

**Matter of Gomez v Hernandez**

2007 NY Slip Op 31356(U)

May 21, 2007

Supreme Court, New York County

Docket Number: 0114838/2005

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN  
J.S.C.

PART 11

Index Number : 114838/2005

GOMEZ, GILBERTO

vs

HERNANDEZ, NEIL

Sequence Number : 001

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 \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ *Article 78 proceeding* is determined in accordance with the annexed decision, order and judgment.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be given as provided hereon. To obtain entry, counsel or other qualified representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: May 21, 2007

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
In the Matter of the Application of  
GILBERTO S. GOMEZ,

INDEX NO. 114838/05

Petitioner,

-against-

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notes of entry of this judgment should be obtained hereon. To  
obtain entry, counsel or representative must  
appear in person at the Judgment Clerk's Desk (Room  
141E).

Respondents.

-----X  
JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner seeks to annual a determination of the New York City Department of Juvenile Justice ("DJJ") which did not select him for promotion from an established civil service list of eligible candidates for the position of permanent Associate Juvenile Counselor.

The DJJ hired petitioner in 1990, appointed him to the permanent civil service title of Juvenile Counselor in 1991, and appointed him to the position of provisional Associate Juvenile Counselor in March 2000. In September 2004, the Department of Citywide Administrative Services (DCAS) promulgated a Second Amended Notice of Examination for Promotion to Associate Juvenile Counselor (Exam No. 3536). Petitioner took the exam, and on February 24, 2005, DCAS established the eligible list from Exam No. 3536. Receiving a score of 82.4 on the exam, petitioner was ranked number 7 of the 50 individuals on the eligible list. Thereafter,

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petitioner was considered but not chosen for any of the openings for Associate Juvenile Counselor. He continued in his position as a provisional Associate Juvenile Counselor until October 3, 2005, when he was reassigned to his prior position as a Juvenile Counselor.

Petitioner commenced this Article 78 proceeding, challenging the DJJ's decision not to select him from the eligible list for a promotion to a permanent position as Associate Juvenile Counselor. Petitioner asserts two grounds for Article 78 relief. First, he contends that pursuant to New York Civil Service Law §65(4), if the eligible list was not "adequate to fill all the positions then held on a provisional basis," the conditions required by section 65(4) would have been satisfied, and he would be entitled to permanent status, subject to a probationary period, by operation of law.<sup>1</sup> Second, petitioner contends that respondents abused their discretion in utilizing the section criteria mandated under Civil Service Law §61, in view of the fact that he passed the examination, was ranked 7 on the eligible list, served in a provisional capacity for

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<sup>1</sup>Section 65(4) of the Civil Service Law provides as follows:

Successive provisional appointments shall not be made to the same position after the expiration of the authorized period of the original appointment to such position; provided, however, that where an examination for a position or a group of positions fails to produce a list adequate to fill all positions then held on a provisional basis, or where such list is exhausted immediately following its establishment, a new provisional appointment may be made to any such position remaining unfulfilled by permanent appointment, and such new provisional appointment, may in the discretion of the appointing authority, be given to a current or former provisional appointee in such position, except that a current or former provisional appointee who become eligible for permanent appointment to any such position shall if he is then to be continued in or appointed to any such position be afforded permanent appointment to such position.

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more than five years, and received “very good” ratings from his supervisor.<sup>2</sup>

On October 24, 2006, the court issued an interim order directing respondents to submit affidavits based on first-hand knowledge, and supporting documents, if any, addressing the issues raised in the petition. The submission of additional papers was necessitated by respondents’ failure to submit competent evidence in opposition to the petition, since the answer was verified by an attorney without personal knowledge of the underlying facts. Specifically, with respect to the issue whether the eligible list was adequate to fill all the positions held on a provisional basis, the interim order directed respondents to submit an affidavit from an employee of the agency or agencies responsible for the selection process, providing “factual details of the process by which respondents selected and rejected candidates from the list, the names and number of candidates selected, and the positions they held at the time they were selected.” With respect to petitioner’s objections as to the selection criteria, the interim order directed respondents to submit an affidavit based on personal knowledge to support their “conclusory allegations as to their use of the 1-in-3 rule and their consideration of petitioner for three separate vacancies.”

In response to the interim order, respondents supplemented their answer with two additional affidavits, and petitioner submitted a Reply Affirmation objecting that respondents’ additional submissions did not fully comply with the interim order. On January 18, 2006, the parties appeared for oral argument and the court issued a second interim order that “respondents

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<sup>2</sup>New York Civil Service Law §61(1) provides that “[a]ppointment 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.

5] may submit supplemental affidavit(s) in compliance with the Interim Order by January 31, 2007 and petitioner may submit reply affidavit and/or an additional memoranda of law by February 14, 2007.” By letter dated February 5, 2007, petitioner’s counsel informed the court that respondents “have chosen to rest on the record” and would not be submitting any additional papers.

As cited in the initial interim order, the Court of Appeals has held that the New York State constitution does not mandate the selection of the highest individual on the eligible list. See Matter of Cassidy v. Municipal Civil Service Commission of City of New Rochelle, 37 NY2d 526, 528 (1975). Rather the “1-in-3” rule codified in Civil Service Law §61(1) permits an appointing authority to exercise its discretion in determining who to appoint to a specific position from a limited field of candidates. Matter of Professional Clerical Technical Employees Ass’n v. Buffalo Board of Education, 90 NY2d 364, 375 (1997); Matter of Cassidy v. Municipal Civil Service Commission of City of New Rochelle, *supra* at 527-528. In addition, New York City regulations provide in pertinent part that “[n]o name shall be certified more than three times to the same agency head for the same or similar position unless at such officer’s request.” 55 RCNY §4.7.4, Appendix A, Personnel Rules & Regulations of the City of New York. Thus, a person, like petitioner, who successfully passes a competitive Civil Service examination and is on an eligible list, does not acquire any “legally protectable interest” in an appointment to the position for which the examination was given. Matter of Cassidy v. Municipal Civil Service Commission of City of New Rochelle, *supra* at 529; accord Matter of Andriola v. Ortiz, 82 NY2d 320, 324 (1993), cert den 511 US 1031 (1994). At most he or she can assert “the right to consideration for and a ‘hope’ of appointment.” Matter of Cassidy v. Municipal Civil Service Commission of City of New Rochelle, *supra* at 529; accord Archer v. Riccio, 201 AD2d 395, 396

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(1<sup>st</sup> Dept 1994). Moreover, a provisional employee is not automatically entitled to permanent civil service status under Civil Service Law §65(4), if the eligible list for the position exists and the list has not been exhausted. See Matter of Becker v. New York State Civil Service Commission, 61 NY2d 252, 256 (1984); Matter of Haynes v. County of Chautauqua, 55 NY2d 814, 816 (1981); Matter of Dhawan v. Office of the Suffolk County Medical Examiner, 148 AD2d 708, 709 (2<sup>nd</sup> Dept 1989), aff'd 81 NY2d 857 (1993).

Taking respondents additional submissions consisting of the two affidavits, and reading them together, the court concludes that respondents have substantially complied with the initial interim order to the extent that sufficient competent evidence now exists in the record to resolve the issues raised in the petition.<sup>3</sup> Respondents submit one affidavit from Stephen Dobrowsky, Director of Certification for DCAS, who describes his responsibilities as including “oversight of the unit responsible for maintaining and administering the various civil service lists and records relating to the status, certifications, evaluation and review of individuals whose names appear on the lists through a computer system known as Certification, Evaluation, Reporting and Tracking Systems (‘Certs’).” Dobrowsky states that his “affidavit is based upon my personal knowledge as well as the books and records of DCAS” and explains that

[o]n March 9, 2005 a civil service eligible list was established from Examination No. 3536 for Promotion to Associate Juvenile Counselor. The life of this list is for a four-year duration and is currently set to expire on March 9, 2009. . . . A review of the records on CERTS shows that the New York City Department of Juvenile Justice (“DJJ”) has used the civil service eligible list established from Examination No. 3536 to fill vacancies and replace provisionals in the title of

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<sup>3</sup>Although the initial interim order directed respondents to provide the names of the candidates selected, the specific names are not material and necessary to the determination of the issues raised herein.

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Associate Juvenile Counselor. There are currently no individuals appointed provisionally to the title of Associate Juvenile Counselor. . . . The list established for promotion to Associate Juvenile Counselor under Examination No. 3536 has not been exhausted. There is currently a valid eligible list resulting from Examination No. 3536 which contains three names.

Respondents submit a second affidavit from Thomas Tsotsoros, Deputy Commissioner of Operations and Detention with the DJJ. Tsotsoros also states that his affidavit is "based upon my personal knowledge as well as the books and records of DJJ" and explains as follows:

On October 30, 2004, a civil service examination, previously announced under Examination No. 3536, was administered for the Position of Associate Juvenile Counsel I ("AJC"). . . . On or about March 9, 2005 a civil service eligible list was established under Examination No. 3536 for promotion to Associate Juvenile Counselor. . . . In September 2005, consistent with Civil Service §61, a DJJ [Department of Juvenile Justice] Committee included myself, DJJ Human Resources Director Nancy Romero, and Deputy Commissioner of Administration & Policy Carlos Serrano utilized the "1-in-3" rule for the purpose of considering and selecting candidates from the eligible list for appointment to the title of Associate Juvenile Counselor. In total, there were 34 appointments for Associate Juvenile Counselor from the established list. Eighteen (18) of the individuals selected from the eligible list for appointment had been serving provisionally in the AJC title. Sixteen (16) individuals appointed from the eligible list were promoted from permanent Juvenile Counselor to permanent AJC. . . . Petitioner and two other provisional AJCs who were on the certified eligible list were considered but not selected three times for the position of AJC. . . . As such, they reverted back to their permanent civil service titles of Juvenile Counselor. . . . All of the permanent AJC vacancies were filled by the time the Selection Committee reached the last 3 individuals on the eligible list. As such the list was not exhausted. . . . After the selection process was completed, there were no vacancies for the position of permanent Associate Juvenile Counselor I. . . . The list established for promotion to Associate Juvenile Counselor under Examination No. 3536 has not been exhausted. There is currently a valid eligible list resulting from Examination No. 3536 which contains three names.

In view of these sworn statements from Tsotsoros, who personally participated in the selection process utilizing the eligible list that included petitioner, respondents have produced sufficient competent evidence that they complied with the statutory selection process under Civil

Service Law §61, which mandates the use of the "1-in-3" rule to consider and select candidates from an eligible list. As a member of the selection committee which considered candidates from the eligible list, Tsotsoros states that the committee utilized the "1-in-3" rule to consider and not select petitioner three times for the position of permanent Associate Juvenile Counselor.

Tsotsoros further states that a total of 34 appointments for the Associate Juvenile Counselor position were made from the list, with 18 employees having previously served as a provisional Associate Juvenile Counsel, and 16 employees promoted from permanent Juvenile Counsel to permanent Associate Juvenile Counselor. Tsotsoros also states that by the time the selection committee reached the last three individuals on the list, which included petitioner, all permanent vacancies were filled and no vacancies remained for the position of permanent Associate Juvenile Counselor. As a result, the list was not exhausted and a currently valid eligible list with three names still exists.

Dobrowksy confirms the fact that the list was not exhausted. As Director of Certification for DCAS, Dobrowsky is responsible for overseeing the citywide unit which maintains and administers civil service lists and the computer records relating to the status of such lists. Dobrowksy explains that on March 9, 2005, a civil service eligible list was established from Exam No. 3536 for promotion to permanent Associate Juvenile Counselor; the list is good for four years and expires on March 9, 2009. He states that a review of the computer records shows that the DJJ used the eligible list from Exam No. 3536 to fill vacancies and replace provisionals in the title of Associate Juvenile Counselor, that currently no one is appointed provisionally as Associate Juvenile Counselor, and that the list is still currently valid with three names.

Based on the foregoing, respondents have produced sufficient competent evidence

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establishing that the eligible list has not been exhausted, and as such, petitioner is not automatically entitled to a permanent position as Associate Juvenile Counsel pursuant to Civil Service Law §65(4). See Matter of Becker v. New York State Civil Service Commission, supra at 256; Matter of Haynes v. County of Chautauqua, 55 NY2d 814, 816 (1981). The affidavits are likewise sufficient to establish that respondents complied with the statutory "1-in-3" statutory selection process in considering and not selecting petitioner from the eligible list. See Matter of Cassidy v. Municipal Civil Service Commission of New Rochelle, supra; Archer v. Riccio, supra. Thus, as respondents acted neither arbitrarily nor capriciously, and did not abuse their discretion, the petition is denied.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied.

This constitutes the decision, order and judgment of the court.

DATED: May 21, 2007

ENTER:

  
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J.S.C.

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