

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

CYNTHIA S. KERN

PRESENT: _____
Justice

PART 52

Index Number : 111730/2010
 RICHTER, ROY T.
 VS.
 KELLY, RAYMOND W.
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. 111730/10
 MOTION DATE _____
 MOTION SEQ. NO. 01
 MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the attached decision.*

FILED

APR 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/6/11

CK
CYNTHIA S. KERN J.S.C.
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
In the Matter of the Application of: ROY T. RICHTER, as
President of the Captains Endowment Association of the City
of New York, Inc. and as a Trustee of the Board of Trustees
of the Police Pension Fund, Article II and the Captains
Endowment Association of the City of New York,

Petitioner,

Index No. 111730/10

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

-against-

DECISION/ORDER

RAYMOND KELLY, as the Police Commissioner of
the City of New York, and as Chairman of the
Board of Trustees of the Police Pension Fund, Article II,
THE BOARD OF TRUSTEES of the Police Pension
Fund, Article II and THE CITY OF NEW YORK

FILED

APR 07 2011

Respondents.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Roy Richter brought this petition pursuant to Article 78 of the Civil Practice Law and Rules seeking to compel the respondent Board of Trustees of the Police Pension Fund, Article II (the "Board of Trustees" or the "Board") to allow petitioner to present a resolution concerning the interpretation of a statute regarding the calculation of police pensions for a vote before the Board. For the reasons set forth below, the petition is granted.

The relevant facts are as follows. Petitioner is a New York City police officer with the rank of Deputy Inspector and is the duly elected president of the police department's Captains Endowment Association of the City of New York, Inc. ("CEA"). He is also a trustee of the Board of Trustees. The CEA is the sole and exclusive collective bargaining representative for police department employees with certain titles, including petitioner's. The Board of Trustees administers the New York City Police Pension Fund. It frequently votes on issues regarding individual officers' pensions. It acts by voting on resolutions. It is composed of representatives of the City, who have six votes, and representatives of the police union, who have six votes. In order for a vote to be adopted, it must be approved by a majority (seven votes). In the event of a six-six tie, the resolution being voted upon does not pass.

In his capacity as a member of the Board of Trustees, petitioner proposed the Board vote on a resolution regarding the legal interpretation of Administrative Code Section 13-249 at a meeting of the Board during executive session on November 9, 2009. From November through April, the matter was postponed at each monthly meeting of the Board. However, the City representatives repeatedly stated that they did not believe the Board could vote on the resolution and that the interpretation of a statute was not the appropriate subject matter of a vote. At the May meeting of the Board, the City representatives flatly refused to vote on the resolution. Petitioner subsequently commenced this action, claiming that the refusal of the Board to vote on the resolution was arbitrary and capricious and unlawful and denied petitioner due process.

The petition is granted because the Board has no authority to refuse to vote on a resolution, whether that resolution pertains to an individual case or to the interpretation of a statute generally. There is no statutory or regulatory provision which prohibits the Board from

voting on a resolution regarding the interpretation of a statute or other provision of law or which, conversely, limits it to voting on individual cases regarding pensions. The Board is charged with the administration of the pension fund and may "establish rules and regulations for the administration and transaction of the business of such fund." NYC Administrative Code §13-202. That statute does not explicitly empower the Board to vote on statutory interpretations but it does not explicitly bar it from doing so either. Respondents' contention that the City Charter provision which gives Corporation Counsel the exclusive authority and responsibility to "have charge and conduct of all the law business" of the pension fund prohibits the Board from voting on a statutory interpretation is without merit. That provision does not explicitly restrict the Board to voting on individual cases regarding pension issues. Similarly, the cases cited by respondents, discussed in detail below, which hold that the City's attorney is in charge of all legal matters affecting the city, do not bar the Board from interpreting statutes. *See City of New York v Buckley*, 260 A.D.19 (1st Dept 1940); *Kay v Board of Higher Education of the City of New York*, 260 A.D. 9, 12 (1st Dept 1940). In fact, every time the Board votes on an individual determination it is, implicitly, interpreting the governing statute.

There is also no basis for the argument of respondent that the Board is prohibited from voting on the resolution because Corporation Counsel has already issued an opinion regarding how the statute should be interpreted. The Board is not prohibited from voting on a resolution regarding statutory interpretation simply because Corporation Counsel has opined on the issue. In fact, not only is the Board not prohibited from doing so, it is actually required to vote on the resolution. Corporation Counsel's opinion may constrain how the City representatives on the Board vote if they believe they must conform to that opinion but it does not and cannot constrain

the Board from voting. It is the Board's duty to determine how police pensions are administered and it may only take action by resolution. When it fails to do so, it fails to fulfill its duty. As the court said in *Lynch v Bloomberg*, where the "Board took no action... but instead deferred to the pronouncement of its attorney" "the Board has not fulfilled its duty" to make an independent determination regarding pension issues. *Lynch v Bloomberg*, Index No. 112968 (Sup Ct., Payne, J., Sept. 19, 2002).

The cases cited by respondents are inapposite. Although the First Department has repeatedly held that the City's attorney is in charge of all legal matters affecting the city (*see Buckley*, 260 A.D.19; *Kay*, 260 A.D. 9, 12), those cases do not specifically address the fiduciary and statutory duties of the Board of Trustees at issue here. *Caruso v New York City Police Department Pension Fund*, 72 N.Y.2d 568 (1988), is also irrelevant. In *Caruso*, the question before the court was whether individual trustees on the Board could employ outside counsel, at cost to the pension fund, to sue the other trustees in order to resolve a disagreement over statutory interpretation. Although the underlying issue involved the interpretation of a statute, that question, and the question of how to resolve such deadlocks, came before the court in a separate proceeding. In neither proceeding did the court address the responsibility of the Board to vote on resolutions proposed to it and whether it may refuse to vote on such resolutions.

Accordingly, petitioner's petition is granted to the extent that the Board of Trustees is directed to vote on petitioner's proposed resolution at its next meeting. This constitutes the decision, order and judgment of the court.

Dated: 4/6/11

FILED

APR 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Enter:

J.S.C.

CYNTHIA S. KERN
J.S.C.