

**Matter of Dmitra v City of New York**

2002 NY Slip Op 30104(U)

December 20, 2002

Supreme Court, New York County

Docket Number: 102633-02

Judge: James A. Yates

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

PRESENT: Hon. JAMES A. YATES \_\_\_\_\_ PART 50Y \_\_\_\_\_  
Justice

\_\_\_\_\_  
In the Matter of the Application of  
JAMES R. DMITRA,

Petitioner ,

INDEX NO. 102633-02

- v -

MOTION DATE  
MOTION SEQ. NO. 001

THE CITY OF NEW YORK,

Respondent(s).

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_  
The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits...

**SCANNED**

Answering Affidavits - Exhibits \_\_\_\_\_

FEB 04 2003

Replying Affidavits \_\_\_\_\_

**Cross-Motion:**  **Yes**  **No**

Upon the foregoing papers, it is Ordered that Respondents'cross-motion to dismiss is denied and the petition is granted to the extent of declaring that the temporary appointment of Dempsey and Quackenbush, without consideration of Petitioner's

application, is arbitrary and capricious and the matter is remitted to DHS and DCAS for a new determination on Petitioner's application in accordance with this decision (see attached Decision).

Dated 12-20-02 ENTER: \_\_\_\_\_, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

  
HON. JAMES A. YATES

PART 50Y  
SUP. CT. N.Y. COUNTY



remains in effect "not less than one nor more than four years" and "terminate[s] upon the establishment of an appropriate new list." The list here is less than three years old. Petitioner has been employed as a carpenter with DHS since 1990. He passed the test for Supervisor of Mechanics in March 2000 and was ranked number seven on the eligible promotional list which is scheduled to expire on January 17, 2003. It is alleged that DHS selected four persons from the list-numbers 1, 4, 5, and 6- and promoted them to Supervisor of Mechanics. Petitioner was considered for promotion, but was allegedly "passed over" for appointment. There are two other candidates, including Petitioner, remaining on the eligible list. Respondents Dempsey and Quackenbush failed to pass the civil service test for Supervisor of Mechanics. Notwithstanding their failure, Petitioner complains that DHS and DCAS allowed them to act as provisional Supervisors of Mechanics since 1998. At the time of Dempsey and Quackenbush's provisional appointments, an appropriate eligible list was not available.

Section 6 of article V of the New York State Constitution states that "[a]ppointments and promotions in the civil service \* \* shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." However, successful completion of a civil service examination does not create a property interest or vested right in appointment to the position for which the applicant has applied. *Deas v Levitt*, 73 NY2d 525, 532, cert. denied 493 US 933 [1989]. An appointing officer of a city agency has broad discretion to select persons for civil service appointment. See *Cassidy v Municipal Civ. Serv. Commn. of City of New Rochelle*, 37 NY2d 526 [1975]. The court will not interfere with the exercise of that discretion unless there is evidence of arbitrary and capricious conduct by the appointing officer. *Matter of Delicati v Schechter*, 3 AD2d 19 [1<sup>st</sup> Dept 1956]. Here, Petitioner's placement on an eligible list for the supervisory position is not a basis for awarding him permanent status.

While persons who are on a civil service eligible list do not possess a vested right to appointment, they do have a right to insist that no appointments be made to vacant positions except from that list as long as the eligible list remains in force. Civil Service Law § 65 [1] provides that provisional appointments are authorized only where "there is no appropriate eligible list available for filling a vacancy in the competitive class." Respondents argue that an appropriate eligible list is one that contains at least three persons. In support of their position, Respondents cite Civil Service Law § 61 [1] which states, in relevant part:

"1. Appointment or promotion from eligible lists.

Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion."

In resolving this matter, however, Petitioner argues that Civil Service Law §§ 65 [2] and [3] must be addressed. Section 65 [2] states that:

"Time Limitation on provisional appointments. No provisional appointment shall continue for a period in excess of nine months. The civil service department shall, for competitive positions within its jurisdiction, and a municipal civil service commission for competitive positions within its jurisdiction, order a civil service examination for any position held by provisional appointment for a period of one month and such department or commission shall conduct a civil service examination, or see that an such an examination is conducted, as soon as practicable thereafter, in order to prevent the provisional appointment from continuing for a period in excess of nine months."

Section 65 [3] provides that:

"A provisional appointment to any position shall be terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions[.]

In this case, the list only designates two persons, including Petitioner. Because there are fewer than three candidates on the eligible list, DHS and DCAS may make provisional appointments from outside the list.

Nonetheless, Respondents acted in an arbitrary manner in failing to consider Petitioner's candidacy for filling a vacancy on a temporary basis, notwithstanding the fact that he and another candidate passed the requisite examination. Instead, Respondents chose to fill two vacancies by appointing provisionally two individuals who failed to pass the examination. Respondents Dempsey and Quackenbush have been continued as provisional Supervisors for over two years after a list was established. Their continued appointment is in contradiction of the strong public policy that appointments to civil service positions should be made, as far as practicable, according to merit and fitness, as ascertained, to the extent possible, by competitive examination (*see* NY Const, art. V, § 6; *Liebman v New York City Housing Auth.*, 91 Misc 2d 854 [Sup Ct, New York County 1977]). Based on these facts, Respondents' actions appear without

a rational basis (see *Ruggeri v Hall*, 101 AD2d 934 [3d Dept 1984]).

While Respondents cannot be compelled to make a permanent or temporary appointment from the list of two names, it does not mean that the list is without effect (See *Ensley v New York City Dept. Of Personnel*, 170 AD2d 298 [1<sup>st</sup> Dept 1991]; *Nassau Chapter CSEA Local 830 v Nassau County Civ. Serv. Commn.*, 97 AD2d 416 [2d Dept 1983]). Petitioner has sufficiently demonstrated his abilities to create a presumption of competence. Accordingly, he is entitled to consideration of his application for temporary appointment to the supervisory position. As stated in *Cassidy* "[h]e can assert at most the right to consideration for and a 'hope' of appointment". *Cassidy v Municipal Civ. Serv. Commn. of City of New Rochelle*, 37 NY2d at 529 citing *Bd. of Regents v Roth*, 408 US 564. He also is entitled to a statement of the reasons why he was not chosen to temporarily fill the position of Supervisor. *Liebman v New York City Housing Auth.*, 91 Misc 2d at 855.

As well, there has been a showing that the eligible list is inadequate. In the absence of three names from which to choose, Respondents are permitted in their discretion to fill positions on a provisional basis. Dempsey and Quackenbush's provisional appointments, however, have been continued beyond the nine-months limit of Civil Service Law § 65 [3]. Their provisional appointments do not ripen into a permanent appointment just because the list contains two names. See *Vacca v Town of Southeast*, 206 AD2d 433, 434 [2d Dept 1994]. An examination for the supervisory position should be held as soon as practicable to avoid circumventing the spirit of the State Constitution.

Accordingly, Respondents' cross-motion to dismiss is denied and the petition is granted to the extent of declaring that the temporary appointment of Dempsey and Quackenbush, without consideration of Petitioner's application, is arbitrary and capricious and the matter is remitted to DHS and DCAS for a new determination on Petitioner's application in accordance with this decision.

This constitutes the Decision and Order of the Court.

**Dated: December 20, 2002**

ENTER:

  
James A. Yates, J.S.C.

**HON. JAMES A. YATES**