

**Matter of Botero v New York City Civ. Serv.
Comm.**

2008 NY Slip Op 30426(U)

February 11, 2008

Supreme Court, New York County

Docket Number: 0103844/2007

Judge: Alice Schlesinger

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

Alice Schlesinger

IA Part 16

PRESENT: SCHLESINGER
Justice

PART 16

EDWARD BOTERO

INDEX NO. 103844/07

- v -

NYC CIVIL SERVICE COMMISSION

MOTION DATE _____

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

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, it is ordered that this motion

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 2415).

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: FEB 11 2008

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST RECEIPTS

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

-----X
In the Matter of the Application of

EDWARD BOTERO,

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

Petitioner, 141B.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and for an Order Pursuant to §290 et. Seq. Of the New York State Human Rights Law and §8-101 et. Seq. Of the New York City Human Rights Law

-against-

Index No. 103844/07
Motion Seq. No. 002

NEW YORK CITY CIVIL SERVICE COMMISSION and
NEW YORK CITY DEPARTMENT OF SANITATION,

Respondents.

-----X
SCHLESINGER, J.

Edward Botero wants very much to be a Sanitation Worker for the City of New York. And in fact as of April 10, 2006, he was well on his way toward achieving that result. He had taken and passed the Sanitation Worker Exam No. 2052 (May 10, 2003 and February 14, 2004), he had passed a physical agility test (July 2005), and he had passed a medical examination (October 2005). In fact, he seemed, as of April 7, 2006 to have passed a second medical examination given that day. He had taken an earlier one, which apparently had lapsed after 6 months. On that day he was referred to a laboratory to give a blood specimen, which he did three days later. But then a peanut butter and jelly sandwich got in the way of his quest.

Mr. Botero, at age 47, suffered from Type 2 diabetes, a condition which had been diagnosed in 1991 by his physician Dr. Marvin Leder. During the intervening years, Mr. Botero had seen this doctor monthly so as to control his illness. And he appears to

have been successful in that effort. He was able to control his diabetes with diet and daily oral medication without the need for insulin. As evidence of such, he had worked continually without incident since the diagnosis in jobs which included construction work from 1992 through 2003.

But then the peanut butter and jelly sandwich got in his way. He had planned to give blood later in the afternoon, but his boss told him to go right after his lunch. Therefore, in a result which his lawyer characterized as "aberrational," the blood sample indicated a glucose level of 242 mg/dl, whereas the normal or accepted range is 60 to 140 mg/dl.

On April 26, 2006, he was sent a notice which described the "problem" and told him that "In order to determine eligibility for employment, we need additional information, as outlined below." He was then given the results of the test for his "Type II D.M. - on oral meds - glucose 242" and informed that "we need - narrative report re: pt's status." In response, Dr. Leder, on May 1 mailed and faxed a note to Sanitation's Medical Division which read in its entirety:

Re Botero, Edward

This letter is to inform you that the above named patient is a well controlled diabetic and is able to work.

Please call if any questions.

The letter was signed and was sent along with more recent labs for Mr. Botero. Those were ordered by the physician and showed glucose of 82 mg/dl for April 13 and 98 mg/dl for May 18, 2006.

Dr. Leder was never contacted by respondent Department. Instead on May 22, 2006, Mr. Botero was found not qualified for medical reasons, described as

"uncontrolled diabetes."

Mr. Botero appealed to the New York City Civil Service Commission. The letter of June 8, 2006, constituting the appeal from his attorney, recited a full history of his diabetes. It explained the continuing monitoring from his doctor and by Botero himself daily with a portable monitor and suggested that the peanut butter and jelly sandwich a half-hour before the April 10 test was an explanation for the abnormal results.

The letter also annexed the later normal blood tests and two notes from Dr. Leder. The second note, dated June 1, 2006 referred the recipient to the attached blood test that "would confirm that his diabetic (sic) is under control and pt. is compliant on any medication."

On August 8, 2006, counsel supplemented his earlier letter with still more recent laboratory results of June 20, 2006 showing a glucose level of 61 mg/dl. The letter stated, "These test results confirm the statement in my June 8, 2006 letter of appeal to the Civil Service Commission that the results of the blood test administered to Mr. Botero on April 10, 2006 at the request of the Department of Sanitation were aberrational".

Finally, counsel requested that he be provided, on behalf of his client, any other medical documentation that the Department had which supported its decision of disqualification.

But the Department had no other information. Instead they responded to the appeal in a November 3, 2006 letter to the Commission from a Dr. Remy Obas. The entire thrust of the several lines dealing with Mr. Botero, as opposed to the rest of the letter dealing with the demands of the job of sanitation worker, as well as the dangers of diabetes, was the April 10 blood test which made it clear that his diabetes "was not controlled" (emphasis in

original). There was no serious attempt to deal with Mr. Botero's unblemished work history, nor the three more recent blood tests, nor the two notes from his personal physician, nor even the proffered peanut butter and jelly sandwich explanation. The letter concluded, "The DSNY maintains that Mr. Botero is not qualified for the position of Sanitation Worker." That apparently was enough for the Commission because, in a January 10, 2007 Notice it "affirmed" the determination, without further explanation.

Botero then commenced this Article 78 petition. Everyone agrees that the sole legal standard of review that this Court must apply is whether CSC's decision was "arbitrary and capricious," meaning it is "without a sound basis in reason." *Matter of Pell v. Board of Education*, 34 NY2d 222 (1974).¹

On the basis of the record before the CSC which relied exclusively on the opposition letter of November 3 from DOS which relied exclusively on the April 10, 2006 abnormal blood test and relied in no way or even discussed in a meaningful way all of the other evidence which supported Mr. Botero's position that his Type 2 diabetes was under control, I find that CSC's affirmance without explanation was arbitrary and capricious. I make this finding in light of the overwhelming evidence which seems not to have even been considered by CSC or the Department.

Rational decision making must show that relevant data has been noted and dealt with. Otherwise, there is no opportunity to comprehend the process. The evidence

¹On November 29, 2007, another Justice denied respondent's cross-motion to dismiss the petition, stating: "Petitioner properly plead its claim and there is some indication in the record that DOS's opposition to petitioner's appeal was based on the false assumption that petitioner was taking insulin to control his diabetes." This was based on Dr. Obas' November 3, 2006 letter wherein he spoke of the dangers to diabetics who require insulin for control. Of course, Mr. Botero had never taken Insulin.

overlooked was Mr. Botero's 15 year work history, in spite of his diabetes, without incident including 11 years of construction work, his never taking insulin, his ability to control the illness with diet and oral medication and continuous surveillance, his doctor's assessment that his diabetes was well-controlled and that he was compliant with his medications, and finally three additional blood tests showing readings well within the norm. In light of all of this, CSC's and the Department's reliance on one April 10 abnormal result, which could well have been aberrational was itself irrational.

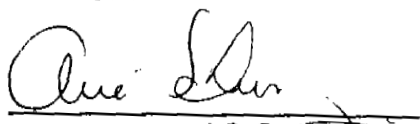
Accordingly, it is hereby

ADJUDGED that the petition is granted, respondent's decision of January 10, 2007 finding petitioner unqualified for medical reasons is annulled, and the matter is remanded for expeditious processing consistent with this decision.

This constitutes the decision and judgment of this Court.

Dated: February 10, 2008

FEB 11 2008


J.S.C.
ALICE SCHLESINGER

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).