

**Matter of Rivers v New York City Dept. of Sanitation**

2007 NY Slip Op 32740(U)

August 31, 2007

Supreme Court, New York County

Docket Number: 0104210/2007

Judge: Lewis Bart Stone

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

PRESENT: Hon Lewis Bart Stone  
**HON. LEWIS BART STONE** Justice

PART 505

Index Number : 104210/2007  
RIVERS, ALMETTA  
vs  
NYC DEPT OF SANITATION  
Sequence Number : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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 <sup>cross</sup> motion is granted and the  
amended Petition is dismissed in accordance  
with the amended Decision and Order

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

**FILED**  
SEP 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/31/07

Lewis Bart Stone  
**HON. LEWIS BART STONE** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50

-----X

In the Matter of the Application of :  
ALMETTA RIVERS, :

Petitioner, :

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

-against- :

NEW YORK CITY DEPARTMENT OF :  
SANITATION, NEW YORK CITY CIVIL :  
SERVICE COMMISSION, and THE CITY :  
OF NEW YORK, :

Respondent. :  
-----X

DECISION AND  
ORDER

INDEX NUMBER  
104210/07

**FILED**  
SEP 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Hon. Lewis Bart Stone:

Petitioner, Almetta Rivers (“Rivers”) commenced this proceeding by Notice of Petition dated March 26, 2007, to annul, pursuant to Civil Practice Law and Rules, (“CPLR”) Article 78, a determination of Respondents, the City of New York (the “City”), and the New York City Department of Sanitation (“DOS”), disqualifying her “from consideration for the position of Sanitation Worker” and to appoint her on the grounds that such determinations were arbitrary, capricious and irrational. On April 25, 2007, Respondents cross moved to dismiss the Amended Petition on the grounds that, to the extent Rivers challenges the decision of DOS, such challenge was time

barred, to the extent the petition challenges the decision of CSC, the Court had no jurisdiction as CSC was never served and that the petition fails to state a cause of action. On May 2, 2007, the parties stipulated that Rivers could add the New York City Civil Service Commission (“CSC”) as a Respondent “within five days after this stipulation is so ordered by a Justice of the Supreme Court.” CSC was served with the Amended Petition on May 16, 2007.

There is an initial problem, unaddressed by the parties. Under CPLR §401, no party may be joined to a special proceeding without the leave of the Court. As this proceeding is a special proceeding, court consent was required for Rivers to join CSC. Although the parties’ May 2, 2007 stipulation contemplated such consent, the copy of the Stipulation in the file before this Court shows no endorsement or order of the Supreme Court. As the parties have proceeded as if such has been obtained, this Court will nunc pro tunc “so order” the Stipulation as of the date thereof to authorize the joinder of CSC the service of the Amended Petition.

Subsequent to the service of CSC, Respondents served a Cross Motion to dismiss the Amended Petition (1) on the grounds that the it is time-barred as to the disqualification determination made by DOS, and (2) fails to state a cause of action.

Respondents’ assertion of the statute of limitations argument is disingenuous. A CPLR Article 78 proceeding may only review a final administrative decision. To

the extent there is a process for an administrative review, a party may not commence an Article 78 proceeding until such review has been exhausted. Aspects of earlier proceedings are only considered to the extent, in the review of the final result, such earlier proceeding is relevant to the final proceeding, and objections to the earlier proceedings are properly preserved. The final decision which is the subject of this Amended Petition is therefore the rejection of her appeal by CSC.

Respondents' second grounds for dismissal is that Rivers has failed to state a claim. To determine whether she has, this Court must assume the facts are as she has alleged them and apply the law to such facts to determine whether they would support a cognizable claim. The Court may not consider, in such context, any facts alleged by Respondents. These facts include those forth in the Amended Petition including all exhibits thereto.

Rivers initially asserts in her response to the Cross Motion that the Cross Motion must be denied, citing CPLR §3212 and §7804(f), because CSC submitted no affidavits with the Cross Motion, but only arguments of counsel. This assertion is without merit. The Cross Motion is not a Motion for Summary Judgment under CPLR §3212 which requires an affidavit. CPLR §3212(b). Similarly CPLR §7404(f) contemplates the within motion to dismiss, which may be made without affidavit.

It is therefore appropriate for CSC to argue, as it has, that assuming the facts are alleged by Rivers are true, she has still not stated a claim. Thus, the Court must review Rivers' assertions to determine whether she has or has not stated a claim upon which relief may be granted. Only if this Court denies CSC's motion may this Court address whether CSC is to submit its answer. CPLR §7404(f).

The Amended Petition states that its basis for its prayer for relief is that the Decision was arbitrary, capricious or irrational. CPLR §7803(3) limits these concerns to whether the Decision was "arbitrary and capricious." While "irrationality" is not a ground, irrationality may be evidence or even proof that the action taken was "arbitrary and capricious."

Rivers applied for and passed the written portion of the civil service examination for the position of Sanitation Worker. An additional requirement for such position is the physical qualification of the applicant under certain medical standards established for such position.

Central to this dispute whether Rivers' medical condition disqualifies her for appointment as a Sanitation Worker. Under DOS rules, DOS may disqualify a candidate for Sanitation Worker where her "diastolic [blood] pressure is equal or greater than 145 mm Hg." According to the submission of the Medical Director of DOS to CSC in connection with Rivers' appeal (Exhibit 3 to Rivers' Amended

Petition), at a pre-employment test at DOS on June 30, 2006 Rivers' blood pressure was 140/90 and on August 17, 2006, 174/84 with a repeat test of 150/100, and Rivers' pre-employment questionnaire dated August 17, 2006, which she completed, acknowledged that she was taking "High Blood Pressure medications - taken for (1 year 2005-2006)...daily." When Rivers took her blood test on August 17, 2006, DOS performed an electrocardiogram which revealed a "left ventricular hypertrophy, ST abnormality indicating her Hypotensive status has now begun to affect her cardiac function." The report further notes "Disqualification for uncontrolled Hypertension is based on the notion that each disease entity has its own progression, which is proven, in this candidate's case by progression to left ventricular hypertrophy."

Rivers' arguments make it clear that she does not challenge DOS rules as to what medical conditions would disqualify an applicant, but only as to whether CSC's decision on appeal was arbitrary and capricious as to the applicability of such rules to her. Rivers, in support of her position, submitted three letters by three doctors to support her ability to perform the job.

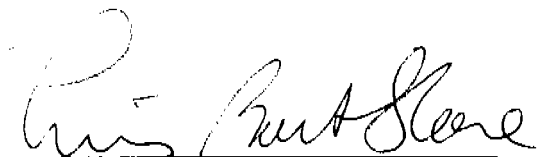
Rivers' own exhibits, even if construed in the most favorable light to her only show that there may have been a conflict in medical opinion. In such event, this Court may not substitute its own view of the medical evidence for the administrative decision of CSC in determining not to allow Rivers' appeal. As CSC has before it a

professional opinion (that of the DOS medical director) supporting the DOS view, the existence of contrary medical opinions proffered by Rivers do not make CSC's decision arbitrary and capricious. Farrell v. NYPD, 37 NY2d 843 (1975) (Hypertension and heart murmur); Talamo v. Murphy, 38 NY2d 637 (1976) (wrist fracture); Palozzolo v. Naidel, 83 AD2d 539 (1<sup>st</sup> Dept. 1981) (Scoliosis); Keryc v. Nassau Co. Civil Service Comm., 143 AD2d 669 (2<sup>nd</sup> Dept 1988) (Psychological evaluation); Winegar v. County of Suffolk, 13 AD3d 382 (2<sup>nd</sup> Dept 2004) (psychological evaluation).

The Cross Motion is granted and the Amended Petition is dismissed.

This is the Decision and Order of the Court.

DATED: AUGUST 31, 2007  
NEW YORK, NEW YORK



Hon. Lewis Bart Stone  
Justice of the Supreme Court

**FILED**  
SEP 06 2007  
NEW YORK  
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