

**Matter of Malverne Volunteer Fire Dept. v New York  
State Off. of Fire Prevention & Control**

2011 NY Slip Op 30632(U)

March 4, 2011

Supreme Court, Nassau County

Docket Number: 014821/2010

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

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In the matter of the application of the Malverne Volunteer Fire Department and the Estate of Paul Ryan Brady,

Petitioners,

For a Judgement under Article 78 of the Civil Practice Law and Rules for the inclusion of Paul Ryan Brady on the New York State Fallen Firefighters Memorial,

**MICHELE M. WOODARD  
J.S.C.  
TRIAL/IAS Part 11  
Index No.: 014821/2010  
Motion Seq. No.: 02**

**DECISION AND ORDER**

New York State Office of Fire Prevention and Control, New York State Fallen Firefighters Memorial Selection Committee and New York State Fallen Fire Fighters Memorial Appeals Committee.

Respondents,

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**Papers Read on this Motion:**

Amended Notice of Petition	01
Petitioner's Memorandum of Law	xx
Respondent's Verified Answer & Objections	xx
Defendant's Reply	xx

This is an Article 78 proceeding wherein the Malverne Volunteer Fire Department, hereinafter referred to as "Malverne", and the Estate of Paul Ryan Brady move for an order annulling and vacating respondents final determination dated May 11, 2010; approving petitioner's nomination and awarding petitioner costs, disbursements, and attorney fees.

Paul Ryan Brady, hereinafter referred to as "Brady", was a volunteer firefighter for the Malverne Volunteer Fire Department. On July 30, 2006 Brady was at the Malverne Firehouse participating in various drills and training, namely "Air Bag Familiarization and Hands-On Application/Apparatus and Firehouse Maintenance" for the department with 12 other volunteer fire fighters. Brady was on the top of a heavy rescue fire truck performing maintenance activities as part of the training. Another fire fighter, who was unaware that Brady was on top of the truck, began to drive the truck causing Brady to hit a ceiling beam and fall off the moving truck. Brady suffered serious internal injuries which led to his death later that day.

The New York State Workers' Compensation Board determined that Brady died in the line of duty and awarded death benefits to Brady's wife.

The plaintiff commenced a wrongful death action against the Village of Malverne, Malverne Fire Department, Nassau County and Town of Hempstead. In granting the Village of Malverne and Malverne Fire Department's motion to dismiss, the Court indicated that Brady died "in the line of duty". The United States Department of Justice indicated after its investigation that Brady died "in the line of duty" and awarded his spouse benefits. The National Fallen Firefighters Foundation has honored Brady for his line of duty death.

The New York State Fallen Firefighters Memorial was created in 1998-1999 through a line item in the budget, providing funding for the design and erection of a memorial to honor firefighters who died in the line of duty. The Office of General Services worked with a committee of individuals representing the firefighting community on the design and construction of the Memorial, although this was not mandated by law. In 1998, the members of the design committee formed a not-for profit corporation, the New York State Fallen Firefighters Memorial Committee, Inc. (hereinafter referred to as Memorial Committee & Committee) for the express purpose of raising money to support the Memorial and the families of the deceased firefighters. Individuals from the Firemen's Association of the State of New York, the New York State Association of Fire Chiefs, the New York County Fire Coordinators Association, the New York State Association of Fire Districts, the New York State Professional Firefighters Association, the Uniformed Firefighters Association of Greater New York, the Uniformed Fire Officers Association of New York City, the Albany Fire Department, one member at large and the State Fire Administrator comprised the committee which reviewed applications to be included on the Fallen Firefighters Memorial. In January 2008, it was determined that decisions regarding the Memorial were the responsibility of the State. Based on the advice of representatives from the Firemen's Association of the State of New York, New York State Association of Fire Chiefs, New York State Professional Firefighters Association, New York State County Fire Coordinators Association, New York State Association of Fire Chiefs, New York State Professional Firefighter Association, New York State County Fire Coordinators comprised the advisory committee which would consider and ultimately draft the criterion for being included in the

memorial. The final document establishing the criteria was adopted and finalized in April 2008 by the State Fire Administrator. The State Fire Administrator designated the advisory committee as the New York State Fallen Firefighters Memorial Selection Committee. The April 2008 criteria excluded deaths related to training.

On November 30, 2006 the Malverne Volunteer Fire Department submitted a request for Brady to be included in the New York State Fallen Fire Fighters Memorial. The petitioner claims that all of the requisite documents were submitted with the application. By letter dated May 24, 2007 the New York State Fallen Firefighters Memorial Committee denied Malverne's application to include Brady in the memorial. On June 18, 2007 Malverne sent a letter grieving the Committee's decision to not include Brady on the memorial. On or about May 12, 2008 the Committee decided to treat Brady's application as a new submission. The Committee then voted to deny the application to include Brady on the wall. On Or about July 22, 2008, Malverne appealed to the Office of Fire Prevention and Control, as to the Memorial Committee's decision to not include Brady on the wall. On September 22, 2008 the New York State Fallen Firefighter Memorial Appeals Committee determined that the activities surrounding Brady's death did not meet the "Line Of Duty" definition outlined in the April 2008 criteria. Malverne appealed that decision arguing that the criteria used to determine Brady's eligibility was established after his death and is inconsistent with the established definition utilized by the fire service. On January 14, 2009 the Office of Fire Prevention and Control responded to the Fire Department's appeal by stating that the Appeals Committee September 22, 2008 decision was final. In October 2009 Malverne requested permission to reapply under any new Committee established criteria. On February 9, 2010 Malverne submitted a request to reconsider the nomination of Brady under the new January 2010 criteria. On April 19, 2010 the Committee decided, by vote, not to reconsider Brady's nomination. On or about July 23, 2010 Malverne and the Brady Estate appealed the Committee's determination. On August 9, 2010 the Appeals Committee heard the Brady appeal and based on a vote of 2 to 1, denied the appeals stating in its decision that the "conditions outlined in the Memorial Selection Criteria were not met. Specifically, his involved activity did not meet the 'Line of Duty' definition as outlined within the Selection Criterion".

April 2008 selection criteria defines "Line of Duty Death" as:

Any action which is required or authorized by law, rule, regulation, condition of employment, for which compensation is provided by the employing agency; or by virtue of association in a duty to act and is directly related to the protection of life and/or property of the citizens of the State of New York.

In January 2010 criteria was adopted to include hands-on-training deaths as part of the "Line Of Duty Death" category. Pursuant to the January 2010 criteria notwithstanding deaths related to classroom training, other non-strenuous training activity or physical fitness training are specifically excluded from consideration. The 2008 and 2010 criteria language state that recognition by other entities, including local, state and federal organizations, does not equate to automatic inclusion on the Memorial Wall.

January 2010 selection criteria defines "Line of Duty Death" as a:

Death attributable to any action which is required, authorized or recognized in law, rule, regulation, condition of employment, or by virtue of association in a duty to act and that is directly related to: the response to, operation at, or return from an emergency incident; conducting authorized fire prevention or fire investigation activities directly related to an emergency incident; or participating in hands-on training for the suppression of fires and explosions or the control of emergencies.

The petitioners argue that Brady's death meets the "line of duty death" criteria because he was performing duties that were required authorized and recognized in law, rule, regulation, and his conditions of employment and Brady was participating in hands-on training for the suppression of fires and explosions. The petitioners argue that the decision of the Memorial Committee to deny Brady's inclusion on the wall was arbitrary and capricious.

The Court of Appeals has explained the nature of the arbitrary and capricious standard in Article 78 cases in *Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974) as follows: "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Id.* at 231). The question, said the Court, is whether the determination has a "rational basis" (*Id.*).

In this Article 78 proceeding where the petitioner challenges the determination "the only issue to be reviewed by this Court herein is whether the administrative decision to deny including


Fire Fighter Brady in the Fallen Fire Fighter's Memorial was arbitrary and capricious or an abuse of discretion (*Iacono v Police Dept. of City of N.Y.*, 204 AD2d 225, 226 [1994], *lv dismissed in part and denied in part* 85 NY2d 848 [1995]; *Sewell v City of New York*, 182 AD2d 469, 473 [1992], *lv denied* 80 NY2d 756 [1992]), and whether a rational basis exists for the agency's determination. A rational basis exists when the evidence adduced is sufficient to support the Commissioner's action (*see Matter of Bocchiano v New York City Police Dept.*, 213 AD2d 264 [1995]; *Sewell v City of New York, supra* at 473)" (*Papaioannou v Kelly, supra*).

Indeed, as long as the respondent has met the "very minimal evidentiary requirement necessary to uphold its determination," the decision must not be disturbed (*Perlov v Kelly*, 21 AD3d 270 [1<sup>st</sup> Dept 2005]).

Based upon the foregoing, the application to annul and/or vacate respondent's determination, and approve petitioner's nomination is **denied**.

This constitutes the Decision and Order of the Court.

**DATED:** March 4, 2011  
 Mineola, N.Y. 11501

ENTER:   
 HON. MICHELE M. WOODARD  
 J.S.C.

**ENTERED**

MAR 09 2011

NASSAU COUNTY  
 COUNTY CLERK'S OFFICE