



TOWNSEND WATER DEPARTMENT
540 Main Street West Townsend, Massachusetts 01474

Lance Lewand, Chairman
Paul L. Rafuse,
Water Superintendent

Michael MacEachern, Vice-Chairman

Nathan Mattila, Clerk
(978) 597-2212
Email: water@townsend.ma.us

EXECUTIVE SESSION MINUTES
WATER COMMISSIONERS MEETING AGENDA
April 2, 2019 - 5:00 P.M.
Water Department 540 Main Street, Meeting Room




EXECUTIVE SESSION-VOTES MAY BE TAKEN:

Paul presented the Board with the transcript of the court decision where the Water Department did not prevail. Attorney Doucette recommends that we appeal the decision to a higher court. The appeals needs to be filed within thirty (30) days.

Attorney Doucette would like us to send in the next invoice for payment. If the town refuses to pay Attorney Doucette will file a lawsuit against the Town of Townsend. Attorney Doucette also recommends that we move forward with the charter change and try to meet with the BOS to try and find a resolution for the issues that need to resolved. NM hopes that The BOWC and BOS can resolve issues so the appeal can be rescinded.


NM made a motion to appeal the court's decision docket # 1781CV02286 to a higher court. MM seconded. NM, Aye LL, Aye and MM, Nay. Motion carries 2-1.

LL reconvened into open session.

Respectfully Submitted,



Brenda Boudreau, Office Administrator

CLERK'S NOTICE	DOCKET NUMBER 1781CV02286	Trial Court of Massachusetts The Superior Court 
CASE NAME: Townsend Water Department vs. Town Of Townsend		Michael A. Sullivan, Clerk of Court Middlesex County
TO: Stephen G Doucette, Esq. Doucette & Associates, Ltd. 251 Main St Oxford, MA 01540		COURT NAME & ADDRESS Middlesex Superior - Lowell 360 Gorham Street Lowell, MA 01852
<p>You are hereby notified that on 03/26/2019 the following entry was made on the above referenced docket:</p> <p>MEMORANDUM & ORDER:</p> <p>On plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment</p> <p>For the reasons below, the plaintiffs' motion is DENIED, and the Town's cross motion is ALLOWED.</p> <p>Judge: Tuttman, Hon. Kathe M</p>		
DATE ISSUED 03/27/2019	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. Kathe M Tuttman	SESSION PHONE#

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1781CV02286

TOWNSEND WATER DEPARTMENT, and others¹

vs.

TOWN OF TOWNSEND

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Townsend Water Department ("Department") and its Commissioners ("Water Commissioners") brought this action seeking a declaratory judgment in order to resolve a dispute between the Department and the defendant, the Town of Townsend ("Town"), over the Department's management. The plaintiffs contend that the Department is an independent entity free from the Town's control, and that the Town has improperly interfered with its operations. The matter is now before the court on the plaintiffs' motion for summary judgment and the Town's cross-motion for summary judgment. For the reasons set forth below, the plaintiffs' motion is **DENIED**, and the Town's cross motion is **ALLOWED**.

¹ Nathan Mattila, Lance Lewand, and Michael MacEachern, in their capacities as Commissioners of the Townsend Water Department.

BACKGROUND

The summary judgment record discloses the following undisputed material facts, which are drawn from the parties' jointly filed Rule 9A(b)(5) statement. Any factual conflicts are viewed in the light most favorable to the non-moving party.²

I. Factual Background

The Department and the Town have been involved in an escalating dispute since 2011, when the Department's Superintendent, Paul Rafuse, proposed a vote of no confidence in the Town's Board of Selectmen. Although the Water Commissioners declined to act on Rafuse's proposal, the relationship between the two entities gradually soured.

Things reached a breaking point in the summer of 2017. On July 26, Town Administrator James Kreidler sent an e-mail to the Water Commissioners informing them that Rafuse was to cease using a Department vehicle and to cease submitting requests to be paid for "standby duties." Affidavit of James Kreidler, Ex. 9. Kreidler reminded the Water Commissioners that the Water Superintendent position was a union position covered by an existing collective bargaining agreement ("CBA").³ The CBA provides that the Water Superintendent is to use his or her personal vehicle and receive a monthly vehicle allowance, and is not entitled to standby pay. See *id.*, Ex. 7 at 12. Kreidler informed the Water Commissioners that interfering with or undermining the CBA could lead to a complaint to the Department of Labor Resources. He also noted that if Rafuse continued to use a Water Department vehicle he could be liable under G. L. c. 268A, and could trigger the Town's fraud policy. Kreidler did not receive a response.

² The court has not relied in any way on the deposition testimony of Savas Danos, which is the subject of the Town's Motion to Strike Paragraphs 11 through 16 of the Statement of Facts (See endorsement, Paper No. 11.3).

³ The Town and AFSCME Council 93 executed the CBA on July 1, 2017. The Water Department Superintendent position was included in the Voluntary Recognition Agreement. Affidavit of James Kreidler, Ex. 5. Rafuse, as the Department's Superintendent, was a member of the union bargaining team and participated in the CBA negotiations.

Since then, the plaintiffs allege the following acts of interference by the Town through its Board of Selectmen:

- 1) The Board refused to provide funds to hire personnel approved for hire by the Water Commissioners;
- 2) The Board injected itself into, and delayed work on, a Department contract to rehabilitate a water storage tank;
- 3) The Board injected itself into a Department of Environmental Protection sanitary survey report and a report associated with the Department's disposal of scrap metal; and
- 4) The Board instructed the Town Administrator to impose a 7.4% administration fee on the Department.

The Town contends that these actions simply reflect the exercise of its lawful authority, granted by the Town Charter and by-laws, to oversee a Town department and manage the overall municipal business of Townsend.

II. Relevant Authority

The Town's governing document is the Town Charter ("Charter"). Its significant provisions for the purposes of this decision are as follows:

Section 1-4. Division of Powers.

The administration of all of the fiscal, prudential and municipal affairs of the [T]own shall be vested in an executive branch headed by a Board. The legislative powers of the [T]own shall be vested in a [T]own [M]eeting open to all voters.

Section 3-2. Selectmen.

(b) Powers and Duties.

The executive powers of the Town shall be vested in the Board, which shall be deemed the chief executive office of the Town. The Board of Selectmen shall have all of the executive power possible to have and to exercise in accordance with the Constitution and the laws of the Commonwealth and by the charter and by-laws of the Town of Townsend. . . . The Board of Selectmen shall be responsible for the formulation and promulgation of policy directives and guidelines to be followed by all [T]own agencies serving under it and, in conjunction with other elected multiple member bodies to develop and promulgate policy guidelines designed to bring the operation of all [T]own agencies into

harmony. . . . It is the intention of this provision that the Board of Selectmen shall act only through the adoption of broad policy guidelines that are to be implemented by officers and employees serving under it.

(c) Appointment Authority.

The Board of Selectmen shall appoint a Town Administrator [and other Town officials]. . . . Unless some other provision is expressly made by law, the Board of Selectmen shall also appoint individuals who are to serve as representatives of the Town to the governing or advisory bodies of area, regional, or district authorities.

(c) Investigations.

The Board of Selectmen may make investigations and may authorize the Town Administrator to investigate the affairs of the Town and the conduct of any Town Agency including any doubtful claims against the Town.

Section 3-8. Water Commissioners.

(b) Powers and Duties.

Defined by special agreement voted on September 16, 1933, pursuant to Chapter 381 of the Acts of 1920.⁴

See Affidavit of James Kriedler, Ex. 1.

In 2017, the Town Meeting voted to accept the provisions of G. L. c. 41, § 69B. Section 69B defines the powers and duties of the Water Commissioners, stating, in relevant part, that:

The water commissioners, or the selectmen authorized to act as such, in a town establishing a water supply or water distributing system under authority of section thirty-nine A of chapter forty shall have exclusive charge and control of the water department and water system, subject to all lawful by-laws and to such instructions, rules and regulations as the town may from time to time impose by its vote. They may establish fountains and hydrants, may relocate or discontinue the same, may regulate the use of the water and fix and collect just and equitable prices and rates for the use thereof, and shall prescribe the time and manner of payment of such prices and rates.

⁴ Chapter 381 of the Acts of 1920 reads in part: "All the authority granted to said Town by this Act and not otherwise provided for shall be vested in said Water Commissioners, who shall be subject however to such instructions, rules and regulations as the Town may impose by vote."

G. L. c. 41, § 69B.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of demonstrating affirmatively the absence of a triable issue. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). If the moving party does not bear the burden of proof at trial, it must either submit affirmative evidence negating an essential element of the non-moving party's claim or demonstrate that the non-moving party's evidence is insufficient to establish its claim. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991). Mere assertions of the existence of disputed facts without evidentiary support cannot defeat a summary judgment motion. LaLonde v. Eissner, 405 Mass. 207, 209 (1989). The court reviews the evidence in the light most favorable to the nonmoving party, but does not weigh evidence, assess credibility, or find facts. Attorney Gen. v. Bailey, 386 Mass. 367, 370-371 (1982).

DISCUSSION

To maintain an action for declaratory judgment under G. L. c. 231, § 1, a party must demonstrate in the pleadings the existence of (1) an actual controversy and (2) legal standing. Galipault v. Wash Rock Invs. LLC, 65 Mass. App. Ct. 73, 84 (2005), citing Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 292 (1977). "An actual controversy exists where there is a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion

by another party also having a definite interest in the subject matter” Gay & Lesbian Advocates & Defenders v. Attorney Gen., 436 Mass. 132, 134 (2002) (quotations omitted).

Here, it is undisputed that the parties have, through their pleadings, identified an actual controversy regarding the scope of the Town’s control over the Department and its personnel. See Sahli v. Bull HN Info. Sys., Inc., 437 Mass. 696, 705 (2002) (purpose of declaratory judgment “is to provide a plaintiff relief from uncertainty and insecurity with respect to rights, duties, status, and other legal relations”).

However, the Town argues that the second prong of the above test is not met, because the Department lacks the authority to engage its own counsel and initiate lawsuits. The Town maintains that such authority resides only with the Town, through its Board of Selectmen and Town Meeting, unless otherwise specifically delegated in a by-law or statute. The Department responds that, as an “independent municipal body politic,” it has the inherent right to engage counsel and litigate the instant case. The Department also argues that, even if it does not possess such authority as a matter of right, the Board of Selectmen has recently granted it the authority to hire counsel, and in any event, the three Commissioners have individual standing.

I. The Plaintiffs’ Standing

The court can determine the plaintiffs’ standing as a matter of law, as there are no relevant material facts in dispute. As noted above, the Special Act establishing the Department subjected control of the Department “to such instructions, rules and regulations as the Town may impose by vote.” There is no authority granted or mention made in the Special Act allowing the Department to control legal matters or initiate litigation against the Town in connection with Department activities. Nor does such authority appear in G. L. c. 41, § 69B. And the Town’s Charter specifically grants the authority to conduct legal matters to the Town’s Board of

Selectmen. Under Section 1-4 of the Charter, "the administration of all the fiscal, prudential and municipal affairs of the Town shall be vested in an executive branch headed by the Board of Selectmen." The Board has "all of the executive power possible to have and to exercise in accordance with the Constitution and the laws of the Commonwealth and by the Charter and by-laws of the Town of Townsend." See Charter Section 3-2(d). The Charter does not confer authority to retain independent counsel on any other Town department. Because the Charter vests all powers and duties regarding the Town's legal affairs with the Board, the court concludes that the Department lacks the inherent right to retain counsel and initiate litigation.

However, the Department notes that on May 1, 2018, the Town voted to authorize it to hire legal counsel. See Supplemental Affidavit of Paul Rafuse in Support of the Plaintiffs' Motion for Summary Judgment, Ex. A. In Board of Public Works of Wellesley v. Wellesley, 377 Mass. 621 (1979), the Supreme Judicial Court held that the Wellesley Board of Public Works did not have authority to file a lawsuit on its own. Id. at 627-629. The court noted that, "when the board apprehended (with what justification we cannot say) that town counsel was being lax in prosecuting the alleged frauds, its recourse was, under the by-law, to the selectmen, or to a town meeting, for permission to engage independent counsel (with additional action, if any was needed, to secure authority to carry on the necessary litigation)." Id. at 629 (emphasis added). Since this case was already being litigated at the time the Town authorized the Department to engage its own counsel, it can be inferred that such authority also included the authority to litigate this matter.

Moreover, even if the Town had not authorized the Department to retain counsel, it is likely that the individual Water Commissioners, in their capacities as such, have standing to maintain this suit. In Wellesley, the court stated in dicta that "[f]ailing recourse to the by-law,

we conceive that it would be open to members of the board, as individuals with a particular interest (see Kaplan v. Bowker, 333 Mass. 455, 459-461 [1965]), to employ counsel and get a judicial resolution of the problem by means of an action in the nature of mandamus (G. L. c. 249, § 5); or, joining others, by a taxpayers' action (G. L. c. 40, § 53). Mandamus was used for such a purpose in Pearsons v. Ranlett, 110 Mass. 118, 126 (1872) (water commissioners)." 377 Mass. at 630-631. While the plaintiffs brought this case seeking a declaratory judgment under G. L. c. 231, § 1, and not a writ of mandamus, the reasoning in Wellesley applies equally here.

Based on the foregoing, the court concludes that the plaintiffs have standing to maintain this action.

II. Control of the Department

The Department argues that, in voting to accept the provisions of G. L. c. 41, § 69B, the Town has vested exclusive control of the Department with the Water Commissioners, and that the Department now operates as an "independent municipal body politic," outside the Town's control. The Town responds that, notwithstanding the provision of § 69B vesting the "exclusive" control of the Department in the Water Commissioners, the Department remains subject to the Town's control, through its Board of Selectmen and Town Meeting. After reviewing the relevant statutes and by-laws cited by the parties, the court concludes that the Department, while generally run by the Water Commissioners, nonetheless operates subject to the Town's periodic direction and control.

Section 69B does not entirely release the Department from the Town's authority. The Water Commissioners' power is conferred "subject to . . . such instructions, rules and regulations" as the Town may impose. The Charter gives the Board of Selectmen authority to "formulat[e] and promulgat[e] policy directives and guidelines." This power to make policy,

together with the authority to hire and appoint Town employees,⁵ necessarily implies the power to take the kinds of actions about which the Department complains. In taking such actions, the Town is not interfering with the performance of the Water Commissioners' ability to "establish fountains and hydrants, . . . regulate the use of the water and fix and collect just and equitable prices and rates for the use thereof, and [] prescribe the time and manner of payment of such prices and rates." G. L. c. 41, § 69B. The Town is simply exercising its authority to oversee its departments, which includes regulating the terms and conditions of the employment of Department personnel. See G. L. c. 150E, § 1 ("employer" defined as "any county, city, town, district, or other political subdivision acting through its chief executive officer"); Boston Teachers Union v. Boston, 382 Mass. 553, 559 (1981). The Town also has authority to form and implement fiscal policies and guidelines that apply to the Department, and generally oversee the Department, as it does other Town agencies. Such actions are "instructions, rules and regulations" that the Town has the right to impose under § 69B.

Due to the lack of applicable case law, the Department urges the court to consider cases involving the independent nature of municipal light departments. See Municipal Light Comm'n of Taunton v. Taunton, 323 Mass. 79, 84 (1948), and cases cited therein. Those cases are inapposite, however, as municipal electric departments are creations of statutes that differ significantly from the statute at issue here. General Laws c. 164, §§ 34, 36, and 56 control the creation and operation of municipal light and gas companies. Notably, Chapter 164, which is largely comprised of statutes governing private electric and gas companies, falls under Title XXII of the General Laws, which mostly governs private corporations. See G. L. c. 155 – G. L. c. 182. By contrast, the statute at issue here, G. L. c. 41, § 69B, falls under Title VII of the

⁵ See Articles 4, 5, and 6 of the Town by-laws, reprinted in Affidavit of Paul Rafuse in Support of the Plaintiffs' Opposition to the Town of Townsend's Motion for Summary Judgment, Ex. B.

General Laws, which governs cities and towns. See G. L. c. 39 - G. L. c. 49A. In fact, Chapter 41 is titled "Officers and Employees of Cities, Towns and Districts." See G. L. c. 41. This difference suggests an intentional decision by the Legislature to grant municipal light and gas companies greater autonomy than other municipal departments. The difference is further highlighted by the fact that Title XXII of the General Laws also contains a chapter governing water and aqueduct companies. See G. L. c. 165, §§ 1 et seq. If the Legislature intended municipal water departments to have the same degree of independence as municipal light and gas companies, it could have enacted a statute analogous to the municipal light and gas company statute within Chapter 165. It did not do so.⁶

In defining the Department's relationship to the Town, it is helpful to examine what the Department is not. In 2003, and again in 2012, the Town rejected a proposal to create a "water district." According to a document provided for discussion at a special town meeting on April 2, 2012, a water district is an independent entity that "is a political subdivision of the Commonwealth and [is] an independent public instrumentality." The document states that one benefit of converting a water department to a water district is "creating an entity independent from the Town" that would "eliminate redundancy, [by] focusing an independent, separate legal entity on supplying water." Affidavit of James Kreidler, Ex. 2. Under the question "What type of governmental body would the District be?" the document states that "[a]ll of the authority of

⁶ Incidentally, the phrase "exclusive control" appears in one other place within G. L. c. 41: in § 62. That section states, in pertinent part, that "[i]f a highway surveyor be chosen, he shall have the exclusive control of the ordinary repair of public ways in his town without being subject to the authority of the selectmen" (emphasis added). This inclusion is further evidence that had the Legislature intended municipal water departments to function as the plaintiffs desire, it would have included such language in § 69B. Interestingly, the Supreme Judicial Court has held that even with the strong language of § 62, a town nonetheless retains some measure of control over its highway surveyor. See *Tuckerman v. Moynihan*, 282 Mass. 562, 566-568 (1933) (G. L. c. 41, § 62 "does not release the surveyor from the authority of the town").

the District would remain essentially the same. . . . although the District would operate as an independent governmental authority, separate from Town government.”⁷ Id.

The Department’s argument is further contradicted by G. L. c. 40N, which provides for the creation of municipal water and sewer commissions. Section 4 of that chapter states in relevant part:

In any city or town which accepts the provisions of this chapter, there is hereby created a body politic and corporate and political subdivision of the commonwealth to be known as the water and sewer commission of the municipality. The commission is hereby constituted an independent public instrumentality and the exercise by the commission of the powers conferred by this chapter shall be deemed and held to be the performance of an essential public function. The commission shall not be subject to the supervision of the municipality or of any department, commission, board, bureau or agency of the municipality except to the extent and in the manner provided in this chapter.

G. L. c. 40N, § 4 (emphasis added). If, as the plaintiffs argue, the Department in its current form already enjoys these powers, there would effectively be no functional difference between a town’s water department and a water district, or a municipal water and sewer commission. These differences further support the court’s determination that the Department is not independent of the Town.

ORDER

For the foregoing reasons, it is **ORDERED** that the plaintiffs’ motion for summary judgment is **DENIED**, and the defendant’s cross motion for summary judgment is **ALLOWED**.

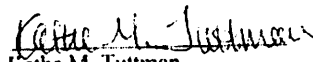
Accordingly, judgment shall enter declaring that:

- (1) the Townsend Water Department is not an independent municipal body politic;

⁷ One of the provisions in the proposed act that would have created the water district states that a district “may adopt other bylaws as appropriate for the operation of the District.” Another section provides that existing water department employees become employees of the new water district “subject to the direction, control, [and] supervision of the District,” and for new water district employees, “[t]he terms and conditions of employment . . . shall be determined by the Commissioners.” No such provisions appear in G. L. c. 41, § 69B or the Town’s Charter.

- (2) the Townsend Water Department, pursuant to G. L. c. 41, § 69B, has exclusive charge and control of establishing fountains and hydrants, relocating or discontinuing the same, regulating the use of the water and fixing and collecting just and equitable prices and rates for the use thereof, and prescribing the time and manner of payment of such prices and rates; and
- (3) the Townsend Water Department, pursuant to G. L. c. 41, § 69B, is subject to such instruction, rules and regulations as the Town of Townsend may from time to time impose by a vote of its Board of Selectmen or Town Meeting, including the formation and implementation of Water Department employee policies and guidelines, formation and implementation of Town fiscal policies and guidelines that apply to the Water Department, and general oversight of the Water Department.

Dated: March 26, 2019


Kathe M. Tuttleman
Justice of the Superior Court