STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JOSEPH P. IANNELLO, AND
DOUGLAS C. VROOMAN,
ON BEHALF OF THEMSELVES AND ALL
SIMILARLY SITUATED COURT OFFICERS
IN THE EIGHTH JUDICIAL DISTRICT,

Plaintiffs,

MEMORANDUM DECISION

vs.

Index No. 8994/08

NEW YORK STATE UNIFIED COURT
SYSTEM/OFFICE OF COURT
ADMINISTRATION,

Defendant

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **SANDERS & SANDERS**
Attorneys for Plaintiffs
Harvey P. Sanders, Esq., Counsel

OFFICER OF COURT ADMINISTRATION
Attorneys for Defendant
Michael Colodner, Esq., of Counsel
John Eiseman, Esq., of Counsel

CURRAN, J.

Plaintiffs seek a declaratory judgment that Defendant New York State Unified Court System/Office of Court Administration (hereinafter OCA) failed to properly classify them under the appropriate salary rate and at proper seniority levels upon their transfer in service from the Erie County Sheriff's Office. Plaintiffs also seek recovery of back wages and

costs. The matter came before the Court upon a motion by OCA to dismiss the complaint. Upon due consideration, the Court grants the motion in its entirety because the only cause of action properly before this Court is barred by the doctrine of res judicata and the other causes of action can be asserted only in the Court of Claims.

BACKGROUND

In May 2006, Erie County Sheriff Timothy B. Howard informed employees of the Erie County Sheriff's Office that OCA had expressed interest in hiring its own security employees from among those Sheriff's deputies in Erie County who had been performing security services for the State courts (Sanders Affid., Exhibit 1 [hereinafter Complaint], ¶ 8). In a May 16, 2006 letter, Sheriff Howard stated that "OCA will use each employee[']s Erie County hiring date in determining seniority" (Complaint, Exhibit 1 at 2). An accompanying information sheet stated that salary increments would be paid as follows:

> "Paid 4/1 of each year. JG:18 increment $2,224; JG:16 increment $2,021 (based on 4/1/06 salary schedule)"

(Complaint, Exhibit 1 at 3).

Thereafter, by letter dated January 5, 2007, Chief Administrative Judge Lippmann informed Erie County Executive Joel Giambra that the Unified Court System would assume responsibility for the security functions at the Erie County and Buffalo City Court facilities in downtown Buffalo previously provided by the Erie County Sheriff's Office. The change was to be effective March 8, 2007, and was being made pursuant to Civil Service Law § 70 (2) (Eiseman Affid., Exhibit B to Exhibit D). In February 2007, as prospective transferees, Plaintiffs received a letter, a "Notice of Election Form," an information summary, and other

materials (*see* Complaint, Exhibit 3). According to Plaintiffs, none of these documents stated that employees so transferred would be treated as new employees by OCA; rather, paragraph 6 of the information summary indicated that the "Original Appointment Date" would be based upon the date of appointment in the jurisdiction "from which the transfer is made (Erie County)"; that service in Erie County would be used to calculate lonegevity bonuses; and, that time and leave anniversary dates would be based upon eligible service with the County (Complaint ¶ 10 & Exhibit 3). Regarding "Service Increments," the information summary stated:

> Upon placement on the current salary schedule, eligibility for annual service increments and longevity service increments will be determined in accordance with the same provisions applicable to all represented and unrepresented nonjudicial employees whose positions are allocated to grades.

(Complaint, Exhibit 3).

The Notice of Election form stated that the employee accepted "all of the terms and conditions of employment with the New York State Unified Court System as they have been described to me in the Unified Court System Employment Information package" (Complaint, Exhibit 3).

Plaintiffs and other Erie County Deputy Sheriffs chose to become New York State Court Officers. (Complaint ¶ 12).[1] Although the new court officers were given seniority credit in connection with their prior service in Erie County for purposes of calculating their Longevity Bonuses, Plaintiffs allege that they did not receive a "longevity salary increment" in

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[1] Although Plaintiffs purport to represent similarly situated newly transferred court officers in the Eighth Judicial District, no application has been made for class action certification.

April 2007 (Complaint ¶ 13). However, Plaintiffs did receive a "longevity salary increment" in 2008 (*id*.).

By the term longevity salary increment, Plaintiffs apparently mean an annual salary increment. According to OCA:

> An annual salary increment is a step increase within a salary grade on the salary schedule – i.e., from step 2 to step 3 or step 3 to step 4 within salary grade 18. Employees whose service during the previous fiscal year has been satisfactory are given an annual salary increment (a step increase) at the start of the next fiscal year.

(Eiseman Affid., Exhibit E at 15). OCA contends that Judiciary Law § 37 governs annual salary increments for all nonjudicial court employees (*id*. at 14). That statute provides in part:

> Accrual of increments. Annual increments shall take effect on the first day of each fiscal year, subject, however, to the provisions of section forty-four of the state finance law. **An employee who has served the equivalent of at least twelve complete payroll periods of actual service during the fiscal year in his position shall be eligible to receive an increment in such position on the first day of the next succeeding fiscal year** . . .

(Judiciary Law § 37 [9] [emphasis supplied]).

In November 2007, Plaintiffs filed a petition pursuant to CPLR Article 78, seeking an order directing OCA to assign them to the proper classifications, seniority levels and wage rates required by the Civil Service Law and as allegedly promised by OCA.[2] Petitioners also sought back wages and benefits (Eiseman Affid., Exhibit A).

After the justice to whom the proceeding had been assigned recused himself, the Eighth Judicial District Administrative Judge assigned the proceeding to Acting Supreme Court

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[2] In that petition, a request for a declaratory judgment appeared in the prayer for relief, but was not stated in the Notice of Petition (*see* Eiseman Affid., Exhibit A at 5).

Justice Dadd, who sits in Wyoming County. OCA moved to dismiss in part on the basis of the statute of limitations in CPLR 217(1). Upon due consideration, Justice Dadd dismissed the proceeding on that basis. The decision also stated:

> It is not necessary to address the other issues raised in this matter because the petition must be dismissed under CPLR 217. Petitioners have made an unsubstantiated and conclusory request that this action be converted to a proceeding for unspecified declaratory relief or for breach of contract. The Court will not speculate as to whether the petitioners could state a cause of action for a declaratory judgment, whether such an action would be barred by the Statute of Limitations, or whether a breach of contract action could be filed in the Court of Claims (see 24 Carmody Wait 2d, § 145:377, §145:384, §145:184, and 19D Carmody Wait 2d §120:65; *see also Matter of Roebling Liquors v Urbach,* 245 AD2d 829 [1997]; *Schaffer v Evans*, 86 AD2d 708 [1982], *affirmed* 57 NY2d 992).

(Eiseman Affid., Exhibit I [hereinafter 2008 Decision]). That decision was not appealed.

The instant action was filed on August 4, 2008 in Erie County. It alleges three causes of action: one, based upon a violation of the Civil Service Law; two, based upon breach of contract; and three, based upon promissory estoppel. After OCA served a Verified Answer, it served the instant motion for change of venue and to dismiss.

DISCUSSION

1. Request for Change of "Venue" to Justice Dadd in Wyoming County

OCA alleges that the Court should grant its motion for a change of venue pursuant to CPLR 510 because the Court "should not be placed in the position of having to rule . . . on these contested salary issues" involving two of the officers who provide court security in Erie County (Defendant's Memo of Law at 5). OCA asserts that courts have not hesitated to change venue when judges or court employees have filed lawsuits in the courts in

which they are employed (*see Saxe v OB/GYN Assoc., P.C.,* 86 NY2d 820 [1995] [Supreme Court Justice]; *Rothwax v Spicehandler*, 161 AD2d 184 [1st Dept 1990] [Acting Supreme Court Justice]; *DeLuca v CBS*, *Inc.*, 105 AD2d 770 [2d Dept 1984] [Supreme Court Justice]; *Milazzo v Long Island Lighting Co.*, 106 AD2d 495 [2d Dept 1984] [law secretary to two judges in county]; *Matter of Suffolk County Court Employees Assoc. Inc v OCA*, 102 Misc2d 837 [Sup Ct Nassau County 1980] [court clerks]).

OCA's position is that the transfer is necessary to avoid even the possible appearance of bias or favoritism. At oral argument, counsel for OCA stated in response to a question that this Court's handling of this matter assigned to it through the Commercial Division, Eighth Judicial District does not violate the Code of Judicial Conduct. Rather, OCA believes it is inappropriate for employees to bring a lawsuit in their own courts. However,

> [a] change of venue pursuant to CPLR 510(2) requires a showing of facts demonstrating a strong possibility that an impartial trial cannot be obtained in the selected county [citations omitted]. "Mere belief, suspicion or feeling are insufficient grounds to grant a motion to change venue under CPLR 510(2)"

(*In re Eighth Judicial Dist. Asbestos Litigation [Gossel v Beazer East, Inc.],* 14 Misc3d 235, 238 [Sup Ct Erie County 2006] [citations omitted]). The decision rests generally in the discretion of the trial judge (*see Milazzo v Long Island Lighting Co*., 106 AD2d at 496). In the *Gossel* case, Judge Lane noted that the fact that plaintiff's decedent had served as a former Supreme Court Judge and Judicial Hearing Officer did not warrant "a presumption that an appearance of impropriety w[ould] result unless venue [were] changed" (*In re Eighth Judicial Dist. Asbestos Litigation*, 14 Misc3d at 237).

Here, the only evidence submitted to support a determination that an impartial trial cannot be obtained in the Commercial Division is the identity of the two Plaintiffs who serve as Court Officers in Erie County (*see generally County of Onondaga v Home Ins. Companies*, 265 AD2d 896 [4th Dept 1999]). However, because of the Commercial Division's district-wide jurisdiction, transferring venue to a different county within the district would not alter the identity of the presiding justice.

Unlike in the *Gossel* case, venue in this matter would be proper in other Districts, such as the Seventh Judicial District. However, OCA has not requested that the matter be transferred out of the Eighth Judicial District, and CPLR § 510 "authorizes a Court to change venue only 'upon motion', and not on its own initiative" (*see In re Jewish Ass'n for Services for the Aged*, 2008 WL 2374671, 2 [Sup Ct Queens County June 2008]; *see also Travelers Indem. Co. of Illinois v Nnamani*, 286 AD2d 769, 770 [2d Dept 2001]). OCA requests instead that the Court transfer the proceeding to Justice Dadd, who sits in Wyoming County. This Court lacks the authority to transfer an action to a specific judge in another county (*see generally* Uniform Civil Rules of the Trial Court Rule 202.3 [5] [Chief Administrator of the courts or his designee may authorize the transfer of action from one judge to another]).

Moreover, the Court is cognizant that, to date, although the caption indicates that Plaintiffs purport to represent all similarly situated Court Officers in the Eighth Judicial District, there has been no attempt by Plaintiffs to show that a class action certification is

appropriate. On balance, the Court determines that OCA has not met its burden to establish the necessity for a change of venue and, therefore, the Court denies OCA's request for that relief.[3]

2. Claims Barred by Res Judicata, Lack of Subject Matter Jurisdiction

OCA asserts that under New York's transactional approach to res judicata, the instant action is barred by the dismissal of the prior petition pursuant to CPLR Article 78 and Plaintiffs' failure to appeal that ruling. The Court agrees, but only with respect to the first cause of action.

"[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). In *Parker v Blauvelt Volunteer Fire Co.* (93 NY2d 343 [1999]), the plaintiff had previously challenged his dismissal as a firefighter in an Article 78 proceeding in which he joined as respondents all of the defendants in the later action. In the proceeding, he sought vacatur of his dismissal and reinstatement to his position, along with damages under 42 USC § 1983. The Supreme Court in the proceeding severed the cause of action under section 1983 and dismissed it, without prejudice to commencement of an appropriate action (*see id*. at 347). The remainder of the proceeding was transferred to the Appellate Division, which confirmed the plaintiff's dismissal and granted judgment for the respondents. The plaintiff then commenced the *Parker* action under 42 USC § 1983 alleging civil rights claims for damages. The Court of Appeals

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[3] OCA asserts that the State Comptroller is a necessary party to this action. However, given the substance of the rulings herein, the Court finds it unnecessary to reach that non-dispositive issue.

held that the plaintiff was not barred by res judicata from bringing the action. Because Supreme Court had properly dismissed the section 1983 civil rights damage claims as not incidental to the primary relief of reinstatement sought under the CPLR Article 78 petition, the termination of the petition on the merits was not res judicata as to the section 1983 damage claims (*see id.* at 348-349). The Court noted:

> Our holding in this regard is also consistent with the position of the Restatement (Second) of Judgments that res judicata is inapplicable where the plaintiff "was unable to . . . seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain . . . multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action . . . to seek that remedy or form of relief" (Restatement [Second] of Judgments § 26[1][c]. . .

(*Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d at 349 [citations omitted]).[4]

Here, Plaintiffs' petition sought review under CPLR 7803 (3), "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."[5] In ruling on the petition, Justice Dadd determined that the claim for a salary increment for April 2007 was untimely in that the petition had been brought more than four months after the final administrative determination (*see* 2008 Decision at 2-3). Justice Dadd determined that it was unnecessary to reach any other issues

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[4] The Court in *Parker* held that the plaintiff was barred by collateral estoppel from proving the underlying allegations supporting his section 1983 claims, as the alleged constitutional violations had been necessarily addressed as grounds for reinstatement (93 NY2d at 350). No such similar assertion has been made here.

[5] Significantly, the prayer for relief in the Article 78 proceeding referring to declaratory relief is essentially identical to the prayer for relief in this action.

raised "because the petition must be dismissed under CPLR 217." As noted, Justice Dadd refused to "speculate as to whether the petitioners could state a cause of action for a declaratory judgment, whether such an action would be barred by the Statute of Limitations, or whether a breach of contract action could be filed in the Court of Claims" (*id.* at 3).

It is clear from Justice Dadd's citation of *Matter of Roebling Liquors, Inc. v Urbach* (245 AD2d 829 [3rd Dept 1997], *lv denied* 91 NY2d 948 [1998]), that he found that the "essence" of Plaintiffs' challenge was to the action of the administrative agency, for review of which "the customary procedural vehicle" is an Article 78 proceeding , and the appropriate Statute of Limitations is four months (*see Matter of Foley v Masiello*, 38 AD3d 1201 [4th Dept 2007]).

> "The appropriate [s]tatute of [l]imitations is determined by the substance of the action and the relief sought" [citations omitted]. "[I]f the claim could have been made in a form other than an action for a declaratory judgment and the limitations period for an action in that form has already expired, the time for asserting the claim cannot be extended through the simple expedient of denominating the action one for declaratory relief" (*New York City Health & Hosps. Corp.*, 84 NY2d [194,] 201).

(*Matter of Foley v Masiello*, 38 AD3d at 1201). Further, "[a] declaratory judgment action may not be utilized as a vehicle to appeal an adverse determination" (*Akivis v Drucker*, 4/7/93 NYLJ 24 [1993]). Thus, Plaintiffs' cause of action for a declaratory judgment is barred by res judicata, because the essence of their complaint is the administrative interpretation of Judiciary Law § 37(9) as requiring 12 pay periods within State service, rather than Erie County service, in order to qualify Plaintiffs for the 2007 annual increment (*see generally Matter of State of New York Unified Court System v Court Attorneys Assoc. of the City of New York*, 267 AD2d 92, 93

[1st Dept 1999] [correct method of determining the validity of the Comptroller's construction of Judiciary Law § 37 concerning appropriate salary increments is by CPLR Article 78 proceeding]).

Even were the Court to determine that Justice Dadd did not reach the issue whether a declaratory judgment action could lie, the result, under principles of res judicata, would be the same. It is generally held that a court's failure to rule on an issue is deemed a denial (*see Matter of Longton v Village of Corinth*, 49 AD3d 995, 996 [3rd Dept 2008], citing *Brown v U.S. Vanadium Corp.*, 198 A.D.2d 863, 864 [4th Dept 1993]).

However, unless it is determined that the Plaintiffs' causes of action for breach of contract and promissory estoppel were "incidental" to the causes of action under CPLR Article 78 and for a declaratory judgment, this Court lacks subject matter jurisdiction over those causes of action (*see* Court of Claims Act § 9 [4]; *Schaffer v Evans*, 86 AD2d at 708, cited in 2008 Decision [Dadd, J.] at 3; *see also Beth Rifka, Inc. v State of New York*, 114 AD2d 560, 563 [3rd Dept 1985]). The Court determines that those causes of action were not "incidental" to the CPLR article 78 proceedings. Although causes of action two and three arise out of many of the same facts as the CPLR Article 78 proceeding, they are derived also from additional allegations that, essentially, OCA promised by contract or otherwise that Plaintiffs' seniority for all purposes would be based upon their service for Erie County, not their service for the State. In other words, those causes of action for contract and promissory estoppel are based not upon the Civil Service law or other statutory law but upon the alleged actions of OCA. Further, because those causes of action seek money damages from the State, Supreme Court has no

jurisdiction over them and, therefore, Judge Dadd's prior decision based only upon the statute of limitations under CPLR Article 78, is not res judicata as to them.

For the reasons stated, the first cause of action is dismissed with prejudice, on the basis of res judicata. Causes of action two and three are dismissed, without prejudice, for lack of subject matter jurisdiction. Defendant to prepare judgment and submit on notice to Plaintiffs.

DATED: March 4, 2009

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HON. JOHN M. CURRAN, J.S.C.