

**Matter of Levine v McDonald**

2014 NY Slip Op 30649(U)

March 17, 2014

Sup Ct, Albany County

Docket Number: 6294-13

Judge: Joseph C. Teresi

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of  
RICHIE F. LEVINE,

Petitioner,

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

-against-

**DECISION and ORDER**  
**RJI NO.: 01-13-ST5268**  
**INDEX NO.: 6294-13**

JOAN MCDONALD, in her official capacity as  
Commissioner of the New York State Department of  
Transportation and NEW YORK STATE  
DEPARTMENT OF TRANSPORTATION,

Respondents.

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Supreme Court Albany County All Purpose Term, February 7, 2014  
Assigned to Justice Joseph C. Teresi, Presiding)

**APPEARANCES:**

Law Office of Arthur A. Feltman  
*Attorneys for Petitioner*  
(Arthur A. Feltman, Esq.)  
314 West 231<sup>st</sup> Street  
Bronx, New York 10463

Eric T. Schneiderman, Esq.  
Attorney General of New York State  
*Attorneys for the Respondents*  
Christopher W. Hall, AAG  
Department of Law  
The Capitol  
Albany, New York 12224

**TERESI, J.:**

Petitioner Richie F. Levine commenced this special proceeding seeking a writ of prohibition against the New York State Department of Transportation Respondents alleging that Respondents violated Executive Law § 296(1)(d) and (15), Correction Law Article 23-A (750-755), Labor Law 201-F, and New York Administrative Code 8-10710) by allegedly requiring

private contractors engaged in Respondents' Highway Emergency Local Patrol ("HELP") program not to hire individuals with felony or misdemeanor A convictions to operate the HELP trucks deployed on the highways to provide free basic emergency roadside assistance to motorists whose vehicles become disabled.

Respondents first object that this proceeding was barred by the statute of limitations when it was commenced in August 2013. Respondents bear the burden of establishing their statute of limitations defense (Richmond Med. Ctr. v Daines, 101 AD3d 1434, 1435 [3<sup>rd</sup> Dept 2012]) and have met their burden. Respondents' alleged restriction on hiring operators with serious criminal records is a quasi-legislative act. The proper vehicle by which to challenge a quasi-legislative act or decision made by an administrative agency is a CPLR Article 78 proceeding and CPLR§ 217's four-month statute of limitations governs (New York City Health & Hosps. Corp. v McBarnette, 84 NY2d 194, 200-201, 204 [1994]; Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d 1044, 1045-46 [3<sup>rd</sup> Dept 2012]; Spinney At Pond View, LLC v Town Bd. of Town of Schodack, 99 AD3d 1088, 1088-1089 [3<sup>rd</sup> Dept 2012]; New York Coalition for Quality Assisted Living, Inc. v Novello, 53 AD3d 914, 916 [3<sup>rd</sup> Dept 2008]).

The applicable limitations period commences when the challenged determination becomes "final and binding" (CPLR § 217 [1]; Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 194 [2007]; Town of Olive v City of New York, 63 AD3d 1416, 1418 [3<sup>rd</sup> Dept 2009]; Riverkeeper, Inc. v Crotty, 28 AD3d 957 [3<sup>rd</sup> Dept 2006]; Owners Comm. of Elec. Rates, Inc. v Pub. Serv. Com'n of State of N.Y., 76 NY2d 779, 780 [1990], revg. on dissenting op. of Levine, J., 150 AD2d 45 [3<sup>rd</sup> Dept 1989]). When making the determination as to whether

an agency determination is final, courts must consider the completeness of the administrative action and make a pragmatic evaluation as to whether a position has been reached that inflicts an actual, concrete injury. Consideration must also be accorded to whether further resort to administrative remedies by the complaining party might serve to ameliorate the injury (Walton v New York State Dept., of Correctional Servs., 8 NY3d 186, 194 [2007]; Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd., 97 AD3d 1044, 1046 [3<sup>rd</sup> Dept 2012]).

Petitioner alleges that the challenged preclusion of felons and serious misdemeanants was included in Respondents Invitation for Bids, Solicitation (IFB) 3BA-12-007. The attached IFB required would-be HELP operators to submit their bids by August 7, 2012. Although Petitioner claims that Respondent's contracts with the selected HELP operators did not become "effective" until April 15, 2013, the contracts that Petitioner submits show that the contracts containing the challenged restrictions were actually entered into and approved by Respondents on December 17, 2012. Petitioner did not even apply for a job as a HELP truck operator, much less pursue any administrative remedies that might have been available to ameliorate the situation had a HELP private contractor rejected Petitioner's employment application based on Petitioner's criminal record. This record contains no further administrative remedy that Petitioner could have pursued. With that showing, Respondents demonstrated that the statute of limitations accrued on Petitioners' claims against them, at the latest, on December 17, 2012 when the contracts containing the challenged restrictions were entered into and became final and binding (Walton v New York State Dept., of Correctional Servs., 8 NY3d 186, 194 [2007]; Owners Comm. of Elec. Rates, Inc. v Pub. Serv. Com'n of State of N.Y., 76 NY2d 779, 780

[1990]; Thrun v Cuomo, 112 AD3d 1038, [3<sup>rd</sup> Dept 2013]; Schulz v Town Bd. of Town of Queensbury, 253 AD2d 956 [3<sup>rd</sup> Dept 1998]). Because the applicable limitations period was just four months and began on December 17, 2012, Petitioner's commencement of this proceeding more than seven months later was untimely and this proceeding must be dismissed.

Assuming for the purposes of the argument that Petitioner timely commenced this proceeding seeking a writ of prohibition, the Court would also dismiss the proceeding for the following reasons. Article 78 nearly proscribes courts' involvement in the day to day details of administrative action and severely limits the courts' authority to review administrative determinations by prescribing only four questions that may be raised in these special proceedings (CPLR § 7803). Prohibition is a form of relief directed at pre-decisional activity and could be misused by petitioners to avoid exhausting their administrative remedies and to stop administrative agencies from making decisions that could only be challenged via certiorari (CPLR § 7803[3]). Indeed, Petitioner has avoided creating any administrative record upon which to judge his fitness to serve as a HELP truck operator by choosing not to apply for such a position. The potential for abuse has been avoided by limiting the scope of what may be prohibited.

The extraordinary writ of prohibition is restricted first by statute to addressing whether a body or officer proceeded, is proceeding, or is threatening to proceed either without or in excess of its jurisdiction or in excess of its authorized powers in a proceeding over which it has jurisdiction (CPLR 7803[2]; Matter of Town of Huntington v New York State Div. of Human Rights, 82 NY2d 783, 786 [1993]; Matter of Holtzman v Goldman, 71 NY2d 564, 569 [1988]; Matter of Niagara Frontier Transp. Authority v Nevins, 295 AD2d 887, 887 [4th Dept 2002]).

Petitions for a writ of prohibition are further restricted by precedent to very limited instances when the respondent is acting in a judicial or quasi-judicial capacity (Matter of Garner v New York State Dept., of Correctional Services, 10 NY3d 358, 361 [2008]; Matter of McGinley v Hynes, 51 NY2d 116 [1980]).

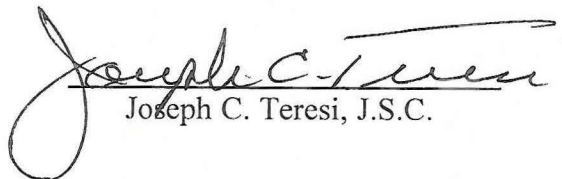
Thus, to meet even the minimum requirements, petitioners seeking a writ of prohibition have the burden of demonstrating that: (1) a body or officer is acting in a judicial or quasi-judicial capacity, (2) the body or officer is proceeding or threatening to proceed in excess of its jurisdiction, and (3) petitioner has a clear legal right to the relief requested (Matter of Garner v New York State Dept., of Correctional Services, 10 NY3d 358, 361 [2008]). This petition must be denied because Respondents are not acting in a judicial or quasi-judicial capacity in allegedly requiring that HELP contractors not hire felons and serious misdemeanants to operate the HELP trucks. Petitioner has further failed to demonstrate that Respondents were acting in excess of their jurisdiction by imposing such requirements or that Petitioner is a suitable candidate or has a clear legal right to the relief he requests.

Accordingly, Petitioner's Article 78 proceeding for a writ of prohibition is dismissed.

This Decision and Order is being returned to the attorneys for the Respondents. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall 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.

So Ordered.

Dated: Albany, New York  
March 17, 2014

  
Joseph C. Teresi, J.S.C.

## PAPERS CONSIDERED:

1. Notice of Petition dated August 7, 2013; Petition dated August 7, 2013; Affirmation of Arthur A. Feltman, Esq. dated August 7, 2013, with attached exhibits A-K; Memorandum of Law dated August 6, 2013.
2. Answer dated December 30, 2013; Affidavit of Rebecca Gibson dated December 13, 2013, with attached exhibits A-K; Memorandum of Law dated December 30, 2013.
3. Affirmation of Arthur A. Feltman, Esq. dated January 16, 2014; Memorandum of Law dated January 16, 2014.