

**Matter of Civil Servs. Empls. Assoc., Inc.,  
A.F.S.C.M.E., Local 1000, A.F.L.-C.I.O. v Glen Cove  
City**

2007 NY Slip Op 33357(U)

October 10, 2007

Supreme Court, Nassau County

Docket Number: 7678-07/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

**PRESENT:**

**Honorable James P. McCormack**  
**Acting Justice of the Supreme Court**

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**In the Matter of the Application of CIVIL SERVICES  
EMPLOYEES ASSOCIATION, INC., A.F.S.C.M.E.,  
Local 1000, A.F.L.-C.I.O., by its Local 882, and  
MARTIN COOK,**

**Index No. 007678/07**

**Petitioner(s),**

**Motion Seq. No.: 001 & 002**

**Motion Submitted: 8/31/07**

**for a Judgment pursuant to Article 78 CPLR,**

**-against-**

**GLEN COVE CITY and MAYOR RALPH SUOZZI,**

**Respondent(s).**

\_\_\_\_\_x

The following papers read on this motion:

Notice of Petition.....XX  
Affirmation in Opposition.....XX  
Reply Affirmation.....XX

This Petition by Civil Service Employees Association, A.F.S.C.M.E., Local 1000, A.F.L.-C.I.O., by its Local 882 ("CSEA"), and Martin Cook, for a judgment pursuant to Article 78 of the CPLR declaring that the respondents Glen Cove City and Mayor Ralph Suozzi's continuing appointment of John Charon, a non-competitive class employee, to the competitive class position of Employee Benefits Representative is violative of Article 5, Section 6 of the New York State Constitution and Civil Service Law § 65; enjoining the

continuation of that appointment; and, ordering respondents to appoint an individual from the Competitive and Promotional "eligible" list to that position, is denied.

This motion by respondents Glen Cove City and Mayor Ralph Suozzi for an order denying the Petition and dismissing this action pursuant to CPLR 7804(f) is granted.

By way of this proceeding, the petitioners CSEA and Mr. Cook challenge the respondent Glen Cove City's appointment of a non-competitive class employee to a competitive class position despite the existence of an eligible list for that position. The respondents Glen Cove City and its Mayor seek dismissal of the Petition pursuant to CPLR 7804(f) on the ground that the petitioners have failed to exhaust their administrative remedies.

In their Petition, petitioners allege that John Charon voluntarily resigned from his position as Employee Benefits Representative in 2000 and assumed a non-competitive position in 2002 as Secretary to the Glen Cove Civil Service Commission. In 2002, Glen Cove City held an exam to fill the position of Employee Benefits Representative and that position was filled from the eligible list created as a result of that exam. Petitioners allege that in 2004, that person resigned and that some time thereafter, John Charon was temporarily appointed to that position pending the creation of a new eligible list. Petitioners allege that a competitive exam for that position was given on May 14, 2005 and that an eligible list for that position was created on or about July 21, 2005. Petitioners allege that despite their objection, John Charon still

occupies the position and that an appointment from the eligible list has not been made.

Petitioners allege that on July 3, 2007, CSEA filed a grievance seeking Charon's removal as Employee Benefits Representative and on January 31, 2007, respondent Mayor Suozzi responded "Employee Benefits Representative job description is inclusive of Civil Service Duties." Petitioners allege that on February 12, 2007, CSEA formally requested arbitration and that on February 28, 2007, CSEA filed a Demand for Arbitration, alleging that Glen Cove City had violated Article 9, Section 1 ("Use of Promotion List") of their Collective Bargaining Agreement. Petitioners requested the removal of Charon as Employee Benefits Representative and that an appointment from the eligible list be made.

The petitioners allege in their Petition that Charon's continued appointment as Employee Benefits Representative and the respondents' failure to appoint someone from the eligible list constitute violations of Article 5, Section 6 of the New York State Constitution and Section 65 of the New York State Civil Service Law. In addition to declarative relief, the petitioners seek to enjoin the appointment of individuals not on the eligible list and to compel an appointment from the list.

Article 5, Section 6 of the New York State Constitution provides that "[a]ppointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." Section 65(1) of the Civil Service Law allows for

provisional appointments in the absence of a provisional list, however, those appointments are limited in duration and examinations are mandated by Section 65(2) of the Civil Service Law.

Article VIII of the Collective Bargaining Agreement between CSEA and the City of Glen Cove sets forth a Grievance Procedure. A grievance is defined as a dispute between the City and the CSEA "with respect to the meaning, interpretation or application of a provision of [that] agreement." Step 1 of the Grievance Procedure requires an oral complaint by an affected employee to his or her immediate supervisor not in the bargaining unit or the supervisors designed [sic] representative for grievance procedure. Step 2 requires a written complaint by the affected employee to his or her employee's Department Head. Step 3 requires a request for the Mayor to review the determination reached at Step 2. Step 4 requires the written request for arbitration.

"It is the rule in New York that once it is established that a petitioner is obligated to arbitrate his grievance under an applicable collective bargaining agreement, his failure to do so operates as a bar to an article 78 proceeding." Matter of Prey v County of Cattaraugus, 79 AD2d 205 (4<sup>th</sup> Dept. 1981), citing Matter of Plummer v Klepak, 48 NY2d 486, 489, cert. den. 445 U.S. 952; Curtis v Schlegel Mfg. Corp., 72 AD2d 969; Matter of Madon v Long Is. Univ., 70 AD2d 913, 914; Matter of Barhite v Dyson, 63 AD2d 1051, 1052; Matter of Flemming v Cagliostro, 53 AD2d 187, 189, mot for lv to app den. 40 NY2d 806. Even where the grievance procedure requires prosecution of the grievance by petitioner's union, absent any showing that the union is unwilling to

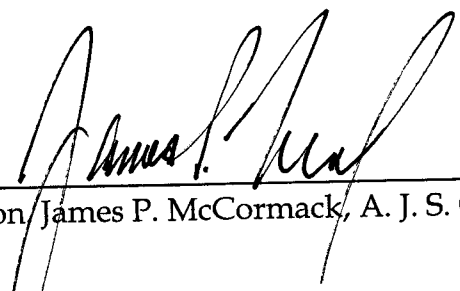
pursue the grievance, such procedures must be exhausted before trying to obtain a judicial resolution." Matter of Prey v County of Cattaraugus, supra.

The request for arbitration was made by petitioners and a hearing was scheduled for August 21, 2007. This CPLR article 78 proceeding is barred on account of the petitioners' failure to exhaust their administrative remedies. Matter of Chyn v County of Chautaughna, 115 AD2d 989 (4<sup>th</sup> Dept. 1989) citing Matter of Plummer v Klepak, supra; Matter of Prey v County of Cattaraugus, supra. None of the cases relief

upon by petitioners alter this result. None of the cases relied upon by petitioner concern the interpretation and application of a Collective Bargaining Agreement that requires arbitration.

This constitutes the Decision and Order of this Court.

Dated: October 10, 2007  
Mineola, N.Y.

  
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Hon. James P. McCormack, A. J. S. C.

**ENTERED**

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**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**