

**Matter of Local 100, Transp. Workers Union of
Greater N.Y. v City of New York Dept. of Citywide
Admin. Servs.**

2005 NY Slip Op 30590(U)

October 11, 2005

Supreme Court, New York County

Docket Number: 103015/04

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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In the Matter of the Application of

LOCAL 100, TRANSPORT WORKERS UNION OF
GREATER NEW YORK,

Petitioner,

Index No. 103015/04

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

Seqs. 004

-against-

CITY OF NEW YORK DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES,

Respondent.

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DORIS LING-COHAN, J. S. C.:

Petitioner Local 100, Transport Workers Union of Greater New York (hereafter, Local 100) represents the non-supervisory operational and maintenance employees of the New York City Transit Authority (hereafter, Transit Authority).

Respondent City of New York Department of Citywide Administrative Services (hereafter, DCAS), is a municipal civil service commission with the responsibility, among other things, for administration of New York City's (hereinafter, the City) municipal and agency employees, including the administration of examinations for the City's civil service titles¹.

¹ New York City Charter § 811 provides that the Commissioner of DCAS "...shall have all the powers and duties of a municipal civil service commission provided in the civil service law or in any other statute or local law...". One of the responsibilities exercised by DCAS, as a municipal civil service commission, is to schedule and conduct civil service examinations (see New York City Charter § 814 [a] [1] - [a] [5]).

DCAS had a practice, since in or about 1996, of conducting two examinations for the position of Transit Authority station agent, or token booth clerk. One of these examinations was promotional, and was administered to incumbent employees in certain unskilled Transit Authority labor titles, held by employees responsible for the protection and maintenance of the Transit Authority's facilities (hereafter, collectively, cleaner titles). The other, an open-competitive examination, was open to the general public.

The examinations were scheduled so that the promotional examination was administered prior to the open-competitive examination, which in effect gave test-takers in the cleaner titles an advantage, because open positions were filled from the promotional list, prior to resort to candidates from the open-competitive list.

Station agent is an entry-level position. As a result, there are no positions in the direct line for promotion to the station agent position. However, section 52 (1) of the New York Civil Service Law (Civil Service Law) provides that DCAS may extend promotional eligibility to employees which it "determines to be in related or collateral lines of promotion". Section 52 (14) of the New York Civil Service Law provides that:

Notwithstanding any other provision of law, in a city containing more than one county, the municipal civil service commission may, for titles designated by it, extend to employees in the service of a civil division or public authority under its jurisdiction who are holding a position in the non-competitive class or the labor class of such service the same opportunities as employees in the competitive class to take promotional examinations for which such non-competitive class or labor class service is determined by the municipal civil service commission to be appropriate preparation.

For many years, it had been the practice of the Transit Authority for cleaners to relieve station agents, when the latter needed to take "comfort breaks". In fact, the job description for the position

of “Transit Cleaner”, one of the cleaner titles, includes the following: “Relieves Railroad Clerk when necessary.” (Respondent’s Verified Answer [Answer], Ex. B). When a given station agent took a break, a cleaner working in the station would operate the token booth. Until the station agent returned, the cleaner would give assistance and instructions to the general public, and perform the station agent’s duties. This practice resulted in a type of “on-the-job” training for cleaners, which DCAS had previously determined to be adequate preparation, within the meaning of Civil Service Law § 52 (14), warranting the preferential treatment accorded the cleaner titles in connection with prior promotional examinations for station agent positions in 1996 and 1998.

As had been the case in 1996 and 1998², DCAS scheduled two examinations for station agent, one promotional, and one open-competitive, for the 2004 examination year. In the fall of 2003, DCAS asked the Transit Authority to provide the basis upon which it could administer a promotional examination to the cleaner titles, and the Transit Authority informed DCAS that it believed that the practice of cleaners relieving station agents during comfort breaks, outlined above, was being followed (Answer, Affidavit of Thomas J. Patitucci on behalf of Respondent [Patitucci Aff.], at ¶ 22). Therefore, the Transit Authority suggested that the experience of cleaners provided adequate preparation for work as station agents, so that the two lines could be considered related or collateral, within the meaning of Civil Service Law § 52, as the cleaners had to be familiar with both the equipment station agents operated and the issues they generally encountered (*id.*).

² DCAS had previously scheduled both promotional and open-competitive examinations for station agent positions in April 1996 and August 1998. The announcements for the promotional examinations stated that employees in the cleaner titles were eligible to take the examinations and then explained, “For this examination only, admission of employees is extended to persons holding the above competitive or labor class positions which have been determined by the Department of Personnel to be in related or collateral lines of promotion.” (Answer, Ex. C)

However, when asked by DCAS to definitively confirm that this practice of cleaners relieving station agents during comfort breaks was routinely followed, the Transit Authority was unable to verify that this practice was, indeed, being followed (Patitucci Aff., at ¶ 23).

In a subsequent letter to DCAS dated December 22, 2003, Kevin Hyland, the Transit Authority's Vice President for Human Resources, requested that the cleaners be afforded the opportunity to take the promotional examination for the station agent position (Answer, Ex. D). However, Mr. Hyland's letter did not advance the "comfort break" relief practice as the justification. Instead, Mr. Hyland advised DCAS that the Transit Authority was in the process of changing the duties of station agents from functions limited to work within token booths to work within the entire area of the stations, including interacting with customers (*id.*). Mr. Hyland emphasized the fact that cleaners currently fulfilled roles which included prioritizing information and interacting with customers. Accordingly, Mr. Hyland concluded, "It is our belief that the customer service elements in the Cleaner job create a sufficient job affinity with the Station Agent title to justify continuing the collateral promotional opportunity" (*id.*).

DCAS disagreed with the Transit Authority's new justification, that the customer service elements of the work of cleaners either made the cleaner titles "related or collateral lines of promotion" with regard to the station agent title, within the meaning of Civil Service Law § 52 (1), or provided "adequate preparation" for work as a station agent, within the meaning of Civil Service Law § 52 (14). Accordingly, on December 31, 2003, DCAS cancelled the scheduled April 2004 promotional examination, which, in effect, meant that the employees in the cleaner titles were relegated to competing against the general public for the station agent positions to be filled from the list generated by the examination.

In a letter dated January 21, 2004, DCAS Deputy Commissioner Joseph A. De Marco wrote to Mr. Hyland, in response to his December 22, 2003 letter, stating that the basis for allowing employees in the cleaner titles to take promotional examinations for station agent positions had been the practice of cleaners relieving station agents during their “comfort breaks”, thereby allowing cleaners to become familiar with the equipment operated by station agents and the issues they encountered (Answer, Ex. E). Mr. De Marco explained, “Appropriate preparation is required by the Civil Service Law in order to consider a title to be collateral when it is not in a direct line of promotion to another title, and to make this title eligible for a promotional exam to the other title” (*id.*). He then noted that, “once cleaners no longer relieved station agents, the basis for making cleaners eligible for the promotional exam was eliminated” (*id.*). Mr. De Marco further stated, however, that he had reviewed copies of a proposed new Transit Authority training program for cleaners and, once the program has been implemented, DCAS will evaluate it to determine whether it provides cleaners with adequate preparation to perform the duties and responsibilities of station agents (*id.*). The Transit Authority did not send further correspondence to DCAS on this issue, and, thus, DCAS concluded that the Transit Authority had understood and accepted its rationale for cancelling the 2004 promotional examination for the cleaner titles (Patitucci Aff., at ¶ 28).

On or about February 26, 2004, Local 100 commenced this Article 78 proceeding, seeking, among other things, to compel DCAS to reinstate the promotional examination for station agent, for the benefit of its members in the cleaner titles. DCAS cross-moved to dismiss the petition. In response, Local 100 produced affidavits from several of its members, indicating that cleaners were still providing comfort break relief to station agents (*see* Affidavits of Marvin Holland, Jacqueline Allison, Alice Ackerman and Darlyne Lawson in Support of Verified Petition). For example,

Marvin Holland, who worked as a cleaner until in or about January 2004, stated that his job duties included relieving station agents when they went on breaks, and that cleaners generally relieve station agents from two to three times per day, up to eight to ten times per day (*see* Holland Aff., at ¶¶ 3-5). Station agent Jacqueline Allison stated that while cleaners still relieve station agents during breaks at other token booths in her subway station, around May 2004, her supervisor told her to discontinue the practice of allowing cleaners into her booth to relieve her during “comfort breaks” (Allison Aff., at ¶¶ 8, 10). In addition, Ms. Allison and another station agent, Alice Ackerman, stated that the official Transit Authority announcement broadcast heard in token booths at least several times per week, reminds station agents that person authorized to enter token booths include “Cleaners on duty, cleaning token booths or giving authorized comfort relief to Station Agents” (Allison Aff., at ¶¶ 5-7; Ackerman Aff., at ¶¶ 3-5). Ms. Ackerman also stated that cleaners regularly relieve her when she taken “comfort breaks” (Ackerman Aff., at ¶ 6).

DCAS asserts, however, that based upon the information provided by the Transit Authority to DCAS in late 2003 and early 2004 regarding the changes in functions of the station agents and changes in the prior practice of cleaners relieving station agents in token booths during the latter’s “comfort breaks”, it had a rational basis to exercise its discretion to cancel the promotional examination for employees in the cleaner titles and this decision was neither arbitrary nor capricious (*see* Patitucci Aff., at ¶¶ 28-31).

By order entered on October 4, 2004, this Court denied the cross motion by respondent DCAS to dismiss the petition and directed DCAS to file an answer (Answer, Ex. H). This Court reasoned that DCAS had the discretion to determine whether to administer promotional examinations to employees in the cleaner titles for the position of station agent, as the cleaner titles

were not in the direct line of promotion to station agent, but, rather, were allegedly in related or collateral lines (see Civil Service Law § 52 [1]) (*id.*). This Court concluded that the petition stated a cognizable cause of action under CPLR Article 78, as there was conflicting evidence as to whether the Transit Authority had, in fact, discontinued the practice of having cleaners relieve ticket agents during “comfort breaks”, which had been the basis for the determination by DCAS that the cleaner titles were related or collateral to the station agent title (*id.*). After DCAS filed its answer, Local 100 re-noticed the petition, which is now being considered on the merits.

Discussion

Courts defer to the discretion of the appropriate civil service commission, in this case DCAS, to determine the eligibility requirements for promotional examinations, including whether certain job titles are in related or collateral lines, within the meaning of Civil Service Law § 52 (1), or provide “appropriate preparation” for another job title, within the meaning of Civil Service Law § 52 (14) (see *Matter of Conlon v McCoy*, 22 NY2d 356, 362-363 [1968]; *Wirzberger v Watson*, 305 NY 507, 513-514 [1953]; *Matter of Gallagher v City of New York*, 307 AD2d 76, 80-82 [1st Dept 2003], *lv denied* 1 NY3d 503 [2003]; *Matter of Palaia v Yonkers Civil Serv. Commn.*, 293 AD2d 479 [2d Dept 2002]; *Liebe v Nassau County Civil Serv. Commn.*, 291 AD2d 451 [2d Dept 2002]; *Matter of Beloten v Diamond*, 276 AD2d 438 [1st Dept 2000]; *Matter of McGrath v Safir*, 250 AD2d 470 [1st Dept 1998]; *Matter of Hedeman v County of Dutchess*, 234 AD2d 294 [2d Dept 1996]). Courts will not substitute their judgment for that of a civil service commission regarding the eligibility requirements to take a promotional examination, if any fair argument can be made to sustain the commission’s determination (see *Wirzberger v Watson*, 305 NY at 513; *Matter of Gallagher v City of New York*, 307 AD2d at 81; *Matter of McGrath v Safir*, 250 AD2d at 479). Courts have upheld

the discretion of a civil service commission in changing existing requirements for promotional examinations, if the commission's determination was supported by a fair argument and was not arbitrary or capricious (*see Matter of McGrath v Safir*, 250 AD2d 479, *supra* [experience requirement increased for promotional examination for police sergeant]; *Matter of Hedeman v County of Dutchess*, 234 AD2d 294, *supra* [educational requirements for promotion to junior civil engineer position increased]; *Matter of Connery v White*, 164 AD2d 535 [3d Dept 1990] [Civil Service Commission could make requirements for promotion to Department of Transportation Personnel Director more stringent]).

An administrative agency, like DCAS, however, must explain its reasons for departing from a prior practice, in this case administering a promotional examination for the station agent position open to employees in the cleaner titles. If an administrative agency does not provide adequate reasons for departing from prior practice or precedent in cases where the facts are substantially similar, its determination may be considered arbitrary and capricious (*see Matter of Klein v Levin*, 305 AD2d 316, 317-318 [1st Dept 2003], *lv denied* 100 NY2d 514 [2003]; *see also Matter of Buffalo Civic Auto Ramps, Inc. v Serio*, --- AD2d ---, 800 NYS2d 686 [1st Dept 2005]; *Matter of 2084-2086 BPE Assocs. v State of New York Div. of Hous. and Community Renewal*, 15 AD3d 288 [1st Dept 2005], *lv denied* ---NY3d --- [Sept. 13, 2005]).

The petition asserts that DCAS cancelled the 2004 promotional examination for the cleaner titles, based upon the mistaken belief that the prior practice of having cleaners relieve station agents during comfort breaks had been discontinued. (Verified Petition, at ¶¶ 26-27). As has been noted above, in his January 21, 2004 letter to Transit Authority Vice President Kenneth Hyland, DCAS Deputy Commissioner Joseph DeMarco stated, "once cleaners no longer relieved station agents, the

basis for making the cleaners eligible for the promotional exam was eliminated” (*see* Answer, Ex. E). According to DCAS, in response to its inquiries, the Transit Authority could not confirm whether, in light of their new duties, station agents were still relieved by cleaners. DCAS did not accept the new rationale for allowing cleaners to take the promotional examinations proposed by Transit Authority Vice President, Kenneth Hyland in his December 22, 2003 letter, namely that certain “customer service elements of the Cleaner job create a sufficient job affinity with the Station Agent title” (Answer, Exs. D and E).

The record on the instant petition is inadequate to enable this Court to make a determination on certain disputed factual issues necessary to review the determination by DCAS to cancel the 2004 promotional examination for cleaners. Accordingly, pursuant to CPLR 7804 (h), this Court refers this matter for a hearing before a Special Referee, concerning the disputed factual issues, including: (1) whether, in or after 2004, the Transit Authority continued its prior practice of having employees in the cleaner titles relieve station agents during “comfort breaks”; and (2) whether, in or after 2004, the cleaners have had other training or work experience providing them with adequate preparation to perform the work of station agents (*see Matter of Sontag v Bronstein*, 33 NY2d 197 [1973]; *Matter of Anonymous v Commr. of Health*, ___ AD3d ___, 2005 NY Slip Op 06884 [1st Dept Sept. 27, 2005]; *Matter of Pantelidis v New York City Bd. of Stds. and Appeals*, 13 AD3d 242 [1st Dept 2004], *lv denied* 4 NY3d 809 [2005]; *Church of Scientology of New York v Tax Commn. of City of New York*, 120 AD2d 376 [1st Dept 1986], *appeal dismissed* 68 NY2d 807 [1986] and 69 NY2d 659 [1986]).

Accordingly, it is

ORDERED that, pursuant to CPLR 7804 (h), the disputed factual issues specified herein,

related to the determination by the New York City Department of Citywide Administrative Services to cancel the 2004 promotional examination for employees in the cleaner titles, are referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that pending receipt of the Special Referee's report and recommendations, and a motion pursuant to CPLR 4403, the final determination of the within Article 78 proceeding is held in abeyance; and it is further

ORDERED that, within thirty days of entry, petitioner shall serve a copy of this decision and order, with notice of entry, upon respondent and shall also serve a copy of the decision and order, with notice of entry and a completed Information Sheet using the form annexed hereto, on the Special Referee Clerk in the Motion Support Office, Room 119 , in order to obtain a hearing date; and it is further

ORDERED that upon failure of petitioner to comply with the above, the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the Court..

Dated: October 11, 2005

ENTER

DORIS LING-COHAN, J.S.C.

HON. DORIS LING-COHAN

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