

357

COUNTY OF SUFFOLK



PETER F. COHALAN
SUFFOLK COUNTY EXECUTIVE

MARTIN BRADLEY ASHARE
COUNTY ATTORNEY

DOCKET NUMBER 50-32201
PROD. & UTIL. FAC. 50-32201-3
50-32201-A
DOCKETED
USNRC

*85 AUG 26 P1:10

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH
DEPARTMENT OF LAW
ADDRESS ALL COMMUNICATIONS
IN THIS MATTER TO:

August 23, 1985

Chairman Nunzio J. Palladino
United States Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Dear Sir:

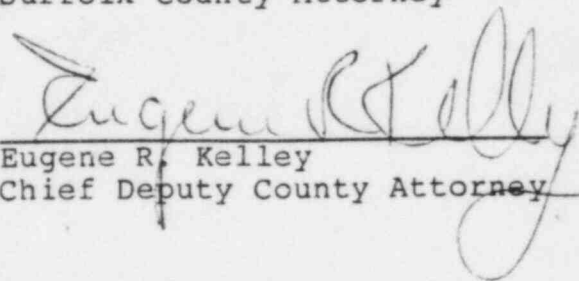
It has been called to our attention that the copy of the Appellate Division decision attached to our letter of August 16, 1985, is not very clear. Accordingly, we are forwarding another copy to all parties on the Service List.

Thank you for your consideration.

Very truly yours,

MARTIN BRADLEY ASHARE
Suffolk County Attorney

By:


Eugene R. Kelley
Chief Deputy County Attorney

ERK:rq
Enclosure

Copies: Service List

8508280375 850823
PDR ADOCK 05000322
G PDR

DS03

Second Judicial Department

APPELLATE DIVISION

By Mollen, P.J.; Brown,
Weinstein, Rubin and Lawrence, JJ.

MATTER OF PROSPECT, et al., ap:
Kirkpatrick & Lockhart, pet (Cohalan,
res)—In consolidated proceedings pursuant
to CPLR article, 78, inter alia, seeking
(1) to prohibit respondent Peter F. Cohalan,
the County Executive of the County of
Suffolk, and his agents from terminating
the services of the law firm of Kirkpatrick
& Lockhart on behalf of the County of
Suffolk, and (2) to enjoin respondent Cohalan
and his agents from interfering with the
continued representation of the county by
said firm, petitioners appeal, as limited
by their briefs, from so much of a judgment
of the Supreme Court, Suffolk County
(Brown, J.), dated July 31, 1985, as
dismissed an application to enforce a prior
judgment of the same court (Doyle, J.),
dated June 10, 1985.

Judgment affirmed insofar as appealed
from, without costs or disbursements.

Oral applications by appellants for
leave to appeal to the Court of Appeals
granted. Questions of law have arisen
which in our opinion ought to be reviewed.

The instant proceedings involve a challenge
to the validity of the actions of respondent
Peter F. Cohalan, the County Executive
of Suffolk County (Cohalan) in terminating,
without prior legislative approval, the
services of the Washington, D.C. law firm
of Kirkpatrick & Lockhart which had been
assisting the County Attorney in the legal
representation of the County of Suffolk in
administrative proceedings before the Nuclear
Regulatory Commission, as well as in various
judicial proceedings, in connection with the
Shoreham nuclear power facility. Kirkpatrick
& Lockhart had been retained pursuant to a
written agreement dated February 22, 1982
which was executed by respondent Cohalan
on behalf of the county, and which, according
to its terms, could be terminated by either
party upon 30-days notice. Immediately prior
to the execution of that agreement, the Suffolk
County Legislature adopted Resolution No. 43-1982
which "authorized" respondent Cohalan to
hire appropriate technical engineers and legal
counsel to assist the county attorney in the
various proceedings involving the Shoreham
facility and appropriated the sum of \$500,000
for that specific

purpose. This budget appropriation was
subsequently increased to over \$6,000,000.

On May 30, 1985, without prior legislative
approval, respondent Cohalan issued Executive
Order 1-1985 which provided, in pertinent
part, that the county's Commissioner of Police
and its planning department were to "use whatever
resources * * * (are) necessary in order to complete
a review and evaluation" of a local emergency
response plan for the Shoreham facility and to
"carry out and cause to be completed a test and
exercise" of said plan. Following respondent
Cohalan's issuance of that order, the petitioners
herein (several) individual Suffolk County
legislators and four Suffolk County towns
challenged its validity on the basis that
respondent Cohalan exceeded his authority
under Executive Law article 2-B and County
Law § 153, as well as the Suffolk County
Charter. By judgment dated June 10, 1985,
Special Term (Doyle, J.) annulled Executive
Order 1-1985 and enjoined respondent Cohalan,
his agents and employees from taking "any action
whatsoever to enforce, implement or carry out
the directions, policies or terms" of said order.
Special Term's judgment was subsequently
affirmed by this court and by the Court of
Appeals (Matter of Prospect v. Cohalan,
AD2d — [June 24, 1985], aff'd — NY2d — [July 9, 1985]).

Immediately prior to the commencement
of the proceedings challenging the validity
of Executive Order 1-1985, respondent Cohalan,
by letter dated June 3, 1985, informed
Kirkpatrick & Lockhart that, pursuant to the
terms of the retainer agreement, he was
terminating the firm's services on behalf of
the county. Following Special Term's annulment
of the executive order on June 10, 1985,
respondent Cohalan and the Suffolk County
Attorney, Martin Ashare, again contacted
Kirkpatrick & Lockhart by separate letters
dated June 19, 1985, to reiterate that the
firm's services were no longer required to
assist in the county's representation in the
Shoreham-related proceedings. In his June 19th
letter, respondent Cohalan emphasized that
this prior termination letter of June 3, 1985,
was not in any way related to

his executive order but rather was based on a
determination by the County Attorney that
the firm's assistance was no longer necessary.

The petitioners contend that the termination
of Kirkpatrick & Lockhart's services by
respondent Cohalan, without prior legislative
approval, was in excess of his authority and
constitutes an attempt by respondent Cohalan
to "enforce, implement and carry out" the
policies and directions of his illegal executive
order in violation of Justice Doyle's judgment.
We do not agree and, accordingly, affirm
Special Term's judgment dismissing the application.

Under the statutory framework established
by the Suffolk County Charter, the County
Attorney, who is appointed by the County
Executive subject to legislative approval,
is designated as the head of the county's
department of law (Suffolk County Charter
§ 1501) and is vested with the authority to
"prosecute and defend all civil actions and
proceedings brought by or against the county"
(Suffolk County Charter § 1502; see also,
County Law § 501[1]). Section 1501 of the
charter further provides that "(w)ithin the
appropriations therefor and when authorized
by the County Executive, the county attorney
may employ such special counsel as may be
necessary" (emphasis supplied). Moreover,
County Law § 501(1), governing the general
grants of power to a county attorney,
provides, inter alia, that "(w)ithin the
limits of the appropriation, the county
attorney may employ counsel to assist in
any civil action or proceeding brought by
or against the county."

The Suffolk County Charter provisions
unequivocally establish that the discretionary
authority to hire outside counsel on behalf
of Suffolk County is vested with the County
Attorney and the County Executive. Furthermore,
implicit in the power to hire or appoint is
the power to terminate employment (see,
Mack v. Mayor of the City of N.Y., 37 Misc.
371, 374, aff'd 82 App Div 637, aff'd 176
NY 573; Bosco v. County of Oneida, 106 Misc.
2d 872, 874, aff'd 79 AD2d 1092; County of
Broome v. Conte, 120 Misc. 2d 1050, 1054,
aff'd 101 AD2d 905). No provision of either
the County Law or the Suffolk County Charter
requires that the dismissal of the county's
special counsel be approved by the County
Legislature.

Petitioners' suggestion that the Legislature's
Resolution No. 43-1982 constitutes a limitation
on the executive branch's discretionary
authority to discharge Kirkpatrick & Lockhart
is without merit. The resolution was merely a
budgetary appropriation permitting respondent
Cohalan to hire appropriate legal counsel on
behalf of the county to assist the County
Attorney in Shoreham-related proceedings.
The resolution did not mandate that the
Legislature approve the hiring or firing of
such legal counsel. Parenthetically, it is
noted that the county's retainer agreement
with Kirkpatrick does not provide that the
firm's discharge be contingent upon a
legislative act.

Law Journal
Aug. 16, 1985

Accordingly, it is clear that respondent Cohalan, acting with the County Attorney and in accordance with the provisions of the retainer agreement, did not exceed his authority in discharging Kirkpatrick & Lockhart without legislative approval. In the absence of any evidence to establish fraud or corruption, it is beyond the realm of judicial review to conduct an inquiry into respondent Cohalan's motives for exercising that authority (see, 2 McQuillin, Municipal Corporations §§ 10.35, 10.36, 10.37 [2d ed]). This point was recently discussed in the case of Matter of New York State Inspection, Security & Law Enforcement Employees, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo (64 NY 2d 233, 239), in which the Court of Appeals stated:

"The lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, involve questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review * * *. This judicial deference to a coordinate, coequal branch of government includes one issue of justiciability generally denominated as the 'political question' doctrine" (see also, Matter of Lorie C., 49 NY2d 161).

Thus, we reject petitioners' argument that the court must annul and set aside respondent Cohalan's termination of Kirkpatrick & Lockhart's services on the basis that his actions were purportedly the result of that firm's refusal to advocate the policy enunciated under respondent Cohalan's Executive Order 1-1985 rather than a reasoned decision by respondent Cohalan and the County Attorney that the firm's services were no longer necessary. Such a result would necessarily contravene the "fundamental principle of the organic law that each department of government should be free from interference, in the lawful discharge of duties expressly conferred, by either of the other branches" (see, Matter of New York State Inspection, Security & Law Enforcement Employees, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo, supra, at p 239).

Finally, we note that contrary to petitioners' argument, the terms of Justice Doyle's judgment of June 10, 1985 did not prohibit or limit respondent Cohalan's discretionary authority to terminate the services of Kirkpatrick & Lockhart as the county's outside legal counsel. In fact, on the prior legal from Justice Doyle's judgment, this court, in a decision dated June 19, 1985 denying a motion by certain of the petitioners for vacatur of a statutory stay, noted that the issue of Kirkpatrick & Lockhart's status as the county's legal representative could not be resolved in that appeal. In that decision, this court expressly stated:

"the issues of who should properly represent the County of Suffolk in related matters involving the Shoreham Nuclear Power Plant and the status, if any, in these related matters of the law firm of Kirkpatrick & Lockhart, were not argued before Special Term and were not determined in the subject judgment, and we deem it inappropriate, under the circumstances, particularly in the absence of a complete record with respect thereto, to decide these issues on the appeal from the judgment" (emphasis supplied).

Accordingly, Special Term's judgment dismissing the application must be affirmed. Since the issue is not before us, we do not address the question as to whether the County Legislature has the right to retain special counsel in appropriate circumstances.