

**Matter of Kapell v Incorporated Vil. of
Greenport**

2008 NY Slip Op 31072(U)

April 9, 2008

Supreme Court, Suffolk County

Docket Number: 0023552/2007

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

In the Matter of the Application of

DAVID E KAPPELL,

Petitioner,

For an Order and Judgment Pursuant to Article 78, CPLR

- against -

**THE INCORPORATED VILLAGE OF GREENPORT,
BOARD OF TRUSTEES OF THE INCORPORATED
VILLAGE OF GREENPORT, DAVID NYCE,** Mayor of the
Village of Greenport (individually and in his official capacity),
GEORGE HUBBARD JR, (individually and in his official
capacity), **MICHAEL OSINSKI,** (individually and in his
official capacity), **VALERIE SHELBY,** (individually and in
her official capacity), **JOSEPH PROKOP,** (individually and
in his official capacity), and **WILLIAM J MILLS III,**
(individually and in his official capacity),

Respondent.

INDEX NO.: 2007-23552

MOTION SEQ. NO.: 001 - CASEDISP
ORIG. MOTION DATE: 09/26/07

MOTION SEQ. NO.: 002 - CASEDISP
ORIG. MOTION DATE: 10/10/07

FINAL SUBMIT DATE: 11/28/07

UPON the following papers numbered 1 to 126 read on the Petition and the Motion herein:

- Petition [001] (Pages 1-26 & Exhibits A-L);
- Respondents' Motion [002] (Pages 27-49 & Exhibits A-F);
- Petitioner's Combined Response (Pages 50-106 & Exhibits A-N);
- Respondents' Reply (Pages 107-126);

it is,

ORDERED, that the application of Petitioner is hereby denied in all respects; and the application of Respondents is hereby granted in all respects.

Petitioners move this Court [001] for an Order and Judgment, pursuant to CPLR Article 78, for the relief demanded in the Petition, together with the costs and disbursements of this proceeding.

Specifically, the underlying Petition requests that this Court grant a Judgment against Respondents:

1. Declaring that the employment practices complained of in the Petition are unlawful, and that Respondents and their agents acted in violation of applicable Constitutional, federal and/or state law as described in the Petition, 42 USC § 1983, and related laws, rules, regulations, as well as the common law of the United States and New York State;

2. Directing Respondents to pay Petitioner damages equal to the amount of the benefits denied or lost to him by reason of the violations; all out-of-pocket losses incurred by Petitioner as a direct result of Respondents' actions; pre- and post- judgment interest on those amounts at the prevailing rate; an additional amount as liquidated damages equal to the sums due and owing Petitioner as described above, including interest; and otherwise making Petitioner whole;
3. Permanently enjoining Respondents and its agents, officers and employees from engaging in all practices found by this Court to be in violation of the statutes and related laws, rules and regulations, as well as the common law of the United States of America and New York State, as stated in paragraph 1 above;
4. Attorneys' fees in an amount to be determined as mandated by 42 USC § 1988;
5. The costs and expenses of this action, and expert witness fees to the extent applicable, pursuant to 42 USC § 1988;
6. Retaining jurisdiction over this action to ensure full compliance with the Court's orders, and requiring Respondents to file such reports as the Court deems necessary to evaluate such compliance;
7. Declaring that Respondents have acted in bad faith, arbitrarily and capriciously, and in violation of law, and declaring the April 27, 2007 Village Board resolution to be null and void;
8. Ordering Respondents to pay the full cost of Petitioner's health and hospitalization insurance benefits, retroactive to June 1, 2007, and reimbursement to Petitioner for the payments that Petitioner made for insurance coverage;
9. Ordering a name clearing hearing;
10. Finding that, as a direct and proximate cause of the aforementioned conduct, accusations, harassment and/or retaliation, Respondents caused Petitioner to suffer loss of benefits, great pain, humiliation, as well as physical and emotional damages, which damages are to be determined at trial; and the individual Respondents are also subject to punitive damages for their violation of 42 USC § 1983;
11. Awarding costs and disbursements incurred in this action.

Respondents move this Court [002] for an Order granting summary judgment dismissing the Petition in its entirety, with prejudice.

Petitioner served as Mayor of Respondent Village from April 1, 1994, until his retirement on April 22, 2007. From April 1, 1994 until May 18, 1995 Petitioner paid for health and hospitalization insurance benefits he received through Respondent Village, but on May 18, 1995, Respondent Board enacted a resolution providing the Mayor, the members of the Village Board of Trustees and the Village Attorney with paid health insurance benefits identical to those provided to all Village employees pursuant to their labor contract. Petitioner received such benefits from that time until June 1, 2007.

On December 17, 1998, Respondent Board enacted a resolution recognizing the regular activities of the Mayor, demonstrating Petitioner's full-time employment status in performing his duties. On June 15, 2006, Respondent Board enacted a resolution authorizing payment of an amount equal to the costs of said insurance coverage to the Mayor or any Village Board member who declined such coverage through Respondent Village.

On January 18, 2007, Respondent Board enacted a resolution reaffirming and restating earlier Respondent Board resolutions authorizing paid health and hospitalization benefits for the Mayor and members of the Village Board during their service and upon their retirement, requiring eligible retirees to have completed 10 years of consecutive service, with Respondent Village as their last public employer, and further

reaffirming payment of an amount equal to the costs of said insurance coverage to the Mayor or any Village Board member who declined such coverage through Respondent Village. Again on March 8, 2007, Respondent Board enacted a resolution reaffirming same, but apparently narrowed the payment provision for those declining coverage to the time while they were in active service to Respondent Village. Such resolution also reaffirmed that Respondent Village would continue to pay health and hospitalization coverage to the Mayor or any Village Board member during retirement, provided said retirees had completed 10 years of consecutive service, with Respondent Village as their last public employer, and all other requirements of the New York State Health Insurance Plan were met.

On March 30, 2007, the collective bargaining agreement between the Respondent Village and its employee union was ratified, which agreement provides for health insurance and hospitalization coverage to all Village employees and retirees, the full cost of which was to be borne by Respondent Village.

After Petitioner's retirement on April 22, 2007, Respondent Village Board enacted a resolution rescinding prior resolutions adopted on April 25, 1995, June 15, 2006, and January 17, 2007, terminating any such benefits described in said resolutions, except as required by statute, and then limited to the minimum required, effective May 1, 2007. Thereafter, payment for Petitioner's health and hospitalization coverage by Respondent Village terminated on May 31, 2007.

Thereafter, Petitioner instituted this hybrid Article 78 proceeding, asserting causes of action alleging violations of Labor Law § 201-d (political discrimination), denial of constitutional rights, retaliation for the exercise of free speech and associational rights, breach of promise, contract, agreement to provide the same health insurance benefits to retirees as to full-time Village employees, all being arbitrary, capricious and in violation of proper procedure. All sides raise a multitude of issues in their submissions, but the Court will only address those deemed to be meritorious and/or necessary to address in deciding this action, and all other arguments are to be considered lacking in merit.

The following has been adeptly argued by Counsel for Respondents, and is clearly dispositive of all the claims contained in the underlying Petition herein.

Certain types of legislative acts, including those fixing salaries and compensation, are not presumed to create a contract, the presumption being that such an act merely declares a policy to be pursued until the legislative body ordains otherwise; and that such an act will be treated as a contract when the language and circumstances manifest a legislative intent to create private rights of a contractual nature (See: *Handy v County of Schoharie*, 244 AD2d 842 [3 Dept 1997] citing *Cook v City of Binghamton*, 48 NY2d 330), where the County Board of Supervisors rescinded a resolution of the prior Board entitling retired members of said Board health insurance coverage at the expense of the County. It is within the discretion of the Town to terminate post-retirement health insurance benefits, and therefore said action is neither arbitrary nor capricious (See: *Weatherwax v Town of Stony Point*, 97 AD2d 840 [2 Dept 1983]). A municipal resolution is generally a unilateral action that is temporary in nature, and therefore does not create any vested contractual rights (See: *Aeneas McDonald Police Benevolent Association v City of Geneva*, 92 NY2d 326 [1998] citing *Matter of Jewett v Luau-Nyack Corp*, 31 NY2d 298), where the Court determined that retirees who were members of a bargaining unit were no longer entitled to the contractual health insurance benefits of active members, as they were no longer covered by the contract.

In order to sustain constitutional claims, it is incumbent upon claimant to specify the substantive constitutional right on which his claim is based, and allege facts in support of the claimed deprivation (*See: Incorporated Village of Ocean Beach v Maker Water Taxi Inc*, 201 AD2d 704 [2 Dept 1994]), and conclusory allegations do not meet these requirements (*See: Incorporated Village of Ocean Beach v Maker Water Taxi Inc, supra; Muka v Greene County*, 101 AD2d 965 [3 Dept 1984]; *Kubik v NYS Department of Social Services*, 244 AD2d 606 [3 Dept 1997]; *Omni Group Farms Inc v County of Cayuga*, 178 AD2d 578 [4 Dept 1991]). Conclusory allegations of a violation of 42 USC § 1983 are unavailing (*See: Scarfone v Village of Ossining*, 23 AD3d 540 [2 Dept 2005]). Petitioner, a retiree, is not similarly situated with current Respondent BOARD members, and cannot pursue an equal protection claim (*See: Zaidins v Village of Hastings-on-Hudson*, 171 AD2d 875 [2 Dept 1991]; *Affrunti v Zwirn*, 892 FSupp 451 [EDNY 1995] *aff'd* 100 F3d 943 [2 Cir 1996]).

A government agency possesses significant discretionary authority in bestowing and/or continuing a governmental benefit, and the recipient thereof will rarely be able to establish a property interest in said benefit (*See: Dworkin v NYS Department of Environmental Conservation*, 229 AD2d 42 [3 Dept 1997]). The Respondent BOARD retained the discretion to terminate the benefit herein, and therefore Petitioner did not have a property interest in said benefit (*See: Loyal Tire and Auto Center Inc v NYS Thruway Authority*, 227 AD2d 82 [3 Dept 1997]).

In order to sustain a cause of action for defamation, a petition must set forth the particular words complained of, the time, place and manner of the alleged false statements, and to whom the statements were made (*See: Nesathurai v University of Buffalo*, 23 AD3d 1070 [4 Dept 2005]; *Lesesne v Lesesne*, 292 AD2d 507 [2 Dept 2002]; *Sirianni v Al Rafaloff*, 284 AD2d 447 [2 Dept 2001]); and a cause of action that fails to comply with these special pleading requirements mandates dismissal (*See: Simpson v Cook Pony Farm Real Estate Inc*, 12 AD3d 496 [2 Dept 2004]; *Sirianni v Al Rafaloff, supra*).

Local legislators are entitled to absolute legislative immunity for legislative acts done in their official capacity (*See: Kaczmarek v Conroy*, 218 AD2d 97 [3 Dept 1995]; *Affrunti v Zwirn, supra*); and the Petition herein does not allege that the individual Respondents herein acted outside the scope of their employment (*See: Moore v Melesky*, 14 AD3d 757 [3 Dept 2005]).

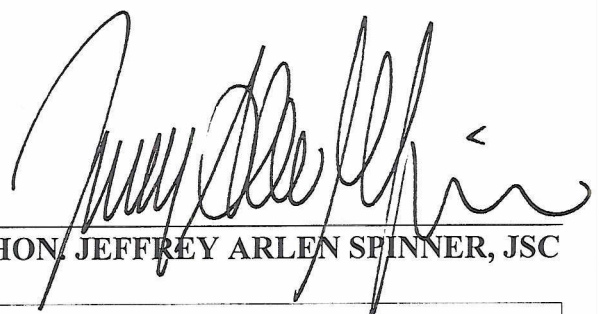
In light of the above, Respondents have demonstrated that Petitioner did not have a contract, nor a property interest in the health insurance benefits at issue, and the pleadings fail to set forth causes of action for discrimination, deprivation of constitutional rights or retaliation for exercise of same, or defamation; nor that, even had he sustained such claims, that the members of Respondent BOARD could be personally sued, as they had acted within the scope of their authority, and therefore the Petition herein must be dismissed and the Motion for summary Judgment must be granted.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the above referenced application [001] of Petitioners is hereby denied in all respects, the Petition is hereby dismissed and this action is hereby disposed, and the above referenced application [002] of Respondents is hereby granted in all respects, and summary Judgment is hereby granted to Respondents and against Petitioner; and it is further

ORDERED, that Respondents' Counsel is hereby directed to serve a copy of this Order, with Notice of Entry, on all other parties, the Calendar Clerk of this Court and the Suffolk County Clerk, within 20 days of the date of entry of this Order by the Suffolk County Clerk.

Dated: Riverhead, New York
April 9, 2008


HON. JEFFREY ARLEN SPINNER, JSC

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

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