

Matter of Deblasio v Gourdine

2010 NY Slip Op 30119(U)

January 14, 2010

Supreme Court, New York County

Docket Number: 108568/09

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN

PART 11

J.S.C.

Index Number : 108568/2009

DEBLASIO, MATTHEW

INDEX NO. _____

vs

GOURDINE, SIMON

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 proceeding is determined in accordance with the annexed decision, order and judgment.

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be given hereon. To obtain entry, counsel for the party whose name appears in person at the County Clerk's Desk (Room

Dated: Jan. 14, 2010

HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
In the Matter of an Article 78 Proceeding:
MATTHEW DEBLASIO,

Petitioner,

Index No.: 108568/09

SIMON GOURDINE, CHAIRMAN OF THE NEW YORK
CITY CIVIL SERVICE COMMISSION, NEW YORK
CITY CIVIL SERVICE COMMISSION and NICHOLAS
SCOPETTA, COMMISSIONER OF THE NEW YORK
CITY FIRE DEPARTMENT,

Respondents.

UNFILED JUDGMENT
This judgment has not been filed in the County Clerk's Office and notice of entry of judgment has not been given to the parties.
Clerk of the Court
County of New York
Date: 10/12/09

MADDEN, J.:

This is an Article 78 proceeding commenced by petitioner, Matthew Deblasio. Petitioner seeks to vacate a determination by the New York City Civil Service Commission (CSC) that affirmed the decision of the Fire Department of the City of New York (FDNY), which found that petitioner was medically unqualified to serve as a firefighter. Petitioner contends that the decision to disqualify him from becoming a firefighter was arbitrary, capricious, unlawful and discriminatory. In the alternative, petitioner seeks an order directing that a hearing be scheduled to prove that any alleged disability would not prohibit his ability to work as a firefighter. Petitioner also seeks an order immediately staying and prohibiting the expiration or termination of New York City Civil Service Examination Number 6019, List Number 708, pending the determination of this proceeding.

Petitioner successfully passed civil service examination number 6019 in order to become a firefighter with the FDNY and was placed on the eligible list. Following his placement on the eligible list, petitioner was required to undergo a medical examination in order to ensure that he

was physically able to perform the duties associated with this position.

On April 16, 2008, petitioner was examined at the Bureau of Health Service (BHS), which is supervised by the FDNY's Chief Medical Officer, Dr. Kerry Kelly (Dr. Kelly). BHS monitors the medical conditions of the FDNY's firefighters as well as candidates hoping to join the Department. At the examination, petitioner was administered a pulmonary function test.

Subsequently thereafter, petitioner was notified that his pulmonary function test results were abnormal. Petitioner's Forced Expiratory Volume (FEV), a test utilized to measure lung capacity, was 72%, and the Functional Vital Capacity (FVC), a test which measures the amount of air a candidate can exhale in one second, was 83%. According to respondents, a result below 80% on either test is abnormal. Dr. Kelly found that the FVC result was "borderline" and that petitioner failed the FEV test. Dr. Kelly noted that the test results were unacceptable and suggestive that petitioner has an obstructive lung disease.

Due to the abnormal pulmonary function test results, petitioner was directed to undergo a methacholine challenge test to evaluate how he would respond to a lung irritant. As a result of this test, Dr. Kelly found that petitioner continued to show borderline FVC results of 80% with FEV results at 78% and 77%, which are below the acceptable result of 80%. The test had a bronchodilator effect of 11% which is consistent with baseline bronchoconstriction.

BHS reviewed petitioner's pulmonary function test and methacholine test and concluded that, based upon his pulmonary respiratory condition, petitioner was not qualified to become a firefighter.

Petitioner appealed the disqualification to the CSC. Prior to submitting the FDNY's response for the appeal, Dr. Kelly consulted with Dr. Michael Weiden, the FDNY's pulmonary

specialist. In Dr. Kelly's September 26, 2008 response to the appeal disqualification, she reported that Dr. Weiden found petitioner to have a significant bronchodilator response and that, therefore, petitioner was not a candidate for employment as a firefighter. Dr. Kelly noted that petitioner exhibited significant abnormalities on multiple pulmonary function testing, and that due to the demanding environment which firefighters work in, she felt that petitioner was not qualified for the position.

In support of his appeal, petitioner submitted a pulmonary function test report dated June 10, 2008, which was administered by Dr. Vinay Sikand; a letter dated September 4, 2008 submitted from Dr. Sikand, resubmitting his earlier pulmonary function test report with revisions; and a pulmonary function test report dated September 18, 2008, which was administered at New York University Medical Center's Rusk Institute. Dr. Sikand's letter stated that petitioner's pulmonary function test was normal and that there was no evidence of asthma.

Respondents contend that although Dr. Sikand's results of the June 10, 2008 pulmonary test showed higher percentages than the BHS's tests, at the time which this test was conducted, petitioner was utilizing Proventil, a medication that enhances respiratory function. Respondents also point out that Dr. Sikand's report notes that petitioner has evidence of early obstructive pulmonary impairment, such as a mild degree of airway disease or the earliest stages of emphysema. Although petitioner contends that the June 10, 2008 pulmonary function test administered by Dr. Sikand, inadvertently included information which did not pertain to him, he does not specify which information was incorrect and does not include an affidavit from Dr. Sikand which explains the confusion.

Respondents note that, at the pulmonary test performed at New York University Medical

Center's Rusk Institute, petitioner did not experience a bronchodilator response, but had an elevated residual volume of 138%, which is present in individuals with a reactive airways disease.

On February 18, 2009, the CSC affirmed the determination of the FDNY and found that petitioner failed to meet the medical requirements necessary to become a firefighter.

"In the context of a CPLR article 78 proceeding, it is well settled that judicial review is limited to a determination of whether the administrative action was arbitrary and capricious or lacks a reasonable basis. Where such a rational basis exists, an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions are entitled to great deference." *Matter of Arif v New York City Taxi & Limousine Commn.*, 3 AD3d 345, 346 (1st Dept 2004) (citations omitted).

Here, petitioner fails to demonstrate how the determination to deny his application was arbitrary or capricious. The determination of the respondents was based upon medical documentation and examinations, and Dr. Kelly's findings discuss the various pulmonary tests completed and the records which she reviewed.

Although petitioner contends that Dr. Sikand's test results regarding his pulmonary ability differ from those results determined by the FDNY, the First Department has held that when conflicting medical opinions exist, an agency's decision to rely upon its own medical results does not render the decision arbitrary or capricious. *See In re Altieri v City of New York Civ. Serv. Commn.*, 57 AD3d 248, 248 (1st Dept 2008) (the conflicting opinion of petitioner's treating medical physician does not show that respondent acted illegally, capriciously, or adopted a professional opinion not founded on a rational basis); *In re Rivers v New York City Dept. of*

Sanitation, 49 AD3d 436, 436 (1st Dept 2008) (respondents are entitled to rely on the conclusions of respondent Department of Sanitation's medical director despite conflicting opinions from petitioner's physicians). Therefore, despite the conflicting findings presented by Dr. Sikand and Dr. Kelly, the FDNY's reliance on Dr. Kelly's determination was neither arbitrary or capricious.

In his reply papers, petitioner contends that Dr. Kelly is not a pulmonologist and cannot offer an opinion outside her area of expertise. Nevertheless, Dr. Kelly is the Chief Medical Officer of the BHS, has served in that capacity since December 1993, and is in charge of monitoring the medical condition of the FDNY's firefighting personnel and future candidates. Petitioner fails to demonstrate how Dr. Kelly's experience makes her unqualified to render decisions regarding an applicant's medical capacity.

Petitioner also questions why Dr. Kelly contacted Dr. Weiden, a pulmonologist, during the appeal process, and after the FDNY issued its original decision to disqualify petitioner. However, there is no evidence presented by petitioner which suggests that Dr. Kelly was unable to render an opinion by herself regarding medical qualifications, or that the original determination to disqualify petitioner was improper or not based upon valid medical documentation.

Petitioner alleges that respondents' disqualification is discriminatory and is in violation of Article 15, sections 292 and 296 of the Executive Law of the State of New York. Petitioner contends that the denial for the position was based upon an alleged disability and that there has been no determination that he cannot perform the reasonable requirements of working as a firefighter. However, respondents have described the medical testing process, the vigorous

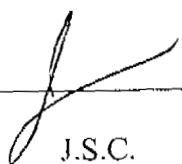
training, the unique and dangerous physical environment in which firefighters work, and the high medical standards needed for an applicant to successfully gain employment as a firefighter. There is no evidence presented by petitioner which substantiates his allegation of discrimination or which refutes that his disqualification for the position was not based upon the medical evidence.

Therefore, because petitioner fails to demonstrate that the decision of the CSC was arbitrary, capricious, illegal, or discriminatory, petitioner's application must be denied.

Accordingly, it is

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

Dated: January 14, 2010

ENTER: 
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain a copy, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).