

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 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.: 9480/07

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

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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 supplemental memorandum of law in further opposition to plaintiffs' motion for a preliminary injunction and more specifically to address the memorandum of law and the affidavits submitted by plaintiffs in reply on this motion on May 29, 2007.

**PRELIMINARY STATEMENT**

Plaintiffs seek a preliminary injunction enjoining the Village Board's determination that a paid fireman, Richard Heine, shall have charge of all apparatus and other

equipment of the Village Fire Department and that the voluntary department shall act under the orders of such paid fireman. Plaintiffs cannot demonstrate a likelihood of success on the merits, however, because Villages, including the Village of Larchmont, are specifically permitted under § 10-1020 of the Village Law to place all apparatus and personnel of a volunteer department under the leadership and supervision of paid firemen.

Plaintiffs do not cite a single court decision or opinion by the Attorney General or State Comptroller which actually prohibits a village from placing the management of a volunteer fire department under the supervision of a paid chief. Moreover, plaintiffs' argument that the Village Board's actions have abolished the department and thus are subject to a permissive referendum is contradicted by the Village Board's Resolutions and the Village Law. The fact is that many village governments provide fire protection services under the exact model which has now been implemented by the Village of Larchmont and, thus, a ruling by this Court against the authority of a village to place its volunteer fire department under the jurisdiction of a paid chief would create uncertainty for other municipalities with respect to an area of law which, until now, has been settled.

Neither can plaintiffs demonstrate irreparable injury absent injunctive relief. First, the fact that volunteers have threatened to resign should not be a factor in the Court's decision. Indeed, beyond the fact that these volunteers are creating the very situation that they are deeming unsafe, the Court cannot sanction what is in essence a strike by Village safety personnel to protest a decision of the Village Board.

Second, at least ten current volunteers have indicated that they intend to remain members of the Fire Department and will not resign, two former volunteers have expressed their intention to return to the Fire Department and Chief Heine has received an application for a new

volunteer. Moreover, notwithstanding the threatened resignations, the Mayor, the Village Board, the Chief of Police (who is also the Emergency Coordinator for the Village) and Chief Heine -- the Village officials and administrators charged with responsibility for providing emergency services to the Village -- have concluded that under Chief Heine the provision of emergency fire services to the Village will not be diminished and there will be no additional risk to the community. Indeed, Chief Heine has been running the Village Fire Department since May 17 without negative incident. Based on the circumstances present here, neither the Court nor the volunteer firefighters should substitute their judgment for that of the Village Board.

In short, and as set forth below, plaintiffs have failed in *their burden* of establishing likelihood of success on the merits or irreparable injury absent injunctive relief. Accordingly, plaintiffs are simply not entitled to a preliminary injunction. This is especially so here, where (i) the Court would be substituting its judgment for that of the Village officials and administrators charged with providing emergency services for the Village; and (ii) the injunction that plaintiffs seek would not maintain the status quo; rather it would remove Chief Heine from the position he has occupied without negative incident for the last 3 weeks.

### **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**

For more than 30 years, John Galligan has been the New York State Conference of Mayors' ("NYCOM") staff member for labor and employment matters, including civil service topics and issues relating to paid and volunteer fire departments.<sup>1</sup> In this capacity, he regularly

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<sup>1</sup> Founded in 1910, NYCOM is a statewide voluntary membership organization of approximately 581 municipalities representing more than 7000 local government officials. One of the services the organization provides is advising municipal officials on pending issues, including litigation. NYCOM frequently appears as an amicus curiae in litigation on subjects of interest to its members and also maintains regular contact with entities that interact with local governments, including the State Comptroller, the Attorney General and the State Legislature. Affidavit of John Galligan sworn to on June 5, 2007 ("Galligan Aff.") ¶ 1.

conducts training programs for government officials on fire department matters. Mr. Galligan also edits a monthly labor relations publication which is distributed to NYCOM members. Information on volunteer firefighters, summaries of court decisions, new legislation affecting public sector employment matters, statutory changes and decisions involving volunteer firefighters are regularly included in his publication. Additionally, Mr. Galligan consults with municipal officials to ensure that they are in compliance with applicable provisions of law. Galligan Aff. ¶ 2.

With respect to a Village's authority to place all apparatus and personnel of a volunteer fire department under the leadership and supervision of paid firemen, Mr. Galligan confirms that § 10-1020 is quite clear:

Villages, including the Village of Larchmont, are specifically permitted under §10-1020 of the Village Law to place all apparatus and personnel of a volunteer department under the leadership and supervision of paid firemen. While the statute refers generically to the employment of "firemen," in practice, in many municipalities the paid firemen who assume the management responsibility over a department are often officers up to and including the rank of chief of the department. I am familiar with many village volunteer fire departments that are under the jurisdiction of a paid chief and have consulted with the Executive Director of the State Fire Chiefs Association on that subject. Galligan Aff. ¶ 3.

With respect to decisions of the Attorney General and State Comptroller on this issue Mr. Galligan notes that:

In advising municipal officials on the operations of volunteer fire departments and in conducting educational programs on that issue, I regularly review decisions of the Attorney General and State Comptroller and have occasion to speak to representatives of those agencies. I am aware of no legal opinion from either agency or the courts which would prohibit a village from placing the management of a volunteer fire department including the supervision of all personnel under the supervision of a paid chief. As the last clause of §10-1020 provides, a board of trustees may determine that "the voluntary department shall act under the orders of such paid fireman or firemen." Galligan Aff. ¶ 4.

In this regard, plaintiffs' insistence that the Comptroller's 1979 Opinion (Op. St. Compt. No. 79-600) which held that a paid fireman could not be appointed chief of a town volunteer fire department, "was interpreting the identical statutory framework as now under the current village law" is simply dishonest. Plaintiffs' Reply Memorandum at 3-4. When this Comptroller's Opinion was written there was no provision in the Town Law similar to the provision in the Village Law providing for the placement of the apparatus and personnel of a volunteer fire department under the leadership and supervision of a paid fireman. It was not until 1991 that the Town Law was amended to provide a similar authority for Towns (§ 176(11-c)). In contrast, Village Law has provided for a Village Board to determine that its voluntary department shall act under the orders of a paid fireman for decades. As Mr. Galligan notes:

The last recodification of the Village Law took effect January 1, 1973. Section 10-1020 derives from the former §211 of the Village Law. Section 10-1020 is virtually identical to the former section, the only difference being the addition of an authorization for a board of trustees to act by resolution in employing firefighters and fixing their salary. In effect, the substantive wording of §10-1020 and its predecessor have existed for decades. Galligan Aff. ¶ 5.

Accordingly, a 1979 Comptroller's Opinion addressing the New York State Town Law which had no companion provision to Village Law § 10-1020 at the time is inapposite to this case.

Similarly, the 1992 Comptroller's Opinion relied on by Plaintiffs applies to a new volunteer chief pursuant to § 10-1012. *See* Op. St. Compt. No. 92-38, 1992 WL 442090 (1992). That opinion simply does not address the circumstance present in this case, where the Village Board, by resolution, gave control of the voluntary department to a paid fireman under § 10-1020. Mr. Galligan offers further explanation of the Comptroller's Opinions, distinguishing between a paid Volunteer Chief and a paid Chief of a Volunteer Department:

Over the years there have been opinions issued by the Comptroller advising that a volunteer fire chief can not receive a monetary

payment for services rendered as chief. However, in the event someone is employed to serve as the chief of a volunteer fire department, the individual would not be a volunteer and would be paid a wage for services rendered. An opinion which serves to highlight this distinction is Op. St. Compt. No. 80-544. Galligan Aff. ¶ 5.

In short, plaintiffs' suggestion that Comptroller's Opinions support their position is wholly without merit.

Similarly without merit is plaintiffs' final argument that the Village Board has abolished the Fire Department and, thus, pursuant to Village Law § 10-1020, the Village Board's Resolutions are subject to permissive referendum. Plaintiffs' Reply Memorandum at 6.

First, and as noted previously, § 10-1020 does not require a permissive referendum for a resolution to employ a paid fireman or to place all apparatus and personnel of a volunteer department under the leadership and supervision of a paid firemen. That is why the second sentence of § 10-1020 begins with the word "Or" and does not mention the term "permissive referendum." Moreover, the second sentence of § 10-1020 states that "the *voluntary department* shall act under the orders of such paid fireman . . . ." (Emphasis added). Plaintiffs' interpretation of the statute to require abolition of the *voluntary department* before turning control of the *voluntary department* over to a paid fireman simply makes no sense and contradicts the express language of the statute.

Second, plaintiffs' argument that the Village Board has abolished the Fire Counsel is not true, as the Resolutions clearly state that the "Fire Counsel of the Village of Larchmont shall remain in place." Moreover, as set forth in the Affidavit of Mayor Elizabeth Feld, sworn to on May 24, 2007 ("Feld Aff.") at ¶ 13:

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.

Even if the Village Board had abolished the Fire Counsel, however, such act would not constitute the abolition or partial abolition of the Fire Department. Indeed, Village Law does not mandate that a Village Fire Department have a fire council. Pursuant to Village Law § 10-1014, a fire council only exists in a village “in which separate fire commissioners are not appointed . . . .” Thus, for example, the Village Board may, at any time, abolish the Fire Counsel by appointing a board of fire commissioners pursuant Village Law § 3-308(1) and such act would not abolish the fire department in whole or in part.

The fallacy of plaintiffs’ argument that the appointment of a paid chief affects the responsibilities of the Fire Council, and therefore constitutes a partial abolishment of the Fire Department, is evident if taken to its logical conclusion: A Village Fire Department, by definition, must have either a Board of Fire Commissioners or a Fire Council. Village Law § 10-1014. The appointment of a paid chief would have the same effect on a Board of Commissioners as it has on a Council. Thus, if plaintiffs’ argument is correct, then the appointment of a paid chief would always constitute a partial abolishment of the department. This, however, cannot be the case, because the legislature placed the authority to appoint a paid chief in the portion of § 10-1020 that does not require a permissive referendum. If plaintiffs were correct, the appointment of a paid chief would always require a permissive referendum, and the legislature would not have so carefully placed the appointment of a paid chief in the portion of § 10-1020 that does not require a permissive referendum.

In addition, the term “fire department” is a defined term in Article 10 of the Village Law. Section 10-1008 defines “fire department” as a corporation comprised of “the members of all the fire, hose, protective and hook and ladder companies of a village . . . .”

Village Law § 10-1008. Accordingly, because the Village Board's Resolutions do not abolish the Companies of the fire department in whole or in part, they do not abolish any part of the fire department as that term is specifically defined in Article 10.

As summarized by Mr. Galligan:

[M]any village governments provide fire protection services under the exact model which has now been implemented by the Village of Larchmont. A ruling by this Court against the authority of a village to place its volunteer fire department under the jurisdiction of a paid chief would create uncertainty for other municipalities with respect to an area of law which has been settled. There is no basis of which I am aware for the challenge before this Court. Galligan Aff. ¶ 6.

Indeed, there is no basis in law for the challenge presently before this Court and therefore, plaintiffs are not, as a matter of law, entitled to a preliminary injunction.<sup>2</sup>

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

To prevail on their motion for a preliminary injunction, plaintiffs must establish, in addition to a likelihood of success on the merits, that plaintiffs will suffer irreparable harm in the absence of injunctive relief. *APA Security, Inc. v. Steven Apa, et al.*, 37 A.D.3d 502, 831 N.Y.S.2d 201 (2d Dep't 2007). Plaintiffs have failed in this regard.

As set forth in the accompanying Supplemental Affidavit of Chief Heine sworn to on June 6, 2007 ("Supplemental Heine Aff."), the affidavit of Village Police Stephen D. Rubeo sworn to on June 5, 2007 ("Rubeo Aff."), and the previously submitted affidavit of Mayor Feld, there is simply no truth to the allegations that the Village Board's determination has placed the Village in danger. On this the Village officials charged with the responsibility for providing

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<sup>2</sup> Plaintiffs' argument that defendants somehow acted inappropriately in submitting a "New Position Duties Statement" for the position of "Fire Chief Proposed" to the Westchester Civil Service Department is absurd. Plaintiffs' Reply Memorandum at 9-10. Defendants submitted the Statement for certification of the new position prior to issuing its resolution which directed the employment of a paid chief. Defendants' actions were both necessary and appropriate and the fact is that Civil Service certified the position as appropriate for the Village of Larchmont on March 23, 2007. Feld Aff. ¶ 9 and Exhibit B.

emergency services to the Village are quite clear; there is no confusion as to who is chief and no added risk to the community. Supplemental Heine Aff. ¶¶ 11, 14, 20; Rubeo Aff. ¶ 9-10; Feld Aff. ¶ 12.

According to Chief Heine, at least ten current volunteers have advised that they intend to remain members of the Fire Department and will not resign. Moreover, Chief Heine has received an application for a new volunteer, and two former volunteers have expressed their intention to return to the Fire Department. Supplemental Heine Aff. ¶ 12.

The fact that other volunteers have threatened to resign should not be a factor in the Court's decision. Only two of the nine plaintiffs have responded to fire calls since May 17. Moreover, volunteers willing to work with Chief Heine have reported receiving harassing phone calls and e-mails from other volunteers in which the participating volunteers were told that their attendance was causing the absent volunteers to look bad and ruining the effect of their stop-work action. Supplemental Heine Aff. ¶ 13. Beyond the fact that these volunteers are creating the very situation that they are deeming unsafe, the Court cannot sanction what is in essence a strike by Village safety personnel to protest a decision of the Village Board. The Taylor Laws prohibit this conduct by union employees. *See* N.Y. Civil Service Law § 210. The Court should not reward the volunteers for, what is in essence, the same inappropriate conduct.

In any event, notwithstanding these resignations, the provision of emergency fire services to the Village will not be diminished and there will be no added risk to the community. In this regard, it must be noted that although at least three career firefighters respond to every fire alarm, there is never a guaranty that any volunteers will answer a call and the Fire Department must always be prepared to handle that situation. Indeed, even before the Village Board adopted the Resolutions, during the six month period from October 2006 through March 2007, there were

at least 10 fire calls where not a single volunteer showed up. During that same period, on average, only four volunteers responded to fire calls on weekdays from 8 a.m to 6 p.m. The fact is that the Village respects and appreciates its volunteers, but it does not depend exclusively on them for fire safety.<sup>3</sup> Supplemental Heine Aff. ¶ 15; Rubeo Aff. ¶¶ 11-12.

When volunteers are not available, which is more common during weekdays when many volunteers are at work outside of the Village, the Fire Department relies on the assistance of the Village Police. This will continue regardless of whether volunteers resign. Moreover, the Village Fire Department handles first alarm emergencies; for second alarms and higher, larger fires and high life hazard situations, the Village always relies on Mutual Aid. Again, this will not change, regardless of whether volunteers resign. Supplemental Heine Aff. ¶ 16; Rubeo Aff. ¶ 11-12.

In short, notwithstanding the threatened resignations of many of the volunteer firefighters, the Village remains well protected with Richard Heine as the Chief of the Fire Department.

Moreover, Police Chief Rubeo confirms that there is no confusion within the Police Department or elsewhere as to who is the Chief of the Fire Department. Rubeo Aff. ¶ 9. Chief Rubeo further confirms that Chief Heine has the full support of the Police Department. *Id.* Likewise, Chief Heine has personally conferred with Fire Chief Matt Peloso of the Town of Mamaroneck who has confirmed the continued Mutual Aid response and support of his

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<sup>3</sup> The plaintiffs' references to their attendance rates are extremely misleading. For example in the period from October 2006 through March 2007, the Fire Department received 406 calls. In their attendance rates, however, the volunteers do not count calls for Emergency Medical Services or still alarms, but they do count attendance at non-fire related events, such as training events, parades, meetings and social gatherings. Thus, plaintiff Benton, for example, who claims a much higher attendance record during this period, attended only 20 out of 195 fire calls (only 10%) and only 20 out of 406 total calls (5%). Similarly, plaintiff Maldonado responded to only 6 fire calls during this period or 3% of the total calls, and plaintiff Heubel responded to only 37 fire calls or 9% of the total calls. Again, the Village appreciates these volunteers, but is not relying on them for fire protection and safety. Supplemental Heine Aff. ¶ 15, n.1.

Department. Supplemental Heine Aff. ¶ 17. Westchester County Commissioner of Emergency Services Anthony Sutton, Deputy Commissioner of Emergency Services John Jackson and Chief of Communications and EMS Michael Volk have also acknowledged that Chief Heine is the Chief of the Village Fire Department and have agreed to work with Chief Heine and the Fire Department in the event of an emergency. Supplemental Heine Aff. ¶ 19.

In sum, there is no confusion as to Chief Heine's status as Chief or any question as to his authority over all personnel and equipment. Indeed, former Volunteer Chief MacDonald has returned the Chief's car and personally handed the keys to Chief Heine. Supplemental Heine Aff. ¶ 20. Moreover, notwithstanding the volunteers' threatened resignations, the Village remains well protected with Richard Heine as Chief of the Fire Department. Thus plaintiffs' have failed in their burden of establishing irreparable injury in the absence of injunctive relieve.

**3. The Court Must Not Substitute its Judgment for that of the Village Board**

It has long been the law in New York that a court may not substitute its judgment for that of the legislature as to the wisdom or expediency of its legislation. *Thompson v. Wallin*; 301 N.Y. 476, 488, 95 N.E.2d 806, 811 (1950); *McCabe v. City of New York*, 213 N.Y. 468, 484, 107 N.E.1049, 1953 (1915)

The Village Board gave this issue very careful consideration over many years. Numerous public hearings were held, a consultant was retained and countless discussions took place between board members and both paid and volunteer firefighters, past fire chiefs and those involved with the provision of fire services from other communities. Feld Aff. ¶ 8.

The Village Board observed that friction between the career and volunteer members had escalated to the point that the Department was not functioning effectively. The Village Board determined that it was virtually impossible and no longer reasonable for a

volunteer, with another full-time job, to run the Fire Department with the level of detail and accountability that the Village reasonably requires. All of the other Village departments are supervised by paid, full-time department heads. Feld Aff. ¶ 6.

Indeed, recent volunteer chiefs have been ineffective in managing the Department, coordinating with the Village and other emergency departments and controlling or disciplining either the volunteer or career firefighters. Previous volunteer chiefs have failed, for example, to track and monitor the turnout gear and radios that each volunteer receives and which cost the Village approximately \$3,000 per firefighter. In addition, despite repeated requests from the Mayor, the Village Board and the Police Chief, previous fire chiefs have failed and refused to collect and provide data and information. As another example, the Village requested that after-action meetings and debriefings be held with firefighters following significant events such as the recent flood and a substantial house fire, but the part-time volunteer chief was simply unable to comply with the Village's request. Supplemental Heine Aff. ¶¶ 5-6. Rubeo Aff. ¶¶ 6-7.

Yet another example of the need for a full-time independent chief arises out of the issue of Mutual Aid. The Village Fire Department provides and receives "Mutual Aid" on an as called for basis from neighboring fire departments. Indeed, Mutual Aid is and has been an essential component of the Village's fire protection plan for many years and, in that regard, the volunteers established an order in which neighboring communities are called to provide Mutual Aid. Remarkably, the City of New Rochelle, which is one of the Village's closest neighbors, has a full professional staff and a three to four minute response time, is among the last to be called to supply Mutual Aid. The sole reason for this is that the volunteers do not want to work with New Rochelle's professional department. Supplemental Heine Aff. ¶ 7.

This issue between the volunteers and the New Rochelle Fire Department rose to an extremely dangerous situation last year when, having arrived first on scene of a fire on the top floor of a five-story building and having assessed the situation, the career firefighters called for Mutual Aid from both the Town of Mamaroneck and the City of New Rochelle. The volunteer Deputy Chief cancelled the call for mutual aid to New Rochelle, however, even before he had acquainted himself with the severity of the situation. Supplemental Heine Aff. ¶ 8.

The unwillingness on the part of the volunteers to work with the New Rochelle Fire Department is a significant issue that must be corrected and Chief Heine has already taken the step of moving the New Rochelle Fire Department to the second position on the Village Mutual Aid ladder and Chief Heine has spoken with Fire Commissioner Raymond Kiernan of the New Rochelle Fire Department who confirmed his Department's commitment to providing Mutual Aid response and support. Supplemental Heine Aff. ¶ 9.

Another example of discord between the volunteer and career firefighters involves the way alarms are dispatched. Several months ago, the volunteers asked the Village Board to switch from the present system to "60 Control," a dispatch service provided by Westchester County. The career firefighters objected to the change. The Village Board heard presentations from both sides and concluded that that it was not ready to make the change. Nevertheless, and without advising the Village Board or the Chief of Police (who also acts as the Village Emergency Coordinator), the volunteer chief contacted 60 Control to advise that the Village was changing its dispatch system to 60 Control. Supplemental Heine Aff. ¶ 10. To prevent this sort of irresponsible conduct in the future, an independent Fire Chief is necessary to coordinate emergency services with the Village Emergency Coordinator.

Following years of careful consideration and approval of the position of paid Fire Chief within the Village 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 Aff. ¶ 10. That decision was legal and justified in all respects. It was neither arbitrary nor capricious and accordingly, is entitled to deference. The Court must not substitute its judgment for that of that of the Village Board.

### CONCLUSION

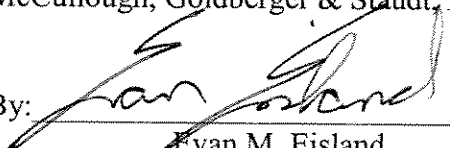
As set forth above, plaintiffs have failed in their burden to demonstrate a likelihood of success on the merits of their claims or irreparable harm in the absence of the injunctive relief they seek. Accordingly, the Court should deny plaintiffs' application for a preliminary injunction in all respects.

Dated: White Plains, New York  
May 24, 2007

Respectfully submitted,

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