

**Matter of Gottlieb v City of New York**

2013 NY Slip Op 32790(U)

September 30, 2013

Sup Ct, Queens County

Docket Number: 2226/13

Judge: Timothy J. Dufficy

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**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice**

**PART 35**

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**In the Matter of the Application of**  
**CRAIG GOTTLIEB,**

**Plaintiffs,**

**Index No. : 2226/13**

**Mot. Date: 5/31/13**

**-against-**

**Mot. Cal. No.**

**Mot. Seq. 1**

**THE CITY OF NEW YORK, SUZANNE**  
**A. BADDOE NOTICE, in her capacity as**  
**Commissioner of the CITY OF NEW YORK**  
**ENVIRONMENTAL CONTROL BOARD,**  
**and the CITY OF NEW YORK**  
**ENVIRONMENTAL CONTROL BOARD,**

**Defendants.**

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The following numbered papers 1 to 12 read on this petition by petitioner, who is self-represented, pursuant to CPLR Article 78, to reverse, annul, and set aside or modify the decision and order of the Administrative Law Judge, dated October 4, 2012, to direct respondents to reimburse him for all costs and damages he sustained in complying with the order of the Commissioner of the Department of Environmental Protection (DEP), pursuant to CPLR 8601(a) for an award of costs and reasonable fees, along with costs and disbursements, and for an award of exemplary damages; and this cross-motion by respondents City of New York, Suzanne Baddoe in her capacity as Commissioner of the City of New York Environmental Control Board, and City of New York Environmental Control Board (ECB), pursuant to CPLR 3211(a)(2) and 7804(f) to dismiss the petition based upon lack of subject matter jurisdiction due to petitioner’s failure to exhaust administrative remedies.

	<u>Papers</u> <u>Numbered</u>
Notice of Petition- Affidavits - Exhibits .....	1-3
Notice of Cross Motion - Affidavits - Exhibits.....	4-7
Answering Affidavits - Exhibits .....	8-10
Reply Affidavits .....	11-12

Upon the foregoing papers it is ordered that the application and cross-motion are determined as follows:

On September 20, 2010, as part of an investigation to eliminate illegal connections to the storm sewer tributary, inspectors with the New York City Department of Environmental Protection (DEP) performed tests to determine whether any illegal connections were present among certain residences along 67th Avenue, Queens, New York. A test confirmed that sanitary waste from the premises owned by petitioner was being discharged into the storm sewer. As a result of the investigation, petitioner was issued an Order (No. E44184) of the Commissioner of the DEP on September 21, 2010, directing petitioner to cease discharging sanitary waste from his property into the storm sewer. Petitioner failed to implement any corrective measures, and as a result, a notice of violation (No. 0168593307) (NOV07) was issued to petitioner by the ECB on May 11, 2012, charging petitioner with violation of New York City Administrative Code § 24-524(f) for his failure to comply with the DEP Commissioner's Order No. E44184. A hearing was held on September 27, 2012 before an Administrative Law Judge of the Office of Administrative Trials and Hearings, and by decision and order dated October 4, 2012, the Administrative Law Judge sustained the violation (NOV07), and imposed the civil penalty of \$400.00.

Petitioner challenges the order of the Administrative Law Judge, sustaining the notice of violation no. 0168593307 (NOV07).

Respondents cross-move to dismiss the petition, contending that petitioner did not properly appeal the decision of the Administrative Law Judge, and therefore failed to exhaust his available administrative remedies. Respondents assert the records of the ECB reflect that petitioner, when filing his appeal, failed to enclose proof of service of a copy of his appeal upon the DEP within 30 days of the date of the mailing of the hearing decision and order. Respondents also assert that as a result, petitioner's request for an appeal was properly denied by letter dated November 16, 2012. The letter stated:

**“[y]ou did not enclose proof that you sent a copy of your appeal to the agency that charged you with the violation within 30 days of the date of the hearing decision and order was mailed to the parties. Under ECB**

rules, you must affirm that you sent the agency a copy of the appeal at the proper address.” (emphasis in the original).

The letter also read in part, “[i]f you believe that ECB rejected your appeal in error, you must submit documentation that proves the error. You must send the documentation to ECB Appeals by 11/26/12. On that date the rejection will become final.” Petitioner did not send any additional documentation by November 26, 2012, and as a consequence, the ECB Appeals Board did not consider his appeal of the decision and order of the Administrative Law Judge.

Respondents contend that petitioner, having failed properly to exhaust an available administrative remedy, is barred from seeking judicial relief with respect to the same matter. In addition, respondents contend the ECB Appeals Board decision to reject the appeal on the ground that petitioner failed to comply with the requirement that he include proof of service of a copy of the appeal to DEP, as the agency which charged him with the violation, was neither arbitrary or capricious.

Petitioner was provided with a copy of the decision and order of the Administrative Law Judge, along with a notice setting forth the manner in which an appeal could be filed. The notice advised that as a condition of filing the appeal, the full penalty imposed had to be paid within 20 days of the mailing date of the decision and order, or alternatively, a bond could be posted if agreed to by the Board. The notice also advised that a request for an exemption from the pre-payment requirement, based upon financial hardship, could be made by “sending ... a letter within 20 days of the mailing date of the decision and order.” The notice further advised that if the request for the exemption was granted, payment of the penalty would not be required pending the decision on the appeal. The notice additionally advised that an appeal from the decision and order could be filed “by mail, by hand delivery to ECB or online,” and stated that a copy of any letter sent or delivered to ECB must also be sent or delivered to the city agency responsible for the violation. The notice stated that proof of service of the letter to the city agency responsible for the violation was required for the appeal.

Petitioner sent a letter to the ECB dated October 9, 2012 seeking an exemption from the penalty prepayment requirement as a condition of filing the appeal, on the basis of alleged

financial hardship. He separately sent an email to the ECB's Office of Administrative Trials and Hearings to file his appeal from the decision and order of the Administrative Law Judge. Petitioner makes no claim, however, that he also sent a copy of the email to the DEP.<sup>1</sup>

The New York City Office of Administrative Trials and Hearings (OATH) is established under the New York City Charter, Chapter 45-A (§§ 1048 *et seq.*). Section 1049-a of the New York City Charter establishes the ECB as part of OATH. The City Charter authorizes the ECB to enforce provisions of the City Charter and Administrative Code of the City of New York and any rules and regulations made thereunder, which relate, among other things, to the disposal of wastes (NY City Charter § 1049-a[c][1][b]). The Rules of the City of New York provide an appeal process whereby any party aggrieved by the hearing officer's recommended decision and order may, within 30 days of mailing of the same, file written exceptions with the tribunal (48 RCNY 3-71). The appeals panel established by the ECB may review the administrative law judge's recommended decision and order, report its findings to the full board for final resolution, and after the review, the board issues its decision (48 RCNY 3-74). The Rules also provide that after exhaustion of the appeal procedures, judicial review of the final decision and order of the board may be sought pursuant to CPLR article 78 (48 RCNY 3-76[a]).

In this instance, petitioner admittedly never served the DEP with a copy of his exceptions, and thus, failed to file proof of service of his exceptions upon "all parties" within 30 days of the mailing of the decision and order of the Administrative Law Judge as required by 48 RCNY 3-71(a). Under such circumstances, he failed to appeal the decision and order of the Administrative Law Judge properly, and therefore, never exhausted his available administrative remedies or obtained a final agency determination.

A CPLR article 78 proceeding may not be maintained where a petitioner fails to exhaust administrative remedies (*see Lehigh Portland Cement Co. v New York State Dept. of Env'tl. Conservation*, 87 NY2d 136, 140 [1995]; *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; CPLR 7801[1]). Petitioner failed to obtain administrative review

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Petitioner admits that he erroneously sent a "CC" of the email sent to the ECB to the email address for the Department of Sanitation— not the email address for the DEP. The court does not reach the issue of whether a copy of the email sent by email to the DEP would have been sufficient to meet the requirement of "sending" or "delivering" a copy of the letter sent or delivered to the ECB.

of the decision and order of the Administrative Law Judge (*see Sabatini v Incorporated Village of Kensington*, 284 AD2d 320 [2d Dept 2001]). To the extent he asserts he did not receive the letter dated November 16, 2012, rejecting his appeal, it is undisputed that petitioner failed to serve a copy of his appeal on the DEP (*see* 48 RCNY 3-71[a]). Moreover, petitioner has failed to demonstrate that an exception to the exhaustion of administrative remedies doctrine applies here (*see Watergate II Apts.* , 46 NY2d at 57). Contrary to his assertions, petitioner has failed to show that review of the decision and order of the Administrative Law Judge would have been futile, or that the ECB's or the DEP's actions were unconstitutional.

Under such circumstances, the petitioner's application is denied in its entirety and the cross-motion by respondents to dismiss the petition on the ground that petitioner failed to exhaust his administrative remedies is granted (*see* CPLR 7801[1]; *Lehigh Portland Cement Co.*, 87 NY2d at 140; *Watergate NEWMAN Apts.*, 46 NY2d at 57).

This constitutes the decision, order and judgement of this court.

**Dated: September 30, 2013**

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**TIMOTHY J. DUFFICY, J.S.C.**