

<b>Lieutenants Benevolent Assoc. of the City of NY v City of NY</b>
2012 NY Slip Op 31148(U)
April 23, 2012
Sup Ct, NY County
Docket Number: 112914/2011
Judge: Joan B. Lobis
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

*Justice: Joan B. Lobis*

Index Number : 112914/2011

LIEUTENANTS BENEVOLENT ASSOC.

vs

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

PART 6

INDEX NO. \_\_\_\_\_

MOTION DATE 2/16/12

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 22, were read on this motion to for reverse administrative determination.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

No(s) 1-17

Answering Affidavits — Exhibits \_\_\_\_\_

No(s) X-mot 18-20

Replying Affidavits \_\_\_\_\_

No(s) reply to x-mot: 21,

22

Upon the foregoing papers, It is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION & ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

FILED

APR 26 2012

Dated: 4/23/12

NEW YORK  
COUNTY CLERK'S OFFICE

*[Signature]* J.S.C.  
**JOAN B. LOBIS**

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
LIEUTENANTS BENEVOLENT ASSOCIATION  
OF THE CITY OF NEW YORK, INC, and  
LIEUTENANT PATRICK F. DEVITO,

Petitioners,

Index No. 112914/2011

-against-

**Decision, Order, and Judgment**

THE CITY OF NEW YORK, THE NEW  
YORK CITY CIVIL SERVICE COMMISSION,  
THE NEW YORK CITY DEPARTMENT OF  
CITYWIDE ADMINISTRATIVE SERVICES, ALINA  
A. GARCIA, DIRECTOR, NEW YORK CITY  
CIVIL SERVICE COMMISSION, and EDNA WELLS  
HANDY, COMMISSIONER, NEW YORK CITY  
DEPARTMENT OF CITYWIDE ADMINISTRATIVE  
SERVICES,

Respondents.

-----X  
JOAN B. LOBIS, J.S.C.:

**FILED**

APR 26 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Petitioners Lieutenants Benevolent Association of the City of New York, Inc. ("LBA") and Lieutenant Patrick F. DeVito bring this proceeding under Article 78 of the C.P.L.R. seeking an order directing the New York City Department of Administrative Services ("DCAS") to turn over for a hearing all materials related to the administration of the test for promotion to Captain (Police), civil service exam No. 0510 (the "Exam"); directing the New York City Civil Service Commission ("CCSC") to reverse its dismissal of Lt. DeVito's appeal and promptly schedule a hearing on said appeal; or, in the alternative, compelling CCSC to sustain Lt. DeVito's appeal and direct DCAS to place Lt. DeVito on the promotion list for Captain in the New York City Police Department ("NYPD"). In response to the petition, respondents The City of New York, CCSC, DCAS, Alina A. Garcia, Director of CCSC, and Edna Wells Handy, Director of DCAS, cross-move

to dismiss the petition, pursuant to C.P.L.R. Rules 3211(a)(5) and 3211(a)(7), for failure to timely file the petition and failure to state a cause of action.

On April 24, 2010, Lt. DeVito took the Exam, a civil service examination administered by DCAS, containing one hundred (100) multiple choice questions. After the Exam was given, DCAS scheduled a Protest Review Session on May 26, 2010, at which time Lt. DeVito and other the test takers challenged the proposed answers and rating guides for the Exam. After the Protest Review Session, DCAS eliminated fifteen (15) of the 100 test questions. By written notice dated October 28, 2010, Lt. DeVito was informed that he received a failing score of sixty-nine (69), rendering him ineligible to be placed on the list for promotion to Captain. The disqualification notice stated that Lt. DeVito may appeal his score to DCAS's Committee on Manifest Errors within thirty (30) days of the date of the notice if he believed that his exam was incorrectly rated. On November 24, 2010, Lt. DeVito submitted an appeal to CCSC, disputing his results. In his appeal, Lt. DeVito stated that a large number of the Exam questions were protested and were ultimately eliminated, and that although he agreed with DCAS's decision to eliminate those protested questions, he believed that Question Numbers 9 and 84 should have also been eliminated from consideration. Additionally, Lt. DeVito stated, "the fact that such an inordinate amount of questions were eliminated from [the Exam] brings into question the knowledge that the test makers had of the subject matter in the first place."

By letter dated December 10, 2010, CCSC acknowledged receipt of Lt. DeVito's appeal, required DCAS to furnish to CCSC with all documentation and/or legal arguments relating

to the appeal, and stated that CCSC would review the record and render a decision or schedule a hearing. A Test Validation Board ("TVB") convened, evaluated the protested questions and issued a final answer key for the Exam. On June 28, 2011, Lt. DeVito attended the TVB Reading, where he was given the opportunity to review his exam booklet and the final answer key. On September 19, 2011, CCSC informed Lt. DeVito that his appeal was being dismissed, based on DCAS's memorandum of law asserting that CCSC lacked jurisdiction to entertain Lt. DeVito's protest of the final answer key.

Petitioners now bring this special proceeding for the above-referenced relief, arguing that CCSC's dismissal of his appeal was arbitrary. Petitioners contend that CCSC's dismissal was based on the erroneous view that Lt. DeVito's appeal only protested the validity of Question Numbers 9 and 84. Petitioners maintain that Lt. DeVito also appealed the overall soundness of the Exam. Further, petitioners point out that CCSC's nine-month delay in addressing Lt. DeVito's appeal was contrary to their eventual dismissal, as CCSC could have issued a decision based on its lack of jurisdiction shortly after receiving the appeal in December 2010. Petitioners further argue that CCSC is obligated to hear appeals pursuant to the New York City Charter and the Rules of the City of New York.

Rather than serving an answer to the petition, respondents cross-move to dismiss the petition, alleging that the petition is time-barred by the thirty-day statute of limitations set forth in section 50-a of the Civil Service Law and that it fails to state a cause of action. Respondents state that petitioners' last day to timely bring this special proceeding was on July 28, 2011, which was thirty days after June 28, 2011, the date of the TVB Reading and the date on which Lt. DeVito

became aggrieved for the purposes of the statute. Respondents further argue that the petition should be dismissed because neither the court nor CCSC can examine whether the TVB's determination of the final test answers are acceptable, under Civ. Serv. L. § 50(7). In opposition to respondents' cross motion to dismiss, petitioners reiterate their argument that Lt. DeVito's appeal was not limited to protesting Question Numbers 9 and 84, and that Civ. Serv. L. § 50(7) is inapplicable to their petition. In reply, respondents underscore their initial argument that Lt. DeVito filed an improper appeal.

Section 50-a of the Civil Service Law sets forth the procedure by which a protest of any answer or rating guide as proposed by DCAS must be made. It allows for protests to be filed with DCAS, which are then submitted to a TVB, which reviews the protest submissions to determine whether questions should be eliminated or answers should be changed. Thereafter, the TVB makes a final determination and makes the answers available to the candidates. The TVB's determination concerning whether the answers selected by the protesting candidates are as good as or better than the proposed key answers or whether the rating guide should be modified is binding on the city personnel director. CCSC "shall have no jurisdiction to make determinations with respect to protests to answers or rating guides to civil service examination questions." Civ. Serv. L. § 50-a.

After the final review of the test validity and scoring, any candidate aggrieved by the determination of the TVB may file an article 78 proceeding in accordance with Civ. Serv. L. § 50(7). However, the article 78 proceeding must be filed within thirty days after the protesting candidate receives notice of the availability of the determination of the TVB, which is a shorter time period than the usual four months permitted under C.P.L.R. § 217(1). Civ. Serv. L. § 50-a. Moreover,

once the TVB has made a final determination as to which answers are acceptable on a particular examination, such determination is not subject to further review by any court. Civ. Serv. L. § 50(7).

The relief that petitioners seek, whether construed as a challenge to the validity of the entire exam or to individual questions, is time-barred. Petitioners do not dispute that the TVB's final determination was made at or around the time of the TVB Reading. Petitioners filed this special proceeding on or about November 14, 2011, which is more than thirty days after June 28, 2011, rendering it untimely. Civ. Serv. L. § 50-a. Furthermore, there is no statutory right to a hearing. CCSC's authority to review examination results is limited to whether DCAS correctly applied the final answer key to the candidate's score sheet, and the court's review of examination results is limited to whether the established procedures were followed. Civ. Serv. L. § 50(7). Petitioners make no claim that Lt. DeVito's answer sheet was incorrectly scored. Thus, the court need not consider the remaining merits of the petition. Accordingly, it is hereby

ORDERED that the cross motion to dismiss the proceeding is granted; and it is further


ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: April 23, 2012

ENTER:

**FILED**

APR 26 2012

  
JOAN B. LOBIS, J.S.C. NEW YORK  
COUNTY CLERK'S OFFICE