

**Matter of Gilliam v City of New York**

2011 NY Slip Op 30777(U)

April 1, 2011

Sup Ct, NY County

Docket Number: 113765/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C.  
Justice

PART 52

Index Number : 113765/2010  
GILLIAM, FREDERICK  
VS.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. 113765/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
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 is decided in accordance with the attached 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 141B).

Dated: 4/1/11 CK  
CYNTHIA S. KERN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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 52

-----X  
In the Matter of the Application of

FREDERICK GILLIAM,

Petitioner,

Index No. 113765/10

For an Order Pursuant to Article 78  
of the Civil Practice Law and Rules,

**DECISION/ORDER**

-against-

CITY OF NEW YORK, NEW YORK CITY CIVIL  
SERVICE COMMISSION, NEW YORK CITY  
DEPARTMENT OF CITYWIDE ADMINISTRATIVE  
SERVICES, and NEW YORK CITY HUMAN  
RESOURCES ADMINISTRATION,

**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).

Respondents.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Frederick Gilliam brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to reverse and annul a determination made by the New York City Civil Service Commission (the "CSC"), dated July 1, 2010 (the "Determination"). In the Determination, the CSC affirmed the determination of respondent New York City Department of Citywide Administrative Services ("DCAS") finding petitioner not

qualified for the civil service position of Job Opportunity Specialist, Exam No. 8105, for failing to meet the minimum requirements for said position. Respondents cross-move to dismiss the petition alleging petitioner failed to state a cause of action against respondents upon which relief may be granted. For the reasons set forth below, respondents' cross-motion is granted and the petition is hereby dismissed.

The relevant facts are as follows. On or about October 15, 2008, DCAS issued Notice of Examination No. 8105 ("JOS Examination") for the civil service position of Job Opportunity Specialist ("JOS"). The JOS Examination was a training and experience examination in which applicants completed an Education and Experience Test Paper ("EETP") and submitted the EETP to DCAS for determination of eligibility, and if found to be eligible, for grading. According to the Notice of Examination, the qualification requirements for the JOS position under JOS Examination No. 8105 are as follows:

1. A baccalaureate degree from an accredited college; or
2. A four-year high school diploma or its educational equivalent, and four years of full-time satisfactory experience working directly with or for a job opportunity program, providing employment planning/counseling services involving job development, skills assessment and employment placement; or
3. A satisfactory combination of education and/or experience that is equivalent to (1) or (2) above. College credit from an accredited college may be submitted for experience on the basis of 30 semester credits for one year of work experience. However, all candidates must have at least a four-year high school diploma or its educational equivalent.

Petitioner submitted his EETP for Examination No. 8105. At the time of submission, petitioner had been performing the position of JOS for the New York City Human Resources

Administration (“HRA”) as a provisional employee in said position for a period of seven years and six months. While at HRA, petitioner performed all of the duties and responsibilities of the JOS position as set forth in the civil service job description for said position. On July 27, 2009, DCAS responded to petitioner’s EETP by rating him “Not Qualified” for Examination No. 8105 because he “did not indicate the percent of time...spent on all duties/tasks/functions...,” as required by the EETP. Petitioner then revised his EETP to specify the percent of time he spent on each task and DCAS reviewed the new information.

DCAS responded to petitioner’s revised EETP by notifying him in writing that he was found unqualified for the JOS position under the requirements of the JOS Examination. Petitioner was notified of his right to appeal the disqualification determination to the DCAS’s Committee on Manifest Errors (the “CME”). Petitioner filed a timely appeal of his disqualification to the CME. By letter dated September 15, 2009, DCAS notified petitioner that the CME had denied his appeal but notified him of his right to appeal the CME’s decision to the CSC.

In basing its decision on petitioner’s EETP, the CME found petitioner unqualified for the JOS position because even after petitioner corrected the percent of time issue on his second application, it became clear that only 20% of his time working as a provisional JOS was spent on employment placement duties for his 7 year 6 month tenure or the equivalent of 1 year and 6 months experience. The CME found that the remaining 80% of petitioner’s time spent on other tasks could not be counted towards the minimum experience requirements. Additionally, petitioner was given the equivalent of 2 years of experience for his 68 college credits he reported on his application. Thus, petitioner was only given credit for 3 years and 6 months experience,

which is still 6 months short of the required 4 years experience.

By memorandum dated April 23, 2010, and exhibits annexed thereto, DCAS submitted its statement of position on petitioner's appeal to the CSC, which was that "the decision of the CME to deny Appellant's appeal was lawful and rational." By notice and an annexed decision dated July 1, 2010, the CSC affirmed the determination of the CME finding petitioner not qualified for the JOS position under Examination No. 8105. In affirming the CME's decision, it found that the CME "properly found appellant lacked the requisite education and/or experience to be deemed qualified for this position." Petitioner now moves pursuant to Article 78 of the CPLR for an order vacating and annulling the CSC's affirmation of the DCAS's determination that he is not qualified for the JOS position under Examination No. 8105.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1<sup>st</sup> Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "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.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

