

**Matter of District Council 37 v New York City Dept.  
of Educ.**

2020 NY Slip Op 32219(U)

July 7, 2020

Supreme Court, New York County

Docket Number: 159016/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of  
DISTRICT COUNCIL 37, AFSCME, AFL-CIO;  
HENRY GARRIDO as EXECUTIVE DIRECTOR;  
and its AFFILIATE LOCAL 1251; and SUZAN HEMPHILL,

Index No.  
159016/2019

Petitioners,

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

**DECISION  
and ORDER**

- against -

Mot. Seq. 1

THE NEW YORK CITY DEPARTMENT OF EDUCATION;  
RICHARD CARRANZA, as CHANCELLOR OF THE  
NEW YORK CITY DEPARTMENT OF EDUCATION;  
THE NEW YORK CITY DEPARTMENT OF  
CITYWIDE ADMINISTRATIVE SERVICES;  
LISETTE CAMILO, as COMMISSIONER of the  
NEW YORK CITY DEPARTMENT of CITYWIDE  
ADMINISTRATIVE SERVICES,

Respondents.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioners District Council 37, AFSCME, AFL-CIO (the "Union"); Henry Garrido as Executive Director; and its Affiliate Local 1251; and Suzan Hemphill ("Ms. Hemphill") (collectively, "Petitioners") are seeking relief pursuant to CPLR § 7803(3), seeking to vacate Respondent Department of Citywide Administrative Services' ("DCAS") May 17, 2019 decision denying Ms. Hemphill's out-of-title work claim. Petitioners claim that (i) Respondent The New York City Department of Education ("DOE") assigned Ms. Hemphill out-of-title work as prohibited by both Article V, § 6 of the New York State Constitution and § 61(2) of the New York Civil Service Law, and (ii) the DCAS's denial of Ms. Hemphill's claim was arbitrary and capricious. Respondents DOE; Richard Carranza, as Chancellor of the DCAS; Lisette Camilo, as Commissioner of the DCAS (collectively, "Respondents") cross move to dismiss the case for failure to state a claim pursuant to CPLR § 7804(f).

### **Statement of Facts**

Ms. Hemphill is an employee who serves as a Clerical Associate Level II (“CA2”) for the Committee on Pre-school Special Education (“CSE”) at the DOE. (Verified Petition at 4). Ms. Hemphill is assigned to the division of the CPSE that ensures pre-school students receive educational services. (*Id.*) Petitioners contend that Ms. Hemphill became responsible for providing services to about 400 pre-school age children after an employee with the title of Educational Administrator (“EA”) retired. (*Id.*) Petitioners contend that Ms. Hemphill must ensure that each child receives an Individualized Education Plan (“IEP”), and that these are out-of-title duties. (*Id.*)

Petitioners contend that Ms. Hemphill has been performing work that is beyond the duties enumerated in the Job Specification of CA2 since approximately 2016. (Verified Petition at 4). Petitioners write:

The Job Specification for a Clerical Assoc. Level II provides that an employee works “under supervision,” and the tasks listed are office-related tasks including, “performs responsible clerical work in various administrative duties and operational areas by processing, recording, checking, and maintaining records ... performs routine data processing functions in the area of production control.

(Verified Petition at 2-3).

The Job Specification also provides that a CA2 “performs responsible clerical and related work with some latitude for independent judgment.” (*Id.*)

Petitioners contend that Ms. Hemphill identifies city and nonprofit agencies that will provide services to fulfill all the necessary IEPs, and initiates calls to new agencies to secure services. (*Id.* at 7) Ms. Hemphill sends agencies service contracts if they accept a child for services, and she notifies the child’s parents in such a situation. (*Id.*) Ms. Hemphill contends that she does this work independently with little supervision, and is the only one in her office with these duties. (*Id.*) Petitioners contend that:

If an agency accepts a child for services, Ms. Hemphill then sends a contract for services to the agency. If more than one agency responds, Ms. Hemphill will then send the lowest bidder the contract for the

services. After the agency executes the contract, Ms. Hemphill next calls the parents to inform them that their child has been matched with an agency, and directs the parents to send a form indicating that the student has started to receive services from the aforementioned agency. Ms. Hemphill gives the form to the other clerical staff in the office to input the data into the Children's Assessment Program, which is the DOE database for special education.

(Verified Petition at 5).

Petitioners contend that at the nine other CSE offices in New York City, employees with the title of EA perform the duties they allege Ms. Hemphill performs at her office. (*Id.*)

The collective bargaining agreement between the DOE and the Union stipulates that complaints of out-of-title work assignments should be referred to the DOE's Executive Director of Personnel and they may be appealed to the City's Personnel Director at DCAS. (Verified Petition, Exhibit A).

On January 15, 2016, the Union on Ms. Hemphill's behalf, filed an out-of-title grievance pursuant to the Formal Grievance Procedure of Article XXIII, Section (C) of the CBA, requesting a desk audit. The Union asserted that Ms. Hemphill was performing duties consistent with EA, Clerical Associate, Level 3 ("CA3"), and 4 ("CA4"), titles rather than her CA2 title. On May 31, 2017, DOE's Compensation and Classification Unit ("CCU") conducted a desk audit of Ms. Hemphill. Respondents assert that the "desk audit included a review of Petitioner's grievance claims, the 'Civil Service Title Specifications' for the CA position, and the duties Petitioner performs in the CA2 title as determined by CCU." (Respondents' Memorandum of Law at 6). Also, CCU interviewed Ms. Hemphill and the DOE CSE Chairperson. After the investigation, CCU determined Ms. Hemphill performed the following job responsibilities as a CA2:

- generating transmittal spread sheet[s] in [the] Cognos system;
- transferring student information and recommended related service from the summary sheet[s] of the IEP[s] to the appropriate service type transmittal spread sheet;

- sending transmittal sheets to service providers and for children that are accepted, determining which agency will take the case;
- sending an authorization transmittal sheet[s] that allows agency to begin providing services;
- forwarding documents received from services provider to clerical staff for data entry;
- processing related service cases that have been received through 311;
- monitoring cases that have not been accepted; researching alternative service providers;
- forwarding hard-to-place cases to the employee who handles contracts; and
- monitoring and keeping record of all transmittal sheets.

(Verified Petition, Exhibit E).

On July 11, 2017, the DOE Chief Executive Officer's Representative, Robin Kittrell, adopted CCU's findings and denied Petitioner's out-of-title grievance. Kittrell found that Ms. Hemphill was assigned tasks consistent with CA2.

Petitioners appealed the DOE's decision to Respondent DCAS on March 2, 2018. The Union sent DCAS multiple letters over the course of a year requesting that a determination be reached. (Verified Petition, Exhibit G). DCAS denied Petitioners' claim as well via email and letter. (Verified Petition at 9). On May 17, 2019, DCAS sent a letter affirming DOE's denial of the grievance, based on the records provided by Petitioner. DCAS concluded that "Petitioner 'had been performing in-title and in-level work.'" See DCAS Decision, dated May 17, 2019, a copy of which is annexed to the Petition as Exhibit "H." (Respondents' Memorandum of Law at 8).

### **Parties' Contentions**

The Petition states two causes of action. Petitioners allege that (1) DCAS's determination was arbitrary and capricious, and (2) DOE assigned Ms. Hemphill duties substantially different from those of CA2. (Verified Petition at 9-10). Petitioners claim that Ms. Hemphill provides more than just clerical work for DOE, and that her duties are more analogous to those of an EA – Special Education. (Petitioners' Memorandum of Law at 10). Petitioners submitted the Job Specification for EA as Exhibit D to the Verified Petition and cite the duties as follows:

Ensures that each preschool child with a handicapping condition residing in a given region has the opportunity to participate in preschool programs ... Maintains up-to-date case records and statistics on all preschool children referred for valuation for possible placement in special education ... Maintains preschool data, including the numbers of preschool children who are receiving services and who are on waiting lists.

(*Id.*) (internal citations omitted).

Petitioners argue that the Job Specification for EA shows that Ms. Hemphill's duties are substantially different from those of her title. Petitioners argue that the DOE's determination in the Desk Audit was arbitrary and capricious because it failed to cite reasons as to why Ms. Hemphill's were substantially similar to her title. (Petitioners' Memorandum of Law at 11). Petitioners contend that simply listing Ms. Hemphill's actual duties in the Desk Audit and comparing them to those of her title was not enough to arrive at the determination that she was performing in-title work. (*Id.*) Petitioners also contend that DCAS's determination was arbitrary and capricious because it failed to state any reasons for why the determination was reached. (Petitioners' Memorandum of Law at 13). Petitioners claim that DCAS was not entitled to base its decision on the DOE decision, and that doing so was arbitrary and capricious. (*Id.*)

Respondents cross moved to dismiss the Petition for failure to state a cause of action. (Respondents' Memorandum of Law at 1). Respondents contend that the Desk Audit Memorandum is rational, and the fact that some of Ms. Hemphill's duties overlap with those of an EA do not establish out-of-title work as a matter of law. (Respondents' Memorandum of Law at 14). Respondents claim that because the CA2 position is allowed "some latitude for independent judgment," it was rational to find Ms. Hemphill's duties were substantially similar to those of her title. (Respondents' Memorandum of Law at 15). Respondents point out that Petitioners do not dispute the findings of Ms. Hemphill's duties in the Desk Audit. (*Id.*)

Respondents contend that the DOE and DCAS were both entitled to rely on the CCU's investigation and the Desk Audit in making their determinations. (Respondents' Memorandum of Law at 19-20). Respondents claim that DCAS was not required to conduct its own investigation and could instead rely on the facts presented before the DOE, since Petitioners did not furnish any extra evidence on the matter. (*Id.*)

### Legal Analysis

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v. Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v. Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." See CPLR 7803[3]. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

"Civil Service Law § 61 (2) proscribes the assignment of an employee to perform the duties of any position unless he or she has been duly appointed, promoted, transferred or reinstated to such position other than when those duties are performed on a temporary emergency basis." *Matter of New York State Correctional Officers and Police Benev. Ass'n, Inc. v Governor's Off. of Empl. Relations*, 27 NY3d 936, 939 [2016] (citation omitted). "However, work is not considered out-of-title if it is related to, similar in nature to, or a reasonable outgrowth of, the employee's 'in-title' work." *Chakraborty v. The New York City Dept. of Educ.*, No. 156449/2019, 2020 WL 1080333, at \*2 [Sup Ct, NY County 2020] (citation omitted). "The job specifications for any given title will dictate what duties are properly performed under that title." *Id.* (citation omitted).

In determining "whether certain functions are properly included within a given title... [the Court] need only review the job specifications of the title

involved.” *Fitzpatrick ex rel. Thompson v Ruffo*, 110 AD2d 1032, 1034 [3rd Dep’t 1985] (citation omitted). “Duties performed by those in one civil service title may also be exercised by those in another title.” *Id.*

When an employee’s job title provides for a range of independence, it is reasonable for the employer to assign them unsupervised tasks. *Meadows v. Rosenblatt*, 161 AD2d 430, 433 [1st Dep’t 1990] (“The duties Meadows performed in orienting her new supervisor and in assisting co-workers are ‘reasonably related’ to the duties authorized by the title standard and regularly performed by her.”).

The agency denying an out-of-title work claim is entitled to rely on competent evidence in the record produced by another agency, and it is not obliged to undertake its own separate investigation in search of the same facts. *Matter of NY State Corr. Officers and Police Benevolent Ass’n v. Governor’s Off. Of Empl. Relations*, 27 NY3d 936, 939 [2016]. The Court will not disturb the agency’s determination that an employee’s work is substantially similar to or a natural extension of their employment title if the determination is based on evidence in the record. *Id.*

### Application

Petitioner has failed to show that DCAS’s decision was arbitrary and capricious. DCAS determined that Ms. Hemphill’s duties were “in-title and in-level work” based on the evidence in the record. (Verified Petition, Exhibit H). DCAS reasonably relied on the DOE’s adoption of CCU’s findings in rendering its decision and was not obliged to undertake its own separate investigation. *Matter of NY State Corr. Officers and Police Benevolent Ass’n*, 27 NY3d at 939. CCU conducted a Desk Audit which involved examining the work Ms. Hemphill did and comparing it to the work in her title. (Verified Petition, Exhibit E). CCU also conducted an interview with the Chairperson for the CSE to confirm their findings. (*Id.*). DCAS was provided a basis for assessing the knowledge, skills, and abilities required to perform the work that Ms. Hemphill was performing and comparing it with the work associated with her title.

CCU’s Desk Audit found that Petitioner:

is responsible for securing related services (e.g. speech therapy, physical therapy[,], occupational therapy) for students that attend preschools in [DOE] districts 8, 11 and 12 on the recommendations written by the CPSE[] Administrations on each child’s Individualized

Educational Plan (IEP). The CPSE Administrators conduct the IEP reviews where they determine appropriate related services for each child and then forward the summary...with pertinent information to [Petitioner] for processing.

(Verified Petition, Exhibit E).

CCU determined Ms. Hemphill performed the following job responsibilities as a CA2:

- generating transmittal spread sheet[s] in [the] Cognos system;
- transferring student information and recommended related service from the summary sheet[s] of the IEP[s] to the appropriate service type transmittal spread sheet;
- sending transmittal sheets to service providers and for children that are accepted, determining which agency will take the case;
- sending an authorization transmittal sheet[s] that allows agency to begin providing services;
- forwarding documents received from services provider to clerical staff for data entry;
- processing related service cases that have been received through 311;
- monitoring cases that have not been accepted; researching alternative service providers;
- forwarding hard-to-place cases to the employee who handles contracts; and
- monitoring and keeping record of all transmittal sheets.

(Verified Petition, Exhibit E).

It was rational to find Ms. Hemphill's duties were "in-title and in-level work" and it is insignificant that Ms. Hemphill performs some tasks as a CA2 that are similar to job tasks as an EA.

Moreover, the Job Specification for CA2 allows room for relatively independent operation, therefore the agencies reasonably found that Ms. Hemphill's duties were substantially similar to, or a reasonable outgrowth of, the official CA2 duties even in light of their unsupervised nature. *Meadows*, 161 AD2d at 433. Petitioners have failed to show that the determination by DCAS was unreasonable or otherwise not rooted in the facts presented before the agencies.

Wherefore it is hereby

ORDERED that the Petition is denied; and it is further

ORDERED that Respondents' cross-motion is granted and the Petition is dismissed, without costs; and it is further

ORDERED that the Clerk is directed to enter a judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: July 7, 2020

  
EILEEN A. RAKOWER, J.S.C.