

**Matter of A Ugl UmY\_\` v NYC Department of Parks & Recreation**

2007 NY Slip Op 30246(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0104081

Judge: Charles J. Tejada

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS 50N

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In the Matter of the Application of  
MOHAMMED REZA MASHAYEKHL

Petitioner,

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

Index No. 104081/06  
Decision and Judgement

-against

NYC DEPARTMENT OF PARKS AND RECREATION,  
NYC DEPARTMENT OF PARKS AND RECREATION  
COMMISSIONER ADRIAN BENEPE and THE CITY OF  
NEW YORK,

Respondents.

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TEJADA, C.J., J.S.C.

**UNLAWFUL JUDGMENT**  
The County Clerk  
of this County has filed hereon. To  
obtain a copy of this judgment, the interested parties must  
appear in person at the County Clerk's Office, Room  
1115, 100 Nassau Street, New York, NY 10038.

Petitioner, MOHAMMED REZA MASHAYEKHL, filed the instant petition seeking an order directing and compelling respondents NYC DEPARTMENT OF PARKS AND RECREATION, NYC DEPARTMENT OF PARKS AND RECREATION COMMISSIONER ADRIAN BENEPE and THE CITY OF NEW YORK (hereinafter "respondents") to reinstate petitioner, restore annual leave he was compelled to use as of March 10, 2006 and appoint him to the position of Associate Project Manager III; or in the alternative to the position he was hired in, Assistant Civil Engineer; an order directing and compelling respondents to rescind the "unlawful" cease and desist' directive; an order directing petitioner be permitted to perform the duties of an Assistant Project Manager, Level III with commensurate salary; an order directing petitioner be appointed to the position of Assistant Project Manager, Level III; an order declaring respondent's actions towards petitioner as arbitrary, capricious and made in bad faith and an order granting petitioner costs and disbursements of this action, including reasonable attorney's fees.

Respondent cross moves to dismiss the petition in its entirety on the grounds that the petition is barred, in whole or in part, by the applicable statute of limitations and fails to state a cause of action and enter judgment for respondents and grant respondents costs, fees and

disbursements.

Pursuant to Article 78 of the Civil Practice Laws and Rules (CPLR), the scope of this Court's review of an administrative agency's determination is limited. In reviewing an agency's decision, the only determination to be made is "whether a determination was made in violation of lawful procedures, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion." CPLR § 7803[3]; *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974). See also, *Fanille v. NYC Conciliation and Appeals Board*, 90 A.D.2d 756, (1<sup>st</sup> Dep't 1982) aff'd 58 N.Y.2d 952 (1983) ("the function of the Court upon an application of relief under CPLR Article 78 is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious.")

Petitioner is a provisional Associate Engineer Technician, Level II (AET II) employee of the Department of Parks and Recreation (DPR). Petitioner was hired by the DPR in 1997 as a provisional employee under the title of Assistant Civil Engineer (ACE) and thereafter, in December 2000, petitioner was provisionally appointed to his to present title. To date, petitioner remains a provisional employee.

Petitioner seeks, *inter alia*, an order of rescission of a November 28, 2005 memorandum he received from his supervisor, Assistant Commissioner Nancy Barthold (Asst. Commissioner), directing him to refrain from performing duties outside the scope of his job description (cease and desist order). However, respondent's determination advising petitioner that he is to refrain from performing duties outside the scope of his job description is more in the form of a clarification of his position within DPR and, as such, subject to only limited judicial review, and will not be disturbed in the absence of a showing that they are wholly arbitrary or without any rational basis". *Cove v Sise*, 71 NY2d 910, 912 ("Administrative determinations concerning position classifications are of course subject to only limited judicial review, and will not be disturbed in the absence of a showing that they are wholly arbitrary or without any rational basis); see, *Matter of Dillon v Nassau County Civ. Serv. Commn.*, 43 NY2d 574, 580; *Matter of Grossman v Rankin*, 43 NY2d 493, 503, *rearg denied* 44 NY2d 733).; and see, *Matter of Steen v Governor's Off. of Empl. Relations*, 271 AD2d 738, 739. The burden falls upon the petitioner to demonstrate that the determination is either arbitrary, capricious or afflicted with an error of law

(see, *Matter of Grossman v Rankin*, 43 NY2d 493, 502; *Matter of Civil Serv. Empls. Assn. v State Univ. of N. Y.*, 280 AD2d 832, 833). Petitioner has failed to demonstrate any of the above. Moreover., in reviewing a determination made by the agency responsible for the administration of its' statutes and regulations, the Courts will allow great deference to the administrative agency's decision. See, *Cale Development Inc., v. Conciliation and Appeals Board*, 94 AD2d 229 ("It is well established that the construction and implementation of statutes and regulations by the agency responsible for their administration is entitled to great deference."); see also, *Salvati v. Eimeicke*, 72 NY2d 784 ("Where a question involves the application of a broad statutory provision, the construction placed on the statute and regulations by the agency with responsibility is entitled to great weight.")

Petitioner's application to this Court seeking an order "declaring respondent's actions towards petitioner as arbitrary, capricious and made in bad faith" must also be denied. "A declaratory judgment action is appropriate only when there is a substantial legal controversy between the parties that may be resolved by a declaration of the parties' legal rights (see, CPLR 3001; *De Veau v Braisted*, 5 AD2d 603, *affd* 5 NY2d 236, *affd* 363 US 144; see also, *Board of Coop. Educ. Servs. v Goldin*, 38 AD2d 267, *lv denied* 30 NY2d 486). In this case, the declaratory relief petitioner seeks relates to a matter too general and vague to be considered actionable under this theory of law and consequently, no justiciable controversy exists upon which this Court could properly rule. See CPLR § 3001. More importantly, however, is the fact that while respondent's actions toward petitioner may be questionable and retaliatory, respondent's determination, that as a provisional employee of the DPR petitioner has no claim of entitlement to the position of an Associate Project Manager, Level III, is supported by the record.

Furthermore, the petitioner was not fired. He was ordered to perform only the duties required of him in his job description as an Associate Engineering Technician, Level II. While it is admittedly a lower paying position, respondents did not terminate the petitioner and were well within their administrative capacity to order the petitioner to refrain from handling any duties outside his current job title as Associate Engineering Technician, Level II.

With regard to petitioner's argument of a violation of his First Amendment rights and claim of employment retaliation, the record before this Court supports respondent's conclusion

that the November 18, 2005 letter petitioner wrote to Parks Department Commissioner Adrian Benepe complaining about Chief Engineer Natoli actions against him, did not address a matter of public concern. See, *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999) (“A public employee who makes a First Amendment claim of employment retaliation under § 1983 must show that: (1) his speech addressed a matter of public concern, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and that adverse employment decision, so that it can be said that the plaintiff’s speech was a motivating factor in the adverse employment action.”) See, *Connick v. Meyers*, 461 US 138, 146, 147; *Pickering v. Bd of Education*, 391 US 563, 568.

Lastly, petitioner’s “whistle blower” claim pursuant to Civil Service Law § 75-b, must be denied as petitioner did not meet the reporting requirement of the statute. See, *Bal v. City of New York*, 266 AD2d 79.

Consequently, the petition must be denied.

The foregoing constitutes the decision and judgement of this Court.

Date: March 6, 2007  
New York, NY

  
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Charles J. Tejada, J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been filed by the County Clerk  
and notes of entry court. To be entered hereon. To  
obtain entry, counsel or party must  
appear in person at the County Clerk's Desk (Room  
41B).