

**Matter of Jochelman v New York State Banking
Dept.**

2007 NY Slip Op 32709(U)

August 26, 2007

Supreme Court, New York County

Docket Number: 0103533/2007

Judge: Kibbie F. Payne

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

In the Matter of Application of

IRVING JOCHELMAN

Petitioner,

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

INDEX NO. 103533/07

MOTION DATE 6/23/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

-against-

THE NEW YORK STATE BANKING DEPARTMENT,
DIANE TAYLOR, SUPERINTENDENT OF BANKS, and
THE NEW YORK STATE DEPARTMENT OF BANKS,

Respondents.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes | | No

Upon the foregoing papers, petitioner's application is dismissed in part and denied in part and respondents' cross-motion is granted, as indicated in the attached memorandum.

Dated: August 20, 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):

141-1111-1111

promoted petitioner to senior bank examiner. Eventually, in 2003, the Civil Service Department published an announcement that it was accepting applications for the principal bank examiner 1 title. Petitioner sat for the written and oral parts of the competitive promotional examination, earning a combined score of 90. After the period of examination closed, the Civil Service Department published the "eligible list" of candidates passing the exam, which is effective until March 9, 2008. Petitioner, along with twelve other candidates, ranked equally as number nine therein.

The Banking Department used the list to appoint candidates in accordance with Civil Service Law § 61 (1), requiring that appointment or promotion be made "by the selection of one of the three persons . . . standing highest on such eligible list who are willing to accept such appointment or promotion." As part of the appointment process, the Banking Department put together a promotion committee. Said committee conducted a candidate interview, an interview with the candidate's supervisor and a review of the candidate's job performance evaluations. For each of these three components, the committee gave the candidates numerical scores ranging from one to three; one was the highest rating and three was lowest rating. The candidate interview rating was worth 50% of the candidate's total score, and the supervisor interview and performance evaluation ratings were each worth 25% of the total score.

In April 2004, petitioner received a weighted score of 2.25 for all three components of the promotion process. That month, the Banking Department filled three principal banking examiner 1 positions with candidates, who scored higher than petitioner on both the promotional exam and interview. In July 2004, the Banking Department filled two more principal bank examiner 1 positions, promoting individuals that scored 95 and 97 respectively on the competitive exam and received scores of less than 2 points in the department's promotional process. In November 2004, the Banking Department filled six more principal banking examiner 1 positions with candidates, who had the same examination score as petitioner, but performed better in the interview process. Under similar circumstances, petitioner was not promoted in May 2005 or in March 2006.

In October 2006, the Banking Department anticipating needing to make additional promotions to principal bank examiner 1 positions. The Banking Department decided to consider the remaining individuals on the eligible list who scored either a 90 or 85 on the promotional examination. It established a new promotion committee and process, changing the question asked of all candidates during the interview. The process was further modified in that the deputy superintendents in the divisions where the candidates were assigned gave their recommendations.

Undergoing this new process, petitioner received a final weighed score of 1.67 from the committee. Petitioner's deputy

superintendent, however, did not recommend him for promotion. The deputy superintendent reasoned that petitioner's work history showed he was not prepared for greater responsibility. She summarized her findings as follows:

"As per [petitioner's] most recent annual evaluation, . . . petitioner was assigned institutional profiles of consumer finance licensees to complete. The institutional profiles were either not completed or the quality of the profile was not adequate. [Petitioner] requires close supervision to ensure his tasks are completed adequately and in a timely manner. [Petitioner] is currently performing at the senior bank examiner level; however, since he has difficulty managing his current workload without close supervision, he has not demonstrated the skills necessary for the next level."

The deputy superintendent attached petitioner's work evaluation for the period from October 2005 to October 2006, which indicated the shortcomings in his work performance.

Following deputy superintendent's recommendation, in November 2006, the Banking Department did not promote petitioner. Petitioner commenced this CPLR article 78 proceeding challenging the determination as irrational and discriminatory.¹ Petitioner

¹ Petitioner has neurofibromatosis. Neurofibromatosis refers to "two distinct major (and some minor) hereditary disorders, formerly labeled peripheral and central n., but now entitled n. type 1 and type 2. Type 1 (peripheral) n., by far the most common of the two types, is characterized clinically by the combination of patches of hyperpigmentation in both cutaneous and subcutaneous tumors. They hyperpigmented skin areas, present from birth and found anywhere in the body surface, can vary markedly in size and color; . . . The multiple cutaneous and subcutaneous tumors, nerve sheath neoplasms, called

further argues that respondents have failed to show that they applied the one and three rule.² Respondents cross-move for an order dismissing the petition as against the Civil Service Department because it has no authority to make promotions from the eligible list and denying the petition as to the remaining respondents as the determination is rationally based.

Our state jurisprudence has "repeatedly . . . acknowledged the importance of the discretionary governmental appointive power embodied in Civil Service Law § 61, and [has] rejected attempts to invoke the aid of the courts to limit the reasonable exercise of that discretion" (Matter of Andriola v Ortiz, 82 NY2d 320, 324 [1993], [citations omitted]). Consistent with this policy, "a person successfully passing a competitive Civil Service examination does not acquire any 'legal protectable interest' in

neurofibromas, can develop anywhere along the peripheral nerve fibers, from the roots, distally. Neurofibromas can become quite large, causing major disfigurement, eroding bone, and compressing various peripheral nerve structures" (Stedman's Medical Dictionary 1201 [26th ed]). As a result of neurofibromatosis, petitioner has a disfiguring tumor on his neck, which prevents him from wearing a tie. Petitioner has tumors that affect his ability to lift heavy objects and walk quickly or without a crutch.

² The petition appears to challenge all the determinations not to promote petitioner, beginning in 2004. However, in petitioner's affidavit in reply, petitioner correctly states that "the key time period in question for review is the round of promotions which took place in November, 2006." In any event, as respondents argue, the four month statute of limitations elapsed with respect to the previous determinations (see CPLR 217 [a]). Thus, the only issue before the court is whether the November 2006 determination is rationally based.

an appointment to the position for which the examination was given" (id. [emphasis in original] [citations omitted]). "An individual's ability to achieve a high examination score does not necessarily demonstrate his capacity to perform the actual duties of a particular position" (Matter of Cassidy v Municipal Civil Service Commission of the City of New Rochelle, 37 NY2d 526, 529 [1975] [citation omitted]). "[E]xamination success cannot reveal any possible defects of personality, character or disposition . . ." (id. [citation omitted]). "Civil Service Law § 61 (1) affords a State agency broad discretion to adopt appropriate procedures to determine a candidate's merit and fitness for employment . . ." (Matter of Hatala v McCaul, 253 AD2d 666, 667 [1st Dept 1998] [citation omitted]).

Applying these principles here, the Banking Department acted within its reasonable discretion in setting up an interview process that included the participation of a candidate's deputy superintendent. Further, the Banking Department followed the one in three rule when making its November 2006 promotions. At the time of each appointment, there were never more than two eligible candidates with a higher score than the candidate appointed. Petitioner, who was twice promoted while an employee of the Bank Department, did not have a favorable job performance evaluation for the period immediately prior to the 2007 promotion process. It was rational for the deputy superintendent to take said evaluation into account when deciding between candidates.

Petitioner argues that he did not complete documents known as profiles because all employees were instructed to stop preparing them in February 2006. However, the Chief Operating Officer of the Banking Department submits an affidavit, providing that the creation of profiles was suspended for several weeks, not the entire evaluation year, which ran from October 10, 2005 to October 9, 2006. Petitioner himself submits emails, dated in April 2006, in which he and his supervisor address the creation of profiles at that time.

To the extent that petitioner claims the deputy superintendent's recommendation was part of a general scheme of discrimination against him, this allegation is not born out in the record. To support his claim, petitioner states that he was denied reasonable accommodation when he was moved to a desk closer to the bathroom for persons with disabilities, but farther from the general employee bathroom. Petitioner prefers to use the general bathroom, claiming that it has more stalls available and a shorter wait time. Petitioner's other complaints about his new work station, included that he did not have access to sales finance files or printing jobs. The Banking Department addressed petitioner's concerns, moving the sales finance files in close proximity to petitioner's workstation and rerouting printing jobs to the printer location closest to petitioner's work area. In addition, the Banking Department assigned petitioner photocopier-support staff "to make and provide photocopies in a timely and

responsive manner." With regard to his request to be moved closer to the general employee bathroom, the Banking Department advised petitioner to reapply for such accommodation upon a showing of medical need.


The court has reviewed petitioner's remaining contentions and finds them without merit.

Accordingly, it is

ORDERED that respondents' cross-motion is granted in its entirety and the petition is dismissed as against respondent New York State Department of Civil Service and denied as against respondents the New York State Banking Department and Diane Taylor, Superintendent of Banks, and the proceeding is dismissed.

The foregoing constitutes the decision and judgment of the court.

Date: August 26, 2007


Kibbie F. Payne, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry should be served based hereon. To obtain entry of this judgment, an authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).