FA 12/17/14 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100798/2014
UNIFORMED FIREFIGHTERS
vs
CITY OF NEW YORK
Sequence Number : 001
ARTICLE 78

PART 55

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____
FOR THE FOLLOWING REASON(S): _____

FILED
DEC 17 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/12/14

PK
_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

In the Matter of the Application of

UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, LOCAL 94, *IAFF*, AFL-CIO,

Petitioner,

Index No. 100798/14

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

THE CITY OF NEW YORK, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and the NEW YORK CITY BOARD OF COLLECTIVE BARGAINING,

Respondents.

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross-Motion and Affidavits Annexed.....	2,3
Answering Affidavits.....	4
Replying Affidavits.....	5,6
Exhibits.....	7

Petitioner Uniformed Firefighters Association of Greater New York, Local 94, *IAFF*, AFL-CIO ("UFA") brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to annul a determination made by respondent New York City Board of Collective Bargaining ("BCB"). Respondents the City of New York (the "City), the Fire Department of the City of New York (the "FDNY") and BCB cross-move for an Order dismissing the petition. For the reasons set forth below, the cross-motions to dismiss the petition

are granted and the petition is denied.

The relevant facts are as follows. Petitioner is a municipal "employee organization" as defined by the New York City Administrative Code § 12-303(i) and is the certified and recognized exclusive bargaining representative for a bargaining unit consisting of all Firefighters, Fire Marshals, Marine Wipers, Pilots and Marine Engineers employed by the FDNY. On or about November 28, 2012, the UFA filed with the BCB a Verified Improper Practice and Scope of Bargaining Petition (the "Improper Practice Petition") against respondents City and the FDNY in which it claimed that the City and the FDNY, specifically through its Bureau of Fire Investigation ("BFI") and the Chief Fire Marshal, violated New York City Collective Bargaining Law ("NYCCBL") §§ 12-306(a)(1) and (4) by unilaterally creating and implementing a two-year "minimum work commitment policy" (the "Policy") for the rank of Fire Marshal without negotiating in good faith despite the fact that such a policy is a mandatory subject of bargaining between the parties. The Improper Practice Petition asserts that as a result of the Policy, (a) the FDNY will not consider a firefighter for the position of Fire Marshal if he or she is in a certain rank on the Lieutenants list due to the risk that said firefighter would leave the Fire Marshal position before spending a minimum of two years in said position; and (b) the FDNY will not consider a Fire Marshal for the position of Lieutenant if he or she has not served in the title of Fire Marshal for a minimum of two years.

On or about January 18, 2013, the FDNY filed its Verified Answer to the UFA's Improper Practice Petition in which it denied the existence of the Policy and stated that in any event, petitioner's claims must fail because "the decision to appoint a candidate from an eligible list involves issues of hiring and selection, which are a clear management right pursuant to

NYCCBL § 12-307(b)" and that "Respondents may exercise managerial discretion in the selection of candidates from an eligible list and there is no legally cognizable right to appointment from an eligible list." On or about February 25, 2013, the UFA filed its Verified Reply and its Reply Memorandum of Law, which was supported by an affidavit sworn to by Steven Tagliani, the UFA's Fire Marshal Representative. In its Reply, the UFA asserted that there was in fact a Policy and that the FDNY's unilateral imposition of the Policy for the Fire Marshall rank was a violation of the NYCCBL because negotiations were legally required prior to the implementation of the Policy.

A hearing was held on the record before Philip Maier, Esq. ("Hearing Officer Maier"), the Deputy Chair and General Counsel for the Office of Collective Bargaining ("OCB"). During the hearing, the FDNY submitted evidence demonstrating that the FDNY has multiple eligibility requirements for promotion to Fire Marshal but that Fire Marshals are not required to remain in that title for any minimum period of time. The evidence specified that employees, typically firefighters, who take the Fire Marshal civil service examination, receive a passing score, and meet all of the other requirements for promotion to Fire Marshal, are placed in descending score order on a civil service eligible list created by the New York City Department of Citywide Administrative Services ("DCAS"). Upon promotion, Fire Marshals enter extensive training programs for which they receive college-level credits. Promotion to Lieutenant, either from the rank of firefighter or Fire Marshal, involves a similar process. At the hearing, firefighters, who at the time of the hearing were firefighters, Fire Marshals or Lieutenants, testified about their hiring experiences. Additionally, the City and the FDNY produced one witness at the hearing, Martha Pierre, who testified generally about her role as Director of Certification at DCAS and the Fire

Marshal hiring process.

On or about June 24, 2014, Hearing Officer Maier issued his Decision and Order denying the Improper Practice Petition on the ground that the UFA failed to establish that the Policy existed or was being enforced. UFA then commenced the instant proceeding seeking to annul the BCB's determination.

As an initial matter, petitioner's request that this court transfer this proceeding to the Appellate Division pursuant to CPLR § 7804(g) is denied. Pursuant to CPLR § 7803(4),

> The only questions that may be raised in a proceeding under this article are:
>
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

Further, pursuant to CPLR § 7804(g),

> Where the substantial evidence issue specified in question four of section 7803...is raised, the court shall first dispose of such other objections as could terminate the proceeding....If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced.

It is well-settled that transfer to the Appellate Division of an Article 78 proceeding is improper if the hearing on which such transfer is based was discretionary as opposed to "pursuant to direction by law." *See D'Ornellas v. Ortiz*, 119 A.D.2d 459, 461 (1st Dept 1986)("this proceeding was improperly transferred. The hearing before respondent Civil Service Commission was not required by law, but was discretionary, and in such a case the court of first instance must decide whether the challenged determination was arbitrary or capricious. Direct

transfer to this court is unavailable in such a case under CPLR 7804(g)"); *see also Matter of Lippman v. Public Empl. Relations Bd.*, 263 A.D.2d 891, 894-95 (3d Dept 1999)("the hearing that respondent afforded to the [petitioner]...was discretionary and was clearly not required by law...Therefore, the standard to be applied upon a CPLR article 78 review of respondent's determination interpreting and applying the [applicable law] is whether it was arbitrary and capricious. Accordingly,...transfer to this Court was not warranted" under CPLR § 7804(g))(internal citations omitted).

This court finds that transfer of this proceeding to the Appellate Division pursuant to CPLR § 7804(g) would be improper on the ground that the hearing held by the BCB was discretionary and was not held "pursuant to direction by law." Indeed, the BCB's rules explicitly provide that "[a]fter issue has been joined, the Board *may* decide the matter on the papers and briefs filed, *may* direct that oral argument be held before it, *may* direct a hearing before a trial examiner, or *may* make such other disposition of the matter as it deems appropriate and proper." OCB Rule § 107(c)(8)(emphasis added). Thus, as conducting a hearing was discretionary and not directed by law, transfer of this proceeding to the Appellate Division is not proper and the standard of review remains whether the BCB's determination was arbitrary and capricious.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); *see also Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale &*

Mamaroneck, Westchester County, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted). When an administrative agency is charged with implementing and enforcing the provisions of a particular statute, courts presume that the agency has developed an expertise with regard to that statute and, accordingly, defer to the judgment of the agency. *See Matter of Chenango Forks Cent. Sch. Dist. v. NYS Pub. Empl. Relations Bd.*, 21 N.Y.3d 255 (2013). Indeed, courts have routinely deferred to BCB's expertise in applying and interpreting the provisions of the NYCCBL. *See Matter of NY City Dept. of Sanit. v. MacDonald*, 87 N.Y.2d 650 (1996); *see also Matter of Levitt v. Board of Collective Bargaining of City of N.Y., Off. of Collective Bargaining*, 79 N.Y.2d 120 (1992). The Court of Appeals has made clear that "[t]he resolution of an improper practice charge is generally a matter within [the agency's] sound discretion." *Matter of Professional Staff Congress-City Univ. of NY v. NYS Pub. Empl. Relations Bd.*, 7 N.Y.3d 458, 465 (2006).

In the instant action, the court finds that BCB's determination denying petitioner's Improper Practice Petition on the ground that the UFA failed to establish that the Policy exists was made on a rational basis. Based on the evidence put forth by the UFA at the hearing, the BCB found that it was "undisputed that the Chief Fire Marshal interviewed multiple candidates for Fire Marshal and requested that they agree to stay in the role of Fire Marshal for a specified period of time." However, the BCB rationally found that "there is no evidence that the Chief

Fire Marshal made anything more than a request or that any of the witnesses were required to remain a Fire Marshal for two years before being promoted." The BCB based such determination on the evidence provided by the UFA at the hearing in its attempt to establish the existence of the Policy. Specifically, the BCB pointed to the testimony of Firefighter Nelson Roman, who was promoted to Fire Marshal in September 2011 and then promoted to Lieutenant in January 2013, less than two years later; Firefighter Justin Horigan, who was promoted to Fire Marshal and had served less than two years in that position at the time of the hearing; and Firefighter John Drumm, who was promoted directly to Lieutenant and never promoted to Fire Marshal, none of which conclusively established the existence of the Policy. Further, although there was testimony that a few individuals heard or were told that if a firefighter was within a certain number of names of being called from the Lieutenants list, he or she was being passed over for promotion to Fire Marshal, the BCB found that such testimony, by itself, was not "probative of an improper practice" under the NYCCBL. The BCB rationally determined that although the testimony of these witnesses demonstrated that the Chief Fire Marshal may have preferred that an official policy existed mandating that Fire Marshals commit two years to the position, such testimony did not conclusively establish that the Policy was ever promulgated or enforced by the FDNY.

Petitioner's assertion that the BCB's determination was arbitrary and capricious on the ground that it incorrectly interpreted the case law petitioner relied upon at the hearing is without merit. At the hearing, petitioner presented the BCB with two cases, both of which involved minimum commitment policies which were found to be clearly articulated and enforced by the respective agencies and were found to be mandatory subjects of bargaining. The BCB rationally

found that those cases were inapplicable to the UFA's proceeding based on its finding that the UFA failed to establish that the Policy was ever promulgated or enforced by the FDNY.

Accordingly, both cross-motions to dismiss the petition are granted and the petition is denied and dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 12/12/14

Enter: _____
J.S.C.