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

**CAROL E. HUFF**

Index Number : 100043/2014

PART 32

O'BRIEN, EDWARD

vs

NYC CIVIL SERVICE COMMISSION

Sequence Number : 001

ARTICLE 78

INDEX NO. ____________

MOTION DATE ____________

MOTION SEQ. NO. ____________

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

**The following papers, numbered 1 to ____, were read on this motion to/for ____________**

| | |
|---|---|
| **Notice of Motion/Order to Show Cause — Affidavits — Exhibits** ____________ | **No(s).** ____________ |
| **Answering Affidavits — Exhibits** ____________ | **No(s).** ____________ |
| **Replying Affidavits** ____________ | **No(s).** ____________ |

**Upon the foregoing papers, it is ordered that this**

Motion is decided in accordance
with accompanying memorandum decision

Dated: OCT 24 2014

____________, J.S.C.

1. CHECK ONE: .................... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..........MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .................... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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In the Matter of the Application of : Index No. 100043/14
EDWARD O'BRIEN,

Petitioner, :

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

- against - :

NEW YORK CITY CIVIL SERVICE COMMISSION :
and NEW YORK CITY POLICE DEPARTMENT,

Respondents. :

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CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner seeks to annul the determination of respondent New York City Civil Service Commission ("CSC"), dated September 10, 2013, confirming the decision of respondent New York City Police Department ("NYPD"), dated October 22, 2012, which found petitioner medically disqualified from appointment as a NYPD police officer.

Initially, respondents contend that the service of the petition was jurisdictionally defective and that the proceeding is time-barred. However, petitioner's late service of an accompanying supporting affirmation is not jurisdictionally fatal. See CPLR 7804(d): "There shall be a verified petition, which may be accompanied by affidavits . . ." (emphasis added). The affirmation was served upon respondents more than a month before the return date, and no prejudice resulted from the failure to serve it with the petition. Further, the proceeding was commenced within four months of the CSC determination (see CPLR 217[1]), which was the final administrative

determination in this matter.

Petitioner was disqualified from appointment as a police officer because he has a history of multiple sclerosis (MS). In his application papers petitioner fully disclosed this fact, and reported that his condition is of the relapsing-remitting type rather than the progressive form of the disease. Petitioner's treating neurologist advised CSC that petitioner "had complete control of his illness with intravenous Tysabri infusions. He has no residual or active physical or cognitive disability related to his multiple sclerosis. . . . he should be able to participate in all activities including stressful situations." Mark Gudesblatt, MD, letter dated December 31, 2012, Petition Ex. C.

NYPD did not physically examine petitioner, but their physician Eli J. Kleinman, MD, a surgeon, reviewed his medical records, which cited anxiety and fatigue in a "problem list." In his letter dated May 21, 2013, (Petition Ex. E) Dr. Kleinman states that the disqualification was because of petitioner's MS, "which would be aggravated by the stress and poor sleep inherent in the position."

In his letter to CSC on the appeal, Dr. Kleinman reported that an NYPD neurologist had examined petitioner's records ( NYPD's initial disqualification decision) and had concluded: "I find him to be medically disqualified for the position of police officer due to the fact that he has epilepsy-remitting multiple sclerosis. This is an inflammatory disease that is likely to cause progressive disability over time. Though he reportedly has a normal neurologic exam at present, there is magnificent plaque burden and he failed interferon therapy. He is now being tested with tyfavry – a powerful immunosuppressant." Id.

Although some of the errors in this passage are transcription errors (ie., epilepsy,

magnificent, tyfavry), they appeared this way in Dr. Kleinman's report to the CSC, and some errors are still true to the original. Nowhere does the record indicate that petitioner had "failed" interferon therapy, and he is being successfully treated, not "tested," with Tysabri.

The only record support respondents point to in justifying their assertion that petitioner would be unable to perform the duties of a police officer was in Dr. Gudesblatt's inclusion of stress and fatigue on a medical report "problem list." In his December 2012 letter Dr. Gudesblatt discounted these factors as relevant to petitioner's prospective employment, and respondents offer no rationale to contradict his opinion.

Respondents' experts' conclusions as to the future course of the condition are completely unsupported. Petitioner's counsel has cited numerous references to medical literature indicating that a diagnosis of relapsing-remitting MS is not a predictor of its course in a particular individual, many of whom go on to lead lives essentially unaffected by disability. See Rachel J. Minter 3/21/14 Aff., Ex. D. Respondents object that these publications were not submitted to CSC, but presumably a diligent neurologist assessing an MS patient would have knowledge of them.

In Matter of State Div. of Human Rights (Granelle), 70 NY2d 100, 103 (1987) the Court of Appeals considered the appeal of a police officer candidate who was rejected because of a "presently asymptomatic back condition. . . ." The City argued, without record support, that there was "a reasonable expectation that Granelle would be unable to reasonably perform such duties in the future." Id. at 107. The Court reversed his disqualification, finding: "Employment may not be denied based on speculation and mere possibilities, especially when such determination is premised solely on the fact of an applicant's inclusion in a class of persons with

a particular disability rather than upon an individualized assessment of the specific individual."

The determination upholding petitioner's disqualification will be upheld unless it is shown that the determination "was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The test is whether the determination is "without sound basis in reason and is generally taken without regard to the facts." Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974). An administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), aff'd 11 NY3d 859 (2008).

Here, respondents cannot be said to have made their determination with accurate regard to the facts, or to have acted pursuant to any particular, informed special expertise. After failing to examine petitioner themselves, their conclusory rationales for disqualifying petitioner are insufficient to sustain the determination.

Accordingly, it is

ADJUDGED that the petition is granted and the matter is remanded to NYPD for a de novo determination.

Dated: OCT 24 2014

J.S.C.