

**Matter of Occhigrosso v New York State Office of  
Children and Family Servs.**

2008 NY Slip Op 33107(U)

October 27, 2008

Supreme Court, Suffolk County

Docket Number: 6870/2008

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

**PRESENT:**

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

In the Matter of the Application of  
 JEAN OCCHIGROSSO and JEAN'S GROUP  
 FAMILY DAY CARE,

Petitioner,

for a Judgment pursuant to Article 78 of the  
 Civil Practice Law and Rules

-against-

NEW YORK STATE OFFICE OF CHILDREN  
 AND FAMILY SERVICES, ADMINISTRATIVE  
 LAW JUDGE DEBRA A. CUBBEDGE, TANA  
 T. STROME, ESQ. of the NEW YORK  
 STATE OFFICE OF CHILDREN AND  
 FAMILY SERVICES, and its Officers, Agents,  
 Servants, Representatives and Employees,

Respondents.

ORIG. RETURN DATE: MARCH 12, 2008  
 FINAL SUBMISSION DATE: APRIL 24, 2008  
 MTN. SEQ. #: 001  
 MOTION: MOT D

**PLTF'S/PET'S ATTORNEY:**  
 STANLEY E. ORZECOWSKI, ESQ.  
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 631-862-7500

**DEFT'S/RESP ATTORNEY:**  
 ANDREW M. CUOMO  
 ATTORNEY GENERAL OF THE  
 STATE OF NEW YORK  
 BY: LORI L. PACK, ESQ.  
 ASSISTANT ATTORNEY GENERAL  
 300 MOTOR PARKWAY - SUITE 205  
 HAUPPAUGE, NEW YORK 11788  
 631-231-2424

Upon the following papers numbered 1 to 10 read on this petition \_\_\_\_\_  
 FOR A JUDGMENT PURSUANT TO ARTICLE 78 \_\_\_\_\_.

Order to Show Cause, Verified Petition, and supporting papers 1-4; Affirmation in Opposition  
 and supporting papers 5; Verified Answer 6; Return and supporting papers 7, 8;  
 Replying Affirmation and supporting papers 9, 10; it is,

**ORDERED** that this petition for a judgment, pursuant to Article 78 of  
 the CPLR:

(1) granting petitioners' petition for certiorari and judicial review of  
 the determination of respondent New York State Office of Children and Family  
 Services to revoke License No. 25056 of petitioners, and the Decision After

Hearing of John Franklin Udochi, Bureau of Special Hearings, dated October 16, 2007, rendered after a hearing before Administrative Law Judge Debra A. Cubbedge; and

(2) upon judicial review, vacating, setting aside, reversing and rescinding or modifying in each and all respects the findings of fact, conclusions of law, and the Decision After Hearing of John Franklin Udochi, Bureau of Special Hearings, dated October 16, 2007, rendered after a hearing before Administrative Law Judge Debra A. Cubbedge, which affirmed the determination of respondent New York State Office of Children and Family Services to suspend and revoke the license of petitioner Jean Occhigrosso to operate a group family day care home, upon the grounds that:

- (a) said determinations, decision and order were not based upon a full and fair hearing or a full opportunity to be heard;
- (b) the fair hearing was conducted in violation of petitioners' right to due process and equal protection of law;
- (c) the decisions, determinations and order were and are arbitrary, capricious, and irrational;
- (d) the decisions, determinations and order were rendered in violation of lawful procedure;
- (e) the Administrative Law Judge proceeded without and/or in excess of her jurisdiction, and her bias and prejudice precluded any possibility of an impartial determination;
- (f) the decisions, determinations and order were made in violation of lawful procedure, were affected by errors of law and fact and were tainted by repeated acts constituting an abuse of discretion, including an abuse of discretion as to the measure and mode of penalty or discipline imposed; and
- (g) the decisions, determinations and order made prior to the fair hearing, and as a result of the fair hearing were not supported by clear, convincing, credible, or substantial evidence,

is hereby determined as provided hereinafter.

By Order to Show Cause issued on February 15, 2008 (Spinner, J.), the Court granted the following temporary restraining order, pending the hearing and determination of this proceeding:

[T]he respondents, their agents, servants, representatives, employees and their counsel are hereby restrained and stayed from taking any further action to enforce the determinations of the New York State Office of Children and Family Services, or the Decision and Order rendered after hearing of the Administrative Law Judge and from taking any further action against, or having any further communication or contact with the Petitioners based upon those determinations, decisions and order, and all proceedings to enforce said determinations, discussions and order are stayed.

Within the Order of February 15, 2008, the Court further ordered that “nothing contained herein shall prohibit or prevent the Respondents from exercising their official statutory authority including but not limited to investigation, enforcement and supervision and all necessary and appropriate action.”

Subsequent thereto, the parties entered into three stipulations adjourning the return date of the petition, and continuing in full force and effect the temporary restraining order as described hereinabove, pending the hearing of this matter.

Petitioners commenced this Article 78 proceeding to vacate, set aside, reverse and rescind in each and all respects the findings of fact, conclusions of law, and the Decision After Hearing of John Franklin Udochi, Bureau of Special Hearings, dated October 16, 2007, rendered after a hearing before Administrative Law Judge Debra A. Cubbedge, which affirmed the determination of respondent New York State Office of Children and Family Services to suspend and revoke the license of petitioner Jean Occhigrosso to provide group family day care services to families and children.

As a threshold matter, respondents allege that jurisdiction has not been obtained over the State respondents herein. Respondents argue that personal service upon a state officer sued solely in an official capacity or a state agency must be effectuated pursuant to CPLR 307 (2). Respondents allege, upon information and belief, that the instant Order to Show Cause was merely

mailed to respondent New York State Office of Children and Family Services and not to the chief executive officer or any person authorized to accept service by the agency, as required under CPLR 307 (2).

Notwithstanding the foregoing allegation, the Court finds that jurisdiction has been obtained over the respondents herein. CPLR 403 and 7804 permit a court to specify the manner of service of an order to show cause filed in lieu of a notice of petition (see CPLR 403 [d], 7804 [c]). The instant proceeding was commenced by Order to Show Cause, which directed the time and manner of service thereof. Specifically, the Order directed service upon respondents by "personal service and delivery" to the New York State Office of Children and Family Services, on its own behalf and on behalf of Administrative Law Judge Debra A. Cubbedge, and by overnight mail service upon respondent Tana T. Strome, Esq., on or before the 22<sup>nd</sup> day of February 2008 at 5:00 p.m. The method of service provided for in an Order to Show Cause is jurisdictional in nature and must be strictly complied with (see *Matter of Bruno v Ackerson*, 39 NY2d 718 [1976]; *Matter of Correnti v Suffolk County Dist. Attorney's Off.*, 34 AD3d 578 [2d Dept 2006]; *Matter of Jones v Dennison*, 30 AD3d 952 [3d Dept 2006]; *Stern v Garfinkle*, 22 AD3d 694 [2d Dept 2005]; *Bell v State University of New York*, 185 AD2d 925 [2d Dept 1992]).

Petitioners have submitted an Attorney Affirmation, dated February 20, 2008, in which petitioners' counsel indicates that on February 19, 2008, he personally attended at the New York State Office of Children and Family Services and served the instant Order to Show Cause with supporting documents upon the New York State Office of Children and Family Services and Administrative Law Judge Debra A. Cubbedge by serving Cheryl Williams, a Licensing Supervisor, who acknowledged she was authorized to accept service. In addition, petitioners have submitted an affidavit of service, dated February 20, 2008, indicating that overnight mail service upon respondent Tana T. Strome, Esq. was effectuated on even date. As such, petitioners have demonstrated compliance with the service directives contained in the Order to Show Cause, and respondents have not refuted these allegations with any particularity. Therefore, the Court finds that personal jurisdiction has been obtained over the respondents herein.

As the jurisdictional issue has now been determined and does not terminate the proceeding, and as this proceeding is based upon a factual determination of whether there is substantial evidence in the record to support the determination made after a hearing held pursuant to direction by law, to wit: Social Services Law §§ 422 (8) and 424-a, this petition is respectfully transferred to the Appellate Division, Second Judicial Department for disposition pursuant to

CPLR 7804 (g) (see CPLR 7803 [4], 7804 [g]; *Matter of Patterson v State of N.Y. Office of Children & Family Servs.*, 34 AD3d 684 [2d Dept 2006]; *Hosmer v. N. Y. Office of Children & Family Servs.*, 289 AD2d 1042 [4th Dept 2001]).

The foregoing constitutes the decision and Order of the Court.

Dated: October 27, 2008

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court