

Cribbin v New York State Unified Court Sys.

2010 NY Slip Op 32237(U)

August 12, 2010

Supreme Court, Nassau County

Docket Number: 21757/09

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

PATRICK CRIBBIN, as President an on behalf
of COURT OFFICERS BENEVOLENT ASSOCIATION OF
NASSAU COUNTY, INC. and MAJORS KEVIN ANDERSON,
MARTIN D'AMICO, JOSEPH CECORA, KENNETH M. LITTLE,
and others similarly situated,

Petitioner(s),

MOTION DATE: 3/10/10
INDEX NO.: 21757/09
SEQ. NOS. 1 & 2

For a Judgment and Order Pursuant to
Article 78 of the Civil Practice Law
and Rules

-against-

NEW YORK STATE UNIFIED COURT SYSTEM and ANN
PFAU, as Chief Administrative Judge,

Respondent(s).

The Petitioners, in the above captioned special proceeding, seek a judgment of this Court pursuant to Article 78 of the CPLR:

Declaring Respondents' herein described actions to be arbitrary, capricious and in violation of, *inter alia*, 22 NYCRR § § 25.5, 25.7 and 25.9;

Declaring Respondents' said actions to be in violation of New York State Civil Service Law § § 61(2) and 115;

Ordering Respondents to classify or reclassify Majors Kevin Anderson, Martin D'Amico, Kenneth Little, Joseph Cecora and others similarly situated from the New York State Court Officer - Major I, Salary Grade 26 to New York State Court Officer - Major II, Salary Grade 28 effective June 24, 2009; and

Awarding the Petitioners costs and disbursements of this proceeding including reasonable attorney's fees incurred in connection with this proceeding.

The Respondents, by motion pursuant to Article 5 of the CPLR, seek an order of this Court changing the venue of this proceeding from Nassau County to New York County.

Based upon all of the papers submitted for this Court's consideration, the Court will first address the Respondents' motion.

At the time of the commencement of this special proceeding, the petitioners Majors Martin D'Amico, Joseph Cecora and Kenneth M. Little were, and they presently remain, the New York State Court Officer-Majors in charge of security for the Nassau County Supreme, County and District Court facilities, respectively. New York State Court Officer- Major Kevin Anderson is assigned to the Office of the District Administrative Judge of the Nassau County Courts. Major Anderson's duties include, *inter alia*, overseeing the Nassau County Courts' Mobile Patrol Unit.

Section 7804(b) of the CPLR provides:

- (b) Where proceeding brought. A proceeding under this article shall be brought in the Supreme Court in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides.

Section 506(b) of the CPLR provides in pertinent part:

- (b) Proceeding against body or officer. A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located

The following are undisputed facts herein:

The Court Officers Benevolent Association of Nassau County ("COBANC") is the exclusive bargaining agent for certain court employees located in Nassau County, including employees in the Major I title.

The Petitioner, Patrick Cribbin, is currently the president of COBANC and the Petitioners, Major Kevin Anderson, Major Martin D'Amico, Major Joseph Cecora and Major Kevin M. Little, are all employed in courts in Nassau County in the title of Major I (JG 26).

COBANC has its principal place of business in Nassau County and Majors Kevin Anderson, Martin D'Amico, Joseph Cecora and Kenneth M. Little reside in Nassau County.

The Unified Court System constitutes the Judicial Branch of Government of New York State, established and organized in accordance with Article VI of the New York State Constitution.

The Respondent, the Honorable Ann Pfau, is the Chief Administrative Judge of the Courts of the State of New York and maintains an office from which to administer such duties and responsibilities at 25 Beaver Street, New York City.

The New York State Unified Court System ("UCS") Major I (JG 26) and Major II (JG 28) titles are designated as noncompetitive-confidential.

The UCS Title Standard for Major I provides that such employee works "[u]nder the general direction of an Administrative Judge, Executive Assistant or Security Coordinator. . . ."

Majors Kevin Anderson, Martin D'Amico, Joseph Cecora and Kenneth M. Little report directly to Chief James DiNapoli, New York State Security Coordinator (JG 28), the Chief of Security for the Nassau County Courts.

There are no employees in the UCS Major I title in the City of New York.

The UCS Title Standard for Major II provides that such employee works "[u]nder the direction of an Administrative Judge or Chief Clerk"

There are no UCS employees in Nassau County who hold the Major II title.

In a memorandum dated June 11, 2009, the Honorable Fern A. Fisher, the Deputy Chief Administrative Judge of the New York City Courts, conveyed the following:

Chief Judge Lippman and Chief Administrative Judge Pfau recently announced plans to streamline the administrative structure and operations of the NYC Civil and Criminal Courts. Under the plan, each county in New York City will have a County Administrative Judge for Criminal Matters and a County Administrative Judge for Civil Matters; Richmond County will continue to have a single Administrative Judge. The County Supervising Judges for the Civil and Criminal Courts will now report directly to the respective County Administrative Judge.

This emphasis on local accountability requires changes in the current security and reporting structures in the Citywide courts.

Security operations in Supreme Court will continue to be overseen by a Major in the Criminal Term and the Civil Term, who report to the appropriate county Chief Clerk. A Major will also be appointed for the Civil and Criminal Courts in each county. In consultation with their respective Supervising Judges and Borough Chief Clerks, the Civil and Criminal Court Majors will oversee security operations, supervise uniformed personnel in their respective courts, and will report to their respective County Chief Clerk.

The current Citywide Majors for the Civil and Criminal Courts will assume the new positions of Citywide Security Coordinators, working out of the Deputy Chief Administrative Judge's office and reporting to the Citywide Chief Clerks. In this new capacity, they will address security issues of a citywide nature, work to ensure uniformity in security practices throughout the Citywide courts and provide assistance and support to local security supervisors. The management of the Community Courts will be assumed by the Deputy Chief Administrative Judge and the security officers assigned therein will be supervised by the Citywide Security Coordinators.

Thereafter, the Honorable Lawrence K. Marks, the Administrative Director of the UCS Office of Court Administration, issued a memorandum dated June 24, 2009 which stated:

As was recently explained, one component of the new administrative structure in the New York City courts is the designation of a Major for the Criminal Court and also for the Civil Court of each county. These Majors will oversee security operations and supervise uniformed personnel in their respective courts, and will report to the Supreme Court Chief Clerks.

Although initially we were considering a selection process from the Captains currently assigned to these courts, we have decided to take a different approach. Currently, ten Captains assigned to regular Monday through Friday day schedules are responsible for day-to-day operations in the commands in the Criminal Court and the Civil Court. Our fiscal and operational review of their responsibilities under the new administrative structure supports reclassifying their positions to New York State Court Officer-Major, JG-28. Accordingly, effective immediately, the ten incumbent Captains are appointed to the Major title. Please note that their positions will be earmarked.

Captains are ranked below Major Is in both UCS salary grade and chain of command. As

such Captains report to Major Is and so on up the chain of command.

Majors Martin D'Amico, Joseph Cecora and Kenneth M. Little are responsible for court security operations for the courts to which they are assigned.

Harry Greenberg, Esq., of counsel to COBANC, submitted a letter, dated July 15, 2009, to the Hon. Lawrence K. Marks, Administrative Director of the UCS Office of Court Administration which formally requested:

This office represents the Court Officers Benevolent Association of Nassau County, Inc. ("COBANC"). Enclosed is a Memorandum from you, dated June 24, 2009, regarding appointment of New Majors. In your June 24, 2009 Memorandum, in pertinent part, you indicate, "Our fiscal and operational review . . . supports reclassifying their positions to New York State Court Officer-Major, JG-28."

It is COBANC's position that the Majors in Nassau County should also be reclassified to JG-28. Majors in Nassau County are also responsible for day to day operations in the various courts in Nassau County, in the same way as the new Majors that were reclassified to JG-28, as referenced in your June 24, 2009 Memorandum.

Accordingly, on behalf of COBANC, we are requesting that Majors in Nassau County be reclassified to JG-28 and to meet with you, as soon as possible, regarding this reclassification request.

I await your reply.

The Hon. Lawrence K. Marks, by letter, dated August 17, 2009, replied to the aforesaid July 15, 2009 letter of Harry Greenberg wherein Judge Marks stated:

This is response to your recent correspondence concerning the newly-established title Court Clerk

Training Specialist and the classification of New York State Court Officer-Major title in Nassau County.

* * *

NYS Court Officer-Major

With regard to your request that the Majors in Nassau County be reclassified from NYS Court Officer-Major I, JG26, to NYS Court

Officer-Major II, JG28, please be advised that Majors in Nassau are properly classified under the current classification plan for security titles.

In accordance with the changes to the security series adopted January 8, 2004, the appropriate title and grade for Majors working in Districts outside of New York City is NYS Major, JG26, because they report to a NYS Security Coordinator, JG28, who is the highest ranking security supervisor in the jurisdiction. Classification of Majors at JG28 is appropriate where the Major is the highest ranking security supervisor in a jurisdiction. Majors in Nassau County are not comparable to Majors in the Civil and Criminal Citywide courts, where the Majors in each county are the highest ranking security supervisor in each county and report directly to the Supreme Court Chief Clerk.

* * *

I hope this has satisfactorily answered your questions.

Very truly yours,

Lawrence K. Marks

22 NYCRR Part 25, Rules of the Chief Judge, provides in pertinent part:

§ 25.5. Classification and Allocation

- (a) The Chief Administrator of the Courts shall have the power to classify and reclassify, and to allocate and reallocate to an appropriate salary grade, all positions in the classified service of the unified court system.
- (b) The Chief Administrator of the Courts may, in order to implement a plan for the progressive advancement of employees in an occupational group, based on their acquiring, as prescribed by the Chief Administrator, training or experience or both, reclassify the positions of the incumbents who meet the prescribed qualifications to titles allocated to higher salary grades. the advancement of an incumbent pursuant to this subdivision shall not be deemed a reallocation.

- (c) The effective date of any classification, reclassification, allocation or reallocation shall be such date as is determined by the Chief Administrator of the Courts. No employee whose salary would be increased by any classification, reclassification, allocation or reallocation shall have any claim for the difference, if any, between his or her former salary and that which he or she should receive as a result of that classification, reclassification, allocation or reallocation for the period prior to the date the change in title or salary grade becomes effective.
- (d) Review of Classification and Allocation. Any nonjudicial employee, employee organization or court administrator directly concerned in any classification or allocation of a position in the unified court system may seek review of that classification or allocation by submitting a request, in writing, to the director of personnel of the unified court system setting forth the basis of the change requested, together with any supporting papers. The director of personnel shall conduct such inquiry as is necessary and recommend to the Chief Administrator any required adjustments in the classification or allocation. The Chief Administrator shall determine the request for review and shall notify the employee, employee organization or administrator of that determination.
- (e) No classification or reclassification of a position of a permanent employee shall diminish any existing salary compensable on an annual basis so long as such position is held by the then permanent incumbent.

§ 25.7 Classified Service

The classified service shall comprise all offices and positions in the unified court system except justices, judges, county clerks and housing judges appointed pursuant to section 110 of the New York City Civil Court Act. The offices and positions in the classified service of the unified court system shall be divided into four classes, to be designated as the exempt class, the noncompetitive class, the labor class and the competitive class. The Chief Administrator of the courts shall determine the appropriate class for each job title in the unified court system.

25.9. Noncompetitive Class.

The noncompetitive class shall include all positions that are not in the exempt class or in the labor class and for which it is found by the Chief Administrator of the Courts not to be practicable to ascertain the merit and fitness of applicants by competitive examination. Appointments to positions in the noncompetitive class shall be made after such noncompetitive examination as is prescribed by the Chief Administrator.

New York Civil Service Law § 115 provides:

Policy of the State.

In Order to attract unusual merit and ability to the service of the state of New York, to stimulate higher efficiency among the personnel, to provide skilled leadership in administrative departments, to reward merit and to insure to the people and the taxpayers of the state of New York the highest return in services for the necessary costs of government, it is hereby declared to be the policy of the state to provide equal pay for equal work, and regular increases in pay in proper proportion to increase of ability, increase of output and increase of equality of work demonstrated in service.

New York Civil Service Law § 61(2) provides:

Prohibition against out-of-title work. No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder. No credit shall be granted in a promotion examination for out-of-title work.

The respondents premise their motion to change the venue of the instant special proceeding from Nassau County to New York County, upon CPLR § § 506(b), set forth herein above, and 510(1)(3) which provide:

“The court, upon motion, may change the place of trial of an action where:

1. The county designated for that purpose is not a proper county;
or
3. the convenience of material witnesses and the ends of justice will be promoted by the change.”

Interestingly, they do not cite to subdivision (2) of CPLR § 510 which provides:

2. there is reason to believe that an impartial trial cannot be had in the proper county.

However, the Respondents take the position at page 5 of the Affidavit of Kenneth Falk, Esq., in support of their motion:

“ . . . in order to promote an impartial trial of the issues and to avoid even the appearance of impropriety in the determination of this matter, respondents request that the trial of this proceeding be changed from Nassau County to New York County.”

Furthermore, the Respondents cite to the following cases as precedent in support of their motion: *Matter of Flynn v Evans*, Index No. 113961/81 (Sup. Ct. Nassau Co., August 3, 1981), *Matter of Perich v Evans*, Index No. 3664/80 (Sup. Ct. Westchester Co., May 21, 1980), *Matter of Suffolk County Court Employees Assn. v Office of Court Administration*, Index No. 79-22130 (Sup. Ct., Suffolk Co., January 18, 1980); *Matter of New York State Supreme Court Offices Assn. v Lippman*, Index No. 109830/03 (Sup. Ct., New York Co., July 17, 2003) and *Ward v Sise*, 127 Misc2d 32 (Sup. Ct., Erie Co. 1984).

With respect to the concerns of an appearance of impropriety expressed by the Respondents, this Court finds and determines that such concerns are without merit. For “the mere fact that a party to an action is of some prominence or holds an official position in the county does not justify an inference that an impartial trial cannot be had in that County.” *The Trust U/W/O Nick Gallipoli v Eric Russo, Esq. and VanBrunt, Juzwiak & Russo, P.C.*, Index No. 07612/08 (Sup. Ct., Nassau Co., October 28, 2008, N.Y.L.J., October 31, 2008, p. 28, col. 3). (See also, *Cohen v Bernstein*, 9 AD3d 573 [3rd Dept. 2004]).

Addressing the Respondents’ motion to change venue, the burden to show that the Petitioners did not designate a proper county is upon the movants and such a motion will be denied where the movants have failed to sustain their burden of showing that the Petitioners did not have the right to designate Nassau County as the venue of this special proceeding. *General Acc. Fire & Life Assur. Corp. v AllCity Ins. Co.*, 93 Misc2d 596. (cf. *Circle Bake Shop v Demand Oil Corp.*, 21 Misc2d 643).

Pursuant to CPLR § 506(b) the Petitioners had the discretion to designate venue in the County “where the material events otherwise took place.”

In the instant special proceeding, notwithstanding the fact that the Respondents' decisions were made in New York City, the Petitioners work in Nassau County Courts, they are complaining of actions taken by their superiors which affect their work in Nassau County and nearly all of the undisputed facts as set forth herein above took place in Nassau County.

Accordingly, this Court finds and determines that the Petitioners' designation of Nassau County is a proper venue for the instant proceeding. Therefore, the Respondents' motion to change the venue herein, pursuant to CPLR § 510(1) is denied.

The remaining prong of the Respondents' motion for a change of venue is CPLR § 510(3), specifically "where the ends of justice will be promoted by the change."

As set forth herein above CPLR § 510(3) provides:

3. the convenience of material witnesses and the ends of justice will be promoted by the change. (Emphasis added).

The conjunctivity of the two elements of CPLR § 510(3) has been recognized by an Appellate Court. (*See Wilson v Sponable*, 77 AD2d 799 [4th Dept. 1980]).

Accordingly, in order to support its CPLR § 510(3) motion, the Respondents must demonstrate that "the convenience of material witnesses" would be better served by the change (see *Cardona v Aggressive Heating*, 180 AD2d 572).

To make the aforesaid showing, the Respondents must satisfy the following five (5) criteria:

"(1) the identify of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case."
Cardona v Aggressive Heating, supra at 572.

Furthermore, a motion under CPLR § 510(3) requires specificity. *Williamsburg Steel Products Co., Inc. v Shevlin-Manning, Inc.*, 90 AD2d 550.

Counsel for the Respondents in his Affidavit in Support of the instant motion to change venue at pages 6 and 7 states:

"It is anticipated that this proceeding will be decided on the pleadings and the papers submitted by counsel, and that there are no witnesses who will be inconvenienced by a change of venue."

Accordingly, based upon all of the above, this Court finds and determines that, as a matter of law, the Respondents have not met their burden to justify a change in venue, pursuant to CPLR § 510, nor have they persuaded this Court to exercise its inherent discretion to change the venue herein.

Therefore, the cross-motion of the Respondents is denied in all respects.

Set forth before this Court, as and for a third cause of action in the Verified Petition herein, it is alleged:

“Respondents’ failure to reclassify Major I’s in Nassau County in conformance with their functions, which are the same as Major II’s in New York City, requires Major I’s to perform out-of-title work.

Namely, Major I’s are now performing the work of a higher ranking title, Major II.”

The Respondents, in their Verified Answer to the instant Petition, interpose a Third Affirmative Defense, as follows:

“Petitioners have failed to exhaust their administrative remedies set forth in the collective bargaining agreement between the Unified Court System and COBANC”

Pursuant to the 2007-2011 collective bargaining agreement between the Court Officers Benevolent Association of Nassau County and the State of New York State Unified Court System, the parties herein have collectively negotiated procedures to resolve the dispute particularized in the Petitioners’ Third Cause of Action, specifically, Articles 18 and 19 of the said collective bargaining agreement. This grievance process requires such claims to be submitted in writing to the New York State Unified Court System’s Deputy Director of Labor Relations, who meets with COBANC and then issues a written decision.


Based upon all of the papers submitted for this Court’s consideration in the instant special proceeding, this Court finds and determines that the determinative issue herein is whether Major I’s in Nassau County, in conformance with their functions, are performing the same duties as Major II’s in New York City.

Notwithstanding, the Petitioners’ position that the herein above described grievance process would be futile, this Court, *sua sponte*, directs all parties herein to forthwith initiate and participate in the grievance procedure set forth in Articles 18 and 19 of their 2007-2011 collective bargaining agreement and to specifically address the herein above framed issue in the said procedure.

Thereafter, upon the filing with this Court of a copy of the written decision of New York

State Unified Court System's Deputy Director of Labor Relations, this Court will consider same in rendering its judgment in the instant special proceeding.

DATED 8/12/10


A.J.S.C.

ENTERED

AUG 16 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**