Matter of Dobbins v State of New York - Unified Ct. Sys.
2018 NY Slip Op 30375(U)
February 28, 2018
Supreme Court, Suffolk County
Docket Number: 10534/2016
Judge: Paul J. Baisley, Jr.

MEMORANDUM

SUPREME COURT - COUNTY OF SUFFOLK

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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In the Matter of the Application of

William Dobbins, as President and on behalf of Suffolk County Court Employees Association,

Petitioner,

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

-against-

State of New York - Unified Court System and Lawrence K. Marks, as Chief Administrative Judge,

Respondents.

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I.A.S. PART 36

By: Baisley, J. S. C.

Dated: February 28, 2018

INDEX NO.: 10534/2016
MOTION SEQ. NO.: 001 MG

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Petitioner William Dobbins, President of the Suffolk County Court Employees Association ("SCCEA"), commenced this Article 78 proceeding for an order and judgment annulling the decision of the Acting Director of Labor Relations of the New York State Unified Court System ("UCS") dated July 20, 2016 holding that UCS did not violate, misinterpret or misapply the rules and regulations, written policy and/or orders of the State when it placed several candidates on the eligibility list for promotional examination 55-587 for the title of Senior Court Reporter (JG-27) when those candidates did not meet the minimum qualifications to compete set forth in the promotional examination.

Petitioner seeks a judgment declaring that respondents' actions were arbitrary, capricious and in violation of §25.13(k) of the Rules of the Chief Judge (22 NYCRR §25.13(k)), and directing respondents to remove from the eligibility list for promotional examination no. 55-787 the names of those candidates who were not employed in the Court Reporter title by the date of the examination, as required by the minimum qualifications in the promotional examination announcement, and ordering respondents to remove any candidates from appointments made to Senior Court Reporter positions from the promotional examination eligibility list who did not meet the minimum qualifications to compete.

For the reasons set forth hereinafter, the petition is granted.

The submissions reflect that on June 13, 2015 respondents administered simultaneous and substantively identical open-competitive and promotional examinations (examination nos. 45-787 and 55-787, respectively) for the title of Senior Court Reporter (JG-27). The examination announcement for the promotion examination set forth the minimum qualifications to compete as follows: "To be eligible to compete, applicants **must**, by the date of the examination, June 13, 2015, have current permanent [footnote omitted] competitive class status as a Court Reporter." The announcement also set forth the minimum qualifications for appointment: "Successful candidates **must** at the time of appointment have one (1) year of current permanent [footnote omitted] competitive class service as a Court Reporter." (The examination announcement for the open-competitive examination also set minimum qualifications to compete and for appointment that are not directly relevant here.)

The examination announcements for both the promotion examination and the competitive examination advised applicants in substantially identical language that "The eligible list established as a result of this examination will be used to fill positions in the Unified Court System throughout New York State. An [open-competitive] [promotion] examination...is being held in conjunction with this [promotion] [open-competitive] examination. *The promotion list will be used to make appointments before appointments are made from the list established from the open-competitive examination*" [emphasis added].

When the separate eligibility lists for each examination were established, on March 25, 2016 the names of 22 individuals who had taken the open-competitive examination (the "competitive candidates") appeared on both the competitive list and the promotion list, although none of the 22 met the minimum qualification to take the promotion examination and none had actually taken the promotion examination. These individuals had, however, been hired as entry level Court Reporters (JG-24) after the examination date but before the eligibility lists were established, and some of them had scored higher than those who had taken the promotion exam.[1]

SCCEA thereafter filed a non-contract grievance dated May 18, 2016 on behalf of two named court reporters, alleging that respondents' placement of the names of the competitive candidates on the promotion list violated respondents' own rules regarding the minimum qualifications required to compete for the promotional examination. Petitioner sought the removal from the promotion list of anyone who was ineligible to compete for the promotional Senior Court Reporter examination, as well as fair compensation for anyone legitimately on the promotion list who was displaced by someone who should not have been on the list if they lost a

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[1] The petition alleges, apparently incorrectly, that 36 individuals who took the open-competitive examination were subsequently appointed as entry level Court Reporters and thereafter placed on both the open-competitive list and the promotion list. Respondents' submissions reflect, however, that the promotion list includes the names of only 22 individuals who took the competitive exam and were thereafter hired as Court Reporters. Those individuals have an "A" after their names on the promotion list indicating the date that they will complete their one-year probationary period and become eligible for promotion from the list. Respondents' submissions further reflect that an additional 14 individuals who took the promotion examination as Court Reporters were thereafter promoted to the Senior Court Reporter title from a previous promotion list. Those individuals have an "E" after their names indicating the date on which they will complete their probationary period and their eligibility for appointment off the current promotion list will expire.

promotional opportunity as a result of their displacement.

A Step 2 grievance meeting was conducted telephonically on June 24, 2016 and on July 20, 2016 respondents issued their decision denying petitioner's grievance.

Upon receipt of the decision, petitioner timely commenced the instant proceeding. The petition is supported by the affidavit of William Dobbins, as President and on behalf of the Suffolk County Court Employees Association, together with various exhibits including the collective bargaining agreement between the SCCEA and the UCS, the examination announcements for both the open-competitive exam and the promotional exam, and the Second Step Decision of the Acting Director of Labor Relations.

In opposition to the petition, respondents have submitted a verified answer; the answering affidavit of Anne Johnson-Endy, a Principal Management Analyst in the Division of Human Resources of the Unified Court System of the State of New York; a memorandum of law; and the answering affidavit of an Assistant Deputy Counsel for UCS with exhibits including petitioner's non-contract grievance.

Petitioner alleges that the determination of the Acting Director of Labor Relations was arbitrary and capricious because it failed to address respondents' argument that placement of the competitive candidates on the promotion list violates respondents' own "minimum qualifications to compete" established in the promotion exam announcement, and further violates §25.13(k) of the Rules of the Chief Judge.

The Decision

The decision of the Acting Deputy Director of Labor Relations noted that the open-competitive and promotional examinations held on June 13, 2015 were identical, simultaneously administered, and scored identically. The decision conceded that "several" candidates who sat for the open-competitive examination did not have one year of permanent competitive class status on the examination date, but noted that they had been duly appointed to the entry-level title of Court Reporter (JG-24) before the Senior Court Reporter lists were established. The decision stated that "[t]he generic eligibility to compete language contained in the promotional announcement did not accurately reflect the long-standing practice to grant requests from employees who were duly appointed to the Court Reporter title after taking the exam, to be included on the promotional list."

The decision continued that, "[i]n accordance with Court System policy, these candidates were placed on the open competitive list for Senior Court Reporter with an expiration date corresponding with the anticipated date that they complete probation in the Court Reporter title. Once they complete their one-year probation in the Court Reporter title, they will be eligible for appointment from the promotion list." In a footnote, the decision explained that "[i]n the past, the Court System followed the same practice *but only if a candidate made a written request to be placed on the promotion list* [emphasis added]. To be fair, with this list it was determined that it

should be done automatically for all similarly-situated candidates."

The decision cited §25.15 of the Rules of the Chief Judge as authority for respondents' contention that they are permitted to promote candidates who are employed as Court Reporters at the time of the examination for appointment *or* at the time of appointment (22 NYCRR §25.15(a)). The decision concluded that the fact that "the promotional examination announcement contained generic eligibility to compete language imparted from a general examination announcement does not preclude respondents from placing candidates on both lists as it has done in the past, which is in accord with the New York State Constitution and the Rules."

Analysis

Respondents' reliance on §25.15(a) of the Rules of the Chief Judge, entitled "Filling Vacancies by Promotion Examination," is misplaced, as that rule does not authorize placement of the competitive candidates on the promotion list in the circumstances presented here. Section 25.15(a) authorizes filling vacancies in positions in the competitive class "by promotion from among persons holding, at the time of the examination for promotion *or at the time of appointment* [emphasis added], competitive class positions on a permanent basis in a lower title in the promotion unit in which the vacancy exists" (22 NYCRR §25.15(a)). The rule further provides, however, that "The Chief Administrator may prescribe minimum training and experience qualifications for eligibility to take a promotion examination and for promotion."

It is undisputed that here, the Chief Administrator did prescribe minimum qualifications for eligibility to take the promotion examination, and that requirement – that applicants **must** have current permanent competitive class status as a Court Reporter by the date of the examination, June 13, 2015 – was clearly set forth in the promotion examination announcement. Indeed, as pointed out by petitioner, the Rules of the Chief Judge expressly mandate that "The Chief Administrator of the Courts shall issue an announcement of each competitive examination, setting forth the minimum qualifications required, the subjects of examination, and such other information as he or she may deem necessary, and shall advertise such examination in such manner as the nature of the examination may require" (22 NYCRR §25.14(b)). While the isolated language relied on by respondents appears to offer broad discretion to respondents in promoting employees in the competitive class, that language does not supplant the minimum eligibility requirements for taking the examination in the first place, as expressly provided for in the last sentence of §25.15(a). Accordingly, the Acting Director of Labor Relations should not have disparaged the eligibility requirement as mere "generic language" and disregarded it in compiling the eligibility lists.

Section 25.13(k) of the Rules of the Chief Judge prescribes the requirements for the establishment of eligible lists: "Every candidate who attains a passing mark in an examination...shall be eligible for appointment to the position for which he or she was examined, and his or her name shall be entered on the eligible list in the order of his or her final ranking." Nothing in §25.13(k), or in §25.15(a), for that matter, authorizes placing competitive examination takers on the eligible list of promotional examination takers.

Here, the Court Reporters who sat for the promotion examination were entitled to rely on the representations set forth in the examination announcement that only individuals who were employed as Court Reporters on the day of the examination would be permitted to take the examination, and that the qualified individuals on that list would be appointed to the position of Senior Court Reporter before any of the individuals whose names appeared on the open-competitive list. The clear intendment of the restriction of the promotion examination to then-currently employed Court Reporters was to favor those exam takers over those taking the open-competitive exam. That is why there is language in both examination announcements informing all candidates that the promotion list will be used first before the competitive list. Respondents' submissions confirm that means that the promotion list must be exhausted before the competitive list may be reached, thus limiting the likelihood that anyone on the competitive list will attain the position of Senior Court Reporter.

Moreover, that representation was known to all of the individuals who took the open-competitive examination, including the 22 individuals identified in respondents' submissions as having been hired as Court Reporters after the examination date but before the lists were established. By respondents' own admission, none of those 22 individuals sought or requested inclusion of their names on the promotion list by reason of the fact that their status had changed after the examination date.

Rather, respondents unilaterally decided to place all of those individuals – some of whom had scored higher than those legitimately on the promotion list – on both lists, invoking an alleged "past practice" and a desire "to be fair." As a result, three of the top five candidates on the promotion list are transferees from the open-competitive list. Respondents have offered no evidence of this past practice. The submissions reflect that petitioner was previously unaware of any such "past practice," which concededly had not been communicated to the candidates for the open-competitive and promotion examinations.

In any event, respondents failed to follow its alleged "past practice" here. By respondents' own admission, the "past practice" of placing open-competitive candidates on a promotion list was followed only where the individual requested it, in writing. Here, it is undisputed that there was no such request, in writing or otherwise, and no evidence that any of the 22 individuals whom respondents unilaterally placed on the promotion list knew of the "past practice" of which they had become unwitting beneficiaries.

Moreover, by disregarding the eligibility requirement for taking the promotion examination and unilaterally bestowing the benefit on a substantial number of candidates who did not seek it, respondents negated the black-letter representations of the examination announcements and violated the reasonable expectations of the exam takers.

It is well established that "[a] determination establishing minimum eligibility requirements for promotional examinations is not to be interfered with by the courts if any fair argument can be made to sustain the action even though the courts may differ as to its advisability" (*Suffolk County Court Employees Association, Inc. v Office of Court Administration*, 102 Misc 2d 837 [Sup Ct *In*

Nassau Cty 1980]). No less than the courts, respondents must be deemed to be bound by the minimum eligibility requirements they themselves established, and cannot simply disregard them in order to "cherry pick" candidates who do not otherwise qualify to enlarge or improve the pool of promotion-list candidates (*see, Severino v Ingraham*, 59 AD2d 587 [3d Dept 1977]; *Poss v Kern*, 263 AD 320 [1st Dept 1942]).

The court is mindful of the constitutional mandate that appointments and promotions in the civil service be made according to merit and fitness, as ascertained by competitive examinations, as intended to assure that individuals with the greatest merit and ability are appointed. However, this must be consistent with the law and rules and policies otherwise applicable. In the circumstances, the court is constrained to conclude that the respondents did not follow their own eligibility requirements, or their own self-described "past practice," and instead created a new "practice" that is unsupported by any rule, regulation, written policy or order of the State. In light of the foregoing, the court finds that respondents' determination was arbitrary and capricious, and accordingly the petition is granted.

Submit judgment.

HON. PAUL J. BAISLEY, JR.
J.S.C.