

13962

Date: September 10, 2010

To: Board of Acquisition and Contract

From: Robert F. Meehan
County Attorney

Re: Authority to enter into a retainer agreement with the law firm of Friedman Harfenist Kraut & Perlstein, LLP to provide legal representation to C.O. Mark Footes in the matter of Quincy Barnes v. Westchester County, Andrew J. Spano, Joseph K. Spano, Anthony Amicucci and C.O. Mark Footes, for a term commencing on September 8, 2010 and continuing through September 7, 2011, in an amount not-to-exceed \$200,000.00

By Act No. 100-2010, approved on September 7, 2010, the Westchester County Board of Legislators authorized the County to retain, at County expense, the law firm of Friedman Harfenist Kraut & Perlstein, LLP to provide legal representation to C.O. Mark Footes in connection with the matter of Quincy Barnes v. Westchester County, Andrew J. Spano, Joseph K. Spano, Anthony Amicucci and C.O. Mark Footes, and to pay the firm an amount not-to-exceed \$200,000.00. Under section 161.11(1) of the Laws of Westchester County, the authority of your Honorable Board is also required.

This case involves a federal lawsuit commenced under 42 U.S.C. §1983 for alleged deprivations of rights secured under the First and Fourteenth Amendments of the United States Constitution. There are also state law claims for negligence, excessive force, assault and battery, negligent and intentional infliction of emotional distress, conversion, and respondeat superior. The case is assigned to United States District Judge Stephen C. Robinson.

Plaintiff alleges that on July 30, 2009, C.O. Footes entered his cell and assaulted him without provocation or cause. Plaintiff further alleges that Westchester County has an unconstitutional policy or practice which permits the use of excessive force on inmates and that Defendants Andrew J. Spano, Joseph K. Spano, and Anthony Amicucci were on notice of the policy or practice and failed to take the appropriate steps to remedy it. As a result, he was caused to suffer serious physical injury.

The County agreed to provide C.O. Footes with defense and indemnification in this matter. However, the existence of a conflict prevents the County Attorney's office

from representing C.O. Footes and the other individually named County defendants in this action. According to Rule 1.7 of the New York Rules of Professional Conduct, it is inappropriate for an attorney to represent a client if a reasonable lawyer would conclude that “the representation will involve the lawyer in representing differing interests” and none of the exceptions in subsection (b) of the rule apply. I have concluded that there are “differing interests” as defined in Rule 1.0 and that none of the exceptions of Rule 1.7 apply (See 22 NYCRR §1200 et seq.). Therefore, pursuant to Section 297.31(2)(b)(i) of the Laws of Westchester County, I sought and received authorization from the Board of Legislators to retain separate counsel to represent C.O. Footes in this matter. However, as you know, section 161.11(1) of the Laws of Westchester County also requires this Honorable Board’s approval of the contract.

Accordingly, authority is now respectfully requested to enter into a retainer agreement with the law firm of Friedman Harfenist Kraut & Perlstein, LLP, 2975 Westchester Avenue, Purchase, New York 10577 to provide legal representation to C.O. Mark Footes in connection with the matter of Quincy Barnes v. Westchester County, Andrew J. Spano, Joseph K. Spano, Anthony Amicucci and C.O. Mark Footes, for a term commencing on September 8, 2010 and continuing through September 7, 2011. In consideration for services to be rendered, Friedman Harfenist Kraut & Perlstein, LLP shall be paid at rates ranging from \$155.00 to \$215.00 per hour for attorney time depending upon the expertise of the attorney working on the matter, and will include a rate of \$85.00 per hour for paralegal services, for a total aggregate amount not-to-exceed \$200,000.00, inclusive of all reasonable and necessary out-of-pocket expenses.

Accordingly, your favorable action on the annexed Resolution is most respectfully urged and recommended.

RFM/JPG/sw

APPROVED BOARD OF ACQUISITION & CONTRACT ADMINISTRATION
§ 2300 (6) (b)
WESTCHESTER COUNTY CLERK
SECRETARY

RESOLUTION

Upon a communication from the County Attorney, be it hereby:

RESOLVED, that the County of Westchester is authorized to enter into a retainer agreement with the law firm of Friedman Harfenist Kraut & Perlstein, LLP (the "Firm"), 2975 Westchester Avenue, Purchase, New York 10577, to provide legal representation to C.O. Mark Footes in the matter of Quincy Barnes v. Westchester County, Andrew J. Spano, Joseph K. Spano, Anthony Amicucci and C.O. Mark Footes, for a term commencing on September 8, 2010 and continuing through September 7, 2011; and be it further

RESOLVED, that in consideration for services to be rendered, the Firm shall be paid at rates ranging from \$155.00 to \$215.00 per hour for attorney time depending upon the expertise of the attorney working on the matter; and will include a rate of \$85.00 per hour for paralegal services, for a total aggregate amount not-to-exceed \$200,000.00, inclusive of all reasonable and necessary out-of-pocket expenses; and be it further

RESOLVED, that this Agreement is subject to County appropriations; and be it further

RESOLVED, that this Agreement is also subject to further financial analysis of the impact of any New York State Budget (the "State Budget") proposed and adopted during the term of this Agreement. The County shall retain the right, upon the occurrence of any release by the Governor of a proposed State Budget and/or the adoption of a State Budget or any amendments thereto, and for a reasonable period of time after such release(s) or adoption(s), to conduct an analysis of the impacts of any such State Budget on County finances. After such analysis, the County shall retain the right to either terminate this Agreement or to renegotiate the amounts and rates approved herein. If the County subsequently offers to pay a reduced amount to the Firm, then the Firm shall have the right to terminate this Agreement upon reasonable prior written notice; and be it further

RESOLVED, that the County Attorney or his duly authorized designee is hereby authorized to take such action and execute such documents as may be necessary and proper to effect the purposes hereof.

Account to be
Charged/Credited

| Fund | Dept | Major Program, Program & Phase Or Unit | Object/ Sub-Object | Trust Account | Dollars |
|------|------|---|-----------------------|------------------|-----------|
| 615 | 59 | 0689/3350 | 4923 | | \$200,000 |
| | | | | | |
| | | | | | |

Budget Funding Year(s) Current Start Date 9/08/10 End Date 9/07/11
(must match resolution)

Funding Source

Tax Dollars _____

State Aid _____

\$200,000

Federal Aid _____

(must match resolution)

Other 6N _____

APPROVED BOARD OF ACQUISITION & CONTRACT - 9-23-2010 HONORARY WEIRA, SECRETARY