

Matter of Kotowski v Port Auth. of N.Y. & N.J.

2018 NY Slip Op 32134(U)

August 30, 2018

Supreme Court, New York County

Docket Number: 158519/17

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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In the Matter of

ADAM KOTOWSKI,

Petitioner,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, and RICK COTTON, Executive Director of the
Port Authority of New York and New Jersey, in his
official capacity,

Respondents.

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NANCY M. BANNON, J.:

Index No.: 158519/17

DECISION, ORDER, AND
JUDGMENT

MOT SEQ. 001, 002

I. INTRODUCTION

In this proceeding pursuant to CPLR article 78, Adam Kotowski (the petitioner) seeks judicial review of a determination of The Port Authority of New York and New Jersey (Port Authority) dated June 2, 2017, that he was not qualified for employment as a Port Authority police officer. He also seeks to compel the respondents to release to him all psychological testing records in connection with his application, to immediately designate him as qualified for employment, and to place his name on a preferred eligible list enabling him to be appointed forthwith to the title of Port Authority Police Department Police Officer. In the alternative, the petitioner requests that the matter be remitted to the Port Authority for an additional investigation, or that a trial be conducted pursuant to CPLR 7804(h). The Port Authority moves pursuant to CPLR 3211(a)(7) and 7804(f) to dismiss the petition,.

II. BACKGROUND

The parties' submissions, which include most of the administrative record and all of the petitioner's application for employment, as well as supporting explanatory affidavits from Port Authority human resources and medical personnel, show the following.

The petitioner graduated from college in 2012 and graduated from the Police Academy of the New York City Police Department's (NYPD) in December 2015. He is currently serving as an NYPD police officer in the 18th Precinct. In May 2013, the petitioner passed the written examination for employment as a police officer with the Port Authority, and was placed on a list of test-qualified applicants. On April 27, 2017, the Port Authority extended a contingent offer of employment to petitioner as a police officer recruit. Jennifer Tejada, the police recruitment coordinator in the human resources department of the Port Authority, explains that "[t]he offer was contingent upon successful completion of the remaining events in the process, including psychological testing, individual psychological interviews, and medical evaluations."

Shortly thereafter, the petitioner underwent four psychological tests and was clinically interviewed and evaluated by three medical professionals. Dr. Howard Fisher, the Medical Director for the Port Authority's Office of Medical Services, explains in his affidavit that these psychological tests are "used as a diagnostic tool in assessing the appropriateness of an applicant, which is ultimately determined during the clinical interview by a psychologist in the Port Authority's Office of Medical Services." He further states that the psychological evaluations are "separate and independent. In other words, the psychologists do not speak to one another about a particular candidate, know the findings of another psychologist's evaluation, or review any notes taken [by] any other psychologist."

On May 9, 2017, the petitioner was evaluated by Dr. Nancy Bloom, who found him psychologically unsuitable for employment as a police officer. Bloom stated in her affidavit that she “ultimately look[s] to see if the person would have the right temperament and own important attributes to become a good PA police officer. These qualities would includes the ability to resolve conflicts, exercise good judgment, exhibit appropriate empathy ” After interviewing the petitioner and reviewing the test results, Bloom “concluded that [petitioner] was not appropriate for the position because of his inability to be forthcoming, immaturity, lack of interpersonal skills, and bland affect.” Bloom noted that, despite working as a police officer with the NYPD, the petitioner was not forthcoming in his interview, as he “struggled to disclose any stressful experiences” with the NYPD, and conveyed a “high stress immunity.” Bloom further disclosed that her interview with the petitioner “drew attention to several examples of poor insight and immaturity. [Petitioner] revealed that he still lives with his parents and that he contributes nothing towards housing or food expenses.”

The petitioner was then evaluated by Dr. Robin Kanen, in order to confirm or disconfirm Bloom’s findings. According to Fisher, Kanen found the petitioner suitable for police work. As explained by Fisher, since two professionals presented conflicting opinions regarding the petitioner’s suitability, a third evaluation was undertaken.

On May 25, 2017, the petitioner was evaluated by Dr. Robert Mead. Mead stated in his affidavit that the “tests provide information about the candidate’s psychological and cognitive strengths and weaknesses as well as his/her suitability for law enforcement work.” He explained that the “psychological interview is also necessary to confirm or refute the data derived from the tests.” Mead averred that he reviewed the tests prior to the petitioner’s interview, and found,

among other things, that the PEPQ/PSRP test “raised questions about [petitioner’s] judgment as his responses suggested that he does not always consider the negative consequences of his actions.” After interviewing the petitioner, Mead found that he was not psychologically suitable for the position of police officer. He stated, in relevant part:

“During the clinical interview, [petitioner’s] responses indicated some red flags. Although [petitioner] maintains a full time job, he lives with his parents and does not have any financial responsibilities within the household. [Petitioner] indicated that he rarely gets angry and has never felt the emotions of anxiety, shyness, or nervousness. [Petitioner] denied ever doing anything impulsive or reckless in his life. Further, [petitioner’s] educational background raises significant questions about why he scored so low on the problem solving portion of the self-reported tests.”

According to the respondents, as a result of being found psychologically unsuitable by two independent psychologists, the Port Authority was unable to medically certify the petitioner for the position of police officer. By letter dated June 2, 2017, the Port Authority notified the petitioner of its determination that it was unable to certify him for appointment. The letter advised the petitioner that, if he wanted additional information regarding this determination, he could write to Paulette Counts, the Port Authority’s Medical Operations Manager.

Through counsel, the petitioner contacted Counts and requested information about an appeal and also to meet and review the situation. According to the petitioner, he never received any response from Counts.

Shortly thereafter, the petitioner commenced this CPLR article 78 proceeding. The petitioner claims that the Port Authority’s determination to disqualify him from the position of police officer was arbitrary and capricious, as it lacked a rational basis, and was made in bad faith. The petitioner alleges that he passed all of his psychological testing with the NYPD, and

that he has no psychological issues that would prevent him from working as a police officer with the Port Authority. He explains that he graduated from the NYPD's Police Academy at the top of his class, and "passed similar background, psychological, and physical examinations" with the NYPD. The petitioner further alleges that the Port Authority failed to adhere to its own regulations when it failed to provide him with any additional information about the disqualification. He contends that, by not disclosing the entirety of the psychological testing results, he has been prevented from filing a meaningful appeal, and thus also seeks to compel the Port Authority to release the results of his psychological testing to a doctor chosen by him for review and response.

The petitioner argues that he was disqualified due to a personality conflict with the interviewer or the misperception that something in his current job would prevent him from being able to perform the duties at the Port Authority. He thus contends that, under the circumstances, a hearing on the reasonableness of the denial of employment is warranted.

The Port Authority moves to dismiss the petition, arguing that its actions in medically disqualifying petitioner were rational, and were thus not arbitrary and capricious. It contends that, after the written psychological testing of the petitioner, two medical professionals independently assessed him and found that he was psychologically unsuitable to work as a police officer for the Port Authority. The Port Authority asserts that it has a legitimate policy of applying high suitability standards when assessing whether a potential police officer will be able to perform the responsibilities of protecting the public. It also maintains that the petitioner's application was processed in the same manner as other applicants.

In addition, the Port Authority argues that mandamus is not available here because the

petitioner has no legal right to compel the Port Authority to hire him. Furthermore, it contends that the petitioner's request for discovery is not material or necessary to the resolution of the dispute, as it has set forth a comprehensive process and reasoning for its denial, including detailed affidavits, and that leave of the court should not be granted.

In response to the motion, the petitioner submits an affidavit detailing why he believed the Port Authority's determination was arbitrary and capricious and also discriminatory. The petitioner alleges that, inasmuch as he has served as a police officer with the NYPD, he should be more than qualified to be appointed as a police officer with the Port Authority. He maintains that Mead had a "pre-conceived notion that I should not be eligible for employment with the Port Authority and in fact did everything possible to prevent my employment." The petitioner asserts that it is "disturbing" that both Bloom and Mead "think that there is something wrong with living at home. I am living at home with my parents' blessing so that I can save enough money to start my own family and purchase my own home." The petitioner further claims that Mead has a bias against him, as Mead suggested that he had a sense of entitlement. In response to this alleged suggestion, the petitioner asserts that "I believe I have many characteristics needed to be a successful police officer and [it] seems to me that I am being discriminated against due to psychologist, Dr. Mead's interpretation of 'white privilege' or in my opinion entitled, immature, white male."

III. DISCUSSION

1. Review of the Disqualification Determination

Where, as here, an administrative determination is made, and a trial-type hearing is not

mandated by law, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure. See CPLR 7803(3); Matter of Lemma v Nassau County Police Officer Indem. Bd., 31 NY3d 523 (2018); Matter of McClave v Port Auth. of N.Y. & N.J., 134 AD3d 435, 435 (1st Dept. 2015). A determination is arbitrary and capricious where is not rationally based, or has no support in the record (see Matter of Gorelik v New York City Dept. of Bldgs., 128 AD3d 624 [1st Dept. 2015]), or where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh. See Matter of Kaufman v Incorporated Vil. of Kings Point, 52 AD3d 604 (2nd Dept. 2008). Stated another way, a determination is arbitrary and capricious when it is made “without sound basis in reason and is generally taken without regard to the facts.” 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).

“Even though the court might have decided differently were it in the agency’s position, the court may not upset the agency’s determination in the absence of a finding, not supported by this record, that the determination had no rational basis.” Matter of Mid-State Mgt. Corp. v New York City Conciliation & Appeals Bd., 112 AD2d 72, 76 (1st Dept. 1985), affd 66 NY2d 1032 (1985). Thus, “[a] reviewing court . . . may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the finding upon which the agency’s determination is predicated.” Matter of Purdy v Kreisberg, 47 NY2d 354, 358 (1979). In an article 78 proceeding, “[t]he determination of an agency, acting pursuant to its authority and in its area of expertise, is entitled to deference.” Matter of Nelson v Roberts, 304 AD2d 20, 23 (1st Dept

2003); see Matter of Flacke v Onondaga Landfill Sys., 69 NY2d 355 (1987); Matter of Tockwotten Assoc. v New York State Div. of Hous. and Community Renewal, 7 AD3d 453 (1st Dept. 2004).

An appointing authority such as the Port Authority has wide discretion in determining the fitness of candidates and, in particular, a police department may apply high standards in the hiring of police officers. See Matter of City of New York v New York City Civ. Serv. Commn., 61 AD3d 584 (1st Dept. 2009); Matter of Verme v Suffolk County Dept. of Civ. Serv., 5 AD3d 498 (2nd Dept. 2004).

Generally, a CPLR article 78 proceeding is summarily determined “upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised.” CPLR 409 (b); see also CPLR 7804 (a) and (f). Here, the Port Authority has not submitted an answer, but instead moved to dismiss the petition for failure to state a cause of action. “In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a)(7) and 7804(f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference.” Matter of Eastern Oaks Dev., LLC v Town of Clinton, 76 AD3d 676, 678 (2nd Dept 2010). However, where “it is clear that no dispute as to the facts exists and no prejudice will result,” a court, upon a respondent’s motion to dismiss, may decide the petition on the merits. Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County, 63 NY2d 100, 102 (1984); see Matter of Arash Real Estate & Mgt. Co. v New York City Dept. of Consumer Affairs, 148 AD3d 1137 (2nd Dept. 2017); Chestnut Ridge Assoc, LLC v 30 Sephar Lane, Inc., 129 AD3d 885 (2nd Dept. 2015); Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y., 115 AD3d 427 (1st Dept. 2014); Matter of Kuzma v City of

Buffalo, 45 AD3d 1308 (4th Dept. 2007).

Under the circumstances presented here, service of an answer is not necessary, as the facts have been fully presented in the parties' papers, and no factual dispute remains. See Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. Of Nassau County, supra; Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y., supra; Matter of Camacho v Kelly, 57 AD3d 297 (1st Dept. 2008). It is not disputed that the hiring and evaluation process employed by the Port Authority was conducted in the manner described by Tejada, or that medical professionals performed psychological testing upon the petitioner, and evaluated him in the manner set forth in the affidavits of Fisher, Bloom, Kanen, and Mead. Nor is there a factual dispute as to whether two of those professionals disagreed as to whether it was suitable to employ the petitioner as a police officer, that a third professional thereupon independently evaluated him as unsuitable, and that the disqualification was based thereon. Moreover, the petitioner does not submit an affidavit or sworn report of any expert mental health professional evaluating his suitability as a police officer or providing the results of any independent testing that might contradict or cast doubt on the results obtained by the Port Authority's mental health professionals. Rather, the petitioner relies only on the undisputed fact that the NYPD subjected him to similar psychological testing, and determined that he was suitable for employment as an NYPD police officer.

The court concludes that the Port Authority's determination that the petitioner was not psychologically qualified for the position of police officer has a rational basis, and will not be disturbed. The court rejects the petitioner's contention that, because he passed the psychotherapy tests with the NYPD, the Port Authority's disqualification determination was

arbitrary and capricious. The Port Authority is a separate agency from the NYPD, is responsible for promulgating its own standards for employment, and “is entitled to rely upon the findings of its own medical personnel.” Matter of Thomas v Straub, 29 AD3d 595, 596 (2nd Dept. 2006). Moreover, the petitioner’s subjective belief that he is qualified for the position does not create a factual dispute. Where, as here, the respondents “performed an individualized assessment . . . , [t]he fact that [petitioner] claims he served as a police officer” with the NYPD, “and performed adequately in that job does not create an issue of fact as to whether he can perform the functions of” a Port Authority police officer. Bellamy v City of New York, 14 AD3d 462, 463 (1st Dept 2005). Although the petitioner contends that he has the characteristics necessary to be qualified as a police officer with the Port Authority, explains the circumstances surrounding his living situation, and disputes the conclusions of the Port Authority medical personnel that, among other things, he is entitled and anti-social, the court may not conduct a de novo review of the Port Authority’s hiring determinations. See Matter of Luisi v Safir 262 AD2d 47 (1st Dept 1999).

2. Request for Trial

A hearing or trial pursuant to CPLR 7804 (h) is not warranted, as there are “no disputed facts that needed to be tried in order for the Supreme Court to determine whether the underlying administrative determination was irrational or arbitrary and capricious.” Matter of Rogan v Nassau County Civ. Serv. Commn., 91 AD3d 658, 659 (2nd Dept. 2012). The petitioner has advanced no basis for affording him a fact-finding hearing, as he “has failed to demonstrate the existence of any issue of fact could show, even if resolved in [his] favor, arbitrary and capricious action under the circumstances.” See Matter of Van Rabenswaay v City of New York, 140

AD3d 596, 596 (1st Dept. 2016); see Matter of Frederick v Civil Serv. Commn. of County of Schenectady, 175 AD2d 428 (3rd Dept. 1991); cf. Matter of Carrero v New York City Housing Auth., 116 AD2d 141 (1st Dept. 1986) (CPLR 7804[h] hearing warranted where discharged probationary police officer submitted expert affidavits making a strong prima facie showing of disability-based discrimination).

3. Request for Production of Psychological Test Results

“In a special proceeding, where disclosure is available only by leave of the court, the Supreme Court has broad discretion in granting or denying disclosure, although it must balance the needs of the party seeking discovery against such opposing interests as expediency and confidentiality.” Matter of Bramble v New York City Dept. of Educ., 125 AD3d 856, 857 (2nd Dept. 2015) (citations omitted); see CPLR 408. The court rejects the petitioner’s contention that he should be provided with the entirety of his psychological testing results, or that it is impossible for him to prosecute a meaningful appeal in the absence of those documents. The petitioner has cited, and research has revealed, no legal support for his claim that he is entitled to review the full test results, given that he was merely an applicant for a job with the Port Authority.

In any event, the Port Authority provided four comprehensive affidavits regarding its employment screening process. Bloom and Mead interviewed the petitioner and reviewed his test results, making the determination that he was not suitable for employment, based not only on the psychological testing, but also on interviews. The affidavits submitted by the Port Authority’s medical professionals described and identified the tests that were administered to the

petitioner, what those tests purport to measure, the protocol for administering the tests, and the manner in which the results of the testing suggested the petitioner's suitability of unsuitability for employment. See Matter of McElligott v. Nassau County Civ. Serv. Commn., 57 AD3d 671 (2nd Dept. 2008). Consequently, the petitioner "failed to demonstrate that the requested discovery was necessary." Matter of Bramble v New York City Dept. of Educ., *supra*, at 857.

4. Additional Relief

The petitioner requests additional relief in the nature of mandamus, including that he be marked immediately qualified for employment and also placed on a preferred eligible list for employment. However, the petitioner is not entitled to such relief. "A CPLR article 78 proceeding seeking mandamus to compel the performance of a specific duty applies only to acts that are ministerial in nature and not those that involve the exercise of discretion." Matter of Maron v Silver, 14 NY3d 230, 249 (2010). "Mandamus is available . . . only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law." New York Civil Liberties Union v State of New York, 4 NY3d 175, 185 (2005). Since an agency's determination as to whether to hire an applicant is a discretionary one (see Matter of City of New York v New York City Civ. Serv. Commn., *supra*), the petitioner has not shown, and cannot show, that the Port Authority had a ministerial duty to appoint him as a police officer, or that he had a clear legal right to that relief.

There is no basis for the petitioner's request that the matter be remitted to the Port Authority for further investigation.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED that respondents' motion to dismiss the petition (motion sequence 002) is granted; and it is,

ADJUDGED that the petition and proceeding (motion sequence 001) are dismissed.

This constitutes the Decision, Order, and Judgment of the court.

Dated: August 30, 2018

ENTER:



A handwritten signature in black ink, appearing to read 'NMB', is written over a horizontal line.

J.S.C.

HON. NANCY M. BANNON