

**Matter of Carmichael v Hite**

2012 NY Slip Op 33158(U)

December 28, 2012

Supreme Court, Albany County

Docket Number: 3498-12

Judge: George B. Ceresia Jr

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STATE OF NEW YORK  
SUPREME COURT      COUNTY OF ALBANY

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In the Matter of the Application of the

WILLIAM L. CARMICHAEL, JONI T. JOHNSON,  
and SUSAN KENT, as President of the NEW YORK  
STATE PUBLIC EMPLOYEES FEDERATION,  
AFL-CIO,

Petitioners,

For an Order and Judgment Pursuant to CPLR  
Article 78

Index No. 3498-12  
RJI No. 01-12-ST3765

-against-

PATRICIA A. HITE, as both the Director of  
the Division of Classification and Compensation  
of the New York State Department of Civil Service  
and as an Acting Commissioner of the New York  
State Civil Service Commission; the DIVISION OF  
CLASSIFICATION AND COMPENSATION OF  
THE NEW YORK STATE DEPARTMENT OF  
CIVIL SERVICE, and the NEW YORK STATE  
DEPARTMENT OF CIVIL SERVICE,

Respondents.

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Special Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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### DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

In January 2012, the New York State Department of Corrections and Community Supervision (hereinafter DOCCS) requested that respondents approve title structure changes for a group of job titles, including two at issue in this proceeding. Specifically, DOCCS proposed to consolidate the job titles of Supervising Correction Counselor and Facility Parole Officer 2 into a new title – Supervising Offender Rehabilitation Coordinator – based on its view that the duties, knowledge, skills and abilities necessary to perform the job(s) are quite similar (see Verified Petition, Ex. A, p. 12).<sup>1</sup> Respondents approved DOCCS' request effective March 8, 2012 (see Verified Petition, Ex. B).

Thereafter, Kenneth Brynien, petitioners William Carmichael and Joni Johnson's bargaining agent and former President of the New York State Public Employees Federation (hereinafter PEF), requested reconsideration and rescission of the consolidation decision (see Verified Petition, Ex. A, p. 1-11). In May 2012, respondents declined to rescind the title structure change (see Verified Petition, Ex. C). On June 14, 2012, PEF filed an

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<sup>1</sup> All of these job titles are allocated to salary grade 22.

administrative appeal with respondent New York State Civil Service Commission (hereinafter CSC) (see Verified Petition, Ex. D).

Only six days later, petitioners commenced the instant CPLR article 78 proceeding seeking an order and judgment: (1) declaring that respondents' job title consolidation determination was arbitrary, capricious, irrational and contrary to Civil Service Law § 118; (2) declaring that respondents' determination violated the constitutional mandate of merit and fitness set forth in Article 5, § 6 of the New York State Constitution; and (3) directing rescission of the title structure changes, restoration of the former title series, and placement of the impacted employees in the appropriate titles. As such, respondents moved to dismiss the petition based upon petitioners' failure to exhaust their administrative remedy.

### DISCUSSION

"It is well settled that a party seeking to challenge the action of an administrative agency must first exhaust available administrative remedies" (Matter of Sabino v DiNapoli, 90 AD3d 1392, 1393 [2011]; see Town of Oyster Bay v Kirkland, 19 NY3d 1035, 1038 [2012]). Here, it is undisputed that CSC has yet to issue a determination with respect to PEF's administrative appeal.<sup>2</sup> However, petitioners assert that it would be futile exhaust their administrative remedy (see generally Town of Oyster Bay v Kirkland, 19 NY3d at 1038; (Matter of Sabino v DiNapoli, 90 AD3d at 1393). In this regard, petitioners speculate that

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<sup>2</sup> Due to procedural requirements and scheduling constraints, CSC was unable to meet to consider and render a determination with respect to petitioners' administrative appeal before the return date of the instant proceeding, August 3, 2012 (see Kiyonga Aff., ¶17).

the CSC will likely defer to respondents' decision and fail to perform an independent review of the underlying facts (see Petitioners' Brief, dated August 1, 2012, p. 6).

To the contrary, the record is devoid of evidence that the CSC has inappropriately predetermined the issues raised by petitioners. Further, in the Court's view, resolution of factual matters regarding civil service job title classifications is best left in the first instance to the administrative agency "so that a clearer formulation of and the rationales for agency policy may be fully aired" (Lehigh Portland Cement Co. v New York State Dept. of Env'tl. Conservation, 87 NY2d 136, 143 [1995]; see Matter of Sabino v DiNapoli, 90 AD3d at 1394). In particular, a factual record regarding the substantial similarity of the affected job titles, and the extent to which the duties of the consolidated positions conflict, has yet to be fully developed (see e.g. Town of Oyster Bay v Kirkland, 19 NY3d at 1039).

Moreover, it is quite conceivable that, following a factual review, CSC could provide the relief sought by petitioners. Given the foregoing, the Court finds that petitioners have failed to demonstrate that pursuit of their administrative remedy would be futile (see e.g. Matter of Sabino v DiNapoli, 90 AD3d at 1394).

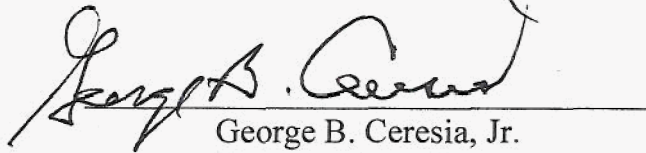
Accordingly it is

**ORDERED and ADJUDGED** that respondents' motion to dismiss the petition is hereby granted, without prejudice.

Those arguments not specifically addressed herein were found to be unpersuasive, or otherwise rendered academic.

This Decision/Order/Judgment is being returned to the Attorney General. All original supporting documentation is being filed with the County Clerk's Office. The signing of this Decision/Order/Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry and notice of entry.

Dated: Albany, New York  
December 28, 2012



George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Notice of Petition, dated June 19, 2012; Verified Petition, dated June 19, 2012, with annexed exhibits; Brief on Behalf of Petitioners, dated June 19, 2012;
2. Notice of Motion, dated July 26, 2012; Affidavit of Nancy B. Kiyonaga, sworn to July 16, 2012, with annexed exhibits; Memorandum of Law in Support of Respondents' Motion to Dismiss Based on an Objection in Point of Law: Failure to Exhaust, dated July 25, 2012; and
3. Affirmation of Katherine J. Vorwald, Esq., dated August 1, 2012; Petitioners' Brief in Opposition to Respondents' Motion to Dismiss, dated August 1, 2012.