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| <b>Davis v City of New York</b>  |
| 2011 NY Slip Op 31276(U)   |
| May 8, 2011  |
| Sup Ct, NY County  |
| Docket Number: 100722/11   |
| Judge: Emily Jane Goodman  |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EMILY JANE GOODMAN, Justice

PART 17

James Davis III  
v.  
City of NY

INDEX NO. 100722/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

FOR THE  
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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

|  | <u>Papers Numbered</u> |
|--|------------------------|
| Notice of Motion/Order to Show Cause — Affidavits — Exhibits | _____                  |
| Answering Affidavits — Exhibits _____                        | _____                  |
| Replying Affidavits _____                                    | _____                  |


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *partia is*  
*granted per attached*

**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).

Dated: 5/8/11  
New York, New York

  
\_\_\_\_\_  
EMILY JANE GOODMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  DO NOT POST  
Check if appropriate:  REFERENCE  SETTLE/SUBMIT ORDER/JUDGMENT

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17**

-----X  
JAMES R. DAVIS III, as President of the New York  
City Deputy Sheriff's Association, et al

Index No. 100722/11

Petitioners,

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

-against-

THE CITY OF NEW YORK, et al

Respondents.  
-----X

**Emily Jane Goodman, J.S.C.:**

**UNFILED JUDGMENT**

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In this Article 78 proceeding, petitioners move for a judgment determining that respondents acted arbitrarily and capriciously in notifying nine permanent deputy sheriffs that they would be laid off and three supervising deputy sheriffs that they would be demoted; the total was almost 11% of the work force in those titles. A temporary restraining order was issued with a short return date, and a hearing was held on petitioners' contention that irreparable harm would occur in the absence of restraint because public safety as well as the safety of the remaining sheriffs was threatened.

In addition to contending that respondents traded "public safety for dollars," petitioners argue that the determination was based on the irrational process of the most recent employees being let go first, and, in the event of a tie, relying on the employee's number on the eligible list, and in the event of a further tie, referencing the employees' social security numbers.

In opposition, respondents maintain that the issue is not "justiciable" because it intrudes

on the executive branch's authority to decide matters of fiscal policy, citing, among other cases, Klosterman v Cuomo, 61 NY2d 525, 535-36 [1984]). Respondents also maintain that petitioners cannot establish the right to a preliminary injunction. They argue that petitioners cannot demonstrate likelihood of success because the Appellate Division, First Department has upheld the use of social security numbers to break ties (see Napoli v Levitt, 176 AD2d 668 [1st Dept 1991]). Further, they maintain that the alleged irreparable harm to public safety is unsupported by any evidence, and, that the loss of employment is never considered irreparable harm, despite the way it is understood in non-legal terms.

For the first time, in their reply, petitioners maintain that the layoffs are disproportionate to other agencies, and violate the merit and fitness provision of Article V section 6 of the New York State Constitution (which provides that "appointments and promotions" should be made according to "merit and fitness to be ascertained as far as practicable" by examination). They then question what they believe is the City's anticipated plan to turn over the remainder of a towing program enforced by petitioners to City Marshals, which had almost been completely eliminated in 2005, when the job was turned over to private business. They argue that this too violates the merit and fitness provision of the Constitution. Petitioners further expound on their argument that the decision was not based on any well considered methodology, citing Council of Trade Waste Associates v City of New York, 179 AD2d 413 [1st Dept 1992] [while the City was not bound to use a particular formula, the use of inconsistent methodologies is arbitrary and capricious]). The arbitrary nature of the decision is highlighted, petitioners argue, because respondents have eliminated a public service that is fundamental to respondents' duty without providing an equally meritorious and effective alternative, citing Powis v Giuliani (216 AD2d

107 [1st Dept 1995]).

The concept of justiciability is a “nebulous” concept (Klosterman v Cuomo, 61 NY2d at 535, supra), which is difficult to apply. It is based upon the well known principal of the separation of powers of the three branches of government, i.e., the executive, the legislature and the judiciary, and the concept that each should be free from interference from the other in the lawful discharge of duties (see Matter of New York State Inspection, Security and Law Enforcement Employees v Cuomo, 64 NY2d 233 [1984]). Much has been written on justiciability, but “its meaning and application remain uncertain” (Jones v Beame, 45 NY2d 402 [1978]). In its emotional and unseemly outcry, respondents have overlooked that the Appellate Division First Department has held, “[t]he controversy cannot be found nonjusticiable absent an adequate showing ...that the plan will not undermine... public safety.” (see Powis v Giuliani, 216 AD2d 107 [1st Dept 1995]). Therefore, until a hearing was held and a determination was rendered on the public safety issue, the argument was premature. Further, the concept of non-interference is based upon the lawful discharge of duties, which required this Court to render a determination, after the hearing. Thus, the Court of Appeals has found controversies justiciable, rejecting similar claims by the executive branch that budget issues were not justiciable and intruded on functions reserved to the legislature (see, e.g., McCain v Koch, 70 NY2d 109 [1987]; Klosterman v Cuomo, 61 NY2d 525, supra).

However, there is no need to apply the nebulous concept here because even after the hearing, petitioners have not demonstrated that the respondents’ underlying decision was arbitrary and capricious. Judicial review of an administrative agency determination is limited to whether the determination was arbitrary and capricious, that is, without a rational basis in the

administrative record (see CPLR 7803 [3]; Matter of Arrocha v Board of Education of City of New York, 93 NY2d 361, 363-364 [1999]; Matter of Scherbyn v Wayne-Finger Lakes Board of Cooperative Educational Services, 77 NY2d 753, 757-758 [1991]; Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231-232 [1974]; Matter of Climent v Board of Education of Community School District No. 22, 288 AD2d 312, 313 [2d Dept 2001]). “[A] court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion” (Matter of Arrocha, 93 NY2d at 363, quoting Matter of Pell, 34 NY2d at 232 (emphasis in original; citation omitted)).

“Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (Matter of Pell, 34 NY2d at 231). “[O]nce it has been determined that an agency’s conclusion has a ‘sound basis in reason,’ the judicial function is at an end” (Paramount Communications v Gibraltar Casualty Company, 90 NY2d 507, 514 (1997), quoting Matter of Pell, 34 NY2d at 231).

The First Department has already upheld the use of social security numbers to break ties (see Napolj v Levitt, 176 AD2d 668 [1st Dept 1991]). This is no evidence of inconsistent methodology as there was in Council of Trade Waste Associates v City of New York (179 AD2d 413, supra). Further to the extent that the layoff scheme under Civil Service Law does not take into account specific facts involving the individuals, such a scheme not irrational where it creates an impartial, neutral, mechanism to determine layoffs. The argument under the merit and fitness provision of Article V section 6 of the New York State Constitution was improperly raised by petitioners’ counsel for the first time in reply rather than in the initial moving papers, and

therefore cannot be addressed. The provision only provides for considerations of merit and fitness "as practicable" and the record has not been developed on this issue.

Despite a full evidentiary hearing, petitioners have not been able to establish that the decision was arbitrary and capricious, the temporary restraining order was previously dissolved and the request for a preliminary injunction is denied, as moot.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ADJUDGED** that petition is denied and the proceeding is dismissed, without costs and disbursements.

**This Constitutes the Decision, Order and Judgment of the Court.**

DATED: May 8, 2011

ENTER:

\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

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