

Wallace v NYC Civ. Serv. Commn.

2010 NY Slip Op 30212(U)

January 27, 2010

Supreme Court, New York County

Docket Number: 402178/2009

Judge: Joan B. Lobis

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Jean B. Lewis
Justice

PART 6

Index Number : 402178/2009
WALLACE, ROBERT N.
vs.
NYC CIVIL SERVICE COMMISSION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 11/19/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED
1-7
8-19
20

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

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 147B).

Dated: 1/27/10

JBL
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**

-----X

In the Matter of the Application of
ROBERT N. WALLACE,

Petitioner,

Index No.: 402178/09

- against -

Decision, Order, and Judgment

NYC CIVIL SERVICE COMMISSION and
SIMON P. GOURDINE,

Respondents.

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).

JOAN B. LOBIS, J.S.C.:

Petitioner Robert N. Wallace, proceeding pro se, brings this Article 78 proceeding seeking to reverse the decision and order of the New York City Civil Service Commission (the "Commission"), dated July 24, 2009, which confirmed the determination of the New York City Department of Correction (the "Department"), finding petitioner unfit for the position of Correction Officer.

Petitioner took Civil Service Examination No. 6023 (the "Examination"), for the position of Correction Officer in the City of New York. He passed the examination and was ranked as number 576 on the eligible list from the Examination. As part of the application process, petitioner was also required to submit to an employment background investigation. On or about January 3, 2008, he was administered a battery of psychological tests to determine his suitability for the position. One test, the Minnesota Multiphasic Personality Inventory ("MMPI-2"), revealed elevated scores for the personality characteristic of poor credibility. On June 18, 2008, the Department staff psychologist Joseph E. Stack, Ph.D., interviewed petitioner and reviewed

information obtained by a Department investigator assigned to conduct petitioner's background check, including information on file with the New York City Police Department ("NYPD") concerning petitioner's prior application for the position of Police Officer.¹ According to information on file with the NYPD, in 1994, petitioner and another man were arrested and charged with Manslaughter in the First Degree after assaulting an individual who died the next day due to a ruptured liver as a result of the attack. The arresting officer recalled that petitioner was belligerent and hostile during the investigation. The NYPD also discovered that petitioner pushed a police officer while being arrested for petit larceny. During Dr. Stack's interview of petitioner, he was evasive about these arrests. Petitioner believed that he did not have to share the information because the cases were sealed; however, he was told in January 2008 that sealed cases would be considered by the Department.

Dr. Stack learned that petitioner was arrested for gun possession in 1999 and had his driver's license suspended for failure to pay parking tickets on three separate occasions in 1999, 2004, and 2005. During the interview, petitioner revealed to Dr. Stack that in 2004, while riding a motorcycle and dressed improperly, he broke his leg after his pants were caught in the motorcycle. Based on all of this information, Dr. Stack concluded in a July 1, 2008 report that petitioner had poor credibility, poor insight, poor judgment, poor impulse control, and aggressive behavior. Dr. Stack recommended that petitioner be disqualified for the position of Correction Officer on psychological grounds.

¹ Petitioner had been found to be psychologically unsuitable for the position of Police Officer by the staff psychologist who administered the tests when he applied to be a police officer.

By letter dated July 2, 2008, petitioner was advised that he was found psychologically "not qualified" for the title of Correction Officer. Petitioner was advised of his ability to appeal the determination. Petitioner filed an appeal, and authorized the release of his records to Frederic Jaffee, Ph.D. According to Dr. Jaffee's December 15, 2008 report, Dr. Jaffee administered the Rorschach test and the Thematic Apperception test. The report does not contain the test results or any analysis of the testing that was performed. The report sets forth general conclusions that petitioner is motivated, ambitious, and intelligent. Dr. Jaffee acknowledges that petitioner had "brushes with the law in his youth." He asserts that the testing is limited in predicting how well impulsive responses can be predicted and how much good judgment an individual will employ in an actual altercation. Dr. Jaffee concludes that the Department's evaluation "underestimates Mr. Wallace's capabilities at this time."

As part of the appeal process, Barry Protter, Ph.D., A.B.P.P., an outside consultant retained by the Department, reviewed the original disqualification and the report of Dr. Jaffee. Dr. Protter issued a recommendation, dated April 21, 2009, disqualifying petitioner as psychologically unsuitable. Dr. Protter emphasized that petitioner withheld information about his arrests for manslaughter, grand larceny and other crimes. Dr. Protter further noted that petitioner had credibility problems concerning his arrest for possession of a weapon in 1999; that on three (3) separate occasions petitioner's license was suspended for non-payment of traffic tickets; and, that he was charged with resisting arrest after an alleged petit larceny. Dr. Protter criticized Dr. Jaffee's report for failing to substantially address any of the issues referred to in the Department's report.

Petitioner appealed his disqualification, which was then reviewed by David Safran, Ph.D., the Department's Director of Psychological Services. In a decision dated May 6, 2009, Dr. Safran recommended that the disqualification be affirmed. This determination was then appealed to the Commission. In a decision dated July 24, 2009, Simon P. Gourdine, as Chairman, together with Nicholas A. LaPorte and Rudy Washington, both Commissioners, found that the evidence before them established a rational basis for the Department to conclude that petitioner is not psychologically suited for the position of Correction Officer. Further, they found that there were no issues raised that require a hearing. The determination was affirmed. This Article 78 proceeding followed.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. C.P.L.R. § 7803(3); In re Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

The decision is upheld. During petitioner's evaluation by Dr. Stack, petitioner failed to disclose information about his arrests for manslaughter, grand larceny, and other crimes. It was learned that petitioner failed to pay traffic tickets, which resulted in his license being suspended on

three separate occasions. Dr. Stack determined that this evinced poor insight and judgment. Dr. Stack further found that petitioner had poor impulse control, as evidenced by his motorcycle accident. Petitioner was found to have exhibited belligerent and hostile behavior, as evidenced by his resisting arrest charge.

In his papers, petitioner claims that the interview was not conducted fairly, because he would have disclosed his prior disqualification from the NYPD, but the disqualification came out before he had the opportunity to impart all of the information he wanted to tell Dr. Stark. Petitioner denies that he intentionally withheld information. Petitioner also believes it is unfair that the decision is seemingly based on incidents that occurred and decisions that were made when he was a teenager. But petitioner, who was born in 1975, was 19 or 20 years old at the time of the manslaughter charge; approximately 25 years old when he was a bouncer at a club and was charged with weapons possession; and, 31 years old when he broke his leg in the motorcycle accident.

The only professional who concluded that petitioner was not unfit for the position of Correction Officer is Dr. Jaffee. This report is not supported by objective testing results. Moreover, nowhere does Dr. Jaffee set forth specifically that petitioner is psychologically fit for the position of Correction Officer; rather, he merely concludes that the Department "underestimates" petitioner's capabilities "at this time." Even if this court were to credit the opinion of petitioner's reviewing psychologist, Dr. Jaffee, this court cannot choose between the opinions and reject the opinions of Dr. Stack and Dr. Protter. "[W]here there is a dispute among several doctors regarding petitioner's prognosis, ' [i]t is not for the courts to choose between * * * diverse professional opinions. That

is the function of the proper department heads and as long as they act reasonably and responsibly, the courts will not interfere.”” In re O’Hare v. New York City Police Dep’t., 161 A.D.2d 487, 488 (1st Dep’t 1990), quoting In re Palozzolo v Nadel, 83 A.D.2d 539 (1st Dep’t 1981) (citation omitted), aff’d. 55 N.Y.2d 984 (1982). It was not arbitrary and capricious for the Department to conclude, and for the Commission to confirm, that petitioner is not psychologically fit for the position of Correction Officer.

Accordingly, the petition is denied and the proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: January 27, 2010



JOAN B. LOBIS, 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 entry, counsel or authorized representative must appear in person at the Judgment Clerk’s Desk (Room 141B).