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

PRESENT: HON. JOAN A. MADDEN PART 11
Justice

Portney, William

Plaintiff,

-v-

Port Authority of New York, New Jersey

Defendant.

INDEX NO.: 116024/07

MOTION DATE: 2-21-09

MOTION SEQ. NO.: 001

MOTION CAL. NO.:

The following papers, numbered 1 to ____ were read on this ~~motion to~~ petition/for Article 78 relief

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this ~~motion~~ application is decided in accordance with annexed Memorandum Decision Order + Judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: June 16, 2009

J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

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In the Matter of the Application of

WILLIAM PORTNEY,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice law and Rules

Index No. 116024/07

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

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JOAN A. MADDEN, J:

In this Article 78 proceeding, petitioner William Portney ("petitioner") seeks to annul a determination of the respondent, Port Authority of New York and New Jersey ("the Port Authority" or "the Authority"), which found him psychologically unfit for the position of police officer with the Port Authority, and mandating that the Authority appoint him to said position. The Port Authority opposes the relief sought by petitioner, and pursuant to CPLR 2221 seeks leave to reargue this Court's interim decision that, inter alia, denied its cross-motion to dismiss under CPLR 3211(a)(7) and granted the petitioner's motion pursuant to Public Health Law § 18 to obtain certain documentation that the Authority used as a basis to disqualify petitioner.

Background

In 2002, petitioner took, and passed, the written examination required to become a Port Authority Police Officer (Ver. Pet. ¶ 3). Thereafter, the Port Authority placed petitioner on a list of test-qualified applicants, and in 2007 randomly selected petitioner to proceed to a screening process which included a series of written tests and interviews, by both medical and psychological professionals (See Davidson Aff. ¶ 5).

Petitioner completed the following psychological tests during the evaluation process: (1) Minnesota Multi-phasic Personality Inventory-2 ("MMPI-2"), (2) Cornell Index, (3) Draw-a-person, and (4) Law Enforcement Assessment and Development Report ("LEADR") (Ver. Pet. ¶ 11). On March 27, 2007, the Port Authority had Craig Polite, Ph.D., ("Dr. Polite") interview petitioner. Dr. Polite found petitioner to be psychologically unsuitable for the Port Authority Police Department. On April 3, 2007, petitioner was re-evaluated (Francis Aff. ¶ 12). On April 3, 2007, the Port Authority had Glen Heiss, Ph.D., ("Dr. Heiss") re-evaluate petitioner (Id. at ¶ 14). Dr. Heiss also found petitioner to be unsuited for Police Authority work (Id.). At the conclusion of these interviews, the Port Authority's Office of Medical Services determined that petitioner was not a viable candidate (Id. at ¶ 15).

Petitioner was notified of his disqualification by the Port Authority Human Resources Department by letter dated August 7, 2007 (Ver. Pet. ¶ 4). Petitioner alleges that, pursuant to the instructions in the August 7, 2007 letter, by letter dated August 11, 2007, Petitioner requested that the Port Authority provide him with the reasons for his disqualification (Ver. Pet. ¶ 7; see also Ver. Pet. Ex. B). In a letter dated August 30, 2007, petitioner made a second request for the Port Authority to provide him with the reasons for his disqualification (Ver. Pet. ¶ 8; see also Ver. Pet. Ex. C).

By letter dated August 27, 2007, the Port Authority provided petitioner with the following statement regarding its determination: "The reason that you were not medically certified for the position of Police Officer with the Port Authority of New York and New Jersey is that you failed to meet the psychological requirements" (Ver. Pet. Ex. D).

Petitioner contends that the Port Authority's letter was vague, uninformative, and patently insufficient to provide him with adequate notice of the reason for his disqualification.

By letters dated September 27, 2007, petitioner's attorney wrote to three separate members of the Port Authority, requesting that the Port Authority forward to petitioner, or to him, or to a psychiatrist or psychologist chosen by petitioner, all documentation in the Port Authority's possession that were used to form the basis of their determination (Ver. Pet. Exs. E-G).

By letter dated October 10, 2007, Barbara Smith, an attorney for the Employment and Labor Law Division of the Port Authority, informed petitioner's attorney that the requested records were neither patient nor treatment records, and as such the Port Authority was not required to produce them (Ver. Pet. Ex. H).

This proceeding ensued. Petitioner contends that the Port Authority acted in an arbitrary and capricious manner by failing to notify petitioner adequately as to the specific reasons for its disqualification determination, and by denying him access to his records, since that impeded his ability to appeal the Port Authority's determination. Petitioner also alleged that, pursuant to Public Health Law § 18, the Port Authority ought to have provided the documentation, reports, and information it used to make its disqualification determination. Lastly, petitioner alleged that the Port Authority's disqualification determination, its internal review process that excluded his participation, and its lack of an accessible appeals process were each arbitrary and capricious.

The Port Authority asserts that its determination not to hire petitioner was rational since it followed the conclusion of two psychologists and the results of four tests showing

that petitioner was not psychologically qualified to be a Port Authority police officer. The Port Authority also argued that the records that the petitioner requested were exempt from disclosure pursuant to Public Officers Law § 87, which provides that agencies may deny access to records, or portions thereof, that are inter- or intra-agency materials, and that are not final agency policy or determinations. N.Y. Public Officers Law § 87(2)(g)(iii), see also Matter of O'Shaughnessy v. New York State Div. of State Police, 202 A.D.2d 508 (2d Dep't), lv. to app. denied, 84 N.Y.2d 807 (1994). The Port Authority further asserted that petitioner was not entitled to the records pursuant to New York Public Health Law § 18, since his right to obtain such records was not absolute, and petitioner was not entitled to records related to his disqualification. The Port Authority thus also contended that the letter of August 27, 2007, informing petitioner that he failed to meet the psychological requirements was a sufficiently specific statement regarding his disqualification. O'Shaughnessy, 202 A.D.2d at 509.

In its interim decision dated October 21, 2008, this Court ordered, inter alia, that the Port Authority's cross-motion to dismiss the petition be denied, and that the Port Authority was to provide to the court for in-camera inspection all records relating to its determination that petitioner was not qualified to be a Port Authority Police Officer. The Court, not having received a copy of the Port Authority's verified answer, additionally ordered the Authority to serve its verified answer.

The Port Authority proceeded by order to show cause why an order pursuant to CPLR 2221 should not issue granting leave to the Port Authority to reargue its prior motion to dismiss. It included a copy of its verified answer, which the New York County Clerk's Office stamped on January 03, 2008 (Hood Affirmation Ex. C). It also offers for

the first time the argument that the New York Public Health Law does not apply to it since it is a bi-state entity, regarding which neither New York nor New Jersey can enact unilateral regulations. It further argues that the psychological records at issue were not true patient records, since petitioner was not a patient, and therefore the language in Public Health Law § 18 concerning "patient information" does not apply here.

Despite the Port Authority's motion for reargument, in his affirmation counsel for the Port Authority stated that "in light of the Court's directive in the [interim decision], the Port Authority is prepared to provide the Court with a copy of petitioner's records for an in-camera review . . . ." (Hood Affirmation ¶ 9). However, rather than confidentially providing these documents to the Court for an in-camera review, the Port Authority attached them as Exhibits (See Hood Affirmation Exs. D and E). These Exhibits contain petitioner's psychological test results and the conclusions of Drs. Heiss and Polite (Id.).

Although test results showed that the petitioner would have "very few likely employment problems," they also indicated that he was less than forthright when taking the tests, as he "was trying to project an inflated image of himself," among other problems (Hood Affirmation Ex. E). Drs. Heiss and Polite both concluded that the petitioner is not psychologically suitable for the position (Id.).

Petitioner responds by again asserting that Public Health Law § 18 requires the Port Authority to release its entire psychological file on the petitioner, and that the New York Public Health Law does apply to the Port Authority.

Discussion

Decisions made by administrative agencies are subject to judicial review under Article 78 of the CPLR. The court may inquire as to "whether a determination was made

in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803. Although courts may review administrative decisions, they "have no right to review the facts . . . beyond seeing to it that there is substantial evidence." Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1, 34 N.Y.2d 222, 230 (1974).

It is well settled that "[a]n appropriate authority has wide discretion in determining the fitness of candidates. That discretion is particularly broad in the hiring of persons for positions of law enforcement, to whom high standards may be applied." Needleman v. County of Rockland, 270 A.D.2d 423, 424 (2d Dep't 2000) (internal citations omitted); accord Matter of Shedlock v. Connelie, 66 A.D.2d 433 (3d Dep't), aff'd 48 N.Y.2d 943 (1979); see also Conlon v. Comm'r of Civ. Serv. of County of Suffolk, 225 A.D.2d 766 (2d Dep't 1996). The Port Authority's reliance on its medical staff to make a determination of a candidate's fitness, is not, per se, arbitrary or capricious. McCabe v. Hoberman, 33 A.D.2d 547 (1st Dep't 1969). "In determining whether a candidate is medically qualified to serve as a police officer, the appointing authority is entitled to rely upon the findings of its own medical personnel, . . . and the judicial function is exhausted once a rational basis for the conclusion is found." Matter of Thomas v. Straub, 29 N.Y.3d 595, 596 (2d Dep't 2006).

A motion to reargue addresses the discretion of the court, and provides a party the opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See Foley v. Roche, 68 A.D.2d 558, 567 (1st Dep't 1979).

Here, the court need not reach whether the motion to reargue should be granted,[1] since the documentary evidence that the Port Authority has submitted establishes that its decision to disqualify petitioner had a rational basis. See Scandariato v. Port Authority, Supreme Court New York County, April 12, 2002, Madden, J. Index no. 106120/01 at 4 ("[R]espondent did not act irrationally or arbitrarily in relying on the objective written tests and the evaluations of two psychologists . . . to determine that she was not psychologically qualified to serve as respondent's police officer, based on clearly articulated and justifiable reasons.").

[1] In any event, it appears that the New York Public Health Law would apply in this case. New York may unilaterally regulate the Port Authority's actions that "externally" affect the public, but not the Authority's "internal operations." See Matter of Agesen v. Catherwood, 26 N.Y.2d 521, 525 (1970) ("The distinction between the internal operations and conduct affecting external relations of the Authority is crucial in charting the areas permitting unilateral and requiring bilateral State action."), Salvador-Pajaro v. The Port Auth. of New York & New Jersey, 52 A.D.3d 303, 303-04 (1st Dep't 2008) ("[T]he Port Authority, albeit bi-state, is subject to New York's laws involving health and safety, insofar as its activities may externally affect the public . . . .") (internal citations and quotations omitted), American Honda Finance Corp. v. One 2008 Honda Pilot, 878 N.Y.S.2d 597, 600 (Sup. Ct. N.Y. Co. 2009) ("[A]ny unilaterally enacted New York statute applies to the Authority if such statute governs conduct affecting external relations of the Authority implicating New York interests.") (internal citations and quotations omitted). Here, it would appear the Port Authority is subject to the Public Health Law's requirement that patient records be made available since such requirement affects the public and implicates New York's interest in affording its residents access to their own health care records.

In addition, the Port Authority's argument that petitioner is not a "patient" within the meaning of New York Public Health Law § 18 is incorrect. New York Public Health Law § 18 defines the phrase "patient information" to mean "any information concerning . . . an identifiable subject possessed by a by a health care facility or health care practitioner who has provided . . . services for assessment of a health condition including, but not limited to, a health assessment for insurance and employment purposes . . . ." New York Public Health Law § 18(1)(e). The Port Authority's records clearly concern "an identifiable subject" (the instant petitioner, William Portney), and "were possessed by a health care facility or health care practitioner" (Drs. Heiss and Polite of the Port Authority's Office of Medical Services) for a health assessment for employment purposes.

As noted above, the written test results indicated that petitioner "was not totally open" when responding, which betrayed "an unwillingness or inability to disclose personal information," a problem that might have masked other "symptoms" (Hood Affirmation Ex. E). The MMPI-2 results did show that petitioner was mentally inflexible, had a limited range of interests, and "may be somewhat intolerant and insensitive . . . ." (Id.). The LEADR test suggested the petitioner could have problems in situations requiring quick and decisive actions (Id.).

Dr. Heiss found that the petitioner "lacks the customary interpersonal skills, stress tolerance, conflict resolution skills and maturity required of a [Port Authority] police officer" (Id.). Dr. Polite also expressed concern whether the petitioner "could handle the emotional stresses of a Port Authority police officer," and added he "is of questionable judgment" and that "[h]is self insight is minimal and definitely not at the level necessary for a Port Authority police officer" (Id.). Both of the psychologists noted petitioner's academic difficulties and undistinguished career serving the fast-food industry, and more critically, questioned his maturity level (Id.).

This evidence clearly supports the Port Authority's disqualification determination, and precludes a claim that the Port Authority's determination was arbitrary and capricious. Cf., e.g., Garcia v. Port Authority of New York and New Jersey, Supreme Court New York, August 14, 2007, Gische, J. Index no. 105382/07 (finding that the psychological written testing and oral interviews provided the Port Authority a rational basis to disqualify job candidate, despite the contrary claims of candidate's own psychologist), Diaz v. Port Authority of New York and New Jersey, Supreme Court New York County, February 14, 2003, Madden, J. Index no. 119351/02 (same), Scandariato, supra Index no.

106120/01 (same), Chin v. Port of New York Authority, Supreme Court New York County, February 5, 1987, Sandifer, J. Index no. 22881/86 (finding that the single psychological written test and single oral interview provided the Port Authority a rational basis to disqualify job candidate, despite the contrary claims of candidate's own psychologist and psychometrist)

Finally, petitioner's claim that the Port Authority's internal review process and lack of an accessible appeals process was arbitrary and capricious is without merit. Case law has settled that "[t]he act of disqualifying one eligible for an appointment[,] like the act of discharging a probationary governmental employee[,] is an administrative function, and no hearing or notice need be given unless specifically enjoined by statute." Shedlock, 66 A.D.2d at 435. Petitioner cites no law granting him the right to any hearing or internal appeal, and by way of this Article 78 proceeding, he has received an opportunity for judicial review of whether that determination was arbitrary or irrational. Cf. id.

Accordingly, it is hereby

ORDERED and ADJUDGED that petition is denied and dismissed.

Dated: June 16, 2009

J.S.C.