

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

JAMES E. SWEENEY, F. WARREN BENTON,  
SAM ORANS, BRIAN PAYNE, RAY  
MALDONADO, DAN HEUBEL, PAUL J.  
ABRAHAMSEN, CHRISTOPHER MACDONALD  
and MICHAEL WIENER,

Index No.: 9480/07

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.

**DEFENDANTS' MEMORANDUM OF LAW IN  
OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

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**DEFENDANTS' MEMORANDUM OF LAW IN  
OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

Defendant Elizabeth N. Feld, in her capacity as Mayor of the Village of Larchmont (the "Village"), together with defendants Marlene Kolbert, Anne McAndrews, Jim Millstein and Richard Ward, in their capacities as Trustees of the Village (the Mayor and the Trustees constitute and are collectively referred to herein as the "Village Board of Trustees" or the "Village Board") and defendant Richard Heine, Chief of the Fire Department of the Village, by their attorneys, submit this memorandum of law in opposition to plaintiffs' motion for a preliminary injunction.

**PRELIMINARY STATEMENT**

On May 16, 2007, the Village Board, acting pursuant to § 10-1020 of the N. Y. Village Law, adopted two resolutions which, among other things, provisionally appointed Richard Heine as the paid Fire Chief of the Village Fire Department and provided Chief Heine

with the authority over all Fire Department personnel, both paid and volunteer, and over all apparatus and equipment of the Village Fire Department. Chief Heine assumed the position of Chief on the morning of May 17, 2007.

Plaintiffs, who are volunteer members of the Village's combined paid and volunteer Fire Department, seek to enjoin the Village Board from employing defendant Richard Heine as the paid Fire Chief of the Department. Plaintiffs commenced this action by Order to Show Cause on May 19, 2007 seeking a temporary restraining order and preliminary injunction. Justice Richard B. Liebowitz, sitting as the Duty Judge, denied plaintiffs application for a temporary restraining order. For the reasons set forth below, Justice Liebowitz was correct and plaintiffs are similarly not entitled to a preliminary injunction.

As set forth below, the Village Board's actions were taken to address legitimate public concerns including, among other things: (i) the lack of communication between the paid and volunteer firefighters who must work together to serve and protect the Village; and (ii) the Fire Department's lack of accountability and failure to provide requisite information about the Fire Department to the Village. These concerns grow in great part out of the inherent unreasonableness of expecting a volunteer chief with another full time job to run a public safety department. The Village Board's actions were taken after years of discussion by the Village Board, a consultant study, numerous public hearings, and numerous discussions between Board members and both paid and volunteer firefighters, past fire chiefs and those involved with the provision of fire services from other communities.

Moreover, the Village Board complied with the precise language of §10-1020 of the N.Y. Village Law in appointing Heine to the position of paid Fire Chief and giving him authority over all Fire Department personnel, both paid and volunteer, and over all apparatus and

equipment of the Village Fire Department. In addition, the Westchester County Department of Personnel, which serves as the Civil Service Department for municipalities in the County, has approved the position of paid Fire Chief for the Village. Because the Civil Service Department is the administrative agency charged with interpreting and enforcing the State and County Civil Service Laws for municipalities in Westchester County including the appropriateness of positions pursuant to section 22 of the Civil Service Law, its determination in this regard is entitled to deference. Plaintiffs are, therefore, unlikely to succeed on the merits of their claims.

In addition, as set forth below, and contrary to plaintiffs' arguments, there is no danger of irreparable harm absent injunctive relief. Chief Heine has been serving as Chief since May 17, 2007 without incident. There has been no confusion as to his status as Chief or any question as to his authority over all personnel and equipment. Plaintiffs' arguments to the contrary are based on mere speculation and not facts. Moreover, because Chief Heine has been serving in his position since last Thursday, an order removing him from office would not, as plaintiffs suggest, preserve the status quo; rather, such an order would be more likely to disrupt the Department and cause the confusion that plaintiffs claim to be trying to avoid.

Finally, there is a presumption of validity to legislative resolutions and there is no evidence that the Village Board has exceeded its power or exercised its judgment in an arbitrary or discriminatory fashion. Thus, a balancing of the equities here tips in favor of the Village Board. Because plaintiffs cannot establish likelihood of success or irreparable harm, and because a balancing of the equities tips in favor of the Village Board, plaintiffs are simply not entitled to injunctive relief.

#### **STATEMENT OF FACTS**

As set forth more fully in the affidavit of Elizabeth N. Feld, sworn to on May 24, 2007 ("Feld Affidavit"), the Village Fire Department is comprised of both volunteer firefighters

and paid "professional" or "career" firefighters (sometimes referred to as a "Combination Fire Department"). The Fire Department currently has approximately 25 active volunteer firefighters, down from approximately 50 in 1991. There are currently 14 paid professional firefighters on the staff. Feld Affidavit ¶ 3.

For many years, the Village Board has been concerned with a number of issues affecting the Fire Department, including that (i) the number of volunteers has been dropping while the level of administrative and emergency preparedness responsibilities has increased exponentially; (ii) the cost of operating the department is growing; (iii) friction between the career and volunteer members is escalating to the point that the Department is not functioning effectively; and (iv) the demands on those in charge continues to intensify. Indeed, throughout his tenure, immediate past chief MacDonald continually expressed his grave concerns about these issues. Feld Affidavit ¶ 5.

The position of Chief of the Fire Department has become a full-time job, and it is virtually impossible for a volunteer, with another full-time job, to run a department with the level of detail and accountability that that the Village requires. All of the other Village departments are supervised by paid, full-time department heads. Feld Affidavit ¶ 6. The Buracker Report, commissioned by the Village Board in 1996 recommended that the Village hire a full time paid Fire Chief. Feld Affidavit ¶ 7 and Exhibit A.

The Village Board has given this issue years of very careful consideration. There have been numerous public hearings and countless discussions between board members and both paid and volunteer firefighters, past fire chiefs and those involved with the provision of fire services from other communities. This is not a matter of first impression. There are other

Combination Fire Departments within the County of Westchester with paid fire Chiefs, including the Villages of Scarsdale and Pelham. Feld Affidavit ¶ 8.<sup>1</sup>

The Village Board also sought the certification of the Westchester County Department of Personnel, which serves as the Civil Service Department for municipalities in the County. The Civil Service department has approved the position of paid Fire Chief for the Village.. Feld Affidavit ¶ 9 and Exhibit B.

Following years of careful consideration and approval by the Civil Service Department, on May 16, 2007, the Village Board adopted two resolutions provisionally appointing Richard Heine to the position of Fire Chief of the Fire Department, having authority over all Fire Department personnel, both paid and volunteer, and all Fire Department apparatus and equipment. Feld Affidavit ¶ 10 and Exhibit C. Chief Heine took and filed the oath of office with the Village Clerk on the Morning of May 17, 2007. Feld Affidavit ¶ 10.

As Chief Heine notes in his affidavit, sworn to on May 24, 2007 (“Heine Affidavit”) Chief Heine was raised in the Village, joined the Fire Department as a volunteer when he was fourteen years old, and remained as a volunteer for 6 years. In 1989, Chief Heine became a paid member of the Fire Department, where he has served for 17 years, most recently as a Lieutenant. Chief Heine is also a hospital corpsman for the United States Navy Reserves and has served two tours of combat duty in Iraq. He is intimately aware of the issues related to both groups in the Fire Department, and the Board believes that his unique background and skills make him the perfect choice to supervise the combination department. Heine Affidavit ¶ 2.

Chief Heine has been serving as Chief since May 17, 2007 without incident. Contrary to plaintiffs’ assertions, there has been no chaos or confusion as to his status as chief or

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<sup>1</sup> The Village itself had a paid Fire Chief from 1915 through 1934. Feld Affidavit ¶ 4.

any question as to his authority over all personnel and equipment. Former Chief MacDonald has acquiesced to the authority of Chief Heine. There have been calls in the past week while Chief Heine has been in charge and they have been dispatched efficiently and without confusion or question as to his authority. A training exercise was conducted with both volunteer and career members without incident. The Mayor has personally confirmed with the adjoining municipalities, the City of New Rochelle, the Town of Mamaroneck, and the Village of Mamaroneck, that they will continue to provide mutual aid and that they recognize Chief Heine's authority. The Village Police Department acknowledges Chief Heine's authority. There is simply no support for plaintiffs' assertions. Feld Affidavit ¶ 12; Heine Affidavit ¶¶ 3- 4.

Finally, there is no truth to the assertion that the Fire Department has been abolished. The four volunteer Companies remain in place. The Fire Council is still active, and the four Companies still elect two members from their respective membership to represent the Companies at Fire Council. The two Deputy Chiefs are still elected by the members of the Fire Department, with confirmation from the Board, and they retain the full authority they have had, which includes incident command authority at fire scenes. Feld Affidavit ¶ 13.

The only substantive change is that the Chief is now a full-time, paid employee of the Village, rather than a volunteer. He is the paid firefighter authorized by Village Law §10-1020 with authority over all Fire Department personnel, both paid and volunteer, and over all apparatus and equipment of the Fire Department.

### ARGUMENT

1. **Plaintiffs Cannot Demonstrate Likelihood of Success on the Merits because the Village Board's Resolutions Comply Entirely with the New York Village Law**

Section 10-1020 of the N. Y. Village Law provides in relevant part:

*Or, the board of trustees may, by resolution, determine that one or more firemen shall be employed to act with such*

voluntary department and may fix the salary of such firemen; *the board of trustees may also determine that such paid firemen shall have charge of all apparatus and other equipment and that the voluntary department shall act under the orders of such paid fireman or firemen.* (Emphasis Added).

The Board of Trustees of the Village of Larchmont complied with the precise language of this statute in appointing Heine to the position of paid Fire Chief and giving him authority over all Fire Department personnel, both paid and volunteer, and over all apparatus and equipment of the Village Fire Department. Thus, there is simply no basis to enjoin the Board's decision.

Plaintiffs argument that § 10-1020 requires "abolition of the Department" before the Village Board can appoint a paid fireman to take charge of the Department ignores the plain language of the statute. Plaintiffs' Memorandum in Support at 8. Pursuant to § 10-1020, a Village Board can either abolish a Fire Department, subject to a permissive referendum, *OR*, by resolution and not subject to permissive referendum, appoint a paid head of the Fire Department. That is why the State Legislature put the authority to appoint a paid head of the Fire Department in a subsequent sentence that begins with the word "Or."<sup>2</sup>

Likewise, plaintiffs arguments that preceding sections of Article 10 of the Village Law are not meant to be trumped by §10-1020 are clearly wrong. For example, plaintiffs assert that §10-1018 sets forth the duties of the *volunteer* chief. *See e.g.*, Plaintiffs' Memorandum in Support at 9. However, §10-1020 is obviously intended to trump §10-1018 if §10-1018 applies to a volunteer chief because §10-1020, the immediately following section, gives the Village Board the power to appoint a paid fireman who will have charge over all of the apparatus and

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<sup>2</sup> As noted above, there is no truth to the assertion that the Fire Department has been abolished as the four volunteer Companies remain in place as does the Fire Council. Feld Affidavit ¶ 13. Moreover, a decision accepting plaintiffs' view that the Department has or must be abolished would have serious implications to the other combination Fire Departments in the state which have paid chiefs.



personnel. The legislature could not have intended to have a volunteer chief under §10-1018 and a paid "head of department" under §10-1020 with the same powers. Thus, it must have been intended that in the event the provisions of §10-1020 were invoked, that section would trump the prior sections.

Moreover, plaintiffs' argument that the State Comptroller supports their position is disingenuous, at best. Plaintiffs' Memorandum in Support at 13. Comptroller's Opinion 79-600, which is relied on by plaintiffs and interprets Town Law, was written in 1971, twenty years before the Town Law was amended to enable a Town Volunteer Fire Department to provide for the hiring of paid head of the fire department. Thus, the Comptroller opined that without an act of the State Legislature or other enabling legislation, a paid fireman could not be appointed chief of a town volunteer fire department. That opinion is of no moment here because Village Law §10-1020 (enacted in 1927) provides the enabling legislation for a Village to hire paid firefighters and to require that "the voluntary department shall act under the orders of such paid fireman or firemen."

In short, the two resolutions adopted by the Village Board comply with Article 10 of the Village Law in all respects. Plaintiffs' arguments to the contrary are wholly without merit and therefore, plaintiffs are not entitled to a preliminary injunction.

2. **The Civil Service Department's approval of the Position of Chief of the Fire Department is Entitled to Deference**

The Westchester County Department of Personnel, which serves as the Civil Service Department for municipalities in the County, has approved the position of Chief of the Department for the Village.

The Civil Service Department administers all civil service examinations for the county and municipal subdivisions located therein, certifies all eligible lists, and oversees the

appointment and/or promotion of candidates within the County. *See* N.Y. Civil Service Law. In furtherance of its role in this regard, the Civil Service Department has promulgated Rules, the purpose of which “is to provide an orderly and uniform system for the administration of civil service in the County . . .” R. 117. As the New York Court of Appeals has noted, “[s]uch rules, properly adopted by such commissions have the force and effect of law . . . and are to be construed in the same manner as a statute”. *Albano v. Kirby*, 36 NY2d 526, 529, 369 N.Y.S.2d 655, 658 (1975) (internal citations omitted); *see also In re Fulton County*, 14 A.D.3d 771, 773, 788 N.Y.S.2d 232 (3d Dep’t 2005). The Civil Service Department is thus responsible for monitoring all civil service appointments made by municipalities within its jurisdiction. It is also the agency charged with advising municipalities within its jurisdiction of proper procedure and requirements for making those appointments. This includes the Village of Larchmont.

The Civil Service Department’s responsibilities also include determining which civil service positions are appropriate for municipal subdivisions in the County and has concluded that the position of Fire Chief is appropriate for all Villages within the County and specifically Larchmont. A copy of the County Personnel Officer’s Certification of the position for the Village of Larchmont dated March 26, 2007 is annexed to the Feld Affidavit as Exhibit B.

It is well-settled that an agency’s determination of matters in the area of its expertise is to be accorded deference by the courts. *See NLRB v. Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267, 274-75 (1974) (“a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration”); *Town of Southampton v. PERB*, 2 N.Y.3d 513, 520, 780 N.Y.S.2d 522, 526 (2004) (“since [the issue on appeal] relies upon the special competence [PERB] is presumed to have developed in its administration of the statute, we ultimately must afford great deference to PERB’s

determination”) (internal citations and quotations omitted); *Judd v. Constantine*, 153 A.D.2d 270, 272-73, 551 N.Y.S.2d 378, 379-80 (3d Dept 1990) (“judicial deference should be accorded an agency’s interpretation of a statute . . . where the agency’s interpretation has been longstanding and unchallenged, inducing reliance thereon by those practicing before it”) (internal citations and quotations omitted).

Furthermore, as the New York Court of Appeals has held “[o]rdinarily, courts will defer to the construction given statutes and regulations by the agencies responsible for their administration, if said construction is not irrational or unreasonable.” *Albano v. Kirby*, 36 NY2d 526, 532 , 369 N.Y.S.2d 655, 661 (1975). Because the Civil Service Department is the administrative agency charged with interpreting and enforcing the State and County Civil Service Laws for municipalities in Westchester County including the appropriateness of positions pursuant to section 22 of the Civil Service Law, its determination in this regard is entitled to deference. *See Benson v. McCaul*, 268 A.D.2d 756,757, 702 N.Y.S.2d 164 (3d Dep’t 2000). Moreover, municipalities are entitled to rely on the advice of the Civil Service Department on matters within its area of expertise.

Section 10-1020 of the Village Law permits the Village to employ paid firemen and to place all apparatus and personnel under the authority of the paid firemen. The County Personnel Department has previously certified the positions of firefighter, lieutenant and captain as appropriate for the Village of Larchmont as paid firemen. It has now certified the appropriateness of Fire Chief in the Village, and its determination of this issue should be deferred to because it is that Agency’s statutory responsibility to make such decisions and certifications.

**3. Plaintiffs Cannot Establish That They Will Suffer Irreparable Injury in the Absence of Injunctive Relief**

In support of plaintiffs' application, plaintiffs assert that they will suffer irreparable harm in the absence of injunctive relief because the appointment of a paid Fire Chief will create chaos in the Department. Plaintiffs Memorandum of Law at 13-15. In fact, that has not been the case. As set forth in greater detail in the Feld Affidavit and the Heine Affidavit, Chief Heine has been serving as Chief since May 17, 2007 without incident. There has been no confusion as to his status as chief or any question as to his authority over all personnel and equipment. Plaintiffs' arguments to the contrary are based on mere speculation and not facts.

Indeed, there is no confusion as to who the chief is because former Chief MacDonald has acquiesced to the authority of Chief Heine. There have been calls in the past week while Chief Heine has been in charge and they have been dispatched efficiently and without confusion or question as to his authority. The Mayor has confirmed with adjoining municipalities that they will continue to provide Mutual Aid, and will recognize Chief Heine's authority. The Village Police Department acknowledges Chief Heine's authority. There is simply no support for plaintiffs' assertions.

As to plaintiffs' suggestion that volunteers are going to resign in response to the Village Board's resolutions, that is entirely up to them. Plaintiffs cannot create irreparable harm by resigning or suborning other volunteers to resign and then complain of it.

The fact is that the appointment of Chief Heine has not and will not cause plaintiffs to suffer irreparable injury and absent irreparable injury and a likelihood of success on the merits, plaintiffs are not entitled to a preliminary injunction. *See Aetna v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918 (1990); *APA Security, Inc. v. Steven Apa, et al.*, 37 A.D.3d 502, 831 N.Y.S.2d 201 (2d Dep't 2007).

Moreover, because Chief Heine has been serving in his position since last Thursday and the transition has been smooth in all respects, an order removing him from office would not, as plaintiffs suggest, preserve the status quo; rather, it would more likely cause the confusion that plaintiffs claim to be trying to avoid.

4. **A Balancing of the Equities Tips In Favor of the Village Board's Properly Adopted Resolutions**

Finally, deference must be afforded the reasoned resolutions of the Village Board because legislative acts are presumptively valid.

When a municipal legislative body enacts an ordinance, a presumption of validity attaches to its resolution. The presumption of validity has the effect of (1) imposing the burden of proof on the party questioning the ordinance; and (2) sustaining the ordinance if the propriety of its enactment is fairly debatable. The content of the burden on the assailant is sometimes said to extend further than a mere preponderance of the evidence to proof beyond a reasonable doubt and perhaps we may best rationalize the presumption as a reminder of the force of legislative judgment which must be supported by the courts if there is "any state of facts either known or which could reasonably be assumed" on which the ordinance could be based (citations omitted).

*Spring Valley Gardens Associates v. Marrero*, 100 A.D.2d 93, 474 N.Y.S. 2d 311 (2d Dept. 1984) quoting *De Sena v. Gulde*, 24 A.D.2d 165, 169, 265 N.Y.S.2d 239 (2d Dep't 1965).

Where as here, the propriety of the resolutions is beyond doubt, the Village Board's Resolutions must be sustained. Clearly, the deference that must be afforded the reasoned resolutions of the Village Board tips the balancing of the equities in favor of the Village.

**CONCLUSION**

As set forth above, plaintiffs cannot demonstrate a likelihood of success on the merits of their claims or irreparable harm in the absence of the injunctive relief they seek.

Moreover, a balancing of the equities tips in favor of the Village Board. Accordingly, the Court should deny plaintiffs' application for a preliminary injunction in all respects.

Dated: White Plains, New York  
May 24, 2007

Respectfully submitted,

McCullough, Goldberger & Staudt, LLP

By:

A handwritten signature in black ink, appearing to read "Evan M. Eisland", is written over a horizontal line.

Evan M. Eisland

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