STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
KENNETH BRYNIEN, as President of the
NEW YORK STATE PUBLIC EMPLOYEES
FEDERATION, AFL-CIO, ROBERT LOWINGER,
and on behalf of themselves and others similarly situated,

Petitioners,

-against-

DECISION and ORDER
INDEX NO. 2144-09
RJI NO. 01-09-ST0074

THE NEW YORK STATE DEPARTMENT OF CIVIL
SERVICE; and NANCY GROENWEGEN, as Commissioner;
NANCY GROENWEGEN, CAROLINE W. AHL, and
STELLA CHEN HARDING, together constituting the
NEW YORK STATE CIVIL SERVICE COMMISSION;
and DAVID PATTERSON, as Governor of the State
of New York,

Respondents.

Supreme Court Albany County Special Term, July 2, 2009

APPEARANCES:

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TERESI, J.:

Petitioners commenced the instant article 78 proceeding challenging a determination of the respondent Civil Service Commission which reclassified 29 civil service titles from the competitive class to the non-competitive class. The titles all involve licensed and certified medical professionals including physicians, psychiatrists, dentists and veterinarians. The reclassification affects almost 1700 incumbents, as well as a large number of vacancies. Petitioners have also moved for leave to substitute J. Dennis Hanrahan as a member of the Civil Service Commission in place of respondent Stella Chen Harding, who was named a party respondent in error. There being no opposition to such motion, and it appearing that proposed respondent Hanrahan was served with the notice of petition and petition, such relief is granted nunc pro tunc.

Respondent Civil Service Commission voted to reclassify the subject titles based upon staff recommendations that the existing training and experience examination for competitive appointment was redundant due to the licensing and certification requirements for medical professionals. Respondents reasoned that all medical professionals were already required to undergo many years of schooling, as well as passing rigorous licensing and certification examinations and requirements. As such, the mere fact of licensing and certification established the qualifications and merit for employment by the state without any need to require applicants to undergo additional similar testing. They further contended that the training and experience examination did not provide a meaningful test of an applicant's abilities, merit or fitness for the positions and further, that the current procedures led to delays in hiring professionals, making it more difficult for the State to compete with the private sector for qualified employees in medical fields. While the instant proceeding is limited to the subject 29 titles, denial of the petition would be likely to have broad implications, justifying reclassification of essentially all licensed and certified professionals in the civil service

of this State.

Judicial review herein is limited, with petitioners bearing the burden of proving that the determination was arbitrary and capricious, affected by an error of law or an abuse of discretion. Therefore, if there is a rational basis for the classification as non-competitive, it will be upheld (*see Matter of Benson v New York State Dept. of Civ. Serv.*, 296 AD2d 816, 817-818 [3d Dept 2002]; *Matter of Benson v McCaul*, 268 AD2d 756, 757 [3d Dept 2000]; *Matter of Condell v Jorling*, 151 AD2d 88, 92 [3d Dept 1989]). Moreover, respondents' determination is entitled to substantial deference (*see Matter of Benson v New York State Dept. of Civ. Serv.*, 296 AD2d at 818; *Matter of Benson v McCaul*, 268 AD2d at 757).

However, there is a significant constitutional preference for competitive classification (N.Y. Const., art. V, § 6) as "a reflection of our citizens' insistence that competence, rather than cronyism, should determine civil service appointments" (*McGowan v Burstein*, 71 NY2d 729, 733 [1988]) and "because it provides, presumably, an objective and verifiable measurement of the candidates' merit" (*McGowan v Burstein*, 71 NY2d at 734).

> "'Exemption is the exception and is constitutionally permissible only when it is established that a competitive examination is not practicable. Practicability denotes the ability to *objectively* and "fairly test the relative capacity and fitness of the applicants to discharge the duties of the service to which they seek appointment" ... and begins with an analysis of the nature and character of the duties involved in the performance of a particular position ...
>
> Essentially, there are two different bases upon which impracticability can be asserted: (1) because of the confidential character of the position, or (2) because the nature of the duties involved is such that a competitive examination is an insufficient method "to fully and fairly determine the merit and fitness of the contemplated employee"' (emphasis in original)." (*Matter of Shafer v Regan*, 171 AD2d 311, 313 [3d Dept 1991] affd 80 NY2d 1006 [1992] quoting *Matter of Condell v Jorling*, 151 AD2d at 93).

Furthermore, once petitioners have met their initial burden, respondents are required to provide

objective evidence supporting their determination, rather than basing it upon conclusory and subjective claims (*see Matter of Shafer v Regan*, 171 AD2d at 314; *Matter of Condell v Jorling*, 151 AD2d at 93). This requirement is especially pertinent in the instant proceeding as respondents have acted to change the long standing administrative policy of applying a training and experience examination to competitively rank candidates for the subject titles. Under such circumstances, respondents must set forth specific reasons for reaching a different result or establish a significant change in the underlying facts (*see Matter of Charles A. Field Delivery Serv., Inc.*, 66 NY2d 516, 516-517 [1985]).

Respondents have failed to show any change whatsoever in the nature of the duties performed by the persons in the subject titles which might support a change in testing requirements. They have also failed to show any change in circumstances or offer any valid explanation as to why a training and experience examination is no longer relevant. Rather, they contend that there is no need to give a subject based test similar in content and scope to the licensing and or certification tests given to medical professionals, and that any such test would be redundant. They have made entirely conclusory assertions that a training and experience examination adds little to a determination of the qualifications and merit of candidates and does not guarantee that the candidate with the higher score will be more qualified.

Respondents have offered little information with respect to the history of using training and experience examinations to rank civil service candidates for competitive class positions. Research into reported cases indicates that such examinations have been in use for at least ten years (*see Matter of Benson v McCaul*, 268 AD2d at 759). However, to call them examinations appears to be a misnomer. In fact, the training and experience examination merely gives additional points over

the minimum qualifications for the position based upon factors such as additional education, residencies, fellowships, teaching experience and work experience as listed on the employment application. Respondents have not offered any explanation as to why a training and experience rating is of little or no value with respect to medical professionals and it is unclear whether they are attempting ultimately to eliminate all such examinations or whether their claims are limited to the medical field. While they have made conclusory assertions that training and experience will not guarantee the best candidate (no competitive examination will guarantee the best candidate), there is no factual basis for a conclusion that all other things being equal, the candidate with the most training and experience is not likely to be more qualified. Furthermore, respondents' own job descriptions clearly indicate that work experience is a major factor with respect to a candidate's qualifications. For essentially all of the positions with different designated levels, with accompanying increases in salary and duties, the major distinguishing factor is the number of years of work experience. It is therefore determined that respondents' contention that training and experience are of little value in ascertaining the merit and fitness of candidates for employment in the medical professions has no factual basis and is inconsistent with longstanding administrative policy and published job descriptions.

In addition, respondents must show that no competitive examination is practicable. At best, they have alleged that a comprehensive subject based test is redundant and that a training and experience test is ineffective. However, there is no proof whatsoever that because the nature of the duties involved in the subject titles, no other form of objective, competitive testing is feasible to determine the merit and fitness of employment candidates.

Respondents also rely upon the entirely conclusory claim that the current application of a

training and experience examination causes significant delay in the hiring of candidates, giving rise to serious problems in filling vacancies in the medical professions. Such claim has nothing to do with the feasibility or practicability of testing candidates to determine their merit and fitness for state employment, and as such is not a proper consideration. Even if it were, the claim is not supported by any evidence and appears to be inconsistent with the actual facts. As noted above, the training and experience "examination" is merely a ranking of factors which would be included in any proper resume or employment application. There is no evidence that such grading or ranking would take more than a few minutes. Moreover, the subject positions are under "continuous recruitment" with the names of candidates added to the eligible list regardless of the date they took the "examination," that is, immediately upon application. Respondents have not shown that such information could not be made available to all employing agencies almost instantaneously via computer databases and have not identified any other source of actual delay. The Court therefore finds that respondents had no factual or rational basis for their determination that competitive testing was not practicable for the subject medical titles.

Accordingly, the petition seeking a judgment vacating the determination to reclassify the 29 titles from competitive class to non-competitive class is granted.

This Decision and Order is being returned to the attorneys for the petitioners. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: July 25, 2009
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated March 19, 2009; Petition, verified March 20, 2009, with Exhibits A-K annexed;
2. Notice of Motion to substitute party dated March 25, 2009; Affirmation of Edward J. Aluck, Esq. dated March 25, 2009, with Exhibit A annexed;
3. Answer verified May 29, 2009;
4. Affidavit of Judith I. Ratner, Esq. sworn to May 26, 2009, with Exhibits A-J annexed;
5. Reply Affidavit of Arlene Zilkowski sworn to June 24, 2009, with Exhibits A-C annexed.