

**Matter of Kittle v D'Amico**

2014 NY Slip Op 30404(U)

January 10, 2014

Supreme Court, Albany County

Docket Number: 2471-13

Judge: Jr., George B. Ceresia

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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In The Matter of the Application of  
TERRY E. KITTLE,

Petitioner,

For A Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

-against-

JOSEPH A. D'AMICO, in his official capacity  
as Superintendent of the Division of State Police,

Respondent.

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Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-13-ST4624 Index No. 2471-13

Appearances: Stephen G. DeNigris, Esq.  
Law Offices of Stephen G. DeNigris, P.C.  
Attorney For Petitioner  
P.O. Box 14643  
Albany, NY 12212-4643

Eric T. Schneiderman  
Attorney General  
State of New York  
Attorney For Respondent  
The Capitol  
Albany, New York 12224  
(Keith A. Muse,  
Assistant Attorney General  
of Counsel)

**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The petitioner was employed as a New York State Trooper from July 25, 1987 until his retirement on March 29, 2012. Prior to his retirement he submitted an application to the

Superintendent of the State Police, respondent Joseph A. D'Amico, for a Superintendent's firearms's license as set forth in Penal Law § 400.01<sup>1</sup>. He also sought a State Police retiree identification card. The respondent denied the firearms license on August 8, 2012. Thereafter, on April 1, 2013, petitioner's attorney wrote a letter to the respondent requesting that the respondent investigate the matter and direct the issuance of the firearms license and a retired member identification card. The respondent never responded to the letter. The petitioner has commenced the above-captioned CPLR Article 78 proceeding to review the August 8, 2012 determination. The respondent has served an answer and opposing papers.

In a decision-order dated September 3, 2013 the Court found that respondent's papers were defective in that the jurat on the verification of his answer and on his opposing affidavit had not been signed by a notary public. Pursuant to the provisions of CPLR 7804 (e), the Court directed that the respondent serve and file an answer and opposing affidavit which were properly notarized. The respondent has done so, and the Court will now proceed to address the issues.

The respondent initially maintains that the proceeding is barred by the four month statute of limitations (see CPLR 217). Respondent points out that although the determination under review is dated August 8, 2012, the instant proceeding was not commenced until May 6, 2013 when the petition was filed (see CPLR 304). It is well settled that an administrative determination becomes final and binding, and the applicable statute of limitations begins to run, when the administrative action has its impact upon a party and it is clear that the party

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<sup>1</sup>Under Penal Law § 265 (10) the Superintendent of State Police is designated as a firearms licensing officer.

is aggrieved thereby (see Matter of Edmead v McGuire, 67 NY2d 714, 716; Matter of Biondo v State Bd. of Parole, 60 NY2d 832, 834; Mundy v Nassau County Civ. Serv. Comm., 44 NY2d 352, 357; Matter of Dugan v Liggan, 90 AD3d 1445, 1446-1447 [3d Dept., 2011]; Matter of Adams v Carrion, 85 AD3d 1517, 1518 [3d Dept., 2011]; Matter of Ragi v Servis, 91 AD3d 1169, 1179 [3d Dept., 2012]; Matter of Matter of North Dock Tin Boat Assn., Inc. v New York State Off. of Gen. Servs., 96 AD3d 1186, 1187 [3d Dept., 2012]). In other words, the statute of limitations does not commence to run until the aggrieved party is notified of an administrative determination that is unambiguous and certain in its effect (see, Matter of Edmead v McGuire, *supra*, at 716; Singer v New York State and Local Employees' Retirement System, 69 AD3d 1037, 1038 [3rd Dept., 2010]; Matter of Hunt Brothers Contractors v Glennon, *supra*, at p. 819; Matter of New York State Radiological Society v Wing, 244 AD2d 823, 666 NYS2d 285 [3d Dept., 1997], mot for lv to app denied, 92 NY2d 802 [1998]). Finality does not occur until the administrative agency has arrived at a definitive position on the issue which inflicts actual concrete injury (see, Matter of Ward v Bennett, 79 NY2d 394, 400; Matter of McDonald v Board of the Hudson River-Black River Regulating District, 86 AD3d 844, 846 [3d Dept., 2011]).

The petitioner argues that the respondent's determination is ambiguous and uncertain, particularly with regard to whether all administrative appeals had been exhausted. In his view it fails to apprise the petitioner that the determination is a final decision, or that the Superintendent will never review or reconsider the matter again. The petitioner's Counsel also makes reference to the letter he wrote to the respondent on April 1, 2013 which requested that he conduct an investigation thereof. Counsel indicates that his law practice

is devoted almost exclusively to representing law enforcement officers at the federal, state and local levels; and in the course of such legal representation he has often pursued informal internal avenues to rectify retirement issues, as an alternative to resorting to litigation against the agency. Counsel indicates that he followed the same practice here, but never received a response. He cites a case, Conlee v D'Amico (Sup. Ct., Columbia Co., 2011, Index No. 3282-11, unpublished) in which he was successful in overturning respondent's determination to deny an application of a retired State Trooper for a firearms license.

The determination recites as follows:

“Your application for a firearms license, submitted to me pursuant to New York State Penal Law Section 400.01, is denied. This denial is based upon the determination that you do not meet all of the eligibility requirements contained in Penal Law section 400.00 (1).”

The Court is of the view that the decision, as it relates to petitioner's application for a firearms's license, is clear and unambiguous on its face in indicating that the application has been denied. The petitioner acknowledges having received the determination in August 2012. There does not appear to be any procedure for the filing of an administrative appeal (see 9 NYCRR Part 470). As such, on its face, it would appear that the determination was final.

Requests for reconsideration do not, ordinarily, toll or revive the statute of limitations (see, Lubin v. Board of Educ. of City of New York, 60 NY2d 974; Matter of Yarbough v Franco, 95 NY2d 342, 347-348 [2000]; Matter of Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board, 34 AD3d 895, 896-897 [3<sup>rd</sup> Dept., 2006]).

“The statute of limitations runs from the initial determination ‘unless the agency conducts

a fresh and complete examination of the matter based on newly presented evidence” (Matter of Finger Lakes Racing Association, Inc. v State of New York Racing and Wagering Board, *supra*, at 897, quoting Matter of Quantum Health Resources v DeBuono, 273 AD2d 730, 732 [2000], *lv dismissed* 95 NY2d 927 [2000]). There is no evidence that this was done here. The Court finds that Counsel’s letter dated April 1, 2013 failed to revive, extend or toll the statute of limitations. Under the circumstances the proceeding, as it relates to petitioner’s application for a firearms license, is found to be time-barred. The Court need not, and does not reach the merits of the application.

The Court reaches a different conclusion with regard to petitioner’s application for a State Police retiree identification card. The August 8, 2012 determination (*supra*) fails to mention the retirement card in any manner. In this respect, no determination has been made and the statute of limitations has not yet commenced to run. As such, the Court finds that the matter must be remanded to the respondent for a determination of this issue. Upon remand, if the respondent believes that the application should be disapproved, the respondent must advise the petitioner of the reasons for disapproval and afford the petitioner an opportunity to respond (see Novick v Hillery, 183 AD2d 1007 [3d Dept., 1993]).

For the foregoing reasons, the Court concludes that the petition must be granted in part and dismissed in part.

Accordingly, it is

**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed as it relates to petitioner’s application for issuance of a firearms license; and it is.

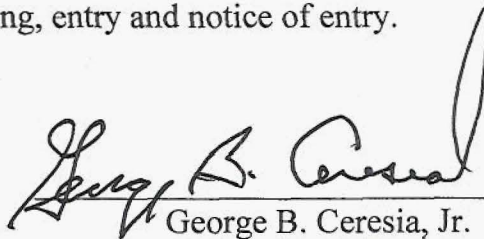
**ORDERED and ADJUDGED**, that the petition is granted with respect to petitioner’s

application for a State Police retiree identification card, to the limited extent that the matter is remanded to the respondent for further proceedings in keeping with this decision/order/judgment.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondent. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

**ENTER**

Dated: January 10, 2014  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated May 6, 2013
2. Petition and Exhibits
3. Affidavit of Terry E. Kittle, sworn to May 6, 2013
4. Respondent's Answer Dated July 19, 2013
5. Affidavit of Joseph A. D'Amico, sworn to July 22, 2013 and Exhibits
6. Respondent's Answer, verified July 22, 2013
7. Reply Affirmation of Stephen G. DeNigris, Esq.
8. Reply Affidavit of Terry E. Kittle, sworn to August 3, 2013