

**Matter of Milos v Board of Education of City School
District of City of New York**

2007 NY Slip Op 34261(U)

December 21, 2007

Supreme Court, New York County

Docket Number: 0118953/2006

Judge: Marcy L. Kahn

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PT. 50K DEC 21 2007

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

PRESENT: Hon. Marcy L. Kahn
Justice

PART 50K

In the Matter of ROBERT MIKOS,

Petitioner,

INDEX NO. 118953/06
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

-against-

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF
NEW YORK

Respondent.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

The following papers, numbered 1 to 10 were read on this motion to/for mandamus to compel (CPLR §7803 (1))

	<u>Papers Numbered</u>
Notice of Petition, Verified Petition, Affidavits, Exhibits, Memorandum of Law	<u>1,2,3,4</u>
Notice of Cross-Motion to Dismiss, Memorandum of Law	<u>5,6</u>
Affirmation in Opposition to Cross-Motion, Memorandum of Law	<u>7,8</u>
Supplemental Memorandum of Law In support of Cross-Motion	<u>9</u>
Supplemental Memorandum of Law	<u>10</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that the petition is denied, the cross-motion is granted and the proceeding is dismissed, for the reasons stated in the accompanying decision and order.

Dated: 12/21/07

ENTER: *Marcy L. Kahn* J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

[*2]
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM: IAS PART 50K

-----x
In the Matter of the Application of
ROBERT MIKOS, PHYLLIS SHERARD, LOIS
DEFREITAS, MARIA TERESA GOUDIE, MARY
ANN MARTINEZ, JAMES LINSON, JERRY
FEIGELSON, OLMON HAIRSTON, ALPHONSO B.
DANCE, SR., RAUL FIGUEROA, GEORGES
MATHIEU, VIVIAN FIGUEROA, RHONDA
PAGANETTI, TARIQ MCKAY, ELLA ROUNDTREE,
and JOANNE MANNA,

Petitioners,

-against-

DECISION AND ORDER
ON CROSS-MOTION TO
DISMISS
Index No. 118953/06

Sequence Number: 001

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK, and
JOEL I. KLEIN, as Chancellor of the
City School District of the City of
New York,

Respondents.

For a judgment Pursuant to Article 78 of
the New York Civil Practice Law and Rules

-----x
MARCY L. KAHN, J.:

In this Article 78 proceeding, petitioners seek
reinstatement to their former positions with respondent Board of
Education of the City of New York (the "Board" or "BOE") or,
alternatively, appointment to certain positions which have been
newly created by BOE, or other alternative relief. The Board
and Joel I. Klein, as Chancellor (collectively, "respondents")
cross-move for an order dismissing the petition on the ground

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

that it fails to state a cause of action.¹ For the reasons that follow, the petition is denied, the cross-motion is granted and the proceeding is dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners, each of whom was formerly employed by respondents as a "Director, Drug Abuse Prevention and Intervention Program, Level II" ("Drug Director") in the New York City school system, commenced this proceeding by petition filed December 21, 2006 seeking an order pursuant to CPLR § 7803(1) and (3) directing respondents to reinstate petitioners to their now-abolished positions of Drug Directors, or, alternatively, to appoint each of the petitioners to the newly-created BOE job title of Youth Development Manager ("YDM") pursuant to Education Law § 2588(2), or, alternatively, to place petitioners on the preferred eligible list pursuant to Education Law § 2588(7), affording petitioners priority in appointment to fill vacancies in the YDM job title, and for other associated relief.

The creation of the YDM and other new titles and the abolition of all but six of the Drug Director positions was undertaken as part of a BOE reorganization in which the Office

¹ Petitioners' motion for an order pursuant to CPLR § 3024(b) striking various portions of Respondents' Memorandum of Law in Support of Their Cross-Motion to Dismiss the Petition dated March 30, 2007 ("Resp. Mem.") and supporting exhibits was denied by decision and order of this court dated July 20, 2007 ["Mikos I"].

of Youth Development and School-Community Services and the regional Offices of Student Placement were combined into one organization, the Office of Youth Development. (Verified Petition ["Pet."], ¶ 1, Exh. B). On August 22, 2006, petitioners were advised by e-mail and memoranda that, pursuant to the reorganization plan, their Drug Director positions were being abolished and that they would be appointed to the newly created positions of Youth Development Specialist ("YDS"), at their option. (Pet., Exh. B). None of the petitioners accepted the YDS position, which is a lower level position than their former posts, which in turn, are lower level positions than the managerial YDM title.

All employees of the BOE are members of the civil service system. Some BOE employees are considered members of the unclassified civil service while others are considered members of the classified civil service. (See Civil Serv. L. §§ 35, 40-45). Pedagogues, including both teachers and educational supervisors, are placed within the unclassified civil service. Drug Directors fall within this category, as their duties are pedagogical. For example the responsibilities of Drug Directors include developing curricula for students and for parent workshops on substance abuse. (See Pet., Exh. A).

The classified civil service comprises the non-pedagogical positions. Respondents have placed the YDMs in the classified civil service, contending that their responsibilities as

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managers include developing and implementing BOE policy throughout the agency, but do not include any teaching functions. As such, the BOE regards YDMs as non-pedagogues. (See Pet., Exh. C). By contrast, petitioners aver that both the YDM title and the Drug Director title "wholly and principally support of the function of teaching" and, due to the similarity of the two positions, petitioners are entitled to appointment to the YDM positions. (Pet., ¶ 27). In support of the petition, petitioners submitted the affidavit of petitioner Robert Mikos sworn December 18, 2006, the affidavit of petitioner Ella Roundtree sworn December 19, 2006, and a memorandum of law in support of verified petition dated December 20, 2006.

By notice of motion filed April 3, 2007, respondents cross-moved pursuant to CPLR §§ 7804(f) and 3211(a)(7) to dismiss the petition on the ground that it fails to state a cause of action. In support of the cross-motion, respondents submitted a memorandum of law dated March 30, 2007. On May 11, 2007, petitioners filed an affirmation and memorandum of law in opposition to the cross-motion. On May 11, 2007, petitioners also filed a motion to strike certain portions of respondents' memorandum of law dated March 30, 2007. On May 18, 2007, respondents filed a reply affirmation in further support of their cross-motion to dismiss and in opposition to petitioners' motion to strike. In Mikos I, July 20, 2007, this court denied petitioner's motion to strike.

Also on July 20, 2007, this court requested supplemental memoranda of law from the parties on certain issues relating to the Education Law claims. Responses were subsequently received from both parties thereafter.

II. PARTIES' CONTENTIONS

In their first cause of action, petitioners contend that respondents violated the seniority reemployment provisions of Education Law § 2588(2) by failing to appoint petitioners to the YDM positions. Petitioners contend that more than fifty percent of the duties and responsibilities of the YDM were previously performed by a Drug Director (Pet., ¶ 41), and offer a comparison of the duties of the two positions based upon their respective job descriptions, concluding that the two titles are "similar" within the meaning of Education Law § 2588(2), entitling them to relief. (Pet., ¶¶ 37-40). Petitioners add that, because the Drug Director position "supported the function of teaching" and is pedagogical in nature (Pet., ¶ 42), and because of the "similarity" of the duties of both positions, the YDM position should also be deemed pedagogical. (Pet., ¶ 43).

In their second cause of action, petitioners claim that respondents violated Education Law § 2588(7) by failing to create a preferred eligible list from which individuals who had been appointed to the abolished Drug Director positions could be appointed to fill vacancies in similar positions in order of their seniority. (Pet., §§ 47-49).

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In their third cause of action, petitioners claim that respondents violated the Civil Service Law by acting in bad faith in abolishing the Drug Director job positions and creating the YDM positions; that they violated Civil Service Law § 35(g) by failing to seek appropriate certification from the New York State Commissioner of Education for the creation of the YDM position; and that they violated Civil Service Law § 22 by failing to submit a proposal for the classification of the YDM position to the Commissioner of the New York City Department of Citywide Administrative Services ("DCAS"). (Pet., ¶¶ 51-53; see Memorandum of Law in Opposition to Respondents' Cross-Motion to Dismiss the Verified Petition, dated May 10, 2007 ["Pet. Mem. in Opp."], at 11).²

Respondents argue that petitioners are entitled neither to appointments to the YDM positions nor to inclusion on a preferred eligible list for that position, because the YDM position is not "similar" to petitioner's abolished Drug Director position within the meaning of Education Law § 2588(2). (Resp. Mem. at 2). Respondents argue that a comparison of the job descriptions reveals that there are material differences in the duties of the two positions. (Id.) Observing that the YDM title is in the classified civil service while the Drug Director

² Petitioners originally maintained that section 22 required certification from the Commissioner of Education (Pet., ¶51) but later averred that certification should have come from the Commissioner of DCAS.

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position is a pedagogical position in the unclassified civil service, they contend that petitioners are not entitled to appointment to the YDM title because it is not the successor title to the Drug Director title. (Id.). Further, respondents assert that YDMs are managers, responsible for the development and implementation of policy throughout the BOE, which materially distinguishes their responsibilities from those of the Drug Directors. (Id. at 6).

They also argue that Education Law §§ 2588(2) and (7) are inapplicable, in that they apply only to the abolition and creation of positions within a "tenure area" and the non-pedagogical YDM positions do not fall within any "tenure area." (Id. at 2-3). Respondents further contend that Civil Service Law § 35(g) is also inapplicable because it applies only to members of the unclassified civil service, including pedagogues, and not to classified civil service positions, such as the YDM position. (Id. at 3).

III. LEGAL STANDARDS

A. Standard of Review - CPLR § 7803

In an Article 78 proceeding brought pursuant to CPLR § 7803(3) in the nature of mandamus to review, the only question before the court is whether the determination of the body or officer:

was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion

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(CPLR § 7803[3]). An agency determination is arbitrary and capricious if it is without rational basis. (Pell v. Board of Educ., 34 NY2d 222, 231 [1974]). The arbitrary and capricious test set forth in CPLR § 7803(3) chiefly "relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact." (Id.). Where a rational basis exists for the agency action, the court may not substitute its judgment for that of the agency. (Tockwotten Assoc., LLC v. New York State Div. of Hous. & Cmty. Renewal, 7 AD3d 453, 454 [1st Dept. 2004]).

Where relief is sought in the nature of mandamus to compel pursuant to CPLR § 7803(1), the court determines whether the agency "failed to perform a duty enjoined upon it by law." (CPLR § 7803[1]).

B. Motion to Dismiss - CPLR § 7804(f)

CPLR § 7804(f) sets forth the procedure to be followed should the respondent in an Article 78 proceeding have "an objection in point of law" to the petition:

The respondent may raise an objection in point of law by setting forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for an answer.

(CPLR § 7804[f]). An objection in point of law pursuant to CPLR § 7804(f) is equivalent to an affirmative defense under CPLR § 3211(a). (Hop-Wah v. Coughlin, 118 AD2d 275, 277 [3d Dept. 1986], rev'd on other grounds, 69 NY2d 791 [1987]).

C. Motion to Dismiss for Failure to State a Cause of Action - CPLR § 3211(a)(7)

Generally, on a motion to dismiss, a pleading is afforded a liberal construction. (Leon v. Martinez, 84 NY2d 83, 87 [1994]; Guggenheimer v. Ginzberg, 43 NY2d 268, 275 [1977]; Foley v. D'Agostino, 21 AD2d 60, 64-65 [1st Dept. 1964]). All factual allegations are deemed true and the pleader is entitled to all favorable inferences (EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Cron v. Hargro Fabrics, Inc., 91 NY2d 362, 366 [1998]; Hispanic AIDS Forum v. Bruno, 16 AD3d 294, 295 [1st Dept. 2005]). Nonetheless, "[a]llegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed true or accorded every favorable inference." (Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 [1st Dept. 1999], aff'd, 94 NY2d 659 [2000], quoting Kliebert v. McKoan, 228 AD2d 232 [1st Dept.], lv. denied, 89 NY2d 802 [1996]).

A party's pleading may itself conclusively establish that the pleader has no cause of action. (Held v. Kaufman, 91 NY2d 425, 430 [1998]; Rovello v. Orofino Realty Co., Inc., 40 NY2d 633, 636 [1976]). Nonetheless, in reviewing a motion to dismiss, the court may freely consider the affidavits and exhibits proffered by petitioners in addition to the petition itself. (See Leon v. Martinez, supra, 84 NY2d at 88;

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Guggenheimer v. Ginzberg, supra, 43 NY2d at 275). "Where extrinsic evidence is used, the standard of review under a CPLR 3211 motion is 'whether the proponent of the pleading has a cause of action, not whether he has stated one.'" (Biondi v. Beekman Hill House Apt. Corp., supra, 257 AD2d at 81, quoting Guggenheimer v. Ginzburg, supra, 43 NY2d at 275). "The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted." (Blackgold Realty Corp. v. Milne, 119 AD2d 512, 513 [1st Dept. 1986], aff'd, 69 NY2d 719, reh'g denied, 69 NY2d 900 [1987]).

Thus, a motion to dismiss pursuant to CPLR 3211(a)(7) may entail not only an assertion with respect to a pleading's prima facie lack of "legal sufficiency," but may also involve an assessment of the viability of a pleading's factual allegations. (7 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 3211:36 at 32-108 [2006]).

IV. DISCUSSION

A. The Education Law Claims

1. Education Law §§ 2510(1) and 2588(2)

Section 2510(1) of the Education Law governs the abolition of offices or positions by boards of education in cities having fewer than 125,000 inhabitants. It provides in pertinent part:

If the board of education abolishes an office or position and creates another office or position for the performance of duties similar to those performed in the office or position abolished, the person filling such office or position at the time of its abolition shall be appointed to the office or position thus created

(Emphasis added).

Section 2588(2) of the Education Law governs the abolition of positions by the Board of Education in New York City. It was enacted in 1976, in the midst of the New York City fiscal crisis, to lessen the impact of layoffs on more senior employees by expanding the concept of the tenure area to encompass positions requiring different, but closely related, licenses.

(See Memorandum from Assembly Member Leonard Silverman to Judah Gribetz, Counsel to Governor Carey, July 15, 1976) ["Silverman Memo"]). It provides in pertinent part:

If a position within a tenure area is abolished and another position is created in such area for the performance of duties similar to those performed in the abolished position, the person filling such office or position at the time of its abolition shall be appointed to the position thus created

(Emphasis added).

The purpose of these provisions was to protect senior members of the teaching and supervisory staff against arbitrary or capricious discharges by their boards of education. (Davis v. Mills, 98 NY2d 120, 124 [2002]). They establish a system of

seniority governing layoffs of pedagogical employees. (Silverman Memo, at 1). The key feature of both provisions, for present purposes, is that the abolished position and the newly created position must be "similar" for either provision to be applicable. Hence, this court may look to decisions under both §§ 2588 and 2510 of the Education Law for guidance.³

2. Certification Differences Dispositive to Lack of Similarity

Research reveals no case law construing the similarity requirement of Education Law § 2588(2). It seems self-evident, however, and the parties do not disagree, that given the similar purpose and wording of section 2510(1), the appellate decisional law construing that section is instructive for this court in applying section 2588(2).

In construing the requirement of similar duties under Education Law § 2510(1), appellate courts have consistently placed primary emphasis on whether both the abolished position and the new position required the same certification. (See, e.g., Davis v. Mills, 98 NY2d 120, 124 [2002] quoting Ward v.

³ Although section 2588 expands the seniority and retention rights of teachers and their supervisors employed in the New York City school district by generally affording seniority rights based upon total service within the school district rather than within a narrowly defined tenure area (Assembly Memorandum, A.1 3043-A [July 12, 1976]), considerations of the difference in the "tenure area" requirement of each measure are not implicated here.

Nyquist, 43 NY2d 57, 63 [1977] ["When seeking re-employment rights (under § 2510) the threshold question must be one of certification to teach in the position sought. Absent such certification, re-employment rights cannot attach"]; Brown v. Board of Educ., 211 AD2d 887, 889 [3d Dept. 1995], quoting Ward v. Nyquist, supra, 43 NY2d at 63 ["'[C]ertification is a statutory requirement of no small significance' in determining whether the new position is similar to the old one"]).

Indeed, it would seem that the existence or absence of an educational certification requirement is virtually dispositive in determining whether positions are "similar" within the meaning of the Education Law. For example, in Bork v. City School Dist., 60 AD2d 13 (4th Dept. 1977), lv. denied, 44 NY2d 647 (1978), seven school nurse-teachers whose positions were abolished by the local board of education sought appointment to newly created school nurse positions at the same salary level as the abolished positions. (Id. at 14-15). The abolished position required teaching certification while the newly created position did not. The court dismissed the petition pursuant to CPLR § 3211(a)(7) on the ground that the two positions were not "similar" within the meaning of § 2510(1), reasoning that:

[t]he dissimilarity between the positions is based primarily upon the fact that several of the areas of responsibility of a school nurse-teacher cannot be delegated to a registered nurse who is not certified to teach.

(Id. at 16).

In Ryan v. Ambach, 71 AD2d 719 (3d Dept. 1979), petitioner's position as a tenured high school assistant principal, which required educational certification, was abolished and several new positions not requiring certification were created. Many of petitioner's former duties were reassigned to the new positions. In affirming the dismissal of petitioner's claim of entitlement to appointment to the new position under section 2510(1), the court reasoned:

Where the board of education abolishes a position requiring certification as instructional or noneducational in nature and creates in lieu thereof a noneducational position which does not require educational certification, the former incumbent of the educational position has no claim on the newly created noninstructional position.

(Id. at 720, citing Bork v. City Sch. Dist., supra).

Similarly, in Mills v. Nyquist, 63 AD2d 1060 (3d Dept. 1978), aff'd, 47 NY2d 809 (1979), the petitioner, who had accepted a newly created dental hygienist position which did not require teaching certification, sought reinstatement to her abolished former position as school dental hygiene teacher, which did require such certification. In affirming the dismissal of her petition, the court concluded that the two positions were not "similar," despite the congruence of their actual respective duties, because "[t]he requirement of teaching certification is the important difference between the duties."

difference between a position requiring a teaching certificate and a civil service position is the responsibility for teaching duties attached to the former.

(Id. at 796-97).

Similarly, in Shearod v. Board of Coop. Educ. Servs., 109 AD2d 743 (2d Dept.), aff'd, 65 NY2d 850 (1985), a retention claim had been advanced by a former work experience counselor whose position had been abolished and who sought appointment to the newly created position of vocational rehabilitation counselor on the ground that two positions were "similar" within the meaning of Education Law § 2510(3).⁴ The

⁴ Petitioner brought the proceeding on behalf of himself and other similarly situated persons seeking appointment to the newly created position from a "preferred eligible list," meaning that he and other persons who had held the abolished title would be appointed to the newly created post in order of seniority as vacancies in the new post occurred. Such appointments are made pursuant to Education Law § 2510(3)(a), which provides, in pertinent part:

If an office or position is abolished . . . the person filling such position at the time of its abolition. . . shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or may thereafter occur in an office or position similar to the one such person filled without reduction of salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled.

(Educ. Law § 2510[3]). Other than the reference to placement on a preferred eligible list, the language of section 2510(3) is identical to the language of section 2510(1). It parallels section 2588(7), which is the claimed basis for the relief sought by petitioners in their second cause of action in this proceeding.

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Second Department held that the two positions were not "similar" within the meaning of section 2510(3):

[T]he work experience counselor position is a pedagogical one, requiring a teaching certificate and the rights of the incumbents of that position are governed by the Education Law. The position of the vocational rehabilitation counselor is a nonpedagogical one; no teaching certificate is required, and the rights of the incumbents are governed by the Civil Service Law

Shearod v. Board Of Coop. Educ. Servs., supra, 109 AD2d at 744.

Recently, the Appellate Division, Second Department applied the reasoning of the Bork, Smith and Shearod courts to a case involving displacement and seniority claims arising under the Civil Service Law. In Civil Serv. Employees Ass'n, Inc. Local 1000, AFSCME, AFL-CIO v. Rockland County Board of Coop. Educ. Servs., 39 AD3d 641 (2d Dept. 2007), Rockland County BOCES abolished the civil service position of clinical psychologist while creating the new job title of school psychologist. (Id. at 642). This determination was challenged by former holders of the abolished positions as evidencing bad faith, in violation of the Civil Service Law.⁵ (Id.) The trial court rejected this argument and dismissed the petition. While acknowledging that "[b]ad faith may be demonstrated by evidence that a newly hired person performed substantially the same duties as the discharged employee" (id. [citations omitted]), the Appellate Division

⁵ See section IV. C.1, infra.

nonetheless affirmed the trial court's dismissal of the petition. The Second Department panel reasoned:

Although some of the duties of the abolished position of clinical psychologist overlap with those of a school psychologist, the positions are not the "same or similar," as they have different certification requirements.

. . . .

[W]hile the position of clinical psychologist is governed by the rules of the Civil Service Law, the position of school psychologist is governed by the Education Law.

(Id. at 642-43, 644, citing Shearod v. Board of Coop. Educ. Servs., supra, 109 AD2d at 744; Smith v. Board of Educ., supra, 97 AD2d at 797).

Thus, regardless of whether the abolished position is established pursuant to the Education Law while the newly created position is created pursuant to the Civil Service Law, or vice versa, courts recognize that the threshold inquiry in determining similarity is whether the two positions have the same certification requirements. In each of the above cases, the apparently legally dispositive fact in determining whether the abolished position was "similar" to the newly created position was that one position required teaching certification, thereby entailing teaching duties, while the other position did not.

Here, it is uncontroverted that the Drug Director position

requires New York State Department of Education certification. The job description for the position states that "New York State certification in School Administration/Supervision (SAS) is required".⁶ (Pet., Exh. A [Memorandum from Joyce R. Coppin, Chief Executive, Division of Human Resources, New York City Department of Education, to Regional Instructional Superintendents, Executive Directors, Heads of Offices and Personnel Managers, October 7, 2003] ["Coppin Mem."]).

Petitioners acknowledge that YDM job description requires no such pedagogical certification. (Supplemental Memorandum of Law dated August 16, 2007 ["Pet. Supplemental Mem. of Law"], at 8; see Pet., Exh. C).

In sum, petitioners' allegation that the two positions are "similar" is flatly contradicted by petitioners' own proffered submissions, which show that the Drug Director position requires educational certification while the YDM position does not. (Pet., Exhs. A and C). The uncontroverted fact that the two positions do not both require educational certification demonstrates that YDMs are not positions created "for the performance of duties similar to those performed in the

⁶ Respondents proffered a somewhat fuller version of the Drug Director job title description, including a salary range pertaining to an unspecified date or school year. (Compare Pet., Exh. A, with Resp. Mem., Appendix B). This court has not considered the exhibit proffered by respondents, however. (See Mikos I, supra, at 6). The material proffered by petitioners itself establishes the certification requirements.

abolished position" of Drug Director. (Educ. L. §2588[2]). Under the reasoning of the case law interpreting the same phrase in the parallel provision of section 2510 respecting cities with smaller populations, the inquiry as to petitioners' rights to relief under section 2588(2), and the issue of whether respondents have breached any duties under that section, should thus be at an end. Under these circumstances, "the essential facts have been negated beyond substantial question by the ... evidentiary matter submitted" by the petitioners, and the motion to dismiss for failure to state a cause of action must be granted. (Biondi v. Beekman Hill House Apt. Corp., *supra*, 257 AD2d at 81; Blackgold Realty Corp. v. Milne, *supra*, 119 AD2d at 513).

3. Similarity Analysis of the Drug Director and YDM Positions

Notwithstanding this apparently dispositive distinction between the two job titles, petitioners maintain that determining the similarity of the two positions solely on the basis of educational certification is insufficient for purposes of assessing their rights. They contend that "[t]he test to determine whether the duties of the abolished position are similar to the newly-created position is completely fact specific." (Pet. Supplemental Mem. of Law at 3). Even assuming that resolution of the issue requires the court to review and

compare the duties of two positions, however,⁷ the disparity between the duties of the two titles is such that this court is compelled to conclude that the positions are not "similar."

The analysis begins with the observations by the Fourth Department in Bork that: "the term 'similar' cannot be said to have a clear and unambiguous meaning in [these sections] of the Education Law" (Bork v. City School Dist., supra, 60 AD2d at 16-17]), but must be given "broad meaning," so as to prevent erosion of the tenure rights of the incumbents of abolished positions." (Id. at 15-16 [citation omitted]).

In arguing that the new YDM position is similar to the previous Drug Director position, petitioners focus on contending that the two jobs contain very similar responsibilities and encompass the same programmatic area of operations. While it is true that both Drug Directors and YDMs address problems of students troubled by drugs and alcohol, and support programs which deal with these problems, YDMs also lead in developing strategies for issues such as guidance, attendance, health and temporary housing. Of greater significance is the fact that the roles of these two positions are quite different.

⁷ But see Smith v. Board of Educ., supra, 97 AD2d at 796 ("[C]ase law holds that the amount of time spent in similar duties should not be the controlling factor in determining the meaning of the word 'similar'"); see also Davis v. Mills, supra, 98 NY2d at 125 (refusing "to supplant the certification requirement [of Ward v. Nyquist, 43 NY2d 57, 63 (1997)] with a fact-intensive assessment of fitness for re-employment").

The job descriptions annexed to the petition indicate that YDMs are responsible for developing and implementing policies, strategies and procedures; creating instruments to evaluate services and interventions that support students; identifying areas which need improvement; collaborating with schools, principals and administrators in order to develop and implement effective programs in these areas on a system-wide basis; gathering information and analyzing data; recommending and bringing in outside experts to provide services supporting these programs; and guiding deployment of resources in response to requests from schools to the central Office of Youth Development ("OYD"). (Pet., Exh C).

Once the program is operating, a YDM serves as the "key point person" for a given group of schools on all matters relating to the OYD, coordinating the programs as well as monitoring and evaluating them, and forging partnerships with community-based organizations. The YDMs do not teach or supervise those who do. (Id.) In sum, the YDMs design the programs and provide overall system-wide support to assure their smooth implementation, from OYD's central offices.

By contrast, Drug Directors' responsibilities focus on the day-to-day operation of programming in the area of alcohol and drug prevention and intervention. The Drug Directors recruit, train and supervise teachers and staff, help principals resolve

immediate conflicts and oversee operation of programs in this area. They also represent the region at workshops, on task forces and coalitions, and make presentations to faculty and parent associations and at local and national conferences relating to alcohol and drug abuse prevention programs.

In short, the YDMs design and deploy resources to support policy in the six areas overseen by the OYD, which include drug and alcohol prevention and intervention, while the Drug Directors oversee the implementation of the drug and alcohol policies and programs in the schools on a daily basis. While some of their responsibilities overlap, this is nearly inevitable for positions that are part of the same program. For example, Drug Directors "develop proposals and budgets for programs" and YDMs "assist schools in developing programs." But even in these areas they interface at different levels of the program's administration.

In context, YDMs work at a higher, more centralized level, while the Drug Directors work with individual schools and regions. Thus, Drug Directors work to resolve immediate conflicts, while the YDMs help schools improve their systemic ability to best meet students' needs. Drug Directors maintain data-collection and reporting systems, YDMs engage in data analysis in the context of making program improvement recommendations. The fact that they work toward the same goals

does not make their positions similar.

These differences in level, position and function in the overall program are sufficient by themselves to preclude any finding of similarity within the meaning of Education Law § 2588. But the foregoing analysis of the petitioners' argument focused only on those parts of the two job descriptions that overlapped; the positions contain many other, non-overlapping, areas of responsibility as well.

YDMs engage in program design at an phase when they collaborate with the central leadership to develop the policies and procedures. When they do assist schools, it is to help them develop programs and implement effective solutions, rather than interface on day-to-day matters. Where they work with principals, school counselors and administrators, it is to provide information to help schools solve systemic problems and assess issues like risk and resiliency. They "develop metrics that evaluate" the effectiveness of the programs' services and interventions and then determine how to improve them. They cultivate relationships with content experts, vendors and community-based organizations who might contribute to providing services and trouble-shooting.

By contrast, the Drug Directors' most distinct work lies with their recruitment, training and supervising of teachers and specialists, directing the day-to-day activities, developing

curricula, and, after liaising with the regional support team, providing advice to the school administrators and teachers to improve their services. Their training activities also include presenting workshops for faculty and parent and community association meetings, and attending meetings of professional organizations.⁸ Thus, the vastly different responsibilities of the two positions demonstrate that the two positions are not "similar." Therefore, because the YDM position does not require educational certification, as the Drug Director position does, and, because, in terms of the respective natures and quality of the responsibilities associated with the two positions, the YDM position does not entail duties similar to those performed in the abolished Drug Director position, petitioners do not have a cognizable claim for relief under Education Law §2588(2).

Accordingly, the first cause of action fails to state a claim for relief and must be dismissed pursuant to CPLR §3211(a)(7).

4. Education Law § 2588(7)

In the second cause of action, petitioners contend that respondents violated Education Law § 2588(7) by failing to

⁸ These are the pedagogical duties which are virtually non-existent in the YDMs' job. Drug Directors are the people who actually work with the teachers, counselors and administrators and who would train them, rather than central-office management personnel who design and support the programs.

create a preferred eligible list from which individuals would be appointed to vacant Drug Director positions or similar positions. (Pet., ¶¶ 46-49). Although not expressly stated in the petition or their subsequent filings, petitioners appear to argue, and have been understood by respondents to assert, that the Board violated section 2588(7) by failing to place petitioners on a preferred eligible list for the YDM positions. (See Respondents Memorandum of Law In Support of Cross-Motion to Dismiss, filed Apr. 3, 2007, at 14). In either case, petitioners' argument under this subdivision fails.

Education Law § 2588(7) provides in relevant part:

If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolition or consolidation . . . shall be placed upon a preferred eligible list of candidates for appointment to a vacancy . . . in the tenure area of such position

(Educ. L. § 2588[7]).

To interpret a statute, this court must look first to its plain language to devine the legislative intent. (Tompkins County Support Unit v. Chamberlain, 99 NY2d 328, 335 [2003]). The language of section 2588(7), by its terms, affords re-hiring opportunities in situations in which a "position is abolished . . . without creating a new position" In the present case, when the BOE combined the Office of Youth Development and School-Community Services with the Regional Offices of Student

Placement, Youth and Family Support Services into the Office of Youth Development, and abolished the title of Drug Director, it also created new titles and positions, including Youth Development Manager and Youth Development Specialist.⁹ Thus, the circumstances faced by petitioners do not entail the abolition of a position without the creation of a new one. For this reason, Education Law §2588(7) is, by its plain language, inapplicable here, and the Board was not required to establish a preferred eligible list for either the Drug Director or YDM positions.

Secondly, the statute, by its terms, requires that the newly created position be within the same tenure area as the position which was abolished. To the extent that petitioners may be claiming a violation of section 2588(7) for the failure to create a preferred eligible list for the YDM positions, this element is key.

Section 2588(1) defines "tenure areas" for purposes of the statute as "the license areas established by the city board pursuant to" Education Law § 2573(10). The latter section provides, in pertinent part, that "[i]n a city having a population of one million or more . . . there shall be one

⁹ Indeed, respondents offered petitioners positions as Youth Development Specialists upon notifying them that their positions as Drug Directors were being abolished. (Pet., Exh. B).

continuing non-expiring eligible list for each license area." (Educ. L. § 2573[10][a]). The plain language of these provisions, therefore, makes clear that section 2588(7) affords re-hiring rights to personnel whose positions have been abolished only within the same tenure, or license, area as the abolished position. Because the YDM position does not require the same license as the Drug Director position, or indeed, any state license at all, it is not in the same tenure area as the Drug Director position. Therefore, section 2588(7) does not require the Board to establish a preferred eligible list for vacancies existing in the YDM title by virtue of the abolition of the Drug Director title.

Finally, to the extent that the manner of determining the tenure areas of administrative personnel, such as petitioners here, may be distinguished from that of delineating the tenure areas of teachers, well-settled principles of case law establish that the standards for determining the similarity of administrative positions also apply to the delineation of administrative tenure areas. These standards emphasize the nature, quality and breadth of responsibilities associated with each position, including the need for certification in order to fulfill those responsibilities. (See Cowan v. Board of Educ. 99 AD2d 831, 833 [2d Dept.], appeal dismissed, 62 NY2d 702 [1984]). citing Bork v. City Sch. Dist., supra). As discussed in section IV.B.3 above, by this measure, the YDM and Drug Director

positions are substantially dissimilar, and could not subsist within a single tenure area. For this reason as well, section 2588(7) does not apply here. Accordingly, petitioners' second cause of action fails to state a claim for relief.

C. The Civil Service Law Claim

In their third cause of action, petitioners claim that respondents violated the Civil Service Law in three respects, as discussed below.

1. The "Bad Faith" Standard

First, petitioners allege that respondents acted in bad faith in abolishing the Drug Director positions. Respondents counter that the positions were abolished as part of an overall plan to promote efficiency in the BOE by merging two offices into one youth services organization. (Pet., Exh. B; Resp. Mem. at 9-10).

A public employer may abolish civil service positions for the purposes of economy or efficiency. (Aldazabal v. Carey, 44 NY2d 787, 788 [1978]; Klos v. Town of Babylon, 237 AD2d 291 [2d Dept. 1997]; Rosenthal v. Gilroy, 208 AD2d 748, 748-49 [2d Dept. 1994]; O'Donnell v. Kirby, 112 AD2d 936 [2d Dept. 1985]). The entity may not abolish a job position as a subterfuge to avoid the statutory protection afforded to civil servants, however. (Wood v. City of New York, 274 NY 155, 162 [1937]; Klos v. Town

of Babylon, supra, 237 AD2d at 291; Rosenthal v. Gilroy, supra, 208 AD2d at 749). One who challenges the abolition of a civil service position has the burden of proving that the employer was engaged in a bad faith effort to circumvent the Civil Service Law. (Aldazabal v. Carey, supra, 44 NY2d at 788 [petitioner failed to show bad faith of agency in abolishing position and creating a position of lower grade, where agency claimed budgetary constraints and new training regimen prompted abolition of position]; Lamb v. Town of Esopus, 35 AD3d 1004, 1005 [3d Dept. 2006]; see also Hritz-Seifts v. Town of Poughkeepsie, supra, 22 AD3d 493 [2d Dept. 2005]; Klos v. Town of Babylon, supra, 237 AD2d at 291; Rosenthal v. Gilroy, supra, 208 AD2d at 749; Della Vecchia v. Town of North Hempstead, 207 AD2d 484, 485 [2d Dept. 1994] lv. denied, 84 NY2d 812 [1995]; Connelly v. Carey, 80 AD2d 936 [3d Dept.], lv. denied, 53 NY2d 609 [1981]). In order to meet the burden of establishing that a position was abolished in bad faith or as a subterfuge, a challenger must either eliminate respondent's bona fide reasons for the abolition of the position (Lamb v. Town of Esopus, supra, 35 AD3d at 1005) or establish that a newly hired person performs substantially the same duties as were done by the terminated employee. (Rosenthal v. Gilroy, supra, 208 AD2d at 749).

In response to petitioners' allegations that respondents acted in bad faith in abolishing the Drug Director positions,

respondents state that the Drug Director titles were abolished as in an effort "to improve the efficiency of the existing [BOE] management system" by combining two of its units into one unified organization, and to "support a new delivery model for Youth Services."¹⁰ (Pet., Exh. B; Resp. Mem. at 9-10). Beyond their unsupported claims that more than half of the duties of the YDMs were previously performed by Drug Directors, petitioners proffer no factual allegations that eliminate respondents' bona fide reasons for their decision to abolish the Drug Director positions and to propose creation of the YDM positions as part of an overall BOE reorganization plan aimed at more efficient delivery of services. They advance no factual support whatsoever for their claim that the positions were eliminated as a subterfuge to achieve some undisclosed and improper purpose rather than as part of a reorganization to promote efficiency.

Furthermore, the claim by petitioners that the duties of the two positions are "substantially similar," even were it true, would not address, much less eliminate, the proffered reasons for terminating their job titles. As explained above,

¹⁰ As Exhibit B to the petition shows, respondent BOE reorganized the Office of Student Placement, Youth and Family Support Services into the Office of Youth Development to support the new delivery model for youth services. Petitioners were notified by e-mail and by regular mail that this was the reason for the abolition of their Drug Director positions. (Pet., Exh. B; Resp. Mem. at 9-10).

the fact that some duties of the YDM positions overlap those of the Drug Directors does not render the two positions the same or similar, given the differing certification requirements of the two positions. (Civil Serv. Employees Assoc. Inc. v. Rockland County Board of Coop. Educ. Servs., supra, 39 AD3d at 642-43, citing Davis v. Mills, supra; Shearod v. Board of Coop. Educ. Servs., supra; Rosenthal v. Gilroy, supra). Accordingly, petitioners have failed to meet their burden of establishing that respondents acted in bad faith in eliminating their positions.

2. Civil Service Law § 35(g)

Petitioners also contend, with respect to their third cause of action, that the YDM position was not created in compliance with the relevant provisions of Civil Service Law § 35(g). That provision states in pertinent part:

The civil service of the state and each of its civil divisions shall be divided into the classified and unclassified service. The unclassified service shall comprise the following:

. . . .

(g) all persons employed by any title whatsoever as members of the teaching and supervisory staff of a school district . . . as certified to the state [civil service] commission by the commissioner of education. The commissioner of education shall prescribe qualifications for appointment for all classes of positions so certified by him, and shall establish specifications setting forth the qualifications for the nature and scope of the duties and responsibility

of such positions. The commissioner of education shall file such qualifications for appointment and such specifications with the civil service commission

. . . .

(Civ. Svc. L. § 35[g]).

Petitioners' arguments under this section also fail.

Holders of the YDM job title are not "members of the teaching or supervisory staff of the school district." They neither teach nor supervise teachers, and, accordingly, are not pedagogues. Thus, this section affords no legal basis for any claim by petitioners, since the creation of the new job title is not governed by Civil Service Law §35(g).

Petitioners argue in vain that, although the YDM positions were established as classified civil service positions,¹¹ they are in fact pedagogical, and should have been placed within the unclassified civil service. The absence of a teaching or supervisory certification requirement or function in the new job title, however, coupled with the difference in the respective duties of the positions, demonstrates clearly that the YDM position is managerial and not pedagogical, however. The YDM position is thus correctly established in the classified civil service rather than in the unclassified pedagogical service under the Education Law.

¹¹ Civil Service Law § 40, defines the classified civil service as comprising "all offices and positions not included in the unclassified service."

Furthermore, this court is required to accord deference to the BOE as the responsible agency because of its expertise in this area. (Madison-Oneida Bd. of Coop. Educ. Servs. v. Mills, 4 NY3d 51, 58 [2004]; Davis v. Mills, supra, 98 NY2d at 125 ["It is for the Commissioner in the first instance, and not for the courts, to establish and apply criteria to govern the selection and retention of qualified educators and staff"]). This court must defer to the BOE's exercise of discretion in this matter, and is not permitted to second-guess the agency's choice, which may be "annulled only if arbitrary, capricious or unsupported by substantial evidence." (Akpan v. Koch, 152 AD2d 113, 118 [1st Dept. 1989], [citations omitted], aff'd, 75 NY2d 561 [1990]).

3. Civil Service Law § 22

In their third cause of action, petitioners further contend that, in creating the YDM job title, respondents violated Civil Service Law § 22, which provides in relevant part:

Before any new position in the service of a civil division shall be created . . . , the proposal therefor, including a statement of duties of the position, shall be referred to the municipal commission having jurisdiction and such commission shall furnish a certificate stating the appropriate civil service title for the proposed position

(Civ. Svc. L. § 22).

Section 22 establishes a three-step procedure for the creation of a position in the classified civil service. First,

the city agency submits a proposal for the creation of a classified civil service position, including a statement of the duties of the proposed position, to the local municipal civil service commission. Second, the municipal civil service commission refers the proposal and a certificate stating the appropriate civil service title for the position to the State Civil Service Commission for its approval. The State Civil Service Commission then approves the certificate and creates the position pursuant to Civil Service Law § 20(2). (See Saratoga Springs Mun. Civil Serv. Comm'n v. N.Y. State Civil Serv. Comm'n, 40 AD2d 740 [3d Dept. 1972]).

In the City of New York, the powers of the municipal civil service commission are vested in the Department of Citywide Administrative Services ("DCAS"). (NYC Charter § 811 [2006]). Petitioners allege that respondents violated section 22 by failing to submit a proposal, with statement of duties, to DCAS for creation of the YDM position and that, consequently, DCAS neither held a public hearing on the proposal (Affirmation in Opposition to the Respondents' Cross-Motion dated May 10, 2007 ["Pet. Mem. in Opp."], ¶ 12, Exh. 3 [DCAS Personnel Services Bulletin 100-2, II(A)]) nor established a probationary period for the position. (Pet. Mem. in Opp., 13; see 55 RCNY § App. A, Rule 5.2.1[a]).

Petitioners proffer neither any supporting factual

allegations nor any concrete evidence in support of their bare legal conclusion that respondents failed to comply with section 22 in creating the YDM title. Bare legal conclusions are not deemed true and are not entitled to any favorable inference on a motion to dismiss. (Biondi v. Beekman Hill House Apt. Corp., supra, 257 AD2d at 81).

Even assuming that respondents violated section 22, however, petitioners have failed to demonstrate that they are entitled to appointment to the YDM positions or any other relief, as a result of such violation.

Based upon the pleadings and limited evidence petitioners have provided, petitioners have failed to show the requisite bad faith on the part of respondents, as they have failed to proffer evidence that respondents created the YDM positions as a subterfuge or that the YDM employees perform the functions previously performed by the Drug Directors. Thus, petitioners have no cognizable cause of action predicated upon any violation of section 22.

In support of their Civil Service Law claims, petitioners rely upon Seligman v. Half Hollow Hills Schools, 74 Misc2d 246 (Sup. Ct. Suffolk Co. 1972). That case is distinguishable, however, and, in any event, is not binding upon this court. There, a challenge was made to the abolition of a classified civil service position and the creation of another position,

having identical responsibilities, but ostensibly in the unclassified civil service, which, in an obvious subterfuge, had been staffed with the patently unqualified subordinate of the displaced former employee.

In Seligman, the representative of the respondent school district claimed that the change was an economy move, but conceded that the new employee performed all of the same duties as his predecessor, albeit at a greater salary. Moreover, the job description of the new position failed to satisfy the applicable certification requirements for a listing in the unclassified service. (Id. at 249). Beyond these problematic indications, the school district contended that the new position required a school administrator's certificate, notwithstanding that the abolished position, comprising identical duties, had required a technical and engineering background. Finally, the job description of the new position was identical to that of the original post, "except for some administrative duties added to the statement post litem motam," and involved little or no teaching or supervisory duties. (Id. at 249).

Under these circumstances, the petitioner in Seligman more than amply met his burden of eliminating the proffered basis for the challenged action, thereby establishing bad faith on the part of the school district. In addition, he proffered evidentiary support for the charges that the new position had

been created in violation of Civil Service Law §§ 22 and 35(g).

In the instant case, by contrast, petitioners have proffered only bare legal conclusions, unsupported by facts that would support their claims of violation of those sections. They have "failed to show any concrete evidence which might be indicative of bad faith, such as the subsequent performance of [their] former duties by a person or persons not appointed in accordance with the provisions of the Civil Service Law."

(O'Donnell v. Kirby, supra, 112 AD2d at 937 [contrasting Seligman; other citation omitted]).

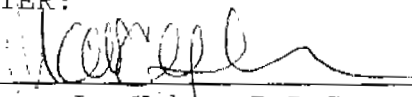
Accordingly, petitioners have failed to state a cognizable third cause of action for violation of the Civil Service Law, and this count must also be dismissed.

V. CONCLUSION

For the foregoing reasons, the petition is denied. Respondents' cross-motion to dismiss the petition is granted and the proceeding is dismissed.

The foregoing constitutes the decision, order and judgment of this court.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

ENTER:

Marcy L. Kahn, J.S.C.

HON. MARCY KAHN

Dated: New York, New York
December 21, 2007

PT. 60A DEC 21 2007