

Local 375 of DC 37 v NYC Dept. of Educ.

2022 NY Slip Op 31136(U)

April 8, 2022

Supreme Court, New York County

Docket Number: Index No. 156778/2021

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

LOCAL 375 of DC 37, et al

INDEX NO. 156778/2021

- v -

MOT. DATE

NYC DEPARTMENT OF EDUCATION, et al

MOT. SEQ. NO. 001

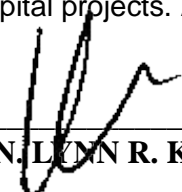
The following papers were read on this motion to/for _____	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

This is an Article 78 proceeding brought by petitioners Local 375 of District Council 37, AFSCME, AFL-CIO (collectively, DC 37 or Local 375), Michael Troman as President of Local 375 and Carlos Alvarez (Alvarez) (collectively, petitioners), challenge the allegedly arbitrary, capricious and unlawful March 26, 2021 determination, which denied petitioner Alvarez’s February 21, 2021 appeal by respondents The New York City Department of Education (DOE), Richard A. Carranza, as Chancellor of the DOE, The City of New York, Bill De Blasio as Mayor of the City of New York, The New York City Department of Citywide Administrative Services (DCAS) and Lisette Camilo, as Commissioner of DCAS (collectively, respondents), in connection with Alvarez’s out-of-title complaint. Respondents answer and oppose the petition.

The relevant facts are as follows. Petitioner Alvarez works for the DOE and has held the civil service title of Associate Project Manager Title I (APM) since August 1994. Petitioner is a member of Local 375 of DC 37 and his civil service title of APM is covered in the collective bargaining agreement (CBA) between Local 375 and the DOE.

The duties and responsibilities of the three levels of Associate Project Manager are as follows: “ASSOCIATE PROJECT MANAGER - Duties and Responsibilities - This class of positions encompasses project management and coordination work of varying degrees of difficulty and responsibility. All personnel may supervise subordinate staff. There are three Assignment Levels within this class of positions. All personnel perform related work. The following are typical assignments within this class of positions. Assignment Level I- Under general supervision, is responsible for planning, coordinating and directing the implementation of the design and construction of capital projects of moderate size and complexity. Assignment Level II - Under direction, is responsible for planning, coordinating and directing the implementation of the design and construction of large and/or complex capital projects. Assignment Level III

Dated: April 8, 2022



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one:** **CASE DISPOSED** **NON-FINAL DISPOSITION**
- 2. Check as appropriate: Motion is** **GRANTED** **DENIED** **GRANTED IN PART** **OTHER**
- 3. Check if appropriate:** **SETTLE ORDER** **SUBMIT ORDER** **DO NOT POST**
- FIDUCIARY APPOINTMENT** **REFERENCE**

- Under general direction, is responsible for managing the implementation of one or more capital projects through the scope, design, and construction phases. Performs supervisory work over a large group of capital project management employees, or directly oversees very large, complex projects which are of the highest priority for an agency. (P Ex. A).

Petitioner alleges that commencing on January 24, 2003, DOE assigned him to work at the New York City School Construction Authority's (SCA) Design Consultant Management Studio (Design Studio) yet since that time, petitioner's employer, DOE, and his civil service title of APM Level I have remained the same. Petitioner further alleges that the Design Consultant Management Studio, where he works, is responsible for managing the scope and design of the architectural, structural, electrical, HVAC (heating, ventilation, and air conditioning), and plumbing aspects of Capital Improvement Projects ("CIP") and Capacity Projects (new schools) and that the other DPMs, aside from petitioner, are employees of the SCA and have the unique SCA civil service title of Senior Construction Assessment Specialist ("SCAS").

Alvarez claims that he and other DPMs manage the work of the design consultants through the scope and design phases to ensure compliance with the contract. Alvarez alleges that he is also responsible for reviewing and approving any design changes that occur during the scope phase as well as the review and management of the performance of the design consultants by ensuring that their draft and final scope reports are in conformance with the overall work to be performed (e.g. new roofs and windows), the contract, the budget, and SCA's technical and design standards. During the design phase, Alvarez alleges that he directly reviews and manages the performance of the design consultants by ensuring that their drawings and specifications, at all completion points (i.e. 50%, 75%, 90%, and 100%), are in conformance with the work to be performed, the contract, the budget, and SCA's design and technical standards.

Alvarez contends that since he filed his out-of-title complaint with Respondent DOE on December 6, 2018, he has managed the scope, design, and construction phases of very large and complex, multi-million-dollar capital projects for the renovations and upgrades of DOE schools. Subsequently, petitioner's union rep filed an appeal on March 12, 2019 with DCAS since he did not receive a decision from DOE. The appeal stated, in pertinent part, that "the Union hereby appeals the failure of the DOE to issue a decision on the December 6, 2018 out-of-title complaint filed by the Union on behalf of member Carlos Alvarez." On September 10, 2020, after an investigation which included a desk audit, the Director of Compensation and Classification concluded that petitioner's responsibilities were consistent with his the APM1 title. On December 28, 2020, DOE representative determined that petitioner Alvarez has been assigned to tasks within his title, APM1, based on the findings in the desk audit. Petitioner subsequently filed an appeal with DCAS on February 24, 2021.

As a way of procedural history, petitioner filed an Article 78 proceeding (the "prior Article 78") claiming he was performing out-of-title work and alleging DOE and DCAS failed to render a decision. On March 29, 2021, Justice Melissa Crane issued a decision that dismissed petitioner's prior Article 78 on the grounds that there had been no final determination and ordered "respondents to render a decision on petitioner's December 2018 out-of-title complaint within 45 days of the efiled date of this order...".

In a letter dated March 26, 2021, DCAS notified defendant Local 375 that the DCAS Classification and Compensation unit reviewed DOE's decision and, "has determined that the grievant has been performing in-title and in-level work. There is no evidence that [petitioner Alvarez] has been performing duties substantially different from those in the class specification for the title/level of Associate Project Manager, Assignment Level I."

Then on April 21, 2021, a classification review was completed by the DCAS Director of Classification and Compensation in which DCAS compared the claims of petitioner Alvarez's out-of-title work complaint to petitioner Alvarez's duties and responsibilities and that review led to the conclusion that petitioner's duties and responsibilities fell within the scope of APM1.

Petitioner filed the instant Article 78 on July 20, 2021.

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, 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 NY2d 222, 231 [1974] [emphasis removed]; see also *Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]).

Under Civil Service Law Sec. 61(2), Appointment and promotion, provides in relevant part: 2. Prohibition against out-of-title work. No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder. See, *Civil Service Employees Ass'n Inc., Local 1000, AFSCME v. Angello*, 277 AD2d 576.

An out-of-title work assignment exists when an employee has been assigned or compelled to perform the duties of a higher grade, without a concomitant increase in pay, frequently, recurrently and for long periods of time, unrelated to any temporary emergency requirement (see, *O'Reilly v. Grumet*, 308 NY 351, 355). Moreover, out-of-title work under the Civil Service Law has been established based upon a significant increase in supervisory responsibility (see, *Matter of Rausch v. Pellegrini*, 237 AD2d 771; *Matter of Kuppinger v. Governor's Off. of Empl. Relations*, 203 AD2d 664, 665). (*Caruso v. Mayor of Village of South Glens Falls*, 278 AD2d 608, 609

Administrative determinations regarding position classifications and related matters may be given only limited judicial review, and will not be disturbed in the absence of a showing that they are wholly arbitrary or without any rational basis. *Cove v. Sise*, 71 NY2d 910, 912, see, *Matter of Steen v. Governor's Office of Employee Relations*, 271 AD2d 738; *Civil Service Employees Ass'n Inc., Local 1000, AFSCME, AFL-CIO v. State University of New York*, 286 AD2d 850. When reviewing appeals involving out-of-title work grievances, courts generally hold that if the record as a whole provides a rational basis for the determination, it will be upheld. *Gergis v. Governor's Office of Employee Relations*, 206 AD2d 766, 768; see, *Bailey v. Governor's Office of Employee Relations*, 259 AD2d 940; *Tirone v. Governor's Office of Employee Relations*, 195 AD2d 816; *Security and Law Enforcement Employees, Dist. Council 82, AFSCME, AFL-CIO, on Behalf of Krom v. Hartnett*, 119 AD2d 877. The standard of review in these matters is whether the record as a whole provides a rational basis for the determination to deny the grievance and [a court] will not disturb such determination unless it is 'wholly arbitrary and without any rational basis. *Civil Service Employees Ass'n Inc., Local 1000, AFSCME v. Angello*, *supra*, 578, quoting *Scala v. Gambino*, 204 AD2d 933, 934; see, *Woodward v. Governor's Office of Employee Relations*, 279 AD2d 725. The petitioner has the burden of demonstrating that the administrative determination is either arbitrary, capricious or affected by an error of law. See, *Grossman v. Rankin*, 43 NY2d 493; *Civil Service Employees Ass'n Inc., Local 1000, AFSCME, AFL-CIO v. State University of New York*, *supra*; *Civil Service Employees Ass'n Inc., Local 1000, AFSCME, AFL-CIO v. State University of New York*, 280 AD2d 832.)

Petitioner argues that Respondent DCAS' March 26, 2021 Determination is arbitrary and capricious and that it fails to provide any basis as to why it denied Petitioner Alvarez's February 26, 2021 appeal of Respondent DOE's December 2020 Decision denying his 2018 out-of-title complaint.

Respondents oppose the petition and argue that there was a rational basis for the respondents' decision, that petitioner's work and responsibilities are consistent with his title, APM1, that after a DOE review of petitioner's duties through a "desk audit", the DOE found that petitioner's work and job duties

were consistent with his title and that DCAS reviewed the DOE decision and came to the same conclusion.

The court disagrees with petitioner that there was no rational basis for denying Alvarez's appeal of DOE's December 2020. There is no evidence on this record that Alvarez was performing APM3 work. The main difference between the two roles involves whether the work is under general supervision or general direction; whether throughout the phases of any particular projects, the employee is coordinating and directing versus managing; as well as whether the employee supervises a large group of employees and the complexity and priority of the projects. In 2020, respondents conducted a desk audit that included a full review of petitioner Alvarez's responsibilities as well as an interview with Alvarez and with the two supervisors, Eric Chou who directly supervised petitioner from August 2016 until May 2019 and then with Ashraf Elias, Design Manager, petitioner's direct supervisor since August 2019.

In the DOE Memorandum dated September 10, 2020 from Boguslaw Wegrzyn, Classification and Compensation Unit, he concluded the following: "After interviewing Mr. Alvarez and his former and current supervisor we have concluded that Mr. Alvarez's participation in project scope determination is limited to facilitating the process of developing proper documentation and does not involve making decisions pertaining to project scope. Mr. Alvarez's assignments are not considered very large (>\$50M) or complex, since they do not include Capacity projects (building new schools), which are most complex and largest in scope, but include only Capital Improvement Projects (CIP) and Resolution A projects which are limited to upgrades and renovations of existing school facilities. The overall number and dollar value of projects assigned to Mr. Alvarez is the lowest in the unit. Mr. Alvarez is not "responsible for managing the implementation of the scope, design, and construction phases of capital projects" since his contribution is limited to facilitating and coordinating the development of project scope document through scope and design phases, and his involvement with the construction phase is very limited. Based on the information gathered, and after careful review of the Civil Service Title Specifications for Associate Project Manager L1, L2, and L3, it is determined that Mr. Alvarez project manages routine reconstruction projects of moderate size and complexity under general supervision. Therefore, Mr. Alvarez's responsibilities within the Architectural and Engineering Department are consistent with his present title of Associate Project Manager L1".

Here, DOE's decision found no evidence that Alvarez worked without supervision and in fact determined that Alvarez worked with supervision. Respondent DOE found that Alvarez, during the scope phase, scheduled and coordinated meetings, forwarded drafts for feedback, facilitated communications, turned over final scope documents, and facilitated the process of developing proper documentation and did not make decisions pertaining to project scope; during the design phase, Alvarez did site walk throughs, forwarded documents for review, ensured documents adhered to schedule, coordinated meeting and reviewed fee proposals which were then submitted for approval; and once the project is turned over to the Construction Management Division, petitioner's involvement consisted of serving as a contact person. Moreover, DCAS reviewed petitioner's work throughout the scope, design and construction phases and confirmed the DOE's determination. Even if petitioner does perform duties that are outside the APM1 role, "not all additional duties constitute out-of-title work, and the mere fact that there may be some overlap between two particular positions does not mandate a finding that a petitioner is being compelled to perform out-of-title work." *Woodward*, 718 NYS.2d at 467

Next, petitioner argues that DCAS' March 26, 2021 Determination also violates New York Civil Service Law § 61(2) and New York State Constitution Article V, Section 6 because the position specification for an APM1 states that an employee "under general supervision, is responsible for planning, coordinating, and directing the implementation of the design and construction of capital projects of moderate size and complexity." And that petitioner's duties are substantially different because he doesn't act "under general supervision", but independently, his projects are not moderate, but are very large and complex and that he is also responsible for coordinating and managing the scope phase of capital projects as well as the design and construction phases.

The court rejects this argument as well. As noted above, the record supports the finding that petitioner worked under general supervision and if he performed the duties of an APM3, he would be working under general direction. The desk audit found that Alvarez has had two supervisors throughout his time in the position of APM 1 at the DOE. Moreover, petitioner failed to establish that Alvarez worked without supervision which belies the finding in the September 2020 Desk Audit.

Finally, petitioner argues that the March 26, 2021 determination is arbitrary and capricious because it fails to provide any basis for its determination. Petitioner further asserts that DCAS' decision violates the New York State Constitution Article V, § 6 and New York Civil Service Law § 61(2) because the evidence demonstrates that Alvarez is performing duties substantially different from those set forth in the APM Level I job specification.

In its Reply, petitioner argues that Respondent DCAS' post-factum April 21, 2021 classification review, issued one month after its March 26, 2021 final determination, was never provided to Petitioners, that it is an improper attempt to rewrite the administrative record and that respondents fail to plead why this document could not have been provided with its March 26, 2021 Determination. Petitioner requests that the document should not be considered and also argues in the alternative that if the court considers it, it shows that Respondent DCAS' explanations lack foundation in fact because they are contrary to the plain language of APM title specification and to the overwhelming evidence reflecting Petitioner Alvarez's out-of-title, APM3 work.

In Justice Crane's decision dated March 29, 2021, she ordered respondents to render a decision on petitioner's December 2018 out-of-title complaint within 45 days of the order. While DCAS issued a letter dated March 26, 2021, three days before Justice Crane's decision, it complied with the court order by issuing its classification review on April 21, 2021 and concurred with DOE's determination. DCAS found that petitioner was performing in title and in level work and that there was no evidence to suggest that he has been performing duties substantially different from those in the class of APM1 as the court noted above. Moreover, the exhibits annexed to petitioner's reply, while not in admissible form, lack any probative value that petitioner worked outside the APM1 level and further is not supported by an affidavit to support petitioner's claims.

Accordingly, it is hereby **ORDERED** that the petition is denied, and the matter dismissed, and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: April 8, 2022
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.