

**Gross v Chaffetz**

2013 NY Slip Op 31440(U)

July 2, 2013

Supreme Court, New York County

Docket Number: 102370/2012

Judge: Kathryn E. Freed

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SCANNED ON 7/9/2013  
[\* 1]  
**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT: \_\_\_\_\_  
Justice

PART 5

Index Number : 102370/2012  
GROSS, WILLIAM  
vs.  
CHAFFETZ, NANCY  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

CAL: # 43

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

**FILED**

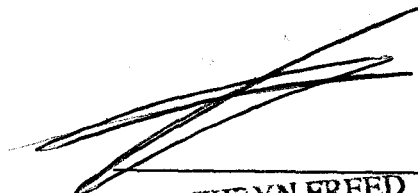
JUL 09 2013

COUNTY CLERK'S OFFICE  
NEW YORK

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

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

Dated: 7-2-13  
JUL 02 2013

  
\_\_\_\_\_, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

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

FILED

U.S. DISTRICT COURT

WESTERN DISTRICT OF MISSOURI

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

-----X  
WILLIAM GROSS,

Plaintiff,

-against-

NANCY CHAFFETZ, Commissioner Chair of the  
New York City Civil Service Commission,  
RAYMOND KELLY, as the Police Commissioner of  
the City of New York, the City of New York Police  
Department, and the City of New York,

Defendants.

-----X  
HON. KATHRYN E. FREED:

DECISION/ORDER  
Index No.: 102370/2012  
Seq. No.: 001

PRESENT:  
Hon. Kathryn E. Freed  
J.S.C

**FILED**  
JUL 09 2013

-----X  
COUNTY CLERK'S OFFICE  
NEW YORK

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF PETITION AND AFFIDAVITS ANNEXED.....	.....1-3.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....
REPLYING AFFIDAVITS.....	.....6.....
EXHIBITS.....	.....
STIPULATIONS.....	.....
OTHER.....( Respondents' Cross-Motion & Memo of Law).....	.....4-5.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Petitioner moves for an Order pursuant to CPLR Article 78 annulling and reversing the determination of respondent disqualifying petitioner from consideration for the position of Police Officer; directing the appointment of petitioner to the position of Police Officer; or in the alternative, conducting a trial pursuant to CPLR§7804(h), to determine if the non-selection of petitioner for the position of Police Officer was arbitrary, capricious and irrational.

Respondents' cross-move for an order dismissing the petition pursuant to CPLR§ 3211(a)(5), (a)(7), (a)(8) and also CPLR§ 7804(f), on the grounds that this Court lacks personal jurisdiction over the New York City Civil Service Commission, that the petition is time barred and fails to state a cause of action.

Factual and procedural background:

Petitioner took the civil service examination for the position of New York City Police Officer under Examination Number 8310, and was given the list number of 91. He passed all background investigations. As part of the application process, petitioner underwent a battery of tests administered by the Police Department's Psychological Services Unit. Said tests included the Minnesota Multiphasic Personality Inventory, the Cornell Index, the California Psychological Inventory and the House-Tree-Person Projective Test. Petitioner also completed a Police Candidate Questionnaire, a Bio-Demographic Questionnaire and a Biological Data Sheet, which included a section wherein petitioner was asked to describe his most stressful experience.

Subsequently, on March 16, 2010, petitioner was interviewed by Police Department Staff Psychologist, Adria Adams, Ph.D. After considering the information obtained from her interview of petitioner as well as a review of his psychological test results, Dr. Adams recommended petitioner's disqualification from the position of Police Officer based on her conclusion that he was not psychologically fit for the demands and stresses related to the duties associated with the job. Petitioner attempted to appeal his psychological disqualification. As part of his appeal process, he sought an independent psychological evaluation and was subsequently examined by Robert Daly, Ph.D on December 22, 2004 and March 2, 2005. Dr. Daley determined that petitioner was "fully mentally competent and a suitable candidate for employment as a police officer." Petitioner's

medical evidence, test results, record, as well as Dr. Daley's assessment of him, were also reviewed by Michele Kaufman, Psy.D, an independent consultant psychologist. On March 24, 2011, Dr. Kaufman rendered her recommendation that the original disqualification of petitioner stand undisturbed.

Thereafter, petitioner's test results, medical evidence and record, the findings of Dr. Adams, Dr. Kaufman and Dr. Daley's assessments were reviewed by Dr. Eloise Archibald, Ph.D., Director of Psychological Services at the New York Police Department. On April 11, 2011, Dr. Archibald also recommended that petitioner's psychological disqualification be sustained. Petitioner appealed his disqualification to the New York City Civil Service Commission ("CSC"). Upon further review by Dr. Archibald, she recommended that the disqualification be sustained based on psychological reasons and forwarded the entire record to the CSC on April 11, 2011.

Three commissioners of the CSC reviewed the results of petitioner's clinical testing, the documentation submitted by him, including a letter from Dr. Daley, and a report prepared by Dr. Kaufman, and Dr. Archibald, respectively. In a decision dated December 5, 2011, the CSC affirmed the previous decision that petitioner was not psychologically qualified for the position of police officer. Moreover, upon examining the written record, the CSC also determined that there were no issues necessitating a hearing. Petitioner filed the instant Article 78 proceeding on April 3, 2012.

Positions of the parties:

Petitioner argues that the CSC improperly refused to grant him a hearing despite ample evidence that such a hearing would reveal an improper psychological disqualification. He asserts that Dr. Daley's affidavit indicates that there are questions of fact as to whether the NYPD disqualification was appropriate absent a hearing. Petitioner further argues that by refusing to

employ him, respondents have acted in bad faith, as well as in an arbitrary, capricious and irrational manner.

Respondents argue that the petition warrants dismissal as to the disqualification decisions rendered by the NYPD because it is time barred by the four month statute of limitations applicable to all Article 78 proceedings, as per CPLR §217. Respondents argue that the last disqualification determination of the NYPD was March 25, 2011, over one year prior to when petitioner filed the instant notice of petition and petition. Respondents further argue that petitioner has failed to allege facts sufficient to demonstrate that the CSC's decision to uphold his disqualification was arbitrary, capricious and an abuse of discretion.

Conclusions of law:

It is axiomatic that in an Article 78 proceeding, the court's function is to determine whether the action of an administrative agency, had a ration basis or was arbitrary and capricious ( *see CPLR 7803(3); Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222, 230 [1974] ). An administrative action is deemed "arbitrary" is if is "without basis in reason and is generally taken without regard to the facts" ( *id.* at 231; *see Matter of Metropolitan Movers Assn., Inv. v. Liu*, 95 A.D.3d 596, 598 [1<sup>st</sup> Dept. 2010] ).

A court should defer to an administrative agency's determination of a statute when it involves specialized "knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom," unless the agency's interpretation is "irrational or unreasonable" ( *Matter of KSLM-Columbus Apts. v. New York State Div. of Housing and Community Renewal*, 5 N.Y.3d 303, 312 [2005]; quoting *Kurcsics v. Merchants Mut. Ins. Co.*,

49 N.Y.2d 451, 459 [1980] ). Furthermore, a court is not permitted to “substitute its own judgment for that of the agency, particularly with respect to matters within its expertise” ( *Flacke v. Onondaga Landfill Systems, Inc.*, 69 N.Y.2d 355, 363 [1987] ). Nevertheless, “[a] decision inconsistent with an agency’s own precedent which ignores the existence of prior rulings or provides no basis for lack of adherence thereto is arbitrary and capricious and will not be upheld” ( *Uniform Firefighters of Cohoes, Local v. Cuevas*, 276 A.D.2d 184, 187 [3d Dept. 2000] ).

Respondents first argue that to the extent petitioner is bringing this proceeding to challenge the CSC’s final determination to affirm his disqualification, this Court does not have jurisdiction over the CSC in that the CSC’s functions are that of an appeal board. Moreover, they argue that because the CSC is deemed a legal entity separate and apart from that of the NYPD or the City of New York, neither of these agencies is authorized to accept legal documents on behalf of the CSC. Respondents further argue that petitioner has not properly named the CSC as a party in the instant proceeding, because he has not served the CSC or Nancy Chaffetz with a copy of the notice of petition and petition. In support of this argument, respondents annex the affidavit of Alina Garcia, Esq., Executive Director and General Counsel of the CSC, as an Exhibit to their cross-motion. Ms. Garcia avers in pertinent part that summonses and notices of petition to initial legal proceedings against the CSC must be served upon the CSC at its offices, located at 1 Centre Street, #2300N, New York, New York 10007. ( *Id.* at ¶ 5 ).

Petitioner argues that the CSC is not required to be served separately. He argues that since the CSC is represented by the New York City Corporation Counsel, via Caroline Maxwell, Esq. who is also representing the NYPD, and Ms. Maxwell knew from the outset that the CSC was made part of the lawsuit, no prejudice has accrued to the City by the failure to serve the CSC because there was



no element of surprise. Petitioner also argues that in her affidavit, Ms. Garcia fails to reference any law, code or case which supports her statement that any documents associated with a proceeding against the CSC must be commenced via service upon it proper.

The Court disagrees. It is well settled that the CSC is a neutral, independent body performing a quasi-judicial function that is separate and apart from the of the NYPD or the City of New York ( see *City of New York v. New York City Civil Service Commission*, 60 N.Y.2d 436, 442 [1983] ). As such, petitioner was required to serve it separately, and its failure to do so divested this Court of personal jurisdiction.

Therefore, the Court finds that the remaining arguments are better suited for a claim specifically against the CSC.

In accordance with the foregoing, it is hereby

ADJUDGED that the petition is denied without prejudice; and it is also

ORDERED that respondents' cross-motion is granted to the extent that petitioner is required to separately serve the NYC Civil Service Commissioner; and denied without prejudice as to the remaining arguments; and it is further

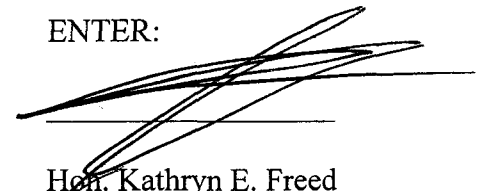
ORDERED that any scheduled conferences are hereby cancelled; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: July 2, 2013

**FILED**  
JUL 02 2013  
JUL 09 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER:



Hon. Kathryn E. Freed  
J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**

FILED

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U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C.