

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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IN THE MATTER OF THE APPLICATION OF:

CHARLES PREVOT,
Petitioner,

DECISION AND ORDER

- against -

Index No. 034846/2021

THE VILLAGE HAVERSTRAW, FIRE COUNCIL OF THE
VILLAGE OF HAVERSTRAW, HAVERSTRAW FIRE
DEPARTMENT,

Respondent/Defendants.

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Sherri L. Eisenpress, A.J.S.C.,

The following papers, numbered 1 to 12, were considered in connection (i) with the instant Article 78 proceeding, for an Order declaring Respondents' suspension of the Petitioner to be null and void; clearing Petitioner's personnel record of the findings of guilt related to these charges; declaring that section of Respondent's bylaws which fail to comply with General Municipal Law Sec. 209-1 null and void; and ordering Respondent's to pay all Court costs as well as attorney's fees and expenses for Petitioners; and (ii) Respondent's Notice of Motion to Dismiss the Petition in its entirety, or alternatively, that Petitioner be granted a hearing on the charges against him:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF PETITION/PETITION/EXHIBITS A-C/AFFIRMATION IN SUPPORT OF PETITION	1-3
ANSWER TO PETITION	4
PETITIONER'S AFFIRMATION IN REPLY	5
NOTICE OF MOTION/AFFIRMATION IN SUPPORT OF MOTION/AFFIDAVIT OF CHIEF MASIELLO/AFFIDAVIT OF SECRETARY DAVIDSON/AFFIRMATION OF ATTORNEY J. NELSON HOOD/EXHIBITS A-G	6-10
AFFIRMATION IN OPPOSITION/EXHIBITS 1-2	11
RESPONDENTS' AFFIRMATION IN REPLY TO MOTION	12

Upon the foregoing papers, the Court now rules as follows:

Background

Petitioner is a volunteer firefighter in the Village of Haverstraw's Fire Department. Respondent, Village of Haverstraw, is a municipality located in the Rockland County. Respondent, Fire Council of the Village of Haverstraw ("Fire Council") is the Fire Council of the Village of Haverstraw's Fire Department, existing pursuant to New York State Village Law 10-1014. Respondent, Haverstraw Fire Department, is a department of the Village of Haverstraw.

It is alleged by Respondents that Petitioner has a history of misconduct and insubordination as a firefighter of the Haverstraw Fire Department, having been given prior verbal and written warnings from the Chief as the result of recklessly responding to fire alarms in his personal vehicle. Respondents assert that on March 19, 2021, Petitioner deliberately and directly disobeyed the orders of the Chief at a fire scene in that he received and acknowledged commands to "hit" a certain fire hydrant in order to attack a structure fire in progress, yet chose to "hit" a different fire hydrant.

On April 29, 2021, at a meeting of the Fire Council, Petitioner was suspended for a period of 90 days by an 8-0 vote, amounting to two thirds (2/3) of Council members, related to Petitioner's conduct on March 19, 2021.¹ After the meeting, the following letter dated April 29, 2021 was sent to Petitioner Prevot:

Please be advised that at the Haverstraw Fire Department Fire Council Meeting held on April 29, 2021 you were brought up on charges (see attached charges) and by a 2/3 vote of the council you were suspended for a period of 90 days starting April 29, 2021 at 9:00 p.m.

The captain of Lady Warren Hose Company No. 5 has been notified and [you] must return all department gear, radios, and any other department property to the captain and remain off all Department property for these 90 days.

¹Respondents submit affidavits from the Fire Chief and the Council Secretary to explain why the minutes state that the vote was 7-0 but was meant to indicate 8-0, since the Secretary inadvertently did not count the Chief's vote.

Please be advised that you [may] appeal this suspension in 30 days at the next fire council meeting on May 27, 2021 at 8:00 p.m. in person. At this time the Fire Council can revisit the length of the suspension.

Village Attorney Jay Hood avers in an affirmation that after the letter was sent, but before the May 27, 2021 meeting, he spoke to Petitioner's attorney Bradley Pinsky by telephone and at no time did counsel request a hearing. On May 27, 2021, Petitioner appeared in person at the Fire Council meeting, without counsel, and read a statement objecting to the process and charges. More specifically, Petitioner's letter states that Respondents failed to comply with General Municipal Law Sec. 209-L in that he was not provided with notice of a hearing and an opportunity for a hearing prior to the imposition of a 90 day suspension.

The Parties Contentions

Plaintiff commenced this Article 78 proceeding on August 14, 2021, seeking an Order declaring Respondents' suspension of the Petitioner to be null and void; clearing Petitioner's personnel record of the findings of guilt related to these charges; declaring that section of Respondent's bylaws which fail to comply with General Municipal Law Sec. 209-1 null and void; and ordering Respondent's to pay all Court costs as well as attorney's fees and expenses for Petitioners. Petitioner contends that Respondents, in failing to hold a hearing prior to the imposition of the 90 day suspension, violated his due process rights. Specifically, he contends that General Municipal Law Sec. 209 was violated in that he was not provided with "charges in writing," was not provided notification of his rights including to the right to be represented by counsel, and a hearing was not held, all before the long-term suspension was issued. Petitioner further asserts that Respondents failed to comply with their own by-laws by obtaining a 2/3 vote. Lastly, Petitioner contends that he should be awarded legal fees and costs based upon Respondent's violation of his due process rights.

Respondents submit Objections in Point of Law to the Article 78 Petition and move to dismiss the proceeding in its entirety. According to the by-laws of the Haverstraw Fire Department, Article IX, Section Four:

The Chief shall hold the officers, members and employees of the

Haverstraw Fire Department strictly to account for neglect of duty and may suspend or discharge any member or officer at any time for refusing to obey orders, for insubordination, or for any reason that should promote discord or decrease efficiency in the Fire Department, subject to the approval of two-thirds of the members of the Haverstraw Fire Council at the next meeting.

Respondents argue that Petitioner's reliance on GML Sec. 209-L is misplaced since that statute only applies to "removals" or termination of the property right to membership. Additionally, Respondents claim that Petitioner, under Town Law Sec. 176-a, was subject to suspension by the chief, without any hearing or appeal required by minimum due process. Thus, they claim that on April 29, 2021, by a vote of 8-0, amounting to two-thirds of the council, Petitioner was appropriately suspended for 90 days in compliance with the by-laws.

Respondents further assert that at the May 27, 2021 meeting, Petitioner appeared at the meeting, without counsel, but declined to request a hearing or to present any evidence or testimony in his defense. As such, they contend he was provided with procedural due process but chose to deprive himself of same. They further argue that the issue is moot now that the suspension period is over. In the alternative, Respondents contend that they will hold a hearing on the charges if Petitioner wants one but advise that if they do, Petitioner could be subject to more than a suspension but also a termination.

In opposition to the motion to dismiss, Petitioner argues that he was not provided due process because Chiefs Masiello and Gordon cannot issue charges, serve as a witness and also cast a vote. He further contends his due process rights were violated because the Fire Council failed to adopt any rules for the discipline of members; he was not provided a hearing on the charges; was not advised of any rights and not given a chance to defend himself; and Respondents prejudged Petitioner's guilt. Petitioner argues that while a volunteer firefighter can be charged with "neglect of duty" without a hearing, in this instance, Petitioner was not charged with "neglect of duty" but was suspended on charges of "insubordination and willful disobedience of command instructions," which requires compliance with GML Sec. 209-I. Lastly,

he contends that he remains aggrieved notwithstanding that the suspension has ended since he still has a record of misconduct listed against him.

In reply to Petitioner's opposition, Respondents assert that there is no statutory basis or case law standing for the proposition that the Chiefs' votes could not be counted as part of the required two-thirds vote of the Company By-Laws. They note that the Fire Council is comprised of officers from all the fire companies in the fire department, which assures that the Petitioner received the impartial decision-maker required by minimum due process. They further argue that Petitioner was provided with the opportunity to have a hearing at the May 27, 2021 meeting but declined to avail himself of one. They note that Respondents in their answer and their motion to dismiss have offered petitioner the option now of a formal hearing and at no time has Petitioner accepted one.

Legal Discussion

"A volunteer firefighter must be afforded due process in disciplinary proceedings." Matter of Green v. Medford Fire Department, 6 A.D.3d 705 705,706, 775 N.Y.S.2d 538 (2d Dept. 2004). "This is true whether the penalty that is ultimately imposed entails the firefighter's permanent removal from his or her position, or a suspension from the position." McEvoy v. Oyster Bay Fire Co. No. 1, 117 A.D.3d 953, 986 N.Y.S.2d 187 (2d Dept. 2014). As set forth in General Municipal Law Section 209-L(5):

The officer or body having the power to remove the person charged with incompetence or misconduct may suspend such person after charges are filed and pending disposition of the charges, *and after the hearing* may remove such person or may suspend him or her for a period of time not to exceed one year. [emphasis added.]

"The plain meaning of this provision is that a volunteer firefighter may only be temporarily suspended, without a hearing, from the time that the charges are filed until the ultimate disposition of the charges, but that a final penalty of suspension, not to exceed one year, may only be imposed after that hearing." McEvoy, 117 A.D.3d at 955.

As an initial matter, the Court finds no merit to Respondents' argument that they were not required to hold a hearing prior to issuing a long-term suspension because GML Sec. 209-I is inapplicable. That law is not limited to terminations but also suspensions. Moreover, where a firefighter is suspended on the ground of misconduct or incompetency, GML Sec. 209 is applicable and a hearing is required. Matter of Lotten v. Board of Fire Commrs. Of Terryville Fire Dist. 262 A.D.2d 563, 692 N.Y.S.2d 437 (2d Dept. 1999); Matter of Bigando v. Quick, 97 A.D.2d 609, 468 N.Y.S.2d 92 (3d Dept. 1983). There is no doubt that upon examination of the charges against Petitioner, he was suspended for insubordination and willful disobedience of command instructions," as opposed to "neglect of duty."² Accordingly, Petitioner was entitled to a hearing.

The Court further finds that Petitioner was deprived of his due process rights in that Respondents failed to comply with GML Sec. 209-I. More specifically, Petitioner was neither advised of the charges, nor offered an opportunity to have a hearing on the charges, before the 90 day suspension was issued. Additionally, when given notice of the charges, he was not advised of his "full panoply of rights." See Bell v. Village of Delhi, 4 A.D.3d 572, 574, 772 N.Y.S.2d 109 (3d Dept. 2004). That Petitioner was given notice of the charges and offered the opportunity to "appeal" the "length of the suspension" after the suspension was issued, does not comply with the GML statute nor does it provide the minimum degree of due process. While Petitioner asks this Court to dismiss the charges with prejudice, and clear Petitioners record with the Department of any findings of guilt, the appropriate remedy pursuant to relevant case law is to annul the suspension and remit the matter for a hearing and a new determination on the charges.

With respect to the request to declare parts of Respondents' by-laws null of void,

²Pursuant to New York Town Law Sec. 176-a(1), a Chief "shall hold the members, officers and employees of the fire department strictly to account for neglect of duty and may suspend them for improper conduct, subject to the action of the board of fire commissioners at its next meeting."

said relief is not warranted. While Respondents' failed to comply with GML Sec. 209-I, there has not been a showing that their by-laws, as written, are void. Lastly, the Court declines to award attorney's fees in this matter.

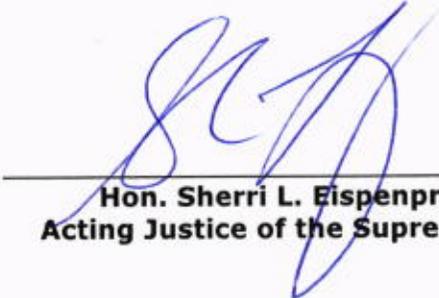
Accordingly, for the foregoing reasons, it is hereby

ORDERED that the Article 78 petition (#1) is GRANTED to the extent of nullifying the 90 day suspension and remitting the matter for a hearing and new determination on the misconduct charges; and it is further

ORDERED that Respondents' Notice of Motion (#2) is DENIED in part and GRANTED in part, to the extent that the matter is remitted for a hearing and new determination.

This constitutes the Decision and Order of the Court on Motion #1 and #2..

Dated: New City, New York
December 8, 2021



Hon. Sherri L. Eispenness
Acting Justice of the Supreme Court