

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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In the Matter of the Application of

STEFAN I. MYCHAJLIW,  
as Comptroller of Erie County,

Petitioner,

**VERIFIED PETITION**

vs.

Index No.: \_\_\_\_\_

MARK C. POLONCARZ,  
as County Executive of Erie County

Respondent.

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Petitioner, Stefan I. Mychajliw, in his official capacity as Comptroller of Erie County, as and for his Verified Petition pursuant to Article 78 of the Civil Practice Law and Rules, against Respondent Mark C. Poloncarz, in his official capacity as County Executive of Erie County, states:

**INTRODUCTION**

1. Petitioner brings this proceeding pursuant to Article 78 of the Civil Practice Law and Rules seeking to annul a determination made by Respondent to reduce the wage of an employee of the Office of the Comptroller, as it was affected by an error of law, was made in violation of lawful procedure, and was arbitrary and capricious.

**THE PARTIES**

2. Petitioner Stefan I. Mychajliw is the Comptroller of Erie County, with an address at 95 Franklin Street, Room 1100, Buffalo, New York 14202.

3. At all relevant times herein, Petitioner has been the Comptroller of Erie County.

4. Respondent Mark C. Poloncarz is the County Executive of Erie County, with an address at 95 Franklin Street, 16th Floor, Buffalo, New York 14202.

5. At all times relevant herein, Respondent has been the County Executive of Erie County and has been responsible for the decisions that are the subject of this Petition.

6. Respondent is a “body or officer” as that term is defined in CPLR § 7802(a).

### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over the claims brought pursuant to CPLR § 7804(b).

8. Venue in Erie County is proper pursuant to CPLR § 506(b), as it is the county where the material events took place and where Respondent maintains its principal office.

### **BACKGROUND**

#### **A. Erie County Charter**

9. Article 18, Section 1801, of the Erie County Charter (“Charter”), which governs the election of the Comptroller, provides:

Section 1801. Election; Comptroller's Act repealed. There shall be a County Comptroller who shall be elected from the County at large. His or her term of office shall begin with the first day of January next following his or her election and shall be for four years. At the time of his or her election and throughout his or her term of office he or she shall be a qualified elector of the County. He or she shall devote his or her whole time to the duties of his or her office and shall hold no other public office. [Emphasis added.]

10. Article 3, Section 302 of the Charter, which governs the powers and duties of the County Executive, provides:

Section 302. Powers and duties. The County Executive, in addition to any other powers and duties provided by this Charter shall:

b. Except as otherwise provided in this Charter, and subject to confirmation where so provided, appoint to serve during his or her pleasure the head of every department and other administrative unit of the County and the officers and employees in his or her own office . . . .

c. Supervise and direct the internal organization and reorganization of each department or other administrative unit the head of which he or she has power to appoint. [Emphasis added.]

11. Article 25, Section 2507, of the Charter, which governs budget controls, provides:

Section 2507. Budget Controls.

b. The County Executive shall maintain control at all times over the expenditures of every department or other administrative unit, officer, employee and financial activity of the County, except for the departments overseen by the independently elected officials (Clerk, Comptroller, District Attorney and Sheriff) who shall have the power to manage their departments within the parameters of the adopted budget. For such purpose, the County Executive may, among other things, prescribe quotas and allotments, and no department or other administrative unit, officer, employee or financial activity of the County, except for the independently elected officials (Clerk, Comptroller, District Attorney and Sheriff), shall encumber its appropriation in an amount in excess of that allowed by any quota or allotment so prescribed. Actions taken by independently elected officials (County Clerk, Comptroller, District Attorney and Sheriff) within the parameters of the adopted budget shall be approved by the County Executive and any other necessary department or office within seven days. The County Executive may request that the Legislature impose quotas, allotments or other cost control measures on the independently elected officials (Clerk, Comptroller, District Attorney and Sheriff) if the need arises. The Legislature shall by resolution impose quotas, allotments or other cost control measures with a simple majority vote. Amended by Local Law No. 1-2017. [Emphasis added.]

12. Article 25, Section 2511 of the Charter, which governs appropriations, reductions and transfer of budget after adoption, provides:

Section 2511. Appropriations; reductions and transfer after budget adoption.

Intent: it is determined that the maintenance of a balanced budget throughout the County's fiscal year is critical to the fiscal integrity of the county and is thus an important public objective. To this end, the County Executive shall recommend to the Legislature budgetary adjustments as are necessary to maintain a balanced budget on an ongoing basis.

If at any time during the fiscal year it appears, from cash flow projections or other generally accepted accounting principles, that the revenues available, as projected through the end of the fiscal year, will be insufficient to meet either (a) the amounts appropriated, or (b) expenses anticipated to be incurred through the end of the fiscal year,

such that the cumulative effect thereof is a projected year-end deficit in excess of fifty percent of the County's undesignated, unreserved fund balance as of the end of the immediately preceding fiscal year, the County Executive or the Comptroller shall submit a report to the Legislature setting forth the estimated amount of the deficit with appropriate details and explanations. Within seven days of the submission of such a report to the Legislature, the County Executive shall present a written proposal of actual remedies to overcome the deficit. The Comptroller shall provide the Legislature with written comments on the County Executive's proposed actions within seven days of the submission of the remedial proposal to the Legislature. The Legislature shall take under consideration the proposed remedial actions and comments presented by the Comptroller and take such action as it deems necessary to prevent or minimize the deficit. Should the Legislature fail to act within twenty-one days of presentation of the written proposal of remedial actions by the County Executive, the County Executive's proposal shall be deemed adopted. In the event the deficit is declared and remedial actions are taken by the County Executive and/ or the Legislature, no appropriation for debt service may be reduced and no appropriation may be reduced by more than the unencumbered balance thereof or below any amount required to be appropriated.

The County Executive may at any time during the fiscal year transfer part or all of the unencumbered appropriation balance between classifications of expenditures within the same administrative unit, provided that prior approval by resolution of the County Legislature shall be required if the proposed transfer (1) would result in an increase exceeding ten thousand dollars (\$10,000), or such larger amount as may be prescribed by local law, during the fiscal year in any one line item in the budget as adopted, or (2) would affect any salary rate or salary total. If the county executive requests in writing, the County Legislature by resolution effective immediately may transfer part or all of any unencumbered appropriation balance from one county administrative unit to another. But no transfer shall be made from appropriations for debt service, and no appropriation may be reduced below any amount required by law to be appropriated. On or before the 15th day of the following month the County Executive shall provide the Legislature a monthly report of all transfers made pursuant to this section. [Emphasis added.]

## **B. Erie County Code**

13. Article 2, Section 2.02 of the Erie County Code ("Code"), which governs the actions of legislative branch.

Section 2.02. Powers and Duties.

c. Notwithstanding the provisions of any state law, or of any local law, act, resolution or salary plan heretofore adopted or enacted by the county legislature, such legislature shall have the power to fix or change the compensation of all officers and employees paid from county funds except members of the judiciary. [Emphasis added.]

14. Article 12, Section 12.03, which governs the actions of the Comptroller, provides:

Section 12.03 Deputies and organization. The comptroller shall have the power to appoint a deputy for accounting, investment and cash management, and an auditing deputy and shall within the appropriations provided therefor, appoint associate deputies. The deputies who are appointed by the comptroller shall, to the extent that the comptroller shall delegate the same, have the comptroller's powers and duties. Such appointment and delegation of duties shall be in writing and filed in the office of county clerk. The comptroller's office shall be headed by an independently elected comptroller, who shall organize it into (1) a division of internal audit, (2) a division of accounting, and (3) a division of investment and cash management. [Emphasis added.]

### **C. Erie County Budget**

15. In December 2017, a resolution was passed by the Erie County Legislature ("Legislature") establishing the Comptroller's ability to fill new positions in the office of the Comptroller at a variable minimum not to exceed Step 5. The 2018 Budget of Erie County, New York, Book B, provides:

**93. RESOLVED, that the County Executive, County Comptroller, District Attorney and County Clerk are hereby authorized to fill new positions added with amendments to the 2018 Budget at a variable minimum not to exceed step 5; and be it further**

Attached hereto as **Exhibit A** is a true and accurate copy of the relevant excerpt from the 2018 Budget of Erie County, New York, Book B.

16. In December 2017, as reflected in the 2018 Budget, two new Associate Deputy Comptroller positions were added to the office of the Comptroller for the 2018 budget year. One of the new Associate Deputy Comptroller positions was designated as a Job Group 15 position and the other was designated as a Job Group 11 position.

17. Consistent with Resolution 93, in the 2018 Budget, the Legislature appropriated funds for the compensation of the new Associate Deputy Comptroller positions at a Step 5. Attached hereto as **Exhibit B** is the relevant excerpt from the 2018 Budget of Erie County, New York, Book A.

18. The Budget for the following year (2019) included line items for the Associate Deputy Comptroller positions created in the 2018 Budget. Again, the Legislature appropriated funds for the compensation of those Associate Deputy Comptroller positions at a Step 5. Attached hereto as **Exhibit C** is the relevant excerpt from the 2019 Budget of Erie County, New York, Book A.

19. Likewise, the 2020 Budget included line items for the Associate Deputy Comptroller positions created in the 2018 Budget. Again, the Legislature appropriated funds for the compensation of those Associate Deputy Comptroller positions at a Step 5. Attached hereto as **Exhibit D** is the relevant excerpt from the 2020 Budget of Erie County, New York, Book A.

#### **D. Respondent's Conduct**

20. On January 6, 2020, Petitioner appointed Lynne Dixon to serve as Associate Deputy Comptroller for Communications, the Job Group 11 Associate Deputy Comptroller position created in the 2018 Budget.

21. Petitioner appointed Ms. Dixon at Step 5 pursuant to his authority under the Charter, the Code, and the 2018 and 2020 Budgets.

22. Respondent's office approved the appointment before Ms. Dixon began her position as Associate Deputy Comptroller on January 6, 2020.

23. Now, five months later, Respondent is claiming that Ms. Dixon's wage was incorrectly placed at a Step 5 and that, as of June 20, 2020, her wage will be reduced to a Step 1.

24. Respondent is also requesting that Ms. Dixon reimburse the county \$5,413.25 in wages that were purportedly overpaid. Attached hereto as **Exhibit E** is a true and accurate copy of a

letter from Respondent to Ms. Dixon, dated June 12, 2020, advising of the wage reduction and seeking the recoupment of funds.

25. Respondent's conduct has injured Petitioner by usurping Petitioner's authority to direct and conduct the activities of his office as intended and authorized by the Charter and other applicable law, by directly seizing sole authority over the compensation of an employee who do not report to the Respondent, and by influencing work product of the office of the Comptroller.

**RESPONDENT'S UNILATERAL DETERMINATION TO REDUCE  
THE WAGE OF AN ASSOCIATE DEPUTY COMPTROLLER WAS MADE IN  
VIOLATION OF LAWFUL PROCEDURE, WAS AFFECTED BY AN ERROR OF LAW,  
AND WAS ARBITRARY AND CAPRICIOUS.**

26. Respondent does not have authority to unilaterally reduce the wage of an Associate Deputy Comptroller lawfully appointed by the Comptroller within the appropriations provided in the budget.

27. Petitioner is an independently elected official and is not appointed by the County Executive. *See* Charter § 1801.

28. As such, Respondent does not have authority to supervise and direct the internal affairs of the office of the Comptroller. *See* Charter § 302 (b) and (c).

29. Ironically, Respondent has previously recognized the significant authority granted by the Charter to the Comptroller as independently elected official. In 2010, while serving as the Comptroller, Respondent disputed budget cuts proposed by the County Executive to the office of Comptroller as *ultra vires*. "In launching his court fight against the county executive last month, [Respondent] argued that the Erie County charter gives elected department heads authority to propose and manage their own budgets and also protects them from severe staff cuts."

[https://buffalonews.com/news/poloncarz-to-revisit-suit-over-budget-cuts/article\\_5d9fc083-c79e-59aa-ace0-b14fbce75086.html](https://buffalonews.com/news/poloncarz-to-revisit-suit-over-budget-cuts/article_5d9fc083-c79e-59aa-ace0-b14fbce75086.html).

30. Petitioner has exclusive authority to appoint associate deputies within the appropriations provided in the budget. *See* Code § 12.03.

31. Respondent does not have authority to control the expenditures of the office of the Comptroller. *See* Charter § 2507(b). Rather, the Comptroller has exclusive authority to manage the office of the Comptroller within the parameters of the adopted budget. *Id.*

32. In fact, Respondent must approve any actions taken by Petitioner, including the appointment of associate deputies, within the parameters of the adopted budget. *Id.*

33. Respondent does not have the authority to unilaterally impose quotas, allotments, or other cost control measures on the Comptroller. *Id.* A resolution passed by the Legislature is required to implement any cost control measures on the Comptroller. *Id.*

34. Respondent does not have authority to unilaterally reduce budget appropriations. *See* Charter § 2511. Respondent must submit to the Legislature any proposed modifications to the budget. *Id.*

35. Additionally, Respondent does not have authority to unilaterally transfer part or all of an unencumbered appropriation balance within a department if the proposed transfer would affect any salary rate or salary total. *Id.*

36. A resolution passed by the Legislature is required to alter the compensation of a County employee. *Id.*; Code § 2.02.

37. Petitioner has exclusive authority to appoint associate deputies to serve in the office of the Comptroller and to set their compensation within the parameters of the budget.

38. Consistent with the doctrine of legislative equivalency, the Legislature, as the adopter of the budget, has exclusive authority to modify the budget to reduce the compensation of any employee paid with county funds. *See* Charter § 2511; Code 2.02.



39. Accordingly, Respondent's unilateral determination: (i) that Ms. Dixon's wage was incorrectly placed at a Step 5; (ii) that Ms. Dixon's wage should have been and, as of June 20, 2020, will be placed at a Step 1; and (iii) that Ms. Dixon must repay \$5,413.25 in wages purportedly overpaid between January 6, 2020 and June 19, 2020, was made in violation of lawful procedure, was affected by an error of law, and was arbitrary and capricious, where Petitioner, exercising his exclusively authority to appoint associate deputies within budget appropriations, lawfully set Ms. Dixon's wage at Step 5 and only the Legislature has authority to amend the budget to reduce Ms. Dixon's wage.

WHEREFORE, Petitioner respectfully requests that this Court enter an Order:

- (1) Declaring that Respondent is without authority to unilaterally reduce the wage of an employee of the office of the Comptroller;
- (2) Annulling Respondent's determination: (i) that Ms. Dixon's wage was incorrectly placed at a Step 5; (ii) that Ms. Dixon's wage should have been and, as of June 20, 2020, will be placed at a Step 1; and (iii) that Ms. Dixon must repay \$5,413.25 in wages purportedly overpaid between January 6, 2020 and June 19, 2020;
- (3) Enjoining Respondent from taking any action to implement the challenged wage reduction;
- (4) Directing Respondent to make payment of any back pay due and owing and to comply with any other make whole remedies; and
- (5) Awarding such other and further relief as the Court deems just and proper.

Dated: July 1, 2020  
Buffalo, New York

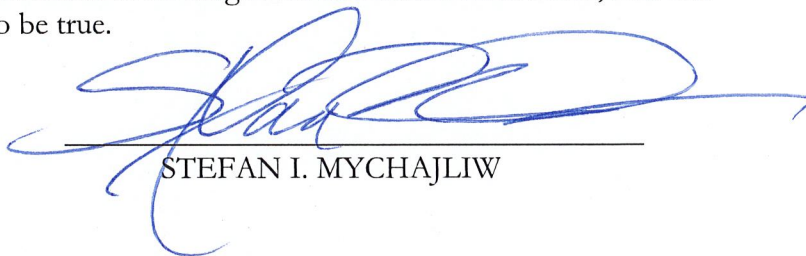
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VERIFICATION

STATE OF NEW YORK     )  
                                      ) ss.:  
COUNTY OF ERIE         )

STEFAN I. MYCHAJLIW, as Comptroller of Erie County, being duly sworn, deposes and says that deponent is the Petitioner in the within action; that deponent has read the foregoing CPLR Article 78 Petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

  
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STEFAN I. MYCHAJLIW

Sworn to before me this  
      1   day of July, 2020.

  
\_\_\_\_\_  
Notary Public

JESSICA L ONEIL  
Notary Public, State of New York  
Reg. No. 01ON6222982  
Qualified in Erie County  
Commission Expires June 1, 2022