

<b>Matter of Herrera v Kelly</b>
2013 NY Slip Op 32517(U)
October 15, 2013
Supreme Court, New York County
Docket Number: 100941/13
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

*In the Matter of the Application of*  
*FREDDY HERRERA,*

Index No. 100941/13

Petitioner,  
For a Judgment Pursuant to Article 78 of the Civil Practice  
Law and Rules

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

-against-

MOTION SEQ. NO. 601

CITY OF NEW YORK, et al.,

Respondents.

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1-3

Answering Affidavits- Exhibits \_\_\_\_\_

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

CROSS-MOTION:  YES

**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).

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

DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

Dated: 10/15/13

  
**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X  
In the Matter of the Application of  
FREDDY HERRERA,

Petitioner,

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

-against-

Index No. 100941/13

RAYMOND W. KELLY, COMMISSIONER, NEW  
YORK CITY POLICE DEPARTMENT, CITY OF  
NEW YORK CIVIL SERVICE COMMISSION,  
and THE CITY OF NEW YORK,

Respondents.

-----X

**DONNA M. MILLS, J.:**

In this Article 78 proceeding, petitioner Freddy Herrera (“Petitioner”) seeks a judgment vacating the determination of respondents Raymond Kelly, Police Commissioner of the City of New York, City of New York Civil Service Commission (“Commission”) and The City of New York (collectively “Respondents”) which medically disqualified the Petitioner from consideration for the position of police officer under Examination Number 0310. Petitioner alleges that the Respondents’ decision to medically disqualify him from consideration violated the New York State Human Rights Law, New York Executive Law §§ 290 et. seq. (“NYSHRL”). Respondents now cross-move to dismiss the petition pursuant to CPLR § 704(f), and Rules 3211(a)(5) and 3211(a)(7) on the grounds that the petition is barred by the applicable four-month statute of limitations, and otherwise fails to state a cause of action.

**BACKGROUND**

Petitioner applied for the position of police officer with the New York Police

Department ("NYPD"), which requires an applicant to pass an examination consisting of both a written portion and a physical portion. Following the Petitioner's successful completion of the written portion of the examination with a passing score, the Petitioner was to take the physical portion of the NYPD examination. However, during the pre-employment processing at the NYPD, Petitioner reported that he had three surgeries on his left knee to repair a torn anterior cruciate ligament ("ACL"). Petitioner was thereafter placed on medical review for orthopedic reasons, and notified to appear for further evaluation and to submit all records related to his ACL surgeries prior to the scheduled evaluation.

On or about March 27, 2012, Petitioner appeared for an appointment with Dr. Marylrene Flynn, M.D., an NYPD physician. Dr. Flynn conducted an individualized clinical examination of Petitioner, during which she visually inspected Petitioner's knees, and performed several tests to determine the integrity of his ACL. Dr. Flynn also reviewed Petitioner's medical records and discussed with Petitioner his surgical history.

Based on the results of the individualized medical examination, Dr. Flynn concluded that due to Petitioner's unstable left knee, including the lack of full range of motion in that leg and significant arthritis, he was not qualified to perform the full duties of a police officer with the NYPD. Petitioner was notified that he was medically disqualified from consideration for the position of police officer because of his left knee.

Petitioner thereafter perfected his administrative appeal of the decision to the Commission. Petitioner's claim that he should have been found medically qualified rests, in part, on his being found fit for active military service in August 2011. The Army's Physical Evaluation Board found Petitioner able to perform all critical functional

activities, including: evading direct and indirect fire, riding in a military vehicle for at least 12 hours per day, wearing body armor for at least 12 hours per day, wearing load bearing equipment for at least 12 hours per day, moving 40 lbs. at least 100 yards while wearing protective gear, and living in an austere environment without worsening his medical condition. Petitioner also relied on his surgeon's findings that he was able to perform all of the critical tasks of a police officer in 2012.

By letter dated June 12, 2013, the NYPD's Supervising Chief Surgeon, Dr. Eli J. Kleinman, M.D., informed the Commission of his conclusion that based on his review of the report of Dr. Flynn and the medical documentation submitted by Petitioner, Petitioner was properly disqualified from consideration as a New York City Police Officer due to his left knee instability interfering with his ability to serve as a reliable member of the NYPD. In so concluding, Dr. Kleinman noted that in contrast to the list of essential soldiering skills, of which Petitioner had been certified to perform by his private physician, the list of critical tasks required of full-duty police officers was more involved and extensive. Dr. Kleinman further noted that the job functions of a police officer differ from those of an active member of the Army, and that being found fit for military duty does not necessarily conclude that a candidate is qualified to perform the duties of a police officer with the NYPD.

On November 28, 2012, the Commission heard oral argument related to Petitioner's appeal of his medical disqualification and, on March 4, 2013, the Commission issued a decision holding that the record supported Petitioner's medical disqualification from consideration for the position of police officer. On June 27, 2013, Petitioner commenced this Article 78 proceeding to annul the decision made on appeal

by the Commission dated March 4, 2013 which affirmed the decision of the NYPD Medical Unit, and to have this Court remand the matter directing an individualized physical examination to determine whether Petitioner can reasonably perform the duties of the position of police officer.

#### DISCUSSION

Petitioner claims that his disqualification by the NYPD violates Executive Law § 296(1)(a), which prevents discrimination against job applicants based on an applicant's disability. Executive Law § 292(21) defines a "disability" as:

(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the terms shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

An employer may refuse to hire a candidate if the disability prevents the candidate from "performing in a reasonable manner the activities involved in the job" (Executive Law § 292 [21]; see Matter of Antonsen v Ward, 77 NY2d 527, 532 [1991]; Matter of Miller v Ravitch, 60 NY2d 527, 532 [1983]). This requires an individualized determination that the particular disability affects the individual in such a way as to



prevent him or her from performing in a reasonable manner the specific activities involved in the position at issue (see Matter of Antonsen v Ward, supra at 513). Moreover, an appointing authority has wide discretion in determining the fitness of candidates (see Matter of Verme v Suffolk County Dept. of Civ. Serv., 5 AD3d 498 [2004]). This discretion is particularly broad in the hiring of law enforcement officers, to whom high standards may be applied (see Matter of Mark v Schneider, 305 AD2d 685, 686 [2003]).

It is well settled that in a CPLR article 78 proceeding to review a determination of an administrative board, the board's decision must be upheld if it is based on substantial evidence ( see, Matter of Berenhaus v. Ward, 70 N.Y.2d 436, 522 N.Y.S.2d 478, 517 N.E.2d 193; Matter of DiCairano v. Gandolfo, 201 A.D.2d 727, 609 N.Y.S.2d 619). This Court cannot reject the determination of the Commission "where the evidence is conflicting and room for choice exists. Thus, when a rational basis for the conclusion adopted by the Commissioner is found, the judicial function is exhausted" ( Matter of State Div. of Human Rights [Granelle], 70 N.Y.2d 100, 106, 517 N.Y.S.2d 715, 510 N.E.2d 799). That the opinion of the Petitioner's physician is contrary to that of the Commission's physician is not controlling ( see, Matter of Kornfeld v. Nassau County Civ. Serv. Commn., 138 A.D.2d 710, 526 N.Y.S.2d 523; Matter of Palozzolo v. Nadel, 83 A.D.2d 539, 441 N.Y.S.2d 673).

Contrary to the Petitioner's contention, the Commission's determination here is supported by substantial evidence in the record, inasmuch as Petitioner was disqualified only after an individualized clinical examination of his knee by an NYPD orthopedic surgeon, who observed his limited range of motion. The Commission was

free to accept the determination of Dr. Kleinman and Dr. Flynn which concluded that the Petitioner's left knee instability interfered with his ability to serve as a member of the NYPD. As long as the administrative determination is not irrational or arbitrary, this Court will not interfere with it. This is because the Police Commissioner "is ultimately responsible for protecting both the community and departmental personnel from foreseeable risks" (Boss v. Kelly, 3 Misc3d 936, 939 (Sup. Ct. , N.Y. Cnty. 2004).

The Petitioner's remaining contentions are without merit.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied; and it is further

ORDERED and ADJUDGED that the cross motion is granted and the proceeding is dismissed.

Dated: 10 / 15 / 13

ENTER:

*Donna M. Mills*  
J.S.C.

**DONNA M. MILLS, 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).