

**Matter of United Probation Officers Assn. v City of
New York**

2019 NY Slip Op 30337(U)

February 13, 2019

Supreme Court, New York County

Docket Number: 158342/2018

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of

Index No.
158342/2018

UNITED PROBATION OFFICERS ASSOCIATION,

Petitioner,

**DECISION and
ORDER**

- against -

CITY OF NEW YORK; and NEW YORK CITY
DEPARTMENT OF CITYWIDE ADMINISTRATIVE
SERVICES,

Mot. Seq. 1

Respondents.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner United Probation Officers Association (“UPOA” or “Petitioner”) brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules (“Article 78”) and pursuant to Public Officers Law Article 6 (the New York Statute Freedom of Information Law or “FOIL”), for an Order directing Respondents City of New York (“City”) and New York City Department of Administrative Services (“DCAS”) (collectively “Respondents”) to produce documentation including information regarding individuals employed from January 1, 2007, to the present in the agencies of the New York City Administration for Children’s Services, New York City Department of Probation, and New York City Department of Correction. Respondents interposed a Verified Answer on October 27, 2018 and oppose UPOA’s Petition.

Relevant Background

First FOIL Request

On November 1, 2017, UPOA submitted a FOIL Request (“First FOIL Request”) seeking records “containing the name, race, gender, current salary, current job title, city start date, salary on city start date, title start date, of all employees of

the following agencies from 2007 through the present: New York City Department of Probation; New York City Department of Corrections and Community Supervision; New York City Police Department; New York City Office of Mental Health". On November 14, 2017, DCAS denied UPOA's First FOIL Request. DCAS stated that the requested information is exempt from disclosure under Public Officers Law ("POL") § 89(2)(b), POL § 89(2)(b)(v) and POL § 89(3)(a). DCAS stated that pursuant to POL § 89(2)(b) and POL § 89(2)(b)(v) the information relating to race and gender is exempt because it amounts to an "unwarranted invasion of personal privacy"; more specifically, "disclosure of information of personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency". DCAS stated that pursuant to POL § 89(3)(a), the employee list requested is not ordinarily maintained or used by the agency and the information cannot be "retrieved or extracted from a computer system with reasonable effort". On December 8, 2017, UPOA appealed DCAS's denial. On December 22, 2017, UPOA's appeal was denied. The First FOIL Request is not at issue in the current proceeding.

Second FOIL Request

On April 19, 2018, UPOA submitted a Second FOIL Request seeking records "containing the name, race, gender, current salary, current job title, city state date, salary on city state date, title state date, of all employees of the following agency from 2007 through the present: New York City Administration for Children's Services". On May 8, 2018, DCAS denied UPOA's Second FOIL Request. DCAS stated that the requested information is exempt from disclosure pursuant to POL § 89(2)(b), POL § 89(2)(b)(v) and POL § 89(3)(a). On May 11, 2018, UPOA appealed DCAS's denial. On May 25, 2018, UPOA's appeal was denied.

Third FOIL Request

On June 4, 2018, UPOA submitted a Third FOIL Request seeking records "containing the name, race, gender, current salary, current job title, city state date, salary on city state date, title state date, of all employees of the following agency from 2007 through the present: New York City Administration for Children's Services; New York City Department of Probation; New York City Department of Correction; and New York City Police Department". DCAS did not respond to UPOA's Third FOIL Request within the statutory time of five days. On June 20, 2018, UPOA appealed DCAS's "constructive" denial. On July 2, 2018, DCAS denied the Third FOIL Request appeal. DCAS denied UPOA's appeal on the ground that the request was duplicative of the First FOIL Request (not at issue in this case) and the Second FOIL Request. DCAS also states that the Third FOIL Request was again denied pursuant to POL § 89(2)(b), POL § 89(2)(b)(v) and POL § 89(3)(a).

Pending Petition

UPOA brings this Article 78 proceeding (1) directing Respondents to provide the requested records; and (2) awarding attorneys' fees and costs reasonably incurred in this litigation as allowed under FOIL. Respondents filed a Verified Answer.

Legal Standard

An Article 78 proceeding “must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” CPLR § 217[1]; *Matter of Yarborough v. Franco*, 95 N.Y.2d 342 [2000]. An administrative determination is final and binding when the respondent unequivocally denies petitioner’s request. *Matter of Mazzilli v. New York City Fire Department*, 224 AD2d 621, 622 [2nd Dept.1996]. The four-month statute of limitation is not extended when the Petitioner brings a FOIL Request that is duplicative of a prior FOIL Request. *Kelly v. New York City Police Dep't*, 730 N.Y.S.2d 84, 85 [1st Dept. 2001].

Pursuant to POL § 89(4)(c), a court may award reasonable attorney’s fees and litigation costs incurred where a party has “substantially prevailed” and when the agency “failed to respond to a request or appeal within the statutory time”; and the agency had no “reasonable basis” for denial. *See* POL § 89(4)(c). “Only after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys’ fees.” *Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 441 [2005].

Discussion

Here, the application is time-barred. UPOA made its First FOIL Request on November 1, 2017. On November 14, 2017, DCAS denied UPOA’s First FOIL Request and on December 8, 2017, UPOA appealed DCAS’s denial. On December 22, 2017 DCAS made a final and binding determination denying UPOA’s appeal. *Matter of Mazzilli*, 224 AD2d at 622. UPOA had until April 22, 2018 to commence an Article 78 proceeding pursuant to CPLR § 217[1], and failed to do so. UPOA instead made two duplicative FOIL Requests, which does not extend the statute of limitations. *Kelly*, 730 N.Y.S.2d at 85.

UPOA has not “substantially prevailed” on its claim and is therefore not entitled to reasonable attorney’s fees and litigation costs. *See* POL § 89(4)(c).

Wherefore it is hereby


ORDERED that the Petition is denied; and it is further

ORDERED that the Petition is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order, along with notice of entry on all parties within 15 days of entry.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: FEBRUARY 13, 2019



Eileen A. Rakower, J.S.C.