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COURT OF APPEALS

STATE OF NEW YORK

Matter of:

M.G.M. INSULATION, INC.,

Appellant,

-against-

No. 4

COLLEEN GARDNER,

Respondent.

20 Eagle Street
Albany, New York 12207
January 2, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 4, Matter of
2 M.G.M. Insulation.

3 MR. ADAMS: Good afternoon, Your Honors.
4 Anthony Adams for the appellant contractors. And
5 Judge Lipmann, may I reserve two minutes for
6 rebuttal, please?

7 CHIEF JUDGE LIPPMAN: Two minutes, sure.
8 Go ahead.

9 MR. ADAMS: Thank you.
10 Your Honors, if the commissioner had the
11 jurisdiction she claims here to extend prevailing
12 wage laws to functional equivalents of the public
13 entities that are listed in the statute, there would
14 have been no reason for the legislature to amend the
15 law in 2007 to extend it to contracts of entities - -
16 -

17 CHIEF JUDGE LIPPMAN: What about the
18 service agree - - -

19 MR. ADAMS: - - - that are in place of - -
20 -

21 CHIEF JUDGE LIPPMAN: What about the
22 service agreement here?

23 MR. ADAMS: The service agreement plainly
24 is for services - - -

25 CHIEF JUDGE LIPPMAN: Does that contemplate

1 that there would be labor - - - laborers and - - -

2 MR. ADAMS: Did not, Your Honor.

3 CHIEF JUDGE LIPPMAN: - - - building a
4 firehouse? No?

5 MR. ADAMS: It did not; no, sir. The - - -

6 CHIEF JUDGE LIPPMAN: Why not? What does
7 it contemplate?

8 MR. ADAMS: What it contemplates in its
9 language is that the fire department will provide
10 fire services, fire prevention services, fire - - -
11 and accidental types of services. That's all it
12 talks about. There's an annual fee. This is all per
13 statute.

14 CHIEF JUDGE LIPPMAN: There was no
15 contemplation of a building being built?

16 MR. ADAMS: No, there was not, Your Honor,
17 not in the contract. This is an annual service
18 contract which was simply for firefighting services
19 and ambulance services. It's the same contract every
20 year, just like the statute requires. Now, what did
21 happen - - -

22 CHIEF JUDGE LIPPMAN: But does - - -

23 JUDGE GRAFFEO: They did increase it quite
24 a bit - - -

25 MR. ADAMS: Now, what did happen - - - what

1 did happen is - - -

2 JUDGE GRAFFEO: - - - though to cover - - -

3 MR. ADAMS: - - - is one year - - -

4 JUDGE GRAFFEO: - - - the debt load, the
5 anticipated debt load.

6 MR. ADAMS: That's right, Judge. In one
7 year, 2005 or 2006, the amount paid under the service
8 contract was increased by 150,000 dollars and at that
9 time - - -

10 CHIEF JUDGE LIPPMAN: So isn't that
11 significant of something?

12 MR. ADAMS: Sure. They knew - - - they
13 knew that the occupancy costs of the fire department
14 were going to increase. The occupancy costs of a
15 fire department are part of the costs that they
16 recoup in their service agreement, same as Charter
17 School.

18 CHIEF JUDGE LIPPMAN: Doesn't that
19 contemplate the building of a building which involves
20 work to get that building built?

21 MR. ADAMS: Contract doesn't contemplate
22 it, Your Honor. The contract - - - the fact that
23 people may have known about it, the fact that the
24 Village knew the occupancy - - - changing the
25 occupancy needs of the fire department doesn't change

1 the nature of the contract from a service contract.
2 That's all it was.

3 JUDGE GRAFFEO: Do you know if this was the
4 first time that the Department of Labor imposed the
5 prevailing wage requirements on the construction of a
6 volunteer firehouse?

7 MR. ADAMS: I know it was not the first
8 time.

9 JUDGE GRAFFEO: I mean, there's hundreds of
10 them that are renovated and built around the - - -

11 MR. ADAMS: That's right, Your Honor. And
12 what I know is that - - -

13 JUDGE GRAFFEO: Are they all subject to
14 prevailing wage - - -

15 MR. ADAMS: Depends what year, Your Honor;
16 it depends what year.

17 JUDGE GRAFFEO: - - - or is the - - - do we
18 have to look particularly at the financial
19 arrangements in this case?

20 MR. ADAMS: It depends what year you talk
21 about it because in my appendix I included three or
22 four opinions that have been issued over the years by
23 the Department about private fire corporation
24 buildings. In some years, they say they're exempt
25 because they aren't municipal corporations. And then

1 a few years go by, and they say, well, we changed our
2 mind; they're really more - - - since they do get
3 public funding, they're really more in the nature of
4 a hybrid. And that goes for a few years, and then
5 they change their mind again.

6 The letter in this case that found - - -
7 that counsel's office wrote that said, yeah, this is
8 a prevailing wage job - - - admitted in the letter
9 itself we're reversing what we've written and the
10 policy we've been following in our past letters.

11 JUDGE PIGOTT: You did - - - did you - - -
12 is there something in this record about you are
13 indemnifying or holding harmless the contractors?

14 MR. ADAMS: There is, Your Honor. The
15 volunteer fire company - - - once the Department of
16 Labor came to the site and told people you're going
17 to have to pay prevailing wages, the contractors
18 stopped working. And at that point, the volunteer
19 fire department issued a letter to the contractor
20 that said, we'll indemnify you in the event that you
21 are found responsible.

22 JUDGE PIGOTT: Well, this has - - - this
23 section has criminal penalties.

24 MR. ADAMS: It does; that's right, Your
25 Honor.

1 JUDGE PIGOTT: You can - - - so, I mean,
2 under our jurisprudence, I think that means we
3 strictly construe it, and you can indemnify them for
4 whatever the fine is, but don't they then face
5 disqualification for up to five years or - - -

6 MR. ADAMS: They face - - - not only they
7 face interest at sixteen percent. They face a
8 penalty of twenty-five percent. They face potential
9 disbarment from future public work. In extreme
10 cases, they face potential criminal conduct.

11 But if I may, Your Honor, I don't think the
12 indemnity agreement really affects the issue here.
13 The question is really whether the commissioner has
14 the authority to go beyond - - - to extend this law
15 beyond the four entities that are very clearly
16 spelled out.

17 JUDGE PIGOTT: I raised it because I don't
18 think it covers everything and - - -

19 MR. ADAMS: It does not; I agree.

20 JUDGE PIGOTT: - - - to get back to my - -
21 - my point is that when we have a criminal statute or
22 a statute that has criminal sanctions, we usually
23 construe them very strictly because you've got to let
24 people know that they may be subject to criminal
25 penalties here.

1 MR. ADAMS: Well, that's right, Your Honor.
2 Not only that, but this court has said on more than
3 one occasion that when defining what the meaning of
4 public work is, under Labor Law 220, it's to be
5 construed strictly under a strict legal sense. Now,
6 I know the other - - -

7 JUDGE GRAFFEO: Well, there's two prongs,
8 right, whether - - -

9 MR. ADAMS: Yes, there are.

10 JUDGE GRAFFEO: - - - it's a public entity
11 and whether it's a public contract.

12 MR. ADAMS: That's right, Your Honor.

13 JUDGE GRAFFEO: Under the public entity
14 prong, what are the factors that you suggest we
15 should examine here to determine if - - -

16 MR. ADAMS: The statute, Your Honor - - -
17 the Section Labor Law 220 which says that it only
18 applies to contracts of a municipal corporation, the
19 state, a public-benefit corporation or a commission
20 appointed pursuant to law. That's what the statute
21 says. Now - - -

22 JUDGE READ: But you say it's restricted to
23 four categories.

24 MR. ADAMS: That's right, Your Honor.
25 That's what it is; it's surely what that says.

1 JUDGE SMITH: Would the amendment change
2 the result here if it applied?

3 MR. ADAMS: It might, Your Honor; I'm not
4 certain.

5 JUDGE GRAFFEO: It would make it a closer -
6 - -

7 MR. ADAMS: It would make it a closer case.

8 JUDGE GRAFFEO: Certainly would.

9 MR. ADAMS: The reason I'm not certain is
10 it didn't make a difference in the Charter Schools
11 case which is also a closed case.

12 CHIEF JUDGE LIPPMAN: But, again, I come
13 back to the question I asked you originally, which I
14 think was the issue in the Charter School case, too.
15 Was the agreement in contemplation of, you know,
16 workers working on this kind of a building as opposed
17 to - - - you could find that in the Charter School
18 case there wasn't that contemplation in the charter
19 as opposed to this case with this agreement, right?
20 One could argue that.

21 MR. ADAMS: Your Honor, I don't think so.
22 There's more in the charter - - -

23 CHIEF JUDGE LIPPMAN: Well, why not?

24 MR. ADAMS: Because there's more language
25 in the charter - - - what you're looking at in the

1 Charter Schools case, that charter actually described
2 the physical premises in which the school was going
3 to operate, at least. If you look at these service
4 contracts, and they haven't changed in substance, the
5 service contracts specifically say, in consideration
6 of the fire department providing firefighting
7 services and emergency services - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but again - - -

9 MR. ADAMS: - - - we're going to pay you a
10 lump sum.

11 CHIEF JUDGE LIPPMAN: But going back to the
12 point that Judge Graffeo made before, but there was
13 an increase in the - - -

14 MR. ADAMS: In the service charge.

15 CHIEF JUDGE LIPPMAN: That could only be
16 attributable to one thing, right?

17 MR. ADAMS: Well, they did it because they
18 knew that the occupancy costs of the fire department
19 were going to increase. There's no question that
20 that money was increased to help the fire department
21 fund its move - - - or fund its future occupancy
22 costs.

23 JUDGE GRAFFEO: Did they get funding from
24 any other sources?

25 MR. ADAMS: Oh, yes, Your Honor. They

1 borrowed the money themselves. They got a permanent
2 loan.

3 JUDGE GRAFFEO: Did they own the land or
4 they had to buy the land?

5 MR. ADAMS: They purchased the land from
6 private company - - - from private - - - here's what
7 happened. They went out - - - they had a little bit
8 of money that they had saved from fundraising. They
9 went out and they got a 2.1-million-dollar loan from
10 the United States Agriculture Department, USDA. They
11 - - - that was only payable upon substantial
12 completion. So then they went out to the local bank
13 and they got three separate loans from the local bank
14 - - - one to fund the purchase of the lots, which
15 they did themselves, and then later to fund the
16 progress payments to the contractors. They were the
17 only ones on those notes; they were the only ones on
18 those obligations.

19 Then when the project was substantially
20 complete, the funding came in from the federal
21 government on the loan that the fire department had
22 acquired, and that was used to pay back the bank.
23 The fire department is the only entity that was on
24 the hook for any of the loans, any of the deeds, any
25 of the other obligations in this record.

1 Now, to the extent that there are minutes -
2 - -

3 JUDGE GRAFFEO: Well, what was the total
4 cost of the project? Do we know? Was that in the
5 record?

6 MR. ADAMS: It's about 2.5 million dollars,
7 Your Honor.

8 JUDGE GRAFFEO: And how much of that came
9 from the Village?

10 MR. ADAMS: None of it; none of it. What
11 we're talking about from the Village is increasing
12 the annual fee.

13 JUDGE GRAFFEO: Only the debt service was
14 paid from the - - -

15 MR. ADAMS: Well - - -

16 JUDGE GRAFFEO: - - - monies received from
17 the Village?

18 MR. ADAMS: - - - the Village didn't
19 technically pay the debt service. The Village
20 increased the service fee each year in part to help
21 the district be able to fund its own debt service on
22 its own loans.

23 JUDGE READ: Well, the debt service was
24 what, slightly more? The debt service was like 158
25 or 156 or - - -

1 MR. ADAMS: That's right, Your Honor.

2 JUDGE READ: - - - 150.

3 Before your time entirely expires, Judge
4 Graffeo asked you about the two prongs - - -

5 MR. ADAMS: Yes.

6 JUDGE READ: - - - the public entity and
7 public work. Now, what's your position on the public
8 work? Is this public work?

9 MR. ADAMS: Not a public work, Your Honor.
10 I think this court's precedent is pretty clear that
11 it's the use to which - - - it is the - - - a public
12 work is if it's a - - - if a work is going to be
13 built for public use and access. The fact that this
14 may be used for a public purpose is not the same
15 thing. Public use and access. The public is not
16 going to have use of this building.

17 JUDGE SMITH: Are you saying that even if
18 the Village builds a firehouse it's not a public
19 work, even if the Village itself builds it?

20 MR. ADAMS: If the Village itself builds
21 it, I'm not sure if there are different things that
22 go into play on that point, Your Honor. But I would
23 say that in this case it's not because a private - -
24 - probably if the Village builds it, maybe it is
25 because the Village is a public entity and

1 traditionally its citizens have access to it. This
2 is a private entity that built this. The citizens
3 don't have access to this firehouse.

4 CHIEF JUDGE LIPPMAN: Do you think there'd
5 be a difference in the access between if the city had
6 built it and what happened here?

7 MR. ADAMS: For sure there could be, Your
8 Honor. And here's a great example - - -

9 CHIEF JUDGE LIPPMAN: Is there in practice?

10 MR. ADAMS: There's a great example here.

11 CHIEF JUDGE LIPPMAN: Is there in practice,
12 counsel?

13 MR. ADAMS: In practice, well, I don't
14 know, Your Honor.

15 CHIEF JUDGE LIPPMAN: There's not a logical
16 distinction between them.

17 MR. ADAMS: I don't know. All I can tell
18 you is in - - -

19 CHIEF JUDGE LIPPMAN: I'm asking you the
20 question.

21 MR. ADAMS: Well - - -

22 CHIEF JUDGE LIPPMAN: There's not a logical
23 distinction between the two, between the Village as
24 an entity?

25 MR. ADAMS: I'm not sure about that, Your

1 Honor. To the extent there's an area of the building
2 that's used for fundraising and that kind of - - - or
3 a common area, that was something - - - in the hands
4 of a village, they may have to make that available to
5 everybody; I don't know. In the hands of this
6 private fire corporation, they leased it out to
7 people on a - - - who are willing to pay the rate and
8 - - - for their community room, and that was - - -
9 and they could be free to turn somebody away. I'm
10 not sure a village would be.

11 CHIEF JUDGE LIPPMAN: Okay. Counselor, you
12 have your rebuttal time. Let's hear from your
13 adversary.

14 MR. ADAMS: Thank you, Your Honor.

15 CHIEF JUDGE LIPPMAN: Thanks, counselor.
16 Counselor.

17 MS. CHAUDHRY: May it please the Court,
18 Zainab Chaudhry for the commissioner.

19 Your Honors, although this - - - a court
20 can affirm for any one of three reasons. Let me
21 start with the simplest, which is that the fire
22 department is a department of the Village, as a
23 matter of law, under the governing statutes; both the
24 Village law and the not-for-profit corporation.

25 JUDGE SMITH: That argument would apply to

1 every volunteer fire company in the state.

2 MS. CHAUDHRY: Correct, correct, Your
3 Honor. And for example, the Village law, all fire -
4 - -

5 JUDGE SMITH: It is the position of the
6 state, then, that all volunteer fire companies have
7 to pay prevailing wage on these projects?

8 MS. CHAUDHRY: Well, Your Honor - - -

9 JUDGE SMITH: Or their contractors do?

10 MS. CHAUDHRY: Yes, yes, Your Honor. The
11 not-for-profit corporation law expressly provides
12 that these fire departments are under the control and
13 authority of the municipalities having, by law,
14 control over the prevention or extinguishment of
15 fires therein. The Village law here - - -

16 JUDGE SMITH: But they're also defined as
17 something called a fire corporation. Is that the
18 name? Fire corporation?

19 MS. CHAUDHRY: Yes, a fire corporation.

20 JUDGE SMITH: And they're not one of the
21 four categories listed in 220.

22 MS. CHAUDHRY: Well, Your Honor, they are
23 one of the categories in the sense that they are a
24 department of the Village, just a - - - which is a
25 municipal corporation which is listed in the statute.

1 JUDGE SMITH: But they are a distinct
2 corporation; they're a fire corporation.

3 MS. CHAUDHRY: They're distinct in that
4 they are incorporated under not-for-profit
5 corporation law, but the - - -

6 JUDGE PIGOTT: Do they get - - -

7 MS. CHAUDHRY: - - - but the - - -

8 JUDGE PIGOTT: They don't get a public
9 pension; they don't get workers comp. They don't get
10 anything from the Village, in this case, which is why
11 they're not-for-profit, and they go do whatever they
12 do. And they're a great benefit to the Village
13 because they don't have to pay them other than under
14 this contract. They don't have to worry about them
15 sliding down poles, for example.

16 MS. CHAUDHRY: Well, certainly, Your Honor,
17 they are actually entitled - - - fire corporations
18 under 1402 and their members are entitled to several
19 of the same benefits and immunities that other fire
20 companies are, same indemnification, immunities, the
21 benefits of the volunteer firefighter benefit law.
22 And if - - -

23 JUDGE SMITH: Do they get to choose -- they
24 get to choose their own leaders, don't they? The
25 ordinary city fire department can't choose its own

1 commissioner.

2 MS. CHAUDHRY: Well, they do elect their
3 officers; however, the membership and the officers
4 are subject to approval by the municipal authorities
5 under the Village law, the town law, whatever the
6 municipality - - -

7 JUDGE SMITH: They can do things that the
8 city wants them not to do. In fact, they did in this
9 case. They went out and pursued a fire - - - a
10 firehouse project that the Village was originally
11 against.

12 MS. CHAUDHRY: It's true that there was
13 some reluctance initially on the part of the Village
14 for the project going forward, but the facts bear out
15 that the Village thereafter was extensively involved.

16 JUDGE PIGOTT: Before we get into that
17 functional equivalent which got me to the fact that
18 this is a criminal statute - - - it has criminal
19 sanctions, and we try to strictly construe that
20 because wouldn't it be a logical conclusion of this
21 that - - - if you were to prevail, that these
22 contractors who then did this work and did not pay
23 prevailing wages can be debarred from - - - for five
24 years - - - I think it's five years from any public
25 works projects in the State of New York?

1 MS. CHAUDHRY: Criminal sanctions are
2 available, Your Honor, but there aren't any here, and
3 the prevailing wage - - -

4 JUDGE PIGOTT: I don't know. I mean, there
5 could be. I mean, you could go tomorrow. But my - -
6 - and the more important question is that I'm not
7 sure you can hire somebody who has been found
8 violating the prevailing wage law if you're another
9 public entity. So these five - - - I think it's five
10 - - - contractors would be out of luck for five
11 years.

12 MS. CHAUDHRY: Yes, Your Honor. But
13 there's no evidence in the record that there's been
14 any criminal sanctions here, and in fact, the other
15 side of this is that the - - -

16 JUDGE PIGOTT: No, you're missing my point;
17 you're missing my point. I mean, we're going to make
18 a decision that's going to say to every - - - I
19 guess, what you want to say - - - every volunteer
20 fire department in the State of New York, if you do
21 something that requires a prevailing wage, your
22 contractors are subject to criminal sanctions; they
23 can be debarred from contracts within the State of
24 New York for public works contracts for five years,
25 so just be careful when you do this. Regardless of

1 what happens, it's too bad.

2 MS. CHAUDHRY: I understand your concern,
3 Honor. Except here - - - Your Honor, except here,
4 there's nothing of that - - - there's nothing harsh
5 about it because they knew at the time of the
6 contract that the prevailing wage law question was an
7 issue counsel's opinion letter had issued. In fact,
8 once they were aware of the issue, they, in fact,
9 engaged in conduct precisely to avoid the application
10 of the prevailing wage law.

11 JUDGE PIGOTT: So you do want to sanction
12 them?

13 MS. CHAUDHRY: Your Honor, the commissioner
14 has not taken a position on whether or not they're
15 going to be sanctioned. I think the question is are
16 they, as a matter of law, a Village department. But
17 alternatively, if the court is reluctant to say that
18 all fire corporations constitute a village
19 department, as the Appellant Division found here
20 alternatively, the facts here do bear out those legal
21 relationships and establish that, in fact, it was
22 actually operating under the Village's control both
23 generally and with respect to the project.

24 CHIEF JUDGE LIPPMAN: What's the
25 significance of the service contract?

1 MS. CHAUDHRY: Your Honor, that provides a
2 third alternative basis to satisfy the first prong of
3 the test. The agreement need not be a construction
4 contract per se. And unlike the situation that we
5 had in Charter Schools where, yes, the court rejected
6 that argument - - -

7 CHIEF JUDGE LIPPMAN: What's the difference
8 between those two?

9 MS. CHAUDHRY: The difference is that here
10 the contract - - - the service contract is more
11 closely related to the actual construction.

12 JUDGE PIGOTT: If the same people say our
13 ambulance is an antique, we're going to buy a new
14 one, is that the functional equivalent of a
15 government? Do they have to worry about buying a new
16 ambulance because they decide to do it and it's going
17 to service the - - -

18 MS. CHAUDHRY: No, Your Honor. The point
19 here is that volunteer fire corporations, they have a
20 unique status under the law. It's a historical
21 anomaly. They have been nominally independent since
22 the beginning of this nation's history, but later on,
23 the legislature had decided to incorporate them
24 within the municipal government structure.

25 CHIEF JUDGE LIPPMAN: What's your best

1 argument among those three arguments?

2 MS. CHAUDHRY: Your Honor, all the
3 arguments are strong. You certainly - - - the
4 broadest argument and the most compelling and
5 actually the simplest is that they are, as a matter
6 of law, departments - - -

7 JUDGE PIGOTT: So you think the - - -

8 MS. CHAUDHRY: - - - under the government.

9 JUDGE PIGOTT: - - - hearing officer was
10 wrong; they're not the functional equivalent of
11 government; they are, in fact, government?

12 MS. CHAUDHRY: Well, the hearing officer
13 used the term "functional equivalent", but I think if
14 the commissioner's determination is carefully read,
15 it really relied upon the governing statutes, the
16 Village law, the not-for-profit corporation law.

17 JUDGE READ: So what if they decide they
18 want to build - - - have somebody build a barbecue
19 pit for their chicken roasts?

20 MS. CHAUDHRY: Well, Your Honor - - -

21 JUDGE READ: That's covered by prevailing
22 wage?

23 MS. CHAUDHRY: Well, Your Honor, that gets
24 into the second prong of the test, whether or not
25 it's a public work. And with regard to - - -

1 JUDGE SMITH: Before you go to public work,
2 I'm sorry, you had three arguments. I think I'm
3 missing the second one. What's in between the first
4 and the third?

5 MS. CHAUDHRY: Yes. The first is under the
6 governing statute as a matter of law - - -

7 JUDGE SMITH: I understand the first and I
8 understand the third. What's the second?

9 MS. CHAUDHRY: Okay. The second one is
10 that as the Appellant Division held on the facts here
11 that the fire department was, in fact, operating as a
12 Village department under the Village's actual
13 control.

14 JUDGE SMITH: That this particular project
15 was a Village project even though the fire department
16 would might - - - could theoretically not be part of
17 the Village?

18 MS. CHAUDHRY: Well, the project, yes, and
19 also that it was acting as a department generally.
20 For fifty years, it operated out of a Village-owned
21 firehouse. It was - - - the Village owned and
22 financed the large trucks, paid for the fuel, the
23 gas, electric, sewer, training, physicals.

24 JUDGE READ: Is that unusual?

25 MS. CHAUDHRY: I don't believe that is

1 unusual, Your Honor. And I think the Appellant
2 Division may have thought it was answering this on a
3 narrower ground, but really the reality is that you
4 may never have a situation where the fire department
5 is not active anymore.

6 JUDGE SMITH: So in your view, the
7 Appellate Division decision essentially stands for
8 the proposition that volunteer fire companies are
9 subject - - - construction contracts by volunteer
10 fire companies are subject to prevailing wage law?

11 MS. CHAUDHRY: I don't think it expressly
12 said that, Your Honor, although it did recognize the
13 importance of the statutes in coming to its
14 conclusion but, perhaps concerned about making a
15 broad ruling, tried to keep it more narrowly tailored
16 to the facts here which are extensive.

17 JUDGE PIGOTT: Does it make any difference
18 that they - - - that the volunteer fire department
19 owns the land?

20 MS. CHAUDHRY: No, Your Honor, it doesn't
21 make a difference.

22 JUDGE PIGOTT: So this building that's
23 going to be on their land is a government building?

24 MS. CHAUDHRY: Well, Your Honor, it's owned
25 in the name of the corporation - - - of the not-for-

1 profit corporation, but it is a Village project here,
2 and the Village - - - the service contract agreement
3 enhanced the annual payments by nearly an amount that
4 matched the loan repayment.

5 CHIEF JUDGE LIPPMAN: But that's the
6 narrowest ground that we could uphold your position,
7 right?

8 MS. CHAUDHRY: Yes, Your Honor, if you want
9 to look at just the service agreement, but - - -

10 CHIEF JUDGE LIPPMAN: We didn't want to
11 make any broad pronouncements.

12 MS. CHAUDHRY: Right.

13 JUDGE GRAFFEO: If the fire department
14 defaulted on the bank loans, is the Village
15 responsible? Do the Village taxpayers have to pay
16 off those loans?

17 MS. CHAUDHRY: I think the status of the
18 fire department as a corporate entity is relevant as
19 a borrower, and I don't think the Village would have
20 been on the hook for that; it was not a cosigner to
21 those loans. But that doesn't speak to whether it's
22 a Village department for prevailing wage law
23 purposes. And I just want to emphasize here that
24 this is not an expansion of the commissioner's - - -

25 JUDGE GRAFFEO: See, I'm trying to figure

1 out where we come up with that a Village department
2 is enough because the statute has four specific
3 categories, so it has to be - - - I guess you're
4 trying to shoehorn it into municipal corporation? Is
5 that what we're trying to do?

6 MS. CHAUDHRY: Yes, just the way that a
7 state and all its departments are subject to the
8 prevailing wage law, a municipal corporation and all
9 of its departments - - - highway department or
10 whatever other department, would be subject to the
11 prevailing wage law.

12 CHIEF JUDGE LIPPMAN: And what's the
13 difference between this case and the Charter School
14 case?

15 MS. CHAUDHRY: Your Honor, this case is
16 very different from the Charter Schools case. That
17 decision was narrowly crafted. The Court looked at
18 specific characteristics of the Charter Schools, none
19 of which are present with respect to fire
20 corporations.

21 CHIEF JUDGE LIPPMAN: Is it because that
22 one wasn't in contemplation of the work being
23 performed and this one is?

24 MS. CHAUDHRY: That's with respect to the
25 service contract.

1 CHIEF JUDGE LIPPMAN: To the service - - -
2 yeah.

3 MS. CHAUDHRY: The service contract, yes.
4 But even more generally, fire corporations do not
5 possess the same characteristics as charter schools.
6 They are - - - while charter schools have substantial
7 autonomy and were created that way, fire corporations
8 are expressly subject to the municipality.

9 CHIEF JUDGE LIPPMAN: Well, that goes back
10 to the line of questioning that Judge Graffeo was
11 asking. You're saying that in reality it is, under
12 the law, a public - - -

13 MS. CHAUDHRY: Yes, Your Honor.

14 CHIEF JUDGE LIPPMAN: - - - a public
15 institution?

16 MS. CHAUDHRY: Under the existing law, the
17 commissioner's determination is grounded in that law
18 where municipal corporations and their departments
19 are already subject to the prevailing wage law, and
20 this is based on the unique statutory scheme
21 governing fire corporations. It would not broadly
22 apply to any other entity out there. And that would
23 be the simplest way upon which the court could
24 affirm.

25 CHIEF JUDGE LIPPMAN: Okay. Thanks,

1 counselor.

2 Counselor, rebuttal.

3 MR. ADAMS: Briefly, Your Honor.

4 Judge Lippman, first of all, as far as the
5 difference between charter schools and fire
6 departments - - - fire corporations, I refer the
7 court to my brief, pages 19 through 21; the
8 differences are not material.

9 With respect to the service contract claim,
10 this was specifically waived in the Appellant
11 Division. In their brief they said to the Appellate
12 Division, we are - - - that in light of this - - -
13 when they went to the Appellant Division, the Third
14 Department had ruled that - - - on the Charter
15 Schools case. And what they wrote in their brief
16 down below in here was in light of the Charter
17 Schools decision at the Appellate Division, we no
18 longer rely on the service agreement argument. They
19 took that right out of their brief, so they can't
20 argue it here.

21 JUDGE SMITH: Aren't they allowed to make
22 arguments here that they didn't make there?

23 MR. ADAMS: Not if they waived them.

24 Specifically, if they overlooked them, sure, Your
25 Honor, but I don't think they're entitled to if they

1 specifically waived them. I mean, what are we
2 supposed to brief? If issues that are waived by
3 counsel, expressly waived, can be resurrected later,
4 what does that - - - does that mean we have to brief
5 everything that's conceivable in the next appeal to
6 any appellate court? Doesn't make sense.

7 Judge Smith, to clarify something you
8 asked, the Appellate Division specifically ruled only
9 that the Bath Volunteer Fire Department is in this
10 partic - - - on this record a functional equivalent.
11 But that's not what the commissioner said. The
12 commissioner said all volunteer fire corporations are
13 functional equivalents. So the Appellate Division
14 ruled on a ground that the commissioner did not.

15 Lastly, this department of a village thing
16 is limited by the statute to Village law, Article 10.
17 Other provisions of the law say that they must be
18 contracted with separately, that they must be paid
19 separately, that they will own their own property.
20 When the legislature has wanted to include volunteer
21 fire companies, fire corporations in public
22 procurement laws, they've done it and they know how
23 to do it.

24 Under municipal law, Article 5(a), on
25 public contracts, specifically has sections that say

1 that not only municipal corporations but volunteer
2 fire companies have certain rights and obligations
3 under the public contracting laws. And when they
4 meant them, they said them. Here they didn't say
5 them. They didn't say fire corporations; they didn't
6 say not-for-profit corporations.

7 That's all, Your Honor.

8 CHIEF JUDGE LIPPMAN: Okay. Thanks,
9 counselors. Thank you both.

10 (Court is adjourned)

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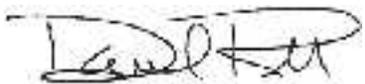
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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of M.G.M. Insulation, Inc. v. Colleen Gardner, No. 4 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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