

SUPREME COURT
STATE OF NEW YORK - MONROE COUNTY

JAMES MCTIERNAN, III,
INDIVIDUALLY AND AS PRESIDENT OF
THE ROCHESTER FIREFIGHTERS, INC.,
LOCAL 1071, IAFF, AFL-CIO,
AND ON BEHALF OF ALL OTHER INDIVIDUALS
PROVIDING FIRE PROTECTION TO
THE CITY OF ROCHESTER, SIMILARLY SITUATED

Petitioners,

-vs-

DECISION &
JUDGMENT

JOHN CAUFIELD,
AS CHIEF OF THE FIRE DEPARTMENT OF THE
CITY OF ROCHESTER, NEW YORK, AND AS
ADMINISTRATOR OF THE FIREFIGHTERS'
INSURANCE FUND OF THE CITY OF ROCHESTER;
CHARLES A. BENINCASA,
AS TREASURER OF THE CITY OF ROCHESTER
AND AS TRUSTEE OF THE FIREFIGHTERS'
INSURANCE FUND OF THE CITY OF ROCHESTER;
THE CITY OF ROCHESTER, NEW YORK;
AND
THE FIRE DEPARTMENT
OF THE CITY OF ROCHESTER,

INDEX #2010/11429

Respondents.

APPEARANCES:

Attorney for Petitioners:

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Attorney for Respondents:

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DECISION

Thomas A. Stander, J.

The Petitioners, James McTiernan, III, Individually and as President of The Rochester Firefighters, Inc., Local 1071, IAFF, AFL-CIO, and on behalf of all other Individuals providing Fire Protection to the City of Rochester, similarly situated, (collectively referred to as “Rochester Firefighters”) submit this Petition seeking a Judgment pursuant to CPLR Article 78

- 1) directing Charles A. Benincasa, as Treasurer of the City of Rochester, to deliver to the Petitioner the sum of \$599,159.56 from the Two-Percent Funds within 30 days of this Court’s order directing same;
- 2) Awarding Petitioner reasonable attorneys fees together with the costs and disbursements of this application.

The Respondents, John Caufield as Chief of the Fire Department of the City of Rochester, New York and as Administrator of the Firefighters’ Insurance Fund of the City of the Rochester (“Fire Department Chief”); Charles A. Benincasa, as Treasurer of the City of Rochester and as Trustee of the Firefighters’ Insurance Fund of the City of the Rochester (“City Treasurer”); the City of Rochester, New York; and the Fire Department of the City of Rochester, (collectively referred to as “City”) submit an Answer with Objections in Point of Law to the Petition.

I. PROCEDURAL HISTORY

This is a special proceeding pursuant to CPLR §7804. The Petitioners are the Rochester Firefighters who seek reimbursement for national union dues paid from 2002 to 2010 and for attorney fees incurred in a prior proceeding related to the City's improper use of a fund established for the fire department. The reimbursement is requested from the Firefighters' Insurance Fund, which is a fund established to collect and distribute monies pursuant to Insurance Law §§9104 and 9105 ("Two Percent Fund"). The Two Percent Fund held by the City Treasurer is administered through a special law created by the City in accordance with the Insurance Law. Pursuant to this special law the City Treasurer, Charles A. Benincasa, receives the proceeds due the Two Percent Fund and thus, is the fiduciary/trustee of the Two Percent Fund. By statute and according to the City's special law, these Two Percent Fund monies are to be distributed for the use and benefit of fire department members. This application is for monies from the Two Percent Fund to be released to the Rochester Firefighters by the City Treasurer.

The Respondents previously raised objections in point of law by a motion to dismiss the Petition. The motion to dismiss asserted that the Petitioners' do not have standing; that Rochester City Council is a necessary party; that the Petition seeks an advisory opinion and mandamus; and that there is an automatic stay in effect based upon an appeal in a different action. The motion to dismiss was denied by Decision and Order of the Court filed in the Monroe County Clerk's Office on March 11, 2011.

After the Decision on the Motion to Dismiss, Respondent was permitted to serve and file an answer within five days after service of the order with notice of entry. The Respondents in their answer now raise two objections in point of law. At this juncture the Respondents have already had the opportunity to raise their objections in point of law in the prior Motion to Dismiss. The statute allows Respondent to "raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition" (CPLR §7804[f]). The Respondents chose to set forth their

objections in point of law in a motion to dismiss. The Court will however, consider the objections in point of law not previously argued by Respondents as arguments in opposition to the Petition.

II. FACTUAL BACKGROUND

The parties to this proceeding have been in litigation in another action since 2002 regarding various issues involving the Two Percent Fund, including whether the City had improperly used monies from the Two Percent Fund (“2002 Litigation”).¹ The outcome from that litigation relevant to this proceeding is that the Two Percent Fund is a proper fund for the monies held pursuant to the special law adopted by the City, the special law is applicable, and the City is prohibited from using the Two Percent Fund monies for items required to be paid by the City under their Collective Bargaining Agreement and for things that are not for the benefit of all firefighters (*Montesano v Madison*, 45 AD3d 1352 [4th Dept. 2007], *leave to appeal denied* 10 NY3d 782; *Montesano v Madison*, 81 AD3d 1412 [4th Dept. 2011], *leave to appeal dismissed* 2011 NY Slip Op 74288; 2011 N.Y. LEXIS 1371 [June 2, 2011]).

In the prior 2002 Litigation, the City was required to repay to the Two Percent Fund the amount of \$3,635,321.80, including investment interest income of \$428,446.83 (*Montesano v Madison*, 81 AD3d 1413 [4th Dept. 2011]). This represents monies that were improperly used by the City from the Two Percent Fund since 2002. The City states that in July 2010 these funds were returned to the Two Percent Fund. Thus, the monies that were not expended from the Two Percent Fund for the use and benefit of the firefighters over these years have now been returned to the Two Percent Fund for

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In the prior litigation the Plaintiff is Joseph Montesano, Individually and as President of Rochester firefighters, Inc., Local 1071, IAFF, AFL-CIO, as Trustee of Rochester Firefighters Association Mutual Aid fund, and on behalf of all other individuals providing fire protection to City of Rochester, similarly situated, Frederick Dinoto, Gary Dinoto, Kevin Bills and Michael Sulli, Individually as Rochester Firefighters and as Trustees of Rochester firefighters Association Mutual Aid Fund. The Defendant is the City, Chief of the fire Department, Mayor, Director of Finance Department, Treasurer of City of Rochester, etc.

proper expenditures. In addition, the Two Percent Fund receives deposits every year pursuant to the requirements of the Insurance Law §§9104 and 9105.

The Rochester Firefighters have requested expenditures from the Two Percent Fund which have been denied or ignored by the City Treasurer and the City of Rochester, Department of Law. Specifically, on May 28, 2010 Petitioners, Rochester Fire Fighters Association sent a letter to Charles Benincasa, City Treasurer, requesting use of monies in the Two Percent Fund to pay for legal fees incurred in the 2002 Litigation and to expend monies for national union dues paid for firefighters to belong to the national organization IAFF since January 2002. The City of Rochester, Department of Law, responded to this request by letter of June 11, 2010 advising that “these reimbursements are not allowed by law or according to published New York State Comptroller Opinions.” The Department of Law letter concludes that “[i]f those [Comptroller’s] opinions [the union references in its letter] are forwarded to the City Treasurer they can be reviewed to see if they do unmistakably substantiate the union’s request.” On June 15, 2010 counsel for the Union sent the Comptroller opinions supporting the requests for expenditures from the Two Percent Fund.

By letter of July 22, 2010 the City of Rochester, Department of Law, advised in response to the Union’s presentation of the Comptroller opinions that the City Treasurer “will not make any determination as to the validity of the requested expenditures from the Two Percent Fund while the legal challenges regarding the Two Percent Fund are not finally decided. . . . No expenditures from the Two Percent Fund will be made until such time as a final determination is made by the courts.” (The legal challenges raised by the City of Rochester in this letter relate to the 2002 Litigation and not to this current proceeding.) There are no further communications submitted by the parties regarding the Petitioners requested expenditures for the attorney fees incurred in the 2002 Litigation or the national union dues since 2002 until the commencement of this Article 78 proceeding.

III. ARTICLE 78 PROCEEDING - MANDAMUS

This Article 78 proceeding seeks a judgment directing the Treasurer of the City of Rochester to deliver certain sums to the Petitioners from the Two Percent Fund. The Petitioners assert that the purpose of this proceeding is to compel the Treasurer to deliver monies to reimburse the Petitioners from the Two Percent Fund for certain expenditures.

The Respondents assert in opposition that the Petition is an improper request for a mandamus and that the Court may not order the Respondents to do a discretionary act and require expenditures from the Two Percent Fund. In addition, Respondents argue that the cash payments requested would be improper because such mandated expenditures cannot be made to the union; and that there was no actual vote of the membership of the Fire Department.

The nature of this Petition is mandamus. There can be mandamus to compel the performance of a ministerial act; or mandamus to review discretionary administrative determinations. Although the parties are not required to denominate the specific nature of the proceeding under Article 78, in this case the nature of the proceeding is relevant to the standard to be applied. The type of mandamus application defines the question to be raised. The statute delineates that “[t]he only questions that may be raised in a proceeding under [Article 78] are [those set forth in CPLR §7803]” depending upon the type of mandamus sought (CPLR §7803).

The Petitioners set forth that this is an application to have the City Treasurer deliver reimbursement monies from the Two Percent Fund. If this is a mandamus to compel, then the Petition is requesting this Court to direct that the City Treasurer deliver to Petitioners certain specific sums. In an Article 78 proceeding, where mandamus to compel is requested, the question raised is “whether the body or officer failed to perform a duty enjoined upon it by law” (CPLR §7803[1]). A mandamus to compel does not apply if there is discretion in the action to be performed.

The City argues, in opposition, that Petitioners are asking the Court to make a determination declaring the outcome of a discretionary act. If it is a mandamus to review, then the Petition is seeking to have the Court direct the City Treasurer to deliver certain sums based upon the Treasurer improperly exercising his discretion as Trustee of the Two Percent Fund in making an administrative determination denying the Petitioners request for expenditures from the Two Percent Fund. The questions to be raised on a proceeding in the nature of a mandamus to review is “whether [the] determination[s] [were] made in violation of lawful procedure, [were] affected by an error of law, or [were] arbitrary and capricious” (CPLR §7803[3]).

The standard for this Court to apply in this Article 78 Petition depends upon whether the acts of the Treasurer are mandatory (mandamus to compel) or discretionary (mandamus to review). To determine the applicable standard, the Court looks to the evidence presented and applicable law.

A. CITY TREASURER ACTIONS AS TRUSTEE
OF TWO PERCENT FUND

The City Treasurer is the trustee of the Two Percent Fund. The Two Percent Fund at issue was created by the City of Rochester to hold fire insurance premiums required to be paid by insurance companies pursuant to Insurance Law §§9104 and 9105. The monies due under the statute “shall be paid . . . to such other person or entity as shall be designated in any special law to receive the premium tax” (Insurance Law §9104[a][3]). The City of Rochester has been determined to be the proper recipient of the Two Percent Funds due the Rochester City Firefighters (*Montesano v Madison*, 45 AD3d 1352 [4th Dept. 2007][for reasons stated at *Montesano v Madison*, 12 Misc.3d 1197], *lv to appeal dismissed* 10 NY3d 782 [2008]). The City special law establishes a Firefighters’ Insurance Fund for receipt of the proceeds of taxes and levies due (Rochester City Code, Fire Department, Ch. 8B, §8B-11). This special law states that the Treasurer of the City of Rochester “shall receive the proceeds due the Firefighters’ Insurance Fund” (Rochester City Code, Fire Department, Ch. 8B, §8B-11).

i. Testimony of City Treasurer

The affidavits of Charles Benincasa state unequivocally that he is the Treasurer of the City of Rochester; that he has been in that position since December 2000; and that part of Benincasa's responsibilities as Treasurer is "acting as Trustee of the Foreign Fire Insurance fund for the City of Rochester Fire Department" (Affidavits of Benincasa dated January 4, 2011 [¶'s 1 & 4] and March 21, 2011 [¶'s 1& 4]). Benincasa avers that during a fiscal year his duties as Trustee includes accounting for the fund to the New York State Comptroller's Office and to the Union, Local 1071 (*Id.* at January 4, 2011 [¶7] and March 21, 2011 [¶7]). Benincasa also states that prior to the lawsuit commenced in 2002 by the Union, Local 1071, he "would send a letter to the Union stating that the funds would be withdrawn from the Fire Insurance fund pursuant to [the Memorandum of Consultation]" (Affidavit of Benincasa dated January 4, 2011 [¶ 9]). The Treasurer avers that he has not disbursed funds for any illegal or improper purposes and "have only disbursed monies within the fund for the benefit of the members of the fire department as determined by Rochester City Council pursuant to New York State Insurance Law and the Rochester City Charter §8B-11" (Affidavit of Benincasa dated January 4, 2011 [¶ 14]; *but see Montesano* , 45 AD3d 1352).

Further, the testimony submitted shows that the Treasurer of the City of Rochester exercises his discretion regarding requests about use of the monies in the Two Percent Fund. The Treasurer avers that he reviews requests of the firefighters for use of the proceeds and the Treasurer makes decisions based on past use, past decisions of the Rochester City Council, and based on what is in the best interest of the Two Percent Fund (Affidavit of Benincasa, dated January 4, 2011 [¶ 15]). The City Treasurer also has reviewed all administrative expense requests from the firefighters for payment of yearly calendars; requests for travel expenses; and requests for miscellaneous expenses (*Id.* at January 4, 2011 ¶'s 17 & 18; March 21, 2011 ¶'s 12 & 13). These costs "have been reviewed and approved or denied through my actions as Trustee" (*Id.* at January 4, 2011 ¶18; March 21, 2011 ¶13). Since 2002 and commencement of the 2002 Litigation, the City Treasurer has consulted with the City of Rochester Law Department on any use, expenditure or processing of the monies in this fund (*Id.* at ¶21).

Ignoring his own averred statements, the City Treasurer somehow concludes that all expenditures are approved by the City Council and states he has “made no decisions regarding specific expenditures outside of investment, administrative and nominal administrative expenses as requested by the firefighters from time to time” (*Id.* at ¶22). Further confusing the issue of authority over decisions regarding the Two Percent Fund, there is an e-mail from John Campolieto, City of Rochester counsel, inquiring from the attorney for Petitioner, “if a response was forthcoming from the union leadership on the use of two percent funds for the 2010 Fire Department Banquet. . . . [I]f you prefer the City will deal directly with the union on this issue . . .” (Petition, Ex. H). By virtue of the affidavits submitted, the authority and process for approving or denying requests for Two Percent Fund monies is irrational, inconsistent and confusing.

ii. City Treasurer Response to Petitioners Requests

The evidence submitted as to the City’s response to the Rochester Firefighters current requests is also evidence of the standard to apply. The requests by letter from the Rochester Fire Fighters Association, Local 1071, seek reimbursement of expenditures for attorney fees in the prior 2002 Litigation between the Union and the City, and for reimbursement for national union dues. The response to this request is a letter from John Campolieto, Municipal Attorney, City of Rochester, Department of Law stating that the City of Rochester Treasurer and the Department of Law reviewed opinions and law, and “their determination is that these reimbursements are not allowed by law or according to [] New York State Comptroller’s Opinions” (Petition, Ex. J). There are no comptroller’s opinions attached in support. After submissions of Comptroller opinions by the Petitioners, the Department of Law advised in a letter that the City Treasurer will not make any determination on the requested expenditures from the Two Percent Fund until legal challenges in the 2002 Litigation regarding the Two Percent fund are completed (Petition, Ex. L).

The City Treasurer states in his affidavit in this proceeding that he is aware of the Petitioners requests for reimbursement from the fund, however, he has made no determination on the validity of these requests for the Union or the members of the Rochester Fire Department (Affidavit of

Benincasa, March 21, 2011 ¶15). The Treasurer's current position is inconsistent with the City's correspondence to Petitioners. The request from the Union was made May 28, 2010; and the response from the municipal attorneys were June 11, 2010 and July 22, 2010. There have been no other responses from the City Treasurer regarding his determination denying the requests.

iii. Denial of Petitioners Request is Discretionary

The proof submitted demonstrates that the determination denying the requests of the Petitioners for expenditures from the Firefighters' Insurance Fund was made in the discretion of the City Treasurer.

After the letters advising that the requests were denied, the City Treasurer never took any other action to approve or deny the requests for monies from the fund. The City Treasurer made a discretionary decision denying the requests of the Petitioner at issue in this Petition and the City cannot now claim that the Treasurer never made a determination on the request.² The City Treasurer denied the requests, notified the Petitioners of the denial, and no further action was taken regarding the requests until this proceeding was commenced. The determination of the Treasurer denying the requests of the Petitioners for expenditures from the Two Percent Fund was done in the exercise of discretion of the Treasurer. Thus, this Article 78 Petition is appropriately in the nature of a mandamus to review.

B. MANDAMUS TO REVIEW ACTIONS OF TREASURER

The City Treasurer exercised his discretion to make the determination to deny the requests of payments from the Firefighters' Insurance Fund. In this proceeding in the nature of a mandamus to review, the questions to be raised regarding the City Treasurer denying the requests are "whether

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The basis of the determination cannot be changed for the purposes of the Article 78 proceeding. Instead the Treasurer is bound to the prior determination and the reasons given for the determination provided to the Petitioners.

[the] determination[s] [were] made in violation of lawful procedure, [were] affected by an error of law, or [were] arbitrary and capricious” (CPLR §7803[3]).

i. Violation of Lawful Procedure

In an Article 78 Petition the standard of whether there has been a violation of lawful procedure relates to the rules and regulations governing the agency. The Two Percent Fund exists based upon the provisions of Insurance Law §§9104 and 9105. Insurance Law §9104 authorized municipalities to adopt a special law regarding funds to be established pursuant to the Insurance Law (*see Montesano v Madison*, 45 AD3d 1352; *Watt v Richardson*, 6 AD3d 1117 [4th Dept. 2004]). The applicable rule relating to the procedure for the Firefighters’ Insurance Fund (Two Percent Fund) is set forth in the Rochester City Code §8B-11 (*Montesano v Madison*, 45 AD3d 1352).

The special law in the Rochester City Code states that “[t]he Treasurer shall receive the proceeds due the Firefighters’ Insurance Fund, and with the concurrence of the Director of Finance, shall invest the unencumbered balance as permitted by state and local law” (Rochester City Code §8B-11). That is the only authority given to the Treasurer pursuant to the special law. There are no other rules or regulations submitted regarding procedures or authority of the Treasurer, as Trustee of the Fund. Based upon the submitted rules and regulations governing the Fund, the Treasurer has no authority to grant or deny requests for expenditures submitted by the Petitioners. The Treasurer has no authority to request that the Union agree to expenditures from the Two Percent Fund to pay for the fireman’s banquet. The Treasurer has no authority to approve the distribution of money to pay for yearly calendars, for travel expenses or for administrative expenses. The Treasurer only has the authority to receive the proceeds and to invest the unencumbered balance.

The other provisions in the special law require City Council to act:

Upon adoption of an ordinance by Council, including the Budget Ordinance, **approving the expenditure**, the Firefighters’ Insurance Fund may be expended to reimburse the annual costs of payments

under the Fire Pension Fund and to pay stipends to indigent and disabled firefighters who otherwise would not receive these benefits. Upon adoption of an ordinance by Council, including the budget Ordinance, the remainder, or any part thereof, [of the Firefighters' Insurance Fund] may be expended for the use and benefit of the Fire Department

(Rochester City Code, Fire Department Chapter 8B, §8B-11). The parties have not submitted any specific procedure for the firefighters to follow to submit requests for expenditures and disbursement of the monies in the Two Percent Fund. Also there are no procedures submitted as to how any requests received by the City Treasurer are handled.

The practical actions previously taken regarding expenditures from the Two Percent Fund are not consistent with the technical language of Rochester City Code 8B-11. The evidence presented shows that the procedures followed for expenditures from the Two Percent Fund were not consistent with applicable law.³

The special law at Rochester City Code §8B-11 sets forth that the Treasurer receives the proceeds due the Two Percent Fund, and that the City Council must adopt an ordinance for the monies to be expended. The only specifics set forth in this special law is language that specific expenditures may be made upon adoption of the ordinance by City Council “approving the expenditure” and that the remainder, or any part of the remainder of the Two Percent Fund, upon adoption of an ordinance by City Council may be expended for the use and benefit of the Fire Department.

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Requests were handled by communication between the City Treasurer and the Union. The City Treasurer indicates that he would “would send a letter to the Union stating that the funds would be withdrawn from the Fire Insurance fund pursuant to [the Memorandum of Consultation].” The City Treasurer would review all requests for administrative expenses such as payment of yearly calendars, travel expenses, and miscellaneous expenses. The City Department of Law also sent a note to counsel asking whether the Union would approve expenditures for the City Banquet for the firefighters. This evidence shows that the City Treasurer and firefighters/Union exchanged necessary information to expend monies from the Two Percent Fund for the use and benefit of the Fire Department.

A special law affecting the Firefighters' Insurance Fund created pursuant to Insurance Law §§9104 and 9105 must be narrowly interpreted (*Volunteer & Exempt Firemen's Assoc. of Garden City v Local 1588 of the Professional Firefighters Assoc. of Nassau County*, 82 AD3d 876 [2d Dept. 2011], *lv to appeal denied* 2011 N.Y. Lexis 1726, 2011 NY Slip Op 76779 [N.Y. June 28, 2011]). The actions of the City Treasurer in denying in July 2010 the requests of the Petitioners and never submitting them to the Rochester City Council does not follow the requirements of the special law set forth at Rochester City Code §8B-11. The Treasurer is bound by the provisions of the Code.

The determination of the City Treasurer to deny the requests of the Petitioners for reimbursement for attorney fees and for national union dues is a violation of lawful procedures. The action of the City Treasurer to deny the requests for expenditures and to not submit them to City Council, such that the determinations of the requests are finalized without ever being addressed by City Council, is also a violation of lawful procedures.

ii. Arbitrary and Capricious or Error of Law

“In a proceeding in the nature of mandamus to review, . . . a court examines an administrative action involving the exercise of discretion. . . . The standard of review in such a proceeding is whether the agency determination was arbitrary and capricious or affected by an error of law” (*Scherbyn v Wayne-Finger Lakes Bd of Co-op Educational Svcs*, 77 NY2d 753, 757–58 [1991]). This proceeding is the judicial review of an administrative determination by the City Treasurer to deny the requests of the Petitioners for expenditures from the Two Percent Fund. “Administrative determinations may properly be made without a trial-type hearing and may be based on ‘whatever evidence is at hand,’ regardless of whether it appears in the record of a hearing (*citation omitted*)” (CPLR §7803, commentaries C7803:1).

Whether an error of law occurred is generally based on allegations that an agency improperly interpreted or applied a statute or regulation (*See New York City Health and Hospitals Corp. v McBarnette*, 84 NY2d 194, 205 [1994]). “As a general rule, ‘the construction given statutes ... by

the agency responsible for their administration, if not irrational or unreasonable, should be upheld’ (*Matter of Howard v Wyman*, 28 NY2d 434,438, 271 NE2d 528, 322 NYS2d 683 [1971])” (*IMA Brooklyn Assembly Halls of Jehovah’s Witnesses, Inc. v Dept. of Environmental Protection of the City of New York*, 11 NY3d 327,334 [2008]; *IMA Transitional Svcs of New York for Long Island, Inc. v New York State Office of Mental Health*, 13 NY3d 801,802 [2009]).

“[W]hen the issue concerns the exercise of discretion by the administrative tribunal: The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is “arbitrary and capricious” (*citations omitted*)” (*Pell* at 230-31; *Wooley v New York State Dept. of Correctional Svcs.*, 15 NY3d 275,280 [2010]). The standard for arbitrary and capricious in an Article 78 proceeding is:

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.” (*citation omitted*)

(*Pell* at 231). When an action by an administrative agency is taken without sound basis in reason or without regard to the facts, then the courts may overturn the administrative action (*Wooley* at 280; *Gigliotti v Bianco*, __ AD3d __, 2011 NY Slip Op 2206, 919 NYS2d 641 [4th Dept. 2011]; *McLiesh v Town of Western*, 68 AD3d 1675 [4th Dept. 2009]).

In this Article 78 proceeding, “we examine whether the action taken by the [Treasurer as Trustee of the Firefighters’ Insurance Fund] has a rational basis” (*see Wooley* at 280). When the interpretation or construction of the Code language being applied is irrational or unreasonable, an error of law may exist that warrants reversing the determination of the agency (*see Brooklyn Assembly* at 334; *Transitional Svcs* at 802). Courts should interfere with the exercise of discretion of the Treasurer as Trustee of the Fund when there is “no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious” (*see Pell* at 230-31; *Wooley* at 280). Whether the act of

the Treasurer denying the request of the Petitioners' for reimbursement is arbitrary and capricious relates to whether such action should have been taken or is justified (*see Pell* at 231).

The determination by the City Treasurer that the requests of the Petitioners are denied, and never submitting the requests to the City Council, applies an interpretation or construction of Rochester City Code §8B-11 that is irrational and unreasonable. The Code does not provide authority for the Treasurer to exercise discretion in approving or denying the request for expenditures from the Firefighters' Insurance Fund. The Code does not give authority for the Department of Law to dictate that no determinations will be made on the requests while legal challenges in the prior 2002 Litigation are pending. The City Treasurer may be the Trustee of the Two Percent Fund, however the City Council is the one granted authority to expend the funds. The determination of the City Treasurer through the Department of Law is irrational and unreasonable. The determination of the City Treasurer to deny the Petitioners requests is affected by an error of law that warrants reversing the determination of the City Treasurer (*see Brooklyn Assembly* at 334; *Transitional Svcs* at 802).

Further the acts of the City Treasurer in denying the requests of Petitioner, without submitting them to the City Council, are not justified. There is no Code provision that provides any authority to the City Treasurer to make discretionary decisions on requests for use of the Two Percent Fund by the firefighters. The actions of the City Treasurer denying the Petitioners' requests for expenditures from the Two Percent Fund, without submitting the requests to the City Council, are arbitrary and capricious.

IV. RESPONDENTS OPPOSITION ARGUMENTS

The Respondents set forth two arguments in opposition to Petitioners application. The Court disagrees with both positions taken by Respondents.

A. PROPER MANDAMUS APPLICATION

The Respondents first argue that the Petition is an improper mandamus and the Court may not order the Respondents to do a discretionary act. However, in an Article 78 proceeding in the nature of a mandamus to review, acts of the City Treasurer done in the exercise of discretion may be reviewed.

The City Treasurer had no authority to deny the requests of the Petitioners for reimbursements from the Two Percent Fund without submitting the requests to the City Council. The special law relied upon by the City requires the request for expenditures to be submitted to City Council. The actions of the City Treasurer may be reviewed pursuant to a mandamus to review discretionary acts under the standards set forth in CPLR 7803[a]. Thus the Respondents arguments that this is an improper mandamus application to review discretionary acts of the City Treasurer are without merit.

B. PROPER USES OF THE TWO PERCENT FUND

The Respondents argue that the cash payments requested are improper because there was no actual vote of the membership of the fire department, and that expenditures from the Two Percent Fund cannot be made to the Union. Generally the New York State Comptroller “has taken a very liberal position with respect to the purposes for which such [Two Percent Fund] moneys may be expended” (Comptroller Op, 1982 N.Y.St.Comp. 12, Op.#82-10 [1982]). The money can be used for any purpose determined to be for the use and benefit of the fire department. “[E]xpenditures for illegal purposes or for purposes which are contrary to public policy would be improper” (*Id.*; Comptroller Op., 1981 N.Y.St. Comp. 151 [1981]). Even special laws allowed under the Insurance Law, which encompasses Code §8B-11, should not change “the ultimate recipient of the funds”; i.e. the fire departments (Comptroller Op., Op. #90-8 [3-30-90]).

The Court will consider the Respondents arguments regarding use of the funds.

i. Vote of Membership

In the Respondents' Motion to Dismiss, the City argued that Petitioners lack standing to commence this proceeding. Respondents argued that Petitioners failed to submit documentation that the members of the fire department want the money from the Two Percent Fund spent for the requested expenditures. The Respondents now raise the same argument framed in the context that there was no actual vote of the membership of the Fire Department.

This issue regarding standing and vote of the membership was submitted by the Respondents in their prior motion and was fully addressed in the Court's Decision and Order filed March 11, 2011.⁴ The Respondents motion to dismiss on the basis that Petitioners did not have standing was denied in the Court's prior Decision and Order. The Respondents chose not to appeal that Decision and Order. Thus the Decision and Order of March 11, 2011 is the law of the case.

ii. Payments to a Union

The City argues that expenditures from the Two Percent Fund cannot be made to the Union. Further, that because the Union paid the expenses, consisting of attorney fees for the 2002 Litigation and national union dues, then such expenses cannot be reimbursed to the Union from the Two Percent Fund. The City asserts that such reimbursement of these expenses are not allowed to be paid to a Union.

The law is clear that a "[u]nion has no right to receive a portion of the funds directly from the State" (*Foley v Masiello*, 52 AD3d 1225 [4th Dept. 2008]; *Watt v Richardson* at 1118). Both of these cases were proceedings where the union was seeking a declaration that a portion of the Two Percent Fund

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Additionally the Comptroller has stated that "[t]here is no statutory requirement regarding notification of the time and place of a vote on the purpose for which foreign fire insurance tax moneys are to be expended. . . . the exact type and manner of notice in this instance is a matter of internal fire company policy" (Comptroller Op., 1981 N.Y. St. Comp. 151, Op. #81-146 [1981]).

monies should be paid to the union on a regular basis as one of the proper parties to receive the monies (*Id.*) The Petitioners here are not seeking a declaration that the Two Percent Fund monies, or some percentage of such monies, be paid to the Union or are owed to the Union on a regular basis.

Instead the Petitioners are seeking a declaration requiring the City Treasurer to release monies to reimburse the Union for expenditures made on behalf of the Rochester Firefighters. These payments were made by the Union on behalf of the Rochester Firefighters under unique circumstances.

iii. Reimbursement Requested

The Petitioners request that the Union be reimbursed for expenditures from 2002 through 2010 for mandatory national union dues of the Rochester Firefighters to IAFF in the amount of \$480,827.25 and for the attorney fees incurred in the 2002 Litigation in the total amount of \$118,332.31. Proceeds from the Two Percent Fund may be used for the purpose of paying dues for the firemen so that they can retain membership in a national union (*see Comptroller Op.* 0281122 [5-22-81]). An appropriate use of moneys in the Two Percent Fund is to pay attorneys fees for bringing a claim on behalf of the fire department where the return of monies to the Two Percent Fund benefitted the fire department (*see Comptroller Op.* 74-1200 [11-26-74]). These are valid uses for money in the Two Percent Fund.

Notwithstanding the validity of these uses of monies from the Two Percent Fund for these expenditures, Respondents claim such monies cannot now be paid to the Union to reimburse the Union for expenditures previously made on behalf of the Rochester Firefighters. Under the circumstances presented, that arguments is without merit.

The Union paid these national union dues and attorney fees during the time period from 2002 to 2010, while the 2002 Litigation was ongoing. During this time the City expended monies from the Two Percent Fund only for items deemed by the Court in the 2002 Litigation to be improper purposes and for *de minimus* expenditures, including yearly calendars and to pay for the City

firefighters banquet. At the same time, however, the Fire Department members were required to continue paying mandatory national union dues to IAFF from January 5, 2002 to April 22, 2010 in the total amount of \$480,827.25. Also, attorney fees were incurred by the Union to challenge the City's use of the monies from the Two Percent Fund in the 2002 Litigation. The Union incurred attorneys fees for services rendered by the law firm of Chamberlain D'Amanda and the law firm of Culley Marks in the total amount of \$118,332.31 (of which \$107,549.02 has been paid and the balance remains outstanding).

According to the Court determinations in the 2002 Litigation regarding the Two Percent Fund, the City had been using the monies in the Two Percent Fund for improper purposes since 2002; and the Court declared that over three million dollars needed to be returned to the Two Percent Fund. (*Montesano* at 1352; *Montesano* 81 AD3d 1413 [4th Dept. 2011]). The City advised in July 2010 that the funds improperly used by the City since 2002 were restored to the Two Percent Fund pursuant to the order of the Court. In addition to the return of this improperly expended money, the Two Percent Fund has continued to receive annual contributions pursuant to Insurance Law §§9104 and 9105.

From 2002 to 2010 the City was using the Two Percent Funds improperly and depleting the amount available in the Two Percent Fund. The actions of the City prevented the use of the Two Percent Funds for proper expenditures, which were not illegal or against public policy, at the request of the Rochester Firefighters. The requests of firefighters for attorney fees to recoup the improperly expended money from the City and payment of national union dues have been held to be proper expenditures, and are not illegal or against public policy (*Comptroller Op.* 74-1200 [11-26-74]; *Comptroller Op.* 0281122 [5-22-81]). However, during the period of 2002 to 2010 funds were not available for these expenditures due to improper use of the Two Percent Funds by the City.

On this motion there is no evidence regarding the amount of money currently held in the Two Percent Fund, except that more than 3 million dollars was restored to the fund sometime prior to July 22, 2010 and that there have been only small expenditures by the City Treasurer. The City does

not argue that there are insufficient funds for the payment of the Petitioners requests. The City does not assert that the Two Percent Fund monies are needed to “reimburse the annual costs of payments under the Fire pension fund and to pay stipends to indigent and disabled firefighters who otherwise would not receive these benefits” as stated in Rochester City Code §8B-11. In fact the City does not address or mention the amount needed for these annual costs or stipends as expenditures authorized by the special law in effect.⁵ The special law sets forth that the remainder of the Two Percent Fund be expended for the use and benefit of the fire department.

The City’s current position that, for the various reasons argued herein, the requested payments are not allowed has no merit. Although the Petitioners seek reimbursement for expenses incurred in the past for national union dues and for attorney fees expended for the 2002 Litigation, under the facts presented here payment to reimburse these past expenditures is reasonable, warranted and proper. It was the City’s own actions in expending the money from the Two Percent Fund for improper purposes, so the funds were not available for proper requests, that led to the Petitioners current application for reimbursement of these past expenditures. The Attorney fees for the 2002 Litigation and the annual national union dues were required to be paid on a timely basis by the Rochester Firefighters. The circumstances, at least partially self-created by the actions of the City, warrant payment for reimbursement of past expenses paid by the Petitioners for the use and benefit of the Rochester Firefighters when the City was improperly using the Two Percent Funds. The Respondents fail to submit viable arguments in opposition to the application.

V. CONCLUSION

The actions of the City Treasurer denying the requests of the Petitioners for reimbursements for attorney fees and for national union dues, and not submitting the requests to City Council, are a

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These expenditures have been limited by the Court Decisions in the 2002 Litigation.

violation of lawful procedures. The motion of the Petitioners for a judgment directing a declaration based on a violation of lawful procedure pursuant to CPLR §7803[3] is GRANTED.

The actions of the City Treasurer denying the Petitioners' requests for expenditures from the Two Percent Fund, without submitting the requests to the City Council, are arbitrary and capricious and affected by an error of law. The motion of the Petitioners for a judgment directing a declaration based on the determinations of the City Treasurer being affected by an error of law, and were arbitrary and capricious, pursuant to CPLR §7803[3] is GRANTED.

The Petitioners challenge to the determinations of the City Treasurer denying the request for payment of the amounts requested for reimbursement of the national union dues from 2002 to 2010 and for attorney fees incurred for the 2002 Litigation is GRANTED and the Petitioners are entitled to a declaration.

The Petitioners seek a judgment declaring that the City Treasurer deliver to Petitioners the requested reimbursement amounts. Based upon the rules and regulations governing the Firefighters' Insurance Fund under the special law in effect in the City of Rochester, the City Treasurer does not have the final authority or power to determine whether the requests for expenditures from the Two Percent Fund are approved or denied. Therefore, the declaration must provide that the City Treasurer, as Trustee of the Two Percent Fund, shall present the Petitioners requests for national union dues in the amount of \$480,827.25 and for attorney fees in the amount of \$118,332.31 incurred in the 2002 Litigation to Rochester City Council.⁶

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The City is bound by its special law provisions. Although this special law, when adopted, was allowed to alter the provision of Insurance Law §9104, the statute specifically prohibits any further changes. "The provisions of this section [§9104] shall not be changed, modified or amended by any charter, local law, ordinance, resolution or regulation" (Insurance Law §910[g]). Based upon the ban on any further modifications to the statute, the City is bound by its Code provision §8B-11 whereby upon approval the Fund may be expended to reimburse the annual costs of payments under the Fire Pension Fund and to pay stipends to indigent and disabled firefighters who otherwise would not receive these benefits. These payments are limited by the determination in the prior litigation (*Montesano v Madison*, 45 AD3d 1352 [rth Dept. 2007][for reasons stated at *Montesano v. Madison*, 12 Misc.3d 1197], *lv to appeal dismissed* 10 NY3d 782 [2008]). Then the remainder of thte Fund is to be expended for the use and benefit of the Fire Department. The Rochester City Code unequivocally provides that any amount remaining in the Two

Unless the requested use is illegal or against public policy, the City Council should adopt the necessary ordinance to expend the funds. **The Petitioners requests are not illegal or against public policy.** Thereafter, in accordance with Rochester City Code §8B-11, upon appropriation of the expenditure for these requests, “the Fire Chief shall be responsible for the proper administration of the funds so appropriated.” The Petitioners are entitled to a declaration as set forth in the Judgment and Order herein.

From this in-depth look at Rochester City Code §8B-11, the appropriate process for distributions from the Two Percent Fund is, first, for the firefighters to submit a request, which is neither illegal or against public policy, to the City Treasurer as Trustee of the Two Percent Fund; second, for the City Treasurer to present the request to Rochester City Council; third, for the Rochester City Council to promptly approve the request unless it is illegal or against public policy; and finally, for the money so appropriated by the Rochester City Council to be distributed by the City Treasurer to the Fire Chief for proper administration of the funds.

J U D G M E N T A N D O R D E R

Based upon all the papers submitted in support and in opposition to this proceeding, upon the above Decision, and after due deliberation, it is hereby

ORDERED AND ADJUDGED that the motion of the Petitioners for a judgment directing a declaration based on the actions of the City Treasurer denying the request for expenditures from the Two Percent Fund being in violation of lawful procedure pursuant to CPLR §7803[3] is GRANTED; it is further

Percent Fund, or any part thereof, “may be expended for the use and benefit of the Fire Department.”

ORDERED AND ADJUDGED that the motion of the Petitioners for a judgment directing a declaration based on the determinations of the City Treasurer denying the requests for expenditures from the Two Percent Fund being affected by an error of law, and were arbitrary and capricious pursuant to CPLR §7803[3] is GRANTED; it is further

DECLARED that the City Treasurer, as Trustee of the Two Percent Fund, shall submit for approval to the Rochester City Council at its next regular or special meeting the Petitioners requests for expenditures from the Two Percent Fund for reimbursement of IAFF national union dues for the period of January 5, 2002 through April 22, 2010 in the amount of \$480,827.25 and for reimbursement for attorney fees paid in the 2002 Litigation in the amount of \$107,549.02 and for payment of the remaining balance outstanding for attorney fees in the amount of \$10,783.29; it is further

DECLARED that monies so appropriated shall be distributed by the City Treasurer, as Trustee of the Two Percent Fund, within five (5) days after City Council's approval, to the Fire Chief for the proper administration of the funds; and it is further

ORDERED AND ADJUDGED that Petitioner's request for reasonable attorneys fees, together with the costs and disbursements of this application, is GRANTED, with the amount to be determined by the Court upon submission of an attorney fee affirmation.

Dated: August , 2011
Rochester, New York

Thomas A. Stander
Supreme Court Justice

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