

**Matter of DC37, Local 3621, AFSCME, AFL-CIO v
City of New York**

2014 NY Slip Op 31761(U)

July 9, 2014

Supreme Court, New York County

Docket Number: 104363/2012

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

In the Matter of the Application of

INDEX NO. 104363/2012

DC37, LOCAL 3621, AFSCME, AFL-CIO, et al.,

MOTION DATE 12/5/13

Petitioners,

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK, et al.,

Respondents.

FILED

JUL 10 2014

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 6, were read on this motion for leave to amend

Notice of Motion — Affirmation dated 5/31/13 — Exhibits A-W — Memo of Law in Support of Verified Petition dated 5/31/13; Memo of Law in Support of Petitioner's Motion for Leave to Amend the Petition dated 5/31/13; Affirmation of Service | No(s). 1; 2; 3

Affirmation in Opposition | No(s). 4

Reply Affirmation — Exhibits A-F; Memo of Law in Support of Motion to Amend Verified Petition dated 7/8/13; Affirmation of Service | No(s). 5; 6

Upon the foregoing papers, it is **ORDERED** that petitioners' motion for leave to amend is decided in accordance with the annexed memorandum decision and order.

Dated: 7/9/14
New York, New York

[Signature] J.S.C.
HON. MICHAEL D. STALLMAN

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

- 1. Check one:.....
- 2. Check if appropriate:.....MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED
- NON-FINAL DISPOSITION
- GRANTED
- DENIED
- GRANTED IN PART
- OTHER
- SETTLE ORDER
- SUBMIT ORDER
- DO NOT POST
- FIDUCIARY APPOINTMENT
- REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
In the Matter of the Application of

DC37, LOCAL 3621, AFSCME, AFL-CIO, VINCENT
VARIABLE, as President of DC37, Local 3621, AFSCME,
AFL-CIO, DONALD BROWNE, KEVIN HAUGH, MARTIN P.
MILLER, DOREEN ASCATINGO, GILBERT CAICEDO,
HOWARD HAHN, JOSEPH GASPARINI, JOSEPH
PATAKY, JOHN S. QUIGLEY, GERARD SANTIAGO,

Petitioners,

Index No. 104363/2012

- against -

Decision and Order

THE CITY OF NEW YORK, MICHAEL BLOOMBERG, as
Mayor of the City of New York, THE CITY OF NEW YORK
FIRE DEPARTMENT, SALVATORE J. CASSANO, as
Commissioner of the City of New York Fire Department,
THE CITY OF NEW YORK DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES, and ENDA WELLS HANDY,
as Commissioner of the City of New York Department of
Citywide Administrative Services, THE CITY OF NEW
YORK CIVIL SERVICE COMMISSION and the EMS
SUPERIOR OFFICERS' ASSOCIATION,

FILED

JUL 10 2014

Respondents.

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

In this Article 78 proceeding, several captains and a lieutenant within the Emergency Medical Services Division of the New York City Fire Department, along with their union, assert that the position of EMS Deputy Chief is subject to competitive examination under Civil Service Law.

Respondents claim that the City reorganized and placed the position of EMS Deputy Chief as a managerial detail within the title of Supervising Emergency Medical Service Specialist, Level II. As a result, only a single written competitive examination is required to be promoted to the title, but no additional examinations are required to move within the title for an EMS Captain to become an EMS Deputy Chief. Respondents contend that this reorganization was "broadbanding" permissible under the Civil Service Law.

Petitioners now move for leave to amend the petition. All respondents except for respondent EMS Superior Officers Association oppose the motion.

I.

The individual petitioners are members of the Uniformed Emergency Medical Services Officers Union, DC 37, Local 3621, AFSCME, AFL-CIO (Local 3621), which represents FDNY EMS Captains and EMS Lieutenants. According to petitioners, there are four competitive civil service titles within the FDNY EMS, and the highest title is Supervising Emergency Medical Service Specialist (SEMSS), which has two assignment levels, Level I (Lieutenant) and Level II. (Amended Verified Petition ¶ 19.) It is undisputed that the SEMSS title is a promotional title from the titles of Emergency Medical Specialist (EMT) and Emergency Medical Specialist (Paramedic).

That is, only FDNY EMTs or paramedics may sit for the competitive civil service examination to be eligible for the SEMSS promotional title. (*Id.* ¶ 22.)

Petitioners allege that there is no competitive examination for the position of Captain (SEMSS-Level II) (*id.* ¶ 23), and that only Captains may be considered for the position of EMS Deputy Chief, which is also not subject to a competitive examination. (*Id.* ¶¶ 62.)

On October 31, 2012, the FDNY issued an announcement that it would be taking applications from EMS Captains for the position of EMS Deputy Chief. (Verified Petition ¶ 16; Verified Petition, Ex A.) On November 28, 2012, petitioners allegedly filed appeals with the Civil Service Commission and with respondent New York City Department of Citywide Administrative Services (DCAS),¹ asserting that the job announcement failed to comply with civil service requirements and with the rules and regulations of DCAS. (Verified Petition, Exs D, E.) According to petitioners, the Civil Service Commission refused to accept petitioners' papers, and DCAS accepted petitioners' papers "for informational purposes only." (Verified Petition ¶ 32.)

¹ In the City of New York, "DCAS is the municipal agency empowered to administer the civil service laws, including those regarding the qualifications of candidates for employment." (*City of New York v New York City Civil Service Commn.*, 6 NY3d 855, 856 n [2006]; see NY City Charter § 811.) "DCAS maintains both policy-making authority and functional responsibility for civil service matters in New York City." (*Matter of Hughes v Doherty*, 5 NY3d 100, 105 [2005].)

A.

On December 4, 2012, petitioners commenced this Article 78 proceeding against the City of New York, the Mayor, the FDNY and its commissioner, DCAS and its commissioner, and the City of New York Civil Service Commission (collectively, the City respondents). Petitioners contend that the position of EMS Deputy Chief should be subject to a competitive examination under Civil Service Law, because New York State's Constitution

“mandates that civil service appointments and promotions ‘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’ (NY Const, art V, § 6). The purpose of this provision was to replace the spoils system with a system of merit selection and to protect the public as well as the individual employee. This constitutional mandate may not be blinked or avoided.”

(*Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.—Long Beach Unit*, 8 NY3d 465, 470 [2007] [internal citations omitted].)²

The Article 78 petition asserted three causes of action: (1) DCAS failed to comply with its own rules and regulations; (2) DCAS violated its own rules and regulations and acted arbitrarily and capriciously in refusing to accept petitioners' appeal; and (3) the Civil Service Commission also violated its

² “Although the constitutional mandate expressed in article V, § 6 has been characterized as self-executing, the Legislature has enacted a specific statutory scheme for its implementation.” (*Matter of Montero v Lum*, 68 NY2d 253, 258-259 [1986] [discussing Civil Service Law §§ 44, 50, 61].)

own rules and regulations and acted arbitrarily and capriciously in refusing to accept petitioners' appeal.

On December 19, 2012, DCAS allegedly rejected petitioners' appeal, stating,

"Rule 8.2.1 (3) provides for appeals to DCAS regarding the scheduling and conduct of non-written promotion examinations by an examining agency. The FDNY is not conducting a promotion examination. It is filling a detail within a title, specifically within Level II of Supervising Emergency Medical Service Specialist. Therefore, Rule 8.2.1 (3) does not authorize DCAS to hear this appeal, and the various other provisions you cite regarding requirements for promotion exams do not apply.

Your appeal, therefore, is denied."

(Zapata Affirm. dated May 31, 2013, Ex M.)

B.

On around December 18, 2012, petitioners sought, by order to show cause, a temporary restraining order and a preliminary injunction "forbidding Respondents from promoting candidates to the position of Deputy Chief. . . and enjoining Respondents from promoting individuals under the current testing and promotion framework" pending this Article 78 proceeding. This Court declined to grant a temporary restraining order pending hearing or determination of the motion.

The City respondents opposed the motion. According to the City respondents, DCAS's predecessor, the Department of Personnel, created

the title of SEMSS-Level I and II in or about March 1996, when the EMS workforce was transferred from the New York City Health and Hospitals Corporation to the FDNY. (Klimowicz Opp. Aff. ¶ 5.) The City respondents maintained that within SEMSS-Level II are three discretionary assignments (Captain, Deputy Chief, and Division Commander) and three managerial details (Deputy Assistant Chief, Assistant Chief, and Chief.) (*Id.* ¶ 6.) The City respondents further asserted,

“These discretionary assignments are not separate civil service titles, nor are they promotions within the meaning of the civil service law. These assignments are not obtained through the use of a competitive civil service examination, nor does a civil service eligible list exist for these assignments. Rather, these are discretionary assignments made solely by the FDNY.”

(*Id.*) In sum, the City respondents claimed, “what petitioners are in effect seeking is for this Court to convert discretionary assignments and managerial details existing within the SEMSS title into separate and distinct civil service positions.” (Mulligan Opp. Affirm. ¶ 6.) According to the City respondents, “the decision to have assignment levels within a title, as opposed to creation of a separate civil service position, are among the powers of DCAS.” (Klimowicz Opp. Aff. ¶ 8.)

In reply, petitioners asserted that the duties of the EMS Deputy Chief position require greater skills and additional tasks such that the position constitutes a promotion with the meaning of the civil service law. (Zapata

Reply Affirm. ¶ 36.) In a sur-reply, the City respondents pointed out that Local 3621 does not represent EMS Deputy Chiefs, which are represented by the EMS Superior Officers Association (EMS/SOA). (Mulligan Sur-Reply Affirm. ¶ 5.)

By a so-ordered stipulation dated January 2, 2013, petitioners agreed to amend the petition to join EMS/SOA as a respondent and to adjourn the return date of the petition, as amended, to March 28, 2013, and the return date was further adjourned to May 16, 2013 by order dated April 18, 2013.

C.

On February 20, 2013, petitioners filed an amended petition with the County Clerk. The amended petition asserts six causes of action, two of which were in the original petition. The second and third causes of action of the original Article 78 petition (Verified Petition ¶¶37-44) appear to have been renumbered as the fifth and sixth causes of action in the amended petition. (Amended Verified Petition ¶¶ 91-98.)

As in the original petition, the gravamen of the amended petition is that the position of Deputy Chief should be subject to a competitive civil service examination. Thus, the amended petition alleges in the second, third, and fourth causes of action that respondents' actions in promoting EMS Captains to EMS Deputy Chiefs and issuing a job announcement for the EMS Deputy

Chief position did not comply with civil service requirements and were arbitrary, capricious, and in violation of the law.

The first cause of action of the original Article 78 petition (Verified Petition ¶¶ 35-36) is no longer denominated a cause of action in the amended petition. Instead, under the first cause of action of the amended petition are allegations that the assignment of EMS Captains to the position of EMS Deputy Chief position was an out-of-title assignment, and that respondents' actions in continuing to assign EMS Captains to the EMS Deputy Chief position were arbitrary, capricious, irrational, an abuse of discretion, and violation of law. According to the amended petition, there are material differences between the duties of EMS Captains and Lieutenants and the duties of EMS Deputy Chiefs. (Amended Petition ¶¶ 31-65.)

In its answer to the amended petition, respondent EMS/SOA claimed that the City reorganized and placed the positions of EMS Deputy Chief and Division Commander within the SEMSS, Level II title (Captain), and thus no competitive examination is required for a EMS Captain to become a EMS Deputy Chief. According to respondent EMS/SOA, the City's reorganization occurred "[s]ome time after the [New York City Office of Collective Bargaining]'s Board of Certification found persons in the titles of Deputy

Chief and Division Commander eligible for collective bargaining.” (Verified Answer ¶ 6).

D.

Petitioners now seek leave to amend the amended petition. The proposed second verified petition asserts nine causes of action seeking 15 different types of relief. The City respondents argue that the proposed amendment is time-barred.

By a so-ordered stipulation dated December 5, 2013, the parties agreed to adjourn the underlying Article 78 petition and petitioners’ motion for preliminary injunction to March 6, 2014 “as a control date, to permit decision of Seq 03 [petitioners’ motion to amend].” Petitioners’ motion for leave to amend affected the outcome of the pending motion for a preliminary injunction, insofar as the proposed second verified petition asserted additional causes of action. If leave to amend were granted, then those additional causes of action could be considered in determining whether petitioners demonstrated a likelihood of success on the merits to warrant a preliminary injunction.

II.

“Leave to amend pleadings is freely given absent prejudice or surprise. Nevertheless, a court must examine the merit of the proposed amendment

in order to conserve judicial resources” (*360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 [1st Dept 2011] [internal citations omitted]). “[T]he standard applied on a motion to amend a pleading is much less exacting than the standard applied on a motion for summary judgment.” (*James v R & G Hacking Corp.*, 39 AD3d 385, 386 [1st Dept 2007].) “[M]ovant need not establish the merit of the proposed new allegations, but must ‘simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.’” (*Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012]). However, leave to amend “cannot be permitted as a means of reviving a time-barred action.” (*Bergman v Indemnity Ins. Co. of N. Am.*, 275 AD2d 675, 676 [1st Dept 2000].)

A.

The proposed second verified petition asserts nine causes of action seeking 15 different types of relief. Of these, four of the nine causes of action are causes of action that appeared in the prior amended petition; five causes of action are new.

1.

Not all of the existing six causes of the amended petition appear as causes of action in the proposed second verified petition. Four of the existing six causes of action of the amended petition were renumbered and scattered

across the various causes of action of the proposed second verified petition, while two are no longer denominated causes of action in the proposed second verified petition.

To illustrate, the allegations of the first cause of action of the amended petition (Amended Petition ¶ 80) now appear under the fifth cause of action of the proposed second verified petition. (Second Verified Petition ¶ 135.) The allegations of the third cause of action of the amended petition (Amended Petition ¶¶ 85-87) now appear under the eighth cause of action of the proposed second verified petition. (Second Verified Petition ¶¶ 145-147.) The allegations of the fifth and sixth causes of action of the amended petition (Amended Petition ¶¶ 91-98) now appear under the sixth and seventh causes of action of the proposed second verified petition, respectively. (Second Verified Petition ¶¶ 137-144.)

The allegations of the existing second and fourth causes of action of the amended petition (Amended Petition ¶¶ 82-84, 88-90) are no longer denominated as causes of action in the proposed second verified petition. However, like the original and amended petition, the proposed second verified petition alleges that the October 31, 2012 job announcement for the Deputy Chief position violated civil service requirements. (Second Verified Petition ¶¶ 87-92.) Indeed, the proposed second verified petition seeks a

judgment annulling the announcement, even though there is no enumerated cause of action for that relief.

2.

The first, second, third, fourth, and ninth causes of action of the proposed second verified petition are based on new allegations. The proposed second verified petition alleges that, prior to the commencement of this Article 78 proceeding, petitioners' counsel sent a Freedom of Information Law (FOIL) request dated September 21, 2012 to DCAS, for documents relating to, among other things:

“job classification analysis for the EMS Deputy Chief title, as contemplated in § 815 (a) (2) of the New York City Charter”; and “DCAS and FDNY’s activities involving NYC Charter § 815 (a) (6) . . . with respect to the EMS Deputy Chief title.”

(See Second Verified Petition ¶¶ 106; see Zapata Affirm., Ex R.)

Petitioners' counsel allegedly sent a similar FOIL request to the FDNY on September 21, 2012. According to proposed second verified petition, the FDNY acknowledged receipt of the FOIL request by a letter dated October 5, 2012, but ultimately failed to respond to the FOIL request. (Second Verified Petition ¶¶ 97-98.)

On April 3, 2013, DCAS's Records Access Officer allegedly responded,

“although the FDNY participated with DCAS in the job classification analysis for the SEMSS title, such analysis was performed for the entire civil service title, rather than an individual

work assignment encompassed within that civil service title, such as the Deputy Chief assignment, for which no analysis was performed. Lastly . . . you have cited to NYC Charter Section 815 (a) (6) which references agency participation in the planning and preparation of open competitive examinations. As such, it is not applicable to the subject examination, which is a promotional examination.”

(Second Verified Petition ¶ 108; see Zapata Affirm., Ex S.)

The first and second causes of action of the proposed second verified petition identically allege that respondents failed to conduct a job classification analysis for the EMS Deputy Chief position, in violation of New York City Charter § 815 (a) (2). The third cause of action alleges that respondents did not participate in the planning and preparing of competitive examinations of the Deputy Chief position, in violation of New York City Charter § 815 (a) (6).

The ninth cause of action alleges that respondents failed to comply with FOIL.

Finally, the fourth cause of action alleges that respondents' hiring practices with respect to the Deputy Chief position “failed to promote equal opportunity for all persons as contemplated by [New York City Charter] § 815 [(a) (15)].” (Second Verified Petition ¶ 130.) The proposed second verified petition alleges that 85.71% of Deputy Chiefs throughout the FDNY are

Caucasian, while 14% of Deputy Chiefs are minorities, and that no minorities hold the position of Division Commander. (*Id.* ¶¶ 113-114.)

Petitioners contend that they could not have included these new allegations and causes of action in the original petition or the amended petition because respondents allegedly delayed in providing the necessary response to petitioners' FOIL request. (Petitioners Mem. dated 5/31/13 at 9.)³

Although the proposed second verified petition contains nine causes of action and seeks relief that is not specifically associated with a specific cause of action, the proposed second verified petition can be distilled into the following main contentions:

- (1) Respondents failed to comply with New York City Charter §§ 815 (a) (2), (6), and (15) (Second Verified Petition ¶¶ 25-26, 116-127);
- (2) The October 31, 2012 job announcement for EMS Deputy Chief did not comply with the requirements of the Civil Service Law (Second Verified Petition ¶¶ 86-92, 104-105, 145-147);

³ The memorandum that petitioners submitted with their moving papers is labeled "Memorandum In Support of Motion to Amend the Petition", dated May 31, 2013, while the memorandum that petitioners submitted in reply is labeled, "Memorandum In Support of Motion to Amend Verified Petition", dated July 8, 2013. To avoid confusion, this Court will cite to petitioners' memoranda of law by their date.

- (3) the EMS Deputy Chief position is an out-of-title assignment for Captains, in violation of Civil Service Law § 61 and DCAS rules (Second Verified Petition ¶¶ 77-85, 132-136)
- (4) the Civil Service Commission and DCAS should not have rejected petitioners' appeals (Second Verified Petition ¶¶ 93-94, 137-144); and
- (5) Respondents did not comply with FOIL (Second Verified Petition ¶¶ 95-98, 148-150).

At the core of these contentions is petitioners' belief that the EMS Deputy Chief position should be subject to a competitive examination, like the title of Deputy Chief in the Fire Division of the FDNY. Petitioners' focus on the City Charter might imply that, had respondents performed a job classification analysis specifically for the EMS Deputy Chief position, the EMS Deputy Chief position would have been classified as its own civil service title in the competitive class (as opposed to a detail within the title of SEMSS-Level II).⁴ As mentioned previously, petitioners claim that the EMS Deputy Chief position involves additional duties and responsibilities beyond the job specifications of the SEMSS title, so as to constitute a promotion within the meaning of Civil Service Law. The proposed second verified

⁴ On its face, the second verified petition does not seek an order to compel respondents to perform a job classification analysis for the EMS Deputy Chief position.

petition points out that the differences were such that EMS Deputy Chiefs won the right to have their own collective bargaining unit.

B.

CPLR 217 (1) provides that an Article 78 proceeding “must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.”

“An administrative determination becomes ‘final and binding’ when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. ‘First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be ... significantly ameliorated by further administrative action or by steps available to the complaining party.’”

(*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194-195 [2007].) “An administrative determination becomes ‘final and binding’ when the petitioner seeking review has been aggrieved by it.” (*Matter of Yarbough v Franco*, 95 NY2d 342, 346 [2000] [citations omitted].) “[I]n determining the issue of timeliness, [the court] must first identify the administrative action or determination to be reviewed, and [the court] must then determine when petitioners were first aggrieved thereby.” (*Matter of Arnold v Erie County Med. Ctr. Corp.*, 59 AD3d 1074, 1075 [4t Dept 2009].)

As discussed above, the causes of action and the allegations of the second verified petition can be distilled into five main contentions. Several of

the main contentions seek to review and annul specific agency actions, such as the October 31, 2012 job announcement for EMS Deputy Chief, the Civil Service Commission's refusal to accept petitioners' appeal on November 28, 2012 and DCAS's refusal on December 19, 2012. These contentions relate back to the original Article 78 petition because they appeared in the original petition, and the Article 78 petition was commenced within four months of the alleged agency actions.

With respect to the contentions that respondents failed to perform duties required under the New York City Charter, such contentions in an Article 78 proceeding would be viewed as seeking mandamus to compel respondents to perform those duties.⁵ In an article 78 proceeding for mandamus to compel, the four-month statute of limitations runs from the date

⁵ Petitioners are careful not to assert that these duties, such as the duty "to ensure and promote equal opportunity" in New York City Charter § 815 (a) (15), are ministerial in nature. Neither does the second verified petition, on its face, seek an order compelling respondents to perform those duties, such as undertaking a job classification analysis for the position of EMS Deputy Chief within the SEMSS title.

The City respondents opposed leave to amend largely on the ground that the proposed pleading is time-barred. The City respondents do argue that allegations of "an overwhelming disparity in the upper management positions held by monitories" failed to plead the elements of a cause of action for discrimination. However, these allegations appear to be related to petitioners' cause of action that the respondents did not fulfill their powers and duties under the City Charter to "ensure and promote equal opportunity" in appointment and advancement.

The obvious question as to whether mandamus to compel lies for the performance of any powers and duties set forth in New York City Charter § 815 (a) (2), (6), or (15) must be left for another day.

upon which the respondent agency refuses to act, following a demand upon the agency to act. (CPLR 217 [1]; *Moskowitz v New York City Police Pension Fund*, 82 AD3d 473 [1st Dept 2011].) “This does not mean that the aggrieved party can, by delay in making his demand, extend indefinitely the period during which he is required to take action. If he does not proceed promptly with his demand he may be charged with laches.” (*Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 442 [1959].) Commencement of the proceeding itself may constitute a demand. (*Matter of Mutschler v Board of Educ. of William Floyd Union Free School Dist.*, 177 AD2d 629, 631 [2d Dept 1991].) Thus, upon first impression, the contentions that respondents failed to perform duties required under the NY City Charter do not appear plainly lacking in merit as time-barred.

With respect to the contention that respondent did not comply with a FOIL request, it appears that this contention relates to the FOIL request that petitioners sent to the FDNY on September 21, 2012. According to the second verified petition, the FDNY acknowledged receipt of the FOIL request by a letter dated October 5, 2012, but ultimately failed to respond to the FOIL request. (Second Verified Petition ¶¶ 97-98.) In support of their motion for leave to amend, petitioners submitted a letter dated October 19, 2012, which

purports to appeal a constructive denial of their FOIL request (Zapata Affirm., Ex O), and the record does not contain any written denial of that appeal.

“A failure to determine an appeal within 10 business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal.” (21 NYCRR 1401.7 [f].) Thus, with respect to the FOIL request served upon the FDNY, petitioners were aggrieved on October 29, 2012. Petitioners had to bring an Article 78 proceeding with respect to this FOIL request within four months of the denial of the administrative appeal, i.e., by February 28, 2013.⁶ However, the ninth cause of action was not interposed by February 28, 2013. Therefore, the ninth cause of action is plainly lacking in merit as time-barred.

1.

The City respondents argue that petitioners were aggrieved at a much earlier point in time. According to the City respondents, “the classification of the SEMSS title with two assignment levels occurred in 1996, which is when the City’s determination became final and binding.” (Collyer Opp. Affirm. ¶ 13.) As mentioned previously, the City respondents asserted in their

⁶ Counting four months from October 29, 2012 would fall on February 29, 2013, but the month of February in 2013 had only 28 days. In such a case, General Construction Law § 30 provides that “the period computed shall expire with the last day of the month so counted.”

opposition to petitioners' motion for a preliminary injunction that DCAS's predecessor created the title of SEMSS-Level I and II in or about March 1996, when the EMS workforce was transferred from the New York City Health and Hospitals Corporation to the FDNY. (Klimowicz Opp. Aff. ¶ 5.) The City respondents conclude that this proceeding should have been brought in or about July 1996. (Collyer Opp. Affirm. ¶ 13.) Thus, City respondents argue that the proposed second verified petition is time-barred, citing *Lenihan v City of New York* (58 NY2d 679 [1982]).

In reply, petitioners argue that the petition is not time-barred, citing *Matter of Grossman v Rankin* (43 NY2d 493 [1977].) (Petitioners Mem. dated 7/8/13, at 3.) In *Matter of Grossman*, the Court of Appeals ruled, "since the petition charges a continuing failure of respondents to follow the command of section 6 of article V of the Constitution, the usual time limitations will not bar review of the other challenged positions (*Matter of Cash v Bates*, 301 NY 258, 261)." (*Matter of Grossman*, 43 NY2d at 506.)

In *Lenihan*, the plaintiffs, who were employed in the titles of Deputy Warden in the New York City Department of Correction, commenced a declaratory judgment action to declare that Resolution 79-14 of the Department of Personnel (DCAS's predecessor) was unconstitutional. (Record on Appeal in *Lenihan v City of New York*, 58 NY2d 679, at 16-29

[Complaint].) The resolution eliminated the title of Supervising Warden from the New York City Department of Correction from the competitive class, and consolidated positions of Assistant Deputy Warden, Deputy Warden and Warden into the single, new title of Warden. (*Id.*) According to the plaintiffs, the assignments to the new Warden position were made in conjunction with an oral "reclassification" examination, which they contended was in violation of the merit and fitness requirements mandated by article V, section 6 of the New York Constitution. (*Id.*; *Lenihan v City of New York*, 85 AD2d 562 [1st Dept 1981], *affd* 58 NY2d 679 [1982].) Defendants moved to dismiss the action on the ground that, among other things, the action was time-barred, which was denied. (*Lenihan v City of New York*, Sup Ct, NY County, June 5, 1981, Blangiardo, J., index No. 22313/1980.)

Contrary to the City respondents' argument, *Lenihan* is not identical to this case. The issue presented in *Lenihan* was whether a declaratory judgment action was timely commenced, which involved the question of when the petitioners became aggrieved by the administrative action that they were seeking to annul. The Appellate Division reasoned that the plaintiffs should have challenged the Resolution through an Article 78 proceeding, within four months after the Resolution was adopted on March 21, 1979. (*Lenihan v City of New York*, 85 AD2d at 562.) The Court of Appeals agreed

that the action should have been brought as an Article 78 proceeding. However, the Court of Appeals found that plaintiffs were aggrieved not on the date that the resolution was adopted, but on the date that a directive implementing the earlier personnel resolution was officially promulgated, which was still 20 months before the action was commenced. (*Lenihan*, 58 NY2d at 682.)

Here, unlike *Lenihan*, petitioners commenced an Article 78 proceeding, not a declaratory judgment action. On its face, the second verified petition does not seek to annul a classification, reclassification or alleged broadbanding of the EMS Deputy Chief position within the SEMSS-Level II title. For the alleged agency actions that petitioners seek to annul, and for the duties that might be the subject of mandamus to compel, the Court disagrees with the City respondents that petitioners were aggrieved as of March 1996, years before the agency actions that are being challenged here took place.⁷ Given all the above, the Court does not address petitioners' argument that the second verified petition timely alleges violations of article V, section 6 of the New York State Constitution that are a continuing wrong.

⁷ On its face, the second verified petition does not seek to remove any person who was already assigned to the EMS Deputy Chief position at the time the Article 78 proceeding was commenced.

Therefore, petitioners are granted leave to amend the petition, in the form of the proposed second verified petition, except for the allegations of the ninth cause of action, which is plainly lacking in merit as time-barred.

2.

That the EMS Deputy Chief position was part of broadbanding that allegedly occurred in March 1996 raises a different issue, which was not clearly set forth in the City respondents' opposition papers but must be mentioned here. Generally speaking, "[i]t is well established that determinations which are made within the jurisdiction of the official or body concerned [] stand unless they are avoided by a direct attack where the infirmity is alleged to be that the action has been arbitrary or capricious." (*Matter of Foy v Schechter*, 1 NY2d 604, 612 [1956].) Thus, "[p]rior administrative actions as to which no challenge has been brought for judicial review may not be collaterally challenged in such proceedings brought for direct review of other administrative actions based on the prior actions." (24 Carmody-Wait 2d § 145:22, at 331; see e.g. *Matter of Lewis Tree Serv. v Fire Dept. of City of N.Y.*, 66 NY2d 667 [1985] [an unsuccessful bidder, who did not bring an Article 78 proceeding to challenge the Comptroller's determination that the unsuccessful bidder violated the Labor Law, may not collaterally attack the determination later by bringing an Article 78 proceeding

to annul a FDNY contract awarded to another bidder because of the Comptroller's prior determination].)

Thus, if petitioners were aggrieved by the alleged broadbanding of the EMS Deputy Chief position into the SEMSS-Level II title, and they did not commence a timely Article 78 proceeding to annul the broadbanding, then they should not be permitted to attack collaterally the alleged broadbanding now, by seeking judicial review of other administrative actions that follow from the unchallenged broadbanding. Neither should petitioners be permitted to attack collaterally the unchallenged broadbanding if their union either assented to it, or incorporated the broadbanding assignments into collective bargaining agreements.

The lack of a competitive examination for the assignment of Captain to EMS Deputy Chief follows from the alleged broadbanding. By definition, broadbanding is "[t]he reassignment or consolidation of assignments under a single title requiring completion of one single written competitive examination to be promoted to the title but no additional examinations to move within the title." (*Matter of Kitchings v Jenkins*, 85 NY2d 694, 699 [1995].) Thus, the placement of the EMS Deputy Chief position into the SEMSS-Level II title—if permissible—requires only a single written competitive examination to be promoted to the SEMSS title, but no additional

examinations are required to move within the title from an EMS Captain to become an EMS Deputy Chief.

Given that this issue—whether certain causes of action of the second verified petition are an impermissible collateral attack upon the alleged broadbanding—was not clearly raised in the City respondents' opposition papers, petitioners should have the opportunity to address that issue after respondents have answered the second verified petition.

Even if this issue had been clearly raised on this motion, the Court cannot determine from the record that petitioners are attempting a collateral attack on the allegedly broadbanding that occurred in March 1996.

First, although the SEMSS title was purportedly created in March 1996, the record indicates that the position of EMS Deputy Chief was not placed as an assignment into the SEMSS title until after July 2002. According to respondent EMS/SOA, the City's reorganization of the EMS Deputy Chief position occurred "[s]ome time after the [New York City Office of Collective Bargaining]'s Board of Certification found persons in the titles of Deputy Chief and Division Commander eligible for collective bargaining." (Verified Answer ¶ 6). The Board of Certification apparently recognized EMS Deputy Chiefs eligible for collective bargaining in July 2002.

Second, the bar against collateral attack presumes that petitioners were aggrieved by the earlier agency action that is now being attacked collaterally. (*Cf. Potratz v Commonwealth of Pennsylvania, Dept. of Env'tl. Protection*, 897 A2d 16, 19 [Pa Cmwlth 2006].) There is not enough information about petitioners in the record for the Court to determine whether any of the individual petitioners, or a member of Local 3621, had been aggrieved by either the creation of the SEMSS title, or by the placement of the EMS Deputy Chief position into SEMSS-Level II,⁸ and had foregone an Article 78 proceeding to annul the creation of the title or the alleged broadbanding.

III.

As discussed in section I.D of this decision, petitioners' motion for leave to amend affected the outcome of the pending motion for a preliminary injunction, insofar as the proposed second verified petition asserted additional causes of action. The parties must be given the opportunity to address whether a preliminary injunction lies with respect to the additional causes of action. Therefore, the parties are directed to submit additional

⁸ In an affidavit dated December 18, 2012, petitioner Variale states that the FDNY employed him since May 1995, and that he initially started working as an Emergency Medical Technician. (Variale Aff. ¶ 3.) Variale was not promoted to Lieutenant until November 2001 (*Id.* ¶ 4), several years after the creation of the SEMSS title, which purportedly occurred in March 1996. The other individual petitioners did not submit affidavits.

papers on petitioners' motion for a preliminary injunction, which is adjourned to October 23, 2014.

The Article 78 petition is also adjourned to October 23, 2014 for submission of respondents' answers to the second verified petition.

IV.

Accordingly, it is hereby

ORDERED that petitioners' motion for leave to amend (Motion Seq. No. 003) is granted, except as to the ninth cause of action (Second Verified Petition ¶¶ 95-98, 148-150), and the proposed second verified petition annexed to the moving papers is deemed served upon respondents upon service of a copy of this order with notice of entry; and it is further

ORDERED that respondents are directed to serve answers to the second verified petition within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that petitioners may submit a supplemental affirmation, supplemental affidavit(s), exhibits, and a supplemental memorandum of law in support of their motion for preliminary injunction, to be served by Friday, September 12, 2014; and it is further

ORDERED that the City respondents and respondent EMS/SOA may each submit a supplemental affirmation, supplemental affidavit(s), exhibits

and a supplemental memorandum of law in opposition to petitioners' motion for preliminary injunction, to be served by Friday, October 17, 2014; and it is further

ORDERED that the Article 78 petition (Motion Seq. No. 001) is ADJOURNED and RECALENDARRED to Thursday, October 23, 2014 at 9:45 A.M. in IAS Part 21, 80 Centre St, Room 278 for submission only of answers to the second verified petition; and it is further

ORDERED that petitioners' motion for preliminary injunction (Motion Seq. No. 002) is ADJOURNED and RECALENDARRED to Thursday, October 23, 2014 at 9:45 A.M in IAS Part 21, 80 Centre St, Room 278 for submission only of supplemental papers, if any.

Dated: July 9, 2014
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED

JUL 10 2014

NEW YORK
COUNTY CLERK'S OFFICE