

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF ERIE

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**In the Matter of the Application of**

**BUFFALO PROFESSIONAL  
FIREFIGHTERS ASSOCIATION, INC.,  
IAFF Local 282,**

*Petitioner,*

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

**NOTICE OF ENTRY**

Index No. I 2011-2839

**- against -**

**BUFFALO FISCAL STABILITY  
AUTHORITY, CITY OF BUFFALO, and  
BYRON BROWN, as Mayor of the City of  
Buffalo,**


*Respondents.*

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**PLEASE TAKE NOTICE** that the within is a true copy of an Order executed on January 27, 2012 regarding the above-entitled proceeding, and entered in the Office of the Erie County Clerk on January 30, 2012.

DATED: Buffalo, New York  
January 30, 2012

**GOLDBERG SEGALLA LLP**

By:   
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STATE OF NEW YORK  
SUPREME COURT: COUNTY OF ERIE

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**ORDER**

Index No. I 2011-2839

**Hon. John A. Michalek, J.S.C.**

**FILED**  
ACTIONS & PROCEEDINGS

JAN 30 2012

**ERIE COUNTY  
CLERK'S OFFICE**

Petitioner, Buffalo Professional Firefighters Association, Inc., by its attorneys Creighton, Johnsen & Giroux, Jonathan Johnsen Of Counsel, having filed a Petition seeking a Declaratory Judgment and an Order pursuant to Article 78 of the CPLR; and Respondents City of Buffalo and Byron Brown, as Mayor of the City, by their attorneys Goldberg Segalla LLP, Matthew C. Van Vessem Of Counsel, and Respondent Buffalo Fiscal Stability Authority, by its attorneys Harris Beach PLLC, A. Vincent Buzard Of Counsel, having moved to dismiss said Petition; and

Respondent Buffalo Fiscal Stability Authority, by its attorneys Harris Beach PLLC, A. Vincent Buzard Of Counsel, having also moved to recuse Hon. John A. Michalek, J.S.C. from this proceeding;

AND, upon reading the Petitioner's Notice of Petition (with blanks on first page) dated July 14, 2011 and filed on July 15, 2011, the said Notice of Petition (with blanks filled in) as served thereafter, and the Verified Petition verified by Daniel Cunningham on July 8, 2011, with exhibits, in support of Petitioner's application for relief under CPLR Article 78; and upon reading Respondents City of Buffalo's and Mayor Brown's Notice of Motion dated October 6, 2011, seeking dismissal of the Petition, and the Affirmation in Support of Motion to Dismiss, signed by Matthew C. Van Vessem on October 6, 2011, with exhibits; and upon reading Respondent Buffalo Fiscal Stability Authority's Notice of Motion dated October 6, 2011, seeking dismissal of the Petition and recusal, and the Affirmation of A. Vincent Buzard in Support of Motion to Dismiss, signed by A. Vincent Buzard on October 6, 2011, with exhibits; and upon reading the Affirmation in Opposition to the Respondents' Motions to Dismiss, signed by Jonathan Johnsen on October 21, 2011, with exhibits, and the Affirmation in Opposition to the Motion to Recuse, signed by Jonathan Johnsen on October 21, 2011, both submitted on behalf of Petitioner; and upon reading the Affirmation in Support of Motion to Dismiss, signed by Janet Penska on October 28, 2011, and the Reply Affirmation in Support of Motion to Dismiss, signed by Matthew C. Van Vessem on November 1, 2011, with exhibits, both submitted on behalf of Respondents City of Buffalo and Mayor Brown; and upon reading the Reply Affirmation of A. Vincent Buzard In Further Support of Motion

to Dismiss, signed by A. Vincent Buzard on October 31, 2011, with exhibits, submitted on behalf of Respondent Buffalo Fiscal Stability Authority;

AND, upon the attorneys for the parties coming to be heard before this Court on November 3, 2011;

AND, the Court having requested further written submissions from Respondents by correspondence dated November 22, 2011, and from Petitioner by correspondence dated December 19, 2011;

AND, upon reading the Supplemental Attorney Affirmation in Response to Request From Court, signed by Matthew C. Van Vessem on December 5, 2011, submitted on behalf of Respondents City of Buffalo and Mayor Brown; and the Supplemental Affirmation of A. Vincent Buzard in Response to Question from the Court, signed by A. Vincent Buzard on December 5, 2011, submitted on behalf of Respondent Buffalo Fiscal Stability Authority; and the Supplemental Affirmation of Jonathan Johnsen in Response to the Court's Request for the Petitioner's Position on Section 3858 (2) (c) (iii) of the Public Authorities Law, signed by Jonathan Johnsen on December 30, 2011, submitted on behalf of Petitioner;

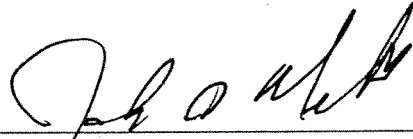
AND, this Court having issued a bench decision on January 12, 2012, a transcript of which is attached hereto as Exhibit A and made a part hereof; it is hereby

ORDERED, that Respondent Buffalo Fiscal Stability Authority's motion to recuse is denied; and it is further

ORDERED, that Respondents' motions to dismiss the Petition are granted; and it is further

ORDERED, ADJUDGED AND DECREED, that the Verified Petition is  
dismissed.

Dated: Buffalo, New York  
January 27, 2012



Hon. John A. Michalek, J.S.C.

**GRANTED**

ENTER:

JAN 27 2012

BY   
MARY LOUISE ENSER  
COURT CLERK

Buffalo Professional Firefighters

v

Buffalo Fiscal Stability Authority  
et al

821362.1

ORDER

I 2011-2839

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# EXHIBIT A

STATE of NEW YORK : SUPREME COURT

COUNTY of ERIE : PART 26

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In the Matter of the Application of  
BUFFALO PROFESSIONAL FIREFIGHTERS  
ASSOCIATION, INC.,

Petitioner,

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

Index #2011-2839  
Decision

against

BUFFALO FISCAL STABILITY AUTHORITY,  
CITY of BUFFALO and BYRON BROWN,  
as Mayor of the City of Buffalo,

Respondents.

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25 Delaware Avenue  
Buffalo, New York 14202  
January 12, 2012

B e f o r e :

HONORABLE JOHN A. MICHALEK,  
Supreme Court Justice.

A p p e a r a n c e s :

JONATHAN G. JOHNSON, ESQ.,  
Appearing for the Petitioner.

RICHARD T. SULLIVAN, ESQ.,  
Appearing for Buf. Fiscal Stability Authority.

MATTHEW C. VAN VESSEM, ESQ.,  
Appearing for the City of Buffalo.

Sandra A. Lelito,  
Supreme Court Reporter.



1 THE COURT: Now, we're in the Matter of the  
2 Application of Buffalo Professional Firefighters  
3 Association, Inc., petitioner, for an Order and  
4 Judgment Pursuant to Article 78 of the Civil Practice  
5 Law and Rules against Buffalo Fiscal Stability  
6 Authority, City of Buffalo and Byron Brown, as the  
7 Mayor of the City of Buffalo. All right.

8 Relief sought by the petitioners, looking for  
9 declaratory judgment and an order pursuant to Article  
10 78 of the Civil Practice Law and Rules, number one,  
11 declaring that resolution number 11-05 is in excess of  
12 the respondent, Buffalo Fiscal Stability Authority's  
13 authority and invalid insofar as it orders a wage  
14 freeze with regard to wage increases provided by the  
15 Rinaldo award number II. Number two, restraining,  
16 enjoining and prohibiting respondent, Buffalo Fiscal  
17 Stability Authority, from freezing the wage increase as  
18 provided by the award, whether now or in the future.  
19 Three, compelling the respondent, City of Buffalo, to  
20 pay the wage increases and resulting back pay provided  
21 for in the Rinaldo award number II. Court's going to  
22 deny that.

23 The relief sought by the respondents, City of  
24 Buffalo and Mayor Byron Brown, for an order dismissing  
25 the verified petition filed by petitioner, or in the

1 event this Court denies the City's motion, permitting  
2 the City to answer the verified petition as required by  
3 Article 78 of the CPLR. Court's granting that request  
4 for further relief.

5 Number three, the relief sought by the Buffalo  
6 Fiscal Stability Authority, that is, for an order,  
7 denying the verified petition and an order of recusal.  
8 This Court's going to deny recusal but grant  
9 denial/dismissal of the petition.

10 The Court's rationale, regarding the request for  
11 recusal, as is noted in the papers submitted on behalf  
12 of the BFSA, this is not the first recusal motion  
13 brought by this party before this Court. In 2009, the  
14 BFSA moved for recusal in another matter on the basis  
15 that the petitioner, Local 282, a party in a proceeding  
16 involving the BFSA, had endorsed this judge's  
17 re-election candidacy while that proceeding was pending  
18 in 2008. So, although the grounds on the current  
19 recusal motion are similar, the endorsement at issue is  
20 now over three years old. This Court denied the prior  
21 motion for recusal and is, once again, now denying the  
22 instant request for relief.

23 Judiciary Law Section 14 sets forth various  
24 grounds upon which recusal is required. Those are not  
25 at issue here, and absent a mandatory legal

1 disqualification under the Judiciary Law, the Court is  
2 the sole arbiter of whether it should recuse itself.  
3 People vs. Johnson, 294 AD2d 908, from our Fourth  
4 Department, 2002. The decision as to whether a judge  
5 should recuse himself to avoid the appearance of  
6 impropriety is a matter left to the personal conscience  
7 of the court. SSAC, Inc. vs. Infitec, 198 AD2d 903,  
8 again, Fourth Department, 1993.

9 Furthermore, pursuant to New York State Judiciary  
10 Advisory Opinion 07-24 issued on February 22nd, 2007,  
11 the judge may continue to preside, even if the party  
12 objects, provided the judge determines that he can be  
13 fair and impartial. Thus, the matter which brings us  
14 here today is discretionary with the court.

15 At this juncture, the Court will note that the  
16 case which was the subject of Judicial Advisory Opinion  
17 07-24, already cited herein, involved a labor union  
18 endorsement of a judicial candidacy. The conclusion of  
19 this Judiciary Advisory Opinion, and I quote, a judge  
20 need not recuse when a labor union that endorsed the  
21 judge's candidacy is a party in a matter before the  
22 judge, end quote.

23 In keeping with Judicial Advisory Opinion 07-24,  
24 this Court has, on two occasions, given all counsel and  
25 parties an opportunity to be heard on the issue of

1           recusal. Accordingly, under the guiding principles  
2           cited herein from both case law and the aforementioned  
3           Judicial Advisory Opinion, this Court rules that  
4           recusal is not warranted as this Court can be fair and  
5           impartial in this case.

6           Although this Court might have specifically  
7           advised the parties of the endorsement at the time it  
8           was issued in 2008, the endorsement was a matter of  
9           public record. Court cites B&R Children's Overalls  
10          Company vs. New York Job Development Authority, 257  
11          AD2d 368, First Department, 1999.

12          Furthermore, as soon as the issue of recusal came  
13          before this Court, the procedure as outlined in  
14          Judicial Advisory Opinion 07-24 was implemented by the  
15          Court, and regardless of the manner in which the issue  
16          arose, the outcome and determination of this Court on  
17          the issue of recusal, after input by the parties, would  
18          be the same either way.

19          Finally, as already noted, the endorsement at  
20          issue is now over three years old. That factor as well  
21          militates against recusal.

22          As to the remaining aspects of the within  
23          proceeding, the following chronology is relevant. On  
24          November 7, 2003 petitioner filed an interest  
25          arbitration claim arising out of an inability to

1 negotiate wage increases for 2002 to 2003.

2 In January of 2004 the BFSAs was created to address  
3 the finances of the City of Buffalo.

4 On April 21st, 2004 the BFSAs issued resolution  
5 number 04-35, the wage freeze resolution.

6 In November 2004, petitioner, through its then  
7 president, went to court arguing that the wage freeze  
8 resolution and the Control Board were ineffective as to  
9 wages earned prior to the wage freeze, including wages  
10 awarded pursuant to any interest arbitration. This  
11 proceeding was dismissed on statute of limitations  
12 grounds, which decision was unanimously affirmed by the  
13 Appellate Division in *Foley vs. Masiello*, 38 AD3d 1201,  
14 Fourth Department, 2007. Therein, that court found  
15 that the matter was in the nature of an Article 78  
16 proceeding and it was, therefore, subject to a four  
17 month limitations period with which petitioner had not  
18 complied.

19 On July 18, 2005 the arbitration panel,  
20 hereinafter referred to as the Rinaldo I panel, issued  
21 its award relative to the interest arbitration claim  
22 filed by the petitioner in 2003.

23 On October 5th, 2005 the firefighters brought a  
24 petition to have the Rinaldo I award vacated.

25 In November of 2005 the firefighters brought a

1 petition arguing that the Control Board has no  
2 authority to prevent payment of wage increases under  
3 the Rinaldo I award. Ultimately, the firefighters did  
4 not pursue this petition.

5 On July 1st, 2007 the BFSA issued resolution  
6 number 07-21 limiting the 2004 wage freeze resolution.

7 On October 15th, 2009 Court of Appeals vacated the  
8 Rinaldo I award in its entirety. A second Rinaldo  
9 panel, the Rinaldo II panel, commenced a new  
10 arbitration proceeding.

11 In April of 2011 the Rinaldo II panel issued an  
12 award and petition herein, asked the City of Buffalo  
13 whether it would, pursuant to same, pay the 2002 to  
14 2003 wage increases and benefits awarded therein.

15 In May of 2011 in response to this inquiry of  
16 petitioner to the City, the BFSA issued Resolution  
17 Number 11-05 which prohibited the City from paying the  
18 retroactive wage increases and benefits awarded in  
19 Rinaldo II. The City has prospectively been paying the  
20 wage increases awarded in both Rinaldo I and the  
21 Rinaldo II awards since the lifting of the wage freeze  
22 resolution in 2007.

23 In July of 2011 petitioner brings the within  
24 proceeding.

25 Accordingly, this matter has its genesis in

1 November 2003 when the petitioner and the City were  
2 unable to successfully negotiate wage increases under a  
3 collective bargaining agreement and the petitioner  
4 filed an interest arbitration claim. Over eight years  
5 later, after the creation of the BFSA, two arbitration  
6 panels and awards, the imposition of a wage freeze by  
7 the BFSA and the lifting of same, as well as several  
8 Appellate Division and Court of Appeals decisions,  
9 petitioner asks this Court to address the payment of  
10 retroactive wage increases awarded by the Rinaldo II  
11 panel in 2011 with reference to the Buffalo Fiscal  
12 Stability Authority Act and various actions taken by  
13 the Authority pursuant to that act, including, again,  
14 the issuance of resolution number 11-05. Respondents  
15 seek dismissal of the petition based on res judicata  
16 and statute of limitations grounds.

17 This Court finds that petitioner raised the same  
18 issues that are brought before this Court today in the  
19 Foley vs. Masiello matter already referenced herein.  
20 In 2007 the Appellate Division, Fourth Department  
21 affirmed the lower court's dismissal of that matter on  
22 statute of limitations grounds. Again, Foley vs.  
23 Masiello, 38 AD3d 1201, Fourth Department, 2007. That  
24 dismissal was the equivalent of a final disposition on  
25 the merits and, accordingly, re-litigation of the

1 issues raised therein, as petitioner is attempting in  
2 the within proceeding, is prohibited by the doctrine of  
3 res judicata. Petitioner may not now seek the same  
4 relief in the same court a second time. Court cites  
5 Lamar Outdoor Advertising, Inc. vs. City Planning  
6 Commission of Syracuse, 296 AD2d 841, Fourth  
7 Department, 2002. Under the doctrine of res judicata a  
8 party may not litigate a claim where a judgment on the  
9 merits exists from a prior action between the same  
10 parties involving the same subject matter. Court cites  
11 in the Matter of Hunter, 4 NY3d 260, from 2005.

12 New York State has adopted the transactional  
13 analysis approach in deciding res judicata issues:  
14 Under this address, once a claim is brought to a final  
15 conclusion, all other claims arising out of the same  
16 transaction or series of transactions are barred, even  
17 if they are based upon different theories or are  
18 seeking a different remedy. Court cites O'Brien vs.  
19 City of Syracuse, 54 NY2d 353, 1981.

20 The petitioner's attempts herein to circumvent the  
21 result reached by this Court today by advancing  
22 alternative arguments relative to the nature of the  
23 prior proceeding in Foley vs. Masiello and the  
24 assertion that the true focus here is the recently  
25 passed resolution number 11-05 which, based on the



1 sheer chronology alone, petitioner asserts, could not  
2 have been the focus of the claims made in *Foley vs.*  
3 *Masiello*, are of no avail.

4 In *Foley*, Local 282 challenged the 2004 wage  
5 freeze imposed by the BFSA. In the instant matter,  
6 contrary to the assertion of petitioner, the gravamen  
7 of the challenge is likewise the 2004 wage freeze  
8 resolution, not resolution number 11-05. Resolution  
9 number 11-05 merely issued a guidance as to the  
10 interplay between the 2004 wage freeze resolution and  
11 the arbitration award of the Rinaldo II panel.

12 Moreover, not only is dismissal warranted based on  
13 *res judicata*, it's also in order on the basis of  
14 statute of limitations. An Article 78 proceeding  
15 against a public body must be commenced within four  
16 months after the administrative determination to be  
17 reviewed becomes final and binding. Court cites *Robles*  
18 *vs. Alexander*, 78 AD3d 1338, Fourth Department 2010.

19 As noted by respondent BFSA, the Supreme Court has  
20 already found, and the Fourth Department has affirmed,  
21 that the four month statute of limitations to challenge  
22 the wage freeze resolution began to run when the BFSA  
23 passed that resolution on April 21st, 2004. On that  
24 date the wage freeze resolution became final and  
25 binding and that is the reason that the court in *Foley*

1 held that November 3rd, 2004 was too late to commence  
2 an Article 78 proceeding challenging the imposition of  
3 the April 21st, 2004 wage freeze resolution. Since the  
4 matter before the court today, in actuality, challenges  
5 the 2004 wage freeze resolution, its filing in June  
6 2011 is likewise too late under applicable four month  
7 statute of limitations.

8 The courts of New York State have in the past  
9 adjudicated attempts to characterize a legal challenge  
10 as being addressed to a more recent action in order to  
11 evade the preclusive effect of a statute of  
12 limitations. In this regard, agency action is final  
13 and binding when an agency reaches a definitive  
14 position on an issue that is binding on the petitioner.  
15 Court cites Best Payphones, Inc. vs. Department of  
16 Info. Tech & Telecom of New York, 5 NY3d 30, 2005.

17 As pointed out by respondent BFSA, the  
18 firefighters' brief in the Foley matter stated as  
19 follows; in quotes, the BFSA has by passage of  
20 resolution 04-35, again, the 2004 wage freeze  
21 resolution, imposed a wage and economic freeze for  
22 period predating the enactment of the Buffalo Fiscal  
23 Stability Act and for periods predating the adoption of  
24 resolution number 04-35. Thus, there can be no doubt  
25 at this point that the petitioner herein understood

1 that the action of the BFSa in issuing the 2004 wage  
2 freeze resolution was final and binding, and petitioner  
3 may not now obfuscate this fact by opting to  
4 characterize the within application as a challenge to  
5 resolution number 11-05. Court cites Young vs. Board  
6 of Trustees, 221 AD2d 975, Fourth Department, 1995.

7 For all these reasons the Court rules as it does  
8 today, denying the petition and granting the motion to  
9 dismiss. This Court is mindful that in another matter  
10 also ruled upon by this Court today, this Court vacated  
11 the Rinaldo II arbitration award. Despite that ruling,  
12 this Court has also ruled on the within matter, the  
13 gravamen of which, as already noted by the Court, is  
14 petitioner's right to challenge the 2004 wage freeze  
15 resolution. To the extent that this is the issue  
16 before the Court in the instant matter, it is not moot.

17 Finally, there is no merit to the claim that this  
18 Court lacks jurisdiction over the petition, nor has  
19 respondent City cited any prejudice in this regard.  
20 Okay. Guys, that's it.

21 MR. JOHNSEN: Judge, I have one question. Is  
22 it remanded to Mr. Rinaldi or a different arbitrator?

23 THE COURT: I don't think I get into that. I  
24 don't think I do.

25 MR. VAN VESSEM: No.

1 THE COURT: I'm not going to comment, putting  
2 my sticky finger in this any further.


3 MR. JOHNSEN: Okay.

4 MR. VAN VESSEM: Thank you, your Honor.

5 (Proceeding concluded.)

6 \* \* \*

7 I hereby certify that the foregoing is a true and  
8 accurate transcript of the official court reporter's  
9 minutes of the proceedings and testimony in the matter  
10 of Buffalo Professional Firefighters versus Buffalo  
11 Fiscal Stability Board, et al.

12   
13 Sandra A. Lelito,  
14 Supreme Court Reporter.  
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