| **Farina v City of New York** |
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| 2018 NY Slip Op 32886(U) |
| November 1, 2018 |
| Supreme Court, New York County |
| Docket Number: 451629/2017 |
| Judge: Lucy Billings |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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ANTHONY FARINA,

Petitioner

- against -

CITY OF NEW YORK, CIVIL SERVICE COMMISSION, CITY OF NEW YORK DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, CITY OF NEW YORK FIRE DEPARTMENT,

Respondents

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Index No. 451629/2017

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Petitioner challenges respondent New York City Department of Citywide Administrative Services' denial March 30, 2016, of his fourth request for restoration to the list of candidates eligible for appointment to the position of Firefighter with respondent New York City Fire Department. The denial was based on the undisputed fact that respondent Department of Citywide Administrative Services (DCAS) already had restored petitioner to the eligible list three times, the maximum times permitted by 55 R.C.N.Y. App. A § 4.8.5. Petitioner further admits that he received the written notice of the denial March 30, 2016. Therefore the four months to commence a proceeding for judicial review of the denial ran July 30, 2016. C.P.L.R. § 217(1). Petitioner did not commence this proceeding, however, until December 27, 2016.

Petitioner did seek administrative review of DCAS' denial by

respondent New York City Civil Service Commission (CSC). CSC did not review DCAS' denial, but instead dismissed petitioner's administrative appeal June 14, 2016, because CSC lacked authority to review DCAS's denial, N.Y.C. Charter §§ 813(d), 814(a)(3) and (b)(5), 815(a)(5) and (11), since it was required by 55 R.C.N.Y. App. A § 4.8.5, which CSC is not empowered to disregard or to invalidate. See, e.g., Schorr v. New York City Dept. of Hous. Preserv. & Dev., 10 N.Y.3d 776, 779 (2008).

Although CSC's refusal to review DCAS's denial, which petitioner does not challenge, did not trigger the statute of limitations anew, even if CSC's dismissal did restart the limitations period, it still ran October 14, 2016, over two months before petitioner commenced this proceeding. Rather than seeking judicial review between June and October 2016, petitioner repeatedly communicated to respondent New York City Fire Department's Chief Investigator to discuss the status of petitioner's candidacy or seek reconsideration of his restoration. However persistent petitioner's pursuit of his candidacy, neither his nor respondents' ongoing communications on the issue tolled, revived, or extended the statute of limitations. Mendez v. New York City Dept. of Educ., 128 A.D.3d 584, 584 (1st Dep't 2015); Moskowitz v. New York City Police Pension Fund, 82 A.D.3d 473, 473 (1st Dep't 2011); Tivoli Stock LLC v. New York City Dept. of Hous. Preserv. & Dev., 63 A.D.3d 543, 544 (1st Dep't 2009); Goonewardena v. Hunter Coll., 40 A.D.3d 443, 443-44 (1st Dep't 2007).

Even were the court to reach the merits of the petition, petitioner's claim that a Fire Department investigator's advice to request restoration promptly caused petitioner to exhaust his three restorations prematurely, before he was ready to proceed with further evaluation of his candidacy, does not negate the requirements of 55 R.C.N.Y. App. A § 4.8.5. Petitioner does not challenge this regulation as contrary to statutory or constitutional authority, is charged with knowledge of the governing regulations, West Midtown Mgt. Group, Inc. v. State of N.Y. Dept. of Health, Off. of the Medicaid Inspector Gen., 31 N.Y.3d 533, 542 (2018); New York State Med. Transporters Assn. v. Perales, 77 N.Y.2d 126, 131 (1990); Modell & Co. v. City of New York, 159 A.D.2d 354, 355-56 (1st Dep't 1990), and was in fact informed of the regulatory requirement each time he was notified of his three restorations: that the regulations limited him to three. Despite these warnings, he declined each restoration because he decided he was not ready to proceed.

Moreover, if in fact a Fire Department investigator gave petitioner the advice he claims, it was not necessarily poor advice: if petitioner wanted to pursue his candidacy, he needed to request restoration before the eligible list was exhausted or expired, as eventually occurred June 26, 2017. At this point, regardless of the merits of petitioner's candidacy or the timeliness of his petition, it now is barred by the expiration of the list. N.Y. Civ. Serv. Law § 56; City of New York v. New York State Div. of Human Rights, 93 N.Y.2d 768, 776 (1999); Deas v.

Levitt, 73 N.Y.2d 525, 530-31 (1989); Hancock v. City of New York, 272 A.D.2d 80, 81 (1st Dep't 2000); Sweeney v. Schneider, 123 A.D.3d 1049, 1050 (2d Dep't 2014).

Rather than respondents having violated lawful procedure, otherwise committed an error of law, or acted arbitrarily, as the petition asks the court to conclude, C.P.L.R. § 7803(3), to grant the petition would violate lawful procedure and commit an error of law, by arbitrarily departing from controlling regulations. 55 R.C.N.Y. App. A § 4.8.5. See, e.g., Schorr v. New York City Dept. of Hous. Preserv. & Dev., 10 N.Y.3d at 779. Therefore the court grants respondents' motion to dismiss the petition and dismisses this proceeding because it is barred by the statute of limitations, C.P.L.R. § 217(1); is moot; and fails to state a viable claim. C.P.L.R. §§ 3211(a)(5) and (7), 7804(f). This decision constitutes the court's order and judgment of dismissal. C.P.L.R. § 7806.

DATED: November 1, 2018

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.