

**Matter of Krishnakumar v New York City Tr.
Auth.**

2008 NY Slip Op 30225(U)

January 22, 2008

Supreme Court, New York County

Docket Number: 0113740/2007

Judge: Eileen A. Rakower

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

PRESENT: HON. EUGENE A. RAPOPORT

PART 5

Justice

Index Number : 113740/2007
KRISHNAKUMAR, PATHMANATHAN
VS.
NEW YORK CITY TRANSIT AUTHORITY
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 113740-07
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

1, 2
3, 4, 5

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

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

UNFILED JUDGMENT
This judgment for costs has been entered by the County Clerk and notice of entry thereof has been mailed heron. To obtain entry, defendant or respondent must appear in person at the Judgment Clerk's Desk (Room 11B)

Dated: 1/22/08

[Signature]

HON. EUGENE A. RAPOPORT J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

In the Matter of the Application of
PATHMANATHAN KRISHNAKUMAR,
Petitioner,
For a Judgment pursuant to Article 78 of the CPLR

Index #113740/07

- against -

The NEW YORK CITY TRANSIT AUTHORITY
and The NEW YORK CITY DEPARTMENT OF
CITIWIDE ADMINISTRATIVE SERVICES
Respondents.

DECISION
and ORDER

FILED JUDGMENT
County Clerk
To

EILEEN A. RAKOWER, J.S.C. :

Petitioner is employed by the New York City Transit Authority (City) as a bus operator. The New York City Department of Citiwide Administrative Services (DCAS) is the agency charged with administering civil service exams and establishing lists of eligible employees who passed those exams. In January, 2004, petitioner took a promotional exam for the position of "Dispatcher (Surface Transportation.)" The results of that exam were released on a certified list in March, 2006 and petitioner ranked number 72 on a list of 559 names. Petitioner expected to be promoted when his list number was reached, however, he has been advised by City that his promotion will not be approved due to his disciplinary record. He has now filed this Article 78 petition seeking an order from the court mandating that he be deemed eligible for promotion or, in the alternative, mandating that he be promoted or, remanding the matter back to City for further proceedings. Petitioner also seeks the costs, disbursements and attorney's fees associated with this proceeding.

Petitioner argues that his disciplinary record should not be a bar to his promotion. He states that there are other employees who have similar disciplinary records to his who have been promoted in spite of their records. Petitioner specifically names five others who he avers were promoted with disciplinary records that were the same of worse than his. Petitioner states that the source of his information regarding these other employees was a union delegate and his co-workers. He feels he is being treated unfairly and that there is no reason why others should receive better treatment

than him. He argues that if an administrative agency fails to adhere to its own precedents and reaches a different result when reviewing essentially the same facts, its actions are arbitrary. (*Matter of Lafayette Storage and Moving Corp.*, 77 NY2d 823 [1991]). He argues that City's action in denying him a promotion is unreasonable, arbitrary, capricious and an abuse of discretion.

DCAS argues that it does not participate in any way in the decision making process with respect to which candidate is chosen from the eligible list. It explains that its role in the process is to provide City with an official list of names for their consideration. City must then comply with Civil Service Law § 61 in the selection of eligible candidates. After City considers and selects a candidate for a vacancy, it must then provide DCAS with an explanation regarding what action it took with respect to each name on the certified list.

City argues that it has adhered to both Civil Service Law and the Personnel Rules and Regulations of the City of New York when filling vacancies for the Dispatcher openings. It states that petitioner's allegation that five similarly situated applicants received promotions when he did not is pure speculation and simply not true. City provides documentation to prove that all five of the individuals named by petitioner had better disciplinary records than he did. Additionally, none of the five were close to petitioner in ranking on the promotional list, none was considered at the same time petitioner was considered and, therefore, their situations are not relevant to him and did not impact on his candidacy.

Civil Service Law § 61 states, in relevant part:

(1) Appointment or promotion from eligible lists. Appointment 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 . . .

The Personnel Rules and Regulations of the City of New York § 4.7.1(c) states, in relevant part:

Appointment or promotion from an established eligible list

[* 4]

to a position in the competitive class shall be made by the selection of one of the three persons certified by the commissioner of citiwide administrative services . . . as standing highest on such established list who are qualified and willing to accept such appointment or promotion.

Together these provisions are known as the “one in three” rule. This rule enables a City agency that wishes to fill a vacancy from a promotional list of eligible candidates to consider a “cluster” of candidates, the next three highest ranked candidates on the list, and select the one it believes is best qualified. The promotional criteria is not merely an employee’s rank on an eligible list but the extent of the candidate’s disciplinary record, if any, is also considered. If a candidate is passed over during this “one in three” process, he will be considered again for the next two vacancies. If he is not chosen any of the three times that he is considered, his name is removed from consideration. A candidate for promotion may have his name restored to the list for consideration upon request.

A court may only interfere with the determination of an administrative agency if there is no rational basis or foundation in fact for the action complained of, and the exercise of discretion is arbitrary and capricious. Where a reviewing court finds that the administrative body has not acted arbitrarily but within its lawful authority, the court has no alternative but must confirm the determination. (*Matter of Pell v. Board of Educ.*, 34 NY2d 222. (1974)). The reviewing court may not substitute its judgment for that of the agency’s determination but must decide if the agency’s decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency’s determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269 [1972]).

There is a strong presumption that, in the exercise of its discretion, an employer acted appropriately with respect to its employees. When determining if an employer acted inappropriately, the issue is whether the employer acted in bad faith or with an improper motive. The burden is on the employee to demonstrate bad faith or improper motive. (*Bourne v. New York City Transit Authority*, 274 AD2d 581 [2nd Dept. 2000]; *Diaz v. Goldman*, 225 AD2d 344 [1st Dept. 1996]). Mere speculation is insufficient to meet that burden. (*Cortijo v. Ward*, 158 AD2d 345 [1st Dept. 1990]). Additionally, use of the “one in three” rule has been repeatedly approved of by appellate courts to

