

Atwell v New York City Fire Dept.
2020 NY Slip Op 34353(U)
December 28, 2020
Supreme Court, New York County
Docket Number: 154978/2020
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMOND PART IAS MOTION 35EFM

Justice

-----X

JOHN P. ATWELL,

Petitioner,

- v -

NEW YORK CITY FIRE DEPARTMENT,
NEW YORK CITY DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES,
THE CITY OF NEW YORK,

Respondents.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 10, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner John P. Atwell (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for respondents shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner John P. Atwell (Atwell) seeks a judgment to overturn a final order of the respondent New York City Department of Citywide Administrative Services (DCAS) as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

Atwell is a applicant for employment at the New York City Fire Department (FDNY). *See* verified petition, ¶ 3. In 2017, Atwell took FDNY Exam No. 7001 and received a score of 99, which was enhanced by a five-point “residency credit” to a total score of 104. *Id.*, ¶ 8. However, the FDNY’s candidate investigation division (CID) subsequently determined that Atwell was not entitled to receive the residency credit because he submitted inadequate and/or improper documents to demonstrate that he was a resident of New York City during the required time period. *See* verified answer, ¶¶ 50-60. As a result, a member of the CID called Atwell on January 29, 2019 to inform him that his documentation was unacceptable and that his test score would be reduced. *See* verified petition, ¶ 10; exhibit C. Thereafter, the CID sent DCAS notifications dated April 11 and 25, 2019 to withdraw Atwell’s residency credit, and to recalculate his test score and his position on the FDNY’s waiting list for future employment. *Id.*, ¶ 13; exhibit E.

During January 2019, Atwell had unsuccessfully attempted to provide the CID with alternate proof of residency; however, the CID notified him via email that it rejected his documentation as improper. *See* verified petition, ¶¶ 11-23; exhibits C, D. After the CID sent the aforementioned notice to DCAS on April 11, 2019, Atwell emailed the FDNY’s CID deputy commissioner on May 15, 2019 to protest the decision not to accept his alternate proof of

residency. *Id.*, ¶ 14; exhibit F. On May 20, 2019, the CID deputy commissioner responded by email to reiterate the FDNY's support for the CID's decision. *Id.* On June 6, 2019, Atwell's counsel submitted a letter to the CID deputy commissioner requesting an appeal of its decision to reject his documentation and deny him the residency credit. *Id.*, ¶ 15; exhibit G. On July 15, 2019, the CID deputy commissioner sent Atwell's counsel a letter that again reaffirmed its determination. *Id.*, ¶ 17; exhibit S.

On August 6, 2019, DCAS sent Atwell a notification that it recalculated his test score to 99, and adjusted his number on the FDNY's waiting list. *See* verified petition, ¶ 18; exhibit T. On August 23, 2019, Atwell submitted an appeal of this action to DCAS's Committee on Manifest Error. *See* verified petition, ¶ 19; exhibit U. On April 16, 2020, the Committee on Manifest Error issued a letter decision that denied Atwell's appeal (the DCAS decision). *Id.*, ¶ 22; Exhibit W. The DCAS decision found as follows:

"This letter is in response to your letter to the Committee on Manifest Error seeking to appeal the determination by [DCAS] to withdraw the New York City Residency Credit John P. Atwell received on Exam No. 7001 for Firefighter. Mr. Atwell received the residency credit subject to investigation by the Fire Department. DCAS withdrew the credit and issued a revised Notice of Result dated August 6, 2019, based on the result of the Fire Department's investigation. As a result of the withdrawal of the residency credit, Mr. Atwell's list number changed from 552 to 5594.5. Mr. Atwell's score on the competitive Computer-Based Test ("CBT") did not change.

"Although the revised Notice of Result stated that Mr. Atwell was entitled to appeal if he believed the exam was scored incorrectly, it specified that such an appeal would only result in the CBT being rescored. The appeal submitted is not seeking the rescoring of the CBT, but rather the restoration of residency credit. However, the withdrawal of residency credit is not an action that is appealable to DCAS. If you have not done so already, you may email CID@fdny.nyc.gov and request a review by a Fire Department supervising investigator."

Id.; exhibit W.

Atwell subsequently commenced this Article 78 proceeding on July 3, 2020. *See* verified petition. Respondents filed an answer on October 13, 2020. *See* verified answer. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

The first portion of DCAS's brief argues that Atwell's Article 78 petition actually asserts challenges to two separate, final agency determinations, rather than one, and that the petition is untimely as to the first determination. *See* respondents' mem of law at 4-5. DCAS specifically identifies: 1) the CID deputy commissioner's July 15, 2019 letter decision that rejected Atwell's appeal of the FDNY's denial of his application for a residency credit; and 2) DCAS's April 16, 2020 decision rejecting his appeal to the August 6, 2019 notice changing his test score. *Id.*; verified petition, exhibits S, W. DCAS notes that its April 16, 2020 decision informed Atwell that he should direct any request for an appeal of the residency credit denial to the FDNY because "the withdrawal of residency credit is not an action that is appealable to DCAS." *Id.*, exhibit W. DCAS then concludes that Atwell's Article 78 petition is untimely as to the FDNY's residency credit determination, which was rendered final on July 15, 2019, because Atwell filed the petition on July 3, 2020, nearly a year later and well past the four-month limitations period proscribed in CPLR 217 (1). *See* respondents' mem of law at 4-5. After reviewing the available precedent, the court agrees.

The Court of Appeals' seminal decision in *Matter of Altamore v Barrios-Paoli* (90 NY2d 378 [1997]), which upheld the constitutionality of residency credits, identified Civil Service Law (CSL) § 23 (4-a) as the State Legislature's grant of statutory authority for the practice. 90 NY2d at 386-387. The relevant portion of CSL § 23 (4-a) provides that "[a]n appointing authority of a department or agency of a city . . . may require that eligibles who are residents of such city . . . shall be certified first for appointment . . ." Clearly, the FDNY is a "department or agency" of the City, and its commissioner is its "appointing authority." Relevant to this case is the notice of examination (NOA), dated May 31, 2017, which DCAS issued regarding FDNY Exam No. 7001.

See verified answer, exhibit 1. That NOA specifically provided that “[e]ligibility for the New York City Residency Credit will be investigated and verified by the FDNY,” and that “[i]nability to produce the required verification of residency documents will result in the forfeiture of the New York City Residency Credit and an adjustment in the final score.” *Id.* at 3. The NOA specified the four types of supporting documentation that the FDNY would consider, which included: 1) an NYC public high school diploma; 2) a GED certificate that indicated partial attendance at an NYC public high school; 3) NYC tax records; and/or 4) NYC HRA benefits records. *Id.* at 4. Regarding tax records, the NOA particularly specified that “[t]he FDNY will not accept amended returns, worksheets, self-generated returns, or any other document that is not an official photocopy of a New York State tax return.” *Id.* The court finds that the rules specified in the NOA constitute a regulatory framework designed to effectuate the FDNY’s statutory authority to grant residency credits to its applicants. There is no doubt that the FDNY is the final arbiter of whether or not to grant a residency credit to any such applicant. CSL § 23 (4-a) plainly reserves residency credit decisions to “the appointing authority of a [City] department,” rather than to DCAS generally. As a result, DCAS plays no part in such determinations.

Turning to the facts of this case, the various correspondences between Atwell and the CID disclose that the FDNY disapproved Atwell’s residency credit application because it found that his supporting documentation was inadequate. *See* Verified petition, exhibits C, D; verified answer, exhibits 4-6. Specifically, Atwell submitted an amended tax return to demonstrate his NYC residency, but the CID rejected it pursuant to the rule set forth in the NOA that “[t]he FDNY will not accept amended returns.” *Id.*, verified answer, exhibit 1. The CID’s June 15, 2019 letter to Atwell’s counsel is plainly the FDNY’s “final agency determination” on the issue

of the residency credit. The Appellate Division, First Department, holds that “[a] ‘final and binding’ determination is one where the agency ‘reached a definitive position on the issue that inflicts actual, concrete injury,’ and the injury may not be ‘significantly ameliorated by further administrative action or by steps available to the complaining party.’” *Matter of Center for Discovery, Inc. v NYC Dept. of Educ.*, 162 AD3d 83, 86 (1st Dept 2018), quoting *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 (2007). The June 15, 2019 letter expressed the CID’s “definitive position” on the issue of the residency credit and inflicted “actual concrete injury” on Atwell via the deputy commissioner’s denial of Atwell’s application for it. It did not specify any “further administrative action” that Atwell might take at the FDNY, and he was mistaken to believe that he could seek redress from DCAS.

Because the June 15, 2019 CID letter constituted the FDNY’s “final and binding determination” on the decision to deny Atwell’s application for a residency credit, his right to seek review of that determination under CPLR Article 78 was subject to the four-month statute of limitations contained in CPLR 217 (1). However, because Atwell did not commence this proceeding until nearly one year after the FDNY issued that letter, his petition is clearly untimely. Even if the court were to consider the merits of Atwell’s petition, however, it would still find them wanting.

The court’s role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether the agency’s determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is “without

sound basis in reason, and in disregard of the . . . facts . . .” *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell*, 34 NY2d at 231. However, if there is a rational basis for the determination, there can be no judicial interference. *Matter of Pell*, 34 NY2d at 231-232. Here, there was plainly a “rational basis” for the CID’s decision to deny Atwell’s application for a residency credit, since the evidence in the administrative record regarding Atwell’s alleged NYC residency only included his amended tax return. As noted earlier, the rules set forth in the NOA plainly provided that the FDNY would not consider amended tax returns as proof of residency. *See* verified answer, exhibit 1. Therefore, the court concludes that the CID’s decision to deny Atwell’s application for a residency credit on his FDNY examination was not arbitrary and capricious. For all of the foregoing reasons, the court denies so much of Atwell’s Article 78 petition as pertained to the FDNY’s denial decision.

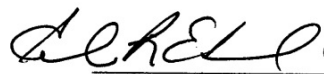
The court also makes the same finding and determination with respect to Atwell’s Article 78 petition as it pertained to DCAS’s April 16, 2020 decision. There was plainly a rational basis for DCAS’s decision to reduce Atwell’s test score and recalculate his place on the FDNY’s waiting list because the administrative record before DCAS included the FDNY’s April 11 and 25, 2019 notifications that Atwell was not entitled to a residency credit. *See* verified petition, exhibit E. Therefore, DCAS’s decision to do so was plainly not an arbitrary and capricious ruling. The arguments to the contrary that Atwell raised in his reply papers are all misplaced, because they presume that DCAS had the authority to review the FDNY’s decision to deny him a residency credit. *See* petitioner’s reply mem at 8-17. It did not, and the court, therefore, rejects Atwell’s arguments. Accordingly, the court finds that Atwell’s Article 78 petition should be denied in full, and that this proceeding should be dismissed.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner John P. Atwell (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for respondents shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.


HON. CAROL R. EDMEAD
 J.S.C.
 J.S.C.

<u>12/28/2020</u>		<u>CAROL R. EDMEAD, J.S.C.</u>	
DATE			
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED ☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE