

**Matter of O'Keefe v State of N.Y., Unified Ct. Sys.,
Off. of Ct. Admin.**

2010 NY Slip Op 33673(U)

December 29, 2010

Sup Ct, New York County

Docket Number: 115980/09

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. Justice

Index Number : 115980/2009

O'KEEFE, DANIEL

VS.

NYS UNIFIED COURT SYSTEM

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Article 75 petition is determined in accordance with the annexed decision, order and judgment.

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: 12/29/10

[Signature]
HON. JOAN A. MADDEN 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 11

-----X

In the Matter of the Application of DANIEL O'KEEFE,

INDEX NO.115980/09

Petitioner,

-against-

STATE OF NEW YORK, UNIFIED COURT SYSTEM,
OFFICE OF COURT ADMINISTRATION,

Respondent.

JOAN A. MADDEN, J.:

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 1235).

In this Article 78 proceeding, petitioner seeks to annul the determination of respondent State of New York, Unified Court System, Office of Court Administration ("OCA") finding that he had used his 2.5 veteran's credits to be appointed an Associate Court Clerk in March 2004, and therefore, those credits could not be subsequently used for appointment to the position of Principal Court Clerk.

Judicial review of an agency determination is circumscribed by CPLR 7803. The court must not weigh the facts or the merits of petitioner's claims, nor may it substitute its judgment for that of the agency; the court is limited to deciding whether the agency's determination was arbitrary and capricious, or an abuse of discretion, by assessing whether a rational or reasonable basis exists for the agency's determination. See Matter of Pell v Board of Education, 34 NY2d 222 (1974).

Petitioner contends that when he was appointed to his current position of Associate Court Clerk in March 2004, he did not use his veteran's credits to obtain that appointment, and as a result, those credits are still available for him to use on examination number 55-743, for the

position of Principal Court Clerk. Specifically, petitioner argues that his appointment to Associate Court Clerk in March 2004 was from a special military list, which is different from an appointment from a regular eligible list, in that the appointment from a special military list did not require him to use his veteran's credits to obtain that appointment. Petitioner also argues that after March 2004, he was permitted to use his veteran's credits on several civil service lists and was told those credits were still available, and that respondent's refusal to permit him to use his veteran's credits on subsequent examinations "violated his rights under CSC § 85 and Military Law § 243.7."

A review of record establishes that petitioner's arguments are without merit, and that respondent's determination was not arbitrary and capricious, nor an abuse of discretion.

In a letter dated January 20, 2004, petitioner requested that he be placed on a special military list for Associate Court Clerk, explaining that for most of the past two years, he had been on active military duty, and was unable to respond to "any of the canvass letters" concerning possible appointment as an Associate Court Clerk and "may have missed out on a number of opportunities." He also explained that since list #55-674 "will be expiring soon, I'd like to know if it's possible to be placed on a separate preferred list in an effort to make up for some of the two years of possible opportunity that I missed." By letter dated February 4, 2004, respondent notified petitioner that his "name was placed on a Special List for the title of Associate Court Clerk pursuant to Section 243(7) of the Military Law" and that his name would remain on that list for a maximum of two years to February 3, 2006.

Respondent submits affidavits from Jeanne Colucci, Director of the Personnel Office of OCA, who is responsible for supervising the operations of the Personnel Office, including the list

appointment process. Ms. Colucci disputes petitioner's claim as to the difference between an appointment from a regular eligible list and a special military list. She explains that the only difference is that a special military list stays in existence for two years from the date the eligible candidate is placed in it, even if the original eligible list expires. She states that an appointment from a special military list is "no different" from an appointment from a regular eligible list, and regardless of whether an individual is on a regular or a special military list, he or she "has to be reachable for appointment; that is, his or her final score must be reached for appointment for the candidate to be appointed."

Respondent submits two pages from the Associate Court Clerk Eligible List #55-674: page one which includes identifying information, and page 23 which lists petitioner's name and ranks him as #225. Ms. Colucci states that petitioner took and passed the Associate Court Clerk promotion exam #55-674, held on December 15, 1998, and that at "some point before the Associate Court Clerk eligible list was established on July 9, 1999, Mr. O'Keefe requested and was approved for the use of veteran's credits."¹ She states that petitioner scored 74 on the 1998 exam; the eligible list shows that he received a veteran's credit of 2.5 points and had a "final rating" of 76.5. The eligible list includes a hand-written notation next to petitioner's name that on March 11, 2004, he received a contingent permanent appointment to Associate Court Clerk in the Bronx Supreme Court from that eligible list.

Ms. Colucci explains that in March 2004, the Bronx Supreme Court chose to appoint

¹Petitioner submits an affidavit stating that under the New York State Constitution, honorably discharged wartime veterans are granted an additional 2.5 points on a civil service promotional examination, which "can be applied to any number of different exams," but "can be used for an actual appointment only once." He states that he "earned the right to apply and use these credits as a result of my army service during the Vietnam era."

petitioner from the regular eligible list, which had not yet expired, and that he “was reachable for this appointment only because his veteran’s credits raised his score to 76.5.” Significantly, she states that even if petitioner had been appointed from the special military list, “which co-existed with the regular eligible list, he still would have had to use his veteran’s credits in order to be reachable for the appointment.” Ms. Colucci, however, acknowledges that “[d]ue to clerical error, Mr. O’Keefe’s veteran’s credits were not designated as used in the list certification system when they were used for his contingent permanent Associate Court Clerk appointment on 3/11/04 from eligible list #55-674.” Since the earlier use of his veteran’s credits was not entered into the list certification system, when he subsequently requested veteran’s credit for the promotional Principal Court Clerk’s exam #55-743, he was notified “in error” that he was approved for veteran’s credit for that exam. Ms. Colucci states that in May 2009, during a “routine audit of list appointments and veteran’s credits recorded in the list certification system,” the manager of the List Certification Unit discovered the error. Respondent submits a copy of the following e-mail dated May 8, 2009:

A review of Daniel O’Keefe’s record show that he had a cont perm appt on elist 55-674. He was later made perm when the list expired. If not for his v/c [veteran’s credit], he would not have received the cont perm appt so I have indicated that he has used his v/c as he received a perm appt as a result of the c/p appt. He is active on elist 55/743 Principal Court Clerk with a score of 86.5 which includes v/c. I have removed the 2.5 v/c and amended his score to 84.0, rank 45A.

Based on the foregoing, respondent has made a sufficient showing that it had a rational and reasonable basis for refusing to apply petitioner’s veteran’s credits to the Principal Court Clerk list #55-743, as those credits had been previously used for petitioner’s appointment to the position of Associate Court Clerk in March 2004. Even though respondent’s record-keeping

system did not originally reflect the use of petitioner's veteran's credits in March 2004, respondent incorrectly advised petitioner that those credits were still available to him, and respondent did not discover and correct the error until five years later, those circumstances do not warrant a contrary conclusion in petitioner's favor, as estoppel generally may not be invoked against a governmental agency to prevent it from performing its statutory functions. See Parkview Assocs v. City of New York, 71 NY2d 274, cert denied 488 US 801 (1988); Benaresh v. City of New York Department of Housing Preservation & Development, 273 AD2d 86 (1st Dept), lv app den 95 NY2d 765 (2000).

Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied and dismissed.

DATED: December 29, 2010

ENTER:



 J.S.C.

UNFILED JUDGMENT
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