

Gallagher v City of New York
2002 NY Slip Op 30171(U)
July 11, 2002
Supreme Court, New York County
Docket Number: 125716/00
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. JANE S. SOLOMON
Justice

PART 55

Matter of Gallagher
- v -
City of New York

INDEX NO. 125716/00
MOTION DATE 4/20/02

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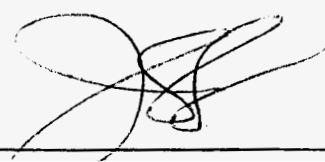
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits — Exhibits

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4-5 SCANNED
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Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ^{and adjudged} motion ^{petition} is decided in accordance with the annexed memorandum decision, order and judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

Dated: July 11, 2002 

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
JANE S. SOLOMON s.c. J.S.C. ION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X

KEVIN E. GALLAGHER, Individually, and as
President of the Uniformed Firefighters
Association,

Petitioner,

Index No. 125716/00

For a Judgment, Pursuant to CPLR Article
78, and for an Order, Pursuant to CPLR
Section 6301, Enjoining Respondents from
Utilizing List No. 7514 for Promotion to
Firefighter in the Fire Department of the
City of New York, and Other Relief,

DECISION, ORDER and
JUDGMENT

- against -

THE CITY OF NEW YORK, WILLIAM J. DIAMOND,
as Commissioner of the New York City
Department of Citywide Administrative
Services, and THOMAS VAN ESSEN, as
Commissioner of the Fire Department of
the City of New York,

Respondents.

-----X-----

Petitioner Kevin E. Gallagher, individually and as
president of the Uniformed Firefighters Association, brought this
Article 78 proceeding to enjoin the continued use of a special
promotional list in place of, or ahead of, a list established by
open competitive examination for making appointments to the
position of firefighter. The petition alleged that use of the
promotional list violates the Merit and Fitness clause of the
Constitution of the State of New York, and that it is arbitrary
and irrational. The petition sought injunctive relief and a
declaration that the appointment of candidates from the
promotional list who scored below 95 on the examinations violates
the Merit and Fitness clause.

Backaround

By order dated July 24, 2001, I denied the City's motion to dismiss the petition, and granted a preliminary injunction barring respondent City of New York ("City") from thereafter promoting or appointing as a firefighter any candidate from the promotional list who had scored lower than 95 on the civil service examination. Petitioner was directed to give notice of this proceeding to those individuals with a passing grade lower than 95 who had not yet been appointed. Notice was given, no such individual has moved to intervene, and the City has now answered. Accordingly, the petition will now be considered on the merits.

Article 5, section 6, of the New York State Constitution provides, in relevant part, that:

[a]ppointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practical, by examination which, as far as practical, shall be competitive.....

This section requires the substance, not merely the form, of competitive examination. Sloat v Board of Examiners of Bd. of Educ. of City of New York, 274 NY 367 (1937).

The pertinent facts are undisputed. As stated in this court's earlier opinion, respondent New York City Department of Citywide Administrative Services ("DCAS") separately administered two identical written examinations on February 27, 1999. The

exams tested candidates as to their qualifications to serve as a firefighter in the Fire Department of the City of New York ("FDNY"). One of these examinations, No. 7514 (the "promotional examination"), was open only to employees of the FDNY who had been serving for at least one year in one of three titles that had been carried over from the March 1996 transfer of the Emergency Medical Service ("EMS") from the City Health and Hospitals Corporation to the FDNY; none of these involved traditional firefighting duties. The other examination, No. 7029 (the "open examination"), was open to members of the general public who met age and other eligibility requirements.

Candidates who scored at least 84.705 on one or the other written test were deemed to have passed it and subsequently were given physical examinations. These too, were identical, and candidates who scored 75 or better were deemed to have passed the physical test. The raw scores of those who had passed the written and physical tests were converted to "standard scores," which were weighted and then combined and transformed into a final score that ranged from 70 to 100. The final scores were adjusted upwards for veterans and, in the case of those who took the open examination, by five points for residency in New York City. On August 30, 2000, DCAS established a hiring list composed exclusively of candidates who passed the promotional examination with a final score of 70 or more. Respondents made a number of appointments from that list, and intended to appoint

from it before appointing any candidate who took the open test. Only individuals with a final score of 95 or more on open examinations have been appointed to the position of firefighter in recent years.

The Issues Here

Petitioner seeks to require respondents to merge the lists from the subject tests so that subsequent appointments will be made based on the final scores of all candidates. The issue before the court is whether DCAS was justified in appointing firefighters from a separate promotional list. In deciding this, the threshold question is whether the firefighter position is an entry level one or whether it is above the EMS positions in FDNY hierarchy such that EMS workers may be promoted to it. (No challenge is pressed to undo any appointment made prior to the preliminary injunction.)

Discussion

Civil Service Law § 52(1) provides, in relevant part, that:

[e]xcept as provided in section fifty-one [which provides for open examinations], vacancies in positions in the competitive class shall be filled, as far as practicable, by promotion from among persons holding competitive class positions in a lower grade in the department in which the vacancy exists, provided that such lower grade positions are in direct line of promotion ...; except that where the state civil service department or municipal commission determines that it is impracticable or against the public interest to limit eligibility for promotion to persons holding lower grade positions in direct line of

promotion, such department or commission may extend eligibility for promotion to persons holding competitive class positions in lower grades which the department or commission determines to be in related or collateral lines of promotion, or in any comparable positions in any other unit or units of governmental service

In Murray v McNamara (303 NY 140 [1951]), the Court noted that, while it was mindful of the legislative policy embodied in then Civil Service Law § 16 (now § 52), favoring the filling of vacancies through promotions, under Article 5, section 6 of the Constitution, "the right to appointment is entitled to the same protection as the right to promotion . . ." Id. at 146. The Court held that "promotion examinations may be held only where the employees sought to be promoted have passed an open examination for a lower grade in the type of work involved in the position to which promotion is sought." Id. at 146-147.

Although respondents acknowledge that the responsibilities of firefighters and persons in the titles transferred from EMS are not identical, they argue that there is enough of an overlap of responsibilities to support the determination that the positions are related. Respondents rely on three forms of such asserted overlap. First and most significantly, that fire trucks in the City are equipped with defibrillators (computers that can be used to evaluate a patient's heart rhythm, and, if indicated, administer an electrical shock), and firefighters are required to take a New York State Department of Health ("DOH")-approved course, to pass

certain DOH examinations, and to be certified by DOH as Certified First Responders with Defibrillation ("CFR-D"). If a medical emergency that is reported to the NYFD is classified by the NYFD dispatcher as life-threatening, both a fire engine and an ambulance will be dispatched to answer the call. As a CFR-D, a responding firefighter is responsible for stabilizing the patient until a person in one of the titles carried over from EMS arrives. See, Affidavit of David Nigro (Exhibit B to the Verified Petition), at 3-4. Respondents' papers do not state whether persons in the titles carried over from EMS are also certified as CFR-Ds or whether respondents simply rely on the fact that firefighters, who respond to certain medical emergencies, are required in the first instance to stabilize patients. In either event, respondents do not contend that the greater medical knowledge that persons in the former EMS titles have will be put to use, if such persons become firefighters, and petitioner avers that firefighters do not perform any pre-hospital emergency care functions other than those performed by SFR-Ds. Firefighters do not administer medications, intubate patients, or perform any other advanced medical care. See, Gallagher Reply Affidavit, at 5-6.

Second, respondents contend that those on the promotional eligible list have been trained in emergency driving and in the use of emergency communications equipment, and have experience working in a uniformed command structure. Petitioner

responds that, regardless of the experience in driving ambulances that candidates on the promotional list may have had, such candidates, if appointed as firefighters, will need to undergo the same additional chauffeur training that is required even of experienced firefighters in order to drive the much larger fire trucks.

The notices of examination that DCAS issued for both the promotional test and the open test describe some of the activities performed by a firefighter, and the conditions that they can expect to experience, as:

wearing protective clothing, such as bunker suit, helmet, boots and breathing apparatus; crawling, crouching and standing, often for prolonged periods, while extinguishing fires; driving fire apparatus; climbing stairs, ladders and fire escapes; raising portable ladders; using forcible entry tools, such as axes, sledge hammers, power saws and hydraulic tools; searching for victims in smoke-filled hostile environments; carrying or dragging victims from dangerous locations; connecting, stretching and operating hose lines; locating hidden fire by feel and smell; providing medical assistance to injured or ill citizens; and providing control and mitigation of hazardous materials incidents while wearing chemical protective clothing.

Verified Answer, Exhs. D and E, at 1. The overlap claimed by respondents applies to a minuscule portion of this list, and it proves to be largely illusory, even where it appears to apply.'

¹ As the late Chief of Department of the FDNY, Peter J. Ganci, Jr., averred in a deposition submitted by respondent FDNY in Beloten v Diamond (276 AD2d 438, 439 [1st Dept 2000]), "[m]embers of the uniformed force of the FDNY must be capable of engaging in firefighting activities. . . . These physically demanding responsibilities are not required for the positions of

As the Appellate Division, First Department, has noted, with specific reference to employees of the FDNY in titles that were carried over from EMS, "the position of firefighter is an 'entry level' position," and, prior to the transfer of EMS to the FDNY, there could be no "promotion" to that position. Beloten v Diamond, 276 AD2d 438, 439 (1st Dept 2000). The Court reasoned that FDNY employees in EMS titles who apply for the position of firefighter are "more akin to an entry-level applicant taking an 'open' exam for that position than to a firefighter taking a 'closed', promotional exam for the position of Lieutenant or a Lieutenant taking an exam for Captain." Id. at 439. Accordingly, the Court held that Civil Service Law § 54, which prohibits disqualification from participation in a promotional civil service examination on the basis of age, was inapplicable to the examination that the petitioners in that proceeding had taken, even though the notice of examination referred to it as "promotion[al]," and even though participation in the exam was limited to FDNY employees in certain EMS titles.'

Respondents also contend that because the final scores are adjusted upward, not based on demonstrations of fitness, but

[emergencymedical technician] and Paramedic. Persons in those positions do not acquire experience fighting fires. They are responsible for responding to calls for emergency medical assistance and providing pre-hospital medical care." Block Reply Aff., Exh. B, at 3.

The petitioners in Beloten had taken and passed the written exam, but were then barred from taking the physical test because of their age.

due to the applicant's status, such as being a veteran or city resident, a high final score does not necessarily suggest that the applicant performed well on the examination. (DCAS also claims that it distributed credits differently on the promotional examination than on the open one). In essence, respondents argue that the final adjusted score is arbitrary and should not dictate who is appointed. The use of competitive examinations is required under the State Constitution, and adjustments for veterans specifically are authorized therein. Art. V, section 6. While respondents appear to be in the position of claiming that their procedures are arbitrary within the constitutional mandate, petitioner does not challenge the details of the scoring system. In any event, the scoring issue is moot in light of the determination that the firefighter position is an entry level one; it comes into play only with promotions.

Mr. Nigro, who is Chief of the FDNY, candidly acknowledges that one of the reasons a "promotional" examination was given was to increase the diversity of firefighter candidates. See, Nigro Aff., at 2. Laudable as that goal surely is, DCAS is without statutory authority to foster it by granting preferences based on race or ethnic background (see, Matter of Jackson v Poston, 40 AD2d 19 [3d Dept 1972]; and Matter of Ruddy v Connelie, 61 AD2d 372 [3d Dept 1978] [where "the narrow question is whether respondents may constitutionally depart from the apparent results of an examination to the extent of making

appointments that allow a preference to ethnic minorities and females[, t]he answer is no.")) The asserted overlap between the functions of firefighters and persons in the EMS titles, even if it were more substantial than it proves to be, would not be a sufficient basis for respondents to do indirectly what they may not do directly.


In conclusion, the FDNY shall make appointments of candidates for the position of firefighter from a merged list encompassing both the promotional and open lists. Fairness dictates this result because the examinations were identical, and the determination by respondents to exhaust the promotional list before appointing candidates from the open list was arbitrary and capricious for the reasons stated above. Finally, declaratory relief in petitioner's favor cannot be granted because the submitted proof does not establish that a particular score is required under the Merit and Fitness clause. Accordingly, it hereby is

ORDERED and ADJUDGED that the petition is granted to the extent that FDNY is permanently enjoined from appointing firefighters from other than a merged list as required herein; and it further is

ADJUDGED and DECLARED that the appointment of candidates from the promotional list who scored below 95 does not violate the Merit and Fitness clause of the Constitution of the State of New York.

Dated: July //, 2002

ENTER :



J.S.C.

JANE S. SOLOMON
J.S.C.