

**Matter of City of New York v New York City Civ.
Serv. Commn.**

2009 NY Slip Op 30712(U)

March 24, 2009

Supreme Court, New York County

Docket Number: 402388/08

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN

PART 57

Index Number : 402388/2008

CITY OF NEW YORK

VS.

CIVIL SERVICE COMMISSION

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. 402388/08

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1

2

3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Memos of Law M1-M3

Upon the foregoing papers, it is ordered that this motion *is*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

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

Dated: 3-24-09

Marcy S. Friedman

MARCY S. FRIEDMAN, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
In the Matter of the Application of

THE CITY OF NEW YORK, MARTHA K. HIRST, as Commissioner of the New York City Department of Citywide Administrative Services, and RAYMOND W. KELLY, as Commissioner of the New York City Police Department,

Index No.: 402388/08

DECISION/ORDER

UNFILED JUDGMENT
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Petitioners,
For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules.

- against -

THE NEW YORK CITY CIVIL SERVICE COMMISSION and HECTOR D. MORALES,

Respondents.

_____ x

This is an Article 78 proceeding in which petitioners, the City of New York ("City"), Martha K. Hirst, as Commissioner of the New York City Department of Citywide Administrative Services ("DCAS"), and the Raymond W. Kelly, as Commissioner of the New York City Police Department ("NYPD"), seek an order setting aside a determination by the New York City Civil Service Commission ("CSC"), dated May 28, 2008, which reversed NYPD's determination that respondent Hector D. Morales did not possess the requisite character and was not qualified for the position of police officer. Respondent CSC opposes the petition.

Respondent Morales applied for the position of NYPD police officer and, after taking and passing the civil service exam on February 12, 2004, was placed on the eligible list of candidates.

[* 3]

(Ex. B to Petition [CSC Hearing Transcript] at 7.) On March 12, 2006, Morales was arrested for assault and other offenses for throwing a glass at an individual at a nightclub and causing injuries to two people. (Id., Ex. E.) By letter dated January 15, 2008, NYPD disqualified Morales for the position, based on his character, as a result of its investigation into his arrest. (Id., Ex. L.) Morales appealed his disqualification to CSC which conducted a hearing on the matter on April 24, 2008. (Id., Ex. B.) At the hearing, CSC permitted respondent's father Angel Morales, a retired NYPD Sergeant, to testify in support of respondent's character, over NYPD's objection that this testimony would be new evidence that was not before NYPD. (Id., Ex. B at 5-6.) In a decision dated May 28, 2008, CSC reversed NYPD's disqualification of Morales. (Id., Ex. A.)

It is well settled that "the standard of judicial review of the Civil Service Commission's action under Civil Service Law § 50(4) is whether that body's action was arbitrary or capricious, or an abuse of discretion." (City of New York v O'Connor, 9 AD3d 328, 329 [1st Dept 2004] lv denied 3 NY3d 611. See generally Matter of Pell v Board of Educ. of Union Free School Dist., 34 NY2d 222, 232 [1974].)

The parties dispute whether CSC was acting within its discretion in conducting a de novo hearing of Morales' disqualification. CSC also asserts that the petition is moot because the list of eligible candidates that Morales was on has since expired.

DCAS, as the agency "empowered to administer the civil service laws, including those regarding the qualifications of candidates for employment . . . has delegated this authority with respect to . . . qualification of police officer candidates to the NYPD." (City of New York v New York City Civ. Serv. Commn. [Ciacciullo], 6 NY3d 855, 858 n [2006]. See also Matter of Hughes v Doherty, 5 NY3d 100 [2005].) Conversely, it is settled that CSC's powers are limited to that of an appeals board and it "may only 'affirm, modify or reverse'" a determination by a municipal

department such as the NYPD. (Matter of Dept. of Personnel of the City of New York v New York City Civ. Serv. Comm., 79 NY2d 806, 807 [1991].)

The Court of Appeals in Ciacciullo did not squarely address the issue of whether a de novo hearing may be proper. Rather, it did not permit DCAS to contest CSC's authority to conduct a de novo hearing because DCAS failed to make this objection at the time of the original proceeding. However, the Appellate Division of the First Department held, in an opinion that was affirmed on other grounds, that "the Civil Service Commission is not empowered to decide [a] matter de novo." (Ciacciullo, 20 AD3d 347, 348 [1st Dept 2005] affd on other grounds 6 NY3d at 855.) It also held that when reviewing NYPD's disqualification of an applicant for police officer, CSC's consideration should be confined to "whether there was a rational basis to support the Police Department's determination that respondent was not qualified." (Id.) The court equated that standard of review with "the judicial standard applicable in article 78 proceedings." (Id.)

The Appellate Division holding in Ciacciullo is controlling where, as is the case here, NYPD promptly objects to CSC's power to decide a matter de novo. (Compare Ciacciullo, 6 NY3d at 858; Matter of Garayua v New York City Police Dept., 98 NY2d 970 [1986].)

At the hearing, Nelson Rosa, a sergeant in NYPD's Applicant Processing Division ("APD") who oversees investigations of potential candidates, testified in support of NYPD as to the basis for its disqualification. Rosa explained that police officers need to have "a sense of self control" and show "discipline in heated situations." (Petition, Ex. B at 32-33.) He testified that the purpose of NYPD's candidate background investigations is to ensure that these applicants, who receive firearms, are qualified for the position. (Id. at 28.) Rosa stated that in making its determination, NYPD considered Morales' guilty plea to harassment, his age at the time of the arrest, the recent date of the arrest, and the violence of the act. (Id. at 29-30.) Rosa further testified that Morales' disqualification was based on the results of a background investigation conducted by Sergeant

Eugene Walsh. (*Id.* at 30-31.) Specifically, NYPD considered a memo that Walsh prepared on the results of his investigation, indicating that he had interviewed the complainant and the arresting officer, and describing the assault as violent and resulting in injuries that required 15 stitches. (Petition, Ex. I.) Based on these factors, NYPD decided that Morales was not qualified for the police officer position.

On this record, there was a rational basis for NYPD's finding that Morales did not meet its character requirements for the position of police officer. NYPD had the wide discretion to rely on its experts in determining whether to disqualify Morales as a potential candidate. (*See Ciacciullo*, 20 AD3d at 348.) Contrary to CSC's contention, NYPD also gave Morales an opportunity, prior to his disqualification, to submit proof of or explain his qualifications to be a police officer, to which he responded with a personal letter and a character letter from his father. (Petition, Exs. J, K.) Moreover, the testimony of Angel Morales, whether or not he was a biased witness as petitioner contends, does not support a finding that NYPD's decision was irrational.

Finally, contrary to CSC's contention, this case is not moot based on the expiration of Civil Service Exam No. 3007 under which Morales was disqualified. As petitioner shows, Morales took and passed Exam Number 6093 and is eligible on a list for that exam until its expiration on December 28, 2011. (*See Aff. of Winslow Mentor*, Ex. AA to Petitioner's Reply.) The court has considered CSC's remaining contentions and finds them without merit.

It is accordingly hereby ORDERED that the petition is granted to the extent of annulling the determination of the New York City Civil Service Commission dated May 28, 2008.

This constitutes the decision and judgment of the court.

Dated: New York, New York
March 24, 2009



UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. To
obtain entry, the filer or his/her representative must
appear in person at the County Clerk's Desk (Room
1412).