

<b>Dagaev v Village of Highland Falls</b>
2018 NY Slip Op 33853(U)
June 19, 2018
Supreme Court, Orange County
Docket Number: 10185/2017
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X

**KATHERINE DAGAEV, PATRICK FLYNN,  
LAURA MILSOM and SHARON GUY,**  
Petitioners,

**DECISION AND ORDER  
INDEX NO.: 10185/2017  
Motion Date: 4/16/18  
Sequence Nos. 1, 3 and 4**

-against-

**VILLAGE OF HIGHLAND FALLS, NEW YORK,**  
Respondent,

**FOR AN ORDER PURSUANT TO ARTICLE 78  
OF THE CIVIL PRACTICE LAW AND RULES,**

-and-

ORIGINAL

**KENNETH SCOTT, CHIEF OF POLICE,  
VILLAGE OF HIGHLAND FALLS, NEW YORK,**  
Intervenor/Respondent.,

-----X

**SCIORTINO, J.**

The following papers numbered 1 to 35 were considered in connection with the petitioner's application (Sequence #1) brought pursuant to Article 78 of the Civil Practice Law and Rules; and the respondents' applications for dismissal of the petition (Sequences #3 and #4):

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Petition/Petition/Exhibits 1-9	1 - 11
Notice of Motion (Seq. #3)/Affidavit (Terhune)/Exhibits 1-10/ Memorandum of Law	12 - 23
Notice of Motion (Seq. #4)/Affirmation (Brady)/Affidavit	24 - 26
Supplemental Affirmation in Opposition (Bergstein)/Exhibits 1-2 Memorandum of Law in Opposition to Sequence #3	27 - 30
Memorandum of Law in Opposition to Sequence #4	31
Affidavit (Lynch)	32

Reply Affidavit and Memorandum of Law (Terhune)	33 - 34
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Affirmation in Opposition (Ryan)/Affirmation (Rice-Ghyll)/ Exhibits 1-2	10 - 13
Reply Affidavit (Quitoni)/Affirmation (Joseph)/Exhibit A	14 - 16

### **Background and Procedural History**

This application, filed December 12, 2017, is brought pursuant to Article 78 of the Civil Practice Law & Rules and seeks to rescind a vote taken by the respondent Village Board of Highland Falls, New York (Village or Village Board) on August 25, 2017. The petitioners assert that the vote of a Village trustee constituted a conflict of interest. By Decision and Order dated March 12, 2018 (Sequence #2), the unopposed application of respondent Chief of Police Kenneth Scott (Chief Scott) to intervene as an additional respondent was granted.

On January 3, 2017, the Village served Chief Scott with a notice of discipline (Exhibit 1 to petition) outlining various charges against him. The charges were amended on January 26, 2017. (Exhibit 2) A disciplinary hearing was scheduled for February 10, 2017. On that day, the Village and Chief Scott came to an agreement to resolve the charges. Chief Scott submitted a letter dated February 10, 2017, in which he notified the Village that he would “voluntarily and irrevocably retire” effective August 1, 2017. (Exhibit 3) A disciplinary settlement agreement between the Village and Chief Scott was executed on February 10, 2017. By the terms of the settlement agreement, Chief Scott had seven days to revoke the agreement, after which time it would “become binding on the parties.” (Exhibit 4 at paragraph 5) He did not revoke. A resolution of the Village Board approving the settlement and accepting the letter of retirement was passed by a 3-1 margin (with one absence) on February 21, 2017. (Exhibit 4) Chief Scott became a consultant to the Village Police Department, and

the Village continued to pay his full salary to him.

In March 2017, a new mayor and two new trustees were elected to the Village Board, including James Ramus, who is the Chief's brother-in-law.

On June 19, 2017, after an Executive Session in which Trustee Ramus did not participate, the Village Board voted 3-1 (with one abstention) to modify Chief Scott's agreement. The modification rescinded the date of Chief Scott's retirement, and allowed Chief Scott to continue as Chief of the Village Police Department past the August 30<sup>th</sup> retirement date provided in the original settlement agreement. A 26-week probationary period was established. Trustee Ramus voted "aye". (Exhibit 5)

Chief Scott resumed his position at the Village Police Department the following day, June 20, 2017. He sent an email to the members of the Village Police Department notifying them of his reinstatement, effective immediately. (Exhibit 8 to Terhune affidavit)

On August 25, 2017, the Village Board passed a Resolution Approving a Modification to the Disciplinary Settlement Agreement dated February 10, 2017 by a 3-2 vote. (Exhibits 6 and 7) The August 25, 2017 Resolution recited that the June 19, 2017 Resolution "identified certain modifications to be made, and directed [the Village's] Labor Attorney to revise said agreement accordingly." A Modified Agreement was prepared and circulated to the Trustees for review. The Resolution stated that the Village Board found and determined that "the Modified Disciplinary Settlement Agreement accurately reflects the proposed modifications identified in the June 19, 2017 Resolution and hereby approves said Agreement." (Exhibit 7)

The Agreement (Exhibit 7) provided that "effective upon approval of this Agreement by the [Village Board], Kenneth Scott shall resume the performance of his duties as Chief of Police for the

[\* 4]

[Village].” It included the provision for the 26-week probationary period outlined in the June resolution. It also provided that the modified Agreement was subject to approval by the Village. The Agreement was signed by Chief Scott on a date which “6/2/17”. It was signed by the Mayor on August 25, 2017.

### **Petition**

By Notice of Petition and Petition filed on December 12, 2017, petitioners seek an order rescinding and vacating the vote taken by the Village Board on August 25, 2017 “to return Kenneth Scott to his position as Police Chief” on the ground that the vote was tainted by a conflict of interest. They assert that the vote of Trustee Ramus, Chief Scott’s brother-in-law, was improper, and that such vote violated Article 18 of the General Municipal Law, as well as the Village municipal code. Petitioners also seek attorneys’ fees and costs.

### **Motions to Dismiss**

#### Village

By Notice of Motion originally filed February 2, 2018, the Village moves for dismissal of the Article 78 proceeding as time-barred, as well as on the grounds of failure to join a necessary party, failure to state a cause of action, and documentary evidence.

The Village argues that all parties understood that, as of June 19, 2017, Chief Scott resumed his active duty as Chief of Police. The August 25, 2017 vote was a mere ministerial confirmation and approval of the modifications identified in the June 19, 2017 resolution. There was no ambiguity in the June 19<sup>th</sup> resolution, which unequivocally authorized Chief Scott to resume his duties. Thus, it was not the August 25<sup>th</sup> vote that reinstated the Chief, it was the June vote which was final and binding. The December 12, 2017 filing of the Article 78 petition is therefore untimely.

Alternatively, even if timely, petitioners nevertheless lack standing. The Village challenges the unsupported assertion that petitioners are residents and taxpayers. More importantly, the petition does not claim a specific injury apart from a grievance that the Chief was enriched at public expense. The Village asserts that petitioners cannot demonstrate an injury-in-fact different from the general public. Further, petitioners' failure to name Chief Scott in the original petition is fatal to the petition, as the statute of limitations has now passed.

Finally, the Village argues that General Municipal Law §18 prohibits conflicts of interest applying to spouses, minor children and dependents. The family relationship between Chief Scott and Trustee Ramus is not within that provision. There is no dispute that Trustee Ramus had no financial interest in the vote or the Chief's contract. Nor does the Village's Ethics Code apply, as it prevents conflicts arising out of "kinship", an undefined term. However, kinship is generally understood to recognize blood relatives. Petitioners' inference that Trustee Ramus' vote raised suspicion among the public or gave an impression of improper influence is unsupported, especially given Trustee Ramus' specific representation on the record that he believed he could be fair and equitable.

#### Chief Scott

Subsequent to the Court's grant of his unopposed motion to intervene, by Notice of Motion filed February 14, 2018, Chief Scott also sought dismissal of the Article 78 proceeding and sanctions against petitioners in the form of attorneys' fees and costs. He argued that it should have been evident that the Village, whose attorney brought disciplinary charges against him earlier in 2017, was conflicted and unable to adequately represent his interests. Nor does his successful intervention cure the fatally-flawed petition.

Chief Scott joins in the arguments of the Village with respect to the balance of the application

[\* 6]

to dismiss. Regarding the statute of limitations, he argues that a rescission of the August 25, 2017 vote would have no bearing on his reinstatement, and, as such, would be of no force and effect. It was not the August 25<sup>th</sup> vote which reinstated him; it was the June 19<sup>th</sup> vote which did so. The sole purpose of the August 25<sup>th</sup> vote was to determine if the “modified disciplinary settlement agreement” comported with the modifications identified in the June 19<sup>th</sup> resolution. He points out that the June 19<sup>th</sup> vote to reinstate him was a 3-1 vote, with one abstention, and the vote of Trustee Ramus was therefore not a “deciding” vote. Finally, like the Village, he asserts that the alleged conflict of interest does not cause harm to the Village or its residents, or a waste of the Village’s funds or property. The Petition does not even make such a claim. Thus, petitioners have no stake in the outcome and do not present a dispute capable of judicial resolution.

Scott seeks sanctions for the frivolous action of petitioners, who “knowingly, deliberately and intentionally” made false factual statements in their petition, including the allegations of conflict of interest and the dates of the vote.

### **Opposition**

In opposition, each petitioner submits an affidavit, asserting his or her residence in the Village. More importantly, petitioners argue that the statute of limitations did not begin to run until August 25, 2017, when the determination to retain Chief Scott was final and binding. They assert that the June 19<sup>th</sup> resolution did not vote on the terms and conditions of the retention. Instead, they point to the August 25<sup>th</sup> resolution, which stated: “by Resolution dated June 19, 2017, the Board of Trustees identified certain modifications to be made to the Disciplinary Settlement Agreement [dated February 21, 2017] and directed its Labor Attorney to revise said agreement accordingly.” (Exhibit 10 to Terhune Affidavit) The August 25<sup>th</sup> Resolution further authorized the Mayor to sign the modified

Agreement, and provided that it would supercede and replace the February 10, 2017 Agreement.

Moreover, they cite that the Modified Agreement itself stated, “[e]ffective upon approval of this Agreement by the Village Board of Trustees, Kenneth Scott shall resume the performance of his duties as Chief of Police for the Village of Highland Falls” subject to certain terms and conditions. The August 25<sup>th</sup> Resolution further stated the Board’s finding that “the Modified Disciplinary Settlement Agreement accurately reflects the *proposed* modifications identified in the June 19, 2017 Resolution.” (Emphasis added) The Mayor signed the Agreement on August 25, 2017. Petitioners argue that these events confirm that the decision to retain Chief Scott did not become final and binding until August 25, 2017.

Petitioners assert that their affidavits demonstrate that they reside in the Village, and, therefore, have standing. They allege that a public perception of a vote tainted by conflict of interest constitutes an injury in fact. Moreover, petitioners are entitled to standing as taxpayers to challenge important governmental actions, because the failure to accord such standing would erect an “impenetrable barrier” to any judicial scrutiny of legislative action. In matters of great public interest, mandamus may lie to compel performance of a statutory duty that is ministerial in nature, but not one in respect to which an officer may exercise judgment or discretion. The publicity surrounding Chief Scott’s dismissal and retention generated community interest, and the taxpayers should thus be granted standing.

Petitioners argue that the Village and Chief Scott have identical interests, as the Chief works for the Village. They argue that, since the order they seek, directing a new “untainted” vote, affects only the Village. Therefore, their failure to join Chief Scott was, if anything, an excusable mistake. But, even if the interests did not converge, dismissal is not warranted, as Chief Scott’s intervention

should relate back to the filing date of the Petition, since his interests arose from the same transactions.

Petitioners assert that they have stated an actionable claim. The Village code prohibits municipal officers from engaging in any business which is in substantial conflict with proper discharge of duties in the public interest. No officer may use, or attempt to use, his official position to secure unwarranted privileges or exemptions for himself or others. (Exhibit 9 to petition) Officers may give a “reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of official duties, or that he is affected by the kinship, rank, position or influence of any person.” It is, petitioners assert, more than mere kinship, but any potential conflict that might raise public suspicion which should be eschewed. In this matter, the public “mischief” is municipal decision-making tainted by conflicting interests.

With respect to Chief Scott’s motion, petitioners assert that there is no basis for an award of sanctions. Contrary to his argument that the petition is rife with “false narrative,” the allegations of the petition accurately characterize the August 25<sup>th</sup> vote, which did, in fact, reinstate Chief Scott. Petitioners did not “conflate” the two votes, but concentrated their effort on the second, tainted vote only, which began anew the statute of limitations.

### **Reply**

The Village and Chief Scott reiterate their position that the August 25, 2017 vote was merely a ministerial action directed by the June 19, 2017 Resolution, and that it was the June 19, 2017 Resolution which made Chief Scott’s reinstatement immediate, final and binding. They distinguish petitioners’ argument concerning taxpayer standing, noting that the Petition claims no waste of public money or property, and makes no assertion that Trustee Ramus received any quid pro quo or monetary benefit. The question of whether an action “raises suspicion” is discretionary and should not support

mandamus. The Village argues that the June 19<sup>th</sup> Resolution was self-executing, because it directed the Labor Attorney to modify the settlement agreement in conformance with the terms and conditions voted on June 19<sup>th</sup>. Petitioners do not assert that the intent of the Village Board was hidden, ambiguous or unknown to them on June 19<sup>th</sup>. Any injury to petitioners indubitably accrued on June 19<sup>th</sup>, and August 25<sup>th</sup> did not begin the statute of limitations anew.

The Village and Chief Scott further reiterates its position that the taxpayer standing cases cited by petitioners are inapposite, and there has been no showing of a matter of sufficient public importance to waive the requirement for a showing of injury-in-fact. Finally, they reiterate that neither the General Municipal Law nor the Village Code require the recusal of a trustee in a position such as that of Trustee Ramus. Where, as here, the recusal is discretionary, mandamus does not lie. Where, as here, there is no waste of public funds, any public injury, any public mischief, any showing that such mischief or injury continues, or even that such an event ever happened, there can be no standing. Chief Scott replies that the Court is vested with the inherent power to sanction parties who engage in frivolous pleading, and that the false narrative asserted as fact entitles him to such relief.

The Court has fully considered the submissions of the parties.

### **Discussion**

For the reasons that follow, the motions of the respondents for dismissal are granted; the application of petitioners is denied; and this proceeding is dismissed.

### **Statute of Limitations**

An Article 78 proceeding must be brought within four months after the determination to be reviewed becomes final and binding upon the petitioner. Civ. Prac. Law & Rules §217[1] “A strong public policy underlies the abbreviated statutory time frame: the operation of government agencies

should not be unnecessarily clouded by potential litigation.” (*Best Payphones, Inc. v. Department of Information Technology and Telecommunications of the City of New York*, 5 NY 3d 30, 34 [2005])

The Court of Appeals identified two requirements for fixing the time when an agency action is final and binding. First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury. Second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. (*Id.*)

Respondents rely on *In re the City of New York (Grand Lafayette Properties, LLC)*, 6 NY 3d 540 [2006] for the proposition that the limitations period commences at the expiration of a period for potential review of the commission’s decision, and not when the mayor actually approved the contract. In *Grand Lafayette*, the City Planning Commission issued a resolution in April 2004, approving the City’s request to acquire property by eminent domain with a twenty-day “call-up” period for potential review by the City. The Mayor’s office approved the acquisition in August 2004. (*Id.* at 548) The Court of Appeals rejected petitioner’s attempt to argue that the statute did not commence to run until the Mayor’s approval, finding that the Mayor’s approval “was not part of the...review process and did not involve any substantive analysis of [the findings]”. Hence, it was not the determination by which petitioners became aggrieved. (*Id.*) Similarly, the Third Department denied a challenge to a state agency regulation brought years after the regulation was passed, but only shortly after a directive by the respondent to enforce it, holding that “the plaintiffs understood the regulations consequence as of [the date of its passage] and were able to accurately reflect its impact. The [later] directive did not affect the impact upon plaintiffs for the purpose of the Statute of Limitations, as it was simply an incidental measure employed to effectuate the regulation.” (*New York City Off-Track Betting Corp. v. State of New York Racing & Wagering Bd.*, 196 AD2d 15 [3d Dept 1994])

Equally clear, however, is that finality required for judicial resolution by Article 78 proceedings does not occur until the decision maker has arrived at a definite position on an issue that inflicts actual, concrete injury. (*Town of Coeymans v. City of Albany*, 237 AD2d 865 [3d Dept 1997]) It is this position on which respondent's statute of limitations argument falls.

The language of the August 25th resolution references the Village Board's approval of the Modified Disciplinary Settlement Agreement as accurately reflecting the "proposed modifications identified in the June 19, 2017 Resolution" and authorizes the Mayor to sign it. It provides further that the Modified Disciplinary Settlement Agreement is effective "as set forth in the Agreement." (Exhibit 9 to Terhune Affidavit) The Agreement, in the same exhibit, specifically provides that "[e]ffective upon approval of this Agreement by the Village Board of Trustees, Kenneth Scott shall resume the performance of his duties as Chief of Police for the Village of Highland Falls." It also provides that the Agreement is "subject to approval by the Village of Highland Falls Board of Trustees."

Thus, by its very terms, and regardless of whether Chief Scott did or did not resume his duties in June, the Agreement was not effective until approved by the Village Board on August 25, 2017. It may be fairly said that the reinstatement of Chief Scott was not in actuality final or binding until that approval. The filing of the Petition on December 12, 2017 is thus timely.

### Standing

Petitioners herein lack adequate standing. "Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue....The rules governing standing help courts separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant." (*Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 NY 2d 801, 812-13 [2003]) In general, to have standing to challenge government action, a party must have sustained

injury in fact, which is different in kind and degree from that sustained by the community generally, and harm to a party must fall within the zone of interests or concerns which are sought to be promoted or protected by statutory provision under which the agency has acted. (*Colella v. Board of Assessors of County of Nassau*, 95 NY 3d 401 [2000]) (Real property owners lacked standing to challenge “religious use” exemption accorded to other property, despite claim that petitioners were taxed too much.)

In *Saratoga v. Pataki*, the Court of Appeals noted that State Finance Law §123-b(1) affords citizen-taxpayers the right to bring suit to prevent the unlawful expenditure of funds “whether or not such person is or may be affected or specially aggrieved” by the challenged action. 100 NY 2d at 813 However, the Court went on to say that “while the statute might be read to allow actions when little or no injury has been claimed, courts have been inhospitable to plaintiffs who essentially seek to challenge nonfiscal activities by invoking the convenient statutory hook of section 123-b....a plaintiff’s claims must have a ‘sufficient nexus to fiscal activities of the State’ in order to confer standing..” (*Id.*) (Internal citations omitted) Thus, “taxpayer standing should not be applied to permit challenges to determinations of local government officials having no appreciable public significance beyond the immediately affected parties, by persons having only the remotest legitimate interest in the matter.” (*Colella*, 95 NY 3d at 410-411)

In the matter at bar, petitioners have not alleged that they or the Village suffered any economic harm by the reinstatement of Chief Scott. Indeed, as pointed out by respondents, Chief Scott continued to receive the same salary he would have received had there never been a modification. Instead, respondents alleged that they, presumably on behalf of the residents and taxpayers of the Village, have been injured by the allegedly tainted vote to approve the contract reinstating Chief Scott.

Were this Court to set aside that vote, it would not rescind or vacate the earlier June 19, 2017 Resolution, but might instead compel the Village Board to prepare a different contract to confirm it. Petitioners concede that neither the General Municipal Law nor the Village Code of Ethics specifically prohibit the vote taken by Trustee Ramus or specifically reference the in-law relationship between him and the Chief. Rather, they assert, the vote creates “an appearance of impropriety” sufficient to warrant its nullification. Such an alleged injury-in-fact is “tenuous” at best, and certainly no different than the (potential for) harm upon the public at large. (*Id.* at 410, quoting, *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 NY 2d 751, 777 [1991])

Petitioners assert that there is a “liberalized attitude toward recognition of standing” (*Matter of Morgenthau v. Cooke*, 56 NY 2d 24, 30 [1982]). Relief in the nature of mandamus may be granted to compel a public body or officer to do his [or her] duty, in matters of great public interest. (*Hebel v. West*, 25 AD3d 172 [3d Dept 2005]) Petitioners argue that the publicity surrounding the termination and reinstatement of Chief Scott, and its effect on the local election make this matter one of “great public interest.” However, in *Hebel*, the Appellate Division took note of national publicity received by West, the Mayor of New Paltz, whose decision to perform same-sex marriages in 2004. If allowed to continue, West’s practice would have the “potential result of permitting a part-time local official to effectively amend the marriage laws of this State with input from neither the Legislature nor the courts.” The Court specifically contrasted the West facts with those in which a local official’s action had “no appreciable public significance.” (*Id.* at 176, citing *Colella*, 95 NY 2d at 411)

The petitioners in the instant matter do not qualify for common-law taxpayer standing, nor have they shown an injury in fact different in kind or degree from the community in general. The matter of the reinstatement of a local official, regardless of who voted for or against him, is not one of such

public significance as to waive the requirement.

Accordingly, this Court finds that petitioners lack standing to challenge the vote of the Village Board. Having so found, the Court need not and does not determine whether the grievances asserted constitute sufficient ground to void the vote.

Sanctions

Although petitioners are not entitled to the relief sought, this Court does not find that the conduct of the litigation, and in particular, failing to originally name Chief Scott, was undertaken in bad faith. This was demonstrated by their willingness to consent to the Chief's application for intervention. Regardless of whether this litigation was prompted by political motivation, it does not constitute frivolous pleading or action. The application for sanctions is denied.

The applications of respondents to dismiss are hereby granted, the petition is denied, and the Article 78 proceeding is hereby dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: June 19, 2018  
Goshen, New York

ENTER:  
  
HON. SANDRA B. SCIORTINO, J.S.C.