

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of

CHRISTOPHER P. SEKUL,
Petitioner,

**DECISION, ORDER,
AND JUDGMENT**

For a Judgment pursuant to Article 78 of the
Civil Practice Law and Rules

Index No. 4095/2009

-against-

MILAN VOLUNTEER FIRE DEPARTMENT, INC.

Respondent.
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Petitioner Christopher P. Sekul moves for an order annulling and setting aside the determinations of the respondent Milan Volunteer Fire Department, Inc., resulting in the suspension and expulsion of Christopher P. Sekul from membership as a volunteer fire fighter, as arbitrary, capricious, an abuse of discretion, lacking due process, lacking reasonable basis and in violation of lawful procedures.

The following submissions were read:

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| Notice of Petition - Verified Petition - Annexed Exhibits | 1-3 |
| Verified Answer | 4 |
| Affidavit of David B. Garwood, Esq. | 5 |
| Affidavit of Gregory R. Becker - Annexed Exhibits | 6-7 |
| Petitioner's Reply Memorandum of Law | 8 |

(Respondent's "Sur-Reply" was not considered as the original was not received by the return date, it was not submitted with the permission of the Court, and the petitioner objected to its consideration.)

Upon the foregoing papers it is hereby ORDERED that the petitioner's motion is denied and the petition is dismissed.

In the instant article 78 proceeding, petitioner challenges the respondent Milan Volunteer Fire Department, Inc.'s determination expelling petitioner as a member of the volunteer fire department. The petitioner alleges, *inter alia*, that the respondent's determination violates General Municipal Law Section 209-1 as no hearing was held. However, "General Municipal Law §209-1 expressly provides that the right to a hearing and other statutory procedural protections 'shall not affect the right of members of any fire company to remove a volunteer officer or voluntary member of such company for failure to comply with the constitution and by-laws of such company'." (*Leahy v. Jordan*, 207 AD2d 385, 386 (2nd Dept., 1994) quoting *Matter of Armstrong v. Centerville Fire Co.*, 83 NY2d 937, 939 (1994).) "By its enactment of section 209-1, the Legislature clearly manifested its intention that removals by the board [of fire commissioners] under the statute and by the local departments pursuant to by-laws and constitution promulgated by the board are not mutually exclusive." (*Matter of Acker v. Board of Fire Commissioners, Kings Park Fire District*, 25 AD2d 282, 284 (2nd Dept., 1966).)

It is undisputed that, by letter dated February 8, 2009, respondent Milan Volunteer Fire Department notified the petitioner as follows: "At the request of 1st Assistant Chief Al Sardaro, the Executive Committee was convened on February 8, 2009 to review your

behavior and actions after arriving on the scene of a reported propane leak at the Milan Town Garage on Monday, February 2, 2009, and prior to the scene being declared safe. After evaluation of written and verbal reports from individuals on the scene, including your email to Assistant Chief Sardaro, the Executive Committee made the following findings:

- 1) That as the driver of 48-12, you [petitioner] failed to remain with your apparatus until relieved or otherwise ordered by the incident Commander or other officer in violation of department SOGs;
- 2) That you knowingly entered and remained in a "hot zone" (close to the building, near the office door) without proper personal protective equipment, specifically self-contained breathing apparatus, in violation of your training and the department's Respiratory Protection Plan (RPP). When you last completed training on this topic, you scored 100% on the test and indicated you had reviewed and understood the RPP;
- 3) That your comments (including 'You killed them. You burned the company' or words to that effect, loudly repeated) directed to Assistant Chief Sardaro, and the manner in which they were spoken, were grossly insubordinate and inappropriate;
- 4) That your actions and behavior before the scene was deemed safe created an unnecessary, inappropriate distraction and potential safety risk to the members operating at the scene."

(Exhibit A annexed to Verified Petition.) The Court notes that the petitioner alleges that he was improperly suspended by the respondent for 180 days when the maximum suspension period was 30 days. However, the record reveals that petitioner was actually suspended for only one day prior to being expelled by the respondent.

It is uncontroverted that at the regular monthly meeting of the Milan Volunteer Fire Department held on February 9, 2009 the petitioner was “expelled from the Department for malfeasance that renders [petitioner] unfit for duty.” (Exhibit C annexed to Verified Petition.) It is also uncontroverted that a quorum was present at the meeting and the motion for expulsion was passed by a majority vote of twenty-nine in favor of expulsion and one opposed. A review of the By-Laws of the Milan Volunteer Fire Department, Inc. reveals the following provisions:

“DISCRETIONARY EXPULSIONS:

- A) A member may be expelled by a majority vote of the voting members present at a regular or special meeting:
 - 1) If a member is guilty of any malfeasance, neglect of duty, or refusing to obey an order of an officer, and the members of the Department consider the member unfit for duty, the member shall be expelled from the Department.” (Article X, Section 2(A).)

Further, Article III, Section 15(A)(3) of the By-Laws states that an active member shall:

“If, being the first qualified driver arriving at the fire station in the event of an alarm, take command of the apparatus and proceed to the scene of the emergency *and remain with the apparatus until it is returned to the fire station, or until relieved by the officer-in-charge.*”

(Italics added.) The February 8, 2009 letter to petitioner specifically alleged that “as the driver of 48-12, you [petitioner] failed to remain with your apparatus until relieved or otherwise ordered by the incident Commander or other officer...”

In addition, Article III, Section 1(A) of the By-Laws states that, "It shall be the duty of the Department to:

- 1) Adhere to these By-Laws and all Federal and New York State laws applicable to the function of fire fighting, emergency medical services, and fire police.
- 2) Adhere to all Rules and Regulations as may be set forth by the Department and/or Special Functions Squads from time to time."

The February 8, 2009 letter to petitioner also specifically alleged that the petitioner violated the Department's Respiratory Protection Plan (RPP) and Standard Operating Guidelines (SOG), which are annexed as exhibits to the affidavit of Chief Gregory R. Becker. Chief Becker states in his affidavit that the petitioner "was expelled by the membership of the department as a result of his violations of Respondent's By-Laws, Standard Operating Guidelines, and Respiratory Protection Plan..." (Affidavit of Chief Gregory R. Becker, paragraph 29.)

"Where, [as here], charges brought against [a] volunteer firefighter concern a violation of the bylaws or constitution of the fire company, the firefighter [is] not entitled to a hearing (see *Matter of Armstrong v. Centerville Fire Co.*, 83 NY2d 937, 939 (1994); *Matter of Ferrara v. Magee Volunteer Fire Dept.*, 191 AD2d 967, 968 (1993).) Under those circumstances... the standard of review is whether the determination is arbitrary and capricious or constitutes an abuse of discretion." (*Matter of Pawlowski v. Big Tree Volunteer Firemen's Co., Inc.* 12 AD3d 1030, 1031 (4th Dept., 2004) citing *Matter of*

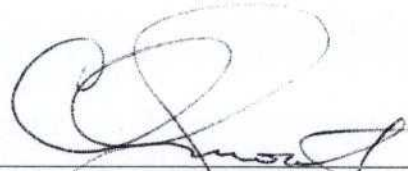
Brown v. Camillus Volunteer Fire Dept., 288 AD2d 932 (2001).) It is well settled that “a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion.” (*Matter of Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974).) “Arbitrary and capricious” conduct has been interpreted as action “without sound basis in reason and is generally taken without regard to the facts.” (*Matter of Pell v. Board of Education*, 34 NY2d 222, 231.) A review of the record submitted to the Court reveals that the determination of the Milan Volunteer Fire Department, Inc. does not fall within the aforesaid definition of “arbitrary and capricious.” Rather, this Court finds that said decision possesses a rational basis. Further, “under the circumstances presented here [the court] cannot conclude that the penalty of termination of the petitioner’s membership in the [Milan Volunteer] Fire Department ‘is so disproportionate to the offense as to be shocking to one’s sense of fairness,’ thus constituting an abuse of discretion as a matter of law.” (*Matter of Kurot v. East Rockaway Fire Department*, 61 AD3d 760, 761 (2nd Dept., 2009) citing *Matter of Kreisler v. New York City Tr. Auth.*, 2 NY3d 775, 776, 780 NYS2d 302, 812 NE2d 1250, quoting *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 237, 356 NYS2d 833, 313 NE2d 321; *Matter of Torrance v. Stout*, 9 NY3d

1022, 1023, 852 NYS2d 8, 881 NE2d 1194; *Matter of Rutkunas v. Stout*, 8 NY3d 897, 899, 834 NYS2d 73, 865 NE2d 1239; *Matter of Thomas v. County of Rockland, Dept. of Hosp.*, 55 AD3d 745, 746, 865 NYS2d 661). Accordingly, the respondent's determination must be confirmed and the petition must be dismissed.

This shall constitute the decision, order, and judgment of this Court.

So Ordered.

Dated: September 30, 2009
Poughkeepsie, New York



HON. CHRISTINE A. SPROAT
Supreme Court Justice

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