

Matter of Alu v Kelly

2009 NY Slip Op 30091(U)

January 14, 2009

Supreme Court, New York County

Docket Number: 112222/08

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 112222/2008
ALU, LAURIE
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE 01/12/09

MOTION SEQ. NO. 001

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 motion

The instant application is decided in accordance with the annexed Memorandum Decision. It is hereby

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry the counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 4115).

ORDERED and ADJUDGED that the application of petitioner Laurie Alu, for a judgment: (1) pursuant to Article 78 of the CPLR (a) reviewing and annulling the action of the respondents herein, Raymond Kelly, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees of the Police Pension Fund, Article II, the Board of Trustees of the Police Pension Fund, Article II, the New York City Police Department, and The City of New York, denying petitioner a line of duty accident disability retirement allowance pursuant to the Administrative Code § 13-252; and declaring said action to be arbitrary, capricious, unreasonable and unlawful; (b) directing and ordering the respondents to retire petitioner with a line of duty accident disability retirement allowance, retroactive to the date of her service retirement; or in the alternative; (c) directing that the Board allow petitioner and/or her representatives to present such testimony as is necessary at a hearing held before the Board in order to prove her entitlement to an accident disability retirement; (2) and for an Order, pursuant

Dated: _____

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):

to § 2307(a) of the CPLR, directing the respondents herein to serve and file upon the date hereof: (a) all reports, recommendations, certificates and all other documents submitted to the Board in connection with the retirement of the petitioner herein; (b) copies of the minutes of each meeting of said Board wherein the Board considered, discussed, or acted upon the retirement application of the petitioner; and (c) copies of any and all medical records, reports or notes relating to petitioner which are on file with the Board and/or the NYPD, **is denied in its entirety and the instant Petition is dismissed;** and it is further

ORDERED that counsel for respondents shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be entered hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated 1/14/09

ENTER: [Signature] J.S.C.
HON. CAROL EDMEAD

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 35

_____ x
In the Matter of the Application of

LAURIE ALU,

Petitioner,

Index No. 112222/08

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

DECISION/ORDER

-against-

RAYMOND KELLY, as the Police Commissioner
of the City of New York, and as
Chairman of the Board of Trustees of the
Police Pension Fund, Article II, THE BOARD
OF TRUSTEES of the Police Pension Fund,
Article II, NEW YORK CITY POLICE
DEPARTMENT and THE CITY OF NEW YORK,

Respondents.

_____ x
EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Laurie Alu (“petitioner”), moves for a judgment: (1) pursuant to Article 78 of the CPLR (a) reviewing and annulling the action of the respondents herein, Raymond Kelly, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees of the Police Pension Fund, Article II (the “Police Commissioner”), the Board of Trustees of the Police Pension Fund, Article II (the “Board”), the New York City Police Department (the “NYPD” and/or the “Department”), and The City of New York (the “City”) (collectively “respondents”), denying petitioner a line of duty accident disability retirement allowance pursuant to the Administrative Code § 13-252; and declaring said action to be arbitrary, capricious, unreasonable and unlawful; (b) directing and ordering the respondents to retire

petitioner with a line of duty accident disability retirement allowance, retroactive to the date of her service retirement; or in the alternative; (c) directing that the Board allow petitioner and/or her representatives to present such testimony as is necessary at a hearing held before the Board in order to prove her entitlement to an accident disability retirement; (2) and for an Order, pursuant to § 2307(a) of the CPLR, directing the respondents herein to serve and file upon the date hereof: (a) all reports, recommendations, certificates and all other documents submitted to the Board in connection with the retirement of the petitioner herein; (b) copies of the minutes of each meeting of said Board wherein the Board considered, discussed, or acted upon the retirement application of the petitioner; and (c) copies of any and all medical records, reports or notes relating to petitioner which are on file with the Board and/or the NYPD.

Background

Petitioner was born on August 17, 1962, and was appointed a police officer with the NYPD on July 5, 1989, and served continuously as a member of said NYPD uniformed force until her retirement. Petitioner prior to her appointment with the NYPD passed all physical and mental examinations administered by the NYPD that demonstrated petitioner to be both physically and mentally fit to perform full duties as a police officer. Petitioner's service with the NYPD during her NYPD employment was satisfactory at all times.

On June 22, 2004, petitioner submitted an application for Accident Disability Retirement ("ADR") concerning her lower back, neck, and left arm. The Police Commissioner also filed an application for Ordinary Disability Retirement ("ODR") on petitioner's behalf.

In her ADR application, petitioner alleges that as a result of several line-of-duty ('LOD') injuries, she is entitled to ADR. She claims that she experiences "constant pain to back (lower

and neck, numbness to the left arm (& tingling), left side. Regarding back numbness & tingling runs down left side into buttocks, radiates down to left foot causing sharp pain in left foot.”

The administrative record contains several LOD injury reports regarding incidents that took place in 1992, 1994 and 2002. On July 4, 1992, petitioner was allegedly injured when she responded to a group of disorderly people and was struck in her back with an unknown blunt object. On May 10, 1994, petitioner was involved in a motor vehicle accident. Petitioner was a passenger in a police vehicle when another car struck her vehicle on the driver’s side door, causing her to strike her head and right arm on the passenger’s side door. On November 20, 2002, petitioner was moving large heavy boxes of department supplies into a building and onto the elevator when she complained of pain to her back, left shoulder and left arm.

Petitioner retired from the NYPD on April 1, 2008.

As to petitioner’s first application for ADR, on October 27, 2004, the Medical Board of the New York Police Pension Fund, Subchapter 2 (the “Medical Board”) considered petitioner’s application for ADR and the Police Commissioner’s application for ODR concerning petitioner’s lower back, neck, and left arm. The Medical Board reviewed petitioner’s entire file, interviewed her, and conducted a physical examination.

Based on an alleged complete review of the record as well as its physical examination and interview, the Medical Board found that “the clinical and documentary evidence [did] not demonstrate that the officer [wa]s disabled from performing the full duties of a New York City police officer.”

At the January 12, 2005 Board meeting, the Board discussed petitioner’s ADR application as well as the Police Commissioner’s ODR application filed on petitioner’s behalf.

The Board voted to deny petitioner's applications.

As to petitioner's second application for ADR, by memorandum dated March 27, 2006, it was recommended that the Chief Surgeon survey petitioner to determine whether she was incapacitated for the performance of duty, and should be retired. Petitioner filed a second application for ADR on or about June 28, 2006. The Police Commissioner also filed an application for ODR on petitioner's behalf. In the application, petitioner alleges that she suffers from constant pain to her lower back and that she has difficulty standing and sitting. Petitioner attributes her disability to her May 10, 1994 LOD injury. On August 16, 2006, the Medical Board considered petitioner's second application for ADR and the Police Commissioner's application for ODR. The Medical Board report notes that the Board saw petitioner previously, and that it had recommended disapproval of her application for ADR and the Police Commissioner's application for ODR.

Based on the alleged complete review of the findings, the Medical Board found that the documentary evidence failed to substantiate that petitioner was disabled from performing the full duties of a police officer. Therefore, the Board recommended that petitioner's application for ADR and the Police Commissioner's application for ODR be denied. Petitioner's June 2006 disability retirement applications were discussed at the Board's November 8, 2006 meeting. At that meeting it was agreed that petitioner's application should be remanded back to the Medical Board for further review.

With respect to the Board's third review, as set forth in the communication dated November 13, 2006, the Board requested that petitioner's applications for disability retirement be reevaluated based on new evidence. On January 17, 2007, the Board considered petitioner's

applications for disability retirement for a third time, and considered the new evidence submitted by petitioner. After an alleged complete review, the Board found that petitioner was unable to perform the full duties of a New York City police officer and diagnosed petitioner with degenerative disc disease of the lumbosacral spine with radiculopathy. Based on this finding, the Board recommended approval of petitioner's application of ADR. The Board opined that the causal factor of petitioner's disability was the LOD injury on November 20, 2002. At the April 11, 2007 Board meeting, petitioner's disability retirement applications were discussed. On April 11, 2007, the Board voted to table petitioner's applications. At the May 9, 2007 Board meeting, petitioner's disability retirement applications were again discussed. The Board again voted to table petitioner's applications. By letter dated June 4, 2007, petitioner's counsel requested that petitioner's case be remanded to the Medical Board so that it could review petitioner's earlier LOD injuries and determine if they caused petitioner's current condition. At the June 13, 2007 Board meeting petitioner's disability retirement applications were discussed. The Board voted to remand petitioner's case back to the Medical Board at the request of her attorney.

As to the Board's fourth review, as set forth in the communication dated June 25, 2007, the Board requested that petitioner's applications for disability retirement be reevaluated based on new evidence. The Medical Board examined petitioner's application for ADR and the Police Commissioner's application for ODR for a fourth time on August 22, 2007. The Medical Board references the minutes of its previous meetings with petitioner for complete documentation of petitioner's LOD injuries, the findings of her physicians, the diagnostic reports, and the findings of the Medical Board. The Medical Board also examined the new medical evidence submitted by petitioner. The August 22, 2007 Medical Board report notes that there was no new objective

medical evidence submitted by petitioner that would cause it to change its previous decision, and the Medical Board therefore recommended approval of ADR based on a diagnosis of Degenerative Disc Disease of the Lumbosacral Spine with Radiculopathy. The Medical Board affirmed its determination that the competent causal factor of petitioner's disability was petitioner's LOD injury on November 20, 2002. On December 12, 2007, the Board reviewed the Medical Board's findings regarding petitioner's application for ADR and the Police Commissioner's application for ODR filed on petitioner's behalf. The Board voted to table a vote on petitioner's applications. At the January 9, 2008 Board meeting, petitioner's application for ADR and the Police Commissioner's application for ODR were discussed. The Board again voted to table a vote on petitioner's applications. At the May 14, 2008 Board meeting, petitioner's application for ADR and the Police Commissioner's application for ODR were discussed again. It was noted by Thaddeus McTigue of the New York City Comptroller's office that in previous discussions of petitioner's case, the city side indicated that petitioner's November 20, 2002 incident was not an accident. At the request of the Detective's Endowment Association, the case was then remanded back to the Medical Board to see if petitioner's injuries could have been caused by an incident other than the one that occurred on November 20, 2002. Mr. McTigue noted that the Medical Board reviewed petitioner's application and affirmed its decision that the causal factor of petitioner's injuries was the November 2002 incident. Based on the Medical Board's finding the city side affirmed its judgment and not approve petitioner for ADR. Petitioner's ODR application was then withdrawn, and by a vote of six-to-six, the Board voted to deny petitioner ADR.

Petitioner's Contentions

The action of the Board in determining to deny petitioner ADR and forcing her to retire with an ODR pension allowance, has resulted in petitioner receiving a retirement allowance which is substantially less than that to which she is entitled in that an ADR pension is comprised of 75% of the final pay of petitioner. The action of respondents in denying petitioner's ADR application was arbitrary and capricious. The Board failed to use the proper legal test of entitlement to a LOD pension applicable in the circumstances. The actions of the Board were contrary to the evidence establishing that the petitioner has sustained an ADR disability and said action is not based on any competent or substantial evidence. Finally, the Board failed to accord or provide petitioner with a fair and reasonable opportunity by way of notice and hearing or otherwise to establish her entitlement to a LOD pension.

If one can demonstrate that an applicant's injuries precipitated the development of a latent condition or aggravation of preexisting condition resulting in a disability, then the applicant is entitled to accident disability retirement as a matter of law.

And, petitioner's injury was an accident for pension purposes and not an incident as the Board has determined. The Medical Board acknowledged the fact that petitioner sustained two LOD injuries before she sustained the one that they determined caused her disability. Had the Medical Board determined that the 2002 injury was an exacerbation of the previous injuries, petitioner would have been entitled to ADR under prevailing case law.

Respondents' Opposition

Petitioner is barred by the four month statute of limitations applicable to Article 78 proceedings pursuant to CPLR 217(1) from alleging that the Board's January 12, 2005 decision

to deny her ADR based on her June 22, 2004 ADR application is arbitrary and capricious. The Board's decision became effective as soon as petitioner learned of the January 12, 2005 denial.

The Medical Board found that petitioner was disabled due to degenerative disc disease of the lumbosacral spine with radiculopathy, and that her disability was caused by an incident that occurred on November 20, 2002, when she lifted boxes of supplies and felt a sharp pain in her shoulder and back.

The petition must be dismissed because well-established case law supports the Board's determination to deny petitioner's application for ADR. Both the Court of Appeals and the First Department have held that lifting heavy objects does not constitute an accident for the purposes of awarding ADR. Moreover, the Medical Board's determination that petitioner's disability was caused by the incident that occurred on November 20, 2002, is supported by credible medical evidence.

According to the injury report, witness statement and petitioner's August 22, 2007 interview with the Medical Board, it is clear that no "sudden, fortuitous, mischance" occurred when petitioner was lifting the heavy boxes. Petitioner confirmed that there was nothing sudden or fortuitous that occurred when she described the incident to the Medical Board during her August 22, 2007 interview. She stated that "she was lifting four gallons of concentrated pine oil, when she felt the pain primarily in her shoulder and also noted back pain." Thus, petitioner's incident is similar to both *Matter of Jacobellis v Bd of Trs. Of the Police Pension fund of the Police Dep't of the City of New York*, 140 AD2d 283 (1st Dep't 1988) and *Matter of Menna v New York City Employees' Ret. Sys.*, 91 AD2d 537 (1st Dep't 1982), and her claim must be dismissed.

And, even if petitioner's November 20, 2002 injury did aggravate an alleged pre-existing back injury to the point that it became disabling, petitioner is still not entitled to ADR. Only an accident that precipitates the development of a latent condition or aggravates a pre-existing condition to the point that it becomes disabling entitles an applicant to ADR.

And, credible evidence in the record clearly supports the Medical Board's finding that petitioner's back disability was caused by the November 2002 incident and not the July 4, 1992 incident or the May 10, 1994 incident. It is also noteworthy that the majority of the medical evidence submitted by petitioner is dated after the November 20, 2002 incident. Furthermore, not one of petitioner's physicians opined that her back disability was caused by either her July 4, 1992 or May 10, 1994 incident.

Moreover, where the decision of the Board is to deny an applicant ADR as a consequence of a six-to-six vote, the Court may not set aside the Board's denial unless it can conclude as a matter of law that the disability was the natural and proximate result of a service-related accident.

Finally, in petitioner's prayer for relief, she requests that the Court grant her a hearing before the Board. However, due process does not require that the member personally appear before the Board.

Analysis

Statute of Limitations

An article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes "final and binding upon the petitioner" (*Yarbough v Franco*, 95 N.Y.2d 342, 717 N.Y.S.2d 79 [2000]; CPLR 217[1]; *New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165, 573 NYS2d 25, 577 N.E.2d 16). An

administrative determination becomes "final and binding" when the petitioner seeking review has been aggrieved by it. An administrative action is not final and binding within the contemplation of CPLR 217 until it "has its impact" upon the petitioner (*Bludson v Popolizio*, 166 AD2d 346, 347, 561 N.Y.S.2d 14 [Dept 1990], citing *Matter of Edmead v McGuire*, 67 NY2d 714, 716, 499 NYS2d 934, 490 NE2d 853). The Statute of Limitations does not begin to run until the petitioner receives notice of the determination (*Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834, 470 NYS2d 130, 458 NE2d 371).

To the extent that the Verified Petition contests the Board of Trustee's January 12, 2005 determination, because it was not brought until September, 2008, over three years after the Board's vote, the Verified Petition is time barred and said claim is dismissed.

CPLR 7803 states that the court review of an administrative determination consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Mutter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the administrative determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the administrative

interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], *affd* 66 N.Y.2d 1032 [1985]).

Pell v Board of Ed. of Union Free School Dist. No...., 356 N.Y.S.2d 833

N.Y. 1974, is instructive on the basic standard of Article 78 review:

In article 78 proceedings: the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence. (Cohen and Karger, *Powers of the New York Court of Appeals*, s 108, p. 460; 1 N.Y.Jur., *Administrative Law*, ss 177, 185; see *Matter of Halloran v. Kirwan*, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. (Cohen and Karger, *Powers of the New York Court of Appeals*, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, *N.Y.Civ.Prac.*, par. 7803.04 *Et seq.*; 1 N.Y.Jur., *Administrative Law*, ss 177, 184; *Matter of Colton v. Berman*, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681--682).

Pell at 839.

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." *Pell v Board of Ed. Union Free School District*, 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974) "The arbitrary and 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." 34 NY2d at 231, 356 NYS2d at 839 *See also Jackson v New York State Urban Dev Corp.*, 67 NY2d 400, 417, 503 NYS2d 298, 305 (1986) (on review of agency

action under CPLR Article 78, the courts may not “second guess the agency’s choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence”).

Moreover, where, as here, the administrative determination involves factual evaluation within an area of the agency’s expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. *See Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to “resolve [any] reasonable doubts in favor of the administrative findings and decisions” of the responsible agency. *Town of Henrietta v Department of Env’tl. Conservation*, 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4th Dep’t 1980). *See also Jackson*, 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v Department of Health Dept.*, 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4th Dep’t 1978), *lv. To app. denied*, 46 NY2d 713, 416 NYS2d 1027 (1979).

And, “Where evidence conflicts, issues of credibility are the province of an administrative hearing officer, since ‘the decisions by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts.’ ” *Wooten v Finkle*, 285 AD2D 407, 408 (1st Dept 2001) (*quoting Berenhaus v Ward*, 70 NY2d 436, 443 (1987)); *Matter of Stork Rest. v Boland*, 282 N.Y. 256, 267, 26 N.E.2d 247 [1940]; *Matter of Acosta Wollett*, 55 N.Y.2d 761, 447 N.Y.S.2d 241, 431 N.E.2d 966 [1981]; *Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 A.D.3d 388, 390, 813 N.Y.S.2d 68 [2006]).

What Constitutes an Accident

The Court of Appeals clearly delineated the difference between and “accident” and an “incident” in *Matter of McCambridge v McGuire*, 62 NY2d 563 (1984). In *McCambridge*, the Court stated:

In order to obtain accident disability retirement, a petitioner must establish that he suffered physical or mental incapacitation "as a natural and proximate result of an accidental injury received in * * * city-service" (Administrative Code of City of New York, § B18-43.0). Not every line of duty injury will result in an award of accident disability. The injury must be the result of a " 'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact' " (Matter of Lichtenstein v Board of Trustees, 57 NY2d 1010, 1012, supra). In each of these claims the injuries were sustained in the line of duty and were accidents within the common sense definition adopted in *Lichtenstein*. To be distinguished are injuries sustained while performing routine duties but not resulting from unexpected events, e.g., back strains sustained while putting a tire in the trunk of a city vehicle (Matter of Menna v New York City Employees' Retirement System, 59 NY2d 696), while leaning over to place a ticket on a car (Matter of Lichtenstein v Board of Trustees, supra), while lifting trash cans (Matter of Valentin v Board of Trustees, 59 NY2d 702), or a loss of hearing sustained as a result of practice sessions on the pistol range (Matter of Schussler v Codd, 59 NY2d 698). It is critical to the determination in each of the present cases that there was a precipitating accidental event -- in one case the loss of balance and fall to the floor; in the other, the slip on the wet pavement and fall which was not a risk of the work performed, as in *Covel* (Matter of Covel v New York State Employees' Retirement System, 84 AD2d 902, mot for lv to app den 55 NY2d 606).

It is important to note that the "loss of balance" referenced above was deemed an accident due to the sudden, unexpected stepping away of a fellow officer that caused petitioner therein to lose his balance and fall.

In the instant case, petitioner's November 2002 incident does not constitute a "sudden, fortuitous mischance." Petitioner's incident occurred during the course of petitioner's usual duties or work activities in the absence of any unexpected or fortuitous event. Again, according to the injury report, witness statement and petitioner's August 22, 2007 interview with the Medical Board, petitioner confirmed that there was nothing sudden or fortuitous that occurred when she described the incident to the Medical Board during her August 22, 2007 interview. She stated that "she was lifting four gallons of concentrated pine oil, when she felt the pain primarily

in her shoulder and also noted back pain.”

And, even if petitioner’s November 20, 2002 injury did aggravate a pre-existing back injury to the point that it became disabling, petitioner is still not entitled to ADR as this court finds that the aggravating event was not an accident.

Finally, petitioner’s request that the Court grant her a hearing before the Board is denied. Due process does not require that the member personally appear before the Board.

Conclusion

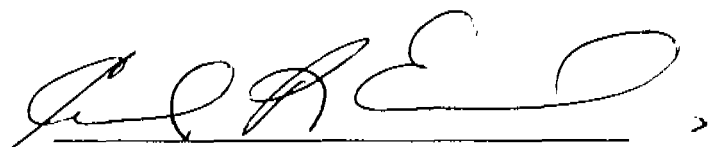
Based on the foregoing, it is here

ORDERED and ADJUDGED that the application of petitioner Laurie Alu, for a judgment: (1) pursuant to Article 78 of the CPLR (a) reviewing and annulling the action of the respondents herein, Raymond Kelly, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees of the Police Pension Fund, Article II, the Board of Trustees of the Police Pension Fund, Article II, the New York City Police Department, and The City of New York, denying petitioner a line of duty accident disability retirement allowance pursuant to the Administrative Code § 13-252; and declaring said action to be arbitrary, capricious, unreasonable and unlawful; (b) directing and ordering the respondents to retire petitioner with a line of duty accident disability retirement allowance, retroactive to the date of her service retirement; or in the alternative; (c) directing that the Board allow petitioner and/or her representatives to present such testimony as is necessary at a hearing held before the Board in order to prove her entitlement to an accident disability retirement; (2) and for an Order, pursuant to § 2307(a) of the CPLR, directing the respondents herein to serve and file upon the date hereof:

(a) all reports, recommendations, certificates and all other documents submitted to the Board in connection with the retirement of the petitioner herein; (b) copies of the minutes of each meeting of said Board wherein the Board considered, discussed, or acted upon the retirement application of the petitioner; and (c) copies of any and all medical records, reports or notes relating to petitioner which are on file with the Board and/or the NYPD, **is denied in its entirety and the instant Petition is dismissed;** and it is further

ORDERED that counsel for respondents shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

Dated: January 14, 2009



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).