

Matter of Yan Yam Koo v Cestero

2009 NY Slip Op 32100(U)

September 10, 2009

Supreme Court, New York County

Docket Number: 107445/09

Judge: Eileen A. Rakower

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

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PART 5

Index Number : 107445/2009

KOO, YAN YAM

VS.

CESTERO, RAFAEL E.

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**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 based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/10/09


HON. EILEEN A. RAKOWER

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 5

-----X
In the Matter of the Application of
YAN YAM KOO,

Petitioner,

-against-

Index No.
107445/09

Mot. Seq.
001

RAFAEL E. CESTERO, as Commissioner of the New
York City Department of Housing Preservation and
Development, BERNARD SCHWARTZ, as Deputy
Commissioner of the New York City Department of
Housing Preservation and Development, SIMON P.
GOURDINE, as Commissioner of the New York City
Civil Service Commission, THE NEW YORK CITY
CIVIL SERVICE COMMISSION, MARTHA HIRST,
as Commissioner of the New York City Department of
Citywide Administrative Services, Division of Citywide
Personnel Services, THE NEW YORK CITY
DEPARTMENT OF CITYWIDE ADMINISTRATIVE
SERVICES, DIVISION OF CITYWIDE PERSONNEL
SERVICES and the NEW YORK CITY DEPARTMENT
OF HOUSING PRESERVATION AND
DEVELOPMENT,

DECISION
and ORDER

UNFILED JUDGMENT

**The 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).**

Respondents.

-----X
HON. EILEEN A. RAKOWER:

Yan Yam Koo ("Petitioner") brings this petition pursuant to Article 78 of the
CPLR for a judgment invalidating the May 11, 2009 decision of Respondent
Schwartz, Deputy Commissioner of the New York City Department of Housing
Preservation & Development ("HPD") to terminate Petitioner from the position of
Inspector (Housing) at HPD.

The record indicates that Petitioner was appointed as an Inspector (Housing) at HPD on May 15, 2004. Petitioner was not appointed from a civil service list, as none existed at the time. A civil service examination for the position of Inspector (Housing) was held in January 2008, from which a list of eligible candidates for the position was generated. Petitioner passed the examination and was placed at number 86 on the list of eligible candidates. As a result of passing the examination and being placed on the list, Petitioner was interviewed by HPD on May 11, 2009. However, HPD decided not to appoint Petitioner as a permanent employee. Accordingly, HPD terminated Petitioner by letter dated May 11, 2009.

Petitioner subsequently commenced this Article 78 proceeding. Petitioner submits a verified petition. Annexed to the petition as exhibits are employee performance evaluations of Petitioner; Petitioner's 2/25/04 letter of appointment to the Inspector (Housing) position; Petitioner's 1/30/09 certification that he passed the civil service examination for permanent employment; a 2/18/09 letter from HPD confirming Plaintiff's certification; a clipping from a Chinese-language publication titled *New World Journal*; an employee performance appraisal form; and the 5/11/09 termination letter.

Respondents submit a verified answer and a memorandum of law in support of their answer. Annexed to the answer as exhibits are Petitioner's Department of Citywide Administrative Services Personnel Document; the affidavit of Karen Allen, Director of HPD's Office of Staffing Management; and the 5/11/09 termination letter.

The judicial review of an administrative determination is limited to the grounds invoked by the agency. (*Lindemann v. American Horse Shows Assn.*, 222 A.D.2d 248 [1st Dept. 1995]). 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 [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]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222 [1974]). The petitioner has the burden of establishing that the actions of the agency were

* 4]
arbitrary and capricious. (see *Royal Realty Co. v. New York State Division of Housing and Community Renewal*, 161 Ad2d 404[1st Dept. 1990]).

Civil Service Law §65, subsection (1) allows for provisional appointments for filling vacancies in competitive classes where there is no appropriate eligible list available. However, subsection (2) limits the time for provisional employment to a period of nine months. In addition, subsection (2) provides that a municipal civil service commission “shall for competitive positions within its jurisdiction, order a civil service examination for any position held by provisional appointment for a period of one month,” and shall conduct an examination as soon as practicable thereafter. Subdivision (3) provides that provisional appointments are to be terminated “within two months following the establishment of an appropriate eligible list for filling vacancies in such positions....”

Petitioner argues that his termination was improper because it was effectuated in violation of the Civil Service Law. Specifically, Petitioner notes that he was employed as a provisional employee for over five years, despite the nine month limit established by Civil Service Law §65(2). Petitioner also points to the fact that he passed the civil service examination, once it was administered, and that other eligible candidates who did not place as highly as Petitioner were offered employment.

The Court of Appeals has observed that provisional appointments

are mere stop-gaps, exceptions of necessity to the general rules with respect to the filling of such positions and while such appointments may on occasion be succeeded by a permanent appointment, this may only be true by virtue of examination and eligibility under the civil service laws, and not by reason of any ripening of the temporary or provisional appointment into a permanent appointment.

(*City of Long Beach v. Civ. Serv. Empls. Assoc., Inc.*, 2007 NY Slip OP 3755, *4 [2007]) (quoting *Koso v. Greene*, 260 N.Y. 491, 496 [1933]). Further, courts have specifically held that violation of Civil Service Law §65(2)'s nine-month limit to provisional employment does not entitle a provisional employee to permanent

[* 5]
employment (see *Haynes v. County of Chautauqua*, 55 N.Y.2d 814, 816 [1981]; *D'Amico v. Nassau County Civ. Serv. Comm.*, 208 A.D.2d 532 [2nd Dept. 1994]).

Moreover, the fact that Petitioner passed the examination and was not offered permanent employment while others who did not place as high as Petitioner were offered permanent employment is insignificant. "Examination scores are not the sole determinant of fitness, as 'the appointing authority must be cloaked with the power to choose a qualified appointee who possesses all the attributes necessary for the responsible performance of his duties'" (*Gomez v. Hernandez*, 2008 NY Slip Op 3143, *1 [1st Dept. 2008]) (quoting *Cassidy v. Mun. Civ. Serv. Comm.*, 37 N.Y.2d 526, 529 [1975]).

Accordingly, as Petitioner remained a provisional employee, he could be terminated without a hearing and for any reason or for no reason, provided the termination was in good faith and not predicated upon an impermissible motive (see *Montero v. Lum*, 68 N.Y.2d 253, 261 [1986]) (citations omitted).

Wherefore it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: September 10, 2009



EILEEN A. RAKOWER, J.S.C.

UNFILED JUDGMENT
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