Matter of Garrido v City of New York
2020 NY Slip Op 30117(U)
January 14, 2020
Supreme Court, New York County
Docket Number: 155460/19
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

HENRY GARRIDO, as Executive Director of District Council 37, AFSCME, AFL-CIO; JOSEPH PULEO, as President of Local 983, District Council 37, AFSCME, AFL-CIO, and DANIEL GITEL, et al, on behalf of Themselves and Others Similarly Situated,

Petitioners,

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

Index No.: 155460/19
DECISION/ORDER

-against-

THE CITY OF NEW YORK, and BILL DE BLASIO, as Mayor of the City of New York, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, and MITCHELL SILVER, as Commissioner, and THE NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, and LISETTE CAMILLO, as Commissioner,

Respondents.

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HON. CAROL R. EDMEAD, J.S.C.:

In this Article 78 proceeding, petitioners seek a judgment granting certain declaratory relief against respondents, and respondents cross-move to dismiss the petition (together, motion sequence number 001). For the following reasons, this petition is denied, the cross motion is granted, and this proceeding is dismissed.

FACTS

Petitioner Daniel Gitel (Gitel) is employed by the respondent New York City Department of Parks and Recreation (Parks & Rec) in the job title of Urban Park Ranger. *See* verified

petition, ¶ 5. He is one of four named co-petitioners,[1] and a group of other unnamed but "similarly situated" co-petitioners, who are also purportedly employed by Parks & Rec as Urban Park Rangers (the Park Ranger petitioners). *Id.*, ¶¶ 6-9. All of the Park Ranger petitioners are members of, and are represented by, their union, District Council 37 (DC 37). *Id.*, ¶¶ 3-4. Co-petitioners Henry Garrido and Joseph Puleo are, respectively, the executive director of DC 37 and the president of Local 983, the DC 37 unit that the Park Ranger petitioners belong to. *Id.*

On December 12, 2017, Gitel and the other Park Ranger petitioners took, and passed, civil service Examination No. 8506 for promotion to the job title of Associate Urban Park Ranger. *See* verified petition, ¶¶ 31-38. They claim that, on October 3, 2018, the co-respondent New York City Department of Citywide Administrative Services (DCAS) certified a list of eligible candidates for open positions as Associate Urban Park Rangers which included all petitioners (named and unnamed) who had passed the examination. *Id.*, ¶¶ 5-9, 33. They aver that, despite their being eligible candidates for promotion to positions as Associate Urban Park Rangers, Parks & Rec's Commissioner has improperly maintained nine provisional employees in such positions instead of dismissing them and replacing them from the among the ranks of eligible petitioners. *Id.*, ¶¶ 2, 34-38. DCAS and Parks & Rec both deny those assertions, and instead contend that there were only two eligible candidates left on the certified list as of February 15, 2019. *See* notice of cross motion, Cohen affirmation, ¶¶ 5-6. They aver that, under the applicable law, certified lists of eligible candidates for promotion are deemed exhausted when there are less than three such candidates remaining on them, and that the certified lists then no longer need be used. *Id.* Respondents have annexed a copy of the

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[1] The other named Park Ranger petitioners are Juan Barretto, Aris Gavilanes and Eloise Reyes. *See* verified petition, ¶¶ 6-8.

Examination No. 8506 certified eligible candidates list, dated February 15, 2019, which shows only two names - neither of them a petitioner. *Id.*, exhibit 1.

Petitioners commenced this proceeding on May 31, 2019 by filing a verified petition that requests provisional remedies regarding five alleged breaches of, inter alia, the New York State Constitution, the New York Civil Service Law and the New York City Administrative Code. *See* verified petition. In particular, petitioners request orders to: 1) declare that respondents have violated the New York State Constitution by improperly maintaining provisional employees in the positions as Associate Urban Park Rangers instead of filling those positions with certified eligible candidates; and 2) enjoin respondents to terminate those provisional employees and replace them with the Park Ranger petitioners. *Id.* Rather than answer, on September 13, 2019, respondents filed a cross motion to dismiss the petition (together, motion sequence number 001). *See* notice of cross motion.

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination is only arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational

basis for the administrative determination, there can be no judicial interference. *Id.* at 231-232. Here, the Park Ranger petitioners essentially argue that respondents Parks & Rec and DCAS acted arbitrarily and capriciously by failing to promote one or all of them to positions as Associate Urban Park Rangers because the law required them to do so. Respondents counter that the law does not require that result. A more detailed review of both arguments reveals as follows.

The Park Ranger petitioners note that both the New York State Constitution, Article V, Section 6 and Civil Service Law § 61 require that appointments or promotions to civil service positions must be filled by applicants who have taken and passed competitive examinations. *See* verified petition, ¶¶ 19-23. They then note that Civil Service Law § 65 permits job vacancies to be filled by provisional employees in certain circumstances, but that such provisional appointments may not be maintained for more than four months after DCAS has certified a list of eligible candidates who have passed a civil service examination for the subject job title. *Id.*, ¶¶ 24-30. The Park Ranger petitioners assert that, even though DCAS certified an eligible list of Associate Urban Park Ranger candidates from Examination No. 8506 on October 3, 2018, and Parks & Rec thereafter promoted approximately 62 members of that list to such positions, Parks & Rec also improperly retained nine provisional employees as Associate Urban Park Rangers for longer than four months after the test's certification date. *Id.*, ¶¶ 31-38. The Park Ranger petitioners argue that this practice violated the State Constitution, the Civil Service Law and the code provisions and regulations that were enabled by the statute. *Id.*

In their cross motion, respondents counter that the general rules which the Park Ranger petitioners cited to are all inapposite, and that this case presents a factual scenario governed by

the "one in three" rule set forth in Civil Service Law § 61 (1), which provides that:

> "Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion; . . ."

Case law interpreting Civil Service Law § 61 (1) holds that a certified list of candidates eligible for employment or promotion is deemed "exhausted" when there are not a sufficient number of names left on the list to enable an agency head to choose among three potential candidates for each one open position. *See e.g., Matter of Gomez v Hernandez*, 50 AD3d 404, 405 (1st Dept 2008), *citing Matter of Becker v New York State Civ. Serv. Commn.*, 61 NY2d 252, 256-257 (1984); *Thomas v City of New York*, 953 F Supp2d 444, 455 (ED NY 2013), *citing Valentin v New York State Dept. of Taxation and Fin.*, 992 F Supp 536 (ED NY1997), *affd*175 F3d 1009 (2d Cir 1999). Civil Service Law § 65 (1) specifically permits state agencies to appoint provisional employees to civil service job titles when a certified list of eligible candidates has been "exhausted." *See e.g., Matter of Ayraykelov v New York City Tr. Auth.*, 5 Misc 3d 944, 947-948 (Sup Ct, Kings County 2004). Respondents finally noted that, as of February 15, 2019, the certified eligible list pertaining to Examination No. 8506 only had two names remaining on in. *See* notice of cross motion, Cohen affirmation, ¶ 6; exhibit 1. Respondents argued that the subject list was "exhausted" by virtue of being "numerically inadequate," and concluded that there was therefore nothing improper about Parks & Rec maintaining provisional employees in the Associate Urban Park Ranger job title. *See* respondents mem of law at 6-7.

After carefully considering the parties' arguments, the court finds for respondents. The

February 15, 2019 record of the certified eligible list for Examination No. 8506 - which has only two names of eligible Associate Urban Park Ranger candidates remaining - speaks for itself. *See* notice of cross motion, Cohen affirmation, exhibit 1. The absence of a sufficient number of candidates to consider for even one open position compels the legal conclusion that the Examination No. 8506 eligible list was exhausted at least of that date. Petitioners' counsel's reply allegation that "the civil service list was established by DCAS on October 2, 2018 and remains open until October 3, 2022" is therefore belied by the evidence, and the court rejects her contention. *See* Nilliasca reply affirmation, ¶ 4.

Petitioners' legal arguments are similarly unavailing. They cite *Matter of Ruggeri v Hall* (101 AD2d 934 [3d Dept 1984]) for the proposition that "it is an 'incredible abuse of discretion' . . . to appoint provisionally when there are even only two candidates left" on an eligible list. *See* petitioners' reply mem at 4. However this argument misstates the *Ruggeri* holding, which was that "Special Term should not have ordered an appointment to be made from [a] nonviable eligible list." 101 AD2d at 934. Here, too, the evidence shows that the Examination No. 8506 eligible list was "nonviable" at least as of February 15, 2019 - three months before petitioners commenced this proceeding.

Petitioners' alternative argument cites *Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.–Long Beach Unit* (8 NY3d 465 [2007]) and *Matter of Aladin v Schultz* (176 AD2d 205 [1st Dept 1991]) for the proposition that respondents violated Civil Service Law § 65 (2) and/or (3) by maintaining eight[2] provisional employees as Associate Urban Park Rangers for more than nine months in total and/or for more than two months after the Examination No. 8506

[2] In their reply papers, petitioners admitted that "further research" indicated that respondents had only maintained eight provisional employees in excess of the statutory time limit rather than nine. *See* petitioners' reply mem at 3, fn1.

eligible list was certified. *See* petitioners' reply mem at 3-6. However, respondents correctly note that both of the cited cases involved certified eligible lists that were "viable" (i.e., that contained a numerically sufficient amount of names from which to choose among three candidates for each single open position), whereas the Examination No. 8506 eligible list was "nonviable" as of February 15, 2019. *See* respondents' reply mem at 5-6. Petitioners' allegation that respondents had made the disputed provisional appointments "well before the establishment of the eligible list" is contradicted by their own counsel's submission of an "AUPR employment list," which indicates that the seven[3] provisional employees that petitioners singled out had actually begun in their positions after this proceeding was commenced. *See* Nilliasca reply affirmation, ¶ 9; exhibit 1; petitioners' reply mem at 3. Instead, that evidence appears to bear out respondents' allegation that Parks & Rec went through the candidates on the Examination No. 8506 eligible list rather quickly to promote 62 candidates to positions as Associate Urban Park Rangers, while it also passed over other candidates from the list several times while applying the "one in three" rule of Civil Service Law § 61 (1), with the result that the list was exhausted by February 15, 2019. *See* respondents' reply mem at 7-10. As a result, the court rejects as unfounded petitioners' assertion that respondents maintained provisional employees in Associate Urban Park Ranger job titles in excess of the statutorily mandated time period. The court also notes, in closing, the First Department's admonition that petitioners have "no vested right, by reason of their positions on the eligibility list, to permanent promotional appointments from that list." *Matter of Aladin v Schultz*, 176 AD2d at 206. Accordingly,

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[3] The court notes that this number varies from the eight provisional employees that petitioners referred to in their reply memorandum, and the nine provisional employees that they mentioned in the verified petition. As a result, the court concludes that petitioners' allegation is unreliable.

because respondents have failed to demonstrate that petitioners engaged in any arbitrary or capricious conduct with respect to Examination No. 8506, the court finds that their Article 78 petition should be denied. As a result, the court also grants respondents' cross motion to dismiss that petition.[4]

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioners Henry Garrido, as Executive Director of District Council 37, AFSCME, AFL-CIO; Joseph Puleo, as President of Local 983, District Council 37, AFSCME, AFL-CIO, and Daniel Gitel, et al, (motion sequence number 001) is denied and the petition is dismissed; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of respondents the City of New York, Bill De Blasio, as Mayor of the City of New York, the New York City Department of Parks and Recreation, and Mitchell Silver, Commissioner, and the New York City Department of Citywide Administrative Services, Lisette Camillo, Commissioner (motion sequence number

[4] Because it does so, the court specifically declines to consider respondents' remaining argument that the law does not permit the retroactive cancellation of provisional civil service appointments.

001) is granted and the complaint is dismissed in its entirety as against said respondents, and the Clerk of the Court is directed to enter judgment accordingly in favor of said respondents.; and it is further

ORDERED that counsel for Petitioners shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for Respondents.

Dated: New York, New York

January 14 2020

ENTER:

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.