employment agreement. (See Exhibit J)

25. The City failed to call Gallo or anyone else as a witness to rebut, explain or otherwise address the testimony and exhibits which demonstrated that Gallo removed the relevant clause without notice to Rea or Sottile after Rea and Sottile reviewed and agreed upon the draft agreement and before the execution of the final agreement. (See Exhibit J)

26. In the Opinion and Recommendation Trela found facts that there was a mutual mistake of fact by Rea and Sottile and as such found that the record supported a reformation of Rea's Employment Agreement restoring the deleted clause. The inclusion of the clause made clear that Rea could not be found guilty of Charge 1, Specifications 14, 15, 17 and 18. The clause also permitted Rea to flex his work hours which was relevant to Charge 1, Specifications 1, 2 and 3 and demonstrated that Rea did not engage in the misconduct alleged. (See Exhibit J)

27. Trela also made findings of fact that there was an appropriate inference drawn that missing witness Shayne Gallo was available to the City and was implicated by the testimony of Rea and Sottile on the facts concerning the deletion of the clause from Rea's Employment Agreement. Trela made findings of fact that the City's failure to call Shayne Gallo as a witness created an inference further supporting Rea and Sottile's testimony that there was a mutual mistake of fact and the Employment Agreement must be reformed. (See Exhibit J)

28. Trela also recommended the dismissal of all charges based on the City's failure to introduce proof sustaining its burden of proof to establish the charges. (See Exhibit J)

29. Trela's Opinion and Recommendation also found facts that the testimony and exhibits established that the City did not sustain its burden of proof that Rea engaged in any of the conduct alleged and that the conduct alleged was sufficient to prove a crime such that the City was excused from the 18 month statute of limitations found in Civil Service Law §75(4). As such, Trela made findings supported by the record that the conduct alleged in the charges was untimely in violation of Civil Service Law §74(4). (See Exhibit J)

30. Trela made findings of fact that Rea was a credible witness in his testimony refuting all allegations of misconduct or incompetence. (See Exhibit J)

#### **GALLO'S DECISION**

31. Shayne Gallo issued a Decision accepting in part and rejecting in part Trela's recommendation and findings of fact. Gallo accepted the findings dismissing the following charges and Specifications:

Charge 1

Specifications 4, 19, 20, 27, 36, 37, 39, 41 and 42

Charge 2

Specification 1 and 6

32. Gallo rejected Trela's findings of fact and conclusions of law on the following Charge 1, Specifications 1-3, 5-18, 21-26, 28-35, 38, 43-45 and 49-54. The Gallo Decision is attached as **Exhibit L**.

33. As a result of a combination of Court decisions, stipulations by the City and concessions made by Gallo in his determination, what remains before the Court for review are the following charges:

Charge 1

Specifications 1-3, 5-18, 21-26, 28-35, 38, 43-45 and 49-54

### TERMINATION

34. Respondent Gallo, acting as ultimate decision maker, declined to adopt the Hearing Officer's recommendations to dismiss all charges and instead determined termination to be the appropriate penalty. (See Exhibit L)

### GALLO'S ILLEGAL ACT AS THE DECISION MAKER

35. Respondent Gallo had prejudged the case and was biased against Petitioner. Gallo exhibited his predetermination in the media. Before the hearing, Respondent Gallo made the following public statements that were published in the local media regarding Mr. Rea and his case: "Mr. Rea, allegedly, and **I am confident I have the factual information, committed misconduct and incompetence**" and "[B]ased on what we have found thus far, **it is very difficult for me not to conclude** that Mr. Rea was paid by two different public entities (for work) on the same date." A copy of the articles containing those statements is included as **Exhibit M**.

36. Subsequent to the conclusion of the hearing but before he reviewed the record, Gallo made further public statements rejecting the Hearing Officer's findings and recommendations. Those public statements indicated that Gallo had prejudged the case.

37. It was improper, in violation of law and lawful procedure, an abuse of discretion and arbitrary and capricious for respondent Gallo to make a determination regarding guilt or innocence and the measure of punishment after having previously made his position known publicly based upon matters outside of the record.

38. It was improper and gave the appearance of impropriety for Respondent Gallo to review and evaluate Trela's recommended determination since Gallo's own conduct in connection with the deletion of a relevant clause from Rea's Employment Agreement was central to the charges of misconduct and Rea's guilt or innocence.

#### **DETERMINATION**

39. Respondent Gallo's finding of guilt on the following surviving specifications was made in violation of law, is arbitrary, capricious, an abuse of discretion and is not supported by substantial evidence.

#### **EMPLOYMENT AGREEMENT**

40. Hearing Officer Trela made specific findings based on the undisputed record facts that there was a mutual mistake by the City and Rea requiring the reformation of Rea's Employment Agreement restoring a Union Benefits clause. It was an error of law, arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence for Gallo to reject the findings of fact on the employment contract issue.

41. Hearing Officer Trela made specific findings based on undisputed record facts that the City's failure to call Gallo, or any other witness, to contest the record facts concerning

the exclusion of an agreed upon term from the final Rea Employment Agreement entitled Rea to a missing witness inference. It was an error of law, arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence for Gallo to reject the findings and conclusions related to the missing witness inference.

42. The reformation of the Employment Agreement restoring the Union Benefits clause requires a finding that Charge 1, Specifications 14, 15, 17 and 18 cannot be sustained. It was an error of law, arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence for Gallo to reject the findings and recommendation holding that Charge 1 Specification 14, 15, 17 and 18 could not be sustained.

#### **FLEX TIME**

43. The reformation of Rea's Employment Agreement restoring the Union Benefits clause allowed Rea to flex his work hours consistent with his Employment Agreement. As such, Charge 1, Specification 1, 2 and 3 cannot be sustained. It was an error of law, arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence for Gallo to reject the findings of fact concerning flextime.

44. Specifications (Charge 1, Specifications 1, 2, 3 and 53) deal with the issue of Rea's flex time. Rea was entitled to flex his time under the KPFFA benefits clause of his reformed Employment Agreement. The City put in no proof to rebut Rea's assertions regarding how he properly flexed his time.

#### **PROOF OF NO CRIMINAL INTENT**

45. The undisputed facts established that after Rea and the City executed Rea's Employment Agreement both parties proceeded consistent with an agreement that included the Union Benefits clause allowing flextime and supplemental pay. That mutual

understanding is inconsistent with a finding that Rea intentionally received supplemental pay and intentionally flexed his work hours knowing he was entitled to neither. Because the record established that Rea had no “criminal intent” the record cannot support a finding that Charge 1 Specification 1, 2, 3, 14, 15, 17 and 18 allege conduct that can avoid the time bar of Civil Service Law §75(4). It was an error of law, arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence for Gallo to find that Charge 1, Specification 1, 2, 3, 14, 15, 17 and 18 were sustained in light of the lack of proof of criminal intent.

### **CITY RECORDS**

46. The record facts established that the City made mistakes in calculating Rea’s accumulated leave time reducing his credits by at least ten days. It was an error of law, arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence for Gallo to make a determination that was inconsistent with these undisputed record facts.

### **REA’S MONTOUR FALLS WORK**

47. The record facts established that Rea consistently charged his leave accruals for all time spent at Montour Falls Fire Academy. It was an error of law, arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence for Gallo to issue a determination in the face of these established facts.

48. The City failed to put in any proof of criminal intent concerning Rea’s payment for work at Montour Falls. As such, it was an error of law, arbitrary, capricious, an abuse of discretion and not supported by substantial evidence for Gallo to issue a determination that the charges related to Rea’s work at Montour Falls were sustained in the face of Civil Service

Law §75(4) barring charges related to conduct occurring more than 18 months prior to the date of the notice of charges.

### CELL PHONE CHARGES

49. The Specifications (Charge 1, Specifications 21-26, 28-35, 38, 43-45 and 49-54) allege Rea was outside the City while on duty and therefore being improperly compensated as Assistant Fire Chief. These specified charges were referred to in the hearing as the cell phone charges. Each of these charges are based solely on cell phone records which purport to show that Rea's City issued cell phone either sent or received a call when the cell phone was outside the City limits. Each of these "cell phone charges" are untimely as they are based on conduct which occurred more than 18 months prior to the date of the filing of charges and as such are barred by Civil Service Law §75(4). The City put in no evidence to establish the requisite intent element necessary for the crime exception to Civil Service Law §75(4) that would permit the City to allege conduct more than 18 months prior to the charges.

50. It was an error of law, arbitrary, capricious, an abuse of discretion and not supported by substantial evidence for Gallo to issue a determination that failed to dismiss the cell phone charges as untimely in violation of Civil Service Law §75(4).

51. The record facts established that there are multiple job related reasons for an Assistant Fire Chief to be outside the City while still doing work as Assistant Chief. The only evidence put in by the City in support of the "cell phone charges" are the cell phone records of Rea during the time he is alleged to have been outside the City. The City offered no evidence to rebut Rea's undisputed testimony regarding his actions performing work for the City on the days in question and the undisputed testimony of other witnesses corroborating that there are legitimate business reasons for the Assistant Fire Chief to be outside the City while on duty.



52. It was an error of law, arbitrary, capricious, an abuse of discretion and not supported by substantial evidence for Gallo to issue a determination that found that the City sustained its burden of proof in proving any of the cell phone charges.

**PENALTY**

53. As a result of the foregoing, the termination of Petitioner by Respondent was effected by error of law, was arbitrary and capricious, was made in an irrational manner, constitutes an abuse of discretion in recommending a penalty of termination for the proven conduct and is not supported by substantial evidence.

**RELIEF**

**WHEREFORE**, Petitioner seeks an ORDER and JUDGMENT providing the following:

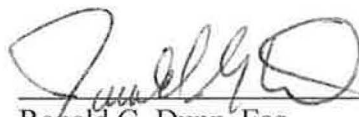
- a) Vacating the disciplinary decision of respondent Gallo dated October 14, 2014 terminating petitioner;
- b) Reinstating Petitioner to his position, title and grade of Assistant Fire Chief for the City of Kingston, New York immediately reinstating him to the payroll;
- c) Dismissing the charges against Petitioner with prejudice, insofar as they allege conduct which is alleged to have occurred more than 18 months prior to the date of the charge;
- d) Awarding Petitioner full back pay and other emoluments associated with the position of Assistant Fire Chief, retroactive to February 9, 2012; and
- e) Awarding Petitioner costs and disbursements of this proceeding, including reasonable attorneys' fees; and
- f) Awarding such other and further relief as the Court deems just.

DATED: November 21, 2014

Yours, etc.

**GLEASON, DUNN, WALSH & O'SHEA**

By:



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