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MEMORANDUM DECISION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MG

In the Matter of the Application of
BRIAN CASLIN,

Motion Sequence #1
Submitted April 29, 2011

Petitioner,

For an Order Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

INDEX NO: 18 368/10

NASSAU COUNTY CIVIL SERVICE COMMISSION,
SCOTT M. DAVIS, in his capacity as Commissioner
of the Nassau County Civil Service Commission,
JAMES F. DEMOS, in his capacity as Commissioner
of the Nassau County Civil Service Commission,
JOHN J. SENKO, in his capacity as Commissioner
of the Nassau County civil Service Commission,
EDWARD P. MANGANO, in his capacity as County
Executive of the County of Nassau and THE COUNTY
OF NASSAU,

Respondents.

Appearances:

For Petitioner:

Wayne J. Schaefer, LLC
199 East Main Street, Suite 4
Smithtown, NY 11787

For Respondents:

John Ciampoli, Esq.
County Attorney
One West Street
Mineola, NY 11501

This is a Special Proceeding brought by petitioner Brian Caslin pursuant to CPLR Article 78 seeking a judgment directing respondents to conduct and complete all remaining tests, examinations and proceedings necessary to conclude the processing of petitioner's application for Nassau County Civil Service Commission Police Officer Examination No. 7000, and upon the successful completion and conclusion of the examination process, directing respondents to certify petitioner's eligibility for employment as a police officer.

The petition specifically seeks a judgment pursuant to CPLR 7803(3), (4) setting aside the respondents' (Nassau County Civil Service Commission, et al.) determination dated May 25, 2010, and affirmed on August 24, 2010, disqualifying the petitioner in his application for Nassau County Civil Service Commission ("CSC") Police Officer Examination No. 7000 for "failure to meet the MPTC standard for audiology."

The Municipal Police Training Council ("MPTC") prescribes the *Medical and Physical Fitness Standards and Procedures for Police Officer Candidates* in the state of New York, which sets forth the essential job functions generally common among all police agencies, the minimum medical and physical fitness standards for entry-level police officer candidates, and the process for medical review by a qualified physician or a qualified practitioner to examine each candidate.

In August 2007, the CSC administered a written examination for Police Officer Examination No. 7000. The petitioner scored satisfactorily on the examination and was offered probationary employment conditioned on passing a medical and physical fitness examination, a psychological evaluation, and any other tests deemed necessary. The petitioner was first given a "pure tone screening" hearing test on May 3, 2010, as part of his medical examination. The results showed impairments in the petitioner's left ear at

2,000 and 3,000 Hz. A retest, given a week later on May 10, 2010, showed impairments in both ears at 2,000 Hz. On May 25, 2010, the CSC resolved that based on the auditory evaluations of the petitioner and the recommendation of Marlaine Tapply, M.D., CSC Medical Director, the petitioner would be disqualified for Police Officer Examination No. 7000 for failure to meet the MPTC standard for audiology. By letter dated June 8, 2010, the CSC notified the petitioner of same.

By letter dated June 20, 2010, the petitioner exercised his right to appeal the determination and submitted the narrative report of Paul R. Esposito, M.A., licensed audiologist, dated June 18, 2010. The results of an audiological evaluation conducted on May 7, 2010, confirmed the May 3, 2010, and May 10, 2010, tests in that the petitioner failed to meet the MPTC standard for audiology. Notwithstanding the failure, Mr. Esposito stated that the petitioner "does not report any difficulties with his hearing" and "by themselves, the response levels indicated should not provide a significant hindrance to Mr. Caslin's performance as a police officer."

Upon receipt of Mr. Esposito's report, the CSC referred the petitioner to an audiologist of its own selection, Dr. Susan Bressi Hamilton, Aud, CEC, FAAA, for "Recourse Testing" pursuant to the MPTC's *Medical and Physical Fitness Standards and Procedures for Police Officer Candidates*. By letter dated July 29, 2010, Dr. Bressi Hamilton notified Dr. Tapply, CSC Medical Director, that based upon a July 29, 2010 audiological evaluation, the petitioner, in her opinion, "does not effectively meet the hearing standard requirement for performing the duties of a police officer as described in the applicable class specifications."

With respect to the sound-field speech recognition testing administered by Dr. Bressi Hamilton , “a score of 96% was obtained for the 50dB HL presentation level in quiet; a score of 86% for the 50dB HL +/- 10 presentation level; and a score of 68% for the 35dB HL presentation level in quiet.” According to the MPTC’s *Medical and Physical Fitness Standards and Procedures for Police Officer Candidates*, a police officer candidate “shall score no poorer than 90% in quiet and 70% in noise” in recourse testing. The petitioner passed the 50dB quiet test with a score of 96%, passed the 50dB HL +/- 10 noise test with a score of 86%, and failed the 35dB quiet test with a score of 68%. The 35dB test, however, is not found in the MPTC’s *Medical and Physical Fitness Standards and Procedures for Police Officer Candidates*. Rather, it is included in a modification of the MPTC audiology standards unilaterally adopted by CSC resolution on February 6, 2007. The modification also raised the passing score of recourse testing to “80% in noise.”

By letter dated August 2, 2010, Karl Kampe, CSC Executive Director, referred the petitioner to Alan Richards, Ph.D., for an additional recourse testing. The evaluation took place on August 10, 2010, and Dr. Richards notified Dr. Tapply, CSC Medical Director, by letter dated August 15, 2010, that “it is my opinion that he does not qualify” for the MPTC standards of hearing. The opinion was based upon the August 15, 2010, results and those of “two other audiological examinations.” Dr. Richards, however, did not state the conditions under which the recourse testing was completed. Thus, this Court cannot determine whether the tests complied with the procedures set forth in the MPTC’s *Medical and Physical Fitness Standards and Procedures for Police Officer Candidates*.

On August 24, 2010, the CSC reviewed the aggregate information concerning the petitioner's audiological activity, including the findings of Mr. Esposito, and the reports of Dr. Bressi Hamilton and Dr. Richards. Karl Kampe, CSC Executive Director, issued a memorandum to the CSC dated August 24, 2010, advising it that the petitioner "was evaluated by CSC audiologist Dr. Alan Richards on August 10, 2010, to complete his appeal process. Dr Richards agreed with Dr. Susan Bressi-Hamilton that candidate does not effectively meet the MPTC audiology standards. Attached is a medical review by M. Tapply, CSC Medical Director, recommending candidate remain disqualified for not meeting the MPTC audiology standards." Upon the memorandum, the CSC resolved that the petitioner would remain disqualified for Police Officer Examination No. 7000. The CSC notified the petitioner of same by letter dated August 31, 2010.

In Article 78 proceedings, judicial review of an administrative determination is limited to the grounds invoked by the agency at the time of its determination (*Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educational Services*, 77 NY2d 753). Therefore, the only grounds to be considered here is the petitioner's purported failure to meet the MPTC standard for audiology. Judicial review is also limited to the facts raised "directly before" the administrative agency, not those raised in the Article 78 proceeding. (*Kelly v Safir*, 96 NY2d 32). Here, the Court has not considered any facts beyond the auditory evaluations of the petitioner and the reports thereof, as these were the only facts submitted to the CSC.

The courts have "no right" to review the facts generally as to weight of evidence (*Pell v Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222). Among the only questions that may be raised in an

Article 78 proceeding, and the only questions raised by the petitioner in this proceeding, are whether the determination was (1) arbitrary and capricious; (2) an abuse of discretion; (3) made in violation of lawful procedure; or, (4) affected by an error of law [CPLR 7803(3)]. The petitioner has raised the additional question of whether the respondents' determination was supported by substantial evidence, but such a question relates to "a determination made as a result of a hearing held, and at which evidence was taken" [CPLR 7803(4)]. There is no evidence in the record that a hearing was held in this case. Therefore, the question of substantial evidence will not be addressed.

In this proceeding, the issue of whether the determination was arbitrary and capricious is dispositive, thus that issue will be the only issue addressed. Rationality is the issue that is reviewed under the arbitrary and capricious question (*Pell v Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, supra*). The question chiefly relates to whether a particular action should have been taken or is justified, and whether the administrative action is without foundation in fact (*Id.*). The petitioner failed his first two auditory evaluations, and the petitioner does not dispute the validity of those tests. Therefore, any administrative action based upon them is not without foundation in fact. The arbitrary and capricious question therefore turns on whether the CSC's denial of the petitioner's appeal, based upon the auditory evaluations of Dr. Richards and Dr. Bressi Hamilton, is justified.

As stated above, Dr. Richards' report does not provide facts sufficient to determine whether the recourse tests administered by him complied with the procedures set forth in the MPTC's *Medical and Physical Fitness Standards and Procedures for Police Officer*

Candidates, thus any administrative action based upon Dr. Richards' report is without foundation in fact, and thus arbitrary and capricious.

The only recourse test administered by Dr. Bressi Hamilton that the petitioner failed was the 35dB sound-field speech recognition test. Since this test was administered pursuant to a modification of the MPTC audiology standards unilaterally adopted by the CSC on February 6, 2007, it remains to be determined whether the CSC's unilateral adoption, as the petitioner suggests, violated Civil Service Law § 20.

Section 20, subdivision 1 of the Civil Service Law provides that "each municipal civil service commission shall prescribe, amend and enforce suitable rules . . . including rules for the jurisdictional classification of the offices and employments in the classified service under its jurisdiction, for the position classification of such offices and employments, *for examinations therefor* and for appointments, promotions, transfers, resignations and reinstatements therein." (Emphasis added). Subdivision 2 provides that "such rules, and any modifications thereof, shall be adopted *only after a public hearing* . . . and shall be valid and take effect *only upon approval of the state civil service commission.*" (Emphasis added).

The petitioner asserts that the CSC's failure to hold a public hearing on the adoption of the 35dB test and the state civil service commission's failure to approve the adoption of the 35dB test renders the CSC's determination arbitrary and capricious, as the petitioner passed all remaining recourse tests administered by Dr. Bressi Hamilton.

The CSC does not contest the fact that its adoption of the 35dB test was not in compliance with the Civil Service Law. Rather, the CSC argues that the 35dB test is not

a “rule,” but a “standard” or a “regulation,” the adoption of which the First Department held in 1966 need not comply with the Civil Service Law (*Bates v Lang*, 26 AD2d 462).

The *Bates* court held that “regulations” affecting the weight accorded performance ratings and seniority in promotional examinations for employees of the New York City Transit Authority were not “rules,” and the 1964 unilateral adoption of amended regulations need not have complied with section 20 of the “new” Civil Service Law, chapter 790 of the Laws of 1958. The “new” Civil Service Law is still in effect today and current through the 2011 Legislative Session, though it has been amended six times since its passage in 1958.

Subdivision 2 of former section 11 of the “old” Civil Service Law provided that “rules so prescribed and established, and all *regulations* for appointment and promotion in the civil service of *said cities* and any subsequent modification thereof . . . shall be valid and take effect only after a public hearing, notice of which has been published for not less than three days, setting forth a summary of the subject matter of such proposals and *upon the approval of the mayor or other duly authorized appointing authority of the city* and of the state civil service commission.” (Emphasis added).

The *Bates* court held that the removal of the “regulations” language in the new Civil Service Law was “undoubtedly deliberate” and thus the mandate that said regulations be subject to the strictures of the Civil Service Law was “impliedly repealed.” However, the CSC’s argument that the 35dB test is a “regulation” and not subject to the strictures of the Civil Service Law is without merit. The old Civil Service Law mandated that regulations of “said cities,” not Nassau County, be subject to public hearing and approval of the “mayor or other duly authorized appointing authority of the city” and the state civil service

commission. Therefore, it is “undoubtedly deliberate” that the legislature removed the “regulations” language only as it pertained to the *cities* listed in the statute, not Nassau County. This is confirmed by the fact that the legislature retained the distinction between “the city of New York” and “a county civil service commission” in subdivision 2, section 20 of the new Civil Service Law. The petitioner is correct in that the *Bates* court’s ruling was narrowly tailored to the facts before it, and is inapplicable here

Therefore, the CSC’s unilateral adoption of the 35dB test and 80% passing score in recourse noise testing on February 6, 2007, violated CSL 20(2) and “was null and void” (*Trager v Kampe*, 99 NY2d 361). As the petitioner passed the recourse testing performed by Dr. Bressi Hamilton on July 29, 2010, the CSC’s determination of disqualification on May 25, 2010, and affirmed on August 24, 2010, was without foundation in fact and thus is arbitrary and capricious. This Court need not reach any other issues raised by the parties.

Accordingly, the petition is granted. The CSC’s determination on May 25, 2010, and affirmed on August 24, 2010, is hereby annulled. The respondents are directed to conduct and complete all remaining tests, examinations and proceedings necessary to conclude the processing of petitioner’s application for Nassau County Civil Service Commission Police Officer Examination No. 7000. Upon the completion and conclusion of the examination process, if the petitioner meets all of the requirements, the respondents shall certify the petitioner’s eligibility for employment as a police officer, in accordance with the CSC’s standard practice and policies.

The petitioner's request for an order pursuant to CPLR 7806 retaining jurisdiction over this proceeding to determine respondents' compliance with the orders of this Court is denied.

The petitioner's request for costs and disbursements of this proceeding is granted.

Settle judgment on notice.

Dated: **JUL 21 2011**



UTE WOLFF LALLY, J.S.C.

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