

Gagliano v New York Fire Dept.
2020 NY Slip Op 32608(U)
August 7, 2020
Supreme Court, New York County
Docket Number: 161432/2018
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

JOHN GAGLIANO,

Petitioner,

- v -

NEW YORK FIRE DEPARTMENT, DANIEL NIGRO, NEW
YORK CITY CIVIL SERVICE COMMISSION, CITY OF NEW
YORK

Respondent.

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INDEX NO. 161432/2018
MOTION DATE 10/08/2019
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

ORDER

Upon the foregoing documents, it is

ORDERED and ADJUDGED that the petition by John P. Gagliano is denied; and it is further

ORDERED and ADJUDGED that the cross motion of respondents New York City Fire Department, Daniel A. Nigro, as Commissioner of the FDNY, the New York City Civil Service and the City of New York, is granted, and the proceeding is dismissed; and it is further

ORDERED that the Clerk of New York County shall enter judgment accordingly.

DECISION

In this article 78 proceeding, petitioner, John P. Gagliano, petitions the court for a judgment: (1) declaring that respondents' actions in disqualifying Gagliano for promotion to firefighter because of his alleged inadequate hearing were arbitrary, capricious, unreasonable, unlawful and contrary to the applicable standards set forth in the National Fire Protection Association (NFPA) code 1582; and (2) directing and ordering respondents to rescind Gagliano's disqualification for promotion to firefighter, restore him to the exam 7501 eligible list and promote him to firefighter; or (3) in the alternative, direct a trial pursuant to CPLR 7804 (h) to resolve any issues of fact.

Respondents New York City Fire Department (FDNY), Daniel A. Nigro, as Commissioner of the FDNY (Nigro), the New York City Civil Service Commission (CSC) and the City of New York oppose the petition and cross-move pursuant to CPLR 7804 (f) for an order dismissing the petition on the grounds that petitioner failed to state a cause of action under CPLR 3211 (a) (7), entering judgment for Respondents and granting Respondents costs, fees and disbursements.

Background

Since April 23, 2012, Gagliano has been employed by the FDNY. Initially, he was hired for the position of emergency

medical technician (EMT). On October 18, 2013, Gagliano was promoted to the title of paramedic, and has been employed in that position since that time.

In 2016, the New York City Department of Citywide Administrative Services (DCAS) announced an examination for promotion to the title of firefighter in the FDNY (examination no. 7501 [the Exam]). Petitioner applied to take the Exam. In December 2016, Gagliano took and passed the written portion of the Exam. In August 2017, Gagliano took and passed the physical ability test of the Exam. He ranked No. 432 on the resulting eligible list. According to Gagliano, this ranking put him in line to be promoted to firefighter as part of the December 2017 class.

In or around September 2017, Gagliano underwent a medical examination as required for the Exam. During the course of his evaluation, questions were raised concerning Gagliano's hearing loss in his left ear, a condition he has had since birth. Gagliano submitted reports from Dr. Augustine A. L. Moscatello, professor and chair of the department of otolaryngology/head and neck surgery of New York Medical College and director of the department of otolaryngology/head and neck surgery of Westchester Medical College (petition, exhibit B). The reports described the parameters of Gagliano's hearing and confirmed

that he was able to perform all of the functions required of a firefighter (id.). According to Dr. Moscatello's report,

"Audiogram shows normal hearing in the right ear and a profound sensorineural hearing loss on the left. . . . In view of the perfectly normal hearing of the right ear my evaluation is that [Gagliano] would be able to perform all the functions as a firefighter" (id.).

Gagliano also submitted a report of Dr. Jerry Huo, who confirmed the same (id.).

On October 25, 2017, the FDNY issued a notice of proposed disqualification based on Gagliano's left ear hearing loss (petition exhibit C). After seeking reconsideration of the proposed disqualification, on January 25, 2018, the FDNY issued a "Final Notice of Disqualification - Medical" disqualifying Gagliano from the Exam based on his "Ear Left (Audiogram)" and "confirmed profound left-sided sensorineural hearing loss" (petitioner exhibit D). Gagliano did not submit any additional information to support his request.

On January 31, 2018, Gagliano appealed the final disqualification to the CSC. In support of his appeal, Gagliano submitted various documents that supported the position that he was qualified to perform the job as a firefighter in spite of his hearing loss (petitioner exhibit E). Gagliano submits a letter from a resident doctor of audiology, Allison McVeety, B.A., who performed a complete audiologic evaluation and

QuickSIN test (id. at exhibit 2). McVeety, among other things, diagnosed Gagliano as having profound sensorineural hearing loss in the left ear with unrestricted hearing in the contralateral ear (id.). McVeety goes on to state that Category B of the NFPA 1582 Medical Examination Guidelines for Physicians states that in order to pass, pure tone thresholds in the better ear must indicate average hearing levels at 500, 1000, 2000, and 3000 Hz be lower than 35 dB HL and a performance score of 80% or better on the speech discrimination test in the better ear; and that: Gagliano's pure tone results indicate an average of 10 dB HL in the right ear; his word recognition scores were excellent in the right ear at 100% when stimuli was presented in a conversational level; and QuickSIN test revealed better than normal ability to understanding speech embedded in increasing levels of background noise (id.). McVeety concluded that it was her "professional opinion that the hearing loss in the left ear will not prevent him from fully functioning as a firefighter" (id.).

In addition, a memo from Captain Norberto J. Torres, Commanding Officer of FDNY - EMS Station 27 (Station 27), indicates that Gagliano has been able to perform his duties as a Haz-Tac certified paramedic without limitations, and has had no restrictions performing his duties (id. at exhibit 4). A memo from retired deputy chief of EMS Division 2 indicates that he

oversaw Station 27, and also worked with Gagliano for 15 years in the capacity of both a volunteer firefighter with the Yorktown Heights Engine Co. #1 and a paramedic with Station 27, and in that time Gagliano performed his job "flawlessly and would communicate effectively any issues that required immediate attention" (id. at exhibit 5).

In response, the FDNY submitted a report dated July 5, 2018 by Dr. Shenecia Beecher, the FDNY's deputy chief medical officer opposing Gagliano's appeal (petitioner exhibit F). Beecher reviewed the medical reports and recommendations submitted by Gagliano, as well as the NFPA guidelines (id.). Beecher found that "[p]er NFPA standards, average hearing loss in the unaided better ear (category A condition) or in either ear (category B condition) worse than 40 dB at 500, 1000, 2000, and 3000 Hz are grounds for the medical disqualification of a Firefighter candidate" (id. at 2). Beecher considered the letters of support from several officers Gagliano has worked with, and found that while

"commendable, they do not detract from the real potential difficulties the candidate could face as a FDNY Firefighter at a noisy, bustling fire scene where accurate communication, accurate speech comprehension, accurate sound localization, and the ability to detect the faint, low volume cries of a victim in such an environment could have dramatic consequences on the success of a rescue operation"

(id. at 3).

Beecher also accounted for the fact that firefighters are at an increased risk of secondary hearing loss due to exposure to noise, carbon monoxide, and certain ototoxic chemicals, including nitriles, certain solvents and hydrogen cyanide (id.). Beecher reviewed the annual EMVS monitoring examinations from 2011 to 2016 and found that there is evidence of a progression in the severity of his left-sided hearing loss (id. at 4).

Beecher concluded that Gagliano's

"current left-sided hearing loss would already limit his ability to perceive critical low-volume sounds, to engage in accurate receptive communication, and to accurately lateralize or locate sounds in a high noise environment such as at a fire scene. These limitations could potentially be life threatening to a Firefighter, the team he or she works with and victims. This candidate continues to be not qualified as a Firefighter"

(id. at 5).

On August 8, 2018, Gagliano, through counsel submitted a reply to the CSC in which he responded to and refuted Beecher's report (petition exhibit H). Gagliano's position was that Beecher's report was full of assumptions, including that his hearing loss will continue to decrease as, Beecher herself makes note of the fact that "Gagliano was found, less than a year ago to demonstrate 'better than normal ability to understand speech embedded in increasing levels of background noise'" (id. at 3). Gagliano further argued that Beecher admits that ALL firefighters are at risk for hearing loss (id. at 4).

On August 27, 2018, in a two-paragraph decision, the CSC denied Gagliano's appeal based on Dr. Beecher's report (petition exhibit I). Specifically, the CSC stated that "[t]he Commission has carefully reviewed the entire record and considered the arguments presented by both parties. The Commission incorporates FDNY's July 11, 2018 report in this decision and concludes that the record supports [Gagliano's] disqualification. ... Accordingly, the determination finding [Gagliano] disqualified is hereby affirmed" (*id.*).

NFPA

The NFPA Chapter 6, section 6.2 states as follows:

"6.2.1. Medical conditions that can affect a candidate's ability to safely perform essential job tasks shall be designated either Category A or Category B.

6.2.2 Candidates with Category A medical conditions shall not be certified as meeting the medical requirements of this standard.

6.2.3 Candidates with Category B medical conditions shall be certified as meeting the medical requirements of this standard only if they can perform the essential job tasks without posing a significant safety and health risk to themselves, members or the public."

(petitioner exhibit G).

Further, section 6.5 as it relates to "Ears and Hearing" states as follows:

"6.5.1 Category A medical conditions shall include the following:

(1) Chronic vertigo or impaired balance as demonstrated by the inability to tandem gait walk.

(2) On audiometric testing, average hearing loss in the unaided better ear greater than 40 decibels (dB) at 500 Hz, 1000 Hz, and 2000 Hz when the audiometric device is calibrated to ANSI Z24.5, Audiometric Device Testing.

(3) Any ear condition (or hearing impairment) that results in a person not being able to safely perform essential job tasks.

6.5.2 Category B medical conditions shall include the following:

- (1) Unequal hearing loss
- (2) Average uncorrected hearing deficit at the test frequencies 500 Hz, 1000 Hz, 2000 Hz, and 3000 Hz greater than 40 dB in either ear
- (3) Atresia, stenosis, or tumor of the auditory canal
- (4) External otitis
- (5) Agensis or traumatic deformity of the auricle
- (6) Mastoiditis or surgical deformity of the mastoid
- (7) Ménière's syndrome, labyrinthitis, or tinnitus
- (8) Otitis media
- (9) Surgical procedures to correct or improve hearing or other conditions of the ear."

Moreover, A.6.5 states:

"Currently, no hearing tests will allow the fire department physician to accurately predict whether the fire fighter will adequately be able to safely perform essential job duties. Job-specific hearing tests should be individualized for each department and its specific job functions.

The following list of hearing-specific tasks can assist to direct development of hearing protocols:

- (1) Understanding spoken commands, both over the radio and while wearing SBCA
- (2) Hearing alarm signals, including building evacuation, low air alarm on the SCBA, and PASS alarms
- (3) Hearing and locating the source of calls for assistance from victims or other fire fighters.

All of these tasks will need to be performed with reasonably simulated incident scene background noise and SCBA noise. The inability to hear sounds of low intensity or to distinguish voice from background noise can lead to failure to respond to imminently hazardous situations.

A.6.5.2(1) Unequal hearing can result in the inability to localize sounds, leading to failure in the ability to safely perform search and rescue and other localized tasks"

(id.).

Discussion

When the CSC hears an appeal of a disqualification determination, pursuant to its authority under New York City Charter § 813, the appropriate standard of review is whether the disqualifying authority's decision "was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803; Matter of City of New York v New York City Civ. Serv. Commn., 20 AD3d 347, 348 [1st Dept 2005] [CSC's review of a disqualification determination is the "same as the judicial standard applicable in article 78 proceedings"], affd, 6 NY3d 855 [2006]).

The test of whether an administrative determination is arbitrary and capricious "chiefly relates to whether a

particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact" (Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974] [internal quotation marks and citation omitted]). On appeal, the CSC must determine whether the FDNY "acted illegally or capriciously" or whether the professional opinion was not rationally based (Matter of Altieri v City of N.Y. Civ. Serv. Commn., 57 AD3d 248, 249 [1st Dept 2008]). "An appointing authority has wide discretion in determining the fitness of candidates . . . particularly . . . in the hiring of [firefighters], to whom high standards may be applied" (Matter of City of New York v New York City Civ. Serv. Commn., 61 AD3d 584, 584 [1st Dept 2009] [internal quotation marks and citation omitted]).

Petitioner claims that Beecher's determination was irrational because his hearing loss was not an NFPA 1582 Category A medical condition, which requires disqualification. He contends, that instead, his hearing loss falls within Category B, in which case candidates "will not be disqualified if they can perform the essential tasks of the job . . . without posing a significant safety and health risk to themselves, members of the Department or the public" (petitioner memorandum of law at 14). However, petitioner, himself, admits that such

determinations, i.e., whether a candidate can perform the essential duties of the job, "must be assessed on a case-by-case basis" (id. at 15).

Respondents counter that Dr. Beecher had a medically justified, rational basis to initially support Gagliano's disqualification, as all reports indicated profound hearing loss on his left-side. While Gagliano's physician's opinions conclude that he could perform the essential functions of the job, conflicting findings between physicians do not render "an agency's decision to rely upon its own medical results. . . arbitrary or capricious" (Matter of DeBlasio v Gourdine, 2010 NY Slip Op 30119[U], *4 [Sup Ct, NY County 2010]; Altieri, 57 AD3d at 249 ["(t)he conflicting opinion of petitioner's treating physician does not tend to show that respondent 'acted illegally or capriciously or adopted a professional opinion not founded on a rational basis'"] [citation omitted]; Matter of Rivers v New York City Dept. of Sanitation, 49 AD3d 436, 436 [1st Dept 2008] ["respondents were entitled to rely on the conclusions of respondent Department of Sanitation's medical director [despite] conflicting opinions from petitioner's physicians"]). Further, despite the conflicting findings by Veety on appeal, the FDNY's reliance on Beecher's determination was neither arbitrary nor capricious (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], affd 11 NY3d 859 [2008] ["(E)ven if different conclusions could be reached . . . , a court may not substitute its judgment for that of the agency [if there is a rational basis for the determination]"). It is evident from the record that Dr. Beecher took heed of all of the evidence submitted when rendering her opinion regarding Gagliano's fitness as a potential firefighter for the FDNY.

Likewise, the CSC's review of Gagliano's file and reliance on the opinions of FDNY's medical doctor cannot be said to be arbitrary or capricious or unlawful. In an article 78 proceeding, the court's function is to determine whether the action of an administrative agency, had a rational basis or was arbitrary and capricious (see CPLR 7803 (3); Matter of Pell, 34 NY2d at 230). An administrative action is deemed "arbitrary" if it is "without basis in reason and is generally taken without regard to the facts" (id. at 231; Matter of Metropolitan Movers Assn., Inv. v Liu, 95 AD3d 596, 598 [1st Dept 2012]).

Furthermore, a court may not "substitute its own judgment for that of the agency, particularly with respect to matters within its expertise" (Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363 [1987]).

Where, as here, the CSC "was confronted with conflicting medical opinion concerning the petitioner, its reliance upon the advice of its own medical staff cannot be considered arbitrary

or capricious" (Matter of Albury v New York City Civ. Serv. Commn., 32 AD2d 895, 895 [1st Dept 1969], affd 27 NY2d 694 [1970]).

Therefore, as petitioner fails to demonstrate that the CSC's decision was arbitrary, capricious or illegal, his application must be denied.

8/7/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
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<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: