

Matter of Garcia v Nassau County Civ. Serv. Commn.

2007 NY Slip Op 33613(U)

October 30, 2007

Supreme Court, Nassau County

Docket Number: 9450-07/

Judge: Daniel Martin

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SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

In the Matter of the Application of

NICHOLAS GARCIA.

Petitioner.

For a Judgment under Article 78 of the Civil Practice
Law and Rules.

- against -

Sequence No.: 001
Index No.: 009450/07
XXX

NASSAU COUNTY CIVIL SERVICE COMMISSION.

Respondent.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Petition and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	

Petitioner's application for an order pursuant to CPLR Article 78 directing 1) that the respondent's disqualification of petitioner from consideration as a candidate for the Nassau County Police Department is null and void; or 2) that a hearing be conducted on the factual issues herein; or 3) that respondents allow petitioner to present testimony before respondent in order to demonstrate his qualifications as a police officer is denied and the petition dismissed.

The following facts are undisputed:

- 1) petitioner had taken and passed the Nassau County Police Department examination;
- 2) pursuant to letter dated July 24, 2006 from respondent Nassau County Civil Service Commission (hereinafter "Commission"), petitioner submitted to an examination of his hearing at the Nassau University Medical Center Audiology Clinic;
- 3) on September 12, 2006 petitioner was informed by letter from respondent that he was disqualified from consideration for the position of police officer because he failed to meet "MPTC standards for hearing";
- 4) on September 19, 2006 petitioner wrote back to the Commission informing it of his intention to appeal its determination which he was permitted to do by the September 12, 2007 disqualification letter and further requested an extension of time in which to submit facts in

opposition to the disqualification;

5) in late September, 2006 petitioner underwent an audiological examination at Long Island University, the conclusions of which confirmed the high frequency hearing loss upon which his disqualification was based but which also stated that petitioner's word recognition was excellent and that such loss would not interfere with his job performance;

6) by letter dated October 19, 2006 petitioner was referred by the Commission to Dr. Roy Sullivan for a further audiological evaluation;

7) by letter dated February 21, 2007 Jeffrey L. Goldberg, P.C. advised respondent that it represented petitioner and directed that it be informed of any action taken relative to petitioner's application;

8) on April 4, 2007 Mr. Goldberg inquired as to the status of his client's application; and

9) on April 6, 2007 the Commission informed Mr. Goldberg that petitioner had been notified on November 8, 2006 that the original disqualification dated September 12, 2006 remained in place on the grounds that other than counsel's February, 2007 letter the Commission heard nothing from petitioner and his appeal was deemed completed.

Petitioner commenced the instant Article 78 proceeding and seeks the relief set forth above upon the grounds that respondent's actions in disqualifying petitioner were arbitrary, capricious and an abuse of its discretion.

An Article 78 proceeding such as the instant one may seek an order declaring null and void a determination such as that made by the Commission herein on the grounds that same was in violation of lawful procedure, affected by an error of law or was arbitrary, capricious or an abuse of discretion. CPLR §7803(3). See, also, Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). The court will not find that respondent acted in an arbitrary and capricious manner unless it finds that respondent acted without any rational basis. Matter of Pell, supra.

Petitioner, who verified the petition himself, first asserts that respondent failed to give petitioner proper notice of his disqualification. Petitioner denies receipt of the November 8, 2006 letter confirming the earlier disqualification.

Further, petitioner claims that respondent failed to provide petitioner a fair opportunity by way of notice and hearing to demonstrate that he is qualified to perform the duties of police officer.

Respondents have answered and submitted an affirmation in opposition. In their answer respondents raise several objections in points of law, the first of which is that petitioner failed to comply with the four month statute of limitations as set forth in CPLR 217. The court finds same to be unavailing in the instant matter, as the presumption of mailing of the November 8, 2006 letter to which respondent would normally be entitled is inapplicable where, as here, respondent fails to provide the court with an affidavit of service or other proof of mailing by the author of said notice. See, Engel v. Lichterman, 95 A.D.2d 536 (2nd Dep't 1983).

All other objections raised are substantive and not procedural in nature and shall therefore be disposed of in this court's determination of the application on the merits.

In relevant part respondent first asserts that it has complied with Civil Service Law §50(4)(h) which provides that:

“No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons thereafter and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.”

Respondent demonstrates compliance with the requirement that petitioner be given a reason for the disqualification in the September 12, 2006 letter which informed him that he was disqualified due to his failure to meet the MPTC hearing standards. Said letter also set forth the appeal process of the determination which afforded petitioner the opportunity to submit facts and explanations in opposition.

Respondent further demonstrated that the other basis for which petitioner seeks this review, that petitioner was not afforded a hearing on his disqualification is inapplicable to the matter at hand.

Such, contends respondent, is a due process claim. In order for a due process claim to exist, petitioner must, *inter alia*, have had a liberty or property interest interfered with by the state. See, Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989). A potential job with a police department is insufficient to establish a property interest. See, Johnston v. New York City Police Department, 25 Fed.Appx. 32 (2nd Cir.2001). See, also, Donato v. Plainview-Old Bethpage Central School District, 96 F.3d 623 (2nd Cir. 1996).

Under the standards in place at the time of his application petitioner was afforded the opportunity to submit facts in opposition to his disqualification which he did, and, it should be noted, confirmed respondent's technical findings which constituted the basis for disqualification. Petitioner submitted no other facts which contradicted respondent's findings and it therefore appears that respondent properly concluded that the appeals process was concluded.

In reply respondent raises for the first time the issue of whether the disqualification decision itself was made based upon substantial evidence or was arbitrary and capricious. Such is not set forth or *prima facie* demonstrated in the verified petition. It is improper for petitioner to now raise such issues in a memorandum to which respondents are not afforded the opportunity to reply. See, Lewis v. Boyce, 31 A.D.3d 395 (2nd Dep't 2006).

Accordingly, based upon the foregoing, the relief sought in the petition is denied and the petition is dismissed.

So Ordered.

Dated: October 30, 2007

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE

A.J.S.C.

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