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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL G. FEINMAN** PART 12

Justice

Index Number : 103363/2011
BIRNEY, LOUIS LEONARD
VS.
NYC DEPT. OF HLTH & MENTAL
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 103363/11
MOTION DATE
MOTION SEQ. NO. 001

motion to/for
No(s).
No(s).
No(s).

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

PETITION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.

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).

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

Dated: 3/16/2012

, 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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART 12

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In the Matter of LOUIS LEONARD BIRNEY,
Petitioner,

Index Number 103363/2011
Mot. Seq. No. 001

-against-

NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
Respondent.

DECISION, ORDER AND JUDGMENT

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Papers considered in review of this petition to vacate:

Papers	Numbered
Notice of Petition, Ver. Petition, Exhibits	1
Ver. Answer, Exhibits, Memo of Law	2, 3
Pet. Memo of Law in Reply	4

PAUL G. FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks, pursuant to CPLR 7803 (1), an order compelling respondent to produce an amended birth certificate. He also seeks reasonable attorney's fees. Respondent's verified answer opposes and seeks dismissal of the petition. For the reasons which follow, the petition is granted to the extent that it is remanded to the respondent agency for reconsideration in accordance with this decision.

[1]The attorneys' letters dated and sent after the motion was marked submitted have not been considered.

Petitioner seeks an amended birth certificate to reflect his correct name and gender.[2] Petitioner states he is a "transgender male who has undergone convertive surgery" (Ver. Pet. ¶ 2).[3] Respondent is the New York City department charged, among other duties, with supervision and control of the registration of births and deaths (Ver. Ans. ¶ 47, citing section 556 of NYC Charter). At issue is the New York City Health Code provision that a new birth certificate "shall be filed" when

> (5) The name of the person has been changed pursuant to court order and proof satisfactory to the Department has been submitted that such person has undergone convertive surgery.

24 RCNY 207.05 (a).

According to the verified petition, on April 1, 2010, petitioner submitted an application to

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[2]"Gender identity," according to the New York City Human Rights Commission's "GUIDELINES REGARDING GENDER IDENTITY DISCRIMINATION (2004, p. 2), "is an individual's sense of being either male or female, man or woman, or something other or in-between. Gender expression describes the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions." (*See* http://www.nyc.gov/cchr under "Publications," Guidelines: Gender Identity Discrimination). The New York City Human Rights Law provides:

> "The term 'gender' shall include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth."

NYC Administrative Code § 8-102 (23).

[3]The term "transgender," according to the New York City Human Rights Commission's GUIDELINES REGARDING GENDER IDENTITY DISCRIMINATION (2004, pp. 2-3) is "an umbrella term that includes anyone whose gender identity and/or gender expression does not match society's expectations of how an individual who was assigned a particular sex at birth should behave in relation to their gender. The term includes, but is not limited to: pre-operative, post-operative and non-operative transsexuals who may or may not use hormones. (*See* http://www.nyc.gov/cchr under"Publications," Guidelines: Gender Identify Discrimination).

The Gay & Lesbian Alliance Against Defamation (GLAAD), an organization dedicated to fighting homophobia and discrimination in the media, provides a Transgender Glossary of Terms" as part of its online Media Reference Guide" (*See* www.glaad.org/reference/transgender). GLAAD states that the term "transgender" "may include but is not limited to: transsexuals, cross-dressers and other gender-variant people. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF). . . Transgender people may or may not decide to alter their bodies hormonally and/or surgically."

the New York City Department of Health and Mental Hygiene (DHMH) to amend his birth certificate (Pet. ¶ 6; ex. A). He completed a "Birth Certificate Correction Application Form" which, among other pieces of information, asked for the number of the Birth Certificate at issue and its information, and provided space for him to indicate what is"wrong" with what the Certificate says, and what it "should" say (Mot. ex. A). Petitioner indicated that his first and middle name, and his gender, are incorrect. Specifically, his birth name, Luella Lillian Birney, and gender, female, should be corrected to read Louis Leonard Birney and male.

Petitioner's application was accompanied by: copies of his original Certificate of Birth issued by Wyckoff Heights Hospital, Brooklyn, New York; the Order issued by Supreme Court, Kings County on November 10, 2009 authorizing petitioner to assume the name Louis Leonard Birney "upon complying with the provision of Article 6 of the Civil Rights Law and this Order," and publication of a notice[4]; and a certified letter from Toby R. Meltzer, M.D., dated March 1, 2010, stating that Dr. Meltzer had "performed Female to Male Gender Reassignment Surgery" on petitioner on May 12, 2009, that the "surgery was performed and successfully completed" at the Greenbaum Surgery Center Scottsdale Healthcare Osborne, in Scottsdale, Arizona, in compliance with The World Professional Association for Transgender Health (WPATH), and that petitioner "is now a fully functioning male" (Ver. Pet. ex. A).

By "memorandum" dated July 6, 2010, signed by respondent's Director of Corrections and Amendments Unit, respondent indicated that in order for an amended birth certificate to be placed on file in its Office of Vital Records, petitioner should return his application with

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[4]The Order expressly provided that it was not to be used as "evidence that the gender of the petitioner has been changed from female to male." (*Id.*).

particular "missing items" (Ver. Pet. ex. B). Specifically, the Department requested a "[d]etailed Surgical Operative record including the date of surgery"; "[c]onvertive Surgery (if apply to you)"; pre- and post- operative psychiatric evaluations signed by a psychiatrist or clinical psychologist, and a "[c]opy of your current valid photo identification" (Ver. Pet. ex. B). The request for the pre-operative evaluation was hand-written (*id.*).

Petitioner responded through his attorney by letter of September 23, 2010 (Ver. Pet. ex. C). His attorney contended that the application materials previously submitted sufficiently comply with the requirements set forth in the New York City Health Code (24 RCNY § 207.05). In particular, Dr. Meltzer's certified letter stating that female to male reassignment surgery was successfully performed in compliance with WPATH standards, and that petitioner "is now a fully functional male" is, according to petitioner's counsel, sufficient under the Board of Health Rule to prove that he has undergone convertive surgery (Ver. Pet. ex. C). Counsel therefore resubmitted petitioner's application and materials, along with a copy of his New York State Identification Card, requested that respondent issue the corrected Certificate of Birth, and indicated that petitioner would commence a summary proceeding should respondent fail to issue the Certificate (Ver. Pet. ex. C).

Respondent's Director of Corrections and Amendments Unit mailed to petitioner at his home address, rather than to his attorney's office, a second "memorandum" communication, dated November 1, 2010 (Ver. Pet. ex. D). It did not directly respond to the attorney's letter but set forth a revised list of forms and documents that were necessary for petitioner to provide, specifically information concerning the "reconstruction procedure," a post-operative examination by a physician attesting that a surgical change of gender had taken place, and a post-operative

psychiatric evaluation (Ver. Pet. ex. D).[5]

Petitioner commenced this Article 78 proceeding on March 18, 2011. He seeks a judgment ordering the DHMH to provide him a corrected Certificate of Birth, arguing that the DHMH's requirements violate his statutory rights and illegally impose an "extra-statutory legal burden" on him and on other transgender individuals (Ver. Pet. ¶¶ 12-13). He argues that Dr. Meltzer's certified letter fully complies with the provision under the New York City Health Code requiring submission of satisfactory proof that the applicant has undergone convertive surgery in order for a new Birth Certificate to be filed, and that the higher burden of proof demanded by DHMH violates the New York City Human Rights Law which prohibits discrimination on the basis of gender (Ver. Pet. ¶¶ 15-21). He also argues that respondent's request for surgical and psychiatric records is an invasion of his medical privacy (Ver. Pet. ¶¶ 22-27). In addition, he argues that respondent's requirements are disproportionately burdensome when compared with the requirements imposed by agencies of the State and federal governments pertaining to emendation of other documents to reflect correct gender (Ver. Pet. ¶¶ 28 -37).

Respondent's answer seeks dismissal of the petition on several grounds. It argues first that any claim that its actions are arbitrary and capricious is time-barred. In addition, it argues that as the New York City Health Code provides that the DHMH shall determine what proof is necessary to establish that an individual has underdone convertive surgery (24 RCNY 207 [a] [5]), it is rational and reasonable to require applicants who seek to alter their birth certificates as to their sex to provide documentary proof that they have permanently transitioned to a different

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[5]According to respondent's attorney, the instruction letter was redrafted because it was not sufficiently clear, and the second letter "specifies exactly" what is required from any applicant seeking to correct a birth certificate based on completion of convertive surgery (Transcript of Oral Argument, hereinafter "Tr." at p. 22).

sex, and reasonable to require petitioner in this instance to provide more than a doctor's letter. Respondent contends that it has a substantial interest in requiring disclosure of the pertinent medical records so that it can ensure the accuracy of birth certificates, which are vital records. It further argues that petitioner cannot assert a right to privacy with regard to his medical records where he affirmatively seeks relief related to his medical condition, and states that in any event the information is not disseminated to the public.[6] It also argues that it does not violate the Human Rights Law (NYC Administrative Code § 8-107 [4] [a]), which prohibits discrimination based on gender, among other protected classes, in matters of public accommodation, in part because issuing a birth certificate does not fall under what is meant by "public accommodation." It argues as well that because birth certificates categorize based on persons' genitalia, i.e., their biological sex, the DHMH will only change the description on a birth certificate if the applicant establishes he or she has the genitalia that corresponds to the requested designation on the birth certificate. Furthermore, classification based on biological sex, respondent notes, has been found nondiscriminatory in *Hispanic AIDS Forum v Estate of Bruno (*16 AD3d 294, 298-299 (1st Dept 2005), which found no violation of the Human Rights Law as to gender where a restriction, such as for public restrooms, is based on biological sex rather than an individual's biological self-image. Respondent contends there also can be no claim of a violation of equal protection, because a transgender person seeking to change the Birth Certificate's designation of sex is not

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[6]Under the Health Code,

> "(b) When a new birth certificate is filed pursuant to this section [allowing change of sex based on proof of convertive surgery], the original birth certificate, the application for a new birth certificate and supporting documents shall be placed under physical or electronic seal, and such seal shall not be broken except by order of a court of competent jurisdiction."

24 RCNY 207.05 (b).

similarly situated to a person seeking to correct a ministerial error as to their sex created by the hospital at birth.

Respondent also argues that the claim seeking mandamus to compel must fail because issuing a corrected birth certificate is a discretionary rather than ministerial act by the Department, over which the court has no jurisdiction. Finally, it argues that petitioner is not entitled to attorney's fees as the damages are not incidental to the primary relief sought.

Analysis

It is a well-settled rule that judicial review of administrative determinations brought pursuant to Article 78 of the CPLR is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The decision of an administrative agency is entitled to deference by the courts (*see, Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008] ["construction given statutes and regulations by the agency responsible for their administration, 'if not irrational or unreasonable,' should be upheld (*see Chesterfield Assoc. v N.Y. State Dept. of Labor,* 4 NY3d 597, 604, 830 N.E. 2d 287, 797 N.Y.S.2d 389 [2005])]"). Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). The court may only decide if the agency's determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of N.Y.*, 98 AD2d 635, 636 [1st Dept 1983]). The test of whether a decision is arbitrary or capricious is "'determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" (*Matter of Pell v Board of Educ.*, 34 NY2d

222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). Once the court finds a rational basis exists for the determination, its review is ended (*Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]).

An Article 78 proceeding against a public body may be commenced only when a matter has been finally determined (CPLR 7801[1]). CPLR 217 (1) provides that an Article 78 proceeding must be commenced within four months of the date of the final determination (*Carter v State of New York*, 95 NY2d 267, 270 [2000]). An agency determination is deemed final "when the petitioner is aggrieved by the determination" (*Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). If there is further administrative action that could be taken to prevent or ameliorate the harm, then commencement of an Article 78 proceeding would be premature (*see, Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520 [1986], *cert denied* 479 U.S. 985 [1986]).

Respondent's threshold argument that petitioner is time-barred from commencing this special proceeding is without merit. Respondent's memorandum/letter of July 6, 2010 requested that petitioner "return [his] application" with particular "missing" documents. This cannot be held to be the Department's final determination. Petitioner's attorney's letter of September 23, 2010 resubmitted the same application, although this time with a photo identification, and indicated that if respondent failed to accept the application as submitted, an Article 78 proceeding would be commenced. In response, respondent's November 1, 2010 memorandum/letter listed particular items that were required in order to have his birth certificate amended. It was from the receipt of this letter that petitioner was on notice that his application had been denied. Petitioner includes a copy of the mailing envelope in which respondent's

November 1, 2010 communication was mailed directly to petitioner; this envelope was postmarked on November 16, 2010 (Ver. Pet. ex. D). Allowing five days for receipt of the mailing (CPLR 2103 [b] [2]), the statute of limitations did not begin to run until November 21, 2010.[7] Petitioner therefore timely commenced the summary proceeding by filing his notice of petition and petition on March 18, 2011.

The crux of the parties' contentions is whether respondent has acted arbitrarily and capriciously in its response to petitioner's application. Because the legal understanding of transgender persons is evolving in response to scientific and psychological developments, as well as in response to advocacy organizations' efforts to secure full inclusion of transgender persons into our society without discrimination, it is helpful to summarize the history of the pertinent Health Code provision.

Section 556 (c) (1) of the New York City Charter grants the New York City Department of Health and Mental Hygiene the jurisdiction to supervise and control the registration of births in New York City. Pursuant to Section 558 (c) of the Charter, the New York City Board of Health, through the Health Code, regulates the means of registering births, and of filing, maintaining, changing and altering birth certificates. Section 558 (b), (c), and (g) of the Charter empowers the Board of Health to add to, alter, amend or repeal any part of the Health Code.

Article 207 of the Health Code provides for the correction and amendment of birth certificates. Prior to 1965, the Health Code did not specifically permit birth certificates to be amended to provide for a change of sex in cases of individuals who underwent convertive

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[7]If respondent had mailed to document to petitioner's attorney, the running of the statute of limitations would have commenced as of the date of mailing, i.e., November 16, 2010 (CPLR 2103 [b] [2]).

surgery, although this may have occurred on occasion (*see Matter of Anonymous v Weiner*, 50 Misc 2d 380, 385 [Sup Ct, NY County 1966]). In 1965, in response to an application by one such individual for the issuance of a new birth certificate, the Board of Health requested that the New York Academy of Medicine study the issue of changing birth certificates of "transsexuals," i.e., transgender individuals who have undergone surgery to assume the physical body of the other sex (*id.* at 381-382).[8] A committee of the New York Academy of Medicine issued a report in October 1965, concluding that "male-to-female transsexuals are still chromosomally males while ostensibly females," finding it "questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaptation," opposing a change of sex on birth certificates of transsexuals, and that "the desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud" (*id.* at 382; *see also Matter of Hartin v Director of Bur. of Records & Statistics, Dept. of Health of City of N.Y.*, 75 Misc 2d 229, 231 [Sup Ct, NY County 1973]). Relying on the report of the New York Academy of Medicine, the Board of Health then passed a resolution "'that the Health Code not be amended to provide for a change of sex on birth certificates in cases of transsexuals.'" (*Weiner*, 50 Misc 2d at 383; *Matter of Hartin*, at 231).

In 1971, however, the Board of Health amended the Health Code to add section 207.05 (a) (5), which provides that a new birth certificate can be filed when "[t]he name of the person

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[8] *Weiner* and other earlier decisions used the term "transsexual" to mean those individuals who have undergone convertive surgery. This decision employs the term "transgender" in deference to petitioner's self-description and in cognizance of the explanation set forth in the GLAAD Media Reference Guide - Transgender Glossary of Terms, that "transsexual" is an "older term which originated in the medical and psychological communities," and that many transgender people do not identify as transsexual. (*See* www.glaad.org/reference/transgender.)

has been changed pursuant to court order and proof satisfactory to the Department has been submitted that such person has undergone convertive surgery." Under this provision, the DHMH began to issue to "transsexual" applicants, new birth certificates which reflected a new name, but omitted any designation of sex, that is, the section of the birth certificate that identified the person's sex was left blank (*see, e.g. Matter of Hartin*, 75 Misc 2d at 231-232). The Department's refusal to designate a sex on new birth certificates issued to transsexuals was upheld against legal challenges, in part based on deference to the expertise of the Board of Health and the findings in the 1965 report of the New York Academy of Medicine, even while courts recognized that at least some findings of the 1965 report were questionable (*see Anonymous v Mellon*, 91 Misc 2d 375, 378-379 [Sup Ct, NY County 1977]; *Matter of Hartin*, 75 Misc 2d at 231; *see generally* Wenstrom, Comment, *What the Birth Certificate Shows: An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 Law & Sex. 131, 136-142 [2008]). The Department's policy of omitting any identification of sex on new birth certificates issued to transgender individuals remained in place until late 2006.

In 2006, after several years of discussion and in response to concerns raised by advocates for the transgender community, the DHMH drafted a recommendation that people born in the city should be allowed to "change the documented sex on their birth certificates by providing affidavits from a doctor and a mental health professional laying out why their patients should be considered members of the opposite sex, and asserting that their proposed change would be permanent" (www.nytimes.com/2006/11/07/nyregion/07gender.html?scp, Damien Cave,"New York Plans to Make Gender Personal Choice," New York Times, Nov. 7, 2006).

Based on the committee's recommendations, the Board of Health, in about October 2006,

proposed an amendment to the Health Code that would have repealed section 207.05 (a) (5), and added a new section permitting the sex designated on a birth certificate to be changed based on affidavits from a doctor and a mental health professional, but without requiring proof of convertive surgery. The new provision would have required affidavits from medical doctors and mental health professionals that an applicant had completed the transition from one gender to another and intended to permanently remain in such acquired gender. (*Id.; see also* www.nytimes.com/2006/nyregion/06gender.html?scp, Damien Cave, *City Drops Plan to Change Definition of Gender*, New York Times, Dec. 6, 2006).

The Board of Health ultimately withdrew the proposed regulation on December 5, 2006, in part because, as stated in a press release, "the proposal would have broader societal ramifications than anticipated ... for many societal institutions that need to segregate people by sex," and in part because of concerns about forthcoming federal regulations regarding identification documents (*see* http://www.srlp.org/board-health-press-release-birth-certificate-policy-dec-2006, Sylvia Rivera Law Project press release: Board of Health Makes NYC Consistent with New York State and Most of the United States by Allowing Sex-Specific Transgender Birth Certificate). However, the Board of Health announced that, while it would continue to require proof that the applicant has undergone convertive surgery, it was changing its policy of omitting the sex designation on the Certificate of Birth and would now "allow transgender individuals to acquire new birth certificates reflecting their acquired sex," bringing the policy in line with the practice of New York State and most of the United States (*id.*).

Here, petitioner includes a copy of the DHMH instruction form, downloaded from the Department's website, listing the kinds of proof required by the Department in order to correct a

birth certificate (Ver. Pet. ex. E). The form contains no information specific to transgender men and women, although it does note that the applicant must have obtained an order from New York City Civil Court changing the name, and it indicates that a Supreme Court Order is usually required unless the hospital of birth made the error (Ver. Pet. ex. E, Correcting a Birth Certificate, p. 2, "List of Documents Accepted by the New York City Health Department"). Accordingly, petitioner completed the standard form and provided documentation to show that his name has legally been changed and that he has undergone gender reassignment surgery and, according to his surgeon, is now a fully functioning male. He contends that the letter of his surgeon, along with the order allowing him to change his name, are sufficient under the Health Code rule and that respondent's additional requirements are arbitrary and capricious and beyond the scope of what the Health Code requires an applicant to provide as proof that he or she has undergone convertive surgery.

Respondent argues that it is rational and reasonable to require individuals seeking new birth certificates reflecting a biological sex other than the one they were born with, to submit documentary proof of permanent transition, in particular because a birth certificate is a vital document relied upon by individuals to obtain, "among other things, marriage certificates, drivers' licenses, passports, social security cards, and government benefits" (Res. Memo of Law pp. 13-14). Respondent points out that it is important to guard against fraud in important public records which is why, it argues, it has the authority under 24 RCNY 207.05, to make its own "independent" determination of the proof of an applicant's claim, and which is why it can require applicants to submit "medical records regarding the convertive surgery, including the surgical operative records and a post-operative psychiatric evaluation (Res. Memo of Law ppp. 14-15).

Having these documents, respondent argues, will permit it to adequately protect the integrity and accuracy of Certificates of Birth (Memo of Law p. 15, citing Schwartz *para.* 8).

There is no question, and petitioner does not argue otherwise, that under the current Health Code provision, a transgender person is required to submit medical proof that convertive surgery has been performed, in order to effectuate a corrected birth certificate. Where respondent's argument loses force in this proceeding is in what it declares it requires. As noted above, respondent's July 6, 2010 memorandum/letter requesting further documentation, including among other items a pre-operative psychiatric report and a category of documents called "convertive surgery," apparently different from the preceding category of a "detailed surgical operative record," was thought insufficiently clear by respondent's counsel, and redrafted.

Steven Schwartz, the New York City Registrar of Vital Statistics of the Department of Health and Mental Hygiene, states in his sworn affidavit of June 3, 2011, appended to the Verified Answer, that respondent has "continuously" required applicants to provide: a "detailed surgical operative report, including the date of surgery and signature of the physician"; a signed post-operative "examination report attesting to the fact that the surgical change of sex was completed"; and a post-operative "psychiatric evaluation attesting that the individual is living and working in their new sex role" (Ver. Ans. Schwartz Aff. ¶ 6).[9] Interestingly, Schwartz states that the requirement, in place since 2001, that an applicant submit a pre-operative psychiatric

[9]The characterization by Schwartz of what the Department seeks to learn, when contrasted with even the November 1, 2010 directive to petitioner, highlights an apparent lack of clarity within the Department. Compare the requirements as described in the Schwartz affidavit, with the November 1, 2010 communication requiring a "Detailed Surgical Operative Record including date of surgery," the reconstruction procedure, if applicable, and a post-operative psychiatric report signed by a psychiatrist or psychologist (see Ver. Pet. ex. D).

evaluation, "is no longer required" (Ver. Ans. Schwartz Aff. ¶ 7 n. 5). Yet, respondent indicated in July 2010 that petitioner was required to provide a pre-operative psychiatric report.

Even more revealing is that at oral argument held on October 5, 2011, respondent's attorney conceded that in fact the real issue in petitioner's application was the perceived lack of proof of convertive surgery (Tr. pp. 9-10, 38). The psychiatric reports apparently are not really at issue, which of course begs the question of why the Department demanded them. As far as what petitioner provided concerning proof of convertive surgery, respondent describes Dr. Meltzer's signed and notarized letter of March 1, 2010, as a "conclusory statement of an unknown physician" (Res. Memo of Law at 15-16). This is strained, given that the letter includes the doctor's contact information and his license number. Similarly, respondent contends that the contents of Dr. Meltzer's letter do not permit the Department "to determine whether the applicant has undergone convertive surgery," even though Dr. Meltzer's letter, which is notarized, states that he "performed Female to Male Gender Reassignment Surgery," and "the patient is now a fully functioning male." The plain meaning of the words would seem to indicate that petitioner, formerly a female, underwent surgery and is now "fully functioning" in life as a male.

As stated previously, the requirement under the Health Code Rule is that the applicant provide proof of a court-ordered name change and proof satisfactory to the Department that the individual has undergone convertive surgery (24 RCNY § 207.05 [a] [5]). What was finally revealed at oral argument by respondent's counsel is that respondent believes it needs to know in particular the name of the specific surgery performed by Dr. Meltzer on petitioner in order to be satisfied that petitioner underwent convertive surgery (Tr. pp. 22, 38). That calls into question

the requirement for the other documents, in particular the psychiatric records. It is unclear how the psychiatric records would help respondent determine whether a person has undergone convertive surgery. This is perhaps addressed by respondent's Steven Schwartz who states that in order to assure the accuracy of Certificates of Birth, the DHMH must be convinced through the documentary evidence that the applicant "has permanently transitioned to his or her newly acquired sex" (Ver. Ans. Schwartz Aff. ¶ 6). While anything is possible, of course, it does not seem very likely that an individual would go through all the years of required preparation for surgical transition, including psychotherapy, undergo major surgery, assume life under his or her new gender, and then decide it was all a mistake and change back. This apparent assumption tends to suggest a certain ignorance by the Department of the lengthy transition process and the lives and experience of transgender people, also revealed in its legal papers which consistently refer to petitioner using female pronouns despite petitioner asserting himself as a transgender male. It is further revealed in respondent's apparent conclusion that because at this point petitioner's birth certificate indicates that petitioner is a female, it is "accurate" to continue to refer to him as a female. As noted by petitioner's attorney, without a corrected birth certificate, a transgender person faces many potential difficulties in being treated appropriately, as well as in obtaining employment and in many other areas of life (Tr. p. 11).

Based on the record before the court, petitioner has certainly revealed what looks like a capriciousness in respondent's manner in carrying out its governmental function when addressing petitioner's application, but he does not establish that respondent's concerns as to the importance of birth records and its adherence to the current law, are entirely lacking in a rational underpinning that rests on the Health Code Rule. This is not the forum for addressing issues of

"sex" versus "gender" and the interplay of the Human Rights Law protections with other statutory and common law provisions that impact transgender individuals, and this court declines to address the questions raised in the alternative as to whether the Health Code provision requiring proof of convertive surgery violates the Human Rights Law protections of individuals based on gender, or whether there may be a violation of equal protection in the manner transgender people are treated when seeking to correct their birth certificates to coincide with their genders, when compared with people seeking to correct a ministerial error or to add a second parent's name to the birth certificate.

As concerns petitioner's application however, respondent did not provide petitioner with a clear straightforward list of what it requires from an applicant seeking to correct a Certificate of Birth, and the list as provided includes requests for documentary information admitted by respondent's counsel not to be necessary. Respondent also offered no rational reason why a notarized letter from a physician on letterhead stationery and including the physician's license number, and which states that the physician himself successfully performed and completed "Female to Male Gender Reassignment Surgery" on petitioner on May 12, 2009, at a specific named surgical center in Scottsdale, Arizona, and that petitioner "is now a fully functioning male" is insufficient to establish that petitioner has undergone convertive surgery. Accordingly, the respondent should reconsider petitioner's application without regard to the psychiatric records and should provide a written explanation, if any, as to why the notarized statement of Dr. Meltzer that he completed convertive surgery is insufficient.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent that the matter is

remanded for further reconsideration of petitioner's application in accordance with this decision; and it is

ORDERED that the petition is otherwise denied and dismissed.

The foregoing shall constitute the decision, order and judgment of this court.

ENTER

Dated: March 16, 2012
New York, New York

J.S.C.

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).