

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

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

THOMAS BUTTARO,	INDEX NO.	<u>152489/2020</u>
Petitioner,	MOTION DATE	<u>12/16/2020,</u> <u>N/A</u>
- v -	MOTION SEQ. NO.	<u>001 002</u>

THE NEW YORK CITY OFFICE OF COLLECTIVE
BARGAINING, THE BOARD OF COLLECTIVE
BARGAINING, THE UNIFORMED FIREFIGHTERS
ASSOCIATION OF GREATER NEW YORK (LOCAL 94),
THE NEW YORK CITY FIRE DEPARTMENT

**DECISION + ORDER ON
MOTION**

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 100

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129

were read on this motion to/for DISCOVERY.

Upon the foregoing documents and for the reasons stated hereinbelow, [1] the instant CPLR Article 78 and New York City Collective Bargaining Law § 12-308 petition (Seq. No. 001) by Thomas A. Buttaro is denied; [2] the instant CPLR 3211 cross-motions (Seq. No. 001) by respondents, The New York City Office of Collective Bargaining (“OCB”); The Board of Collective Bargaining (“BCB”); The Uniformed Firefighters Association of Greater New York (Local 94) (“UFA” or “the Union”); and The New York City Fire Department (“FDNY”), to dismiss the instant petition are granted; and [3] petitioner’s CPLR 408 motion (Seq. No. 002) for expedited discovery is denied as moot.

Background

On or about August 16, 1998, petitioner, Thomas A. Buttaro, commenced his employment with FDNY. Petitioner became (and remains) a dues-paying member of the Union. During his time as an FDNY employee, petitioner joined “Merit Matters,” an informal group of firefighters that allegedly serves to “advocate for firefighters’ rights.” Citing his First Amendment rights, petitioner wore Merit Matters-related t-shirts, rather than the clothing that FDNY issued to him,

while in the firehouse. A firefighter apparently informed petitioner that said t-shirts offended another firefighter. (NYSCEF Documents 1 and 31.)

Pursuant to Administrative Code Section 15-113, FDNY commenced disciplinary proceeding(s) against petitioner, asserting that petitioner's conduct (including refusing to wear the clothing that FDNY issued and disrupting an FDNY discrimination class) created a hostile work environment. On February 11, 2015, at the recommendation of Administrative Law Judge Alessandra F. Zorgniotti of the City of New York's Office of Administrative Trials and Hearings, FDNY terminated petitioner. (NYSCEF Documents 30-31.)

As here relevant, on February 26 and November 15, 2019, petitioner filed "Improper Practice Petitions" ("IPP #1" and "IPP #3," respectively; NYSCEF Documents 6 and 13) against the Union and FDNY, asserting, inter alia, that the Union violated NYCCBL § 12-306(b)(1) and (3) by failing to represent petitioner properly in his FDNY termination matter. On March 11 and December 2, 2019, the OCB Executive Secretary dismissed IPP #1 and #3, respectively, as, essentially, untimely (NYSCEF Documents 7 and 14). Petitioner appealed both dismissals (NYSCEF Documents 8 and 15). On July 30, 2019, BCB issued "BCB Decision #1" (*Buttaro*, 12 OCB2d 23 (BCB 2019)), affirming the dismissal of IPP #1 (NYSCEF Doc. 3). And on February 3, 2020, BCB issued "BCB Decision #3" (*Buttaro*, 13 OCB2d 1 (BCB 2020)), affirming the dismissal of IPP #3 (NYSCEF Doc. 5). (NYSCEF Doc. 1.)

Petitioner's Instant CPLR Article 78 Special Proceeding (Motion Seq. No. 001)

By petition dated March 6, 2020, petitioner commenced the instant CPLR Article 7803(3) and New York City Collective Bargaining Law § 12-308 special proceeding (Seq. No. 001) against respondents. Petitioner seeks an Order, essentially, (1) vacating and annulling OCB Decisions #1 and #3, on the grounds that those decisions were arbitrary, capricious, contrary to law, and abuses of discretion; (2) entering judgment modifying those decisions accordingly; (3) directing respondents to reinstate petitioner as an FDNY employee; or, alternatively, (4) remanding the subject IPPs for OCB to determine anew (NYSCEF Documents 1-2).

All respondents cross-move (Seq. No. 001), pursuant to various subsections of CPLR 3211, to dismiss the instant petition (NYSCEF Documents 29, 41, and 52).

It is well-settled that in a CPLR Article 78 special proceeding the scope of judicial review is limited to the issue of whether the administrative action is rational. Pell v Board of Educ., 34 NY2d 222, 230-231 (1974). This Court may not disturb respondents' determination unless there is no rational basis for the exercise of discretion or it was arbitrary and capricious. Id., at 231. "The arbitrary or capricious test chiefly relates to ... whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. This Court may not simply second-guess respondents.

The Court of Appeals has held 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 NY3d 458, 465 (2006).

This Court finds that BCB Decisions #1 and #3 were not arbitrary, capricious, and/or contrary to law. BCB Decisions #1 and #3 are supported by substantial evidence, including petitioner's wearing of unauthorized t-shirts that could be considered objectionable, and were issued on rational grounds, including the expiration of pertinent statutes of limitations, including CPLR 217, and res judicata.

Additionally, petitioner has not made out a prima facie case pursuant to New York City Collective Bargaining Law § 12-308. Counsel for the Union affirms that the Union paid over \$100,000.00 to cover legal fees for the (at least) five attorneys that petitioner retained throughout his subject proceedings, even when petitioner would not follow the Union's advice to resolve the subject disciplinary charges against him "for a modest pay penalty" (NYSCEF Doc. 30, at 2). Petitioner's attorney Adam C. Weiss, Esq., concedes that he was on notice of BCB Decision #1 (NYSCEF Doc. 90, at 3).

Therefore, this Court will deny the instant CPLR Article 78 and New York City Collective Bargaining Law § 12-308 petition and grant respondents' CPLR 3211 cross-motions to dismiss.

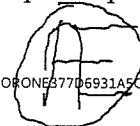
Petitioner's Instant CPLR 408 Motion for Expedited Discovery (Motion Seq. No. 002)
 Petitioner also moves (Seq. No. 002), pursuant to CPLR 408, for limited expedited discovery, including document production and depositions of four individuals (NYSCEF Doc. 122). Respondents oppose that motion (Seq. No. 002) (NYSCEF Documents 120, 123, and 125). This Court will deny petitioner's motion for expedited discovery as moot.

Respondents' request(s) for sanctions, including attorney's fees, are denied in the Court's discretion. This Court has considered petitioner's other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated hereinabove, [1] the instant CPLR Article 78 and New York City Collective Bargaining Law § 12-308 petition (Seq. No. 001) by Thomas A. Buttaro is hereby denied; [2] the instant CPLR 3211 cross-motions (Seq. No. 001) by respondents, The New York City Office of Collective Bargaining; The Board of Collective Bargaining; The Uniformed Firefighters Association of Greater New York (Local 94); and The New York City Fire Department, to dismiss the instant petition are hereby granted; and [3] petitioner's CPLR 408 motion (Seq. No. 002) for expedited discovery is hereby denied as moot. Accordingly, the Clerk is hereby directed to enter judgment denying and dismissing the instant special proceeding and awarding costs and disbursements to respondents.

20210423163206AENGORON01E67706931A5C4C378AF5A42E7361280



4/23/2021

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT

OTHER

REFERENCE