SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. EILEEN BRANSTEN, Justice PART 21

John E. Knox INDEX NO. 103436/98

-v- MOTION SEQ. NO. 001

The City of New York and Steven DeCosta as Chair of the New York City Board of Collective Bargaining

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Cross-Motion: No

Upon the foregoing papers, it is ordered that this motion for leave to conduct discovery is denied. Petition has failed to demonstrate compelling necessity or extraordinary circumstances to allow for the depositions now sought in this Article 78 proceeding. Judicial review in this summary proceeding is limited to a determination of whether the administrative decision respondent removed had a rational basis. It would be improper for this court to allow petitioner to develop additional guidance not placed before respondent when this court is limited to determining whether respondent's decision was arbitrary and capricious as to endorse such respondent considered.

This constitutes the decision as order of this court.

Dated: April 7, 1998

EILEEN BRANSTEIN
J. S. C.

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 21

JOHN E. KNOX

Petitioner,

-against-

Index No. 103436/98
Mot Seq. No. 001
Sub 9/8/98

CITY OF NEW YORK and
STEVEN C. DeCOSTA, as Chair of the
New York City Board of Collective Bargaining,

DECISION/ORDER

Respondent.

EILEEN BRANSTEN, J.:

Petitioner, John E. Knox (hereinafter “Petitioner”), seeks a judgment pursuant to Article 78 of the CPLR annulling the January 27,1998 Decision and Order of the New York City Board of Collective Bargaining (hereinafter "The Board") which dismissed Petitioner's Improper Labor Practice Petition. Petitioner also seeks an order directing Respondent, City of New York (hereinafter "City"), to reinstate Petitioner to the position of Fire Marshall and to award him back salary and benefits from December 13, 1996 to the date of his reinstatement.

Petitioner was the Fire Marshall Representative on the Executive Board of the Uniformed Firefighters Association (hereinafter "UFA"). In October 1991, he was placed on light duty as a result of a lower back condition. In 1994, then Fire Commissioner Howard

Safir instituted a policy to monitor and review the health and job performance of individuals on light duty as possible candidates for involuntary retirement, In July 1996, Petitioner received an involuntary retirement effective December 13, 1996. He filed an unfair labor practice petition with the Board alleging that his involuntary retirement was improper and contrary to law because it purportedly resulted from his aggressive union activities on behalf of the members of the UFA. By Decision and Order dated January 27, 1998 the Board dismissed the petition finding that Petitioner had failed to demonstrate that his union activity was a motivating factor in the City's determination to grant Petitioner an involuntary retirement.

This proceeding followed. The crux of Petitioner's argument is that the Board's January 27 determination was arbitrary and capricious, unsupported by substantial evidence, contrary to law and in violation of established procedures upon allegations that the decision to impose involuntary retirement upon Petitioner was motivated by anti-union animus and resulted in Petitioner becoming "the only union executive board member on light duty to be involuntarily retired" (see Petitioner's memorandum or law p 6).

To prevail, Petitioner must demonstrate that the Board's determination was arbitrary and capneron. *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974). The substantial

evidence test set forth in CPLR 7803(4) and alluded to by Petitioner is not applicable because the Board was not required to hold a formal hearing. NYCRR, title 61, section 1-07(b).

Section 12-306(3) of the New York City Administrative Code provides that it shall be an improper practice for a public employer or its agents "to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization". The burden was on Petitioner to demonstrate to the Board that be was involuntarily retired because of his union activities. *City of Salamanca* 18 PERB 3012 (1985).

The Board's finding that Petitioner failed to meet this burden was based on, inter alia, an affidavit from Kerry Kelly, M.D., Chief Medical Officer of the Bureau of Health Services disclosing that she had recommended that Petitioner be evaluated in accordance with long-standing medical procedures to determine if Petitioner could return to full duty status or whether he should face the possibility of involuntary retirement. The Board's findings were also based on an affidavit from Stephen Rush, Assistant Commissioner for Budget and Finance of the Fire Department, stating that an ongoing attempt to monitor and curtail underutilization of uniformed personnel revealed a disproportionately high number of fire marshals (when compared to firefighters) on light duty which resulted in a directive to the Bureau of Fire Investigation to reduce the numbers of investigative titles on light duty. The Board also

had before it a May 6, 1996 document provided by the City reflecting that of the 10 fire marshals on light duty, four were retired before Petitioner although they were placed on light duty after Petitioner. The Board found that petitioner failed to refute the City's evidence that he was not retired 'out of turn' and stated [t]he mere fact that the Petitioner was an active member in the Union does not insulate him from an otherwise valid exercise of the Department's right to relieve its employees from duty because of lack of work or for other legitimate reasons " (See Petition Ex A p. 12; see also NYC Admin. Code sect. 12-307(b)).

Petitioner's argument that Respondents failed to comply with the December 27, 1994 directive of Ellsworth K. Hughes will not be entertained herein because it appears that this argument was not made before the Board and is being raised for the first time in this proceeding. See *Trump - Equitable Fifth Avenue. Company* v Gliedman, 57 N.Y.2d 588, 593 (1982).

The court concludes that the Board's January 27, 1998 determination to dismiss Petitioner’s unfair labor practice petition had a rational basis and was not arbitrary and capricious. *See Pell v. Board of Education supra 34 N.Y.2d at 231.*

Accordingly, Petitioner's application is denied and the petition is dismissed.

This constitutes the decision and judgment of the court.

Dated: New York, New York
November 24, 1998

EILEEN BRANSTEN, J.S.C.