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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 402305/2009
VIDAL, RENSO
VS.
CAPITOL HALL PRESERVATION HDFC
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 10/15/09
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 motion**

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that the application of petitioner Renso Vidal for an order and judgment, pursuant to CPLR Article 78, nullifying the determination of respondent N.Y.S. Human Rights Dept. regarding petitioner's discrimination complaint against respondent Capitol Hall Preservation HDFC is denied; and it is further

ORDERED that counsel for N.Y.S. Human Rights Dept. shall serve a copy of this order with notice of entry within twenty days of entry on counsel for respondent.

This constitutes the decision and order of the Court.

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

Dated: 12/15/09

HON. CAROL EDMEAD J.S.C.

Check one: ✓ FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of
RENSO VIDAL,

Index No. 402305/09

Petitioner,

**DECISION/ORDER**

For judgment under Article 78 of the
Civil Practice Law & Rules

-against-

CAPITOL HALL PRESERVATION HDFC and
N.Y.S. HUMAN RIGHTS DEPT.,



Respondents.

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EDMEAD, J.S.C.

**MEMORANDUM DECISION**

Petitioner Renso Vidal ("petitioner"), *pro se*, moves for an order and judgment, pursuant to CPLR Article 78, nullifying the Determination and Order after Investigation (the "Determination") of respondent N.Y.S. Human Rights Dept. ("DHR") regarding petitioner's discrimination complaint against respondent Capitol Hall Preservation HDFC ("Capitol Hall").

*Factual Background*[1]

On March 5, 2009, petitioner, a member of the U.S. Naval Reserve, filed a Complaint with DHR alleging that his employer, Capitol Hall, had discriminated against him due to his military reserve status. On July 3, 2009, DHR rendered the Determination, stating that there was no basis to believe that Capitol Hall had discriminated against petitioner. On September 11, 2009, petitioner filed the instant Petition.

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[1]Information is taken from Capitol Hall's opposition ("opp."), petitioner's Verified Petition (the "Petition") and DHR's administrative record (the "Administrative Record").

*Petitioner's Contentions*[2]

Petitioner argues that the Determination was arbitrary or capricious, lacking a rational basis in the record, or an abuse of discretion. Petitioner alleges that "for years" Howard Fleishman ("Mr. Fleishman"), his supervisor at Capitol Hall, discriminated against him. Petitioner started working for Capitol Hall as a part-time front-desk worker in December 2000. He became a full-time worker in December 2004. In 2005, petitioner filed a discrimination complaint with DHR against Mr. Fleishman and Johnny Lopez ("Mr. Lopez"), whom petitioner describes as a "former superintendent." Petitioner contends that he discontinued the action after Mr. Fleishman "begged me to [drop the] charges against them, and he promised me that they will treat me with respect." However, "when the period for legally suing him had expired already, [Mr. Lopez and Mr. Fleishman] started using the same bad treatment toward me." Petitioner contends that he is being retaliated against for filing the prior Complaint against Mr. Fleishman.

Petitioner alleges, *inter alia*, that Mr. Fleishman made disparaging comments about petitioner's Navy Reserve schedule and arbitrarily changed petitioner's work schedule, creating conflicts with his Navy Reserve schedule. Petitioner further alleges that he has been harassed and treated differently from his co-workers. For example, while his co-workers "may take their vacation when they feel like," he can take his only on the anniversary of his date of hire, *i.e.* in December. Further, while he did not receive health insurance until six months after he became a full-time worker, his co-workers received health insurance 30 days after they became full-time workers. If petitioner arrived late to work, Capitol Hall reduced his weekly pay; however, when

[2]Information is taken from petitioner's Petition, which comprises several exhibits, including a letter to the Court dated August 25, 2009 (the "Letter to the Court"), and petitioner's Complaint.

his co-workers arrived late to work, they still received their full pay. Petitioner also is no longer given opportunities to work overtime.

Petitioner further alleges that DHR handled his case "very poorly," and that he felt "ignored and betrayed" by William F. Marhall ("Mr. Marshall"), the DHR investigator.

*Capitol Hall's Opposition*[3]

In its Answer ("Ans."), Capitol asserts nine affirmative defenses. Relevant herein are the third affirmative defense, wherein Capitol Hall contends that it had "legitimate non-discriminatory reasons for all its employment decisions and never took any adverse action against Petitioner"; the fourth affirmative defense, wherein Capitol Hall contends that the Petition is barred, in part, by the applicable statutes of limitations; and the seventh affirmative defense, wherein Capitol Hall contends that the issues petitioner raises regarding his health insurance and probation period were refuted and dismissed by DHR in 2005, and, thus, are time-barred, as well.

In its opposition ("opp."), Capitol Hall first argues that the Petition is time-barred. Petitioner failed to file his appeal within 60 days of the Determination as required by Executive Law §298. While the Determination was "issued and mailed to all parties on July 3, 2009,"[4] the Petition was filed on September 11, 2009. Therefore, the Petition is untimely.

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[3]DHR only filed an Answer ("DHR Ans.") in response to the Petition, in which it contends that the evidence gathered by DHR during its investigation was sufficient to support the Determination, and denies that the Determination is arbitrary, capricious or an abuse of discretion. DHR further states: "Because Petitioner and [Capitol Hall] are the real parties in interest, [DHR] will not actively participate in this matter and is submitting on the record" (DHR Ans., ¶ 4).

[4]The Court notes that while the copy of the Determination annexed to Capitol Hall's moving papers does not include an Affidavit of Service from DHR, the copy included in DHR's Administrative Record does, indicating that the Determination indeed was served on all parties *via* mail on July 3, 2009.

Second, Capitol Hall argues that the Petition should be dismissed because service was improper. Petitioner not only improperly performed service himself, but he also failed to serve Capitol Hall with a complete copy of the Petition. Citing the affidavit of Catherine Herman ("Ms. Herman"), an employee of Goddard Riverside Community Center ("Goddard"), which is affiliated with Capitol Hall, Capitol Hall argues that the Petition served upon Capitol Hall differs materially from the one in the Court file (see the "Herman Aff.").

Third, Capitol Hall argues that the Petition should be dismissed in its entirety for failing to correctly name and join DHR, a necessary party, and/or dismissed as to Mr. Fleishman. Capitol Hall contends that it is unclear whom Petitioner intends to be the respondents in this action. DHR is a necessary party, yet it is not named as a respondent in Paragraph 2 of the Petition, in the caption of the Verified Petition, or "by the Clerk of this Court." Capitol Hall also contends that it also was improper for Petitioner to name Mr. Fleishman as the "Respondent" in Paragraph 2 of the Petition. Mr. Fleishman was not a named as a respondent in the underlying DHR matter nor in the Determination. Also, Mr. Fleishman was neither noticed in the "Notice of Petition" nor served any of petitioner's papers in this matter.

Fourth, Capitol Hall argues that the Petition should be dismissed on the merits, as there has been no discrimination against petitioner. DHR's investigation failed to demonstrate a cause of action pursuant to Executive Law §296. Prior to bringing his Complaint, petitioner engaged in a pattern of approaching another Capitol Hall employee and demanding that he switch his hours with him so that petitioner could work 24 hours within a 32-hour time interval on the weekend. Capitol Hall had a legitimate business interest in keeping its overtime costs down and making sure that its employees were not working too many hours in too short of a time period.

Petitioner's attempts at shift changes clearly could have had an adverse impact on petitioner's job performance and the safety of the building tenants who relied on him for security from intruders.

On January 22, 2009, after Mr. Fleishman refused petitioner's request to manipulate the schedule, petitioner threatened to bring a discrimination claim against him. However, there never has been any employment discrimination against petitioner. In fact, DHR's investigation determined that Capitol Hall and its employees and agents, including Mr. Fleishman, accommodated petitioner when he needed time away for his Navy Reserve requirements. Upon completion of his Navy Reserves duties, petitioner was reinstated to his former position and pay, and Capitol Hall never took any adverse employment action.

Further, petitioner's current work schedule was an accommodation at petitioner's request. While working for Capitol Hall, petitioner was advanced from a part-time to a full-time job, received all yearly pay increases, worked holidays and received holiday overtime, and received all entitled vacation time. In addition, Capitol Hall has maintained health coverage for petitioner and his family during petitioner's extended absences. Therefore, the Determination was not arbitrary or capricious, lacking a rational basis in the record, or an abuse of discretion.

*Petitioner's Reply*[5]

Petitioner denies that he failed to timely serve his Petition. Petitioner contends that he "started to file the [Petition] on August 31, 2009." Petitioner points out that the Notice of Petition was signed on August 31, 2009. He further cites his Affidavit in Support of Application to Proceed as a Poor Person ("Poor Person Affidavit") and the Poor Person Order, waiving his

[5]Petitioner submits three reply affidavits, one naming Ms. Herman as the respondent and dated October 14, 2009; one naming DHR as the respondent and including an Affidavit of Service by mail dated October 14, 2009; and one naming Mr. Fleishman as the respondent and dated October 14, 2009.

filing fees, both dated August 31, 2009. Petitioner contends that after the Poor Person Order was issued, he had to wait "several days" to file the Petition, and that September 7, 2009 was the Labor Day Holiday.

Petitioner further argues that the Determination was "unjustified" because Mr. Marshall failed to fully investigate his Complaint. Petitioner alleges that Mr. Marshall complained about the length of petitioner's Complaint, "which I think was very unprofessional considering that I tried to be as detailed as possible." Mr. Marshall also requested a document that could be used to corroborate petitioner's allegation that Mr. Fleishman denied petitioner vacation time on any date other than his anniversary. "Subsequently, I made several attempts to contact Mr. Marshall by telephone; however, he never responded. My intention was to meet with him and hand him the aforementioned document. Five days after contacting Mr. Marshall, for the first time, I received a notice telling me that my case was dismissed." Petitioner adds that while he had to provide Mr. Marshall with evidence supporting his allegations, Mr. Fleishman never backed up his responses with any evidence. Despite such lack of evidence from Mr. Fleishman, Mr. Marshall only "gave credit to [Mr. Fleishman's] opinions."

Petitioner argues that Capitol Hall's opposition papers are filled with "untruths and fabrications." For example, Capitol Hall's allegation in its third affirmative defense that petitioner's "current work schedule was an accommodation made by [Capitol Hall], at Petitioner's request, several years ago" is a "big lie," petitioner contends, without elaborating. Petitioner also contests Capitol Hall's contention that he "has worked holidays and received holiday overtime." Petitioner contends that he was not paid for working on President's Day in 2005. Although petitioner concedes that he "has received all entitled vacation time," petitioner

adds that Capitol Hall failed to acknowledge that he was allowed to take vacation only during his anniversary in December, while his co-workers were allowed to take their vacation whenever they requested. Finally, petitioner contests Capitol Hall's contention in its seventh affirmative defense that the issues petitioner raises "regarding his health insurance and probation period were refuted and dismissed by [DHR] in 2005 and are time barred." Petitioner contends that Capitol Hall fails to acknowledge that Mr. Fleishman "admitted" mistreating petitioner and "begged" petitioner to drop the 2005 Complaint. Petitioner complied because Mr. Fleishman promised to change the way petitioner was being treated.

*Discussion*

*Timeliness of Petition*

As a threshold matter, the Petition was untimely served. Executive Law §298 provides that a judicial review proceeding of a DHR order must be instituted within 60 days after the service of such an order (*see* 18A NY Jur 2d, Civil Rights §202; *Wilkinson v Division of Human Rights/ Neil Walsh*, 2004 WL 5536848 [Sup Ct New York County 2004], citing *Simmons v New York State Div. of Human Rights*, 188 AD2d 475, 475 [2d Dept 1992] ["This proceeding is untimely. The proceeding had to be commenced within 60 days of service of the order of respondent Division of Human Rights (DHR), under the mandate of Executive Law § 298"]; *Thibodeau v New York State Division of Human Rights*, 2001 WL 36168472 [Sup Ct New York County 2001]). Further, the Determination clearly explains the relevant statute of limitations, as well as the procedure for appeal:

> PLEASE TAKE NOTICE that any party to this proceeding may appeal this Determination to the New York State Supreme Court in the County wherein the alleged unlawful discriminatory practice took place by filing directly with such court a Notice of Petition and Petition *within sixty (60) days after service of this Determination.* A copy of

> this Notice and Petition must also be served on all parties including General Counsel, State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.
> (Determination, p. 2) (Emphasis added)

Here, the record establishes that DHR served the Determination *via* mail delivery to all parties on July 3, 2009. Therefore, in order to be timely, petitioner should have filed his Petition by September 1, 2009. However, the Petition was not filed with this Court until September 11, 2009, approximately ten days later.

In his reply, petitioner neither provides a reason for the delay nor explains why he "needed to wait several days [illegible word] to end this 'file appeal process.'" Instead, he states that he "*started* to file the [Petition] on August 31, 2009" (emphasis added). As proof, petitioner points to the Notice of Petition, the Poor Person Affidavit, and the Poor Person Order, all dated August 31, 2009. Petitioner further contends that on September 11, 2009, he only amended the Petition to correct the address of DHR. However, upon a review of the evidence in the record, the Court finds only one Petition from petitioner, date stamped September 11, 2009.

The Court notes that this *pro se* petitioner may have misunderstood what it means to "file" a Petition. CPLR §304 defines the term "filing" as the delivery of litigation papers to the clerk of the Court or other person designated by the clerk, at which time the clerk will date stamp the papers, assign an index number, and file the papers with the Court (*Grant v Senkowski*, 95 NY2d 605, 608-609 [2001]; *Harris v Niagara Falls Bd. of Educ.*, 6 NY3d 155, 158 [2006]; *Shivers v International Service Systems*, 220 AD2d 357, 358 [1st Dept 1995] ["The attention of the Bar is called to the fact that commencement of an action now requires filing not service"]).

The Court of Appeals explained the importance of commencing a Petition by filing: "[C]onstruing the term 'filing' as requiring the actual receipt of litigation papers which are

date-stamped by the court clerk or the clerk's designee furthers one of the primary purposes underlying the filing requirements: 'to pinpoint the moment of "commencement,"' thereby fixing the 'crucial date' for determining whether the Statute of Limitations is satisfied" (*Grant* at 609, quoting *Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 719 [1997]). In *Grant*, the *pro se* petitioner, a prison inmate, argued that his Article 78 proceeding was timely commenced because he delivered his proposed order to show cause, verified petition and request for poor person relief to prison authorities before the statute of limitations expired. The Court rejected his argument, explaining:

> We recognize the greater impediments *pro se* prisoners may face over most other litigants in filing their legal papers on time. But, absent any evidence that the Legislature intended to vary for their benefit the filing-by-receipt requirement established in CPLR 304, we cannot depart from the statutorily mandated filing requirements by incorporating a *pro se* prisoner mailbox exception.
> (*id.* at 609)

Similarly, this Court cannot make an exception for petitioner herein.

Petitioner may have mistakenly thought that he filed the Petition when he applied for the Poor Person Order on August 31, 2009. However, once petitioner received the Poor Person Order, waiving his filing fees, he still needed to actually file the Petition with the Court. The record shows petitioner did not do so until September 11, 2009, ten days too late. Accordingly, petitioner has failed to demonstrate that he timely filed the Petition.

*Improper Service*

Capitol Hall's arguments that service was improper because petitioner failed to serve Capitol Hall with a complete copy of the Petition lacks merit. CPLR §311(a) provides that "[p]ersonal service upon a corporation or governmental subdivision shall be made by delivering the summons . . . upon any domestic or foreign corporation, to an officer, director, managing or

general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service." Ms. Herman, who received the papers on behalf of Capitol Hall, attests that on the evening of September 14, 2009, petitioner "informed me that he had to give me 'papers' without showing me what they were." She continues:

> [Petitioner] then, using the office copier, photo-copied some miscellaneous loose papers he was carrying . . . and handed them to me demanding that I sign a blue form. I informed him that I would not sign his form, since it looked like the spot he indicated was for an attorney's name, but that I would give him a receipt to acknowledge that he handed me some papers. I then wrote out a receipt and handed it to him. The next day he left more papers in my office mail box. . . . *I have reviewed the Petition papers from the court file and they do not include any of the purported "exhibits"* [attached to the papers petitioner hand-delivered].
> (Herman Aff., ¶ 3)

In his reply, petitioner explains that he was "nervous" and hurried as he copied the papers for Ms. Herman.[6] As a result, petitioner forgot to copy some of the pages of his Petition. "I did not have any bad intention; simply I obeyed to the pressure done by Mrs. Herman rather than . . . argue with her [*sic*]," petitioner states.

It is well settled that "the papers served must conform in *all important respects* to the papers filed" (*Gershel v Porr*, 89 NY2d 327, 332 [1996] [emphasis added]). A review of the exhibits attached to the Herman Aff. shows that while petitioner provided Ms. Herman with copies of the Request for Judicial Intervention, Petition, Poor Person Affidavit, and Poor Person Order, he failed to provide her with a copy of the Notice of Petition (see Herman Aff., Exhs. A and B). However, the Court considers petitioner's failure to include a copy of the Notice of Petition with the papers he gave Ms. Herman, as well as his failure to include exhibits with the papers he filed with the Court, to be "an omission, a mere irregularity, that is governed by CPLR

[6]Petitioner contends that Ms. Herman was complaining that her family members were waiting for her.

Section 2001, which declares that 'At any stage of an action, the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, *or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded*'" (*Crawford v. Beth Israel Medical Ctr.*, 12 Misc 3d 832, 834, 819 NYS2d 437, 438 [Sup Ct New York County 2006] (emphasis added); *Gamiel v Sullivan & Liapakis, P.C.*, 259 AD2d 385, 386 [1st Dept 1999]; *Nagy v Rothstein*, 53 Misc 2d 367, 369 [Sup Ct New York County 1966] ["This court does not count the papers. It looks rather to their merit and their substance. No litigant who states a cause of action will be turned away by mistakes in labeling or in his counting of the papers required to be served."]). The Court of Appeals in *Garth v Board of Assessment Review for Town of Richmond* (13 NY3d 176, 2 [2009]), further explained:

> Taking into account the "dual legal concepts that mere technical defects in pleadings should not defeat otherwise meritorious claims, and that substance should be preferred over form" [*Great E. Mall v. Condon*, 36 NY2d 544, 548 (1975)], this Court held that the petitioners' failure to comply with the technical pleading requirement of RPTL 704(2) did not render the petitions jurisdictionally defective. Notably, the technical defect in Great E. Mall was the absence of statutorily mandated information from the petition, a document that must be filed to commence the proceeding. Likewise, the defect here was the omission of information required in the notice of petition, a document essential to the commencement of a tax certiorari proceeding. . . . Our consideration was also informed by the circumstance that the respondent had failed to demonstrate any prejudice resulting from the pleading infirmity.
> (*Id.* at 2)

Here, Capitol Hall does not argue that it was in any way prejudiced by petitioner's errors and omissions. Accordingly, dismissal based on petitioner's failure to serve a complete copy of the Petition is unwarranted.

Finally, while CPLR §2103 provides that "[e]xcept where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over," the fact that a party served the petition is a mere irregularity that does not vitiate service

(*American Home Assur. Co. v Morris Indus. Builders, Inc.*, 176 AD2d 541, 544 [1st Dept 1991] [holding that while CPLR 2103 states that a party is not eligible to serve legal papers, Appellate Courts in this State, including this Court, have consistently held that a party's service of legal papers is a mere irregularity and not a jurisdictional defect]). Therefore, dismissal based on improper service is denied.

*Necessary Parties*

Capitol Hall's argument that DHR, a necessary party, was not properly joined as a respondent also lacks merit. It is undisputed that DHR is a necessary party (6 NY Jur 2d Article 78 §261), and it is well settled that the failure to join a necessary party is a ground for the dismissal of an action without prejudice (CPLR §§1003,7804). However, the evidence in the record demonstrates that petitioner joined DHR as a respondent. While the Petition lists only Capitol Hall as a respondent, the Notice of Petition lists DHR and Capitol Hall as respondents. Further, DHR is also indicated as a respondent on petitioner's Request for Judicial Intervention. Most importantly, DHR served an Answer in response to petitioner's contentions. "Although the failure to include a necessary party respondent usually results in the dismissal of the Article 78 petition or proceeding, the court may refuse dismissal where the body or officer not included as a respondent is served and responds to the petition" (6 NY Jur 2d Article 78 §26; *Oliver C. v Weissman*, 203 AD2d 458, 458 [2d Dept 1994]; *see also Solid Waste Services, Inc. v New York City Dept. of Environmental Protection*, 29 AD3d 318, 319 [1st Dept 2006], *citing Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452 [2005] ["The failure to join [Contract Dispute Resolution Board] within the statutory period resulted solely from attorney error, which is not one of the 'rare case' factors enumerated in

§1001(b) militating in favor of allowing this proceeding to continue"]; *State Division of Human Rights on Complaint of Davey v Commissioner of New York State Dept. of Civil Service*, 57 AD2d 699, 699 [4d Dept 1977] ["Finally, we find no merit to the claim that petitioner has named the wrong parties as respondents. While the State Appeal Board was not named in the caption of the action, the notice of motion and petition state that this is an appeal from a determination of the State Human Rights Appeal Board and service was made upon the Commissioner of the State Division of Human Rights and his general counsel. Such constitutes substantial compliance with" Executive Law §298]).[7] The fact that petitioner herein failed to list "DHR" as a respondent on one of the submissions comprising his Petition is not a fatal error warranting dismissal.

*Review of Administrative Proceedings*

However, notwithstanding any procedural errors, the Petition should be dismissed on the merits, as it appears that there was a rational basis for DHR's decision.

CPLR §7803 states that the court review of a determination of an agency, such as DHR, 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 (*Windsor Place Corp. v New York State DHCR*, 161 AD2d 279 [1st Dept 1990]; *Mazel v DHCR*, 138 AD2D 600 [1st Dept 1988]; *Bambeck v DHCR*, 129 AD2d 51 [1st Dept 1987], *lv denied* 70 NY2d 615 [1988]). An action is

[7]Capitol Hall further asks the Court to dismiss the Petition as to Mr. Fleishman because petitioner named Mr. Fleishman as the respondent at Paragraph 2 of the Petition, where petitioner is asked to "identify the respondent(s)." Petitioner listed three different names – Ms. Herman, Mr. Fleishman, and DHR– on each of his three reply affidavits where petitioner is asked to name the party "who opposed your motion." There is no substantial evidence in the record to support that petitioner intended Mr. Fleishman to be a respondent in this action; neither the caption of the Petition nor the caption of the Notice of Petition identifies Mr. Fleishman as a respondent.

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 NY2d 222, 231 [1974]). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*id.*). The court's function is completed on finding that a rational basis supports an agency's determination (*Howard v Wyman*, 28 NY2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed, even if the court might have come to a different conclusion (*Mid-State Mgmt Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72 [1st Dept 1985], *affd* 66 NY2d 1032 [1985]).

In the instant case, this Court is constrained to uphold DHR's Determination.

Petitioner alleged that Capitol Hall had discriminated against him because of his military status, in violation of Executive Law 296(1)(a), which provides:

> 1. It shall be an unlawful discriminatory practice:
> (a) For an employer or licensing agency, because of an individual's . . . *military status* . . . *to discriminate against such individual in compensation or in terms, conditions or privileges of employment.*
> (Emphasis added)

DHR dismissed petitioner's Complaint on the following grounds:

> The Complainant has been required to be absent for weekends and longer periods of time. Following each service commitment, the Complainant returns to his position of employment with the Respondent, *with no change in his employment status.* The Complainant, as of the filing of this complaint, remained employed by the Respondent and *his employment status and salary remain unaffected by his service commitment.* To date, the Respondent *has neither disciplined nor taken any negative employment actions against the Complainant, relating to his status or obligations as a Naval Reservist.* The Complainant alleged that the Manager made disparate [*sic*] comments, relating to the Navy . . . . There is no evidence to support either party's position and such alleged act does not, in and of itself, represent a violation of the Human Rights Law.
> (Determination, pp. 1-2) (emphasis added)

In conclusion, DHR found "no evidence to support a nexus between the [petitioner's] military status and the allegations of the verified complaint" (*id.* at 2).

The Court notes that while petitioner lists various grievances against Capitol Hall, he does not dispute the specific finding of the Determination that petitioner has experienced no change in his employment status or pay. Instead, he concedes that Capitol Hall promoted him from a part-time to a full-time position, and that he has received all entitled vacation time. Further, there is no evidence in the record that petitioner was either disciplined or terminated because of his Naval Reserve status. Ms. Herman attests:

> Mr. Vidal has been absent from his position at work many times for long periods to fulfill his reservist obligations. Throughout his employment with the Respondent he has been fully accommodated and restored to his position after each period of service, without any change in his employment status and salary. There has never been any negative employment treatment of him relating to his status or obligations as a Naval Reservist. (Herman Aff., ¶ 4)

As far as petitioner's concerns about Mr. Marshall's investigation, DHR has broad discretion to determine its method of investigating complaints (*Rivera v New York State Div. of Human Rights*, 18 Misc 3d 1133(A), 859 NYS2d 898 [Sup Ct New York County 2008], citing *McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 112 [1st Dept 1998]). Further, DHR's determinations are entitled to considerable deference due to its expertise in evaluating discrimination claims (*Board of Educ. of Farmingdale Union Free School Dist. v New York State Div. of Human Rights*, 56 NY2d 257, 261 [1982]). Here, petitioner was afforded a full and fair opportunity to present his case, as evidenced by the DHR's "Final Investigation Report and Basis of Determination," which clearly details the contentions of petitioner and Capitol Hall. There is no evidence that DHR or Mr. Marshall was biased against petitioner in the investigation of petitioner's Complaint.

Further, the Determination makes clear that petitioners' grievances about his health insurance were addressed in petitioner's prior complaint (SDHR No. 10109218), which was filed in December 2005. Petitioner concedes that "[t]his happened more than three years ago," (Letter to the Court, p. 6) and that he dropped the initial Complaint against Capitol Hall in December 2005 "because of [Mr. Fleishman's] false promises" (Letter to the Court, p. 8). Thus, petitioner's own statements support DHR's conclusion that because these issues occurred more than three years ago, they are time-barred from consideration herein.

DHR determined that the conduct of which petitioner complained does not rise to the level of "unlawful discriminatory practice" in violation of Executive Law 296(1)(a). Absent any proof of unlawful discrimination, there was a rational basis in the record to support DHR's conclusion that there was no probable cause to believe that Capitol Hall had engaged in discriminatory practices in its relationship with petitioner because of his Naval Reserve status. As the Determination was not made in violation of lawful procedure, affected by an error of law, or arbitrary and capricious or an abuse of discretion, this Court affirms it.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of petitioner Renso Vidal for an order and judgment, pursuant to CPLR Article 78, nullifying the determination of respondent N.Y.S. Human Rights Dept. regarding petitioner's discrimination complaint against respondent Capitol Hall Preservation HDFC is denied; and it is further

ORDERED that counsel for N.Y.S. Human Rights Dept. shall serve a copy of this order with notice of entry within twenty days of entry on counsel for respondent.

This constitutes the decision and order of this court.

Dated: December 15, 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 based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).