

**Matter of City of New York v New York City Civil
Service Commission**

2006 NY Slip Op 30014(U)

January 3, 2006

Supreme Court, New York County

Docket Number: 0400599/2005

Judge: Doris Ling-Cohan

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

----- Hon. Doris Ling-Cohan

PART 02

Index Number : 400599/2005

CITY OF NEW YORK

vs

CIVIL SERVICE COMMISSION

Sequence Number : 1

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED
<u>1, 2, 5</u>
<u>4, 5</u>
<u>6</u>


Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *Article 78 proceeding is denied/dismissed*
in accordance with the attached memorandum decision.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

HON. DORIS LING-COHAN

Dated: 1/3/06



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

-----X

In the Matter of the Application of

THE CITY OF NEW YORK and MARTHA K. HIRST, as
COMMISSIONER OF THE NEW YORK CITY
DEPARTMENT OF CITYWIDE ADMINISTRATIVE
SERVICES,

Index No. ~~143961/04~~
400599/05

Petitioners,

For a Judgment and Order Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

THE NEW YORK CITY CIVIL SERVICE
COMMISSION and ESTHER SILVER,

Respondents.

-----X

LING COHAN, J.:

In this Article 78 proceeding, petitioners The City of New York (City) and Martha K. Hirst, as Commissioner of the New York City Department of Citywide Administrative Services (DCAS), seek a judgment against respondents, Esther Silver and New York City Civil Service Commission (CSC), to overturn a decision that reversed DCAS's determination not to rate Silver's examination and to deem her "disqualified" from the examination.

Silver sat for civil service exam No. 0509, for promotion to Associate Staff Analyst on June 8, 2001, which was given on that day to persons who observed the Sabbath. The regularly scheduled exam took place on the following day. After taking the multiple choice examination, respondent Silver received a phone message from DCAS, the administrators of the exam, concerning a missing copy of the examination booklet. Silver searched her belongings and

discovered that the booklet was nestled in between other papers in her purse. Shortly thereafter, Silver phoned DCAS to apprise them of her discovery and they immediately dispatched a representative to Silver's home to retrieve the test booklet. In a letter dated June 21, 2001, Carol Wachter, DCAS's Assistant Commissioner for Examinations, notified Silver that she was disqualified from participating because she retained possession of her test booklet. The letter also explained that the entries on Silver's answer sheet would not be graded. Following that notice, Silver made a written request to DCAS's Deputy Commissioner for reconsideration of the agency's determination. By letter dated July 20, 2001, Joseph A. DeMarco, Deputy Commissioner of the Division of Citywide Personnel Services of DCAS, declined to alter the agency's decision to disqualify Silver from the exam. Silver sought review of DCAS's decision through an appeal to CSC on July 30, 2001. A hearing on the matter was held on October 6, 2004, and on October 18, 2004, CSC issued a decision reversing DCAS' s determination not to rate Silver's examination.

Petitioners contend that CSC's reversal of its decision was affected by an error of law because Silver's continued possession of the test booklet after the conclusion of the exam mandates disqualification, and thus, CSC's determination was arbitrary and capricious and an abuse of discretion.

Respondents argue that petitioners are not entitled to vacatur of CSC's determination because it was made in conformity with all applicable laws, rules, and regulations, and was neither arbitrary, capricious, nor an abuse of discretion. In addition, respondent Silver contends that petitioners failed to file this Article 78 petition in the time period required by law.

Upon review of the submitted papers, the petition is denied and the proceeding dismissed

as there was a rational basis for CSC's determination and the action complained of was neither arbitrary, nor capricious (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 [1974]).

The Civil Service Law empowers New York City to administer the provisions of the Civil Service Law through whatever form of administration it chooses to prescribe in its city charter (Civil Service Law § 15 [4]). The New York City Charter, in turn, has established DCAS as an administrative agency whose commissioner shall be responsible for citywide personnel matters (New York City Charter § 810-811). Moreover, DCAS was given, among other things, the power to recruit personnel, schedule and conduct examinations for positions in the civil service, and establish, promulgate and certify eligible lists in the manner provided in the civil service law, and the rules of the commissioner (New York City Charter 814 [a] [1-4]). However, CSC has the power to prescribe, amend, and enforce suitable rules for examinations, appointments, promotions, transfers, resignations, and reinstatements under the Civil Service Law (Civil Service Law § 20). Moreover, CSC has been delegated the authority to review decisions by DCAS and may affirm, modify, or reverse such actions (New York City Charter § 813 [d]).

Petitioners argue that CSC's finding was affected by an error of law because under Civil Service Law § 50, removing examination questions from a test site mandates disqualification from appointment to the position for which the examination was being held. Moreover, they contend that Silver's disqualification was not conditioned on her knowingly removing an exam booklet from the test site. Section 50 (11) (d) provides that a person who shall:

“(d) Have in his or her possession any questions or answers relating to any such examination, or copies of such questions or answers, unless such possession is duly authorized by the appropriate authorities. . . .

shall be guilty of a class A misdemeanor punishable by a sentence of imprisonment of six months or a fine of one thousand dollars, or both. Additionally, a person who is found by the state civil service department or municipal commission to have violated this section shall be disqualified from appointment to the position for which the examination is being held and may be disqualified from being a candidate for any civil service examination for a period of five years.”

In interpreting a similar statute, the Court of Appeals has held that the Commissioner of Education’s review powers over the decision of a hearing panel were broad and with regard to any punishment to be imposed, the Commissioner could substitute his own judgment for that of the panel (*see Matter of Shurgin v Ambach*, 56 NY2d 700, 702 [1982]; *Matter of Levyn v Ambach*, 56 NY2d 912, 914 [1982]). Furthermore, courts have held that an appeal board has the power to reverse a decision below even if that decision was not arbitrary and was supported by substantial evidence (*see Matter of Shurgin v Ambach*, 56 NY2d 700, 702, *supra*).

Here, Civil Service Law § 50 (11) (d) provides that it is unlawful for a person who shall “have in his or her possession any questions or answers relating to any such examination, or copies of such questions or answers, unless such possession is duly authorized by the appropriate authorities.” However, the statute expressly grants CSC the power to determine whether a person indeed violated the previously mentioned section. “[A] person who is found by the state civil service department or municipal commission to have violated this section” shall be disqualified (Civil Service Law § 50 [11] [d]). CSC conducted a hearing and investigation regarding Silver’s alleged infraction. During that hearing, Silver testified that after completing her exam, the proctor examined and collected all of her test materials and she subsequently

signed her certification of attendance as instructed. She also testified that she was unaware her examination booklet was in her possession until her daughter called and informed her that DCAS had phoned and inquired about the missing booklet. Moreover, she supplied DCAS with a signed affidavit stating that she had not shown the booklet to anyone or made of a copy of it. The record also reveals that each of the commissioners found Silver's testimony to be credible.

Pursuant to New York City Charter § 813 (d), extraordinary powers have been delegated to CSC in matters such as this. As stated above, CSC conducted a hearing with all parties present and made a determination based on the evidence and testimony presented. Three of the commissioners voted to overturn DCAS's decision and only one commissioner wrote a dissent. Thus, the record is sufficient to establish that CSC's decision was neither arbitrary nor capricious (*see Levine v New York State Liq. Auth.*, 23 NY2d 863 [1969]).

Petitioners also assert that CSC could not have found that Silver's possession of the examination booklet outside the test site was in fact authorized and a finding of such by CSC is sufficient to render the commission's ruling arbitrary and capricious. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*see Heintz v Brown*, 80 NY2d 998 [1992]). Here it must be noted that there is no evidence in the record that controverts Silver's statements. "While one might reasonably disagree with the [CSC's] action, [CSC] is the commission that is invested with the discretion to balance the competing interests involved in these matters, and, as previously indicated, the scope of [this court's] review is limited" (*Matter of City of New York v O'Connor*, 9 AD3d 328, 330 [1st Dept 2004], *lv denied* 3 NY3d 611 [2004]). Accordingly, it is

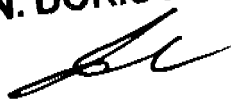
ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed;

it is further

ORDERED that within 30 days of entry of this order, respondents shall serve a copy upon petitioners with notice of entry.

This constitutes the decision of judgment of this court.

Dated: 1/3/06

HON. DORIS LING-COHAN


Hon. Doris Ling-Cohan, J.S.C.

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