

**Matter of Walton v Nassau County Civ. Serv.  
Commn.**

2008 NY Slip Op 31630(U)

June 5, 2008

Supreme Court, Nassau County

Docket Number: 3794-07/

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**

**PAUL D. WALTON.**

**Petitioner.**

**Sequence No.: 003**  
**Index No.: 003794/07**  
**XXX**

**- against -**

**NASSAU COUNTY CIVIL SERVICE COMMISSION.**

**Respondent.**

**For a Judgment pursuant to Article 78 of the CPLR.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Petition and Affidavits Annexed</b>	<b>X</b>
<b>Order to Show Cause and Affidavits Annexed</b>	
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	

Petitioner's application for an order pursuant to CPLR 7803 reversing the determination of the Nassau County Civil Service Commission (hereinafter "Commission") which disqualified petitioner from the Nassau County Correction Officer civil service competition list and upon such reversal directing that petitioner be reinstated to said list is denied and the petition dismissed.

The following facts are undisputed. In 2005 petitioner took and passed the competitive civil service examination for the position of Nassau County Correction Officer. On October 20, 2006 petitioner reported for a scheduled background investigation at which petitioner, *inter alia*, provided a urine sample for drug testing. Due to concerns that he had been exposed to second-hand marijuana smoke the night before the investigation, petitioner withdrew his application. On December 1, 2006 respondent Commission sent petitioner a letter which informed him that he was disqualified from the correction officer examination list "on the basis of disrespect for the process of law and order as evidenced by the use of an illegal substance after the examination." By letter dated December 8, 2006 petitioner requested a hearing at which he could testify under oath as to the amounts of second-hand smoke to which he had been exposed prior to the urine

test. Alternatively, petitioner requested additional time to submit evidence on his behalf.

On December 19, 2006 respondent Commission advised petitioner that his appeal was denied and that the original disqualification remained in effect. By letter dated December 23, 2006 petitioner's attorney asserted that past practice and custom dictated that petitioner be given additional time for a hearing or to perfect the appeal and that the Commission's determination was therefore arbitrary and capricious. On January 11, 2007 petitioner was granted additional time to perfect his appeal which he did by submissions dated January 12, 2007 which included an affidavit from petitioner relative to the second-hand marijuana smoke and four articles about the impact of second-hand marijuana smoke on creating false-positive urine test results. On February 8, 2007 respondent denied the appeal and notified petitioner that the disqualification remained in effect.

Petitioner thereafter made a request pursuant to the New York State Freedom of Information Act to inspect his file and disqualification minutes which was denied by letter dated February 22, 2007 on the grounds that said records are confidential. Petitioner's attorney disputed this in a letter dated February 23, 2007 in which he stated that because petitioner's background investigation had yet to commence, there were no confidential investigation reports contained therein. On February 27, 2007 the Commission provided the requested minutes to petitioner but refused to provide the other requested records.

Petitioner commenced the instant proceeding pursuant to CPLR Article 78 seeking the relief set forth above. Respondent has answered and its objections in point of law all pertain to the merits herein and are not of a procedural nature.

Petitioner asserts that respondent's disqualification and denial of his appeal was arbitrary and capricious on the grounds that the sole reason for petitioner's disqualification was the positive marijuana test despite the fact that: 1) petitioner had averred under oath that he never smoked or used marijuana after he filed his application and took his examination; and 2) as set forth in the four articles submitted with petitioner's appeal, although difficult, exposure to second-hand marijuana smoke could lead to a false-positive test result for up to ten days following said exposure. The articles, copies of which are annexed to the affirmation include one each from Oregon State University's Student Health Services Office, Columbia University's health "Q & A" internet service, a newsletter from Charles Wibbelsman, M.D., and The San Jose Mercury News. In his affidavit submitted to the Commission petitioner averred that he was exposed to more second-hand smoke than that set forth in the four articles and that he gave his urine sample less than twelve hours after said exposure. Further, petitioner's attorney affirms that in one instance which occurred while he served as the Nassau County Civil Service Commissioner that the Commission accepted the explanation that an applicant had eaten a roll with poppy seeds prior to his urine test which resulted in a positive finding for opiates.

In opposition respondent Commission asserts in relevant part that where, as here, it relies upon the determination of its medical personnel who are authorized by law to make such

determinations in making its findings, such reliance is not to be considered arbitrary or capricious. Annexed to respondent's opposition papers is a copy of its investigator's findings that petitioner failed the drug test (the results of which are undisputed), and the memorandum of its Medical Director, Dr. M. Tapply in which he asserts that a recent study refutes the feasibility of any passive inhalation defenses to a failed test for the presence of marijuana. As set forth above, the sole basis of petitioner's appeal was that he did not use, but was secondarily exposed to marijuana.

A proceeding pursuant to Article 78 may be brought to determine whether the governing body 1) failed to perform a duty imposed upon it by law; 2) proceeded in excess of its jurisdiction; 3) made a determination in violation of law; and 4) made a determination not supported by substantial evidence in the record before it. CPLR §7803(1-4). The court may only nullify and void the body's determination when it finds that there is no rational basis for same or that the determination is arbitrary or capricious. See, Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Commission has wide discretion in determining the fitness of candidates for service in law enforcement. Stephens v. Suffolk County Department of Civil Service, 15 A.D.3d 589 (2<sup>nd</sup> Dep't 2005). The court, in determining a petition such as the instant one, will not choose between diverse positions as such is the Commission's responsibility and as long as the Commission acts reasonably, the court will not interfere with such reliance. See, Thomas v. Straub, 29 A.D.3d 595 (2<sup>nd</sup> Dep't 2006); Winneger v. County of Suffolk, 13 A.D.3d 382 (2<sup>nd</sup> Dep't 2004); McCabe v. Hoberman, 33 A.D.2d 547 (2<sup>nd</sup> Dep't 1969). Nothing in the record herein indicates that the Commission acted unreasonably in relying on the determination of its medical director.

Accordingly, the application for the relief sought in the petition is denied and the petition is hereby dismissed.

So Ordered.

Dated: June 5, 2008

  
**ENTERED**

JUN 11 2008  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE