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

PRESENT: Marilyn Shafer Justice

PART 8

Index Number : 116460/2007

RAGANELLA, ANTHONY J.

VS.

NYC CIVIL SERVICE COMMISSION

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Memo	1, 2, 3, 4
Answering Affidavits — Exhibits Memo	5, 6
Replying Affidavits Memo	7, 8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is denied in accord with the annexed memorandum.

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

Dated: 7/1/08

MARILYN SHAFER J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

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

PRESENT: HON. MARILYN SHAFER *Justice* PART 8

In the Matter of the Application of,
ANTHONY J. RAGANELLA,

Petitioner,

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

-against-

NEW YORK CITY CIVIL SERVICE COMMISSION, and NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Respondents.

INDEX NO. 116460/07

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 8, were read on this petition under Article 78 of the Civil Practice Law and Rules:

	PAPERS NUMBERED
Notice of Petition – Exhibits	1,2
Affidavit – Exhibits	3
Memorandum of Law	4
Verified Answer – Exhibits	5
Memorandum of Law	6
Verified Reply	7
Reply Memorandum of Law	8

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that the petition is denied.

This is a petition under Article 78 of the CPLR, by a lieutenant in the New York City Police Department, for review of a decision by respondent, New York City Civil Service Commission(CSC), refusing to hear his appeal of a decision by the New York City Department of Citywide Administrative Services (DCAS) disqualifying him from the eligibility list for promotion to Captain. In the alternative, it seeks review of the DCAS decision.

Background

Petitioner, a lieutenant in the New York City Police Department, sat for the civil service promotional examination to become a Captain on May 20, 2006. One month later, he attended a "Protest Review Session" which provided applicants the opportunity to review the proposed key answers and submit written challenges, either at the session or within 30 days thereafter. Attendees received a page of instructions, which was signed and returned. It stated, in relevant part:

> 3. When you leave, you may not take with you any notes prepared during the protest review.
>
> 4. YOU MUST TURN IN ALL OF THE EXAMINATION MATERIAL, YOUR PROTESTS, YOUR SCRAP PAPER, THE PROPOSED ANSWER KEY, AND ANY NOTES YOU MAY HAVE PREPARED. (*emphasis in original)*

It is undisputed that petitioner copied three exam questions into one of his books and removed them from the session. He has never denied that he did so, but argues that he was confused by a conflict he perceived between the above instruction and the following instruction, describing the format in which protests were to be submitted:

> Put the number of the question in the left margin of the ruled paper. State the question and explain ...

Petitioner

> questioned the proctor as to whether 'state the question' meant that the candidate must restate the question verbatim even if the challenge is made after the scheduled June 21st Protest Review Session and within the 30-day window after the Session. In response to petitioner's question, the proctor explained that 'state the question' applied to all protests filed.

In his submission below, petitioner described this conversation differently:

> I asked the proctor if this 'state the question' format was to be followed if I chose to prepare a protest after the review session and mail it in within 30days. The proctor stated 'yes'.[1]

Petitioner included verbatim transcription of the three questions he had copied in the protests he submitted. DCAS initiated an investigation into his protests and petitioner was interviewed under oath. He admitted, during that interview, that he had removed the questions and advised DCAS that he had, in addition, placed his protests, including verbatim transcriptions of the questions, on a NYPD officers' internet discussion board website, www.examx.com.

The eligible list was established and petitioner scored number thirteen. However, he was subsequently notified that possession and disclosure of exam questions were violations of Sections 50(11)(d) and (g) of the New York State Civil Service Law and Regulation E.16.1 of the General Examination Regulations. These violations required that he be disqualified from promotion to Captain and warranted being disqualified from taking any further civil service exams. He was provided an opportunity to respond to the charges in writing.

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[1] It is this version of the conversation relied upon in the decision reviewed herein.

Petitioner's written response, dated December 18, 2006, stated:

> The 'Instructions to Candidates' that were given to me at the review session clearly stated in paragraph #7 that when preparing a protest candidates must 'state the question' and document why the answer chosen by the candidate is as good, or better than, the proposed key answer.
>
> I asked the proctor if this 'state the question' format was to be followed if I chose to prepare a protest after the review session and mail it in within 30 days. The proctor stated 'yes.'

Petitioner's written response further described his complete and candid cooperation with the investigation, reiterating that his intent in copying and posting the questions was never unethical or deceitful and he had been unaware that there were candidates who would be taking the same exam after he posted the questions.[2] Petitioner requested an opportunity to meet with the Assistant Commissioner considering his case, which request was granted.

The Assistant Commissioner held that the preliminary findings, that petitioner disregarded clear instructions and removed examination materials from the protest session, were not challenged. Therefore, petitioner's exam results were nullified and his name deleted from the eligibility list. However, in response to petitioner's suggestion that he lacked any intent to compromise the examination process, the bar against future civil service exams was removed.

Petitioner requested review of the Assistant Commissioner's decision by the Deputy Commissioner. The Deputy Commissioner found that petitioner's explanation for why he removed test questions from the protest session "strained credibility."

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[2] Several administrations of the same examination may take place to accommodate those test-takers who, due to religious or military commitments, are unable to attend the regularly scheduled examination date.

> I, however, see no ambiguities in those instructions, and, to the extent that [petitioner] did not understand those instructions, he failed to reasonably or responsibly find answers to his questions. ... even if I were to accept as entirely accurate his recollection of the question he posed and the answer he received [referencing petitioner's December 18 letter], the question was not couched in a manner to truly reconcile the instructions and the answer certainly could not have resolved his confusion.

The Deputy Commissioner concluded:

> Read in the best possible light, [petitioner's] explanation falls woefully short of what a reasonable person should have done in this situation and cannot, therefore, serve to excuse his behavior.

Taking into account petitioner's otherwise fine record, and his candor and cooperation with the investigation, the Deputy Commissioner agreed it would have been "unduly harsh" to bar him from future exams. The "measured response" of nullifying his score for this test only seemed "particularly reasonable."

The Deputy Commissioner's decision was a "Final Determination" eligible for Article 78 review by the Court. Petitioner elected, instead, to file an appeal with CSC pursuant to Civil Service Law § 50. The Commission rejected petitioner's appeal on the ground that it did not have the "requisite jurisdiction" to hear it, since it did not fall within the enumerated determinations set forth in Charter § 813. This petition followed.

Discussion

Judicial review in an Article 78 proceeding is limited to a determination of whether the administrative action complained of is arbitrary and capricious or lacks a rational basis (*In re Application of Chelrae Estates, Inc v State Division of Housing and Community Renewal, Office of Rent Administration*, 255 AD2d 387, 389 [1st Dept. 1996] *citing Matter of Pell v Board of*

Education, 34 NY2d 222, 230-231 [1974]). An Article 78 proceeding is limited to consideration of the evidence and arguments raised before the agency when the administrative determination was rendered and "[t]he function of the court . . . is to determine . . . whether the determination had a rational basis in the record (*In re Application of HLV Associates v Aponte*, 223 AD2d 362, 363 [1st Dept. 1996] *citing Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1st Dept. 1982]). Courts are not permitted to substitute their judgment for that of the administrative agency where the decision is rationally based on the record. (*In re Application of Royal Realty Co v New York State Division of Housing and Community Renewal*, 161 AD2d 404, 405 [1st Dept. 1990]; *Matter of Levine v New York State Liq Auth*, 23 NY2d 863, 864 [1969]["Judicial review of an administrative action is limited to the record made before the agency"]). This petition seeks review of two decisions: CSC's refusal to hear petitioner's appeal; and DCAS's nullification of petitioner's test scores.

It is undisputed that petitioner knowingly violated the rules governing DCAS testing procedure when he copied and removed exam questions from the review session and disseminated them on the internet. His actions violated the integrity of the testing process and caused DCAS to incur the expense of replacing three questions it could have reused on future exams. The rules violated, Civil Service Law § 50(11) and GER Regulation E.16.1, authorize the penalty of permanent disqualification from appointment to any position with the City and a ban from all future examinations. The penalty actually imposed on petitioner was disqualification of his test results only with no ban on future appointments or tests. The question for this Court is whether, under the circumstances, the measure of punishment imposed is so disproportionate to the offense as to be shocking to one's sense of fairness. (*Pell, supra*)

Petitioner challenges the imposition of any penalty, beyond that which he has already "served" by being removed from the eligibility list, based upon his complete rejection of culpability. The question posed by his escalating rhetoric of outrage is whether removal from the eligibility list was appropriate in light of "mitigating circumstances": his state of mind, his cooperation with the investigation and the lack of any benefit from his actions. The review he seeks is the opportunity to "offer testimony, and to further explain his rationale for his actions."

The record shows that petitioner was offered, at every stage of the investigation, the opportunity to be heard. He met with DCAS on two separate occasions and made three substantial submissions: the first personally, the second and third by his attorneys. The Deputy Commissioner's decision specifically referenced and analyzed petitioner's "mitigating circumstances." It rejected his "rationale for his actions" as implausible and insufficient but accepted his cooperation and otherwise fine record as mitigation against the potential harshness of a total ban from future promotion. Thus, the mitigating circumstances have already been considered. The penalty imposed is far from the maximum potential penalty and cannot be seen as disproportionate or shocking to one's sense of fairness.

The CSC derives its power to hear appeals from the New York City Charter and Civil Service Law § 76. (*City of New York v City Civil Service Commission*, 60 NY2d 436 [1983]) The scope of CSC review under New York City Charter § 813(d) (renumbered § 814) is far broader than the limited judicial review under Article 78. (*City of New York v New York City Civil Service Commission*, 20 AD3d 347 [1st Dept 2005] *affd* 6 NY3d 855 [2006])

Petitioner argues, without citation, that the Charter provides CSC review for all aggrieved persons who have exhausted their appeals before DCAS. DCAS argues the Charter does not

provide a plenary right to appeal any determination rendered by the DCAS. Charter § 813(d) contains a specific list of determinations which define CSC's jurisdictional ambit. The CSC agreed with DCAS that petitioner's appeal did not fall within the enumerated reviewable determinations and that it did not have the requisite jurisdiction to hear the appeal.

Where interpretation of a statute or its application involves knowledge and understanding of underlying operational practices, or entails an evaluation of factual data and inferences to be drawn therefrom, the court regularly defers to the agency responsible for its administration, unless its determination is irrational or unreasonable. (*Matter of LaCroix v Syracuse Exec Air Serv, Inc*, 8 NY3d 348 [2007]) The deference given depends on the extent to which the interpretation relies upon the special competence the agency is presumed to have developed in its administration of the statute. (*Matter of Rosen v Public Empl Relations Bd*, 72 NY2d 42 [1988])

It cannot be said that from this record that CSC's interpretation of its jurisdiction was irrational or unreasonable. Petitioner has provided no instance where CSC accepted a matter analogous to petitioner's for review, nor any instance where CSC was faulted by the courts for failing to exercise its jurisdiction.

We have considered the other arguments raised by the parties and find them to be without merit.

Conclusion

While our system provides petitioner with further avenues of review after this one, it might be hoped that an officer of law enforcement would finally take responsibility for an error in judgment and recognize the fairness with which he has been treated.

Accordingly, it is

Ordered that the petition is denied.

This reflects the decision and order of the court.

Dated: 7/2/08

J.S.C.

J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION