

Matter of Levy v State of New York, Dept. of Civ. Serv.
2007 NY Slip Op 32833(U)
September 12, 2007
Supreme Court, Albany County
Docket Number: 0266307/2007
Judge: George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the application of
JEFFREY H. LEVY; JOSEPH GAGLIARDI;
and THE NEW YORK STATE CORRECTIONAL
OFFICERS AND POLICE BENEVOLENT
ASSOCIATION, INC. LARRY M.
FLANAGAN, JR., President,

Petitioners,

-against-

STATE OF NEW YORK, DEPARTMENT
OF CIVIL SERVICE; and STATE OF NEW
YORK, DIVISION OF PAROLE,

Respondents,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7589 Index No. 2663-07

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioners have commenced the instant CPLR Article 78 proceeding seeking a declaration that respondent Department of Civil Service's failure to order, schedule and conduct a civil service examination for the position Senior Warrant and Transfer Officer is arbitrary and capricious, contrary to law and in violation of Civil Service Law § 65 (2) and Article 5, § 6 of the New York State Constitution, and ordering respondents to vacate the provisional appointment to the Senior Warrant and Transfer Officer position and to hold an examination for such position within 90 days.

The individual petitioners hold the position of Warrant and Transfer Officer within the New York State Division of Parole. In April 2006, the respondents created the new position of Senior Warrant and Transfer Officer to supervise the 15 employees statewide in the position Warrant and Transfer Officer. The new position also includes responsibility for certain training duties. Certification as both a General Topics Instructor and Firearms Instructor is a necessary qualification for the position, as is one year of service in the position Warrant and Transfer Officer. In May 2006 respondents made a provisional appointment pending preparation of an appropriate promotional examination. That provisional appointment has continued to date.

Civil Service Law § 65 (2) provides: "No provisional appointment shall continue for a period of in excess of nine months." It further requires that where a provisional

appointment has existed for a period of one month, a civil service examination must be conducted as soon as practicable thereafter in order to prevent the provisional appointment from exceeding such time period. Petitioners have clearly made a prima facie showing that respondents are in violation of the technical requirements of Civil Service Law § 65 (2), as the incumbent in the provisional position has held such position for well in excess of nine months and no promotional examination has been given.

By their answer, respondents have raised objections in point of law that the petition fails to state a cause of action, that petitioners do not have standing to maintain the proceeding, and that the proceeding is moot. Respondents contend that the petition fails to state a cause of action because respondents have scheduled an examination as soon as practicable. They have shown that at the time of the provisional appointment, there were no more than three persons statewide who met all of the qualifications for the position of Senior Warrant and Transfer Officer. Pursuant to Civil Service Law § 52 (7) respondents could have made a permanent appointment to the single vacancy in the position of Senior Warrant and Transfer Officer without giving a promotional examination. However, in accord with the principles and purposes of the Civil Service Law and Article 5, § 6 of the New York State Constitution, they chose to delay making a permanent appointment to allow additional incumbent Warrant and Transfer Officers to take the training classes to get the requisite certifications. As of May, 2007 there were six persons qualified for the position.

Respondents contend that the Department of Civil Service has considerable discretion

with respect to scheduling examinations, citing, inter alia, Matter of Hannon v Bartlett, (63 AD2d 810, 812 [3d Dept 1978]). Indeed, a delay in holding examinations of almost two years (three years at the time of the appeal) has been upheld based upon a fiscal crisis which had nothing to do with the examination itself (see Matter of Wolmart v New York City Civ. Serv. Commn., 56 AD2d 531 [1st Dept 1977]). While the Department clearly has significant discretion to hold the examination “as soon as practicable,” respondents have not shown any reason for the significant delay between May, 2007 and the scheduled date of the examination, September 29, 2007. Respondents’ conclusory assertions of difficulty in preparing the examination and limited resources being utilized to prepare tests for more common job titles are insufficient to excuse the delay (see Matter of McGuiness v Office of Court Administration, 107 Misc 2d 426, 428 [Sup Ct, Suffolk County 1980]; Matter of Hannon v. Bartlett, 93 Misc.2d 321, 323 [Sup Ct, New York County 1977], affd 63 AD2d 810, 812 [3d Dept 1978]; cf. Matter of Wolmart v New York City Civ. Serv. Commn., 56 AD2d at 531). The petition therefore states a valid cause of action with respect to a violation of Civil Service Law § 65 (2). However, as noted above, the delay in scheduling a promotional exam was caused primarily by respondents’ intent to comply with the spirit of the Civil Service Law, rather than relying upon the exception provided by Civil Service Law § 52 (7). There clearly has been no attempt to circumvent the constitutional provisions. As such, there has been no violation of Article 5, § 6 of the New York State Constitution. Accordingly, that portion of the petition seeking a declaration that respondents have violated

the constitution fails to state a cause of action.

Respondents also contend that petitioners do not have standing because they have not shown that they have been injured by the delay, which allowed them to meet the qualifications for the position. It has been held that citizenship is sufficient to provide standing to compel compliance with the requirements of a competitive civil service (see Matter of Andresen v Rice, 277 NY 271, 281 [1938]). Moreover, several members of the petitioner organization have been qualified for the position since May 2007. No exam has yet been held. It is therefore determined that petitioners have standing (see Matter of Burke v Sugarman, 35 NY2d 39, 45 [1974]; Matter of Onondaga Ch., Local 834, Civ. Serv. Empls. Assn. v Bobenhausen, 69 AD2d 983, 984 [4th Dept 1979]).

Finally, respondents contend that the fact that an examination has been scheduled for September 29, 2007 renders the proceeding moot. However, the examination has not as yet been held, and it is possible that it could be postponed or cancelled. As such, the proceeding is not moot.

It is therefore determined and declared that respondents are in technical violation of Civil Service Law § 65 (2). Respondents shall be ordered to conduct an examination for the position Senior Warrant and Transfer Officer within 90 days of service of a copy of the instant Decision/Order/Judgment together with notice of entry.

To the extent that the petition seeks to vacate the provisional appointment to the position of Senior Warrant and Transfer Officer, the judgment or order would clearly

adversely affect the incumbent in the position, John Pratt. Petitioners have not joined him as a respondent. It is well settled that any person or entity whose interests will or may be inequitably or adversely affected by a judgment in an Article 78 proceeding must be made a party (Matter of Dudley v Kerwick, 52 NY2d 542, 552 [1981]; Matter of Basha Kill Area Assn. v Town Bd. of Town of Mamakating, 302 AD2d 662 [3d Dept 2003]; Matter of Cuyle v Town Bd. of Town of Oxford, 301 AD2d 838 [3d Dept 2003]; Matter of Van Derwerker v Village of Kinderhook Zoning Bd. of Appeals, 295 AD2d 676 [3d Dept 2002]). Under such circumstances, that portion of the petition which seeks to vacate the provisional appointment shall be denied.

Accordingly it is

ORDERED and ADJUDGED, that the petition is hereby granted to the extent that it is determined and declared that respondents are in technical violation of Civil Service Law § 65 (2), and it is further

ORDERED and ADJUDGED, that respondents shall conduct an examination for the position Senior Warrant and Transfer Officer within 90 days of service of a copy of the instant Decision/Order/Judgment together with notice of entry, and it is further


ORDERED and ADJUDGED, that the petition is otherwise denied.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the petitioners who is directed to enter this Decision/Order/Judgment without notice and to serve respondents with a copy of this

Decision/Order with notice of entry.

ENTER

Dated: September 12, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition dated April 2, 2007; Petition verified April 2, 2007;
2. Petitioners' Memorandum of Law dated April 2, 2007;
3. Answer verified June 11, 2007; Affidavit of Scott A. DeFruscio sworn to June 11, 2007;
4. Respondents' Memorandum of Law dated June 11, 2007;
5. Affidavit of Joseph Gagliardi sworn to June 22, 2007;
6. Petitioners' Reply Memorandum of Law dated June 26, 2007.