

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 29, 2011

512523

In the Matter of ROSE DEWITT,
Petitioner,

v

NEW YORK STATE BOARD OF LAW
EXAMINERS,
Respondent.

MEMORANDUM AND JUDGMENT

Calendar Date: October 14, 2011

Before: Spain, J.P., Rose, Kavanagh, Stein and Garry, JJ.

Tuczinski, Cavalier, Gilchrist & Collura, P.C., Albany
(Daniel J. Tuczinski of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, Albany (Robert M.
Goldfarb of counsel), for respondent.

Rose, J.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of misconduct during the July 2009 bar examination.

Petitioner took the New York State bar exam in July 2009 and was thereafter charged with violating respondent's misconduct rule by copying, or seeking to copy, another candidate's answers to multiple choice questions during each day of the exam (see 22

NYCRR 6000.9 [a] [former (8)]).¹ Following a hearing, respondent sustained the charges and, among other things, nullified petitioner's exam results. Petitioner then commenced this CPLR article 78 proceeding.

We must disagree with petitioner's contention that the determination is not supported by substantial evidence. Substantial evidence is defined as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (Matter of Berenhaus v Ward, 70 NY2d 436, 443 [1987] [internal quotation marks and citation omitted]; see 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 179 [1978]; Matter of Goldsmith v DeBuono, 245 AD2d 627, 628 [1997]). Here, a proctor testified that she observed petitioner repeatedly craning her neck to look at the exam of the candidate seated next to her during the multiple choice session on the first day of the exam. The same proctor and her three supervisors all testified that they observed petitioner doing the same thing on the second day. Respondent also offered expert proof of strong statistical evidence that petitioner succeeded in copying answers from the other candidate. Although petitioner denied copying and presented her own expert proof challenging the statistical evidence against her, the resolution of conflicting evidence and determination of the witnesses' credibility are within the sole province of respondent and will not be disturbed (see Matter of Rogers v Sherburne-Earlville Cent. School Dist., 17 AD3d 823, 824 [2005]; Matter of Mirrer v Hevesi, 4 AD3d 722, 723-724 [2004]; Doolittle v McMahon, 245 AD2d 736, 738 [1997]).

Petitioner's claim that she was denied due process because she was not provided with the address of the other candidate and the data underlying the report of respondent's expert are unpreserved for our review as petitioner did not seek a ruling at the hearing on either issue (see Matter of Moro v Mills, 70 AD3d 1269, 1269-1270 [2010]; Matter of Johnson v Department of Correctional Servs., 53 AD3d 746, 747 [2008]; Matter of Brennan v New York State & Local Empls. Retirement Sys., 50 AD3d 1374, 1377

¹ The regulations were amended in October 2010 and subdivision (8) was renumbered to subdivision (9).

[2008]).

Spain, J.P., Kavanagh, Stein and Garry, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court