

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE – ARTICLE 78 PROCEEDING

X-----X

SCOTT MARTIN,

Petitioner,

Supreme Ct Index #

v.

CITY of BUFFALO, NY and
THE BUFFALO FIRE DEPARTMENT

**VERIFIED
PETITION**

Respondents.

X-----X

Petitioner, SCOTT MARTIN (“Petitioner”), by his attorneys, The Law Offices of David Clifford Holland, P.C., as and for his Verified Petition against the City of Buffalo and the Buffalo Fire Department, allege as follows:

NATURE OF THE ACTION

Petitioner Is A Certified Medical Marijuana Patient Under Compassionate Care Act

1. Petitioner, Firefighter Scott Martin, was a member of the Buffalo Fire Department (“BFD”) and a member of the Buffalo Professional Fire Fighters Association (“BPFFA” or “Association”).
2. At all times relevant, Petitioner was a 12 year veteran of the BFD and certified medical marijuana patient under New York’s Compassionate Care Act (“CCA”), who was unlawful discharged from the BFD for such lawful medical cannabis use in violation of Public Health Law §3360, *et. seq. See, Affidavit of Scott Martin, attached.*
3. While Petitioner has timely commenced a union grievance to overturn his termination, that proceeding cannot restore him to the position he occupied immediately before he was terminated because his assignment to Truck 14, 1st Platoon has been awarded through the bid system to another firefighter, and he cannot be reinstated to that position by means of the pending grievance proceeding. *See, Affirmation of Attorney Holland, attached.*

4. As such, this Article 78 Proceeding is the only way that Petitioner may be fully restored to the position he occupied immediately prior to his unlawful suspension and discharge from the BFD in contravention of his rights and protections as a medical marijuana patient under the Compassionate Care Act and PHL §3369(1) and (2).
5. Through this Article 78 proceeding, Petitioner seeks an Order from this Court not only restoring him to his rank, seniority, backpay, benefits, and status as a Firefighter and EMT with the Buffalo Fire Department, but also to his last assignment as a member of 1st Platoon with Truck 14 which he occupied prior to such unlawful conduct and which may not otherwise be restored through the union grievance process.

The Parties

6. Petitioner is a natural person and resident of Erie County. At all times relevant, Petitioner was and is a member of the Buffalo Professional Firefighters Association which is known as Local 282, IAFF, AFL-CIO (hereinafter, the “BPFFA” or “Association”).
7. Until February 23, 2021, Petitioner Martin was a 12 year veteran employed by the Buffalo Fire Department (“BFD”) as a Firefighter and EMT assigned to 1st Platoon of Truck 14 in the East Side of Buffalo.
8. Respondent, City of Buffalo, is a municipal governmental entity in Erie County which operates the Buffalo Fire Department and was a signatory to the Collective Bargaining Agreement (“CBA”), with the BPFFA and several amended agreements thereto.
9. Non-Party, BPFFA, known as Union Local 282, IAFF, AFL-CIO, represented the interests of its members in Erie County by negotiating the CBA in 1984 and the successor Agreements including the “Rinaldo Award Opinion and Award on Remand” February 16,

2011 and the successor agreement covering the period July 1, 2017 through June 30, 2025.

Petitioner Is Randomly Drug Tested and Discloses His Certified Medical Status Prior To Test – He Is Then Unlawfully Suspended

10. On December 15, 2020, in accordance with the CBA, Firefighter Martin was summoned to submit to a random drug test.
11. Prior to giving a urine sample, Petitioner informed the individual administering the test that he was a certified medical marijuana patient under the Compassionate Care Act and that he would test positive for marijuana which he uses to treat qualifying medical conditions.
12. On December 22, 2020, Firefighter Martin was suspended by letter from the BFD because he "...tested positive for prohibited substances as a result of testing on Tuesday, December 15, 2020." *See, Exhibit 1, attached hereto.*
13. The letter further instructed that:

"Pursuant to Paragraph H(b)(i) of the Rinaldo Panel Interest Arbitration Opinion and Award, you are suspended, effective December 22, 2020 without pay until such time that you submit to you submit to and pass a return to duty test....

Additionally, you will be required to comply with all other EAP requirements specific in the Rinaldo ... Award. ... Note that you are permitted to utilize available paid time off during this period." *Id.*

Petitioner Follows Instruction and Sees EAP and Screens Out Without Further Recommendation

14. As instructed by the suspension letter, Firefighter Martin complied with the EAP requirements and sought out counseling with Orchard Park Family Recovery Center – SUD. *See, Exhibit 2.*
15. Petitioner appeared for counseling on December 29, 2020, January 8, 2021, and January 15, 2021. *Id.*

16. On February 10, 2021, his counselor wrote:

“Scott complied providing random toxicology screenings that showed no concerns [of substance abuse]. Counselor contacted Scott’s collaterals including his girlfriend, his mother, his friend, and his captain as well as the President of the Union, all of whom expressed no concerns. Scott completed two SBIRT appointments as recommended by the treatment team after review. After completion of these two SBIRT appointments, Scott is screened out with no treatment recommended.” *Id.*

17. During that period of time where Petitioner was seeking the mandatory counseling pursuant to the EAP [Employee Assistance Plan], he continued to disclose that he is a certified medical marijuana patient under the Compassionate Care Act and did lawfully use his medical cannabis during the period of such counseling. *See, Exhibit 3.*

18. Petitioner submitted to a drug test on February 5, 2021.

19. Scott Martin was thereafter “screened out” by the counselor on February 10, 2021 with no treatment recommended. *Exhibit 2.*

Petitioner Is Unlawfully Terminated By Letter Dated February 23, 2021

20. Despite his compliance with the mandatory counseling, and being screened out without any further recommended treatment or monitoring, Petitioner was thereafter unlawfully terminated from his job with the Buffalo Fire Department.

21. More specifically, Firefighter Martin received a termination letter dated February 23, 2021 from William Renaldo, the Commissioner of the Buffalo Fire Department, which stated in relevant part:

“As you are aware, the collective bargaining agreement between Local 383 and the City of Buffalo contains a Drug Testing Article and addresses a Drug Testing Policy. Under the terms of that Article, Employees testing positive for alcohol or controlled substances in any drug testing scenario...are subject to the following disciplinary procedures:

H. (b)(i) 1st Positive Following notification of an employee’s first positive alcohol or controlled substances test result, the employee shall be referred

to a substance abuse professional. The employee shall also be suspended from duty without pay until such time that the employee submits to and passes a return to duty test. ... If the return to duty test results are positive, the test result will be considered a second positive under this Agreement.

...

ii) 2nd Positive – Following notification of a second positive alcohol or controlled substance test result, the employee shall be immediately discharged.

“You tested positive for alcohol and/or controlled substances, for purposes of paragraph H(b)(i), as of December 22, 2020, and you were referred to Child and Family Services EAP Program/Horizon Services. You were further suspended from duty as of that day without pay pending your submission to and passage of a return to duty test. You have not passed a return to duty test. On February 5, 2021, you again tested positive, for Marijuana Metabolite. Under the terms of the collective bargaining agreement, this return to duty, follow-up test constitutes a second positive. Since you have now tested positive twice, under paragraph H(b)(i) and (ii) you are hereby and immediately discharged from employment with the City of Buffalo, Buffalo Fire Department.” See, *Exhibit 4*.

22. Thereafter, Plaintiff timely filed a grievance through his union seeking reinstatement, benefits, and backpay. See, *Exhibit 5*.
23. According to counsel for Petitioner in the union grievance proceeding, the process is constrained by the terms of the collective bargaining agreement and modifications made thereto, including the Rinaldo Award, which did not incorporate the passage of the Compassionate Care Act in 2014 or the use of medical marijuana by certified medical patients, and the protections bestowed on them under PHL §3369(1) and (2), which apply even to members of the BFD who are subject to a collective bargaining agreement regarding drug testing. See, *Affirmation of Attorney Holland*.
24. Further, the grievance process cannot restore Petitioner to his detail and assignment as a firefighter and EMT with Truck 14, 1st Platoon because Firefighter Martin’s position has been awarded to another member of the BPFPA through the bid process which cannot be undone by means of the grievance or appeal. Instead, Firefighter Martin may be

reassigned to any firehouse or detail which the Fire Commissioner wants filled anywhere within the BFD other than with Truck 14, 1st Platoon. *Id.*

25. Consequently, Petitioner has been directly and proximately harmed by the unlawful discrimination and adverse employment action taken by the Fire Commissioner in violation of Public Health Law §3369(1) and (2), which may not be cured by the union grievance process.

26. True relief in the form of the protections afforded Firefighter Martin under the Compassionate Care Act and reinstatement to the position he occupied before the unlawful discrimination may only be had by means of this Article 78 Proceeding.

Compassionate Care Act Prohibits Unlawful Discharge Due To Medical Cannabis Use

27. Under Public Health Law 3361(1) an individual with a qualifying medical condition may be certified as a medical patient under the CCA.

28. Under Public Health Law 3362(1) entitled “Lawful Medical Use”:

“The possession, acquisition, use, ... or administration of medical marihuana by a certified patient...possessing a valid registry identification card, for certified medical use, shall be lawful under this title....”

29. Public Health Law §3369(1) prohibits adverse employment action being taken against Firefighter Martin and other medical patients. It provides that:

“Certified Patient...*shall not be subject to* arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or *disciplinary action by a business or occupation* or professional licensing board or bureau, *solely for the certified medical use* or manufacture *of marijuana*, or for any other action or conduct in accordance with this title.” [Emphasis Added].

30. The Compassionate Care Act not only protects medical marijuana patients from unlawful adverse employment actions, but also mandates that patients like Firefighter Martin shall be free from discrimination.

31. Public Health Law §3369(2), specifically mandates that:

“...a *certified patient shall be deemed to be having a “disability” under Article fifteen of the executive law (human rights law), section forty-c of the civil rights law*, sections 240.00, 485.00 and 485.05 of the penal law, and section 200.50 of the criminal procedure law. This subdivision shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance. This subdivision shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.” [Emphasis Added].

32. Article 15 of the *Executive Law* referenced in PHL §3369(2) makes clear that it is an unlawful discriminatory practice for an employer to discharge an employee due to their disability. *N.Y. Executive Law, 296(1)(a)*.

33. Firefighter Martin was suspended and discharged solely due to his use of medical marijuana which is unlawful discrimination against him in the form of an adverse employment action taken due directly to his disability.

The Collective Bargaining Agreement and Successor Agreements Fail To Protect Petitioner

34. The City of Buffalo and the Buffalo Professional Firefighters Association entered into a two-year Collective Bargaining Agreement on June 12, 1984, covering the period July 1, 1984 – June 30, 1986. *Exhibit 6*.

35. That Agreement was modified by the “Rinaldo Award” dated February 16, 2011, which established protocols and procedures for the suspension and outside counseling that a Firefighter is required to undergo before he/she may submit a urine test that must be negative for drugs before reinstatement. *Exhibit 7*.

36. The last Agreement was entered into between the City of Buffalo and the Association which covers the period July 1, 2017 – June 30, 2025, though it is not relevant to this proceeding. *See, Exhibit 8*.

Specifics Of The 1984 Collective Bargaining Agreement

37. The 1984 CBA outlines the entire collective contract between the City of Buffalo and the Association members.
38. As part of that Agreement, the neither the City nor the Buffalo Fire Department may discriminate against any employee "...for any reason whatsoever." See, *Exhibit 6, Article II, "Pledge Against Discrimination and Coercion" pgs. 4-5.*
39. Under that Agreement, Article XVI defines "Seniority" as:
- "Seniority means the length of an employee's service commencing with the date of permanent departmental appointment. Any period of time that a member has been on leave of absence without pay from the department without pay shall be deducted from his accrued seniority." *Exhibit 6, Pg. 31.*
40. Section 16.4(B) of Article XVI provides that any vacancy within the Department shall be posted for a period of 12 days and anyone putting in a "bid" to transfer must do so on the last day of the 12 day period. It directs further that:
- "The vacancy shall be filled by appointing to it that qualified member of the Department who has the greatest seniority in the grade eligible for such appointment." *Exhibit 6, Pg. 32.*
41. At least one bid sheet shall be issued within 300 days of the last bid sheet as per Article XVI, Section 16.4(D)(4). *Id.*
42. Under Article XVI, Section 16.5, all vacancies are only to be filled by the Fire Commissioner who is instructed to fill vacancies if possible prior to the expiration of any current list. *Exhibit 5, Pg. 34.*
43. Article XXIII of the Agreement entitled "Settlement of Disputes" mandates that all matters be brought by means of arbitration as the exclusive means to review "application, meaning, or interpretation" of the CBA shall be performed in accordance with the steps outlined therein. *Exhibit 6, Section 23.1, et. seq.*

44. Article XXIV relates to “Discipline and Discharge” stating that such action may be taken against any employee who has engaged in “misconduct” or “crimes of moral turpitude” and sets out a hearing process in which Petitioner has timely filed a grievance. *Id.*
45. Under Section 24.3(F) of that Agreement, “any person aggrieved by ... a dismissal from service... may appeal such determination...by an application to the Court with the provisions of Article 78 of the Civil Procedure Law and Rules.” *Exhibit 6, Pg. 45.*

The Rinaldo Opinion and Award on Remand

46. The 1984 CBA was modified in 2011 by the Rinaldo Opinion and Award on Remand which was the result of a complex procedural history attempting to modify prior agreements with regard to firefighter salaries and the incorporating a drug testing policy. *See, Exhibit 7, pg. 1-2.*
47. Disagreements between the City and the Union on several issues caused the disputes to be litigated in the Supreme Court of the State of New York, Fourth Department as well as the New York Court of Appeals which found the issues so intertwined that all prior awards were vacated. *Exhibit 7, Pgs. 2, 18.*
48. The Rinaldo Award reinstated the previously vacated “City Proposal #5” – “Award on Drug and Alcohol Testing.” *Exhibit 7, pg. 25.*
49. The Rinaldo Award superseded the June 25, 1995 BFD Drug Testing Policy and established the new testing policy through the award. *Id.*
50. Under Provision “A” of that Award, a Firefighter like Petitioner who tests positive for marijuana shall be referred to a Substance Abuse Professional through the City’s Employee Assistance Program (“EAP”). *Id.*
51. Provision “B” mandates that the City shall administer a “return to duty” drug test. *Id.*

52. Provision “F” is relevant to the situation here where it provides that:

“An employee who is taking prescription...medications which may result in symptoms, impairments, or limitations, similar to alcohol or controlled substance use must bring this matter to the immediate attention of the Commissioner of Human Resources. This information shall be kept confidential and used only for security or performance reasons.” *Exhibit 7, Pg. 26.*

53. Section “H” of the Rinaldo Award sets forth the protocols and procedures for disciplinary measures when a Firefighter like Petitioner tests positive for marijuana. *Exhibit 7, Pg. 27.*

54. More specifically, Section H(b)(i) states that after testing positive for a controlled substance or marijuana the employee shall be referred to a Substance Abuse Professional and suspended from work until such time that they pass a return to duty test. *Id.*

55. Under Section H(b)(ii) of the Rinaldo Award, a second positive test will result in termination. *Id.*

56. Section H(b)(v) of the Rinaldo Agreement provides that if a Substance Abuse expert recommends a treatment plan then the firefighter must complete that program before seeing reinstatement. *Exhibit 7, Pg. 28.*

57. Further to that provision, the employee must sign a release allowing the City to obtain information about attendance in that program. *Id.*

58. Section “I” provides that there shall be a Medical Review Officer (“MRO”) who will review all positive tests for controlled substances and marijuana from the laboratory. *Id.*

59. Section “M” provides that in the event of any conflict between the Rinaldo Award and the Collective Bargaining Agreement, the Award shall be controlling. *Id.*

60. Critical to this proceeding is Section “N” which states that:

“Discipline issued pursuant to this Agreement may be submitted to grievance arbitration under the terms of the collective bargaining agreement solely for the

issues of whether **solely for the issues of whether the employee has violated the Alcohol and Controlled Substance Rules and whether the City was in compliance with the terms of this Article.**”[Emphasis added] *Exhibit 7, Pg. 29.*

61. As shown further below, the Collective Bargaining Agreement of 1984 and the Rinaldo Award of 2011 never foresaw the ratification of the Compassionate Care Act of 2014 which established New York’s medical marijuana program and created the protected “disability” status of a patient in that program who is to be free from discrimination in the workplace as per PHL §3369(1) and (2).
62. The failure of the 2017 successor agreement to incorporate the protected status of medical patients under the Compassionate Care Act which was passed in 2014, some three years after the Rinaldo Award was handed down, deprives Firefighter Martin of the safe harbor protections otherwise incorporated into Section “N” which permit disciplinary action only if there has been a violation of the alcohol and controlled substances rules.
63. The problem of Section N is that a positive test for marijuana, regardless of the CCA protected status, is still a prohibited positive test that warrants suspension on the first occasion and termination on the second even though it is not the result of a crime of moral turpitude or misconduct.
64. Sadly, there is no allowance and recognition in the CBA or Rinaldo Award which predate the CCA, or the 2017 successor Agreement (*Exhibit 8*), to account for the “disabled” status and anti-discrimination provisions created by PHL §3369(1) and (2) to protect medical marijuana patients like Firefighter Martin from adverse employment actions based solely on his positive urine test result derived from a sanctioned medical treatment.
65. Instead, the entirety of the scope of the grievance procedure is immune to the statutory mandates of the CCA and instead is limited to whether the City followed the procedures

outlined in the CBA and Rinaldo Award to (1) recommend an EAP, (2) provide for a return to work test, and (3) an opportunity to file a grievance to determine whether such procedures were followed. *See, Affirmation of Attorney Holland.*

66. Because there is no provision for medical marijuana in any of the CBA related Agreements or the Rinaldo Award, there is no way to interpose the anti-discrimination protections under the CCA in the grievance which is why Petitioner brings this Article 78 proceeding.

67. As stated in the annexed *Affidavit of Scott Martin*, Petitioner did disclose his certified patient status and did disclose his medical marijuana card at the time that he was administered his first drug test as well as during counseling prior to his unlawful termination.

68. Such disclosure was in accordance with the procedures outlined in the Rinaldo Award.

69. The Rinaldo Award “encourages” employees to make the Commissioner aware of any medically prescribed drugs or ingesting of a substance “that may manifest itself as a violation of the Controlled Substance rules”. *Exhibit 7, Pg. 33.*

70. The Rinaldo Award specifically directs that:

“Employees will permitted to justify positive test results by providing evidence of doctor’s prescription or some other legitimate explanation to an independent medical review officer (“MRO”). If the employee satisfies the MRO that there is a legitimate, lawful explanation for the confirmed positive test result and the City will not learn of initial confirmed positive test result. Analysis results and all other documents pertaining to the testing process will be contained as confidentially as possible.” *Exhibit 7, Pg. 33.*

71. Despite Petitioner’s compliance with the above provisions by disclosing his certified medical status and providing the requisite justified explanation required of the anticipated positive result, Firefighter Martin was nonetheless deprived of the protections afforded

under the Rinaldo Award. Consequently, the results of his first drug test were unlawfully disclosed to the City despite his lawful use of medical cannabis.

72. The wrongs inflicted upon Petitioner all directly and proximately flow from that moment forward with unlawful discrimination resulting in wrongful termination and filling his position on Truck 14, 1st Platoon by means of the bid process.

73. Only an Order from this Court in this Article 78 Proceeding may restore him the rights, privileges, immunities, and position he occupied immediately before his first random drug test.

The 2017 Successor Agreement

74. The Collective Bargaining Agreement was last modified by the 2017 Successor Agreement which spans from July 1, 2017 through June 30, 2025. *See, Exhibit 8, Pg. 1, excerpts are annexed hereto.*

75. However, that Agreement did not modify the terms of the CBA or Rinaldo Award with regard to updating the drug testing protocols with regard to the designation and protection of registered medical marijuana patients under the Compassionate Care Act.

76. As such, the controlling procedure to address a positive test from Petitioner, a certified medical marijuana patient, is through the protocols set up in the 2011 Rinaldo Award which was handed down 3 years before the CCA and the anti-discrimination provisions contained in PHL §3369(1) and (2) that protect Petitioner and others from adverse employment action based upon medical usage of cannabis.

77. It is important to state at this juncture that for the reasons set forth below, the Arbitration appeal process, in which Petitioner has timely engaged, neither legally nor contractually can take into account Petitioner's protected status under the Compassionate Care Act as a

“disabled” medical marijuana patient to redress the discrimination and adverse employment action taken against him. He did not engage in any act of moral turpitude or misconduct which is prohibited by the CBA.

78. The provisions of PHL §3369(1) and (2) contained in the CCA did not exist at the time the 1984 CBA Agreement was reached and such status was not directly recognized or taken into account in the “Rinaldo Award” of 2011 or the successor Agreement of 2017.
79. As such, there is no provision or remedy under the CBA or Rinaldo Award which may be weighed by the arbitration appeal process with regard to Firefighter Martin’s suspension and termination due to otherwise lawful medical cannabis use. *See, Affirmation of Attorney Holland.*
80. Thus, this Article 78 proceeding is the sole means to restore Petitioner to the precise position with 1st Platoon of Truck 14 which has already been filled by another BPFFA member through the bid process.
81. The unlawful suspension and termination, as well as putting another BPFFA member in his position on Truck 14, 1st Platoon, are the direct and proximate result of the wrongs inflicted upon Firefighter Martin by means of unlawful discrimination and adverse employment action. Those unlawful actions were taken in violation of the protections afforded him under the Compassionate Care Act and Executive Law.
82. The failure of the grievance process to redress the unlawful discrimination against Petitioner due to his ‘disability’ or restore him to his position with Truck 14, 1st Platoon, necessitate this Article 78 Proceeding.

WHEREFORE, Petitioner respectfully requests that an Order and Judgment be made and entered:

- A. Finding that Firefighter Martin is without adequate remedy under the pending union grievance and appeal procedure to obtain full and adequate relief based upon his lawful use of medical marijuana as a certified patient under the Compassionate Care Act;
- B. Reversing the suspension and termination of Petitioner which was the result of unlawful discrimination and adverse employment actions taken against him for his ‘disability’ in violation of Firefighter Martin’s rights to be free from discrimination under PHL §3369(1) and (2);
- C. Reinstating Firefighter Martin to his position, rank, backpay, benefits, seniority, and assignment to Truck 14, 1st Platoon on the East Side of Buffalo; and
- D. Granting Petitioner such other and further relief as this Court finds necessary, just, and proper, including all costs and attorneys fees required to pursue this Article 78 Proceeding for relief that is otherwise not available under the Collective Bargaining Agreement, amendments thereto, and the Rinaldo Award.

Dated: New York, New York
May 5, 2021

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**ATTORNEY
VERIFICATION**

Respondents.

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DAVID C. HOLLAND, ESQ., an attorney duly admitted to the practice of law before the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am counsel for the Petitioner, Scott Martin, in the above captioned action, and as such I am fully familiar with the facts and circumstances described herein.
2. I verify the information contained in the annexed Notice of Petition, Petition, and exhibits annexed thereto is true based upon my review of the Affidavit of Petitioner, Scott Martin, conversations had with Mr. Martin, the documents and records relevant to this proceeding maintained by my office, and conversations had with Petitioner’s counsel, John Gilmour, Esq., who is representing Firefighter Martin in the pending union grievance appeal proceeding.
3. This verification is made by me as I maintain my offices in New York County and Petitioner resides in Orchard Park, New York in Erie County and as such is unable to meet with me to verify the Petition.

Dated: New York, New York
May 5, 2021

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