

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF MONROE

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In the Matter of the Application of

**VERIFIED PETITION/  
COMPLAINT**

LOUIS T. AMICO, and  
JAMES A. McTIERNAN III, President of the Rochester Fire-  
fighters Association Local 1071 IAFF, AFL-CIO, INC.,

Petitioners/Plaintiffs

Index No.

For a Judgment pursuant to CPLR Article 78 in the  
nature of mandamus & CPLR § 3001

Date Filed:

- against -

Assigned to:

Hon. 111/1155

R. CARLOS CARBALLADA, in his capacity as "Acting  
Mayor" of the City of Rochester, New York, and  
CITY COUNCIL OF THE CITY OF ROCHESTER,  
NEW YORK,

Respondents/Defendants.

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Petitioners/plaintiffs Louis T. Amico and James A. McTiernan III (hereinafter, "petitioners"), by their attorney, Arthur J. Giacalone, Esq., Van Henri White, Esq., of counsel, for their verified petition and complaint (hereinafter, "petition") in this combined CPLR Article 78 proceeding and declaratory judgment action against the respondents/defendants (hereinafter, "respondents"), respectfully allege and state:

**INTRODUCTION**

1. The assertion is made at the official website of the City of Rochester, New York, <http://www.cityofrochester.gov>, that respondent R. Carlos Carballada "became Acting Mayor [of the City of Rochester] on Jan. 20, 2011," and that "[h]e has the official power to act as Mayor of Rochester in the time before the March, 2011 special election." [Attached hereto as **Exhibit A** is a copy of two-page a document obtained from the City's

website, under the heading "Office of the Mayor," which is the source of the above quotes.]

2. This combined CPLR Article 78 proceeding and declaratory judgment action (hereinafter, "proceeding") is brought to challenge both the legitimacy of respondent Carbadalla's purported status as "Acting Mayor" of the City of Rochester, and the assertion that he possesses the power to act as Rochester's Mayor until a special election is held in March of 2011; it is also brought to compel respondent City Council of the City of Rochester to exercise its authority under the Charter of the City of Rochester (hereinafter, "City Charter"), on or before January 31, 2011, to appoint a person to fill the vacancy in the office of Mayor arising from the December 31, 2010 resignation of Mayor Robert J. Duffy.

3(A). Upon information and belief, Louis T. Amico resides at 153 Parkway in the City of Rochester, New York, is a registered voter, and serves as a Democratic Party committee member.

3(B). Upon information and belief, petitioner James A. McTiernan III is a resident of the County of Monroe, State of New York, and President of the Rochester Firefighters Association Local 1071 IAFF, AFL-CIO, INC. (hereinafter, "Rochester Firefighters Association").

4(A). Upon information and belief, respondent R. Carlos Carballada purports to be the "Acting Mayor" of the City of Rochester, New York, and is a resident of the City of Rochester, County of Monroe, State of New York.

4(B). Respondent City Council of the City of Rochester, New York (hereinafter, "City Council"), is the nine-member legislative body for the City of Rochester, with the

powers and duties of a city council pursuant to the constitution and laws of the State of New York, including, without limitation, the authority, pursuant to § 3-2.1 of the City Charter, to fill a vacancy in the office of Mayor arising otherwise than by expiration of term by appointing by a majority vote, within 30 days of a vacancy in the office of Mayor, a person who is registered in the same political party as the person who vacated the office.

### FOR PETITIONERS' FIRST CLAIM

5. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 4(B) of this petition, with the same force and effect as if set forth here at length.

6. On November 2, 2010, Robert J. Duffy, the duly elected Mayor of the City of Rochester, was elected Lieutenant Governor of the State of New York.

7. On December 31, 2010, Mayor Duffy resigned his position as Mayor of Rochester.

8. At the time of Mayor Duffy's resignation, Thomas Richards held the position of Deputy Mayor of the City of Rochester, having been duly appointed to that position by Mayor Duffy pursuant to § 3-2 of the City Charter, which, in pertinent part, states:

*City Charter*  
*§ 3-2. Deputy Mayor.*

*There shall be a Deputy Mayor who shall be appointed by and serve at the pleasure of the Mayor without confirmation by the Council. The Mayor's functions, powers and duties shall be exercised by the Deputy Mayor under the direction and control of the Mayor. ... In the event that the office of the Mayor becomes vacant, the Deputy Mayor shall act as the Mayor until the vacancy is filled as provided in this Charter.*  
*[L.L. No. 22-1970; § 1, L.L. No. 9-1984] [Emphasis added.]*

[For the convenience of the Court, attached hereto as **Exhibit B** is a copy of Article III of the City Charter.]

9. On January 1, 2011, pursuant to § 3-2 of the City Charter, Deputy Mayor Richards was sworn in as Acting Mayor of the City of Rochester, to hold such position “until the vacancy is filled” as provided in the City Charter.

10. Pursuant to Section 3-2.1 of the City Charter, entitled “Vacancy in the office of Mayor,” respondent City Council is mandated to fill the vacancy in the office of Mayor arising from Mayor Duffy’s resignation “by appointing by a majority vote a person who is registered in the same political party as the person who vacated the office”:

*City Charter*

**§ 3-2.1. Vacancy in the office of Mayor.**

*The Council shall fill a vacancy in the office of Mayor arising otherwise than by expiration of term by appointing by a majority vote a person who is registered in the same political party as the person who vacated the office. If the person so appointed is a member of Council, the office of the member of Council appointed as Mayor shall be declared vacant by the Council and filled pursuant to § 5-4 of the Charter. The person so appointed Mayor holds office until the first day of January succeeding the first annual election held in time to permit the filing of nominating petitions following the vacancy, at which a successor must be elected for the unexpired term. If the Council fails to appoint a Mayor within 30 days of a vacancy in the office of Mayor, there shall be a special election held within 90 days of such vacancy to elect a successor to serve the unexpired term. [§ 1, L.L. No. 9-19846] [Emphasis added.]*

11. Pursuant to Section 3-2.1 of the City Charter, respondent City Council has 30 days to appoint a person to fill the vacancy in the office of Mayor.

12. Upon information and belief, on or about January 1, 2011, pursuant to Chapter 7 of the City of Rochester’s Municipal Code (hereinafter, “City Code”), Acting Mayor Richards designated one or more individuals as “emergency interim successors” to the office of Acting Mayor, ranking such individuals in order of succession. [For the convenience of the Court, attached hereto as **Exhibit C** is a copy of Chapter 7 of the City Code, entitled “Continuity of Government”.]

13. Section 7-2 of Chapter of the City Code provides the following definition of “Emergency Interim Successor”:

*City Code*

*§ 7-2 Definitions*

...

**EMERGENCY INTERIM SUCCESSOR**

*A person designated pursuant to this chapter for possible temporary succession to the powers and duties, but not the office, of a City officer in the event that neither such officer nor any duly authorized deputy is able, due to death, absence from the City, or other physical, mental or legal reasons, to perform the powers and duties of the office.*

...

14. Upon information and belief, on or about January 1, 2011, respondent R. Carlos Carballada was designated by Acting Mayor Richards as the first ranked “Emergency Interim Successor” to the powers and duties, but not the office, of Mayor, pursuant of Chapter 7 of the City Code.

15. Pursuant to Section 7-4 of Chapter 7 of the City Code, respondent Carballada, as designated “Emergency Interim Successor” for Acting Mayor Richards, could only assume the powers and duties of Acting Mayor under extremely limited and dire circumstances, that is, “If, in the event of an attack or a public disaster “ Acting Mayor Richards “is unable, due to death, absence from the City, or other physical, mental, or legal reasons, to perform the powers and duties” of the office of Mayor:

*City Code*

**§ 7-4 Assumption of powers and duties of officer by emergency interim successor.**

*[Amended 2-14-2006 by Ord. No. 2006-22]*

*If, in the event of an attack or a public disaster, an officer described in Subsection A or B of § 7-3 of this chapter or his or her duly authorized deputy, if any, is unable, due to death, absence from the City, or other physical, mental, or legal reasons, to perform the powers and duties of the office, the emergency interim successor of such officer highest in rank in order of succession who is*

*able to perform the powers and duties of the office shall, except for the power and duty to discharge or replace duly authorized deputies and emergency interim successors of such officer, perform the powers and duties of such officer. An emergency interim successor shall perform such powers and duties only until such time as the lawful incumbent officer or his or her duly authorized deputy, if any, (or an emergency interim successor higher in rank in order of succession) resumes the office or undertakes the performance of the powers and duties of the office, as the case may be, or until, where an actual vacancy exists, a successor is duly elected or appointed to fill such vacancy and qualifies as provided by law. (The authority of an emergency interim successor performing the powers and duties of an office shall not terminate upon the subsequent availability of an emergency interim successor higher in rank in order of succession.) [Emphasis added.]*

16. The narrow applicability of Chapter 7's provisions is underscored by the explicit definitions provided for the term "attack" and "public disaster," to wit:

*City Code*  
**§ 7-2 Definitions**

...

**ATTACK**

*An attack, actual or imminent, or series of attacks by an enemy or foreign nation upon the United States causing, or which may cause, substantial damage or injury to civilian property or persons in the United States in any manner by sabotage or by the use of bombs, shell fire, or nuclear, radiological, chemical, bacteriological, or biological means or other weapons or processes.*

...

**PUBLIC DISASTER**

*A disaster, catastrophe or emergency, actual or imminent, of such unusual proportions or extent that a substantial number of the residents of the City of Rochester either sustain injury, become ill, are infected with disease, have their lives imperiled, are killed or die as the result of injury, disease or exposure, or the property of a substantial number of such residents is imperiled, damaged, or destroyed, and it is necessary and essential in the interest of public safety, health and welfare that the continuity of the government of the City of Rochester be assured in order that it be enabled to function properly and efficiently and to exercise its essential powers in meeting emergency conditions. Such disasters, catastrophes and emergencies may include, but shall not be limited to, conflagrations, explosions, earthquakes or other convulsions of nature, floods, tidal waves, pestilence, riots, insurrections, storms, prolonged failure of electric power or essential transportation services,*

*or any incident or occurrence which causes or threatens to cause danger to life, health or property from exposure to noxious materials or radiation.*

17. Upon information and belief, on or about January 18, 2011, Acting Mayor Richards announced his intention to resign the position of Acting Mayor effective January 20, 2011 at 10:00 a.m.

18. Upon information and belief, Acting Mayor Richards' resignation was in response to a complaint filed with the federal Office of Special Counsel alleging that his intention to run for the position of Mayor may violate the federal Hatch Act.

19. Upon information and belief, the purported authority for respondent Carballada's assumption of the position of "Acting Mayor" on January 20, 2011, following the resignation of Acting Mayor Richards, is respondent Carballada's designation by Mr. Richards as "emergency interim successor."

20. Mr. Richards' inability to perform the powers and duties of the office of Acting Mayor was not the result of an "attack" or "public disaster" as defined in Section 7-2 of the City Code.

21. The assumption of powers and duties of the office of Acting Mayor set forth in Chapter 7 of the City Code was not lawfully triggered by the vacancy in the office of Acting Mayor created by Mr. Richards' January 20, 2011 resignation.

22. Upon information and belief, commencing on or about January 20, 2011, respondent Carballada has unlawfully assumed the position of Acting Mayor of the City of Rochester, and has unlawfully exercised, and continues to unlawfully exercise, the official powers and duties of the Mayor of Rochester.

23. Upon information and belief, on January 25, 2011, respondent City Council convened and voted to conduct a Special Election for the position of Mayor of the City of Rochester to be held on March 29, 2011.

24. Upon information and belief, at no time since the vacancy in the office of Mayor arising from the December 31, 2010 resignation of Mayor Duffy came into existence has respondent City Council exercised its power and duty pursuant to Section 3-2.1 of the City Charter to fill the vacancy by appointing a person to that vacant office.

25. Upon information and belief, respondent City Council's power to fill the vacancy pursuant to Section 3-2.1's appointment process will expire on Monday, January 31, 2011 given the fact that the 30<sup>th</sup> day following the creation of the vacancy lands on a Sunday, January 30, 2011. [See General Construction Law, § 25-a(1).]

26. Upon information and belief, unless respondent City Council exercises its power to fill the mayoral vacancy pursuant to Article III of the City Charter on or before January 31, 2011, or the Court grants the relief requested in this pleading, respondent Carballada will continue to unlawfully exercise the official powers and duties of the Mayor of Rochester for another two months, that is, until the March 29, 2011 election is held.

27. In light of the above, respondent Carballada has proceeded, is proceeding, and/or is about to proceed in excess of his lawful authority and jurisdiction by holding himself out as Acting Mayor of the City of Rochester, and by exercising the official powers and duties of the Mayor of Rochester.

28. Petitioners have no adequate remedy at law, and respectfully ask the Court to order respondent Carballada to immediately cease the exercise of any and all powers and duties of the Mayor of Rochester.

### **FOR PETITIONER'S SECOND CLAIM**

29. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 28 of this petition, with the same force and effect as if set forth here at length.

30. In the alternative, if the Court concludes that the questions raised in Petitioners' First Claim are not properly asserted in a CPLR Article 78 proceeding, petitioners request that the Court treat Petitioners' First Claim as a cause of action set forth in a declaratory judgment action.

31. Upon information and belief, petitioner McTiernan has advised respondents, in his capacity as President of the Rochester Firefighters Association, that the provisions of Chapter 7 of the City Code regarding the appointment of an "emergency interim successor" were not triggered by the circumstances that led to the resignation of Acting Mayor Richards, and that, therefore, respondent Carballada has unlawfully assumed the position of Acting Mayor, and is unlawfully exercising the powers and duties of the Acting Mayor of the City of Rochester.

32. As President of the Rochester Firefighters Association, petitioner McTiernan is deeply concerned about the absence of an official possessing the authority to lawfully exercise the powers and duties of Mayor of the City of Rochester, and the potential impact of such absence on the rank and file members of his union.

33. For example, where reasonable suspicion is established concerning an

employee's abuse of alcohol or a controlled substance, the procedures set forth in the Statement of Executive Policy on Alcohol and Controlled Substance Testing issued by the City of Rochester's Bureau of Employee Relations prevent a Department Head from authorizing testing until, among other steps, the Department Head has "consulted with the Mayor or the Deputy Mayor." Petitioner McTiernan was involved in such a situation on behalf of a union member last week, and similar situations can arise at any time.

Significant legal and interpersonal problems, complications and delay are likely to occur if a Department Head, and/or employee under suspicion, questions the legitimacy of the person purportedly exercising the powers and duties of the Mayor and/or Deputy Mayor.

[Attached hereto as **Exhibit D** is an excerpt taken from the aforementioned Statement of Executive Policy on Alcohol and Controlled Substance Testing referencing the obligation to consult with "the Mayor or the Deputy Mayor" prior to authorization of testing.]

34. Upon information and belief, respondents, either directly or through their respective agents, have rejected petitioner McTiernan's aforementioned conclusions, and, therefore, a real and substantial controversy exists between the parties.

35. In light of the above, petitioners respectfully ask the Court to render a declaratory judgment declaring that the provisions of Chapter 7 of the City Code have not been triggered, that respondent Carballada is not Acting Mayor of the City of Rochester, and that respondent Carballada may not lawfully exercise the powers and duties of the Acting Mayor of the City of Rochester.

### FOR PETITIONERS' THIRD CLAIM

36. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 35 of this petition, with the same force and effect as if set forth here at length.

37. By use of the word "shall" in the sentence, "The Council shall fill a vacancy in the office of Mayor arising otherwise than by expiration of term by appointing by a majority vote a person who is registered in the same political party as the person who vacated the office," the City Charter renders respondent City Council's obligation to fill the pending mayoral vacancy mandatory.

38. To date, respondent City Council has failed to comply with the City Charter's mandate that it fill the vacancy in the office of Mayor arising from Mayor Duffy's December 31, 2010 resignation.

39. By failing to fill the vacancy in the office of Mayor that commenced on January 1, 2011, and taking no steps publicly since the vacancy arose to attempt to appoint a Mayor, and, instead, voting January 25, 2011 to hold a Special Election for the position of Mayor of the City of Rochester on March 29, 2011, respondent City Council has created a situation where the City of Rochester, its residents and taxpayers will be without the services of an official possessing the authority to exercise the powers and the duties of the office of Mayor for approximately seventy (70) days.

40. By its failure to fill the vacancy in the office of Mayor, and its January 25, 2011 vote to conduct a Special Election for the position of Mayor of the City of Rochester on March 29, 2011, despite the absence of a duly appointed Acting Mayor,

respondent City Council has failed to perform a duty enjoined upon it by law, proceeded in excess of its jurisdiction, and/or made a determination that was affected by an error of law, arbitrary, capricious, or an abuse of discretion.

41. Petitioners have no adequate remedy at law.

#### **REGARDING PRELIMINARY RELIEF**

42. Petitioners repeat and reallege each and every allegation contained in paragraphs 1 through 41 of this petition, with the same force and effect as if set forth here at length.

43. Respondent City Council's authority to appoint a Mayor to fill the mayoral vacancy expires on Monday, January 31, 2011.

44. Given respondent Carballada's lack of authority to exercise the powers and duties of the office of Mayor, the failure of respondent City Council to comply with its mandated obligation to appoint a Mayor prior to expiration of the 30-day window of opportunity provided by Section 3-2.1 of the City Charter would leave City of Rochester, its residents and property owners without an official in lawful possession of the authority to exercise the functions of Mayor for an additional two months, that is, until the Special Election scheduled for March 29, 2011.

45. Petitioners, as well as the City of Rochester, its residents and property owners, will suffer immediate and irreparable injury, including, without limitation, a significant loss of confidence in both the integrity of the office of Mayor and the legitimacy of City government, unless:

(a) respondent Carballada is preliminarily restrained, during the pendency of this proceeding, from exercising the powers and duties of the office of Mayor of the City of Rochester; and

(b) respondent City Council is ordered to convene in public session, with due notice to the public, on or before January 31, 2011, to attempt, in good faith, to appoint an appropriate person, whether respondent Carballada or any other individual meeting the requirements set forth in the City Charter, to fill the vacancy in the office of Mayor.

46. Without the granting of the requested preliminary relief, judgment herein would tend to be rendered ineffectual.

47. Petitioners assert valid causes of action against respondents, and believe that there is a likelihood of success.

48. Upon information and belief, the potential harm to petitioners and to the integrity of the Mayor's office and the legitimacy of City government if the requested preliminary relief is not granted clearly exceeds any potential harm to respondents of granting the temporary restraining order and preliminary injunction.

WHEREFORE, petitioners respectfully demand relief against respondents as follows:

(A) An Order preliminarily enjoining, during the pendency of this proceeding, respondent Carballada from exercising any and all powers and duties of the office of Mayor of the City of Rochester;

(B) Judgment ordering respondent Carballada to immediately cease holding himself out to the public to be Acting Mayor of the City of Rochester, and to

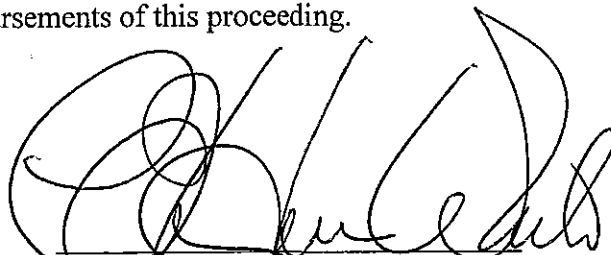
immediately cease and desist the exercise of any and all powers and duties of the office of Mayor of the City of Rochester;

(C) Judgment declaring that the assumption of powers and duties of the office of Acting Mayor set forth in Chapter 7 of the City Code was not triggered by the vacancy in the office of Acting Mayor created by the January 20, 2011 resignation of Acting Mayor Thomas Richards, that respondent Carballada is not Acting Mayor of the City of Rochester, and that respondent Carballada may not lawfully exercise the powers and duties of the Acting Mayor of the City of Rochester.

(D) Judgment ordering respondent City Council to convene in public session, with due notice to the public, on or before January 31, 2011, to attempt, in good faith, to appoint an appropriate person to fill the vacancy in the office of Mayor pursuant to Section 3-2.1 of the City Charter; and

(E) The granting of such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this proceeding.

Dated: January 28, 2011  
East Aurora, New York



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ARTHUR J. GIACALONE  
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**VERIFICATION**

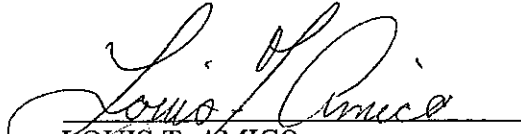
STATE OF NEW YORK)

SS.:

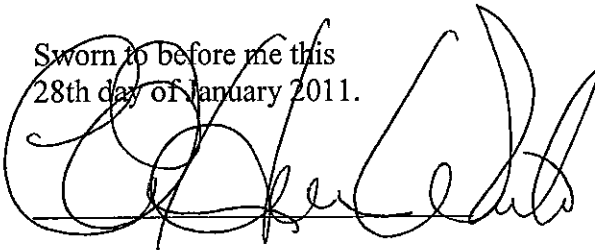
COUNTY OF MONROE)

LOUIS T. AMICO, being duly sworn, deposes and says: he is one of the petitioners/plaintiffs in the within proceeding/action, and that the petitioners/plaintiffs are united in interest; that he has read the foregoing petition/complaint and knows the content thereof; that the same is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

**VAN HENRI WHITE**  
Notary Public, State of New York  
No. 02WH6149379  
Qualified in Monroe County  
Commission Expires June 26, 2014

  
\_\_\_\_\_  
LOUIS T. AMICO

Sworn to before me this  
28th day of January 2011.



Notary Public, State of New York  
Qualified in Monroe County  
My commission expires 6/26/14