

**Matter of Dobrowsky v Kelly**

2011 NY Slip Op 31031(U)

April 19, 2011

Sup Ct, NY County

Docket Number: 113218/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 113218/2010

DOBROWSKY, FRANK

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

CAL # 38

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for petition + dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2, 3, 4

5, 6

7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/19/11

BARBARA JAFFE J.S.C.

APR 19 2011

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X  
In the Matter of the Application of FRANK DOBROWSKY,  
N.Y.C.P.D. Ret.

Index No. 113218/10

Petitioner,

Motion Date: 2/15/11  
Motion Seq. No.: 001

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

**DECISION & JUDGMENT**

-against-

RAYMOND KELLY, Police Commissioner of the  
City of New York,

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

Respondent.

-----X  
BARBARA JAFFE, JSC:

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By notice of petition and verified petition dated October 4, 2010, petitioner brings this Article 78 proceeding seeking an order annulling and reversing respondent's refusal to issue him a "good guy" letter or conduct a hearing related to his retirement status and directing respondent to issue the letter or conduct the hearing. Respondent opposes the petition and, by notice of cross motion dated December 16, 2010, moves pre-answer for an order dismissing the petition on the grounds that the proceeding is time-barred and fails to state a cause of action.

I. FACTUAL BACKGROUND

Effective on February 28, 2010, petitioner, a detective employed by the New York City

Police Department (NYPD), retired from the NYPD. (Verified Petition, dated Oct. 4, 2010 [Pet.], Exh. B). Prior to his retirement, petitioner had applied for a Retired Law Enforcement pistol license, which required him to obtain from the NYPD a “Pistol License Inquiry Response,” otherwise known as a “good guy” letter, in which the NYPD must verify that the applicant: (1) has no record of mental illness and is presently authorized to carry firearms; (2) is not presently under investigation which would preclude the issuance of a pistol license; and (3) has no disciplinary action pending. (*Id.*). On December 23, 2009, the NYPD provided petitioner with a good guy letter. (*Id.*).

Petitioner subsequently returned to work for the NYPD. (*Id.*). On May 9, 2010, after a domestic dispute with his wife, he was found unfit for duty, and on May 10, 2010 was placed on modified duty and prohibited from carrying firearms. (Affidavit of Adam Collyer, ACC, dated December 17, 2010, Exhs. A, B). On June 12, 2010, petitioner retired from the NYPD on modified duty status. (Pet.; Affirmation of Jerold E. Levine, Esq., dated Jan. 14, 2011 [Levine Aff.]).

By letter dated October 2, 2010, petitioner’s attorney requested that respondent issue him a new good guy letter or conduct a hearing to change his duty status as of his retirement date to permit him to be eligible for a good guy letter. (Pet., Exh. A). By letters dated October 14, 2010 and October 22, 2010, respondent advised petitioner that as he was on less than full duty status and unable to possess firearms at the time of his retirement, it would not issue him a good guy letter, and that once an NYPD employee has retired, his status cannot be changed and there is no procedure or right to a post-retirement hearing. (Levine Aff., Exh. A).

## II. CONTENTIONS

Petitioner argues that respondent's refusal to grant his request for a good guy letter or a hearing as to his retirement status is unreasonable, arbitrary and capricious, and an abuse of discretion. He concedes, however, that respondent has a policy of refusing to issue a good guy letter when an officer has retired on less than full duty status. (Pet.).

Respondent contends that petitioner is really seeking a review of the NYPD's May 9, 2010 decision to place him on modified duty, as the denial of a good guy letter is an incidental effect of that decision, and that petitioner's time to commence the instant proceeding expired four months after the May 2010 decision and is thus time-barred. Respondent also denies that petitioner has a right to a post-retirement hearing as to his status. (Respondent's Memo. of Law, dated Dec. 16, 2010).

In opposition to respondent's motion, petitioner denies that the proceeding is time-barred as respondent denied his request in October 2010 and the applicable date for challenging respondent's refusal to issue a good guy letter is the date of his retirement in June 2010, within four months of this proceeding, and that he has stated a claim that respondent's denial of his request was unreasonable and the result of disparate treatment. (Memo. of Law, dated Jan. 14, 2011).

In reply, respondent contends that the May 2010 decision to place petitioner on modified duty is the final determination by which petitioner was aggrieved, that petitioner cannot show that respondent treated him differently inasmuch as he concedes that NYPD officers who retire with less than full duty status are not issued good guy letters, and that petitioner did not challenge his placement to modified duty status before he retired and thus waived any right to a hearing.

(Reply Memo. of Law, dated Jan. 31, 2011).

### III. ANALYSIS

Pursuant to CPLR 217(1), any proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner. The determination becomes final and binding when the petition has been aggrieved by it. (*Yarbough v Franco*, 95 NY2d 342 [2000]).

Here, respondent's decision to place petitioner on modified duty was final on May 10, 2010, and as the ultimate relief petitioner seeks is a review and modification of his status, he became aggrieved by the decision on that date. Consequently, his application for a hearing is time-barred. (*See eg Rocco v Kelly*, 20 AD3d 364 [1<sup>st</sup> Dept 2005] [petitioner's demotion became final and binding on date it became effective as he was aggrieved from moment his rank was reduced]). Similarly, absent any dispute that petitioner's eligibility for a good guy letter depends on whether he retired on full duty status, it is incidental to petitioner's request to change his retirement status and is thus also time-barred.

Moreover, petitioner took no action to change his status or obtain a good guy letter before retiring, and thus waived any right to the letter or a hearing. (*See eg Laier v McGuire*, 111 AD2d 43 [1<sup>st</sup> Dept 1985], *aff'd* 65 NY2d 904 [once petitioner retired from service, he had no right to issuance of certificate permitting him to carry firearms as his firearms privileges had been revoked while in service and had not been restored at time of retirement, and petitioner took no action to obtain certificate prior to retirement]; *see also Giraldez v Bratton*, 215 AD2d 210 [1<sup>st</sup> Dept 1995] [noting that it was petitioner's decision to retire that prevented hearing on charges underlying NYPD's withdrawal of his firearms privileges while he was still employed]).

And as petitioner concedes that only NYPD officers who retire on full duty are eligible for a good guy letter, he has not demonstrated that respondent's denial of his request for a good guy letter was unreasonable, arbitrary or capricious, or an abuse of discretion. (*See Giraldez*, 215 AD2d at 210 [denial of license not arbitrary and capricious as it was NYPD policy and practice to deny license application if applicant retired without firearms privileges as petitioner had done]).

Petitioner also failed to establish any right to a hearing here and thus has not shown that respondent's denial of his request for a hearing was unreasonable, arbitrary or capricious, or an abuse of discretion. Nor has petitioner set forth or demonstrated how he was treated differently from other retired NYPD officers absent any allegation that other officers who retired on less than full duty status were given good guy letters or granted post-retirement hearings.

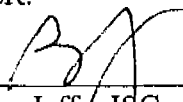
#### IV. CONCLUSION

Accordingly, is it hereby

ADJUDGED and ORDERED, that the petition is denied and respondent's cross motion to dismiss is granted, and it is further

ADJUDGED and ORDERED, that the proceeding is dismissed.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
JSC.

DATED: April 19, 2011  
New York, New York

APR 19 2011

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