

Matter of Espinal v County of Nassau

2017 NY Slip Op 33193(U)

February 16, 2017

Supreme Court, Nassau County

Docket Number: 6696/16

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Application of
NELSON ESPINAL,

Petitioner,

for a Judgment Pursuant to Article 78 CPLR,

- against -

COUNTY OF NASSAU and NASSAU COUNTY CIVIL
SERVICE COMMISSION,

Respondents.

TRIAL/IAS PART 35
NASSAU COUNTY

Index No.: 6696/16
Motion Seq. No.: 01
Motion Date: 10/17/16
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The following papers have been read on this application:

| | Papers Numbered |
|--|-----------------|
| <u>Notice of Petition, Verified Petition and Exhibits, and Affidavit</u> | <u>1</u> |
| <u>Answer and Objection in Law and Exhibits</u> | <u>2</u> |
| <u>Memorandum of Law in Reply and Affidavit in Reply and Exhibits</u> | <u>3</u> |

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioner moves, pursuant to CPLR Article 78, for a judgment reversing the July 20, 2016 determination of respondent Nassau County Civil Service Commission ("Commission"), pursuant to which petitioner's termination from the position of Sewage Treatment Operator and his disqualification from the Industrial Waste Control Specialist I List were upheld. Petitioner further seeks reinstatement and full back pay. Respondents oppose the application.

In 2011, petitioner applied for, and was vetted for, the position of Sewage Treatment Operator in the Nassau County Department of Public Works. Petitioner states that, at that time, he provided the investigator with evidence in his possession of his felony convictions in New York in 1997 (fourteen (14) years earlier). Petitioner was then hired and served as a Sewage Treatment Operator for five (5) years. During that time, petitioner rose through the ranks of the Union to the position of Vice President of the Department of Public Works (“DPW”) unit of CSEA Local 830.

When plans were made for the sewage treatment plant to be privatized, petitioner sought a transfer to the title of Industrial Waste Specialist I with respondent County of Nassau. A new vetting procedure was commenced. Petitioner met with the investigator and was asked about his two (2) New Jersey convictions from 1999. Petitioner states that, during his initial interview in 2011, he was never asked about convictions occurring in New Jersey and it was difficult for him to obtain paperwork concerning said New Jersey convictions. He also explains that, back at the time of his original application in 2011, he had simultaneously applied for the position of Bilingual Social Welfare Intake, and he understood the information concerning prior convictions was for that position, not the position of Sewage Treatment Operator for which he was hired in 2011.

By letter, dated February 23, 2016, respondent Commission disqualified petitioner from the Industrial Waste Control Specialist I List and terminated his employment from his existing position as Sewage Treatment Operator. *See* Petitioner’s Verified Petition Exhibit A. The reasons given for said actions were, “disrespect for the process of law and order as evidenced by your record of convictions and failure to cooperate with your investigation.” *See id.*

Petitioner appealed this determination and submitted letters of support from both supervisors and co-workers describing him as a model employee and worker. Petitioner also submitted a copy of his Associate Degree from Nassau Community College, as well as completion certificates for various training courses taken at Hofstra University, at the Nassau County Fire Service Academy, and training by the New York State Department of Environmental Conservation. *See* Petitioner's Verified Petition Exhibit B.

By letter, dated April 20, 2016, respondent Commission modified its reason for the disqualification to add "failure to disclose material facts." *See* Petitioner's Verified Petition Exhibit C. Three (3) months later, by letter, dated July 20, 2016, respondent Commission upheld the disqualification and termination. *See* Petitioner's Verified Petition Exhibit E.

Petitioner commenced this Article 78 proceeding in September, 2016. In October, 2016, petitioner received a Certificate of Good Conduct from the Department of Corrections and Community Supervision, verifying that petitioner has maintained a record of good conduct since January 28, 2002, and removing all legal bars and disabilities to employment, except those pertaining to firearms. *See* Petitioner's Affidavit in Support.

Respondents' Answer and Objections in Law were served in January, 2017. According to respondents, "an administrative error" lead to petitioner's employment in 2011. *See* Respondents' Answer and Objections in Law ¶ 9; Respondents' Answer and Objections in Law Exhibit H ¶ 4. In the course of respondent Commission's further background investigation in 2016, petitioner disclosed his criminal convictions "not all of which were initially disclosed," including:

1997 - guilty plea to reduced charge of Attempted Criminal Possession of a Weapon in the Third Degree; one (1) year imprisonment and fine;

1999 - New Jersey - two (2) counts of Robbery in Second Degree; five (5) year imprisonment and fine. *See* Respondents' Answer and Objections in Law Exhibit H ¶ 9.

Respondent Commission cites Civil Service Law § 50(4) as the statutory basis for its disqualification and termination of petitioner. Provisions of this statute allow respondent Commission to refuse to certify an otherwise eligible applicant:

- (a) who is found to lack any of the established requirements for appointment to the position for which he applies;
- (d) who has been guilty of a crime;
- (f) who has intentionally made a false statement of any material fact in his application;
- (g) who has practiced or attempted to practice any deception or fraud in his application.

Respondents assert the following factual bases for application of the aforementioned provisions of Civil Service Law § 50(4) to petitioner's application: (1) petitioner's failure to disclose material facts (the complete extent of his prior criminal convictions); (2) petitioner's discrepancy in answering Question #10 pertaining to prior criminal convictions; and (3) petitioner's failure to timely respond to respondent Commission's repeated notifications. *See* Respondents' Answer and Objections in Law ¶¶ 25-26.

Administrative determinations are to be accorded great deference and "the denial by an appointing authority of a promotion to a particular individual will not be disturbed as long as the determination is supported by a rational basis." *Matter of Thorsen v. Nassau County Civ. Commn.*, 300 A.D.2d 405, 751 N.Y.S.2d 859 (2d Dept. 2002) *lv. app. den.* 100 N.Y.2d 516, 769 N.Y.S.2d 202 (2003). This Court will not interfere with the discretion of respondent Commission unless the decision was irrational and arbitrary. *See Matter of Villone v. Nassau County Civ. Serv. Commn.*, 16 A.D.3d 591, 792 N.Y.S.2d 136 (2d Dept. 2005).

It is unlawful in this state to deny employment “by reason of the individual’s having been previously convicted of one or more criminal offenses.” *See* New York Correction Law § 752. “This general prohibition advances the rehabilitation and reintegration goals of the Penal Law. Furthermore, barring discrimination against those who have paid their debt to society and facilitating their efforts to obtain gainful employment benefits the community as a whole.” *Matter of Acosta v. New York City Dept. of Educ.*, 16 N.Y.3d 309, 921 N.Y.S.2d 633 (2011).

Exceptions to this general prohibition arise where: (1) there is a direct relationship between the previous criminal offenses and the specific employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. *See* New York Correction Law § 752. In making a determination as to the applicability of either exception, the employer shall consider eight (8) statutory factors. *See* New York Correction Law § 753(1); *Matter of Acosta v. New York City Dept. of Educ.*, *supra* at 315-316. In addition, the Correction Law creates a presumption of rehabilitation where, as here, the petitioner has obtained a certificate of good conduct. *See* New York Correction Law § 753(2).

On this record, including all of respondent Commission’s paperwork pertaining to petitioner’s applications, and the affidavit of Karle Kampe, Executive Director of respondent Commission, there has been no showing of either exception to the prohibition against denying employment to a prior criminal offender. Respondents appear to have failed to consider Correction Law § 752 and § 753 altogether. Instead, respondents rely exclusively upon Civil Service Law § 50(4). As to this statute, there has been no showing that petitioner lacks any requirements for the position of Industrial Waste Control Specialist I, nor that petitioner intentionally made any false statement in his applications. In addition, this is not a case of fraud,

but rather an admitted “administrative error” by respondent Commission.

Regarding petitioner’s prior criminal convictions, respondents appear to argue that Civil Service Law § 50(4)(d) supercedes Correction Law § 752. That is not the case. Civil Service Law § 50(4)(d) must be read in conjunction with Correction Law § 752. *See Matter of Stewart v. Civil Serv. Commn. of City of N.Y.*, 84 A.D.2d 491, 446 N.Y.S.2d 948 (1st Dept. 1982). Where, as here, it is plain that respondent Commission has failed to consider the two (2) exceptions set forth in Correction Law § 752 and the eight (8) statutory factors in §753, respondent Commission’s disqualification of petitioner’s 2016 application and termination of his employment as Sewage Treatment Operator was arbitrary and capricious. *See Matter of Acosta v. New York City Dept. of Educ.*, *supra* at 318-320. *See also Matter of Bovich v. LiMandri*, 116 A.D.3d 489, 983 N.Y.S.2d 550 (1st Dept. 2014).

On this record, petitioner has shown that, since serving his prison sentences, he has become a law-abiding member of society. He has been employed as a Sewage Treatment Operator for five (5) years without incident, and he has submitted glowing evaluations from supervisors, co-workers and friends. This is evidence of rehabilitation over a significant period of time, as encouraged by the Correction Law. Respondents have submitted no evidence that petitioner has not been rehabilitated. *See generally Matter of Gil v. New York City Dept. of Bldgs.*, 107 A.D.3d 632, 968 N.Y.S.2d 76 (1st Dept. 2013) *lv. app. den.* 22 N.Y.3d 852, 975 N.Y.S.2d 734 (2013).

Remand to respondent Commission is unnecessary because the existing record is sufficiently developed to permit informed judicial review of the issues raised by petitioner’s application, and respondent Commission has already had an opportunity to consider such issues. *See Matter of Pantelidis v. New York City Bd. of Stds. & Appeals*, 43 A.D.3d 314, 841 N.Y.S.2d 41 (1st Dept. 2007) *affd* 10 N.Y.3d 846, 859 N.Y.S.2d 597 (2008). In this regard, although

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respondent Commission did not have the Certificate of Good Conduct at the time of the determination in July, 2016, it did have the opportunity to consider said Certificate prior to serving its Answer and Objections. Any further delay only harms petitioner.

Therefore, based on the foregoing, the Verified Petition is hereby **GRANTED** to the extent that respondent Commission's termination of petitioner's position of Sewage Treatment Operator and his disqualification from the Industrial Waste Control Specialist I List are hereby reversed, and petitioner is entitled to reinstatement with back pay and benefits. *See Matter of Gomez v. Stout*, 13 N.Y.3d 182, 889 N.Y.S.2d 509 (2009). Attorneys' fees, however, are hereby **denied**, as the prevailing party may not recover such fees in the absence of statute, agreement or court rule, none of which have been shown here. *See Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 549 N.Y.S.2d 365 (1989).

This constitutes the Decision and Order of this Court.

ENTER

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
February 16, 2017

ENTERED
FEB 22 2017
NAUSSAU COUNTY
COUNTY CLERK'S OFFICE