

At a term of the Supreme Court of State of New York,
held in and for the County of Chautauqua, 3 North Erie
Street, Mayville, NY held on the 14th day of May
2021.

PRESENT: HON. LYNN W. KEANE, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CHAUTAUQUA

**RICHARD MORRISROE, in his individual
capacity as a citizen and elector, and as City
Attorney for the City of Dunkirk,**

**WILFORD ROSAS, in his individual capacity as
a Citizen and elector, and as Mayor of the City
of Dunkirk,**

**DAVID CAMPOLA, in his individual capacity
as a citizen and elector, and as Human Resources
Director of the City of Dunkirk,**

Petitioners,

**DECISION AND ORDER
INDEX NO. EK1-2020-000394**

-against -

**CITY OF DUNKIRK,
CITY OF DUNKIRK COMMON COUNCIL
COUNCILWOMAN NANCY NICHOLS
COUNCILMAN JAMES STOYLE
COUNCILMAN DONALD WILLIAMS, JR.
COUNCILMAN AT LARGE PAUL VAN DEN VOEVER,**

PROCEDURAL HISTORY

A motion for summary judgment has been filed by Respondents alleging, *inter alia*, that Petitioners' reliance upon the terms of the Dunkirk City Charter ("City Charter" or "Charter") is erroneous.

Petitioners filed a petition pursuant to Article 78 seeking a declaratory judgment that resolutions passed in January 2020 and numbered 13, 14 and 19 were unlawful, and a determination that §4.02 of the City Charter is null and void.*

*In reviewing the Exhibits attached to the Petition dated March 6, 2020, the Court identified: Exhibit "B" as being Resolution 13-2020 regarding removal of Petitioner Campola; Exhibit "C" as being Resolution 19-2020 regarding resolution of Petitioner Morrisroe, and Exhibit "D" being resolution to modify Fiscal Year Budget 2020. As such, the Court treated the resolutions in controversy as being 13, 19 and 20 and not 13, 14 and 19.

Petitioner Morrisroe is the City Attorney for the City of Dunkirk.

Petitioner Rosas is the duly elected mayor of the City of Dunkirk.

Petitioner Campola was, until the actions addressed in this petition, the Human Resources Director for the City of Dunkirk.

On January 7, 2020, the Common Council for the City of Dunkirk held its regular meeting. The Council consists of five elected members. During the meeting, Councilmembers/Respondents Nichols, Stoye and Williams, proposed several resolutions. Resolution #13-2020 called for the removal of Petitioner Campola from his position as Human Resources Director. Resolution 19-2020 called for the removal of Petitioner Morrisroe from his position as City Attorney. Resolution 20-2020 called for modifications to the fiscal budget for 2020 reflecting the termination of Petitioners Morrisroe, Campola and Administrative Assistant Vicki Westling, a non-party.

The resolution to modify the budget was tabled.

At the January 7, 2020 meeting, Mayor Rosas announced his intention to veto the resolutions removing Campola, Morrisroe and Westling. On January 13, 2020, Mayor Rosas exercised his veto power of the Council's Resolutions numbered 13, 14, 19 and 20. On January 13, 2020, Mayor Rosas issued a modified veto, acknowledging that Resolution 20-2020 had been tabled.

On January 21, 2020, the Council overrode Mayor Rosas' veto, passing the resolutions removing Petitioners Campola and Westling. The Mayoral veto of the Council Resolution seeking removal of Morrisroe was not overridden.

The Position of Petitioners

In seeking relief, Petitioners rely upon the list of officials appointed by the Mayor set forth in §2.03 of the City Charter, as well as the language contained in §4.02 of the City Charter allowing the Council to remove such appointees.

Petitioners submit that the language of the City Charter concerning the Mayor's ability to appoint officers states:

§2.03 Appointive Officers

The appointive officers of the City shall be appointed by the Mayor with the consent of the Common Council and shall be the City Attorney, Director of Public Works, Chief of Police, Fire Chief, First Assistant Fire Chief, Second Assistant Fire Chief, City Clerk, Fiscal Affairs Officer, Director of Development, Housing, Building and Zoning Officer, Sealer of Weights and Measures, **Human Resources Director**, and such other officers as may be created by amendment to the Charter. (Emphasis added.)

The petitioners further allege that the language of §4.02 of the City Charter regarding the Council's ability to remove Mayoral appointees states:

§4.02 Powers and Duties

The powers and duties of the Common Council shall include:

...

(n) Removal of any appointive officer at any time with a three-fourths (3/4's) vote of the entire Common Council, except as otherwise provided by law in this chapter.”

Petitioners contend that pursuant to §4.02, the Common Council gave itself the authority to remove an appointive official by a supermajority vote. According to Petitioner, any such provision, that is, one purporting to curtail the powers of the executive, is governed by New York State Home Rule §23, which requires a “mandatory” referendum.

Petitioners urge the court to find that §4.02 is violative of the Home Rule §23, because there was no such referendum. Petitioners ask the court to declare §4.02 of the City Charter null and void.

In making this argument, Petitioners allege that both Morrisroe and Campola were executive-appointed members of the Mayor’s cabinet/staff. Petitioners have also alleged that Morrisroe, Campola and Westling were removed via the vote of the council.

The Position of Respondents

The Respondents reject the arguments set forth by Petitioners in several ways.

At the outset, Respondents contend that Morrisroe was never removed from office

Respondents next contend that §2-03 of the City Charter does not, in fact, list the position of Human Resources Director, as an executive appointive officer/member of the Mayor’s cabinet. The City Charter excerpts attached to the original petition dated March 5, 2020 make no reference to Human Resources Director.

Petitioners conceded that the version of the City Charter that was attached to their Petition is from 2009 and is outdated. They contend, however, that the Charter had been updated to include Human Resources Director as an executive appointment by resolution in October 2017. Finding no copy of the amended City Charter on file at the NYS Secretary of State’s Office, during discovery Respondents sought to locate the City Charter on which Petitioners rely. In response to an interrogatory, Petitioners declared that the “most recent version of the Charter and Code lie within the server files of the City Attorney’s Office.”

Respondents note that NYS Municipal Law Home §Rule 27 requires that a certified copy of a local law amending the Charter be filed with the NYS Secretary of State within 20 days of its passage. They note further that NYS Municipal Home Rule §27(1) requires that a certified copy of all the local laws be filed with the Clerk and §27(6) which requires that “The clerk shall record all local laws filed in his office in a separate book or books, which shall be indexed by him.”

FINDINGS

The Petitioners have failed to establish that Petitioner Campola has standing to bring this action. In order to grant the relief requested by Campola, the court would have to reject the express provisions of the Dunkirk City Charter on file and available to the public since 2009, and instead rely upon a version that only exists on a server in the City attorney’s office, which has never been filed with the

NYS Secretary of State's Office or even filed with the Clerk of the City of Dunkirk for review by the public.

The court declines to find that the amendments purportedly made by the Dunkirk City Council to the Dunkirk City Charter in 2017, and contained in the version of the City Charter contained on a server file in the Dunkirk's City Attorney's Office in 2020, were in effect and binding upon the parties in this litigation.

The claim brought by Petitioner Morrisroe is moot. The Respondents concede that no attempt was made to override Mayor Rosas's veto, and Mr. Morrisroe was never removed from office.

Having determined that Petitioner Campola was not an executive appointed officer, the court finds that §4.02 of the Dunkirk City Charter has no application here. The court declines to ascertain whether §4.02 is violative of Home Rule §23 and whether it should be declared null and void.

Having determined that Petitioner Campola was not an executive appointed officer, and that the claims of Morrisroe are moot, the court finds that Mayor Rosas lacks standing in his official capacity, to prosecute a claim where no violative actions have been established.

The court finds no basis to conclude from the record before it that a manifest injustice resulted from actions taken by the Respondents. See Branca v Board of Education Sagem Cent. Sch. Dist., 239 AD2d 494 (2d Dept. 1997).

It has been said that "summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." Vega v Restani Const. Corp. 18 N.Y.3d 499, 503 (2012); see Alvarez v Prospect Hosp., 68 N.Y. 2d 320 (1986). Respondents have met that burden here.

WHEREFORE, it is,

ORDERED, that the Respondents motion for summary judgment is GRANTED, and it is

ORDERED, that Petition dated March 6, 2020 is DISMISSED.

This shall constitute the Order of the Court.

DATED: May 14, 2021



HON. LYNN W. KEANE, J.S.C.