

Matter of Timoney v Kelly

2011 NY Slip Op 31456(U)

June 1, 2011

Supreme Court, New York County

Docket Number: 10114657/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C.

PART 52

Index Number : 114657/2010
TIMONEY, JOHN
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 114657/10
MOTION DATE _____
MOTION SEQ. NO. 01
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 *is decided in accordance with the annexed decision.*

FILED

JUN 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/1/11

CYNTHIA S. KERN
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 52

-----x
In the Matter of the Application of: JOHN TIMONEY,

Petitioner,

Index No. 10114657/10

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

-against-

DECISION/ORDER

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,
KEVIN HOLLORAN, as Executive Director of the
New York City Police Pension Fund and THE BOARD
OF TRUSTEES of the Police Pension Fund and
THE CITY OF NEW YORK

Respondents.

FILED

JUN 03 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

-----x
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner John Timoney brought this petition pursuant to Article 78 of the Civil Practice Law and Rules seeking a declaration that the New York City Police Pensions Fund's ("PPF's") interpretation of NYC Administrative Code §13-249 is arbitrary and capricious, ordering respondents to pay petitioner a pension (including retroactively) in accordance with petitioner's interpretation of said statute and declaring the PPF's decision not to allow petitioner to have private counsel appear before the Board of Trustees of the PPF (the "Board of Trustees" or the "Board") unconstitutional and a violation of due process. Petitioner also seeks an order directing

respondents to serve and file certain documents in connection with the instant action. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner is a New York City police officer who retired from the position of First Deputy Police Commissioner in 1995. He was a police officer trainee in 1967 and became a police officer in 1969. Petitioner retired from the NYPD in 1996. Petitioner believed he was entitled to a pension of 2/3 of his annual salary. On April 1997, petitioner notified the PPF that he selected Option #4 (Annuity) which provided that \$76,000 would be paid per annum to a beneficiary of his choice upon his death. By letter dated May 25, 1999, the PPF informed petitioner that his pension would be \$76,475.37 per year. Two-thirds of his salary at retirement would have been \$86,333.00. Therefore, petitioner's pension was less than 2/3 of his salary at retirement. The PPF states that he received less because he elected to have a beneficiary receive an annual benefit after his death. Petitioner took no action regarding this differential between the pension he thought he was entitled to and the amount he received until November 2009, ten years after he had begun receiving his pension, when his attorney submitted a memorandum of law to the Board, which administers the PPF, stating petitioner believed he was entitled to the full 2/3 of his salary, both retroactively and going forward based on the language of the applicable statute, Administrative Code §13-249.

Before that issue is reached, however, the court must determine whether the petition is time-barred. The statute of limitations in an Article 78 proceeding is 4 months. Those four months begin to run from the date an administrative determination becomes final and binding. In the instant case, the calculation of petitioner's pension became final and binding in 1999, when he received a letter stating how much he would be receiving annually. Petitioner did not

challenge that determination in any way for ten years. He cannot sit on his rights for ten years and toll the running of the statute of limitations. Accordingly, this action is time-barred. Therefore, the court need not reach the substantive issues regarding the interpretation of the relevant statute and the calculation of petitioner's pension.

The court will, however, address the issue of whether petitioner was deprived of due process. Petitioner was not deprived of due process even though he was not permitted to have his private counsel appear before the Board. The courts, both state and federal, have repeatedly held that due process is satisfied if the individual received notice of a proceeding, was able to review written submissions and could submit documents on his own behalf. *See Balash v New York City Employees' Retirement System*, 34 N.Y.2d 654 (1974); *Meschino v Lowery*, 31 N.Y.2d 772 (1972); *McDarby v Dinkins*, 907 F.2d 1334, 1337 (2nd Cir. 1990); *Basciano v Herkimer*, 605 F.2d 605, 610-11 (2nd Cir. 1978); *Flannelly v Board of Trustees of the New York City Police Pension Fund*, 6 F.Supp.2d 266, 268-69 (S.D.N.Y. 1998); *Rosenthal v Board of Trustees of the New York City Police Pension Fund*, 999 F.Supp. 498, 505 (S.D.N.Y. 1998); *Calzerano v Board of Trustees of the Police Pension Fund*, 877 F.Supp. 161, 164 (S.D.N.Y. 1995). In all these cases, the issue before the Board involved what type of disability payments an individual should receive and there were factual issues regarding the nature and cause of the individual's injury. If no hearing was required in those cases, that holds true even more so for the instant case where the issue before the Board is merely one of statutory interpretation. In the instant case, petitioner had representation and submitted his case in writing to the Board. That is sufficient for due process.

Petitioner's argument that barring him from appearing with his private attorney before the

Board deprives him of due process because he is not represented by any of the trustees on the Board is without merit. Although it is true that petitioner is not directly represented by the union trustees on the board because, as a deputy commissioner, he was not a union member, this point is not determinative. None of the cases cited above based their decisions solely on the issue of whether or not the pensioner in each case had representation on the Board. Rather, they all held that an opportunity to see the documentation submitted by others and to respond in writing was sufficient for due process. While in one case the court did note that "the members of the Board of Trustees representing police labor act on behalf of the member and present his case to the Board," (see *Rosenthal* 999 F.Supp. at 501), in the instant case, petitioner was still able to put his case before the Board. In fact, in *Calzerano*, the court based its decision on its finding that plaintiff "was given the opportunity to present his case before the Board of Trustees in writing" and did not mention his representation, or lack thereof, on the Board. 877 F.Supp. at 164.

Accordingly, the petition is denied. This constitutes the decision, order and judgment of the court.

Dated: 6/1/11

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