Powell v Bermudez
2020 NY Slip Op 30099(U)
January 8, 2020
Supreme Court, New York County
Docket Number: 161785/2018
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY, *Justice*	PART	IAS MOTION 23EFM
	INDEX NO.	161785/2018
DALVANIE POWELL, UNITED PROBATION OFFICERS ASSOCIATION, Petitioner,	MOTION DATE	08/15/2019
	MOTION SEQ. NO.	001
- v -		
ANA BERMUDEZ, NEW YORK CITY DEPARTMENT OF PROBATION, LISETTE CAMILO, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, CITY OF NEW YORK, Respondent.	**DECISION + ORDER ON MOTION**	

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this article 78 proceeding, petitioners Dalvanie Powell (Powell), as President of and on behalf of United Probation Officers Association (UPOA), seek an order directing respondents Ana Bermudez (Bermudez), as Commissioner of the New York City Department of Probation (DOP), Lisette Camilo (Camilo), as Commissioner of the New York City Department of Citywide Administrative Services (DCAS), DCAS and City of New York, to review and rescind the provisional appointments of Marquette McCaskill (McCaskill), John Farrell (Farrell), Bobby LeDay (LeDay), Patricia Lyons (Lyons), Lovelyn Asonga-Morfaw (Asonga-Morfaw) and JC Green (Green) to Supervising Probation Officer in 2018; and seek an order declaring that respondents' determination to provisionally appoint these individuals to the position of

Supervising Probation Officer was made in violation of lawful procedure.[1] Petitioners also seek an order directing respondents to abide by the State Constitution, Civil Service Law and Personnel Rules by specifically, among other things, only provisionally appointing candidates to the supervising probation officer position who have served at least one year as a DOP probation officer. Petitioners further seek to compel respondents to hold an examination for the position of supervising probation officer so that no provisional appointment continues for a period in excess of nine months.

Respondents cross-move, pursuant to Section 65 of the New York Civil Service Law (Civil Service Law), CPLR 7804 (f) and CPLR 3211 (a) (7), for an order dismissing the amended petition on the grounds that it fails to state a cause of action. As set forth below, the amended petition is denied and dismissed, and the cross motion is granted.

BACKGROUND AND FACTUAL ALLEGATIONS

Powell is the president of the UPOA and is employed by the City of New York and DOP as a supervising probation officer. UPOA is the union that represents DOP employees in the civil service titles of probation officer and supervising probation officer, among other titles. Petitioners state that there are approximately 840 active probation officers employed by DOP. Probation officers "perform difficult and responsible work in the field of probation providing assigned individuals services in intake, investigation, supervision, and enforcement." NYSCEF

[1] Originally there were eight contested provisional appointments, but two have since resigned. Without conceding, or waiving any claims or defenses, petitioners filed an amended petition joining the individual respondents. Additionally, the first cause of action in the initial petition, alleging that respondents may only make provisional appointments when there is no active civil service list, was withdrawn.

Doc. No. 33 at 1. In general, to be eligible for promotion to a supervising probation officer, a probation officer must pass the one-year probationary period and then work an additional year in the position. Supervising probation officers are "competitive class" civil service positions, meaning that "it is practicable to determine the merit and fitness of applicants by competitive examination . . .." Rules of the City of New York (55 RCNY) Appendix A § 3.4.1.

Section III, Promotions, states the following, in relevant part:

> Filling Vacancies by Promotion. (a) Except as provided in paragraph 5.3.5, vacancies in positions in the competitive class shall be filled, so far as practicable, by promotion from among persons holding competitive class positions in a lower grade in the agency in which the vacancy exists provided that such lower grade positions are in the direct line of promotion, as determined by the commissioner of [DCAS].

55 RCNY Appendix A § 5.3.3 (a).

> Filling Vacancies by Open Competitive Examination. (a) Upon the initiative of the commissioner of [DCAS] or upon the written request of an agency head stating the reasons therefor the commissioner of [DCAS] may determine to conduct an open competitive examination for filling a vacancy or vacancies instead of a promotion examination.

55 RCNY Appendix A § 5.3.5 (a).

The relevant and corollary statutes in the Civil Service Law regarding promotions are as follows:

> Filling vacancies by promotion. Except as provided in section fifty-one, vacancies in positions in the competitive class shall be filled, as far as practicable, by promotion from among persons holding competitive class positions in a lower grade in the department in which the vacancy exists, provided that such lower grade positions are in direct line of promotion, as determined by the state civil service department or municipal commission; except that where the state civil service department or a municipal commission determines that it is impracticable or against the public interest to limit eligibility for promotion to persons holding lower grade positions . . . .

Civil Service Law § 52 (1).

> Upon the written request of the appointing officer stating his reasons therefor, or on its own initiative, the state civil service department or appropriate municipal commission may determine to conduct an open competitive examination for filling a vacancy or vacancies instead of a promotion examination.

Civil Service Law § 51 (1).

Petitioners address the recently enacted "Raise the Age" legislation, which "prohibits 16- and 17-year-olds from being held in adult jails and prisons . . . and provides them with additional services and alternative detention facilities." Amended petition, ¶ 26. DOP provides necessary services to these teenagers "who enter the criminal and youth justice systems, including intake adjustment, supervision, and other tailored probation services." *Id.*, ¶ 28. Petitioners continue that, in preparation for "Raise the Age," based on the expected influx of clients, respondents hired additional probation officers through an open and competitive examination. However, respondents did not offer a "concomitant promotional examination for current Probation Officers to become Supervising Probation Officers." *Id.*, ¶ 30. According to petitioners, there are a sufficient number of active probation officers who are ready to take the examination for promotion to supervising probation officer and who are eligible to be promoted. However, March 2015 was the last time a promotional examination was offered.

On August 24, 2018, Powell was notified by Michael Forte (Forte), DOP's deputy commissioner of administration, that DOP was planning to provisionally promote 18 probation officers to supervising probation officers, and also provisionally appoint McCaskill, Farrell, LeDay and Lyons to the position of supervising probation officer. These four individuals are external candidates who were not previously employed as DOP probation officers.

Powell objected to these provisional appointments, arguing that DOP is required to promote current probation officers to supervising probation officers prior to considering external candidates. According to petitioners, DOP previously only hired for the position of supervising probation officer through a promotional examination. Powell requested that DOP reconsider these external appointments and respond by September 20, 2018.

Petitioners did not receive a response by September 20, 2018. Subsequently, Victor Hiciano and Asonga-Morfaw, two other external candidates, were also provisionally appointed as supervising probation officers. Bermudez nominated these and the other four individuals, and Camilo certified that they were qualified to fill the title of supervising probation officer. Petitioners allege that these individuals were not qualified, as they were not current DOP probation officers at the time of appointment and had never served the probationary period.

In September 2018, respondents provisionally appointed Green and April Pope, who had been employed in the probation officer position. However, these individuals had not yet completed their probationary period.[2]

Petitioners are now challenging respondents' recent decision to provisionally appoint six allegedly unqualified individuals to the position of supervising probation officer in contravention of the New York State Constitution, Civil Service Law and Personnel Rules and Regulations of the City of New York (Rules of the City or New York, or Personnel Rules). In brief, article V, section 6 of the New York State Constitution sets forth that appointments to civil service

[2] As noted, two of the individuals, April Pope and Victor Hiciano, have since resigned from their provisional appointments and are not named as respondents.

positions "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." Amended petition, ¶ 51. According to petitioners, as indicated above, both Civil Service Law § 52 and 55 RCNY Appendix A § 5.3.3 state that vacancies should be filled by promoting employees "holding competitive class positions in a lower grade in the department in which the vacancy exists, provided that such lower grade positions are in direct line of promotion . . .." *Id.*, ¶ 52. However, respondents are not required to promote from employees holding lower grade positions in the direct line of promotion if "it is impracticable or against public interest to limit eligibility for promotion [to these employees]." *Id.*, ¶ 55.

In the first cause of action, violation of CPLR 7803 (3), petitioners allege that respondents' determination to provisionally appoint the six individuals to supervising probation officer positions was made in violation of the lawful procedure established by these rules. Five out of the six new appointments had not been employed as DOP probation officers, which is the direct line of promotion, prior to their appointment. Petitioners contend, although provisional appointments are permitted by both Civil Service Law § 65 and 55 RCNY Appendix A § 5.5.1 when there is no eligible list, pursuant to Civil Service Law § 52 and 55 RCNY Appendix A § 5.3.3, respondents were first required to provisionally appoint current probation officers who are in the direct line of promotion. Petitioners state the following, in relevant part:

> Respondents are unable to demonstrate that it is impracticable or against the public interest to limit eligibility for the provisional Supervising Probation Officer positions to current eligible Probation Officers, who are in the direct line of promotion. Nor can they offer any rational basis for offering the promotional positions to individuals who were not current DOP Probation Officers when they had an ample pool of such candidates available to them.

Amended petition, ¶ 57.

In the second and third causes of action, petitioners allege that Bermudez and DOP acted arbitrarily and abused their discretion by provisionally appointing individuals to the title of supervising probation officer who did not complete probationary periods as DOP probation officers. Although one of the new appointments had been employed as a DOP probation officer prior to the promotion, he had not yet completed the one-year probationary period. Accordingly, petitioners allege that all six candidates are unqualified. Furthermore, they maintain that there were other qualified DOP probation officers who were not considered. As a result, petitioners allege that it was arbitrary and capricious and an abuse of discretion for respondents to appoint the six unqualified candidates.

The third cause of action, alleged against Camilo and DCAS, sets forth that they acted arbitrarily and abused their discretion by certifying that these six individuals were qualified to become supervising probation officers, despite not completing probationary periods as DOP probation officers.

As noted, petitioners seek the court declare that these six provisional appointments were made in violation of lawful procedure and order respondents to rescind these appointments. They are seeking to have respondents only provisionally appoint candidates to the supervising probation officer title who have served at least one year as a DOP probation officer.

In the fourth cause of action, petitioners allege that Camilo and DCAS failed to hold an examination for supervising probation officer in violation of the Personnel Rules. Petitioners alternatively allege, among other things, that their failure to hold an examination is arbitrary and

capricious. Given the passage of the "Raise the Age" legislation, Camilo and DCAS should have anticipated the need to hire additional supervising probation officers and have had plenty of time to hold a promotional examination. Petitioners seek to compel respondents to hold an examination for the position of supervising probation officer so that no provisional appointment continues for over a nine-month period.

Respondents argue in opposition that they acted lawfully by provisionally appointing eight individuals to the title of supervising probation officer. Respondents state that petitioners "conflate[] provisional appointments with permanent hires." NYSCEF Doc. No. 49, memorandum of law in support at 2. Jerez Hue (Hue), DCAS's deputy director of administrative operations in the list management & audit unit of the examinations bureaus of the human capital line of service, states that the most recent examination for supervising probation officer took place in February 2015. DCAS certified a list of 48 eligible candidates on February 8, 2017. Out of this list, 12 were appointed to supervising probation officer. On five subsequent dates, 22 candidates were appointed. By August 20, 2018, nine candidates remained. DOP selected and appointed six of these candidates, leaving only three remaining candidates. Hue states that, pursuant to 55 RCNY Appendix A § 4.7.4, as two of these three candidates had been considered three times and not selected, DCAS cannot certify them. As a result, as of September 14, 2018, there was only one candidate remaining and no viable list. Pursuant to Civil Service Law § 61 (1), an agency is not required to appoint candidates to a title from a list of less than three candidates. Further, pursuant to Civil Service Law § 65 (1), when there is no list available for a

position in a competitive class title, the agency is authorized to make provisional appointments.[3] Hue concludes, "[n]o other list for the title of Supervising Probation Officer has been active since September 14, 2018. Consequently, DOP has been able to appoint qualified persons to the title on a provisional basis since September 14, 2018." NYSCEF Doc. No. 47, Hue aff, ¶18.

Respondents state that, because of the "Raise the Age" legislation, they needed to make provisional appointments to meet their hiring needs. As Hue explained, at the time the provisional appointments were made, the only civil service list available for the supervising probation officer position had been exhausted. Respondents maintain that they can make provisional appointments pursuant to Civil Service Law § 65. Provisional appointments are different from permanent appointments and can be selected from qualified candidates. As a result, individuals who are being appointed provisionally as supervising probation officers do not need to be current probation officers. According to respondents, the Personnel Rule that "the commissioner of [DCAS] shall conduct examinations for such positions as may be necessary to anticipate the needs of the city service," does not limit respondents' ability to utilize provisional appointments until a permanent examination and permanent appointments can take place. *See* 55 RCNY Appendix A § 4.1.1 (a).

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[3] "Provisional appointments authorized. Whenever there is no appropriate eligible list available for filling a vacancy in the competitive class, the appointing officer may nominate a person to the state civil service department or municipal commission for non-competitive examination, and if such nominee shall be certified by such department or municipal commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination. Such non-competitive examination may consist of a review and evaluation of the training, experience and other qualifications of the nominee, without written, oral or other performance tests." Civil Service Law § 65 (1).

Regarding the promotional exam, respondents argue that this issue is moot, as a promotional examination has been scheduled. In support of the cross motion, respondents provide the affirmation from Sanford Cohen (Cohen), DCAS's deputy general counsel for human capital. Cohen states that "DCAS has scheduled a promotional examination, Exam No. 0527, for the title of Supervising Probation Officer to be administered in Fiscal Year 2020. The application period for Exam No. 0527 is expected to open on December 3, 2019, and close on December 23, 2019." NYSCEF Doc. No., 59, Cohen affirmation, ¶ ¶ 2, 3.

With respect to holding a promotional examination for the position of supervising probation officer, respondents contend that a mandamus to compel is not appropriate here, as they have the discretion as to which type of examination to hold. According to respondents, petitioners are seeking to compel a promotional examination, which would benefit the union members. Respondents continue that the court should not substitute its judgment for DCAS's determination as to what examination is preferable for the position. Even if respondents were compelled to order an examination, they would still have the discretion as to whether it was promotional or competitive, and would also be responsible for setting the time and place.

Petitioners challenge respondents' interpretation of the civil service laws with respect to filling vacant positions. According to petitioners, the civil service laws at issue still include the preference for filling vacant positions by promotion. Even if this preference is not applicable to provisional appointments, petitioners claim that respondents' hiring determination was arbitrary and capricious, as the people appointed were unqualified. According to petitioners, respondents should have demonstrated that they "canvassed" all probation officers within the DOP prior to

appointing external candidates. Petitioners believe that it was irrational for respondents to appoint external candidates, given the amount of eligible current probation officers.

Petitioners reiterate that respondents have not held a promotional examination since 2015. Petitioners request that the court review whether respondents engaged in undue delay in holding an examination, given the anticipation that additional hires would result from the "Raise the Age" legislation.

During oral argument, petitioners' counsel moved to strike the listed job description of a supervising probation officer, attached as exhibit A, from respondents' reply papers. Exhibit A is a document "that purports to be the specifications of the SPO position." Tr at 7. As the exhibit was attached in reply, petitioners claim they were prejudiced and that "[t]here is no information in there that we can authenticate so we don't know if it is actually correct or not." *Id.* If the cross motion is denied, petitioners are also requesting limited discovery to assess the number of probation officers who have completed the probationary period.

DISCUSSION

In the context of an article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 (1st Dept 2006); *see also* CPLR 7803 (3). "The arbitrary and capricious standard asks whether the determination in question had a rational basis." *Matter of Mankarios v New York City Taxi & Limousine Comm.*, 49 AD3d 316, 317 (1st Dept 2008) (internal quotation marks and citations omitted). Once a court finds a

rational basis for the agency's determination, its review ends. *Matter of Hughes v Doherty*, 5 NY3d 100, 107 (2005).

An article 78 proceeding is a special proceeding which may be 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). Pursuant to CPLR 7804 (f), "[t]he respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just . . .."

"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 (2d Dept 2010). Only where "it is clear that no dispute as to the facts exists and no prejudice will result" may a court, upon a respondent's motion to dismiss, 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 also Chestnut Ridge Assoc., LLC v 30 Sephar Lane, Inc.*, 129 AD3d 885, 887 (2d Dept 2015) (internal quotation marks and citations omitted) ("Where the dispositive facts and the positions of the parties are fully set forth in the record, thereby making it clear that no dispute as to the facts exists and [that] no prejudice will result from the failure to require an answer, the court may reach the merits of the petition . . .").

Applying these standards to the case at hand, as set forth below, respondents' determination to provisionally appoint the six individuals was rational, and will not be disturbed.

The amended petition alleges that, in preparation for the implementation of "Raise the Age" legislation, respondents violated lawful procedure by provisionally appointing five individuals to supervising probation officers who were not in the direct line of promotion. Petitioners further oppose the provisional appointment of Green, a former probation officer. Although Green was in the direct line of promotion as a probation officer, he had not yet completed the one-year probationary period. In sum, petitioners allege that respondents' decision to choose these candidates over other qualified current probation officers violated lawful procedure.

The record indicates that, as of September 2018, the only civil service list for the position of supervising probation officer had been exhausted. Pursuant to Civil Service Law § 65 (1) and (2) provisional appointments are authorized when "there is no appropriate eligible list available for filling a vacancy in the competitive class" and "[n]o provisional appointment shall continue for a period in excess of nine months.[4] *See e.g. Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.--Long Beach Unit*, 8 NY3d 465, 470 (2007) (internal citation omitted) ("With respect to provisional appointments, the Civil Service Law authorizes such appointments only when there is no eligible list available for filling a vacancy in a competitive class, and then only for a maximum period of nine months"). Here, respondents required more personnel as a result of the "Raise the Age" legislation, and the individual respondents were appointed on a provisional basis because there was no viable eligible list of candidates for the position.

[4] "Time limitation on provisional appointments. No provisional appointment shall continue for a period in excess of nine months. The civil service department shall for competitive positions within its jurisdiction, and a municipal civil service commission shall for competitive positions within its jurisdiction, order a civil service examination for any position held by provisional appointment for a period of one month and such department or commission shall conduct a civil service examination, or see that such an examination is conducted, as soon as practicable thereafter, in order to prevent the provisional appointment from continuing for a period in excess of nine months." Civil Service Law § 65 (2).

Civil Service Law §§ 51 and 52 address filling vacant positions through either an open or promotional examination. These provisions of the civil service law do not apply to provisional appointments. *See Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.--Long Beach Unit*, 8 NY3d at 471 (internal quotation marks and citations omitted) ("Provisional employees, though in a sense holding positions in the competitive class, are, for reasons of necessity, exempt from the civil service requirements for appointment . . . Such appointments are mere stop-gaps, exceptions of necessity to the general rules with respect to the filling of such [competitive] positions . . ..").

There is no language set forth in Civil Service Law § 65 (1) requiring respondents to promote current probation officers to the temporary, provisional appointment of supervising probation officer. Furthermore, there is no requirement of a probationary period, as this only applies, in relevant part, to permanent competitive class positions.

Accordingly, respondents did not violate any lawful procedure or evade any merit and fitness requirements of the Civil Service Law by provisionally appointing external candidates or candidates that did not complete a probationary period. "While such appointments may on occasion be succeeded by a permanent appointment, this may only be by virtue of examination and eligibility under the civil service laws, and not by reason of any ripening of the temporary or provisional appointment into a permanent appointment." *Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.--Long Beach Unit*, 8 NY3d at 471 (internal quotation marks and citations omitted).

Petitioners allege that the individuals who were provisionally appointed were unqualified and that they were also less qualified than current probation officers who served the probationary period. However, as noted, there is no requirement that provisional appointments be made by

promoting those in a lower grade position. Furthermore, these claims are speculative, and the court will not review the underlying qualifications of the selected candidates. *See e.g. Matter of Luisi v Safir* 262 AD2d 47, 50 (1st Dept 1999) ("A court's role in an article 78 proceeding of this nature is not to determine the merits de novo, but to decide whether the [respondents'] decision was rational, based on the evidence actually before them"); *see also Matter of Tockwotten Assoc. v New York State Div. of Hous. and Community Renewal*, 7 AD3d 453, 454 (1st Dept 2004) ("[A]n agency's determination, acting pursuant to legal authority and within its area of expertise, is entitled to deference").

In addition, petitioners suggest, without providing any specifics, that current probation officers who completed the probationary period would be more qualified for, and interested in, the provisional appointment to supervising probation officer. However, petitioners have not provided anything more than general allegations, which are insufficient to state a claim that respondents' provisional appointments were "'made in violation of lawful procedure, [were] affected by error or law or [were] arbitrary and capricious or an abuse of discretion.'" *See e.g. Matter of Miller v Mulligan*, 73 AD3d 781, 783 (2d Dept 2010), quoting CPLR 7803 (3).

Mandamus to Compel Examination

Petitioners also seek to compel respondents to hold an examination for the position of supervising probation officer so that no provisional appointment continues for longer than nine months. An article 78 mandamus proceeding may be brought to determine "whether the body or officer failed to perform a duty enjoined upon it by law." *See* CPLR § 7803 (1). A mandamus to compel "applies only to acts that are ministerial in nature and not those that involve the exercise of discretion." *Matter of Flosar Realty LLC v New York City Hous. Auth.*, 127 AD3d 147, 152 (1st Dept 2015) (internal quotation marks and citation omitted). Petitioners argue that, although

respondents hired additional probation officers through open competitive examination, respondents unlawfully failed to offer a concurrent promotional examination for supervising probation officer. However, to this extent, respondents cannot be compelled to conduct a promotional exam over an open competitive exam because DCAS has discretion in deciding which exam to hold. *See e.g. Matter of Gallagher v City of New York*, 307 AD2d 76, 81 (1st Dept 2003). "[C]ourts have accorded considerable deference to the agency's ability to assess what extent, and in what manner, merit and fitness should be measured [for a given civil service position]"). In addition, nothing in 55 RCNY Appendix A § 4.1.1 requires DCAS to specifically conduct a promotional examination or conduct examinations within a specific time frame.[5]

While respondents cannot be compelled to order a promotional examination over an open competitive one, the requirements of provisional appointments "must be complied with. The agency has no discretion to determine whether an examination will be ordered and conducted." *Matter of Joyce v Ortiz*, 108 AD2d 158, 162 (1st Dept 1985) (internal quotation marks and citation omitted). Nonetheless, the record indicates that this issue is moot. Respondents have scheduled an examination for the position of supervising probation officer, and it is a promotional exam. *See e.g. Matter of Newton v Police Dept. of New York*, 183 AD2d 621, 623 (1st Dept 1992) (internal quotation marks and citation omitted) ("An action by respondent during pendency of litigation of an Article 78 Action, renders petitioner's claims moot").

The court has considered petitioners' remaining contentions and finds them to be without merit. Based on the foregoing, the amended petition is denied and the proceeding is dismissed.

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[5] In petitioners' reply, for the first time, they request that the court review whether respondents engaged in undue delay in holding an examination for supervising probation officer. The court will not consider petitioners' contentions as they have been "improperly raised for the first time in their reply brief. . . ." *Bailey v Brookdale Univ. Hosp. & Med. Ctr.*, 27 AD3d 677, 678 (2d Dept 2006).

Accordingly, the additional relief requested by petitioners during oral argument is denied as moot.

CONCLUSION

Accordingly, it is hereby

ORDERED that respondents' cross motion to dismiss the amended petition is granted; and it is further

ORDERED and ADJUDGED that the amended petition is denied and the proceeding is dismissed, with costs and disbursements to respondents.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

1/8/2020
DATE

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

161785/2018 POWELL, DALVANIE vs. BERMUDEZ, ANA
Motion No. 001