

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

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In the Matter of the Application of

THE CITY OF NEW YORK, EDNA WELLS HANDY,
as Commissioner of the New York City Department of
Citywide Administrative Services, and RAYMOND W.
KELLY, as Commissioner of the New York City Police
Department,

Petitioners,

Index No. 401120/ 2013
Motion Seq. No. 001

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

- against -

THE NEW YORK CITY CIVIL SERVICE COMMISSION
and MOHAMMED AHMED,

Respondents.

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SCHLESINGER, J.:

Petitioners the City of New York, Edna Wells Handy, as Commissioner of the New York City Department of Citywide Administrative Services (“DCAS”), and Raymond W. Kelly, as Commissioner of the New York City Police Department (“NYPD”) commenced this proceeding challenging a decision by respondent New York City Civil Service Commission (“CCSC”), dated March 18, 2013 (Pet. Exh 1). In that decision, the CCSC reversed the NYPD’s November 11, 2010 determination to disqualify respondent Mohammed Ahmed on psychological grounds from consideration for a police officer position. Before the Court at this time is a petition pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”) to annul the CCSC determination and affirm the NYPD determination disqualifying Mr. Ahmed on the grounds that the CCSC determination was made in violation of lawful procedure, was affected by error of law, and was arbitrary and capricious. Respondent CCSC has opposed the petition; Mr. Ahmed appeared at oral argument to oppose as well.

Three questions present themselves here. First, were there procedural deficiencies in the NYPD's disqualification of Mr. Ahmed? Second, what is the proper standard that the CCSC should apply in reviewing a determination by the NYPD disqualifying an applicant as unsuitable for the position of police officer? Third, assuming that CCSC was acting within its authority, and applying the standard of review to be used by the Court in this Article 78 proceeding, is there a rational basis for the CCSC determination?

BACKGROUND FACTS AND PROCEDURAL HISTORY

Mr. Ahmed initiated the process of becoming a police officer in November of 2008 when he took and passed Civil Service Exam Number 8314 for the position of police officer (Pet. Exh. 2).¹ In conjunction with his candidacy, Mr. Ahmed underwent numerous psychological tests on September 10, 2010 (Exh. 3). It is undisputed that no issues were found through any of those tests.

For the last aspect of the application process, Scott Wheeler, Ph.D., a staff psychologist for the NYPD's Psychological Services Unit, evaluated Mr. Ahmed on September 15, 2010, to determine his psychological suitability for the position. Based on Mr. Ahmed's self-report, Dr. Wheeler concluded that Mr. Ahmed was psychologically unsuitable for police officer work because of "poor stress tolerance" (Exh. 4 at p.3). In his Candidate Psychological Disqualification Summary, Dr. Wheeler noted that Mr. Ahmed "reported experiencing significant disturbance of his overall functioning, which resulted in job termination, when facing familial stressors." More specifically, Dr. Wheeler reported that, due to the stress of the upcoming wedding of Mr. Ahmed's brother, Mr. Ahmed experienced disturbed sleep, appetite and weight loss, fatigue, loss

¹All referenced Exhibits are attached to the Petition unless otherwise noted.

of energy, social withdrawal and a decrease in preferred activities from 2008 to 2010. The following month, Dr. Dayle Schwarzler, Ph.D., a NYPD Supervising Psychologist, sustained Dr. Wheeler's decision without an explanation or further details (Exh. 5).

By letter dated November 11, 2010 (Exh. 6), the NYPD notified Mr. Ahmed that:

[The NYPD] regret[s] to inform you that you have not met the requirements for the position of Police Officer . . . and are hereby disqualified. This determination was based on the evaluation of your psychological tests and interview which found personality characteristics incompatible with the unique demands and stress of employment as a New York City Police Officer.

The letter also included information about Mr. Ahmed's right to appeal, stating that:

PLEASE TAKE NOTICE THAT YOU CAN APPEAL YOUR DISQUALIFICATION by writing to the NYC Civil Service Commission . . . within 30 days of the date on the top of this letter.

Furthermore, the letter advised Mr. Ahmed that if he did choose to appeal, the CCSC determination would be based upon the contents of the NYPD's psychological folder, as well as Mr. Ahmed's letter of appeal and supporting psychological evidence from his own psychiatrist, and the response of the Police Department. Lastly, the letter advised Mr. Ahmed how he could arrange to have the contents of the NYPD psychological folder sent to his own psychiatrist.

On March 18, 2011,² Mr. Ahmed appealed to the CCSC. In its March 23 letter acknowledging the appeal (Exh. 7), the CCSC informed Mr. Ahmed that he was required to submit psychological documentation to support his appeal within 60 days and that NYPD within 60 days thereafter was required to submit its supporting documentation and any legal arguments. Further, and significantly here, CCSC also confirmed its broad authority to determine how best to proceed, indicating that, after

²Although Mr. Ahmed's appeal was filed more than thirty days after the NYPD determination, the timeliness of his appeal is not an issue.

reviewing all the materials, it would “issue a determination on the merits or schedule a hearing or a status conference on the appeal.”

In response, on June 27, 2011, Mr. Ahmed advised the NYPD Psychological Services Unit that he had designated Michelle Alvarez, Psy.D., at The Floating Hospital, as his appeal doctor (Exh. 8). Additionally, Mr. Ahmed submitted an authorization for the release of his records to Dr. Alvarez, and the NYPD released the information (Exh. 9).

After three separate interviews with Mr. Ahmed in July, Dr. Alvarez sent her three-page Adult Psychological Evaluation to the NYPD in August 2011(Exh. 10). In her evaluation, Dr. Alvarez recognized the period of stress that Mr. Ahmed had undergone due in part to “his family’s experiencing a difficult period vis-a-vis a significant disagreement between [Mr. Ahmed’s] brother and their parents” related to his brother’s wedding. Dr. Alvarez also attributed this period of stress to Mr. Ahmed’s unsuccessful efforts to advocate for his co-workers, whom he believed were overworked and undercompensated by those above them.

However, Dr. Alvarez found that Mr. Ahmed had accepted the responsibility for that period of poor stress management and underscored his otherwise “unblemished record of good interpersonal, educational, and occupational functioning and mental/emotional stability” She further noted that Mr. Ahmed had expressed a strong desire to become a police officer and confidence in his abilities, particularly now that he was married and more mature. Ultimately, Dr. Alvarez concluded that “[Mr. Ahmed] is able to identify stress-management techniques that have worked for him in the past and are expected to continue to provide success in the future and in his chosen career.”

On September 28, 2011, Robert Arko, Ph.D. (“Dr. Arko”), an independent appeals review consultant retained by the NYPD, reviewed both the NYPD’s original

disqualification and Dr. Alvarez's subsequent psychological evaluation of Mr. Ahmed. Stating that Dr. Wheeler had found that Mr. Ahmed was "vulnerable to the stress of police work" and that the evaluation by Dr. Alvarez "does not refute" that finding, Dr. Arko recommended that Mr. Ahmed's appeal be denied (Exh. 11). On November 7, 2011, Dr. Eloise Archibald, Ph.D., the Director of Psychological Services for the NYPD, similarly sustained the disqualification of Mr. Ahmed on psychological grounds, merely stating in conclusory terms that the information presented by Mr. Ahmed's doctor "does not alter the original recommendation for rejection for psychological reasons" (Exh. 12).

On February 12, 2013, the CCSC held a hearing regarding Mr. Ahmed's appeal (the hearing transcript is attached as Exh. 13). Eileen Flaherty, Esq., who represented the NYPD, and Mr. Ahmed, who represented himself, participated in the hearing. First, the Chairperson explained the format, stating that "we hold hearings when we have questions We have questions that we will ask of both sides." (p 4). Then, the CCSC asked Ms. Flaherty to confirm the reason for Mr. Ahmed's disqualification because Dr. Wheeler had checked a box indicating "poor interpersonal skills". Ms. Flaherty responded that the marking was in error and that the reason for the disqualification was "poor stress tolerance."³

Next, the CCSC inquired whether Mr. Ahmed, before receiving the November 11, 2010 letter disqualifying him, had gotten "a written statement for the reason of his disqualification and was given an opportunity to present facts and make an argument that might address the concerns" (pp 6-7). Ms. Flaherty confirmed in response that Mr. Ahmed had not received notice and an opportunity to be heard before the November 11, 2010 disqualification determination was issued (p 7). Then, in response to questions,

³While the transcript indicates that Ms. Flaherty cited "50A of the Civil Service Law" as authority for the grounds for disqualification, no such section of law exists.

Ms. Flaherty confirmed that the “sum total” of the disqualification was Mr. Ahmed’s self-reported response to a stressful family situation, which the NYPD found to be “extreme” (pp 7-9). Regarding the assessment by Dr. Alvarez that Mr. Ahmed had developed sufficient “compensatory skills to deal with stressful incidents now,” Ms. Flaherty said: “but we don’t agree; we don’t believe there’s any evidence of that” (p 10).

Then the CCSC gave Mr. Ahmed an opportunity to explain precisely what he had told Dr. Wheeler during the NYPD interview. He explained that because he was spending so much time trying to resolve issues relating to his parents’ disapproval of his brother’s intended marriage, he was getting less sleep and sometimes arrived at work late, but he indicated that his supervisor offered flexibility as to his arrival time (pp 11-12). He added that he was transitioning out of the job, but was let go before that happened. As to weight loss, he described it as “normal” and attributed it to his active lifestyle that included soccer (p 12).

As to Dr. Wheeler’s indication that the difficulties had lasted for two years, Mr. Ahmed indicated that it was really “just in a couple of months” (p 13). He added that he had not had any disruption in social activities, and that his “mindset is different” now that he was married (p 15). He also explained that he had been nervous during his meeting with Dr. Wheeler and was a bit intimidated and that he was simply attempting to respond to Dr. Wheeler’s question whether he had ever experienced a stressful situation in his life (p 15). The exchange continued along those lines, with Ms. Flaherty confirming at the end that there was no anti-social behavior, no record with the police, and no problem with the results of Mr. Ahmed’s psychological testing (pp 28-29).

On March 18, 2013, respondent CCSC issued its final determination reversing the NYPD’s decision to disqualify Mr. Ahmed (Exh. 1). The CCSC devoted nearly all of

its four-page discussion to its finding that the NYPD determination suffered from procedural deficiencies. Specifically, the CCSC found that the NYPD had failed to comply with the requirements of CSL § 50(4) and 55 RCNY App. A., Section 4.3.1(c) by having failed to give Mr. Ahmed notice and an opportunity to be heard on the proposed disqualification before the agency issued its November 11, 2010 determination.

The CCSC also considered the testimony presented at the hearing and ultimately found that “notwithstanding the procedural deficiencies ... the record here is not sufficient to support a disqualification due to poor stress tolerance” (Exh. 1, p.4). Accordingly, the CCSC directed the NYPD to return Mr. Ahmed to the eligible list for Exam No. 8314 within 30 days or to inform Mr. Ahmed and the CCSC as to the reason why Mr. Ahmed will not be returned to the list.

The NYPD now seeks to vacate the CCSC determination on the grounds that it was beyond the scope of the CCSC’s authority as a review board, was affected by errors of law, and was arbitrary and capricious. Specifically, the NYPD first disputes the finding that there were procedural deficiencies in Mr. Ahmed’s disqualification. Second, the NYPD argues that the CCSC was not entitled to hold a *de novo* hearing and was limited to determining whether the NYPD’s decision “was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion.” Lastly, the NYPD argues that its experts rationally concluded that Mr. Ahmed’s poor stress tolerance rendered him unsuitable for a police officer position.

In opposition, the CCSC argues that the petition should be denied. First, the CCSC insists that it had the authority to undertake a *de novo* review of the NYPD’s decision in part because, by participating in the CCSC hearing without objection, the NYPD acquiesced to a *de novo* review. Further, the CCSC argues that its reversal of the

NYPD's determination was rational based both on the deficiencies in the NYPD procedures and the lack of support in the record for the NYPD's disqualification of Mr. Ahmed on the merits.

DISCUSSION

The NYPD Did Not Follow Proper Procedures When Disqualifying Mr. Ahmed

Both Civil Service Law § 50(4) and Title 55 of the Rules and Regulations of the City of New York, App. A, Section 4.3.1(c), require that an applicant must be informed of the reasons for his disqualification and afforded the opportunity to oppose a proposed disqualification *before* the disqualification determination is actually made. Specifically, CSL § 50(4) provides that:

No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

The text of the above-stated section of the City's Rules and Regulations is virtually identical. Thus, both the governing statute and rule set forth procedures, which include advance notice of the proposed reasons for disqualification and an opportunity to be heard, that the NYPD must follow to properly disqualify an applicant.

The record shows that the NYPD did not follow these procedures when it notified Mr. Ahmed of his disqualification. Instead of notifying Mr. Ahmed of the reasons for his disqualification before disqualifying him, the NYPD simply notified Mr. Ahmed of its decision to disqualify him *after* the decision had been made. This fact is evident in the plain language of the November 11, 2010 letter, from which Mr. Ahmed first learned of his disqualification, that states: "I regret to inform you that you ... are hereby disqualified." (Exh. 6). Instead of giving Mr. Ahmed an opportunity to offer an

explanation or submit facts in opposition to his proposed disqualification, the letter simply informed Mr. Ahmed that his only remedy at that point was to appeal to the CCSC. As indicated above, in response to questions from the Chairperson at the CCSC hearing, Ms. Flaherty acknowledged that the first notice Mr. Ahmed received from the NYPD was the November 11, 2010 letter disqualifying him.

While the NYPD cites various laws and cases that stand for the general proposition that the NYPD is tasked with the authority to disqualify applicants, it has not cited any appellate authority supporting its position on the procedural issue. It cites only an unpublished decision from a court of coordinate jurisdiction, *City of New York v. N.Y.C. Civil Serv. Comm'n (Matter of Amato)*, Index No. 403331/10, 2011 N.Y. Misc. LEXIS 2693 (Sup. Ct., N.Y. Co.)(Kern, J.)(Pet Exh 15). However, the procedural issue was of no consequence there because the court found that the NYPD had a rational basis for disqualifying the applicant on the merits.

The NYPD also argues here that any procedural deficiencies were cured by Mr. Ahmed's appearance at the CCSC hearing [see Pet. Memo at 9, citing *Coulthurst v. N.Y.C. Transit Authority*, 231 A.D.2d 519 (2d Dep't 1996)]. This Court disagrees. In *Coulthurst* the court includes a limited discussion of the facts, explaining only that Coulthurst commenced the proceeding to challenge a decision in which CCSC had declined to reinstate him to his probationary position of bus operator with back pay. As the Second Department did not discuss the procedural issue, the decision offers no guidance.

In any event, the Court finds here that neither the reevaluation by the NYPD following the Alvarez report, nor the CCSC hearing, cured the procedural deficiencies which resulted from a failure to follow CSL § 50(4). The purpose of the statute and the

virtually identical Rules and Regulations of the City is to present both sides of an issue to the concerned Department *before* that Department comes to a decision on an applicant's qualifications. This is far different than considering competing evidence *after* deciding on disqualification and then justifying that decision, as happened here.

The CCSC Properly Held a De Novo Hearing

Although the NYPD challenges the procedures followed by the CCSC, claiming that it did not have the right to hold a *de novo* hearing, this Court disagrees. The Court of Appeals has repeatedly held that when the NYPD fails to object to the authority of the CCSC to hear a matter anew, it cannot later argue that the Commission did not have the right to hear the case *de novo*. See *Garayua v. New York City Police Department*, 68 N.Y.2d 970, 972 (1986); *City of New York v. New York City Civ. Serv. Commn. (Matter of Ciacciullo)*, 20 A.D.3d 347 (1st Dep't 2005), *aff'd on other grounds* 6 N.Y.3d 855, 858 (2006). In fact, in *Ciacciullo*, while the Court of Appeals agreed with the Appellate Division that the CCSC decision to reverse NYPD's disqualification lacked a rational basis on the merits, it expressly *disagreed* with the Appellate Division on the procedural point, stating (at p 858) that:

Having failed to object to the authority of the Civil Service Commission to hear the matter anew — indeed, having itself presented new evidence at the hearing — DCAS cannot now complain that the Commission had no power to decide the matter *de novo*. As we noted in *Matter of Garayua v New York City Police Dept.* (68 NY2d 970, 972 [1986]) — squarely on point — the agency “charted [its] own procedural course and cannot now be heard to complain because the Civil Service Commission made findings and exercised its own discretion on the basis of the facts placed before it.”

The First Department has followed suit, holding in repeated cases that, because the City participated without objection in the *de novo* evidentiary hearing conducted by

the Commission, the sole question was whether the Commission's determination was rational. See, e.g., *Matter of City of New York v New York City Civ.Serv. Commn. (Rodriguez)*, 40 AD3d 325 (1st Dep't 2007); *Matter of City of New York v New York City Civ.Serv. Commn. (Huggins)*, 30 AD3d 227 (1st Dep't 2006). Similarly, Justice Doris Ling-Cohan, just a few weeks ago, rejected NYPD's argument that the CCSC had no authority to hold a hearing, finding that because the NYPD had failed to object to the CCSC's decision to hold a de novo hearing, the NYPD could not complain that the CCSC lacked the power to decide the matter de novo. *City of New York, et al. v. New York city Civil Serv. Comm'n and Reginald LeRouge*, Index No. 400863/2013, NYLJ, July 24, 2014, 21:1 (Sup. Ct., N.Y. Co.).

The above-quoted reasoning directly applies here, as the NYPD had repeated opportunities to object to a hearing, and it not only failed to do so, but it actively participated. The CCSC first gave notice of its intentions in its March 23, 2011 acknowledging Mr. Ahmed's appeal, indicating that it might well "schedule a hearing" after reviewing the materials (Exh 7). On February 12, 2013, it indeed held a hearing, and the Chair expressly indicated that the format it was following was the hearing format (Exh 13, p 4). NYPD counsel Ms. Flaherty did not object at that point, nor when the Commission asked her questions. Rather, she responded fully, pointing not only to the psychological evidence submitted by Dr. Wheeler but also submitting reports from two additional psychologists who had reviewed both Dr. Wheeler's report and the report from Mr. Ahmed's physician Dr. Alvarez and expressed agreement with Dr. Wheeler.

Further, and quite significantly, as in *Ciacciullo*, Ms. Flaherty cross-examined Mr. Ahmed. In an apparent attempt to discredit the report of Dr. Alvarez and bolster the report from NYPD's physicians, Ms. Flaherty asked Mr. Ahmed to confirm what he had

told Dr. Alvarez (p 27). Using a leading question typical of cross-examination, she then asked Mr. Ahmed to confirm that he had “admitted” to Dr. Alvarez that the family incident had caused him “significant stress and decreased [his] motivation and [his] performance at work.” (p 28). Mr. Ahmed responded that Dr. Alvarez’s notes presumably reflected what he had said, as he had no specific recollection.

The NYPD’s reliance on the Appellate Division’s decision in *Ciacciullo* is misplaced because, as noted above, the Court of Appeals disagreed with the Appellate Division on the issue of a hearing. Similarly misguided is NYPD’s argument that *Garayua* and *Ciacciullo* are not applicable to this case because the CCSC did not hold a *de novo* hearing, but simply an oral argument. The above discussion shows otherwise, but in any event, the name given to the procedure does not matter because, under case law, the CCSC was authorized to proceed in the manner that it did.

In sum, this Court finds that the present case is analogous to *Garayua* and *Ciacciullo* because the NYPD, represented by Ms. Flaherty, fully participated in the CCSC hearing without objection. As noted above, Ms. Flaherty answered all the questions asked by the CCSC without objecting. Further, similar to the NYPD in *Garayua*, Ms. Flaherty fully participated in the hearing by introducing new evidence through her examination of Mr. Ahmed. *Id.* at p.29. Therefore, because the NYPD fully participated in the CCSC hearing without objecting to the CCSC’s authority to hear the mater *de novo*, its objections today must fail.

The Court is Unable to Review the CCSC Determination on the Merits

With regard to the merits more generally, the CCSC simply stated: “We find that, notwithstanding the procedural deficiencies noted above, the record here is not sufficient to support a disqualification due to poor stress tolerance.” Exh. 1 at p.4. The

standard of review to be applied by this Court in an Article 78 proceeding is “whether a determination was ... arbitrary and capricious” CPLR § 7803(3). The Court here cannot determine whether the CCSC’s determination was arbitrary and capricious because the CCSC did not adequately explain its decision; it did not provide any findings of fact, nor include any assessment of witness credibility or a discussion of the medical evidence.

Nor did the CCSC suggest a rationale in its decision to explain why it found the record insufficient to support a disqualification. It is unclear whether the decision was based on a lack of factual support for the NYPD’s decision to disqualify Mr. Ahmed because, for example, it found that Dr. Wheeler had misunderstood Mr. Ahmed’s answers or had given undue weight to the self-reporting when the psychological tests showed no issues. Perhaps it found that Dr. Wheeler’s conclusion was adequately rebutted by the findings of Mr. Ahmed’s physician, Dr. Alvarez.

Without more information, the Court cannot determine whether the CCSC determination is rational. Therefore, the Court is compelled to grant the petition to the extent of remanding the matter for the sole purpose of having the CCSC set forth the rationale for its decision on the merits. Although, as indicated above, the Court agrees with the CCSC determination that the NYPD disqualification suffers from procedural deficiencies, the merits should be addressed as well.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted to the extent of remanding this matter to the respondent New York City Civil Service for the sole purpose of providing a full explanation of the rationale for its determination on the merits.

This constitutes the decision and order of the Court.

Dated: August 11, 2014

J.S.C.

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