

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

PRESENT

ALICE SCHLESINGER

PART

16

*Justice*

Index Number : 105188/2008

CHACKO, JOSEPH

VS.

CITYWIDE ADMINISTRATIVE SERVICES

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO.

105188-08

MOTION DATE

MOTION SEQ. NO.

#001

MOTION CAL. NO.

were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

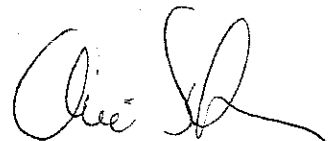
Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

DEC 16 2008

Dated: \_\_\_\_\_



ALICE SCHLESINGER J.S.C.

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

DO NOT POST

REFERENCE

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

-----X  
In the Matter of an Article 78 Proceeding by

JOSEPH CHACKO,

Petitioner,

Index No.105188/2008  
Motion Seq. No. 001

For a Judgment Pursuant to CPLR Article 78,

-against-

NEW YORK CITY DEPARTMENT OF CITYWIDE  
ADMINISTRATIVE SERVICES and NEW YORK CITY  
CIVIL SERVICE COMMISSION,

Respondents.

-----X  
**SCHLESINGER, J.:**

Petitioner Joseph Chacko commenced this Article 78 proceeding to challenge respondents' determination that he failed a civil service promotional examination. Mr. Chacko contends that respondents' grading process was arbitrary and capricious, and he requests that the Court annul respondents' determination and add him to the promotional list generated from the exam results. Respondents New York City Department of Citywide Administrative Services and New York City Civil Service Commission oppose the petition.

Background Facts

Petitioner Joseph Chacko is a long time employee of the New York City Transit Authority with an exemplary record. (See Chacko Aff. in Support of Petition). On March 18, 2006, Mr. Chacko took an examination administered by the New York City Department of Citywide Administrative Services (DCAS) to become eligible for promotion to the position of Maintenance Supervisor (Car Equipment). The exam consisted of two parts: a multiple choice test and an essay to be written as a memorandum reporting a train

derailment. (Aff. of L. Williams in Support of Resp. Ans., hereafter "Williams Aff." ).

The multiple choice and essay parts of the exam each counted for 50% of the test taker's total score. To score the multiple choice, DCAS utilized a set of "Key Answers" described more fully below. To score the essay, DCAS utilized a "Rating Guide" comprised of two sections. Section 1 of the Rating Guide assessed the content of the essay including "whether candidate had included all of the key facts regarding the subject of the memorandum." (Resp. Ver. Ans. [hereafter Ans.] Exh. 2). Section 2 of the Rating Guide assessed "the clarity of the candidate's answers," judging matters such as grammar, punctuation and syntax. (Ans. Exh. 2).

Shortly after Mr. Chacko took the exam, he wrote a letter to the Commissioner of Examinations at the New York State Department of Civil Service complaining of certain irregularities that had occurred during the exam. In this letter, dated April 7, 2006, Mr. Chacko protested that during the exam, the proctors had denied him scrap paper when he asked for it and that they had ended the exam twenty minutes early. (Ans. Exh. 9). Mr. Chacko received no response to this letter.

On December 28, 2006, Mr. Chacko received notification from DCAS regarding his exam results. (Ans. Exh. 4). The two-line notice identified the exam by number and title and then simply stated "YOU HAVE FAILED THE QUALIFYING ESSAY TEST FOR THE ABOVE EXAMINATION." By letter dated December 29, 2006, Mr. Chacko wrote to DCAS's Committee on Manifest Errors (Committee) stating in general terms that he believed that he had "written the essay as per the instructions" and that he should have received a passing score. (Ans. Exh. 6). He indicated that he had passed a similar exam in 2001, but no position had become available before the list expired. Mr. Chacko ended his letter by

requesting an immediate appointment to review his essay. Four days later, on January 2, 2007, Mr. Chacko wrote a second letter listing ten points about his essay which he believed entitled him to a qualifying score. (Ans. Exh. 6). The letter was apparently written based on Mr. Chacko's recollection of the essay but included no challenges to actual point deductions because he had not yet been afforded an opportunity to review the scoring of his essay.

On May 2, 2007 the Committee sent Mr. Chacko a form letter indicating that it had reviewed and denied his appeal. The letter also stated that "a copy of the report fully explaining the decision of the committee is enclosed." (Ans. Exh. 7). The report merely restated that Mr. Chacko had failed the exam and added in conclusory fashion that "the candidate's essay was reviewed and re-rated using the approved essay rating guide. It was determined that the candidate did not receive a passing score." No additional information about the grading of Mr. Chacko's essay or point deductions was provided in the May 2, 2007 letter.

The letter proceeded to instruct Mr. Chacko to make any further appeals in writing to the New York City Civil Service Commission (CSC). To this end, Mr. Chacko's attorney sent the CSC a letter on May 4, 2007 indicating Mr. Chacko's intention to appeal the Committee's determination. Mr. Chacko's attorney then sent a more detailed appeal, including exhibits, to the CSC on May 14, explaining more fully the bases for Mr. Chacko's appeal. However, as Mr. Chacko had still not been afforded an opportunity to review the scoring of his exam, no challenges to specific point deductions were made.

Soon after, Mr. Chacko received another letter from DCAS, dated May 22, 2007, inviting him to an "appeal session" to be held on June 8, 2007. (Williams Aff. ¶15, Exh. 4).

The letter advised him that, during the appeal session, he would be "provided with a copy of the test material and the rating guide(s)." (Williams Aff. Exh. 4). According to an affidavit prepared by Lyndon Williams, an Associate Staff Analyst of DCAS, Mr. Chacko was invited to this session "for the purposes of affording him an opportunity to review his answer to the Exam and to take an appeal concerning his scored answer." (Williams Aff. ¶15).

Mr. Chacko attended the appeal session and, for the first time, reviewed both his essay and the precise point deductions made based on the Rating Guide. Using this information, Mr. Chacko wrote a detailed appeal which identified specific instances where the Rating Guide had been incorrectly applied to his exam. (Ans. Exh. 10). With respect to substantive issues governed by Section 1 of the Rating Guide, Mr. Chacko protested that he had lost points for using a term which was equivalent to the one that the Rating Guide credited. He also asserted that he had properly directed his memorandum to "the Supervisor", given the exam's instructions. With respect to the technical issues governed by Section 2 of the Rating Guide, Mr. Chacko pointed out an instance where the grader had improperly deducted points for omitting punctuation which had, in fact, been included. He also reiterated his complaint that the proctors had ended the exam twenty minutes early, thereby denying him time to proofread his essay.

Mr. Chacko next heard from DCAS on August 1, 2007 when he received another form letter nearly identical to the one he had received on May 2, 2007. This notification again merely stated that the Committee had reviewed and denied his appeal. This time the enclosed report stated that "the CME carefully reviewed the appeal and verified that all of the points deducted were based on the approved rating guide and no points were improperly deducted. It was determined that the scoring was properly done and that the candidate still

did not receive a passing essay score.” (Ans. Exh. 11). Neither the letter nor the enclosed report addressed any of the specific issues Mr. Chacko had raised in the appeal he had written during the June 8 session.

Thereafter, DCAS prepared a detailed memorandum for the City Civil Service Commission concerning Mr. Chacko’s pending appeal. (Ans. Exh. 2). The memo, dated November 5, 2007, explained the series of exchanges that had taken place between Mr. Chacko and their department and described how DCAS had scored Mr. Chacko’s essay. Based on this information, the memo urged the CSC to dismiss Mr. Chacko’s appeal. The CSC did so in a form letter dated December 13, 2007 which stated only that the CSC had affirmed DCAS’s denial of Mr. Chacko’s appeal. This Article 78 proceeding ensued.

#### Petitioner Timely Commenced this Proceeding

Respondents argue that this proceeding is barred by the four month statute of limitations applicable to Article 78 proceedings. CPLR §217. They contend that “it is unclear which decision is being challenged” as Mr. Chacko “may be challenging the establishment of the answer key, or the determination that he failed the Exam, or the August 1, 2007 DCAS determination affirming the decision that petitioner failed the examination, or finally, the CSC determination that petitioner failed the Exam.” (Ans. ¶16).

In fact, there is no confusion as to which determination Mr. Chacko is challenging. Mr. Chacko was not given a meaningful opportunity to review his exam until June 8, 2007. On that date, Mr. Chacko filed a detailed appeal challenging the specific point deductions, which CSC determined on December 13, 2007. He commenced this proceeding on April 8, 2008, within four months of the CSC determination Respondents acknowledge that, when measured from the CSC determination, this proceeding is timely. (Ans. ¶16).

Wholly without merit is respondent's suggestion that the four months runs from an earlier determination. Under CPLR §217, "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." None of the communications Mr. Chacko received from the Committee before December 2007 can be considered "final and binding" because they all indicated that additional appeal opportunities existed. A letter notifying a party of an agency position is considered a final determination only if "it causes petitioners actual, concrete injury and no further agency proceedings might alleviate or avoid the injury." *Essex County v. Zagata*, 91 N.Y.2d 447, 454 (1998); *see also Paulsen Dev. Co. of Albany, LLC v. Schenectady Dept. of Eng'g & Pub. Works*, 47 A.D.3d 1031 (3rd Dep't 2008). Both the May 2 and the August 1, 2007 letters from DCAS advised Mr. Chacko that "[i]f your appeal has been denied or granted in part, you may appeal this decision in writing to the City Civil Service Commission." (Ans. Exh. 7, 11) Mr. Chacko did appeal to the Civil Service Commission which determined the matter on December 13, 2007 in a final determination subject to Article 78 review.

Even if respondents intended for one of their earlier notifications to serve as a final determination, they created ambiguity as to this fact by mentioning further appeals in their letters. If an agency creates uncertainty as to whether a final determination has been reached, "the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court." *Mundy v Nassau County Civ. Serv. Commn.*, 44 N.Y.2d 352, 358 (1978); *see also Biondo v. New York State Board of Parole*, 60 N.Y.2d 832, 834 (1983) ("[f]or the purposes of the commencement of the statutory period, the petitioner cannot be said to be aggrieved by the

mere issuance of a determination when the agency itself has created an ambiguity as to whether or not the determination was intended to be final.”).

The cases cited by respondents do not address the exact issue presented here by Mr. Chacko. In those cases, the petitioners were challenging termination and dismissal decisions. The statute of limitations for those claims began to run as soon as the parties were notified of the public body’s decision. In contrast here, Mr. Chacko was awaiting the determination of his appeal by the Civil Service Commission, and he timely commenced this proceeding within four months of that determination.

#### Petitioner has Exhausted All Administrative Remedies

Respondents also argue that Mr. Chacko is barred from bringing this proceeding because he failed to exhaust his administrative remedies; specifically, they contend that he failed to file a protest with the Test Validation Board (TVB). In fact, the TVB procedure is not applicable to challenges to the essay part of the test.

As established in the affidavit of Lyndon Williams, the Supervisor of Exams, the TVB process applies only to challenges to the “Proposed Key Answers” for the multiple choice part of the exam which Mr. Chacko is simply not challenging. It is clear from Williams’ five page affidavit that the procedure he describes is one wherein candidates can come in on a designated day and propose better multiple choice responses before a final answer sheet is issued. That has no application here, since Mr. Chacko never sought to challenge the multiple choice part of his exam. Rather, he sought to challenge the grading of his essay. As confirmed in the Williams Affidavit quoted above, the only meaningful administrative remedy applicable to the essay was offered at the June 8, 2007 review session when Mr. Chacko was allowed to review the specific point deductions made to his essay and file



a detailed appeal. That appeal was ultimately determined by CSC and is challenged herein. Therefore, Mr. Chacko exhausted all relevant administrative remedies and respondents' claim to the contrary is without merit.

#### This Court has Jurisdiction to Review the Issues Raised Herein

Relying on New York Civil Service Law §50(7), respondents claim that this Court lacks jurisdiction to review the issues raised herein. Again, respondents' claim lacks merit. While the statute limits judicial review of an agency's "final determination as to the answers that are acceptable on a particular examination," it simultaneously empowers a court to determine if the agency has followed the "duly established review procedures." That mandate empowers this Court to determine the issue presented here; i.e., whether Section 2 of the Rating Guide was applied to Mr. Chacko's exam in an arbitrary and capricious manner, resulting in improper point deductions. This Court is not rejecting any of the Key Answers determined by the TVB for the multiple choice part of the exam. Nor is it rejecting the required Key Facts for the essay set forth in the Rating Guide.

#### Respondent's Application of the Rating Guide was Arbitrary and Capricious

A review of the Rating Guide and the grading process reveals that the Guide was applied arbitrarily in this case. Section 2 of the Rating Guide describes five categories of errors and specifies the maximum number of points that could be deducted for errors of each category. The categories and maximum point deductions are as follows:

Category 1: Memo is addressed to the Shop Superintendent,  
Deputy Superintendent or General Superintendent.  
Maximum Point Deduction = 5.

Category 2: Memo is written in complete sentences and  
not missing critical sentence elements. Sentences flow logically.  
Maximum Point Deduction = 10.

Category 3: Sentences are concise and to the point, not overly verbose or run-on. Irrelevant facts and/or opinions are not included.  
Maximum Point Deduction = 10.

Category 4: Grammar, punctuation and spelling are appropriate and do not confuse meaning.  
Maximum Point Deduction = 10.

Category 5: Word usage and tone of memo are appropriate to the context of the exercise. Does not draw inappropriate conclusions.  
Maximum Point Deduction = 15.

The Rating Guide was applied incorrectly to Mr. Chacko's exam in two instances where points were deducted for mistakes that did not exist. First, the scoring sheet used to grade Mr. Chacko's exam indicates that 1 point was deducted because "a comma is missing in the date" on line 3. (Ans. Exh. 5). In fact, a comma is clearly included.

Second, according to the scoring sheet, 1 point was deducted because on lines 12-13 Mr. Chacko wrote "the train operator who was involved with train accident." (Ans. Exh. 5). However, that is not what Mr. Chacko wrote. Instead, he correctly wrote "the train operator who was involved with the accident." (Ans. Exh. 5). In both instances, the grader misread what Mr. Chacko had written (even though it was written legibly) and therefore deducted points erroneously. Fundamental fairness requires that deductions not be made for correct responses.

Respondents contend that Mr. Chacko should have challenged these grading mistakes at the protest review session following the exam. However, such a challenge could not have been made at that time because Mr. Chacko had not yet seen his essay and did not know that the grader had deducted points for mistakes that did not exist. Mr. Chacko could not effectively challenge the grading of his essay until he was given the opportunity to review his essay and the scoring sheet in June 2007. Any argument that he

should have earlier appealed the specific scoring errors in his exam must fail.

The grader of Mr. Chacko's exam further failed to adhere to the maximum point deductions for the above-described categories in the Rating Guide. The scoring sheet shows that Mr. Chacko lost one point each time he included a word that the grader determined was "not needed." (Ans. Exh. 5). He made this type of error four times. The problem is that the first and second times Mr. Chacko included a word that was "not needed" (lines 6,7) the error was marked as a category 4 error related to grammar and punctuation, whereas the third and fourth times he made this same type of error (lines 10,14) it was marked as a category 5 error related to word usage. It is arbitrary and capricious to categorize the same type of error in two different ways. This arbitrary application of the Rating Guide is particularly problematic because it allowed the grader to circumvent the limit on point deductions set for each category of error in the Rating Guide in violation of the established guidelines.

In addition to the point deductions described above which were clearly incorrect and unfair, Mr. Chacko lost points for certain spelling and punctuation errors that were written correctly elsewhere in his essay. For example, the grader deducted one point because Mr. Chacko omitted the letter "s" from the word "Thursday" on line 25, even though he presumably knew the correct spelling because he had written the word correctly on line 3. (Ans. Exh. 5). Similarly, one point was deducted for a missing comma in the date on line 25, even though Mr. Chacko wrote the date correctly on line 3. These minor mistakes may well have been due, in part, to Mr. Chacko's documented complaint that the proctors ended the exam early, thereby depriving him of time to proofread his essay and correct small errors such as these.

In total, at least four points were erroneously deducted from Mr. Chacko's essay, giving him a score of 66, only four shy of a passing score of 70. Respondents' Notice of Examination suggests that Mr. Chacko passed the multiple choice part of the exam, stating that only candidates who pass the multiple choice part will have their essay graded. (Ans. Exh. 1). However, DCAS's May 2, 2007 notification states the opposite: that the essay was a "qualifying portion" and that because Mr. Chacko did not pass the essay his multiple choice test was "not rated." (Ans. Exh. 7). According to the affidavit of Lyndon Williams (at ¶¶3-4), the "eligible list" for this exam was established on December 20, 2006 and is set to expire on December 20, 2010. Since it appears that the promotional list for this exam is still in existence and active, Mr. Chacko's exam should be regraded to correct the errors noted herein and to grade the multiple choice part of the exam, if necessary, and his name should be added to the promotional list if he has received a passing score on the multiple choice section of the exam.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted, the December 13, 2007 determination of the Civil Service Commission is annulled, and the matter is remanded for the regrading of Mr. Chacko's exam consistent with this decision.

Dated: December 16, 2008

DEC 16 2008



J.S.C.  
ALICE SCHLESINGER