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| <b>Matter of Gallo v County of Suffolk</b>   |
| 2011 NY Slip Op 33608(U)   |
| March 30, 2011   |
| Supreme Court, Suffolk County  |
| Docket Number: 33224-11  |
| Judge: Denise F. Molia   |
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Index No: 33224-11

SUPREME COURT - STATE OF NEW YORK  
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,  
Justice

In the Matter of the Application of THOMAS F.  
GALLO, JR.,

Petitioner,

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

- against -

COUNTY OF SUFFOLK, STATE OF NEW YORK,  
and COUNTY OF SUFFOLK DEPARTMENT OF  
CIVIL SERVICE,

Respondents.

CASE DISPOSED: YES  
MOTION R/D: 10/28/11  
SUBMISSION DATE: 1/6/12  
MOTION SEQUENCE No.: 003 MD

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Upon the following papers filed and considered relative to this matter:

Order to Show Cause dated October 25, 2011; Verified Petition dated October 25, 2011; Affirmation in Support dated October 25, 2011; Exhibits A through L annexed thereto; Verified Answer dated December 23, 2011; Verified Reply dated January 5, 2012; Administrative Return; Affirmation in Opposition dated December 27, 2011; Affidavit dated December 16, 2011; Exhibits 1 through 8 annexed thereto; Reply Affidavit dated January 5, 2012; Exhibits A through C annexed thereto; Respondents' Memorandum of Law dated November 2, 2011; Respondents' Memorandum of Law dated December 27, 2011; Petitioner's Reply Memorandum of Law; and upon due deliberation; it is

**ORDERED**, that the petition of Thomas F. Gallo, Jr., pursuant to CPLR 7804(c), Civil Service Law §50(4)(b), and Executive Law §292(21), for an Order (1) annulling and reversing the Respondents' determination that the Petitioner was "Not Qualified-Medically", as of October 18, 2011 for the Civil Service position of Correction Officer I; (2) declaring the Petitioner medically qualified as of October 18, 2011, for the position of Correction Officer I, and eligible to be enrolled in the Suffolk County Police Academy class for said position, starting October 31, 2011; (3) reinstating the Petitioner to the Eligible List Number 07-5501-152 for the position of Correction Officer I based on his examination score of 80; (4) enjoining and restraining the Respondents from appointing any applicants to the position of Correction Officer I pending the court's review and determination of the Petitioner herein; (5) directing and ordering the Respondents to enroll the Petitioner into the Police Academy class starting October 31, 2011, for

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the position of Correction Officer I, pending the court's review and determination of the Petition herein; and (6) ordering an immediate hearing on the Petitioner's request to be enrolled in the Suffolk County Police Academy class for said position starting October 31, 2011; is denied.

On or about January 29, 2008, the petitioner, who had taken the Civil Service written examination for the position of Correction Officer I, received notification from the respondent Civil Service Department, that he had been successful in the overall examination and that his position on the list of those eligible to be appointed to the position of Correction Officer I was based on a score of 80. The petitioner was then placed on the Certification of Eligibles List for the position of Correction Officer I, in a place consistent with his respective score on the Civil Service Examination for that position.

The petition alleges that although the petitioner remains eligible and available to be appointed to the position of Correction Officer I, and enrolled in the Suffolk County Police Academy, he has not received such appointment because he has been declared "medically not qualified" for said position based on the purported results of the County's medical examination of some of his medical records.

Gallo alleges that he attended a seminar for those interested in remaining on the Eligibility List held on August 2, 2011, and at that time represented himself to be ready and available to be enrolled. Petitioner's medical evaluation was scheduled for August 22, 2011, on which date he submitted a Medical Questionnaire which acknowledged that he had three past medical issues; *i.e.*, seasonal asthma, surgically-repaired torn, medial meniscus, and muscle spasms. Petitioner also advised of: "Severe muscle spasm, Dr. Frey-Dr. Nataloni," and that during the preceding twelve months, he had been prescribed Klonopin .5 mg to sleep, Flovent Diskus, and Albuterol inhaler. Petitioner did not reveal when he first began taking Klonopin, the overall length of time he had been taking the drug.

On August 22, 2011, Gallo was questioned by Dr. Chandra Morcos, who was identified as a General Practitioner, working for the respondents' medical center. It appears that at the session with Dr. Morcos, some of the medical records provided to the physician included documents from a person other than the petitioner. Gallo confirmed to Morcos that he had previously visited a chiropractor, for treatment, but no adjustment. However, petitioner's chiropractic records provided by Aquebogue Health Chiropractic revealed a course of treatment and care over the period February 26, 2004 through July, 2011, in response to petitioner's complaints regarding muscle spasms and pain in his low back which radiated into his lower extremities.

The respondents issued a Notification of Determination, dated September 8, 2011, with a finding that the petitioner was "Not Qualified", and specifying the reasons to be "degenerative disease in cervical spine, C5-6, C6-7, chronic lumbar radiculopathy. Diffuse bulging discs w/impingement, L2-3, L3-4, L4-5. The petitioner received a copy of the notification on September 18, 2011. The petitioner appealed on September 19, 2011. It appears that of the documents received for review, Dr. Morcos may have received pages of medical records from the chiropractor, which records applied to other persons also named Thomas Gallo. When advised of this situation, petitioner represents that Marcos told Gallo that she would "re-evaluate" him. One day later a second Notification of Determination was issued, with a finding that petitioner was "Not Qualified", for "degenerative disease in lumbar spine", not mentioned in the first report, and for "diffuse bulging discs with impingement L2-3, L3-4, L4-5."

Believing the evaluation to be inaccurate, the petitioner visited his treating physician

since 1993, Lilly Steel, MD., who ordered an MRI for petitioner. As a result, petitioner underwent an MRI of his lumbar spine, and received an evaluation by Robert Galler, D.I., which determined in part:

“The MRI of the lumbar spine shows mild degenerative changes of the discs from L1 to 5. There is no evidence of herniated disc causing any significant hernial compression.

At this point, Mr. Gallo appears to be quite fit and completely asymptomatic regarding his lumbar spine.”

In addition, Dr. Steel issued a letter, dated September 23, 2011, in which she opined that the petitioner had no “physical limitations that would prevent him from fulfilling his duties as a correction officer, and he was asymptomatic.” Gallo did not indicate the length of time he had been a patient of Dr. Steel, or the nature of the care and treatment provided to him by Dr. Steel. The petitioner however, has not submitted an affidavit from Dr. Galler or any other physician concerning the petitioner’s medical condition. It is also noted that there is no indication of the familiarity of either physician with all of the requirements of the position of Correction Officer I.

The petitioner received a copy of his disqualification, dated October 18, 2011, which stated:

“Pursuant to your APPEAL for reconsideration, Employee Health Services has re-evaluated your medical capability for employment by Suffolk County for the position of : **Correction Officer I**. The result of your APPEAL is that you are found to be: **Not Qualified - Medically.**”

Upon being found medically “not qualified,” the petitioner submitted, as part of the review process, the October 11, 2011 report from Dr. Robert Galler, D.O., to Dr. Lilly Steel, M.D. Although there appeared to be some confusion as to whether and when this report was reviewed by Dr. Morcos, the affidavit of Dr. Morcos states that the Galler report was reviewed by her on October 18, 2011. Based upon her review of the records in possession of the respondent, Dr. Marcos rendered her professional opinion that the petitioner’s symptomatic degenerative disc disease would negatively impact upon his ability to perform the essential functions of the job for which he was applying. In commencing the instant Article 78 proceeding, the petitioner alleges that he was selectively declared to be “Not Qualified” for arbitrary, capricious, erroneous, impermissible, or illegal considerations, and for no objective reason, but instead for a bad faith intent to injure the petitioner.

Placement on an eligibility list for employment or promotion does not give a candidate “any mandated right to appointment or any other legally protectible interest.” Cassidy v. Municipal Civil Service Commission of New Rochelle, 37 N.Y.2d 526, 529, 375 N.Y.S.2d 300, 303. For the position of Correction Officer I, a candidate is required to be found medically qualified in order to guarantee that he/she will be able to properly execute the duties associated with the job. In performing medical evaluations of law enforcement candidates, the respondent’s doctor is guided by the standards as promulgated by the Metropolitan Police Training Council’s Medical and Physical Fitness Standards and Procedures for Police Officer Candidates, as well as the civil service job description for the position.

The Court of Appeals has held that administrative determinations will not be disturbed if

there is a rational basis for the determination and it is neither arbitrary or capricious. The Court held:

“In Article 78 proceedings, “the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has the power to upset the determination of an administrative tribunal on a question of fact; \* \* \* ‘the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is “substantial evidence.”’” . . . “The approach is the same when the issue concerns the exercise of discretion by the administrative tribunal: The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is ‘arbitrary and capricious.’”

The arbitrary or capricious test chiefly “relates to whether a particular action should have been taken or is justified \* \* \* and whether the administrative action is without foundation in fact.” . . . Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. In *Matter of Colton v. Berman* this court said “the proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law.” Where, however, a hearing is held, the determination must be supported by substantial evidence . . . Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.” (Citations omitted)

Pell v. Board of Education of Union Free School District No. 1 of the Towns of Scarsdale and Maaronck, Westchester Co., 34 N.Y.2d 222, 231-232, 356 N.Y.S.2d 833, 839, 313 N.E.2d 321.

Under the circumstances presented, the petitioner has failed to demonstrate the lack of a rational basis to support the findings of respondents’ physician. Dr. Morcos made an individualized assessment of both the petitioner and his medical records. Her evaluation and review of the records, which included a lengthy history of treatment for his back, led Morcos to determine that Gallo’s history of treatment belied his assessment that he was asymptomatic.

In addition, courts have consistently recognized the wide discretion afforded to the various civil service commissions in determining the fitness of candidates and the exercise of such discretion should be sustained unless clearly abused. Cassidy v. Municipal Civil Service Commission of the City of New Rochelle, 37 N.Y.2d 526, 375 N.Y.S.2d 300; Metzger v. Nassau County Civil Service Commission, 54 A.D.2d 565, 386 N.Y.S.2d 890. Such discretion is particularly necessary in the appointment of law enforcement officials to whom higher standards of fitness and character may be applied. See, Shedlock v. Connelie, 66 A.D.2d 433, 435, 414 N.Y.S.2d 55, *aff’d*, 48 N.Y.2d 943, 425 N.Y.S.2d 95. In *Cassidy*, the Court of Appeals explained the rationale supporting the need for broad administrative direction as follows:

“An individual’s ability to achieve a high examination score does not necessarily demonstrate his capacity to perform the actual duties of a particular position. Moreover, examination success cannot reveal any possible defects of personality, character or disposition which may impair the performance of one’s duties in a civil service position. Hence, of necessity, the appointing authority must be cloaked with

the power to choose a qualified appointee who possesses all the attributes necessary for responsible performance of his duties.” (Citations omitted).

Cassidy v. Municipal Civil Service Commission of the City of New Rochelle, 37 N.Y.2d 526, 529, 375 N.Y.S.2d 300, 302.

The courts of this state will generally not upset an administrative determination given the ruling of *Cassidy*. See, e.g., Kornfeld v. Nassau County Civil Service Commission, 138 A.D.2d 710, 526 N.Y.S.2d 523 (determination that applicant was not qualified based on abnormal electrocardiograms upheld as not arbitrary and capricious, despite contrary opinion by applicant’s physician); Sherman v. Leonard, 197 A.D.2d 581, 602 N.Y.S.2d 652 (finding that applicant was medically unqualified because of evidence he had a shoulder susceptible to dislocation upheld as not arbitrary and capricious); City of New York v. New York City Civil Service Commission, 61 A.D.3d 584, 877 N.Y.S.2d 322 (appointing authority has the discretion to rely on the findings of its own medical personnel, even where the determination is contrary to that of a professional retained by the applicant).

In light of the above, including the medical review conducted by the respondents’ physician, the respondents’ determination to disqualify the petitioner from the Suffolk County Correction Officer application process has been demonstrated to have a rational basis, and has not been shown to have been arbitrary or capricious. Accordingly, the petition of Thomas F. Gallo, Jr., is dismissed.

The foregoing constitutes the Order of this Court.

Dated: March 30, 2011

**Hon. Denise F. Molia**  
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HON. DENISE F. MOLIA J.S.C.