

<b>Matter of Melish v New York City Hous. Auth.</b>
2008 NY Slip Op 32834(U)
October 14, 2008
Supreme Court, New York County
Docket Number: 100191/08
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE  
Justice

PART 10

STEVEN M BRISHTER

- v -

NYC HOUSING AUTHORITY

INDEX NO. 100191/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

**FILED**  
OCT. 17 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 10/14/08

J. GISCHE  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
In the Matter of the Application of  
STEPHEN MELISH, JR., as President of LOCAL  
UNION 1969, CIVIL SERVICE EMPLOYEES,  
DISTRICT COUNCIL 9, I.U.P.A.T., AFL-CIO,  
ROGELIO AGUDELO, ABILIO BENITEZ, LUIS  
GALLEGO, HARALAMBOS MAKRIS and  
CARLOS RIOS,

Petitioners,

For a Judgment under Article 78 of the  
Civil Practice Law and Rules,

-against-

NEW YORK CITY HOUSING AUTHORITY, THE  
CITY OF NEW YORK, and MARTHA K. HIRST, as  
Commissioner of THE NEW YORK CITY  
DEPARTMENT OF CITYWIDE ADMINISTRATIVE  
SERVICES,

Respondents.  
----- X

**Decision/Order**

Index No.: 100191/08  
Seq. No. : 001

Present:  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
OCT 17 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this  
(these) motion(s):

<b>Motion Seq. 001 - Papers</b>	<b>Numbered</b>
Pet's OSC, exhs .....	1
Verified Petition, exhs .....	2
NYCHA Verified Answer, exhs .....	3
SJR affirm .....	4
DCAS notice x-mot [dismiss] RG affid, exhs .....	5
Petitioner's Reply, exhs .....	6

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*Upon the foregoing papers, the decision and order of the court is as follows:*

Petitioners bring this Article 78 proceeding to compel respondent New York City

Housing Authority ("NYCHA") to appoint individuals from the civil service eligible list for Exam No. 4059 to permanent Painter positions for existing vacancies. Petitioners further allege that respondents City of New York (the "City"), New York City Department of Citywide Administrative Services ("DCAS") and Martha K. Hirst ("Hirst"), the DCAS Commissioner, "acquiesced" in NYCHA's purported failure to make such appointments.

Petitioners are Stephen Melish, Jr., ("Melish"), President of Civil Service Painters and Glazers, District Council 9, Local Union 1969 ("Local 1969"), Local 1969, and five individuals appearing on a civil service eligible list for the title of Painter certified by DCAS. The five individuals are Rogelio Agudello, Abilio Benitez, Luis Gallego, Haralambos Makris and Carlos Rios (the "individual petitioners").

NYCHA is a public authority created under State law to build, operate and maintain public housing for low income residents of New York City (see Public Housing Law § 401). NYCHA has answered the petition and opposes the relief sought therein.

The City, DCAS and Hirst (collectively herein referred to as the "cross-movants") jointly cross-move to dismiss the petition in lieu of answering.

#### Relevant Facts

The title Painter is classified in the competitive class in the City of New York. DCAS held an examination for the Painter title on or about November 30, 2004. The exam was identified as Exam No. 4059. On or about June 26, 2006, DCAS issued a civil service eligible list with 164 names resulting from Exam No. 4059 (the "List"), and certified names from the list to public agencies, including NYCHA.<sup>1</sup>

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<sup>1</sup> Petitioners allege, upon information and belief, that additional lists of civil service eligible individuals for the position Painter were certified by DCAS to NYCHA on

The petition alleges that NYCHA appointed provisional employees to fill vacant positions in the Painter title for periods in excess of nine months which is the statutory maximum under CSL § 65. The petition further alleges that NYCHA did not replace all its provisional employees in Painter positions with individuals certified from the List. On or about February 13, 2007, NYCHA hired 24 individuals from the List for the Painter position. It also retained 48 provisionally appointed Painters who had served in this position in excess of nine months.

On or about August 30, 2007, petitioners commenced a prior Article 78 proceeding, bearing Index No. 111996/07, in the Supreme Court, New York County (the "2007 Petition"). In the 2007 Petition, petitioners sought, *inter alia*, to compel NYCHA to "(1) terminate the employment of all provisional NYCHA employees serving in the civil service title of 'Painter'; and (2) appoint ... all eligible applicants appearing on [List] for the Painter position..."

It is undisputed that at the time the 2007 Petition was filed, NYCHA still employed twenty-one provisional Painters, all of whom had held their provisional positions longer than was permitted under CSL § 65. Consequently, NYCHA notified all provisional Painters, by letters dated October 19, 2007, that their employment as Painters would be terminated, effective November 2, 2007. On November 1, 2007, petitioners entered into an agreement with NYCHA, whereby the provisional Painters' termination dates were changed to January 4, 2008 and petitioners withdrew the 2007

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September 1, 2007 and December 13, 2007. Although the relationship between these lists and the List has not been made clear to the court, for the reasons stated herein, these lists do not affect the outcome of the court's decision in the instant proceeding.

[\* 5 ]  
Petition without prejudice.

David Marcinek ("Marcinek"), Deputy Director, Labor Relations & Classification at NYCHA states that thereafter NYCHA reassigned one provisional Painter, Joseph Johnson, to a funded position as a permanent Lead Abatement Worker and offered to all other provisional painters positions in the title of Caretaker via letter dated December 20, 2007. Marcinek further states that seventeen provisional Painters are currently employed by NYCHA as Caretakers, one provisional Painter opted for retirement, one declined to apply for a Caretaker position and one, Petitioner Abilio Benitez, did not respond to the December 20, 2007 letter. On January 4, 2008, the latter two provisional Painters were terminated.

Since the termination of the provisional painters, NYCHA has not hired any painters and the positions remain vacant. Thus, the NYCHA staff of painters has been effectively reduced. Petitioners thereafter commenced the instant petition by Order to Show Cause dated January 8, 2008. They seek: [1] a declaration that respondents are in violation of Article 5, § 6 of the New York State Constitution, and the following laws and regulations: CSL §§ 20, 50 (1), 56 (1), 65 (3), PHL § 32, the New York City Charter §§ 811, 814 (a) (3), (4), (5), (7), 814 (e), 817 (a) and DCAS Personnel Rules and Regulations of the City of New York ("City Personnel Rules") 2.3 (a), 5.5.1, 5.5.2, 5.5.3, and 5.5.6 (first claim for relief); [2] a declaration that the respondents' unlawful acts and omissions referenced in the first claim for relief were arbitrary and capricious (second claim for relief); [3] a declaration that NYCHA acted in bad faith when it terminated and

demoted 22 provisional Painters<sup>2</sup> in retaliation for petitioners' efforts to enforce the aforementioned legal requirements (third claim for relief); [4] an order directing respondents to immediately appoint civil service eligible individuals from the List to all vacant Painter positions at NYCHA, including, without limitation, the 22 Painter positions that NYCHA had filled provisionally in violations of the law; [5] an order directing respondents to assure that the individual petitioners are given due and lawful consideration for appointment to the aforementioned Painter positions at NYCHA; and [6] an order directing respondents to pay monetary damages to the individual petitioners.

Petitioners further allege that NYCHA's reduction of its Painter staff "has endangered the health and welfare of NYCHA residents who require and are entitled to the painting of their living spaces and common spaces." Petitioners state that NYCHA has failed to meet its obligation under New York City Administrative Code §§ 24-2004 (7) and 27-2013 to paint each unit in each of its residential buildings once every three years. Petitioners specifically allege that approximately 8,500 NYCHA residential units have been surveyed for painting jobs and have not been painted, approximately 9,239 NYCHA tenant requests have been made for painting and have not been addressed and internal metal structures at NYCHA facilities have not been painted for a least ten years.

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<sup>2</sup> Although petitioners claim that 22 provisional appointees were terminated and/or demoted, this number appears to be in error, because there is no dispute that NYCHA only had 21 provisional appointees as of the filing of the instant petition but had 22 funded Painter positions available. In any event, this discrepancy does not have any effect on the court's decision herein.

As of January 22, 2008, NYCHA maintains that it employs 115 Painters and no longer employs any provisional Painters. NYCHA states that all of the Painters it presently employs have passed appropriate DCAS civil service examinations for this title and were subsequently appointed from the civil service lists established and promulgated by DCAS.

NYCHA maintains that it faces a significant budget deficit, estimated in 2008 at \$195 million. In order to reduce this deficit, NYCHA has enacted several significant cost-reduction methods. Relevant to this proceeding, on February 29, 2008, NYCHA announced the elimination of 427 full-time positions, including 81 Supervisor Painter positions that was scheduled to become effective as of April 18, 2008 (the "layoff"). NYCHA claims that the layoff was to create a future cost savings of approximately \$9 million per year. NYCHA states that the laid-off Supervisor Painters, upon termination, will likely exercise their rights under the CSL by electing to fill Painter positions, including vacant positions at issue herein, thus increasing NYCHA's painting staff from 114 Painters to 149 Painters.<sup>3</sup> Through this restructuring, NYCHA "expects to significantly increase it paint program's productivity."

On April 17, 2008, Melish, along with three NYCHA tenants, sought a preliminary injunction in connection with an Article 78 petition separately commenced in Bronx County (New York Supreme Court, Bronx County, Index No. 303139/08), to preclude NYCHA from eliminating any Supervisor Painter positions. The Hon. Patricia A. Williams granted respondents' motion for a preliminary injunction and ordered NYCHA

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<sup>3</sup> NYCHA claims that there are currently 35 vacant funded Painter positions available.

[\* 8 ]  
to postpone the layoff pending the final resolution of that separate proceeding.

### **Discussion**

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion. CPLR § 7803 (3). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. “[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law.” Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974) (emphasis removed); see also Matter of Colton v. Berman, 21 N.Y.2d 322, 329 (1967).

The gravamen of the petition is that from June 20, 2006 to January 4, 2008, NYCHA, acting contrary to the law, filled 22 funded Painter positions with provisional employees notwithstanding the existence of the List of eligible persons for permanent positions. The petition further complains that once those provisional employees were terminated and/or transferred, NYCHA has improperly failed to fill the vacancies by hiring eligible painters. Petitioners seek a remedy for respondents illegal past conduct, including an order directing NYCHA to fill the existing Painter vacancies with persons from the List, directing respondents to assure that the individual petitioners are given due and lawful consideration for appointment to the aforementioned Painter positions, and an award for monetary damages.

Respondents argue that the petition fails as a matter of law because while the

Civil Service Law dictates the manner in which persons are selected for permanent competitive class positions from an eligible list, it does not mandate that all civil service vacancies be filled. They further argue that while the Civil Service Law places time limits on provisional appointees, it does not mandate hiring after such provisional employees are terminated.

Government agencies have the discretionary authority to determine, in good faith and based upon their own needs and resources, whether or not to make any appointments or fill any vacancies (see Matter of Wayne v. Vogel, 20 NY2d 901 [1967]; Matter of Bacon v. Huje, 287 NY 813; Matter of Friend v. Valentine, 287 NY 526 [1942]; Matter of D'Amico v. Leonard, 64 AD2d 626 [2d Dept 1978]). The Court of Appeals has squarely rejected attempts to limit the reasonable exercise of an agency's discretionary appointive power embodied in CSL § 61 (Matter of Andiola v. Ortiz, 82 NY2d 320 [1993], *cert den* Matter of Andiola v. Antinoro, 511 US 1031 [1994]). In Matter of Andiola v. Ortiz, the Court of Appeals wrote:

[W]e have held that a person successfully passing a competitive Civil Service examination does not acquire any "legally protectable interest" in an appointment to the position for which the examination was given, nor "thereby gain a vested right to appointment to the position" (82 NY2d at 324 [internal citations omitted]; see also Hurley v Board of Educ., 270 NY 275).

It is unrefuted that the provisional painters have been terminated. NYCHA claims that its decision not to appoint new Painters after the provisional employees were terminated was based on legitimate business reasons. NYCHA argues its decision is therefore, not arbitrary, capricious or made in bad faith. NYCHA specifically claims that it is currently facing a significant budget deficit and seeks to address that

deficit by scaling back its workforce. This court holds that petitioners are not entitled to relief which would infringe on NYCHA's discretionary authority to fill the vacant Painter positions as it sees fit, so long as such action is otherwise lawful.

The issues petitioners have raised with respect to the conditions of the NYCHA buildings and the residential units are not relevant to the issue of law raised in this proceeding. It is up to the tenants to enforce their rights to painting. The court, therefore, finds that NYCHA's decision to leave Painter positions vacant is neither arbitrary nor capricious and petitioners' second claim for relief is denied.

Moreover, the violation that petitioners seek this court to fashion a remedy with respect to, NYCHA's appointment of provisional employees beyond the maximum statutorily authorized period, is moot. Petitioners have not demonstrated entitlement to any further relief beyond the termination of the provisional Painters, which has already taken place.

The petition is in large part based upon claims that respondents have violated specific statutes and regulations. They seek an express declaration that respondents are in violation of such laws. As set forth below, the court holds that respondents are not presently in violation of these statutes and/or regulations and that there is no Article 78 remedy available to petitions based upon such claims.

For purposes of addressing petitioner's claims, these laws and regulations can be grouped into the following three categories: [1] laws and regulations which mandate civil service exams and provide for eligible lists for appointment of civil service employees thereof; [2] laws and regulations with respect to provisional civil service employees; and [3] laws and regulations of a general nature.

In New York, civil service is based on a merit system of appointment. Article V, section 6 of the Constitution states:

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 . . .

The CSL implements this mandate of the State Constitution and applies to State as well as municipal employment. In New York City, the New York City Civil Service Commission sets rules to implement the CSL and these rules are administered by DCAS (see City Personnel Rule 2.1 [a]).

CSL § 50 (1) provides that “[t]he merit and fitness of applicants for positions which are classified in the competitive class shall be ascertained by such examination as may be prescribed by the state civil service department or the municipal commission having jurisdiction.” After each exam, DCAS establishes an “eligible to hire” list. This list consists of all candidates who passed the exam by rank order and is available to each City agency with open positions in the corresponding title. Generally a list is active for four years (CSL § 56).

Appointment or promotion from an eligible list to a position in the competitive class is made by the selection of one of the three persons certified as standing highest on the list (CSL § 61 [1]). The person who is the highest in rank on the list does not possess any mandated or legal right to be appointed or promoted.

Section 817 (a) of the New York City Charter provides:

a. All appointments, promotions and changes in status of persons in the public service of the city shall be made in the manner prescribed by the constitution of the state and in accordance with the provisions of the civil service law and other provisions of law not inconsistent therewith nor with

this charter.

Because DCAS has administered the exam from which the List was certified, and the legitimacy and results of that exam have not been challenged whatsoever, there is no dispute that all of the above-cited statutes have been complied with.

CSL § 65 governs the provisional appointment of employees to vacant positions in the competitive class of civil service in New York. CSL § 65 (3) provides, *inter alia*, that a provisional appointment be terminated within two months following the establishment of an appropriate eligible list for filling vacancies.

City Personnel Rule 5.5.2 provides that “[a] provisional appointment shall not continue for a period in excess of nine months.” City Personnel Rule 5.5.3 essentially tracks CSL § 65 (3). City Personnel Rule 5.5.6 requires the commissioner of DCAS to review all provisional appointments within sixty days after the appointment to assure compliance with the law.

Because there is no dispute that NYCHA no longer employs any provisional employees, these statutes and regulations are inapplicable as well and that portion of the petition seeking redress for past violations of these statutes is denied as moot. Petitioners have failed to demonstrate entitlement to any relief beyond the termination of the aforementioned provisionally appointed employees.

City Personnel Rule 5.5.1 is inapplicable here because it provides for agency appointment where no eligible list for filling a vacancy in the competitive class is available. There is no dispute that an eligible list was available at all relevant times.

Finally, petitioners have not alleged any facts which support their claim that respondents violated any of the following general provisions. CSL § 20 is requires

"[e]ach municipal civil service commission [to] prescribe, amend and enforce suitable rules for carrying into effect the provisions of [the CSL] and [the New York State Constitution]." Section 811 of the New York City Charter provides that "the commissioner [of DCAS] shall be responsible for citywide personnel matters ... and shall have all the powers and duties of a municipal civil service commission provided in the civil service law." Section 814 of the New York City Charter sets forth the DCAS Commissioner's powers and duties with respect to civil service exams and the appointment of provisional employees. City Personnel Rule 2.4 (a) provides that the DCAS Commissioner "shall have the authority and responsibility in the administration and enforcement of the rules and regulations prescribed thereunder." Public Housing Law § 32 provides that a municipal housing authority "may employ, subject to the provisions of the civil service law applicable to the municipality in which it is established, ... such other officers, agents and employees as it may require."

Petitioners allegations that NYCHA acted in bad faith do not state any claim for relief. The burden of proving bad faith in an Article 78 proceeding lies with the petitioner alleging it (Matter of Soto v. Koehler, 171 AD2d 567 [1st Dept 1991]). Petitioners papers generally contend that the respondent's decision to terminate the provisional Painters was made in "bad faith" because it constituted retaliation for petitioners' efforts to force NYCHA to comply with the law. Petitioners admit, however, that NYCHA was legally required to terminate such employees. There are no specific allegations set forth tending to suggest that the respondent's decision to terminate the provisional Painters was motivated by reasons other than a desire to comply with CSL § 65 (see i.e. Matter of Young v. Board of Educ., 35 NY2d 31). Moreover, since it is

conceded that respondents were doing what they were legally mandated to do, subjective motivation would not create any separate right of action. Finally, NYCHA did not simply terminate the provisional Painters, but offered each provisional Painter other positions that were available at that time. NYCHA maintains, and petitioners do not dispute, that it terminated only those provisional Painters who chose not to respond to NYCHA's offer of alternative employment or refused to take such alternative employment. For these reasons, petitioners' third claim for relief, that NYCHA acted in bad faith, is denied.

Petitioners argue that NYCHA's decision to appoint laid-off Supervisor Painters to the 22 funded Painter positions instead of Painters from the List also violates applicable law. With respect to the legality of NYCHA's plans to layoff supervisor painters, this issue is before another Justice in another proceeding. The collateral issue of whether laid-off Supervisor Painters should be allowed to fill positions ahead of eligible persons from the List is premature, since the supervisors have neither been laid off or re-appointed to existing painter vacancies.

Because petitioners have failed to establish any of the substantive claims alleged in the petition, petitioners are not entitled to the requested relief, including monetary damages. Moreover, petitioners have failed to establish any basis for their claim for monetary damages (see CPLR § 7806). Accordingly, the cross-motion to dismiss the petition is granted and the petition is hereby denied in its entirety.

### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that the cross motion to dismiss the petition is granted; and it is

further

**ORDERED** that petition is hereby denied.

The Clerk shall enter judgment in favor of respondents and against petitioner.

Any requested relief not addressed expressly by the court has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated:           New York, New York  
                  October 14, 2008

SO ORDERED:

  
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HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
OCT 17 2008  
COUNTY CLERK'S OFFICE  
NEW YORK