Matter of Walker v City of New York

Supreme Court of New York, New York County

December 14, 2018, Decided

100234/2016

Reporter
2018 N.Y. Misc. LEXIS 6261 *; 2018 NY Slip Op 51883(U) **

[**1] In the Matter of the Application of Kevin Walker, Petitioner, against The City of New York, AND THE FIRE DEPARTMENT OF THE CITY OF NEW YORK, NEW YORK CITY CIVIL SERVICE COMMISSION, CHARLES D. McFAUL in his official capacity as Commissioner of the NEW YORK CITY CIVIL SERVICE COMMISSION, NANCY G. CHAFFETZ, Chairwoman of the NEW YORK CITY CIVIL SERVICE COMMISSION, and RUDY WASHINGTON, Commissioner and Vice-Chair of the NEW YORK CITY CIVIL SERVICE COMMISSION, Respondents.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Prior History: Vulcan Soc. of New York City Fire Dept., Inc. v. Civil Service Com., 360 F. Supp. 1265, 1973 U.S. Dist. LEXIS 13233 (S.D.N.Y., June 12, 1973)

Counsel: [*1] FOR petitioner: Stewart Lee Karlin, Esq., New York, NY.

FOR respondent: Evan Piercey, Assistant Corporation Counsel, Labor & Employment Division, New York City Law Department, New York, NY.

Judges: CARMEN VICTORIA ST. GEORGE, J.S.C.

Opinion by: CARMEN VICTORIA ST. GEORGE

Opinion

Carmen Victoria St. George, J.

In this Article 78 proceeding petitioner challenges respondents' determination that he is not qualified for the position of firefighter. He states that respondents graded his physical examination unfairly in retaliation for his participation in *United States of America and The Vulcan Society, Inc. v The City of New York*, Index No. 07-CV-2067 (NGG) (RLM), a federal court action asserting that the Fire Department engaged in discriminatory hiring practices. Respondents' pre-answer cross-motion sought dismissal of all three causes of action. Previously, petitioner withdrew the third cause of action, and the Court issued an order which dismissed the second cause of action, denied the cross-motion as to the first cause of action, and directed respondents to answer the remaining (first) cause of action, which argues that respondents' implementation of portions of his physical examination was arbitrary and in violation [*2] of their own procedures.

According to the petition, petitioner initially applied to be a firefighter in February 1999. In addition to the above, petitioner was one of the lead plaintiffs in *United States of America and Vulcan Society, Inc. v City of New York* (the Vulcan Lawsuit) (Docket Nos. 11-5113-cv [L], 12-491-cv[XAP]), a discrimination case against the fire department. In his petition, he notes that, because of a ruling in that case, petitioner became a "priority hire" when he passed the January 2013 qualifying examination.

In connection with his application, petitioner had to take the Candidate Physical Ability Test (the CPAT), which consists of eight parts, on May 20, 2013. Respondents allege that petitioner failed the CPAT on that date because, according to the proctor, petitioner "fell or dismounted three times" during the warmup for the stair climb portion of the test (Answer, P 37). Respondents also note that petitioner had failed the stair climb when he took a practice test earlier that month.

Subsequently, respondents realized that the May 20 disqualification was due to proctor error. Accordingly, petitioner retook the CPAT two days later with a different proctor supervising [*3] the test. On May 22, the lead proctor found that petitioner did not complete all eight parts of the test within ten minutes and twenty seconds, as required. Instead, petitioner was in the process of performing the seventh exercise (called "Rescue") when, according to the event proctor, his time expired. Petitioner notes that the event proctor for this

exercise was the same individual who had failed him during the stair climb on May 20. Petitioner alleges that the event proctor's determination was retaliatory, due to petitioner's earlier complaint. In addition, the petition alleges that petitioner "was being further retaliated against by this examiner and the NYCFD for being a lead plaintiff in the Vulcan suit" (Petition, P 15).

Petitioner received notification that he had failed the May 22 test on July 1, 2013. On September 4, 2013, he appealed this adverse determination to the Department of Citywide Administrative Services' Committee on Manifest Errors (CME). His letter stated that he was unable to take the first of the two practice tests offered for the CPAT — that is, the practice test on April 25 — because the letter notifying him of the practice test dates arrived after April 25. [*4] He further stated that when he retook the CPAT on May 22, 2013, he was not allowed to watch the clock so that he could pace himself. This was inconsistent with the procedure during the practice test, he wrote. Moreover, he stated that when he watched the clock during the practice date he completed the eight portions of the test within nine minutes and thirty seconds, well within the requisite time frame. He suggested that he may have completed the events timely on May 22 as well. He asked to be allowed to retake the CPAT "a third time, because three opportunities to [**2] take the test [including the two practice tests] are supposed to be afforded to every candidate" (Appeal Letter dated 9/4/13, at Exhibit 11 to Answer).[1] Petitioner stated that on May 20, after he purportedly failed the stair climb, he had grown angry with the proctors and he had threatened to call his attorney if he did not get another opportunity to take the test — but, as respondents note, he did not expressly allege that this gave the event proctor a retaliatory motive when she administered the rescue portion of the CPAT on May 22.

In a letter dated November 13, 2013, the CME denied petitioner's appeal. The CME found [*5] that petitioner had received three opportunities to take the test, including the April 25 and May 14, 2013 practice tests. The CME did not respond to petitioner's statement that he received notification of the April 25 test after that date had passed. The letter noted that petitioner failed the practice test on May 14 during the stair climb.[2] The CME stated that although the event proctor for the stair climb on May 20 was the same as the event proctor for the rescue portion of the test on May 22, this was irrelevant. Although a different lead proctor is necessary when the CPAT is readministered, it concluded, this rule does not apply to the event proctors in the readministered test.

Petitioner appealed this decision to the City Civil Service Commission (CSC) on December 3, 2013. This letter noted that petitioner was one of the lead plaintiffs in *United States of America and Vulcan Society, Inc. v City of New York* (the Vulcan Lawsuit) (Docket Nos. 11-5113-cv [L], 12-491-cv[XAP]), a discrimination case against the fire department. In his petition, he notes that, because of rulings in that case, he was a "priority hire" He reiterated that on May 20 he had grown angry at the proctors and [*6] threatened to call his attorney. He further noted that the event proctor who failed him on May 20 during the stair climb was the same event proctor who failed him during the rescue event on May 22. In this appeal, petitioner expressly stated that "I was unfairly disqualified [on May 22] due to [the event proctor's] biased and hostile feelings towards me from the prior situation on May 20, 2013 when I spoke with her supervisor" (Appeal Letter dated December 3, 2013, at Exhibit 13 to Answer). Respondent stresses that although the appeal letter mentions that he was a lead plaintiff in the Vulcan Lawsuit, he does not suggest that the event proctor was aware of this or discriminated against him because of it.

The CSC denied petitioner's appeal in a letter dated November 30, 2015 (CSC Decision and Order, Appeal No. 2013-0190 [CSC Decision]). The decision found that petitioner did have three opportunities to complete the CPAT — the practice test on May 14, 2013, the May 20, 2013 test, and the May 22, 2013 test. The basis of petitioner's appeal, CSC found, was that "the proctor was biased against him for having disputed the results of his May 20, 2013 disqualification based on the faulty administration [*7] of the CPAT test on that date" (CSC Decision at p 2). It noted that Department of Citywide Administrative Services (DCAS) had cross-moved to dismiss the appeal because "the proctor had no discretion in determining whether or not [petitioner] failed to complete all eight events in the required time" (*id.*). The decision noted that CSC is empowered to consider appeals such as the one before it (citing New York City Charter § 813 [d]), but that under Civil Service Law (CSL) § 50-a, entitled "Test validation boards,"

[1] Petitioner was referring to the two practice tests and the CPAT itself. He discounted the April 25 practice test opportunity because, according to him, he did not receive timely notice of that test.

[2] Petitioner does not challenge the May 14 determination.

CSC lacks the power to consider "protests to answers or rating guides to civil service examination questions." The decision concluded that petitioner essentially had challenged the rule which gave [**3] the proctor "no discretion when it comes to specific types of disqualifying actions," and that this was "akin to challenging an answer key or ratings guide on a written exam as per CSL [§] 50-a" (CSC Decision at p 2). Accordingly, CSC determined that it lacked jurisdiction and it dismissed the appeal.

On March 2, 2016, following the issuance of the CSC decision, petitioner commenced this Article 78 proceeding. For the reasons this Court set forth above, the only remaining cause of action is the first cause of action. Petitioner argues that the determination was arbitrary [*8] and capricious, and that respondents improperly provided a retroactive justification for the challenged determination (citing *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Cooperative Educ. Serv.*, 77 NY2d 753, 759, 573 N.E.2d 562, 570 N.Y.S.2d 474 [1991]). Further, petitioner argues, respondents' decision was arbitrary because it lacked a rational basis and evidentiary support.

In their answer, respondents state that the CSC decision was rational. They note the broad discretion they have in considering an applicant's fitness for the job (citing, inter alia, *Matter of City of New York v New York City Civ. Serv. Commission*, 61 AD3d 584, 584-85, 877 N.Y.S.2d 322 [1st Dept 2009] [regarding medical decision regarding eligibility]; *Matter of City of New York v New York City Civ. Serv. Commission*, 20 AD3d 347, 347-48, 800 N.Y.S.2d 1 [1st Dept 2005] [*In re Ciacciullo*] [annulling CSC decision that DCAS determination was irrational], *aff'd*, 6 N.Y.3d 855, 849 N.E.2d 942, 816 N.Y.S.2d 719 [2006]). They note that, this Court must restrict itself to reviewing the CSC decision and cannot review the original decision de novo (citing *In re Ciacciullo*, 20 AD3d at 348).

CSC's determination that it lacked jurisdiction was also rational, respondents claim. Petitioner's argument that the ruling violated procedure and was irrational "is conclusory in nature, without any basis in fact, and notably offers no explanation as to how specifically the CSC acted arbitrarily or capriciously" (Mem. in Support of Answer at p 7). According to respondents, CSC properly explained and followed Civil Service Law § 50-a. They cite *Lieutenants Benevolent Assoc. of the City of New York v City of New York* (2012 NY Misc LEXIS 2020, at *7 [Sup Ct NY County April 26, 2012, Index No. 112914/2011], [*9] which states that "[CSC's] authority to review examination results is limited to whether [in grading a written examination] DCAS correctly applied the final answer key to the candidate's score sheet, and the court's review of examination results is limited to whether the established procedures were followed." The trial court dismissed the proceeding because of its untimeliness, and additionally noted that in the case before it, where the petitioners "[made] no claim that [the applicant's] answer sheet was incorrectly scored," the court had no authority to review the challenge (*id.*). Respondents argue that in the present proceeding petitioner also challenges the validity of the testing requirements and for this reason the Court should dismiss this petition as well. They point out that the petition does not challenge CSC's decision that it lacked jurisdiction to hear the appeal and they suggest that this issue is not properly before the Court.

In addition, respondents challenge petitioner's request that they appoint him as a firefighter. They argue that this application is moot because the relevant Civil Service list expired on June 26, 2017. For this latter reason, they contend, it would [*10] be unconstitutional for this Court to issue an order directing them to consider petitioner from the expired list.[3]

Petitioner challenges respondents' arguments. He states the application is not moot because respondents cannot use the expiration of the list to evade review. He argues that the cases upon which respondents rely are distinguishable because they relate to promotional examinations rather than qualifying examinations. He alleges that CSL § 50-a is inapplicable because, among other things, it applies to agency review of answers to tests or to grades on tests.

DECISION

After careful consideration, the Court dismisses the proceeding. Despite the Court's belief that CSC should

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[3] The Court rejects respondents' challenge to the timeliness of this proceeding. As petitioner correctly notes, he was required to exhaust his administrative remedies before he commenced this proceeding, and therefore respondents' suggestion that he should have appealed the initial disqualification via Article 78 is simply wrong (*see* CPLR § 7801 [1]). In fact, only the November 30, 2015 decision stated that petitioner had the right to commence an Article 78 proceeding, while the earlier determinations referred petitioner to his administrative remedies. As petitioner had four months to institute this challenge (*see* CPLR § 217), this proceeding is timely.

have heard petitioner's appeal, "[a]n eligible list that has been in existence for one year or more shall terminate upon the establishment of an appropriate new list" (Civil Service Law § 56 [1]). For this reason, petitioner's interest as an eligible applicant "is coextensive with the life of that list" (*Altamore v Barrios-Paoli*, 90 NY2d 378, 384, 683 N.E.2d 740, 660 N.Y.S.2d 834 [1997]). "[A petitioner] whose name appears on a now-expired civil service list, is no longer entitled to be hired . . . notwithstanding that he was improperly declared to have been ineligible for the job" (*Hancock v City of New York*, 272 AD2d 80, 81, 707 N.Y.S.2d 832 [1st Dept 2000]). This principal is a long-standing [*11] one. Indeed, the Court of Appeals noted in 1950 that "the appointment of any of the petitioners after the expiration of the eligible list was a legal impossibility" (*Cash v* Bates, 301 NY 258, 261, 93 N.E.2d 835 [1950]).

The case law is replete with Article 78 proceedings which have been declared moot for this very reason. In *Hancock*, for example, the First Department reversed the trial court's decision which ordered the respondents to "complete plaintiff"s hiring process . . . and accord him back pay" (*id.* at 80). Despite the respondent's improper declaration that the petitioner was ineligible, the petitioner was "no longer entitled to be hired" (*id.*). The Second Department reached the same conclusion with respect to the petitioner's application for reinstatement in *Matter of Altman v Suffolk County Dept. of Civil Serv.* (165 AD3d 921, 922 [2nd Dept 2018] [*Altman*]). In *Deas v Levitt* (73 NY2d 525, 529, 539 N.E.2d 1086, 541 N.Y.S.2d 958 [1989]), the Court of Appeals further concluded that this principal applied even when the list was still in effect after petitioner exhausted his administrative appeals.

The *Deas* Court found that the rule must be strictly applied because the appointment of an applicant from an expired list is unconstitutional (*id.* at 531[4]; *see Altman*, 165 AD3d at 922). The eligibility list cannot be revived where, as here, the expiration was not arbitrary and there has been no argument or evidence indicating respondents caused [*12] the list to expire in bad faith (*see Matter of Hynes v City of Buffalo*, 52 AD3d 1216, 1217, 860 N.Y.S.2d 714 [4th Dept 2008]). *Altamore*, 90 NY2d at 384). Indeed, the list was considered current for four years, which is the maximum allowable period absent circumstances not relevant here (*see Altamore*, 90 NY2d at 385). Accordingly, this petition must be dismissed because it is moot (*see Dmitra v City of New York*, 8 AD3d 110, 110, 778 N.Y.S.2d 165 [1st Dept 2004]).

When this petition was argued, the Court expressed its concerns about the treatment of petitioner. There is a problem with a system which allows so many applicants to "die on the list" [**4] while their challenges are pending. As overwhelming precedent holds that the governing procedure is mandated by the State Constitution's merit and fitness clause, however, this Court has no choice but to dismiss. Petitioner's best remedy, at this juncture, is to retake the test. The Court has considered all the papers and arguments presented in this proceeding, even if not expressly discussed, and they do not change its conclusion. Accordingly, it is

ORDERED that the petition is dismissed.

Dated:December 14, 2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

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[4] In *Deas* the court noted that an exception applies when the allegation is that the list itself "is constitutionally invalid" (*Deas*, 73 NY2d at 531). Petitioner does not make such a claim here, but instead argues "that he was wrongfully denied certification" (*id.*; *see Carozza v City of New York*, 37 AD3d 247, 247, 829 N.Y.S.2d 501 [1st Dept 2007] [reaching same conclusion in connection with promotional list]).