

**Matter of Thomas v New York City Dept. of Citywide
Admin. Servs.**

2011 NY Slip Op 31376(U)

May 20, 2011

Sup Ct, NY County

Docket Number: 114663/10

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C.

PART 5

Index Number : 114663/2010

THOMAS, RAJEE

INDEX NO. 114663/10

vs

NYC DEPARTMENT OF CITYWIDE

MOTION DATE 3/29/11

Sequence Number : 001

MOTION SEQ. NO. 001

ARTICLE 78

MOTION CAL. NO. 143

CAL # 143

The following papers, numbered 1 to 4 were read on this motion to/for annul/reverse administrative decision.

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

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).

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 5/20/11
MAY 20 2011

[Signature]
BARBARA JAFFE 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 5

-----X

In the Matter of the Application of

Index No. 114663/10

RAJEE THOMAS,

Motion Date: 3/29/11

Motion Seq. No.: 001

Calendar No.: 143

Petitioner,

DECISION & JUDGMENT

For a Judgment under Article 78 of the Civil Practice
Law and Rules,

-against-

UNFILED JUDGMENT

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appear in person at the Judgment Clerk's Desk (Room
141B).

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

Respondents.

-----X

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By notice of petition dated November 8, 2010, petitioner brings this Article 78 proceeding seeking an order annulling and reversing respondents' dismissal of his appeal of his failing grade on a civil service examination for promotion to Maintenance Supervisor (Car Equipment). Respondents oppose.

I. BACKGROUND

In December of 2007, the New York City Department of Citywide Administrative

Services (DCAS) issued a "Notice of Examination" for Examination 8513, the civil service examination for promotion to Maintenance Supervisor (Car Equipment). (Ans., Exh. 1). The Notice provided that the examination would have two parts, a multiple choice component and an essay component, and that a score of 70 out of 100 points on each part would be required to pass. (*Id.*).

The "Qualifying Essay Assessment" included in the examination packet directs candidates to write a memorandum in "standard, professional format" and provides that the memo would be graded based upon its content, presentation, and writing composition, which includes "grammar, punctuation, spelling, and word choice." (*Id.*, Exh. 2). The examination is graded according to a rating guide promulgated by DCAS. (*Id.*, Exh. 3). The guide has three parts: "Required Content" (50 points), which scores a candidate's inclusion of key facts; "Required Presentation," (30 points), which scores a candidate's organization; and "Required Writing Composition," (20 points), which scores a candidate's grammar, punctuation, and spelling. (*Id.*, Exh. 3). Each error on the "Required Writing Composition" component is worth one point, and although graders are instructed to record all of the errors, they are permitted to deduct a maximum of 20 points only. (*Id.*, Exh. 4).

Petitioner took the examination on March 15, 2008, scoring 41.5 points on the "Required Content" portion, 25 points on the "Required Presentation" portion, and 0 points on the "Required Writing Composition" portion, for a total of 66.5 points, a failing score. (*Id.*, Exh. 3). He made 25 errors on the last portion, including abbreviating "avenue" to "ave." three times, writing "ave." rather than "avenues," and failing to include the subject in a sentence. (*Id.*, Exh. 4). The grader also noted that 20 points could have been deducted for petitioner's capitalization

of the entire essay, as this error showed that he did not understand when and why to capitalize, but he did not do so in computing petitioner's score. (*Id.*)

By letter dated May 4, 2009, petitioner appealed his score to DCAS, and DCAS, finding no error in the computation of petitioner's score, denied his appeal. (*Id.*, Exhs. 6, 7). By letter dated July 17, 2009, petitioner appealed DCAS' determination to the New York City Civil Service Commission (CSC). (*Id.*, Exh. 8). CSC then requested DCAS provide it with all documents related to petitioner's appeal. (*Id.*). On April 20, 2010, DCAS furnished CSC with petitioner's score, providing in pertinent part that his examination was properly scored in accordance with the rating guide and that his score should remain unchanged. (*Id.*, Exh. 9). By "Notice of City Civil Service Commission Action" dated July 13, 2010, CSC informed petitioner that it affirmed DCAS' determination.

II. CONTENTIONS

In support of his petition, petitioner claims that DCAS's denial of his appeal and CSC's affirmation of this determination were arbitrary and capricious, as four points were deducted for abbreviating "avenue" when there was no indication that abbreviations could not be used in the essay, one point was deducted for a sentence with a missing subject that petitioner contends was not missing a subject, and 20 points were deducted for his capitalization of the entire essay when there was no indication that proper capitalization was required. (Pet.). In opposition, respondents argue that petitioner's disagreement with his score is not a valid basis on which to overturn CSC's and DCAS's decisions, as they had rational bases. (Memorandum of Law in Support of Respondents' Verified Answer, dated Jan. 11, 2011). In reply, petitioner argues that respondents should not be able to deduct points without limit and that his abbreviations did not detract from

the professional nature of his memorandum, as they did not confuse the reader. (Affirmation of Kevin P. Sheerin, Esq. in Reply, dated Jan. 27, 2011).

III. ANALYSIS

Pursuant to CPLR Article 78, a party aggrieved by an administrative decision may challenge it in court, although the grounds for annulment or vacatur of the decision are limited. Where the petitioner challenges a determination rendered after a hearing required by law on the ground that it was not supported by substantial evidence, the action must be transferred to the appellate division. (CPLR 7803[4], 7804[g]; Siegel, NY Prac § 568 [4th ed]). However, if no issues are raised involving substantial evidence, the action need not be transferred. (*Matter of Kinard v New York City Hous. Auth.*, 2009 NY Slip Op 32584[U] [Sup Ct, New York County 2009]; *Matter of Rolon v New York City Hous. Auth.*, 23 Misc 3d 1114[A], 2009 NY Slip Op 50751[U] [Sup Ct, New York County 2009]). Here, as no issues of substantial evidence exist, I review the proceeding to discern whether the determination reached is arbitrary or capricious.

Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR 7803[3]). In evaluating whether an administrative agency's determination is arbitrary or capricious, courts consider whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc., Ltd v Div. of Hous. & Community Renewal*, 225 AD2d 349, 349 [1st Dept 1996]). Moreover, the determination of an administrative agency,

“acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency’s determination is supported by the record.” (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *aff’d* 11 NY3d 859 [2008]).

Here, both DCAS and CSC made their determinations on the basis of the rating guide for the examination, finding that the grader analyzed petitioner’s essay in accordance with the guide. As to the “Required Writing Composition” component, the portion of the grading with which petitioner takes issue, DCAS found that the grader identified errors as to grammar, punctuation, spelling, and word choice, just the sorts of errors that the guide instructed him/her to identify. Even though the “Qualifying Essay Assessment” did not expressly provide that abbreviations should not be used, it did provide that candidates must write the memo in “standard, professional format,” and DCAS and CSC rationally interpreted this to mean that abbreviations were prohibited. As for plaintiff’s failure to use the plural of “avenue” and failure to include the subject in a sentence, DCAS and CSC had sound base for determining that these errors constituted separate grammatical errors that, pursuant to the rating guide, were each worth a one point deduction. Because petitioner made 25 separate errors, and because the grader could only deduct a maximum of 20 points, DCAS’s and CSC’s determinations that the grader properly deducted 20 points from his score were rationally based on the record.

Contrary to petitioner’s assertion, the grader did not deduct 20 points for his incorrect capitalization; rather, the grader simply noted that petitioner had capitalized the entire essay, thereby demonstrating he does not understand capitalization. And, even if he did, petitioner

would still have scored no points on this component, as he made 25 errors in addition to his incorrect capitalization of the entire essay, and the grader could only deduct 20 points.

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED and ORDERED, that the petition is denied, and it is further

ADJUDGED and ORDERED, that the proceeding is dismissed.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: May 20, 2011
New York, New York

MAY 20 2011

UNFILED JUDGMENT

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