

### **Volunteers Are Not Protected by CEPA**

The Plaintiff, a volunteer firefighter, appealed the Court's decision granting summary judgment dismissing his claims against the Colts Neck Volunteer Fire Co.. Plaintiff claimed that he had a valid cause of action under the NJ whistleblower statute or the Conscientious Employee Protection Act (hereinafter "CEPA").<sup>1</sup> The Appellate Division affirmed the decision of the trial Court.

*The central question in the appeal was; whether a volunteer fire fighter is an "employee" of the Fire Company and therefore entitled to the protections of CEPA?*

The Colts Neck Fire Department is a volunteer organization governed by an Executive Fire Council made up of representatives of the Department and the Township Committee. Volunteer firefighters in Colts Neck are eligible for Emergency Services Volunteer Length of Service Award Program (LOSAP), which is a deferred compensation benefit. Plaintiff served for more than 20 years and was a life member of the Fire Company. He was removed by the general membership, for conduct unbecoming of a member and detrimental behavior. Plaintiff had a history of disruptive behavior and the matter before the court was his second CEPA complaint against the organization.

Plaintiff filed suit in the Law Division alleging violations of CEPA, LAD, and defamation. After discovery, the Colts Neck Volunteer Fire Co. moved for Summary Judgment, the Plaintiff withdrew his LAD claim and Judge Gummer granted Summary Judgment dismissing the remainder of his complaint. Judge Gummer found "plaintiff was not an employee entitled to the statute's protections," relying on the statute along with Judge Quinn's analysis of a very similar CEPA claim against the same fire company in 2005.

The Appellate Division addressed the definition of employee finding that the statute defines an employee broadly as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration."<sup>2</sup> Plaintiff conceded he did not perform services for the Fire Company for wages, but asserted his receipt of LOSAP benefits should constitute "remuneration" to bring him within the definition of an employee under the statute. The court disagreed, concluding that "LOSAP benefits available to volunteer firefighters

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<sup>1</sup> N.J.S.A. 34:19-1 et seq.

<sup>2</sup> N.J.S.A. 34:19-2b.

in Colts Neck nowhere near approximate the actual monetary value of the services those firefighters provide.” “The programs facilitated by the Fire Department do not treat its activities as remunerated tasks.” “The very modest LOSAP benefits plaintiff could expect to receive in the future would not be sufficient compensation to change the voluntary nature of the services themselves.”

The court cited, Vogt v. Belmar,<sup>3</sup> which stands for the proposition; the relationship between a volunteer firefighter and the municipality is “not that of master and servant in the true sense” but “rather a gratuitous consensual undertaking to perform ‘public fire duty’ as a member of a volunteer fire company, under the ‘control or supervision’ of the municipal governing body.” The court opined that it was unclear whether the statute extends to protect volunteers such as plaintiff who are not compensated for their work.<sup>4</sup> The court then stated “we are not convinced of the necessity of analyzing plaintiff’s status under Pukowsky<sup>5</sup>.” However, in “doing so does not alter our [the courts] conclusion that he [plaintiff] comes within the ambit of the statute.”<sup>6</sup> The court found “Plaintiff did not perform services for Colts Neck as a member of its volunteer fire department for wages or other remuneration, notwithstanding that those services were performed under the fire company’s direction and control, therefore Plaintiff cannot qualify as an employee under CEPA regardless of the test one employs to evaluate the relationship.”<sup>7</sup>

Lastly, Plaintiff argued that “public policy dictates,” therefore the court should expand CEPA as the LAD has been expanded. The court found that, “we need do no more than point to the difference in the definition of “employee” in the LAD and CEPA to explain why volunteer firefighters might be considered employees under the LAD, but cannot be so considered under CEPA.”<sup>8</sup> Plaintiff is not “within the class of people that the CEPA statute was designed to protect.”<sup>9</sup>

The Appellate Division affirmed Judge Gummer’s decision and noted that they found no error in Judge Gummer relying on the analysis of Judge Quinn.

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<sup>3</sup> Vogt v. Borough of Belmar, 101 A.2d 849, 854, 14 N.J. 195, 206 (N.J. 1954).

<sup>4</sup> Craster v. Bd. of Comm’rs, 9 N.J. 225, 230 (1952).

<sup>5</sup> The courts tool for assessing the “reality” of Plaintiff’s relationship with the party against whom the CEPA claim is advanced is the Pukowsky test, a twelve factor hybrid reflecting both common law right –to control test and economic realities test.

<sup>6</sup> Id.

<sup>7</sup> Sauter v. Colts Neck Volunteer Fire Company No. 2, 2017 WL 4020461 (N.J. Super. A.D., 2017).

<sup>8</sup> Id.

<sup>9</sup> Feldman v. Hunterdon Radiological Associates, 901 A.2d 322, 335, 187 N.J. 228, 249 (N.J.,2006).

