

At a Trial Term of the Supreme Court  
of the State of New York, held in and for the  
County of Cortland at the Court House in  
Cortland, New York, on the 1<sup>st</sup> day of  
December, 2008.

PRESENT: **HON. KEVIN M. DOWD**  
**JUSTICE PRESIDING**

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF CORTLAND

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JOHN M. RICE, as President of the CORTLAND  
PROFESSIONAL FIREFIGHTERS ASSOCIATION,  
IAFF LOCAL 2737, and on behalf of all paid  
bargaining unit firefighters of the Cortland Fire  
Department, similarly situated,

Plaintiff,

Index # 40323

vs.

RJI # 2007-146

RICHARD LATHAM, as Treasurer of the  
CORTLAND FIRE DEPARTMENT BOARD OF  
ENGINEERS, et al

Defendants.

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### **DECISION AND ORDER**

Plaintiff commenced this declaratory judgment action on December 11, 2006.

A trial was held before the Court on December 1, 2008. The Court heard testimony from several witnesses and received numerous exhibits into evidence. The parties submitted proposed findings of fact and legal memorandum in support of their respective positions after conclusion of the trial.

The Cortland Fire Department consists of six companies. The Volunteer

Companies comprise five of the six companies. The sixth company is the paid firefighters, which Plaintiff represents. The Cortland Fire Department Board of Engineers is responsible for the daily business activities of the Volunteer Companies. The Board of Engineers does not supervise or oversee the operations of paid firefighters.

This action involves the two percent tax that is levied by New York State pursuant to **Insurance Law §9104 and 9105**. Pursuant to these statutes, the New York State Insurance Department provides this 2% tax money, collected on premiums for property in a city, to the treasurer or other fiscal officer of the fire department in that city, or, if the fire department does not have a treasurer or fiscal officer, to the fiscal officer of the authorities having jurisdiction and control of the fire department. **Id.** In the instant case, the money is distributed by the Treasurer of the Board of Engineers.

In 1978, there was a lawsuit brought by a paid firefighter of the Cortland Fire Department against the defendants of this action, with the exception of the City and with the addition of the Superintendent of New York State Insurance Department. That lawsuit also concerned the 2% tax money. That action was resolved by a stipulation between the parties wherein the paid fire company would receive 25% of the subject monies. The volunteer companies were to receive 75 % of the monies from May 1978 to December 1980.

This formula continued to be utilized until distribution of the 2% tax money in 2006. In 2006, the Board of Engineers distributed the money on a per capita basis. The per capita distribution was based upon the active rolls of each company. This is where the controversy arises in this case. Plaintiff asserts that there are many members listed on

the active rolls of the volunteer companies who should not be considered such for 2% tax money purposes. Plaintiff seeks to have the Court declare a definition of “active” firefighter for this limited issue and order such definition applied for distribution of the 2007, 2008 and all future 2% tax money. Defendants have argued that it is not appropriate for the Court to define the term. The Court cannot agree with this assessment.

The collection and distribution of the 2% tax money has a long history. It was formerly governed by **Insurance Law §§553 and 554**. There was a great deal of litigation regarding the right of paid firefighters to share in the 2% tax money. In 1980, the Court of Appeals addressed the issue. See **Renn v. Kimbark, 51 NY2d 189 (1980)**. The Court stated that in the absence of an express legislative enactment precluding the paid firefighters of a particular city from sharing in the 2% tax money, all fireman in the locality were entitled to share ratably in the funds. **Renn, 51 NY2d at 194**. The Court went on to hold that as “active” members of the city fire department depriving the paid firefighters of this benefit would be contrary to the purpose of the statute. **Renn, 51 NY2d at 195**. Five years later, in the same case, the Appellate Division, Third Department, affirmed the lower court determination that the tax proceeds should be allocated between the paid and volunteer fire fighters strictly on a pro rata basis from their respective active membership rosters. **Renn v. Kimbark, 115 AD2d 112 (3<sup>rd</sup> Dept. 1985)**.

As a result of these decisions, pro rata distribution to fire companies based on their number of “active members” has become the standard. See **1997 Ops St Comp No.**

97-13; 1994 Ops St Comp No. 94-33 and 1989 Ops St Comp No. 89-53. With this standard firmly established, Plaintiff has the right to its proper use and application. As the defendants, themselves, have pointed out, removal of names from the active membership roster may alter the per capita distribution. Therefore, Plaintiff has a cognizable right that is being affected by the actions of Defendants. The Court will accordingly deny the motion to dismiss the Amended Complaint.

Having determined that Plaintiff is entitled to a declaration of who is properly considered an "active member" for 2% tax money purposes, the Court need look no further than the Defendant's own Constitution for the parameters of this definition. The Constitution, Cortland Volunteer Fire Department, Exhibit C, sets forth the requirements to be an "Active" member. These requirements include completing all other applicable training as mandated by State law, Federal law, regulations or Department policy. It is uncontroverted that the Federal government's Occupational, Safety and Health Administration (OSHA) and New York State's Public Employee Safety and Health bureau (PESH) require a minimum number of training hours each year. It is also uncontroverted that semi-annual physical examinations are also required by OSHA, PESH and the Cortland Fire Department.

The testimony revealed that the Cortland Fire Department has a Municipal Training Officer for both the paid and volunteer firefighters. The Court received several spreadsheets showing the training records for all of the volunteers during three different years. The Court also received an exhibit regarding physicals for the volunteers. Therefore, this information is readily ascertainable.

Volunteer firefighters who meet the requirements mandated by the Department's Constitution should be considered "active" for 2% tax money purposes. Those people are required by the Department's Constitution to report to the scene of an incident and carry out all orders during the emergency. The Court believes being able to do so is sufficient for 2% tax money purposes.

The previously referenced opinions of the Office of the State Comptroller of New York state, "The distinguishing characteristic of currently active members of a fire department or company is that they are subject to call for whatever duties may be assigned to them under the rules and regulations of the department or company." See **1997 Ops St Comp No. 97-13; 1994 Ops St Comp No. 94-33**. The Court believes it would be inappropriate and arbitrary to establish a minimum number of calls that a volunteer must respond to in order to be considered active.

The Court finds no merit to the defendants argument that the Court is usurping the responsibility of the Chief of the Fire Department. The 2% tax money is distributed by the Treasurer of the Cortland Fire Department Board of Engineers, not the Chief of the Fire Department. Moreover, Defendants admit that the officers of the respective companies meet and review the membership rosters. The presiding officer of the volunteer company then submits the list to the Treasurer of the Cortland Fire Department Board of Engineers. Furthermore, the Court has repeatedly stressed that its holding in this case only pertains to distribution of the 2% tax money. The Court is not interfering with the membership rosters.


The Court, however, is mandating that when the per capita distribution is made

the only members who will be considered "active" are those firefighters who have completed all legally required OSHA, PESH and Cortland Fire Department training, and completed any required medical certification/physical. These requirements for "active" firefighters, for 2% tax money purposes, shall apply to the 2007, 2008 and all future 2% tax money distributions.

Plaintiff is entitled to an award of costs and disbursements.

This Decision shall constitute the Order of the Court.

Dated: MARCH 30, 2009  
Norwich, New York

  
Justice Supreme Court