



Supreme Court Chambers

State of New York

412 Hall of Justice

Rochester, New York 14614

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Hon. John J. Ark

Supreme Court Justice

Facsimile 428-3570

Law Clerk 428-2488

September 11, 2008

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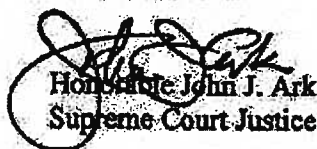
Re: McFiernan v Caufield, et al.
Index No. 2008/6857

Dear Counsel:

Enclosed is a copy of the Decision, Judgment and Order relative to the above-captioned matter.

The original has this date been forwarded to the Monroe County Clerk's Office for filing. Upon return from the Monroe County Clerk's Office, certified copies will be provided to counsel.

Very truly yours,


Honorable John J. Ark
Supreme Court Justice

JJA/dac
Enclosure

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253

4031

W. Scott

STATE OF NEW YORK
SUPREME COURT

COUNTY OF MONROE

JAMES McTIERNAN, as President of the
ROCHESTER FIRE FIGHTERS ASSOCIATION,
LOCAL 1071 IAFF, AFL-CIO, Inc. and
THE ROCHESTER FIRE FIGHTERS
ASSOCIATION, INC.,

DECISION, JUDGMENT
and ORDER.

Petitioners,

Index No. 2008/6857

-vs-

JOHN D. CAUFIELD, FIRE CHIEF OF THE
ROCHESTER FIRE DEPARTMENT, and
THE CITY OF ROCHESTER,

Respondents.

Petitioners filed the instant Article 78 proceeding seeking to enjoin respondents from requiring Battalion Chiefs of the City of Rochester Fire Department to serve in out-of-title positions, in violation of the dictates of Matter of Miller v. Griffith, 251 AD2d 1058, 674 NYS2d 537 (4th Dept., 1998). They also seek an injunction against respondents preventing them from negotiating directly with members of co-petitioner Local 1071 to perform work duties outside the Bargaining Unit as defined by the Collective Bargaining Agreement between the Local and co-respondent City of Rochester. Finally, petitioners seek sanctions against respondents based on a claimed disregard of the ruling in Matter of Miller v. Griffith, which forbade temporary out-of-title assignments of fire fighters to higher positions in violation of Civil Servants Law §64, as well as costs, disbursements and attorney fees.

Respondents moved for dismissal of the Petition, and petitioners cross-moved for summary judgment.

The Court heard oral argument on August 21, 2008. Petitioners were represented by Culley, Marks, Tanenbaum & Pezzulo LLP, Glenn E. Pezzulo, Esq., of counsel. Respondents appeared by Thomas S. Richards, Corporation Counsel of the City of Rochester, Yvette Chancellor Green, Esq., of counsel.

The Court has reviewed the following submissions by the parties: "Notice of Petition Pursuant to CPLR Article 78" and "Petition," with exhibits, and "Affidavit" of James McTiernan, with exhibits (all dated May 15, 2008); respondents' "Notice of Motion" (dated June 20, 2008) and "Affidavit" of John D. Caulfield (dated June 18, 2008), with exhibits; respondents' "Memorandum of Law" (dated June 20, 2008); petitioners' "Notice of Cross-Motion" and Mr. Pezzulo's "Affirmation in Support of Cross-Motion" (both dated August 12, 2008); petitioners' "Affidavit" of Lawrence J. Andolina, Esq. (dated August 14, 2008); Mr. Pezzulo's post-argument "Supplemental Affirmation" (dated August 28, 2008).

Petitioners maintain that the Fourth Department decision in the Matter of Miller v. Griffith case forbade temporary assignments of fire fighters, including Battalion Chiefs, to serve in higher-ranking positions in cases where vacancies concerned furloughs or cycle time. Said absences from duty were found by the Appellate Division to be known by the end of the previous year, on posted schedules, and as such were not unforeseen, as, for example, personal leave time to attend a funeral would be.

Respondents cite inclusion in the Battalion Chief job description of possible temporary duty as a Deputy Chief as evidence that such an appointment is not "out-of-title." Respondents do not distinguish between furloughs/cycle time and unforeseen temporary absences by firefighters, specifically, Deputy Chiefs.

Petitioner Local 1071 is the sole authorized collective bargaining agent for Rochester fire

fighters, up to the rank of "Battalion Chief." Deputy Chiefs, the Executive Deputy Chief and the Fire Chief are not covered by the Collective Bargaining Agreement between the Local and the City.

It is not disputed that the City has appointed Battalion Chiefs to act as Deputy Chiefs during furloughs and cycle time, without any input from the Local. The union has made a demand to negotiate with the City about "legal" temporary assignments of Battalion Chiefs to act as Deputy Chiefs, that is, for eventualities not involving furloughs or cycle time (which are foreseeable), but rather, for unforeseen absences of Deputy Chiefs. The City has accepted the offer to negotiate.

Mr. Pezzulo's "Supplemental Affirmation" notes that the City did not put forth the "job description" argument in the previous Article 78 petition filed in 1996 by Local 1071 and its then president. Such an argument, he opines, may not be relied upon in the current Article 78 proceeding.

As a response to alleged improper re-assignments of Battalion Chiefs, a PERB complaint was filed by Local 1071 on April 25, 2008. That complaint is currently pending. The alleged improper practice under the Civil Servants Law comprised negotiations and attempted negotiations directly between the Executive Deputy Chief and two Battalion Chiefs.

The Court's reading of Matter of Miller v. Griffith, and the uncontroverted facts regarding the policy of the Rochester Fire Department in assigning Battalion Chiefs to act as Deputy Chiefs during furloughs and cycle time, necessitate a ruling in petitioners' favor on the Article 78 petition.

Accordingly, it is the Decision and Judgment of the Court that respondents be, and they are hereby, ENJOINED from assigning Battalion Chiefs to serve in out-of-title positions,

excepting those situations which are specifically allowed by the decision in Matter of Miller v. Griffith.

It is the further Decision and Judgment of the Court that respondents be, and they are hereby, ENJOINED from negotiating directly with members of Local 1071 to perform work duties outside the Bargaining Unit, as defined by the Collective Bargaining Agreement between Local 1071 and the City.

In view of the pendency of the PERB complaint, and PERB's jurisdiction in matters involving contract negotiation, it is the Decision and Judgment of the Court that petitioners' requests for costs, sanctions and attorney fees be, and they are hereby, DENIED.

Similarly, respondents' motion to dismiss the Petition is DENIED.

All of the above is SO ORDERED.

Dated:

September 11, 2008



Honorable John J. Ark, JSC