

**Matter of Feeley v New York City Dept. of
Bldgs.**

2008 NY Slip Op 32230(U)

August 6, 2008

Supreme Court, New York County

Docket Number: 0116923/2007

Judge: Judith J. Gische

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

PRESENT: **HON. JUDITH J. GISCHE**

PART

Index Number : 116923/2007

FEELEY, BRIAN

VS.

NYC DEPARTMENT OF BUILDINGS

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 116923-01

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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 (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED 1

AUG 08 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/06/08

HON. JUDITH J. GISCHE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x
In the Matter of the Application of
BRIAN FEELEY,

Petitioner,

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

- against -

NEW YORK CITY DEPARTMENT OF BUILDINGS,
PATRICIA LANCASTER, FAIA, COMMISSIONER,
NEW YORK CITY DEPARTMENT OF BUILDINGS
BUILDINGS SPECIAL INVESTIGATION UNIT and
JOHN P. WOODS, INSPECTOR GENERAL,

Respondents.
-----x

Decision/Order

Index No.: 116923/07

Seq. No.: 001

Present:

Hon. Judith J. Gische
J.S.C.

FILED

AUG 08 2008

**COUNTY CLERK'S OFFICE
NEW YORK**

Recitation, as required by CPLR 2219 [a], of the papers considered for the review of this motion:

Papers

Numbered

Notice of Petition, Verified Petition w/ exhs	1
Verified Answer w/ exhs	2
Verified Reply	3

Upon the foregoing papers, the decision and order of the Court is as follows:

This is an application by Petitioner, Brian Feeley, pursuant to Article 78 of the Civil Practice Law and Rules, against respondents New York City Department of Buildings ("DOB"), Patricia Lancaster, FAIA, Commissioner, New York City Department of Buildings Buildings Special Investigation Unit ("BSIU") and John P. Woods, Inspector General. Petitioner challenges a February 22, 2007, determination by the DOB, and an August 22, 2007, affirmance thereof, which collectively denied Petitioner's request for registration as an expediter pursuant to § 27-140.1 of the Administrative Code of the City

of New York. The operative agency language for the denial was:

The Department of Buildings' ("the Department") records indicate that you were previously employed as an elevator inspector by the Department and that you were terminated in April 1999 based on allegations that you accepted a \$100 bribe in connection with an elevator inspection and that you refused to answer Department questions concerning these allegations.

Petitioner seeks to have the Court: (1) review, vacate and annul the DOB determination that denied Petitioner registration as an expediter, and overturn the BSIU affirmance; (2) direct Respondents to grant Petitioner a retroactive expediter registration and expunge the record; and (3) direct Respondents to afford Petitioner the retroactive salary, benefits and requisite seniority. Petitioner contends that the denial of his expediter registration is arbitrary and capricious. The Respondents have appeared in this action and served a verified answer.

Preliminarily, to the extent Petitioner raises any issues about whether he has exhausted all of his administrative remedies, they are conceded to by Respondents. Thus, the Court may properly consider the relative substantive merits of the parties' arguments.

Petitioner applied to the DOB for registration as an expediter on August 17, 2006. Prior to that time had been employed as an elevator inspector for DOB. In considering the expediter application, the DOB reviewed Petitioner's old DOB personnel file, which revealed that after a 1995 investigation Petitioner was suspected of accepting bribes in exchange for sign-offs on elevator inspections. The file further revealed that, in April 1996, Petitioner was suspended by the DOB. Following the suspension, and in accordance with the DOB's procedure, Petitioner attended a Step A conference, where

the determination was made to terminate Petitioner's employment with the DOB. A Step B conference followed, where the same determination was made. Thereafter, Petitioner made a Request for Arbitration concerning the determinations.

On the same day as the Step A conference, Petitioner was interviewed by the DOB's Office of Internal Audit and Discipline (IAD). Petitioner was represented by counsel, and during the course of the interview Petitioner's answers were protected by "use immunity." Regardless, and though being advised that refusal to answer questions under use immunity could serve as grounds for termination, Petitioner chose not to answer any questions.

The arbitration was then held in October 1997. The arbitrator found that Petitioner had been denied due process by the DOB, and as result no just cause existed for Petitioner's termination. The arbitration award was confirmed in 1999, and Petitioner was restored to his former position as an elevator inspector, and given back-pay to the date of Petitioner's termination. Upon Petitioner's return to work in March 1999, he was served with a notice directing Petitioner to appear at another interview with IAD. At the second interview Petitioner again, on advice of counsel, refused to answer questions relating to the allegations of accepting bribes, as well as his earlier employment with the DOB. Petitioner and the DOB went through another suspension and set of Step A and Step B conferences, with both conference leaders recommending termination. Petitioner did not pursue arbitration for a second time and was consequently and finally terminated in April 1999.

Petitioner's application to the DOB for registration as an expediter was denied by letter on February 22, 2007. Petitioner contends the denial was improper because

Petitioner's previous employment and misconduct should not have been considered by the DOB.

Discussion

In Article 78 of Civil Practice Law and Rules the applicable standard of judicial review of administrative actions is whether the administrative decision was made in violation of lawful procedure, affected by an error of law, or arbitrary and capricious or an abuse of discretion. CPLR 7803 [3]. "The arbitrary or capricious test chiefly "relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact." Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Matter of Pell v Board of Education, 34 NY2d 222, 231 [1974].

The parties' primary dispute concerns the interpretation of Administrative Code of the City of New York § 27-140.1, which provides:

No person, other than those described in subdivision (c) of this section, may present, submit, furnish or seek approval of applications for approval of plans or remove any documents from the possession of the department, without first having registered with the department his or her name, address and company affiliation on a form to be furnished by the department. Consistent with article twenty-three-A of the correction law, registration may be denied to any person who has been convicted of a criminal offense relating to bribing or receipt of a bribe, giving or receiving unlawful gratuities, official misconduct, or other corruption-related acts. The commissioner, after due notice and a hearing before the office of administrative trials and hearings, pursuant to section one thousand forty-eight of the charter and rules established thereunder, shall have the power to revoke, suspend or limit the registration of any person upon a finding that such person has willfully or negligently violated the rules of the department or has engaged in any misconduct arising out of his or her business dealings with the department. Misconduct shall be defined by the rules of the commissioner promulgated pursuant to subdivision (d) of this section.

Petitioner claims that this Code provision constitutes an exhaustive list of the

reasons that the DOB can refuse to register an expediter. Since the reasons stated by the DOB for denying Petitioner's registration do not come within the applicable Code provision, Petitioner argues it was necessarily arbitrary and capricious.

Respondents claim that because the Code provision uses the word "may" in describing those circumstances when an expediter will be denied registration, other reasons outside the statute may be relied upon by the DOB in reaching its decision. Respondents further point to its own rules which set forth reasons by which an expediter's registration may be revoked, suspended or limited, which are listed in 1 RCNY § 31-01 [a], and include, in part:

(3) Gross negligence, incompetence, misrepresentation or misconduct relating to the business, trade or calling of the person who is registered.

(5) Poor moral character that adversely reflects upon fitness to engage in the activity for which registration is required pursuant to § 27-140.1 of the Administrative Code.

(7) The conviction of a criminal offense relating to offering or receiving a bribe, giving or receiving unlawful gratuities, engaging in official misconduct, or other corruption-related acts, where the underlying act arises out of the registrant's occupation or business dealings with the City of New York or with any other governmental entity.

(8) Willful or negligent failure to comply with any rule, order or requirement of the Department of Buildings.

1 RCNY § 31-01 [b] also states that "the Commissioner shall have the power to suspend, revoke, or limit registration as provided in Administrative Code § 27-140.1." Respondents argue that the reasons allowable for the revocation, suspension or limitation of registration should be the same reasons permitted to deny registration in the first place.

Respondents maintain that Administrative Code § 27-140.01, taken together with

1 RCNY § 31-01, permit the DOB to deny an application for registration as an expediter for the same kinds of offenses or corruption for which registration as an expediter can be revoked, suspended or limited.

The language of Administrative Code § 27-140.1 reveals that the legislature indicated registration "may" be denied for one of the enumerated criminal offenses, and continued to indicate that the Commissioner "shall" have the power to revoke, suspend or limit registration, in the remainder of Administrative Code § 27-140.1 [a]. The Court holds that in this context the use of both "may" and "shall" in the same Code provision means the reasons for denial of registration are more in the nature of guidelines for the DOB, as opposed to a conclusive or exclusive binding list.

Petitioner's interpretation that Administrative Code § 27-140.1 operates as an all-inclusive list of the only instances when applications for registration as an expediter may be denied is in contravention with 1 RCNY § 31-01 and the broad authority of the DOB to regulate the registration of expediters. See Stisser v Roan, 26 A.D.2d 199 [3d Dept 1966].

Given that the Code authority permits consideration of factors outside of those enumerated, the further issue is whether the consideration of the actual factors in this case was either arbitrary or capricious. This Court holds it was not.

Prior employment and performance with the DOB is a relevant factor to consider, particularly when the information concerned the applicant's trustworthiness and conduct. Here, Petitioner was claimed to have engaged in misconduct, and the 1995 investigation warranted further action against petitioner. While Petitioner claims he was exonerated at arbitration, the arbitration decision in Petitioner's favor was based on procedural

considerations. There was never a final determination either finding Petitioner guilty or absolving him of the misconduct. Moreover, it is undisputed that the DOB's attempts to investigate the corruption were met with Petitioner's assertion of a Fifth Amendment privilege. While Petitioner certainly had a right to assert such privilege to protect himself against potential criminal prosecution, the right to file for status as an expeditor carries with it no ascertainable constitutional entitlement.

In that vein, Petitioner generally asserts a violation of procedural due process rights in the denial of his application for registration as an expeditor. According to the Mathews v Eldridge balancing test, there are three prongs to consider when evaluating procedural due process rights, comprised of the private interest affected, the risk of erroneous deprivation, and the governmental interest. 424 US 319, 335 [1976]. Petitioner has failed to specify how his claim fits within the constitutional framework and it is rejected.

Petitioner also characterizes Respondents' determination as retaliation for the earlier arbitration decision that was made in Petitioner's favor. The arbitration decision, which was confirmed by a court in 1999, reinstated Petitioner with full back-pay and seniority as an elevator inspector. A *prima facie* case of retaliation requires evidence of a subjective retaliatory motive for the termination. Pace Univ. v New York City Comm'n on Human Rights, 85 NY2d 125, 128 [1995]. The record at hand fails to demonstrate any indicia of retaliatory animus towards Petitioner. Petitioner's bare-boned representation that there was retaliatory animus is not sufficient grounds for the claim.

Therefore, under the circumstances presented by this proceeding, Respondents have demonstrated a rational basis for the final determination issued by the DOB

denying Petitioner's application for registration as an expediter. The decision was neither arbitrary nor capricious. The remainder of Petitioner's claims are also without merit, as there were no due process right violated and Respondents did not act in retaliation.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that Petitioner Feeley's petition pursuant to Article 78 of the Civil Practice Law and Rules seeking review of Respondents DOB and BSIU's final determination denying Petitioner's application for registration as an expediter is hereby denied.

The Clerk shall enter judgment in favor of Respondents against Petitioner dismissing the Petition.

Any other requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Date: New York, New York
August 6, 2008

So Ordered:



HON. JUDITH U. GISCHE, J.S.C.

FILED
AUG 08 2008
COUNTY CLERK'S OFFICE
NEW YORK