

Roulston v City of New York

2023 NY Slip Op 30662(U)

March 6, 2023

Supreme Court, New York County

Docket Number: Index No. 152431/2022

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

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KEVIN ROULSTON,

Petitioner,

- v -

THE CITY OF NEW YORK, THE CITY OF NEW YORK
DEPARTMENT OF CORRECTION, LOUIS A. MOLINA,
KENNETH STUKES, SHERRIEANN REMBERT, LYNELLE
LIDDIE

Respondent.

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INDEX NO. 152431/2022

MOTION DATE 10/21/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the instant Petition is resolved as follows:

Petitioner commenced the instant CPLR Article 78 Petition by filing same on March 22, 2022, seeking an Order declaring that Respondents violated Civil Service Law § 75, and Rule 5.2.4 of the Personnel Rules and Regulations of the City of New York, that the actions of Respondents were arbitrary and capricious and awarding Petitioner the permanent status of Assistant Deputy Warden with the City of New York Department of Correction (“DOC”). Said Petition alleges that on the permanent status of Assistant Deputy Warden with the City of New York Department of Correction, was promoted to the rank of Captain on or about July 8, 2016 and ascended the permanent rank of captain after completing a one year probation. Thereafter, Petitioner passed Civil Service Examination #9519 and was promoted to the rank of Assistant Deputy Warden on September 4, 2020. As a result of completing that one-year probationary period for the position of Assistant Deputy Warden, on September 4, 2021, Petitioner ascended to the permanent status of

Assistant Deputy Warden with the DOC. Petitioner further alleges that “in or about March 2022, Respondents purport[ed] to strip Petitioner of the permanent status of Assistant Deputy Warden, he obtained on September 4, 2021, and demote him to the status of Captain, without providing Petitioner with the rights accorded to him, pursuant to Civil Service Law § 75.”

On August 19, 2022, Respondents submitted an Answer to the Petition, together with supporting documentation, which establishes as follows: On May 8, 2020, Respondents announced a vacancy for the Position of Assistant Deputy Warden (Provisional). In a letter dated August 31, 2020, Petitioner was provisionally appointed to the rank of “Warden (Correction), I (Assistant Deputy Warden).” During the week of September 8, 2021, DCAS formally created a list based upon the results of Exam No. 9519, with 174 candidates (including Petitioner) deemed eligible for appointment/promotion to permanent status. Respondents further contend that DOC has neither certified the established list nor has DOC appointed any candidates from the established list to the position of Assistant Deputy Warden, and all 174 eligible candidates on the promotional list remain on the list unappointed, therefore as none of the eligible candidates were ever appointed, Petitioner never served a probationary period as there is no probationary period for a provisional appointment. The Answer further details a series of events which occurred in January and February 2021, which resulted in an accepted recommendation of Petitioner’s challenged demotion on February 24, 2021.

In Reply, Petitioner submits the affidavit of Petitioner, adopting the documents submitted with Respondents’ answer, arguing that Respondents’ own documents acknowledge Petitioner’s status as an Assistant Deputy Warden as a February 4, 2021 memorandum from Sherma Dunbar, the Warden of the Otis Bantum Correctional Center (“OBCC”), Warden Dunbar describes Petitioner as a "probationary employee" as does an Employees Performance Service Report, dated

February 4, 2021. Petitioner also submits Teletype Order No. HQ-01345-0, dated June 8, 2022 demoting Petitioner, Teletype Order No. HQ-01386-0, dated June 10, 2022, rescinding the prior Teletype Order, and an e-mail purporting to show that Petitioner achieved permanent status in the role of Assistant Deputy Warden on August 31, 2022.

As discussed in Respondents' Memorandum of Law, "Pursuant to New York Civil Service Law § 65(1), provisional appointments are authorized '[w]henver there is no appropriate eligible list available for filling a vacancy in the competitive class...' N.Y. C.S.L. § 65(1). As opposed to permanent appointments, provisional appointments "are mere stop-gaps, exceptions of necessity to the general rules with respect to the filling of such positions...' *Koso v. Greene*, 260 N.Y. 491, 495 (1933); see also *Hilsenrad v. Miller*, 284 N.Y. 445, 451 (1940). Provisional employees do not, and cannot, have disciplinary rights, including the right to a hearing or arbitration, and there is no probationary period for provisional employees. See *City of Long Beach v. Civil Service Employees Ass'n*, 8 N.Y.3d 465 (2007) (holding that provisional "appointments made pursuant to Civil Service Law § 65 carry no expectation nor right of tenure" and that a Collective bargaining Agreement which "afford[ed] tenure rights to provisional employees after one year of service" was contradicted, and made unlawful, by the Civil Service Law). Provisional appointments cannot ripen into a permanent appointment outside of the rare occasion that an eligibility list is fully exhausted upon establishment. See Civil Service Law § 65(4); see also *Farkas v. Vanderhoef*, 306 A.D.2d 476 (2nd Dep't 2003) (5 year provisional employment did not ripen into permanent employment)."

However, it appears that prior to the filing of the instant Petition, Petitioner had not been demoted to the rank of Captain, and except for a two day period from June 8, 2022 through June 10, 2022, continues to serve in the rank of Assistant Deputy Warden. As Petitioner continues to

serve in the role, this action is clearly premature. The Court further notes that in his Reply Papers, Petitioner submitted a June 3, 2022 email from Eddie Gurbillo, Data Analyst/Human Resources Data & Analytics, stating that Petitioner acquired tenure and permanent status of Assistant Deputy Warden on August 31, 2022. The Court further notes that Petitioner is currently being considered for positions which require permanency in the rank of Assistant Deputy Warden.

ORDERED that the instant Petition is DENIED as premature.



<u>3/6/2023</u>			<u>LAURENCE L. LOVE, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE