

**Matter of McCloskey v City of New York Civil Serv.  
Commn.**

2019 NY Slip Op 31183(U)

April 26, 2019

Supreme Court, New York County

Docket Number: 161896/2018

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

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In the Matter of the Application of  
Charles J. McCloskey,

Index No.  
161896/2018

Petitioner,

For a Judgment pursuant to Article 78 of the CPLR

**DECISION  
and ORDER**

- against -

The City of New York Civil Service Commission;  
Nancy G. Chaffetz, as Chair and Commissioner  
of The City of New York Civil Service  
Commission,

Mot. Seq. 001

Respondents.

-----X  
EILEEN A. RAKOWER, J.S.C.

Petitioner Charles J. McCloskey (“Petitioner”) brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules (“Article 78”), seeking to reverse Respondent the City of New York Civil Service Commission’s (the “Commission”) decision denying Petitioner’s appeal and disqualifying Petitioner’s promotion to Fire Department of New York (“FDNY”) Firefighter dated August 23, 2018 (the “Decision”). Respondents the Commission and Nancy G. Chaffetz, as Chair and Commissioner of the City of New York Civil Service Commission (collectively, “Respondents”) cross move to dismiss Petitioner’s petition.

Background/Factual Allegations

Petitioner was born on June 11, 1987 and is currently 31 years old. Petitioner has been employed for the FDNY as an Emergency Medical Specialist (“EMT”) in the Emergency Medical Services Unit since April 2012. In December 2016, Petitioner took the Promotional Firefighter, Exam # 7501 (the “Exam”). In May 2017, Petitioner passed the Exam and was placed on the “eligible to hire list” and

received List Number 1472. Thereafter, Petitioner passed the Candidate Physical Ability Test (“CPAT”). Petitioner asserts he was told by the FDNY that he would obtain a notification date for entry to the FDNY Academy for promotion to a FDNY Firefighter.

On or about September 15, 2017, Petitioner received a Preliminary Status Notification from the FDNY Candidate Investigation Division (“CID”), which informed Petitioner that he “may” have been “overage at the time of filing” to take the Exam. On or about December 11, 2017, Petitioner was sent a “Final Notice of Disqualification – Hiring Conditions” from the FDNY, notifying Petitioner that he was “overage at the time of filing”. On December 12, 2017, Petitioner sent his “initial Appeal” to the Commission, and on April 2, 2018, Petitioner sent his “Supplemental Appeal” to the Commission (collectively, “Petitioner’s Appeal”). On August 10, 2018, Respondents sent a “Response” denying Petitioner’s Appeal.

Petitioner commenced this action on December 19, 2018 by filing a Verified Petition as an Article 78 special proceeding. Respondents filed their cross motion to dismiss the petition on February 8, 2019.

#### Parties’ Contentions

Petitioner contends that Respondents’ determination was arbitrary and capricious, and constituted an abuse of discretion. Petitioner argues that Respondents failed to take into account the clear legislative intent of Local 38 (2011) (“Local Law 38”) in denying Petitioner’s Appeal. Petitioner argues that Local 38 was put into place in 2007 pursuant to a Federal Court Order. Petitioner contends that from 1999 to 2007 the FDNY’s written examinations excluded people of color, and there was a hiring freeze until 2012. Petitioner contends that as a result of the hiring freeze Local Law 38 was enacted in 2011 to address FDNY applicants “aging out” because of the hiring freeze.

Furthermore, Petitioner asserts that Local Law 38 states that it applies to the first exam given in 2012. Petitioner argues that it is “inconceivable” that Local Law 38 does not also apply to the second exam given in 2016, which is the exam Petitioner “aged out” of by eight weeks. Petitioner contends that he was ineligible to take the exam prior to 2016 because it is required that he serve as an EMT for two

years before being eligible to take the Exam. Petitioner asserts that he was an EMT from 2012 to 2015 and the Exam was not offered within those three years. Petitioner argues that Local Law 38 was also intended to protect the group of exam takers in 2016 from aging out as a result of the hiring freeze.

In opposition, Respondents argue that Petitioner failed to join the FDNY or the City of New York as parties to the proceeding within the four-month statute of limitation pursuant to CPLR § 217(1), and therefore the proceeding should be dismissed. Respondents contend that the FDNY has a right to be heard and is constitutionally entitled to due process. Respondents argue that the statute of limitations began to run on August 23, 2018, when Respondents issued the Decision and it expired on December 23, 2018.

Respondents argue that even if the Court does not determine that the FDNY and the City of New York are necessary parties to the action, the Petition should be dismissed because Local Law 38 was correctly applied. Respondents contend that to be eligible to take the Exam, the applicant must not have reached his 29<sup>th</sup> birthday by the beginning of the application period. Respondents argue that Local Law 38 increases the maximum age for only two exams, “the first open competitive examination for firefighter, or the first promotion examination for firefighter... given after the effective date of this local law...”. *See* Local Law 38. Respondents assert that the first promotional examination and open competitive examination were in 2012. Respondents argue that the drafters’ intent and the plain language of Local Law 38 is clear that the Statute only applies to the first promotional examination and open competitive examination.

#### Legal Standard

“Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action.” *Dunne v Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v Franco*, 95 NY2d 550, 554 [2000]. One such question is “whether a 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 or discipline imposed.” *See* CPLR 7803 [3]. “[I]t is settled that in a proceeding seeking judicial review of administrative

action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious.” *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

Pursuant to Local Law 38, §1:

“[N]o person shall be disqualified from membership in the fire department on the basis of exceeding the otherwise applicable maximum age requirement for the first open competitive examination for firefighter, or the first promotion examination for firefighter in the case of persons eligible to take such examination, given after the effective date of this local law if he or she has not passed his or her thirty-sixth birthday on the date of filing his or her application for the first open competitive examination for firefighter, or the first promotion examination for firefighter in the case of persons eligible to take such examination, given after the effective date of this local law and he or she either (i) could not be appointed from an eligible list for the position of firefighter...established before the effective date of this local law because such list could not be used in whole or in part by the fire department due to litigation or (ii) took a civil service examination for the position of firefighter in the five year preceding the effective date of this local law.”

#### Discussion

Petitioner has failed to demonstrate that Respondents’ Decision was arbitrary and capricious. *Flacke*, 69 NY2d at 363. Respondents’ denial of Petitioner’s Appeal and disqualification of Petitioner’s promotion to FDNY Firefighter was rationally based on Local Law 38. Local Law 38 increases the maximum age to apply as a FDNY Firefighter, from 28 years old to 36 years old. Local Law 38 clearly states

that it applies to the first open competitive or promotional exam, which were both held in 2012. Petitioner took the second promotional examination after he reached his 29<sup>th</sup> birthday. Petitioner fails to meet his burden of demonstrating that the Respondents' denial of Petitioner's appeal and disqualification should be disturbed by the Court.

Wherefore, it is hereby,

ORDERED that Petitioner Charles J. McCloskey's Petition is denied; and its further

ORDERED that Respondents the City of New York Civil Service Commission and Nancy G. Chaffetz, as Chair and Commissioner of the City of New York Civil Service Commission's cross-motion to dismiss is granted and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 26, 2019



Eileen A. Rakower, J.S.C.