Local 375 of Dist. v New York City Dept.
2021 NY Slip Op 30969(U)
March 29, 2021
Supreme Court, New York County
Docket Number: 162229/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** **PART** **IAS MOTION 15EFM**

Justice

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LOCAL 375 OF DISTRICT

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT

Defendant.

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INDEX NO. 162229/2019

MOTION DATE 12/18/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

In this article 78 proceeding, petitioners Local 375 of District Council 37, AFSCME, AFL-CIO (collectively, DC 37 or Local 375), Michael Troman as President of Local 375 and Carlos Alvarez (Alvarez) (collectively, petitioners), challenge the allegedly arbitrary, capricious and unlawful conduct of respondents The New York City Department of Education (DOE), Richard A. Carranza, as Chancellor of the DOE, The City of New York, Bill De Blasio as Mayor of the City of New York, The New York City Department of Citywide Administrative Services (DCAS) and Lisette Camilo, as Commissioner of DCAS (collectively, respondents), in connection with Alvarez's out-of-title complaint made to the DOE dated December 6, 2018 and the subsequent appeal filed with DCAS dated March 12, 2019. Respondents answer and oppose.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner Alvarez works for the DOE and has held the civil service title of Associate Project Manager Title I (APM) since August 1994. District Council 37 "is an amalgam of 62 labor unions . . . ." NYSCEF Doc. No. 1, Petition, ¶ 5. Local 375 is an affiliate local of DC 37

and is the union that represents employees holding various scientific and engineering civil service titles. Petitioner is a member of Local 375 of DC 37 and his civil service title of APM is covered in the collective bargaining agreement (CBA) between Local 375 and the DOE.

Petitioner has a background in architecture. Commencing on January 24, 2003, DOE assigned petitioner to work at the New York City School Construction Authority's (SCA) Design Consultant Management Studio (Design Studio). This assignment "was a result of a merger of the SCA with the school construction functions of DOE's Division of School Facilities in order to reduce the costs of school construction." *Id.*, ¶ 35. SCA gave petitioner "an office title called Design Project Manager (DPM)." *Id.*, ¶ 37. Nonetheless, petitioner still remained a DOE employee and kept the title of APM I.

According to petitioner, the other DPMs in the Design Studio have the title of Senior Construction Assessment Specialist (SCAS) and work for the SCA. He alleges that he has the same job responsibilities as the SCASs, that include managing the work of the design consultants "directly during the scope, design and construction phases of the capital projects." *Id.*, ¶ 42. He monitors and reviews their work and also proposes design alternatives. Petitioner claims that his job responsibilities are substantially different from the ones set forth in his title. Although he manages the "scope, design, and construction phases of capital projects," the "APM Level I job specification makes no mention of an employee performing scope phase duties or managing the work of design consultants." *Id.*, ¶ 70. Within the same title, only the APM Level III job specification "mentions developing a scope of work." *Id.*

As a result, petitioner believes that his duties are substantially consistent with those of an APM III, or, in the alternative, those of a SCAS. The job responsibilities of a SCAS include "report[ing] to a designated manager, perform[ing] difficult and complex reviews and

evaluations of all projected construction cost schedules, mak[ing] recommendations involving feasible alternative designs and interact[ing] with consultants and contractors." *Id.*, ¶ 77 (internal quotations and citation omitted).

The CBA states the following, in relevant part:

> "Complaints concerning out-of-title or out-of-level work assignments shall be referred for decision to the Executive Director of Personnel and his decision may thereafter be appealed to the City Personnel Director. . .. It is understood, that complaints of employees in title or in level against out-of-title or out-of-level assignments made to other employees are subject to the grievance procedure."

NYSCEF Doc. No. 5, CBA at 35.

On December 6, 2018, petitioner, through his Local 375 representative, filed an out-of-title work complaint with Tomas Hanna (Hanna), DOE's Executive Director of Human Resources. The complaint set forth the type of work petitioner has been performing since 2003, along with the various job descriptions. The complaint then requested that Hanna "investigate Mr. Alvarez's out-of-title complaint promptly, cease and desist the out-of-title work or promote Mr. Alvarez to the appropriate title, and pay any backpay as applicable." NYSCEF Doc. No. 6 at 3.

Petitioner states that the DOE did not acknowledge receipt of his complaint nor did they render a decision. Through his union representative and pursuant to the terms of the CBA, petitioner subsequently filed an appeal on March 12, 2019 with DCAS. The appeal stated, in pertinent part, that "the Union hereby appeals the failure of the DOE to issue a decision on the December 6, 2018 out-of-title complaint filed by the Union on behalf of member Carlos Alvarez." NYSCEF Doc. No.7 at 1.

Pursuant to a letter dated April 9, 2019, DCAS acknowledged receipt of the appeal. The letter advised petitioner that the "DCAS Classification and Compensation unit is currently

reviewing this complaint and will notify [him] once a determination is made." NYSCEF Doc. No. 8 at 1. The letter instructed petitioner to contact Sade McIntosh (McIntosh), with any questions.

By June 13, 2019 petitioner still had not received any communications from DCAS. By letter dated June 13, 2019, DC 37's legal counsel advised McIntosh "[t]o date, the Union has not received a response to Mr. Alvarez's complaint and is inquiring as to when DCAS will be issuing a decision." NYSCEF Doc. No. 9 at 1.

DC 37's legal counsel subsequently contacted McIntosh again after still not receiving a response from DCAS. Pursuant to a letter dated July 19, 2019, legal counsel stated that "the Union has not received a response and is respectfully requesting that DCAS render a determination. If my office does not receive a decision from DCAS by August 22, 2019, the Union will be compelled to proceed with the appeal to court." NYSCEF Doc. No. 10 at 1.

Petitioner filed a notice of claim with the DOE on October 23, 2019 pursuant to Education Law § 3813 (1). Petitioners state that the DOE has "not made an adjustment of payment for Mr. Alvarez within 30 days of presentment of the notice of claim." Petition, ¶ 18. After waiting nine months for DCAS to answer the appeal, petitioners commenced the instant article 78 proceeding.

The first and second causes of action allege that the DOE has violated the New York State Constitution Article V, § 6 and New York Civil Service Law (Civil Service Law) 61§ (2) and acted arbitrarily and capriciously by assigning Alvarez to duties substantially different than those in the job description of APM Level I. In the third cause of action, petitioners allege that the DOE's failure to render a determination on Alvarez's out-of-title complaint dated December 6, 2018 is arbitrary and capricious. The fourth and fifth causes of action set forth that DCAS

acted arbitrarily and capriciously and violated the New York State Constitution Article V, § 6 and New York Civil Service Law 61 § (2) by failing to render a determination on Alvarez's appeal dated March 12, 2019.

Petitioners are seeking various forms of relief, including for the court to adjudge and declare that the DOE's assignment of duties to Alvarez different from those set forth in his job description is a violation of Civil Service Law § 61 (2) and the New York State Constitution and that it is arbitrary and capricious. Petitioners also request that the court adjudge and declare that DCAS's failure to render a determination on the March 12, 2019 appeal is arbitrary and capricious. Further, petitioners are seeking a declaration that the DOE has assigned Alvarez job duties aligned with the titles of APM Level III or SCAS. They request that the court order respondents either to cease and desist assigning Alvarez out-of-title work or promote him to the appropriate title. Alvarez is seeking to be compensated the difference in pay between his position and either the title of APM Level III or SCAS starting from December 6, 2018, 0the date he filed his out-of-title complaint with the DOE.

Respondents' Opposition and Petitioners' Reply

Respondents maintain that the DOE never received Alvarez's initial out of work complaint because it was not properly filed. According to respondents, out-of-title complaints such as Alvarez's should be mailed to the Office of Labor Relations (OLR), not the Office of Human Resources. As the complaint was not properly filed, the DOE did not make any determination. DCAS subsequently did not have anything to review on appeal. Respondents allege that the claim is not ripe for review as no decision was made on the initial complaint.

In support of their contentions, respondents submit the affirmation of Karen Solimando (Solimando), director of the Office of Labor Relations and Collective Bargaining of the DOE.

Solimando states that petitioners did not properly file the complaint because DC 37 did not file the complaint directly with the OLR. Solimando states that, as set forth in the CBA, complaints regarding out-of-title work assignments shall be referred to the Executive Director of Personnel. She claims that the Office of Labor Relations and Office of Appeals and Reviews (OLR) has "served as the designees for the Executive Director of Personnel and has a long, out-standing established process whereby any DC 37 out-of-title complaints are filed directly with OLR . . . ." NYSCEF Doc. No. 36, Solimando affirmation, ¶ 6. After the OLR receives a complaint, it conducts a three-part review process.

Solimando states that "DC 37 is well-aware that OLR is the designated office for all out-of-title complaints as DC 37 routinely files such complaints directly with OLR." *Id.*, ¶ 9. She claims that, "[s]ince September 2017, DC 37 filed fifteen (15) out-of-title complaints directly with OLR and all were processed accordingly." *Id.*, ¶ 10. Solimando alleges that she has had numerous email exchanges "notifying representatives of DC 37 of their continued incorrect filings and informing DC 37 of the correct filing procedure." *Id.*, ¶ 12. In addition, Alvarez had also filed an out-of-title complaint in 2013 and, at the time, DC 37 properly filed that complaint.

Respondents continue that, even though the complaint was incorrectly filed, the DOE has started to review the complaint. Solimando states that, "[a]lthough DC 37 has not properly filed the instant out-of-title complaint, OLR is nonetheless reviewing the complaint according to the established process. The DOE is currently conducting a desk audit and anticipates the audit will be complete by September 30, 2020." *Id.*, ¶ 21. As a result, according to respondents, the petition fails to state a cause of action as this claim is not ripe for review.

Alternatively, respondents argue that the petition should be dismissed for the failure to file a notice of claim on time. The petition sets forth that the claims began to accrue on or prior

to December 6, 2018. However, the notice of claim was not filed until October 23, 2019, after the three-month statute of limitations applicable for these claims.

In response, petitioners assert that the DOE's Executive Director of Personnel is not a position within the OLR. As a result, they filed Alvarez's complaint with the correct office pursuant to the terms of the CBA. Petitioners further argue that the CBA should be enforced pursuant to the unambiguous terms in the contract, and if respondents intended that the out-of-title complaint be filed with OLR, the CBA would have been written that way. In support of their interpretation of the CBA, petitioners attach several out-of-title complaints filed without objection by DC 37 with the DOE's Executive Director of Personnel.

Petitioners further note that "while Petitioners had filed an out-of-title complaint on behalf of Mr. Alvarez in 2013, Petitioners re-filed it with Respondent DOE on September 26, 2014 with the then-Executive Director of Human Resources, Lawrence Becker (Becker) because the 2013 complaint had been filed with the incorrect office (internal citation omitted)." NYSCEF Doc. No. 41, petitioners' memorandum of law in reply at 12. Becker was Hanna's predecessor. Further, the emails provided by Solimando were sent to Madonna Knight, the assistant director of DC 37's White Collar Division. "Petitioner Local 375 is not a local covered by the White Collar Division." NYSCEF Doc. No. 42, Klein affirmation, ¶ 9.

In further support of petitioners' contentions, they submit an affidavit from David Boyd (Boyd), Assistant Director of District Council 37's Schools Division. NYSCEF Doc. No. 43, Boyd aff. Boyd states the following, in relevant part:

> "Previously, on or about November 2 1, 2017, I attended a labor-management meeting with the DOE to discuss a number of matters related to the representation of DC 37, Local 372 members. One of the topics which came up was to which office of the DOE should DC 37 be filing complaints over out-of-title work, as opposed to other grievances covered by the grievance procedure. The DOE representatives present included Human Resources Executive Director Mr. Hanna, Mr. Ianniello, Mr. Becker, and Ms. Solimondo

> [sic]. I, and other employees of DC 37 present, were informed by the DOE at this 2017 meeting that out of-title complaints should continue to be sent to DOE's Executive Director of Human Resources, which had become Mr. Hanna, and his designee, Mr. Ianniello. Thereafter, I conveyed this information to DC 37's General Counsel's Office.

Id., ¶ ¶ 9,10.

Petitioners continue that, as they filed the complaint with the correct office, this proceeding is ripe for review. Among other things, petitioners claim that the DOE's certified mail return receipt documents indicate that the DOE did receive the December 6, 2018 complaint and that the failure to render a determination is arbitrary and capricious. Further, after receiving the appeal, DCAS should have contacted the DOE to find out what happened to the processing of the complaint. According to petitioners, "DCAS created ambiguity and uncertainty in that it promised Petitioners, in a letter dated April 9, 2019 a determination on their appeal. Yet, despite that promise and two more status request letters from Petitioners, DCAS never responded." Petitioners' memorandum of law in reply at 20 (internal citations omitted). Petitioners argue that they "should not have to risk dismissal for prematurity or untimeliness by necessarily guessing when a final and binding determination has or has not been made." NYSCEF Doc. No. 41 at 15 (internal quotation marks and citation omitted). Petitioners commenced this article 78 after waiting nine months from when they filed the appeal with DCAS.

Lastly, petitioners argue that their notice of claim dated October 23, 2019 is timely served. According to petitioners, the time to file the notice of claim did not being to run until at least August 22, 2019, when the demand for out-of-title compensation was effectively denied due to respondents' neglect and/or refusal to pay.

DISCUSSION

In the context of an article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no

rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 (1st Dept 2006); *see also* CPLR 7803 (3). "The arbitrary and capricious standard asks whether the determination in question had a rational basis." *Matter of Mankarios v New York City Taxi & Limousine Commn.*, 49 AD3d 316, 317 (1st Dept 2008) (internal quotation marks and citations omitted). Once a court finds a rational basis for the agency's determination, its review ends. *Matter of Hughes v Doherty*, 5 NY3d 100, 107 (2005).

An article 78 proceeding cannot be "'used to challenge a determination . . . which is not final or can be adequately reviewed by appeal to a court or to some other body or officer.'" *Matter of East Ramapo Cent. Sch. Dist. v King*, 29 NY3d 938, 939 (2017), quoting CPLR 7801 (1). "A final and binding determination is one where the agency reached a definitive position on the issue that inflicts actual, concrete injury, and the injury may not be significantly ameliorated by further administrative action or by steps available to the complaining party." *Matter of 333 E. 49th Partnership, LP v New York State Div. of Hous. & Community Renewal*, 165 AD3d 93, 100 (1st Dept 2018) (internal quotation marks and citations omitted).

Civil Service Law § 61 (2) states the following, in pertinent part:

> "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."

Article V, Section 6 of the New York State Constitution sets forth, in relevant part:

"Appointments and promotions in the civil service of the State and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive . . .."

Pursuant to the CBA, "complaints concerning out-of-title or out-of-level work assignments shall be referred for decision to the Executive Director of Personnel and his decision may thereafter be appealed to the City Personnel Director." In brief, as set forth above, petitioners initially filed Alvarez's out of title complaint on December 6, 2018 with Hanna, the DOE's Executive Director of Human Resources. When Hanna did not respond, petitioners followed the procedure set forth in the CBA and filed an appeal with DCAS. The appeal was filed on March 12, 2019 and DCAS responded shortly afterwards that it would be reviewing the complaint and would notify petitioners once a determination was made. However, in their answer, respondents assert that, as they never received the initial out of title complaint, they had nothing to review on appeal. When DCAS did not respond to any further communications from petitioners, they filed this article 78 on December 18, 2019.

As noted, petitioners are seeking various forms of relief, including for the court to order the DOE to compensate Alvarez the difference in pay between his position and either the title of APM Level III or SCAS from December 6, 2018. Petitioners also request that the court adjudge and declare that DCAS's failure to render a determination on the March 12, 2019 is arbitrary and capricious and that the court adjudge and declare that the DOE's assignment of duties to Alvarez different from those set forth in his job description is arbitrary and capricious and is also a violation of Civil Service Law 61 § (2) and the New York State Constitution. However, for the reasons set forth below, petitioners cannot pursue their claims in the instant article 78 as "those claims are not yet ripe as there has been no final agency action inflicting concrete harm." *Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 9 (2014).

Petitioners argue that they should not have to risk dismissal for prematurity or untimeliness due to respondents' ambiguity and failure to issue a decision. Respondents state that they are in the midst of reviewing Alvarez's complaint and that they will render a decision around September 30, 2020. It is now nearly April 2021, seven months later. There is nothing in the record to indicate that respondents have rendered a decision. Although there is nothing in the statutes or in the CBA that requires the DOE or DCAS to render a determination within a specific time frame, *Matter of Mott v Division of Hous. and Community Renewal of State of N.Y.*, 140 AD2d 7, 9 (2d Dept 1988) (internal citation omitted), respondents have failed to live up to their word to have a decision by September 2020.

Nevertheless, courts have found that "[a] 'deemed denial' of an administrative appeal from an initial agency determination, based merely on the passage of time . . . is not a final denial on the merits of the application for review, but is a legal fiction indicative of a mere neglect to act." *Matter of Mott v Division of Hous. and Community Renewal of State of N.Y.,* 140 AD2d at 9-10. Although petitioners did not yet receive a resolution of the out-of-title complaint, "further agency proceedings might render the disputed issue moot or academic," as respondents are presumably still processing his complaint.

Petitioners are, in pertinent part, asking that the court make a determination that Alvarez's out-of-title complaint has merit and that he should be promoted to a more appropriate title. However, even in cases of a lengthy delay, courts have directed agencies to render a final determination instead of disposing the case on the merits. *See e.g. Matter of Kibel v State Div. of Hous. & Community Renewal*, 187 AD2d 338, 340 (1st Dept 1992) (internal citation omitted) (Even after agency took over four years to issue a final determination, the court held that "for reasons of comity and judicial economy as well as adherence to the requirement for

administrative finality we feel the better course is generally to direct the agency to render a final determination within a reasonable and definite time period.

Terms of the CBA

Petitioners claim that the failure of the DOE to make a determination on the initial out-of-title complaint and the subsequent failure of DCAS to issue an appeal, are arbitrary and capricious. According to petitioners, they followed the proper procedure pursuant to the CBA when initiating Alvarez's out-of-title complaint. Respondents claim that the initial complaint was not correctly filed. Citing the CBA, petitioners maintain that the Director of Personnel is within the DOE's Division of Human Resources, while respondents assert that the grievances are traditionally filed in the Office of Labor Relations. Nonetheless, the court will not address the merits of these claims as petitioners did not first exhaust their administrative remedies. *See Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 195 (2007) ("Those who wish to challenge agency determinations under article 78 may not do so until they have exhausted their administrative remedies."

"The doctrine of exhaustion of administrative remedies applies to contractual provisions which provide for dispute resolution procedures as a condition precedent to any action or proceeding in the courts." *Matter of People Care Inc. v City of NY Human Resources Admin.,* 89 AD3d 515, 516 (1st Dept 2011) (internal quotation marks and citation omitted). Thus, disputes related to whether Alvarez followed the proper protocol pursuant to the CBA, whether respondents breached the CBA by not initially considering the complaint, or whether the terms of the CBA should be modified to reflect the intent of the parties, are matters that must first be grieved pursuant to the terms of the CBA. Petitioners have not established that they have followed the proper mechanisms for filing grievances related to any of these contractual issues.

Notice of Claim

In general, pursuant to Education Law § 3813 (1), prior to maintaining an action against the DOE, a plaintiff must file a notice of claim within three months of the accrual of the claim. *See e.g. Parochial Bus Sys. v Board of Educ. of City of N.Y.,* 60 NY2d 539, 547 (1983) ("Satisfaction of these [notice of claim] requirements is a condition precedent to bringing an action against a school district or a board of education . . ."). "Accrual generally equates with the date upon which the damages are ascertainable." *Alfred Santini & Co. v City of New York*, 266 AD2d 119, 120 (1st Dept 1999) *lv denied* 95 NY2d 752 (2000).

Respondents' argument that petitioners' claims should be barred for failing to file, timely, a notice of claim, is without merit. As noted above, there is no final determination yet. Thus, there is no potential date for damages to accrue. If Alvarez is ultimately successful, he will not file a notice of claim. However, if he seeks to challenge the prospective decision, he will have to file a new notice of claim.[1]

Accordingly, it is hereby

ADJUDGED that the court orders respondents to render a decision on petitioner's December 2018 out-of-title complaint within 45 days of the efiled date of this order and otherwise denies the petition

Dated: March 29, 2021
New York, NY

Melissa Crane

CHECK ONE: X CASE DISPOSED NON-FINAL DISPOSITION

[1] As noted by petitioners, respondents have argued in the past that a notice of claim is not actually necessary for an out-of-title claim. As the petition is dismissed on other grounds, the court need not address this issue.

GRANTED DENIED X GRANTED IN PART

OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE