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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

In the Matter of the Application of

ROBERT J. CROGHAN, as Chairman of Organization of Staff Analysts, GALINA IVANOVA, DAWN LAKE, CARL WORRELL, VINCENT NOTO and JOSEPH CONNELL, individually and on behalf of all others similarly situated,

Petitioners,

-against -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HOUSING, PRESERVATION & DEVELOPMENT, MATTHEW M. WAMBUA, as Commissioner, THE NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, EDNA WELLS HANDY, as Commissioner,

Respondents.

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

INDEX NO. 103789/12
MOTION DATE 03-13-2013
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this petition to/for Art. 78 and Cross-Motions to Dismiss the Petition

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits ____ cross motion ____	4 - 6
Replying Affidavits ____	7 - 8, 9 - 10

Cross-Motion: X Yes No

Petitioners brought this Article 78, proceeding seeking to have this Court find and declare that Respondents have acted arbitrarily and capriciously and for a permanent injunction based on violations of the merit and fitness for employment requirement set forth in Article V, Section 6 of the New York State Constitution and Civil Service Law §§ 52 & 61. Petitioners also seek a judgment reversing and annulling all prior reclassifications of the Civil Service title, Associate Staff Analyst ("ASA") positions including those identified in the Petition; restoring GALINA IVANOVA, DAWN LAKE, CARL WORELL and VINCENT NOTO to eligible list No. 0507; and making additional permanent ASA appointments.

Respondents opposes the petition and cross-move to dismiss this proceeding pursuant to CPLR §7804[f] and CPLR §3211, claiming that the petition is barred by the applicable statute of limitations and there is no basis to find that their actions were arbitrary and capricious.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In December of 2009, the New York City Department of Citywide Administrative Services (hereinafter referred to as "DCAS") noticed a promotional examination for the ASA title under Examination No. 0507, and an open competitive examination for the ASA title under Examination No. 0107. On February 20, 2010, the promotional examination was administered. The resulting list of eligible applicants for the ASA title was certified on January 27, 2012, with each City agency having separate lists. The New York City Department of Housing Preservation and Development (hereinafter referred to as "HPD"), listed 22 eligible individuals for permanent promotion to ASA title (Pet. Exh. B). On February 20, 2010, the open competitive examination was administered for the ASA title. The open competitive examination list was certified on April 2, 2012, and it had 2,178 eligible individuals listed for appointment (Pet. Exh. C). Effective April 9, 2012, HPD promoted 14 of the 22 eligible individuals for permanent promotion to an ASA title. One of the eligible individuals was no longer employed by the City, and of the remaining seven candidates eligible for permanent promotion to ASA title, five are petitioners in this proceeding.

Galina Ivanova, Dawn Lake, Carl Worrell, Vincent Noto and Joseph Connell (hereinafter referred to as the "Individual Petitioners") held the title of Staff Analyst (SA) at HPD and are members of the Organization of Staff Analysts (hereinafter referred to as "the union"). The Individual Petitioners were on the permanent promotion list as follows; Galina Ivanova #8; Dawn Lake #12; Carl Worrell #16; Vincent Noto #18; and Joseph Connell #22. By letter dated April 9, 2012, Respondents advised the Individual Petitioners that they were considered but not selected for appointment to a vacancy (Cross-Mot. Exh. 2). By letter dated May 11, 2012, Respondents sent a "Corrected" notice indicating that the Individual Petitioners were considered and not selected for appointment to three separate vacancies and were ineligible for certification to HPD for the ASA title (Cross-Mot. Exh. 3). On May 16, 2012, the union sent a letter to HPD on behalf of the Individual Petitioners seeking to have them reinstated to the ASA promotional list (Pet. Exh. D). On June 25, 2012, HPD sent the union a letter indicating Civil Service Rules were followed, and the lists were closed to the individual petitioners. On September 17, 2012, the Petitioners commenced this proceeding.

The New York State Constitution, Article V, Section 6, requires that appointments and promotions made in the Civil Service be based on merit and fitness, which to the extent it is practicable, is to be ascertained by competitive examination (Benson v. New York State Department of Civil Service, 296 A.D. 2d 816, 745 N.Y.S. 2d 329 [N.Y.A.D. 3rd Dept., 2002]). Article V, Section 6, is interpreted in conjunction with the Civil Service Law to provide employees with "greater merit and ability" (Gallagher v. City of New York, 307 A.D. 2d 76, 761 N.Y.S. 2d 37 [N.Y.A.D. 1st Dept., 2003]). The New York State Constitution, Article V, Section 6 and the Civil Service Laws are not required to remove all agency discretion and other factors may be taken into account. DCAS may select candidates from the promotional list first and then include names from the open competitive list established for the same title or position (Gallagher v. City of New York, 307 A.D. 2d 76, supra, pgs. 83-84).

Pursuant to Civil Service Law §52[1], vacancies are required to be filled, "by persons holding competitive class titles in a lower grade in the department in which the vacancy exists, provided that such lower grade positions are in direct line of promotion...", however, exceptions can be made if it is impracticable or against public

interest to do so, as when responsibilities in different titles overlap causing them to be related (Gallagher v. City of New York, 307 A.D. 2d 76, supra at pgs. 81-82). DCAS is an administrative agency and pursuant to Civil Service Law §52, it has authority and the discretion to make and adjust classifications. Judicial review of DCAS classifications is limited to determinations of whether there was a rational basis for the agency's conclusions. It is rational to reclassify titles and alter the lines of promotion based on the actual roles involved and to encourage "competitive and qualified personnel" (Hughes v. Doherty, 5 N.Y. 3d 100, 833 N.E. 2d 228, 800 N.Y.S. 2d 85 [2005]).

Civil Service Law §61, requires the administrative agency to select three individuals from a list of eligible candidates to fill one vacancy. There is no vested right to appointment or promotion based on a person's name appearing on a list of candidates (Archer v. Riccio, 201 A.D. 2d 395, 6076 N.Y.S. 2d 666 [N.Y.A.D. 1st Dept., 1994]). The "rule of three" affords an appointing authority the flexibility to choose amongst reachable candidates to determine eligibility. An agency may take factors other than examination scores into account provided the administrative actions are not taken in bad faith or arbitrary. There is a "heavy burden" on the petitioner to establish the agency determination was rendered arbitrarily or in bad faith, "conclusory allegations or speculative assertions will not suffice" (Gomez v. Hernandez, 50 A.D. 3d 404, 858 N.Y.S. 2d 8 [N.Y.A.D. 1st Dept., 2008] and Brynien v. New York State Dept. Of Civil Service, 79 A.D. 3d 1501, 913 N.Y.S. 2d 411 [N.Y.A.D. 3rd Dept., 2010]).

A reclassification of titles is lawful, "...where it conforms the civil service structure to the situation which actually existed in operation of the agency prior to the reclassification..." (Joyce v. Ortiz, 108 A.D. 2d 158, 487 N.Y.S. 2d 746 [N.Y.A.D. 1st Dept., 1985]). A civil service title may be abolished in good faith based on economy and efficiency, but not as subterfuge for avoiding statutory protections provided to civil servants (Gorman v. Von Essen, 294 A.D. 2d 209, 742 N.Y.S. 2d 235 [N.Y.A.D. 1st Dept., 2002]). Reclassification is not to be used as a means of circumventing the constitutional mandates for appointment to a civil service title or validating out of title work (Matter of CSEA v. County of Duchess, 6 A.D. 3d 701, 775 N.Y.S. 2d 539 [N.Y.A.D. 2nd Dept., 2004] and Criscolo v. Vagianelis, 50 A.D. 3d 1283, 856 N.Y.S. 2d 265 [N.Y.A.D. 3rd Dept., 2008]).

Petitioners, on information and belief state, that on December 16, 2011, after the promotional list was established but before appointments were made, there were 35 provisional employees working in ASA positions within HPD. As of September 4, 2012, only two provisional positions remained because rather than make permanent appointments to those provisional ASA positions Respondents reclassified thirty of the positions to other titles.

Petitioners also contend that Respondents have reclassified existing positions in the Civil Service ASA title to avoid permanent appointments from the Promotional Examination Civil Service List of eligible individuals at the HPD. Petitioners claim that by manipulating the Civil Service Law one-in-three rule and not selecting or restoring Petitioners for appointment from the Promotional Examination Civil Service List, Respondents are avoiding making permanent appointments and basing their determinations solely on financial and other impermissible considerations instead of merit and fitness.

Pursuant to CPLR §3211[a][5], an action may be dismissed based on a claim of the expiration of the statute of limitations. Pursuant to CPLR §217[1], A proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding (Best Payphones, Inc. v. Department of Information, Technology and Communications of the City of New York, 5 N.Y. 3d 30, 832 N.E. 2d 38, 799 N.Y.S. 2d 182 [2005]). A determination is final and binding when an individual is aggrieved by it. An individual becomes aggrieved by a determination after it is clear that there is no expectation or reason to anticipate a change in circumstances (Cangro v. Mayor of the City of New York, 167 A.D. 2d 258, 561 N.Y.S. 2d 759 [1990]). The four month statute of limitations period runs from receipt of the adverse determination (Matter of Rocco v. Kelly, 20 A.D. 3d 364, 799 N.Y.S. 2d 469 [N.Y.A.D. 1st Dept., 2005]). The statute of limitations cannot be circumvented (In re Long Island Power Authority Ratepayer Litigation, 47 A.D.3d 899, 850 N.Y.S.2d 609 [N.Y.A.D. 2nd Dept., 2008]).

Respondents contend there is no basis to maintain this proceeding because their actions were not arbitrary and capricious and Petitioners allegations are speculative and conclusory based solely on subjective statements. As administrative agencies they had authority to make determinations as to filling job titles and appointments as long as they relied on merit and fitness. Respondents claim the statute of limitations began to run from the April 9, 2012,when letters were mailed to the Individual Petitioners notifying them that they would not be promoted and the "corrected" letters do not alter the final and binding determination. Alternatively, Respondents contend that even if the corrected notice letters dated May 11, 2012 commenced the time period for statute of limitations purposes, the Petitioners were called and made aware of the final determination removing them from the eligible list, prior to the union's May 16, 2012 letter.

Petitioners oppose the cross-motion claiming that the May 11, 2012, "corrected" letters indicate a final determination that the Individual Petitioners have been removed from the certified list of eligible employees for the promotional ASA titles. The four month statue of limitations begins to run upon receipt of the May 11, 2012, final adverse determination, not the date it was prepared. Petitioners claim that copies of the post-marked envelopes for the May 11, 2012 letters sent to Galina Ivanova and Carl Worrell (Aff in Opp. to Cross-Mot. Exh. A) have a May 17, 2012 stamp on the post-marked envelopes establishing that this proceeding commenced on September 17, 2012, is timely.

Upon review of all the papers submitted this Court finds that the Petitioners have not established a basis for the relief sought in Article 78 proceeding, or for the declaratory and injunctive relief. The assertions that job titles were reclassified for financial purposes are stated as, "on information and belief," and based on subjective statements, as such, they are conclusory and speculative. DCAS has authority to reclassify titles including for economical reasons as long as the mandates of the civil service system are not circumvented. Petitioners have not established that Respondents failed to follow the "rule of three," or that the failure to promote the Individual Petitioners was arbitrary and capricious. Respondents chose 14 individuals from 22 named eligible employees on the promotional list before relying on the open competitive list.

This Court finds that the May 11, 2012 "corrected" letters reflect the Respondents' final and binding determination and this proceeding commenced on September 17, 2012, is not time-barred. The May 11, 2012 letters clearly state for the first time, that the Individual Petitioners were "ineligible...for further certification" by HPD. Respondents failed to provide affidavits from an individual attesting to the manner in which any of the letters were prepared and mailed to the Petitioners. Respondents also fail to state the date the May 11, 2012, letters were mailed to the Petitioners. Respondents do not state the manner in which, or the dates prior to May 16, 2012, that all of the Petitioners were contacted by telephone.

Accordingly, it is ORDERED and ADJUDGED that the Amended Article 78 Petition and related Declaratory Judgment and Injunctive relief is denied, and it is further,

ORDERED that the cross-motion to dismiss the petition pursuant to CPLR §3211, is granted, and this proceeding is dismissed.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: April 22, 2013

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE