

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 24-00721

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF RACHEL BARNHART,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

COUNTY OF MONROE AND JOHN P. BRINGEWATT,
IN HIS OFFICIAL CAPACITY, RESPONDENTS-APPELLANTS.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (MARIA E. RODI OF
COUNSEL), FOR RESPONDENTS-APPELLANTS.

ERNSTROM & DRESTE LLP, ROCHESTER (MICHAEL F. HIGGINS OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court,
Monroe County (James A. Vazzana, J.), entered April 10, 2024, in a
proceeding pursuant to CPLR article 78. The judgment granted the
petition to the extent of directing respondents to provide petitioner
a defense.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: Petitioner, a county legislator employed by
respondent County of Monroe, commenced this proceeding pursuant to
CPLR article 78 to challenge the determination of respondent John P.
Bringewatt, the county attorney, denying her request that the County
defend and indemnify her in a defamation action. The defamation
action related to statements made by petitioner at a press conference
and in a post on social media, calling for an official investigation
of allegations made by a firefighter who attended a party at a house
in her legislative district. Respondents appeal from a judgment that,
inter alia, granted the petition to the extent of directing
respondents to provide petitioner a defense in the defamation action.
We affirm.

The County has a duty to provide a defense and indemnification to
petitioner if her conduct occurred or allegedly occurred "while [she]
was acting within the scope of [her] public employment or duties"
(*Matter of Riehle v County of Cattaraugus*, 17 AD3d 1029, 1029 [4th
Dept 2005]; see Monroe County Code §§ 39-3 [A], 39-4 [A]), and the
determination that petitioner was not acting within the scope of her
public employment or duties "may be set aside only if it lacks a
factual basis, and in that sense, is arbitrary and capricious" (*Matter*

of Williams v City of New York, 64 NY2d 800, 802 [1985]).

Here, Bringewatt determined that petitioner was not acting within the scope of her employment or duties because the complaint in the defamation action does not sue petitioner in her official capacity and does not make specific reference to County business. We conclude that the determination was arbitrary and capricious because it relied on aspects of the defamation complaint that are not determinative of the issue and failed to consider whether the alleged conduct actually occurred while petitioner was acting within the scope of her public employment or duties (see *Beare v Byrne*, 103 AD2d 814, 815 [2d Dept 1984], *affd for reasons stated* 67 NY2d 922 [1986]; *Merrill v County of Broome*, 244 AD2d 590, 592 [3d Dept 1997]; *Matter of Polak v City of Schenectady*, 181 AD2d 233, 236 [3d Dept 1992]). Here, the record reveals that the alleged conduct occurred while petitioner was acting within the scope of her public employment inasmuch as petitioner addressed the public in her capacity as a Monroe County legislator at the time she made the statements at the press conference and when she posted on social media. Bringewatt's further rationale that petitioner addressed City employees and the misuse of City, and not County, resources fails to recognize that petitioner's legislative district falls within the City. Addressing public concerns, supporting constituents, and calling for official investigations, regardless of the specific municipality performing the investigation, are functions of a legislator (see generally *People v Ohrenstein*, 77 NY2d 38, 47 [1990]). Moreover, it cannot be said that petitioner's statements were made for wholly personal reasons unrelated to her job (*cf. Matter of Krug v City of Buffalo*, 34 NY3d 1094, 1096 [2019]).