

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JAMES E. SWEENEY, F. WARREN BENTON, SAM :
ORANS, BRIAN PAYNE, RAY MALDONADO, DAN :
HEUBEL, MICHAEL WEINER, :

Plaintiffs, :

-against- :

ELIZABETH N. FELD, Mayor, MARLENE KOLBERT, :
Trustee, ANNE McANDREWS, Trustee, JIM :
MILLSTEIN, Trustee, RICHARD WARD, Trustee, :
constituting the Village of Larchmont Board of Trustees :
and RICHARD HEINE, "Chief" of the Fire Department of :
the Village of Larchmont, :

Defendants. :

Index No.

**SUPPLEMENTAL
AFFIDAVIT OF F. WARREN
BENTON**

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F. WARREN BENTON, being duly sworn, deposes and says:

1. I live at 149 Beach Avenue in Larchmont, New York, and have lived there since 1979. I have served as an active member of the Village of Larchmont Fire Department for the past ten years. I currently serve on the Village of Larchmont Fire Department Fire Council as the Warden of the Engine Company.

2. I previously filed an affidavit in this case which was sworn on May 29th. I submit this supplemental affidavit to reply to statements in the supplemental affidavit filed by Defendant Heine on June 7, 2007. (Heine Supplemental Affidavit)

3. My supplemental affidavit addresses five topics: the permissive referendum petitions, volunteer firefighter membership, firefighter attendance reporting, alleged harassment of volunteers; and Fire Council proposals to the Board.

A. Permissive Referendum Petitioning

4. The Board passed two resolutions on May 16, 2007 - one appointing a paid fire chief and the other abolishing the position of volunteer fire chief along with the right of volunteer firefighters to vote for the fire chief, and providing for division of the statutory duties of the Fire Council in an ad hoc manner by the new "chief" after consulting with the remaining members of the Fire Council and with approval by the Village Board. In effect, the Fire Council which is the governing body of the Department is abolished as it has existed for over 100 years and as provided for by the Village Law.

5. My understanding of NY Village Law § 10-1020 is that abolition of a village fire

department, or a part thereof, is permissible but subject to permissive referendum. I believe that the Village Board therefore lacked the authority – on May 16, 2007 - to appoint Defendant Heine as Chief of the Larchmont Fire Department, because state law provides that if an act of the Village Board of Trustees abolishes a part of the Fire Department, that the Board must delay the effective date of the act for 30 days to permit voters to petition to have the question put to the voters in a referendum. If 20% of the registered voters sign the petition, then the voters will decide whether the resolutions stand or fall.

6. The Plaintiffs in this legal action, along with other members of the Fire Department and other Larchmont residents, have been aware of widespread opposition in Larchmont to the actions taken by the Village Board. Therefore, we organized a petition to respectfully ask, in the manner permitted by NY Village Law § 10-1020, that this important matter be put to the voters in an election.

7. There is one petition for each of the Board's two resolutions. The top of the first petition reads as follows: *"To the Board of Trustees of this Village of Larchmont County of Westchester, State of New York: We, the undersigned, duly qualified electors of the Village of Larchmont respectfully petition that the following proposed resolution: **Management Succession Plan for the Larchmont Fire Department Resolution #1** approved by the Board of Trustees on May 16, 2007 be submitted to a vote of the qualified electors of the village for their approval or rejection as provided by law."* The second petition reads the same way but refers to *"**Management Succession Plan for the Larchmont Fire Department Resolution #2**"*

8. Each petition contains twenty lines for qualified electors to sign, including the information as specified by law. At the bottom of each petition, the witness completing the petition fills out and signs the statement required by law.

9. My understanding is that Village Law § 9-900 requires that within 10 days of taking an action triggering permissive referendum the Village Clerk must post a notice describing the action and announcing that it is subject to permissive referendum.

10. Yesterday I went to the official announcement board in front of Larchmont Municipal Hall located at 120 Larchmont Avenue in Larchmont. I observed that the Village Clerk has not posted the required announcement relating to the two resolutions passed on May 16, 2007. I did observe, however, a permissive referendum announcement relating to the financing of a sanitation truck.

11. My understanding is that the 30-day period runs from May 17, 2007 to June 15, 2007. Because the required announcement has not been posted, I believe that the 30-day period should be extended by this Court to 30 days following the posting of the required announcement by the Village.

12. Thus far, fire department members and village residents have gathered 592 signatures. The Village of Larchmont has 3,802 registered voters, and therefore 20% of

the voters is 761, and therefore we have 169 signatures to go. We intend, however, to collect an excess number of signatures in case some are invalidated.

13. Attachment One consists of some of the petitions collected thus far. Some have not yet been turned in by the persons gathering the signatures. These petitions do not yet have the ward and election district added for each voter, which, consistent with law, will be added before submitting the petitions to the Village Clerk.

B. Volunteer Firefighter Membership

14. Attached to the affidavit filed by Paul J. Abrahamsen sworn on May 29, 2007 is the report to Fire Council relating to the status of membership of the volunteer firefighters. That report showed the 28 members who had informed the Fire Council of their intent to resign from active firefighting for the Larchmont Fire Department. At least two additional members informed Council of their intent to resign subsequent to that report.

15. Defendant Heine (See Heine Supplemental Affidavit paragraph 12) states that at least 10 current volunteers have told him that they intend to remain members of the department and not resign. He provides no specific names.

16. The Abrahamsen table identified the status of all members of the department. Of the members who have not announced to the Fire Council an intent to resign, only ten are qualified for interior firefighting and only 5 have attendance above 15% of alarms.

C. Alarm Attendance

17. Defendant Heine cites alarm attendance statistics in his affidavit. (See Heine Supplemental Affidavit paragraphs 15 and 16.)

18. Attendance statistics have a variety of purposes. Participation in training drills and in official meetings is important. Service in Village social functions such as the Memorial Day parade is also valuable as village service.

19. With respect to alarm responses, it is possible that over a one-year period there might be 10 calls where no volunteers responded. This might happen, for example, when alarms are cancelled in progress, or the incident commander radios a "10-20" announcement to all responding personnel which indicates that the situation is under control and not urgent.

20. It is also true that fewer volunteers are available during the day. This is one of the reasons that the Fire Council has already developed a study of consolidation with the Town of Mamaroneck Fire District.

21. But the real test of attendance is response to actual fires and emergency incidents. For example, at the most recent major structure fire, on Mayhew Avenue on May 4, 2007, among the 17 volunteer firefighters responding were Plaintiffs Benton, Orans, Payne, Maldonado, Huebel, Abrahamsen, MacDonald and Wiener.

22. Similarly, only a few weeks earlier on April 15, 2007, Plaintiffs Sweeney, Benton, Orans, Payne, Huebel, Abrahamsen, MacDonald and Wiener all participated in the extended operations associated with the major storm which resulted in extensive flooding.

23. I reviewed the attendance reports for April 1, 2007 through May 27, 2007. I can make the following observations based on those reports.

- There were 58 attendance reports relating to alarms only – excluding drills, meetings or social functions.
- During the period between April 1, 2007 through May 16, 2007, the average response per alarm was 7.3 volunteer firefighters.
- During the period between May 17, 2007 and May 27, 2007 the average response per alarm was 3.8 volunteer firefighters.
- Considering only those members listed on the Abrahamsen affidavit as NOT reporting to the Fire Council an intent to resign, the average attendance through May 16, 2007 was 1.7 volunteer firefighters. The average attendance after May 16, 2007 was 2.0 volunteer firefighters.

24. Based on this analysis of attendance records, I conclude that when the volunteers who have informed the Fire Council of their intent to resign on or about June 17 cease firefighting for the Larchmont Fire Department, the number of responding volunteer firefighters will drop to an average of two.

25. Based on the same attendance reports, for the 58 incidents involved, I count nine (9) incidents where there were no volunteer firefighters responding from among those who have NOT reported to Fire Council their intent to resign.

D. Volunteer Firefighter Harassment

26. Defendant Heine (See Heine Supplemental Affidavit paragraph 13) states that volunteers responding to alarms or other events have received harassing phone calls or emails discouraging participation.

27. I am not aware of any such incidents. As a firefighter and as a member of the Fire Council, no information concerning any such incidents has been reported to me.

28. A Fire Chief, under the department bylaws, has the duty and authority to discipline members for misconduct. If a Fire Chief is aware of misconduct, the appropriate remedy is to take steps to discipline the member involved.

E. Fire Council Proposals to the Village Board

29. Defendants (See Defendants' Supplemental Memorandum of law, page 11) state that they engaged in discussions with volunteer firefighters concerning their plans.

30. As a member of Fire Council, I am aware of two meetings with Fire Council since the announcement of the Board's plans. I was present at both meetings. At one meeting, the Fire Council presented to the Board a list of ten ideas to consider.

31. One of the ideas was that the Board should consider obtaining an Attorney General's Opinion before acting, for additional advice as to whether their plans were legal. This advice was rejected.

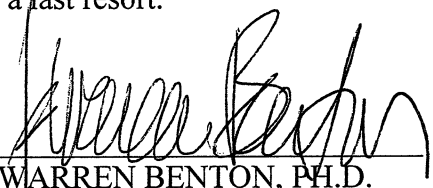
32. Another idea was to meet with the Town of Mamaroneck Fire Department leadership to discuss how they handled the kinds of problems that concerned the Board. This advice was rejected.

33. Another idea was to develop a detailed implementation plan so that the operational implications of their proposals could be fully evaluated. This advice was rejected.

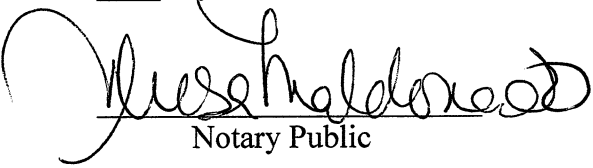
34. Another idea was to develop a full cost analysis of their proposals. This advice was rejected but the volunteers provided one to the Board anyway.

35. Another idea was to meet with the Town Council of the Town of Mamaroneck to discuss the Fire Council's study recommending merger with the Town of Mamaroneck Fire Department. This idea was rejected.

36. There were ten ideas, all rejected. The Plaintiffs never wanted to become involved in a lawsuit with our village. We filed this case as a last resort.


F. WARREN BENTON, PH.D.

Sworn to before me this
8th day of June, 2007


Notary Public

TERESA L. MALDONADO
Notary Public, State of New York
No. 01MA6056317
Qualified in Westchester County
Commission Expires 03/19/11