

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of WALTER SELF,

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS (Rey
Torres) Regional Director, (Victor DeAmelia); NEW YORK
STATE DIVISION OF MILITARY & NAVAL AFFAIRS (John J.
Fallarino), Division Supervisor,

Respondents.

NOTICE OF ENTRY

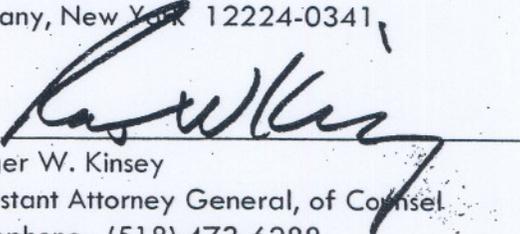
Index No. 7204-06
RJI 01-06-ST7134
November 17, 2006

Sackett, J.

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Judgment in this action
duly entered in the Office of the County Clerk of Albany County on February 1, 2007.

Dated: Albany, New York
February 5, 2007

ANDREW M. CUOMO
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Attorney for Respondents
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Albany, New York 12224-0341

By: 
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TO: Walter Self
78 Dana Avenue
Albany, NY 12208

February 5, 2007

Page 2

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For a Judgment Pursuant to Article 78
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- against -

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REY TORRES REGIONAL DIRECTOR VICTOR DE
AMELIA AND NEW YORK STATE DIVISION OF MILITARY
AND NAVAL AFFAIRS JOHN J. FALLARINO,

Respondents.

**DECISION and
JUDGMENT**

Albany County Clerk
Document Number 9884132
Rcvd 02/01/2007 9:12:25 AM



Motion Return Date: Albany County Special Term, November 17, 2006
RJI Number: 01-06-ST7134
Index Number: 7204/06

Justice Robert A. Sackett, Presiding

APPEARANCES: Walter Self
Self-Represented Petitioner
78 Dana Avenue
Albany, New York 12208

Eliot Spitzer, Attorney General of the
State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224
Roger W. Kinsey, Assistant Attorney General,
Of Counsel

SACKETT, J.:

In this CPLR article 78 proceeding, petitioner, who has been employed by respondent the New York State Division of Military and Naval Affairs ["DMNA"] as a painter for more than 10 years, claims that an evaluation of his work dated September 14, 2005, stating, in part, that he needed "to pay attention to wall preparation prior to painting" was placed in his file in retaliation for previous complaints brought by the petitioner against the DMNA in 1999 and

2004. Petitioner seeks \$300,000 from each respondent in punitive awards in addition to the costs and disbursements of this action. Petitioner also seeks an order of this Court permitting him to proceed as a poor person. The Court finds that petitioner does not satisfy the financial requirements of CPLR 1101 to proceed as a poor person and that his request is denied.

Respondents move to dismiss the petition on the grounds that petitioner has failed to obtain jurisdiction over the New York State Division of Human Rights ; that the proceeding is barred because petitioner elected to pursue an administrative remedy (Executive Law §297[3][a]); that the petition is untimely commenced; and that monetary damages are not available to petitioner in this proceeding pursuant to Court of Claims Act §9[2].

Essentially, the salient facts are as follows. In 1999 and 2004, petitioner filed complaints against the DMNA alleging that he was being treated in a discriminatory fashion. Since the filing of the 1999 complaint, petitioner has had yearly performance evaluations, each of which was rated as "satisfactory". In September 2005, petitioner's job performance was evaluated, and he again received a satisfactory performance rating. In the "Supervisor's Comments" section, the evaluation indicated as follows: "Another good year however as mentioned, Walt needs to pay attention to wall preparation prior to painting." On November 11, 2005, perceiving the aforesaid comment to be negative, petitioner filed a verified complaint with respondent New York State Division of Human Rights ["DHR"], charging respondent DMNA with an unlawful discriminatory practice relating to employment in violation of the Human Rights Law of the State of New York. Specifically, petitioner claimed that the purportedly "negative" comment was made in his evaluation for a retaliatory purpose, to wit, petitioner's filing of the aforesaid two prior complaints. By decision dated August 30, 2006, respondent DHR dismissed the complaint, stating, in pertinent part, that :

"Since the filing of the 1999 complaint the complainant has had yearly performance evaluations, each of which was rated as "satisfactory", and included numerous comments that can only be described as overwhelmingly positive. In 2005 the complainant was once again evaluated as being "satisfactory". The investigation revealed no evidence to believe that the comment made in his evaluation was done for a retaliatory purpose. Furthermore, a single, isolated incident does not rise to a complaint of discrimination under the New York State Human Rights Law."

Initially, the Court concurs with respondents that it lacks jurisdiction over respondents Ray Torres and Victor De Amelia. CPLR 7804 prescribes the method of procedure in a CPLR article 78 proceeding. The proceeding may be commenced either by order to show cause or by a notice of

petition. In relevant part, CPLR 7804 (c) provides that:

“Unless the court grants an order to show cause to be served in lieu of a notice of petition at a time and in a manner specified therein, a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard.”

Here, pursuant to the order to show cause signed by the Hon. Joseph C. Teresi, JSC, on October 23, 2006, petitioner was directed to serve the order to show cause, “together with the affixed papers, upon respondents, agent or respondent’s attorney(s) by personal or regular mail, on or before the 25th day of October.” The record demonstrates that neither respondent DHR, nor respondents Rey Torres or Victor De Amelia were served in this proceeding. Petitioner’s failure to serve a copy of the order to show cause, together with the supporting papers, upon respondents DHR, Torres or De Amelia, as required by CPLR 7804 (c) constitutes a fatal jurisdictional defect which precludes this Court’s consideration of the matter (Matter of Brown v Scully, 135 AD2d 713 [1987], *lv denied* 71 NY2d 804 [1988], citing Macchia v Russo, 67 NY2d 592 [1986]).

CPLR 7804 (c) further provides, in relevant part, that:

“...in addition to the service thereof provided in this section, the order to show cause or notice of petition must be served upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which the venue of the proceeding is designated...”

Here, the order to show cause is silent as to alternative service upon the Office of the Attorney General. While petitioner attempted to effect service upon the Attorney General by mail on October 24, 2006, in the absence of an order to show cause authorizing service by mail such method is jurisdictionally defective (*see* Brown v Scully, *supra*, 135 AD2d at 713). In any event, even if the Court were to consider petitioner’s service upon the Attorney General as proper, such service alone is insufficient to acquire jurisdiction over respondents (*see, e.g.* Matter of Cohen v State Tax Comm., 51 AD2d 79 [1976]).

The Court next turns to respondents’ contention that petitioner is barred from seeking judicial intervention because he elected to pursue an administrative remedy. It is well settled that New York’s Human Rights Law (Executive Law §§290-301) precludes discrimination in employment on the basis of age, race, creed, color, national origin, or sex (Executive Law §291[6]). Pursuant to Executive Law §297(9), a person claiming to be aggrieved by an unlawful discriminatory practice may elect to seek redress in either an administrative or judicial forum where different rights and remedies may be pursued (*see, e.g.* Executive Law §297[3]; *see also* Marine

Midland Bank v New York State Div. of Human Rights, 75 NY2d 240, 244-245 [1989]). The remedies are intended to be mutually exclusive (*see* Executive Law §§297[9], 300), “save in the one situation where a complaint filed with the Human Rights Division has been dismissed for administrative convenience [citation omitted]” (Matter of Kramarsky v City of New York Police Dept., 90 Misc.2d 733, 735 [Sup Ct New York Co. 1977]).

Here, on November 10, 2005, petitioner filed a verified complaint with the State Division of Human Rights charging respondent DMNA with an unlawful discriminatory practice based on his claim that a purportedly unfavorable comment in his evaluation was discriminatory and retaliatory in nature and thus in violation of the Human Rights Law of the State of New York. Upon investigation of such claim, respondent DHR dismissed such complaint finding no probable cause to believe that petitioner was being treated in a discriminatory manner. Approximately 11 months later, petitioner commenced the instant action, the gravamen of which mirrors the charge he made against respondent DMNA in November 2005. Therefore, petitioner’s selection of an administrative remedy bars subsequent judicial action. Accordingly, the petition must be dismissed.

In any event, as respondents properly argue, insofar as petitioner seeks the review and revision of his employee evaluation, his time to bring an article 78 proceeding to challenge same is untimely. In assessing when the limitation period begins to run in any given proceeding which seeks to review the determination of a body or an officer, the Court looks to when the determination to be reviewed becomes final and binding, which triggers the four-month statute of limitations period (CPLR 217[1]). “A challenged determination is final and binding when it ‘has its impact’ upon the petitioner who is thereby aggrieved” (Matter of Edmead v McGuire, 67 NY2d 714, 716 [1986], quoting Mundy County Civ. Serv. Comm., 44 NY2d 352, 357 [1987]). Petitioner’s employee evaluation was dated September 14, 2005 and acknowledged by petitioner on September 16, 2005. The instant proceeding was commenced by the filing of the order to show cause and the petition on October 23, 2006, clearly well outside the four-month statute of limitations period. The instant proceeding is time-barred.

To the extent petitioner seeks judicial review of the determination of respondent DHR, he elected to proceed in the administrative forum by filing a complaint with the State Division of Human Rights and is now precluded from proceeding in the judicial forum. Thus, the Court is limited to deciding whether respondent DHR’s determination is arbitrary and capricious (*see* Catlin v Sobol, 77 NY2d 552, 561 [1991]). However, as respondents properly argue, petitioner seeks this Court to order that the evaluation be “redrafted and revised” and does not seek review of the

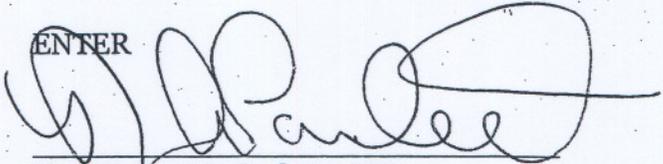
underlying determination. Accordingly, the petition must be dismissed. An additional basis for dismissal is lack of jurisdiction which was addressed by this Court, *supra*.

Finally, the Court concurs with respondents that this Court lacks subject matter jurisdiction over petitioner's claims for money damages as such claims can only be entertained in the Court of Claims (Court of Claims Act §9[4]; see Olsen v New York State Dept. of Env'tl. Conservation, 307 AD2d 595, 596 [2003], *lv denied* 1 NY3d 502 [2003]).

In light of the foregoing, respondents' motion is granted and the petition is dismissed without costs.

This constitutes the Decision and Judgment of this Court. All papers, including the original copy of this Decision and Judgment are being returned to the Attorney General who is not relieved from the provisions of CPLR 2220 with respect to filing, entry and notice of entry.

Dated: Monticello, New York
January 17, 2007

ENTER 
Hon. Robert A. Sackett, JSC

Papers considered:

Notice of motion to proceed as poor person, dated September 23, 2006, and supporting affidavit of Walter Self, dated October 23, 2006; order to show cause, dated October 23, 2006, supporting affidavit and petition of Walter Self, dated October 23, 2006, with exhibits; notice of motion to dismiss and supporting affirmation of Roger W. Kinsey, Esq., dated November 8, 2006, with exhibits and memorandum of law.

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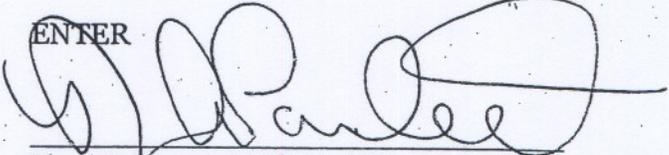
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