APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

18-966-cv

[Filed January 17, 2019]

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of January, two thousand nineteen.

PRESENT: JOSÉ A. CABRANES,
ROSEMARY S. POOLER,
CHRISTOPHER F. DRONEY,
Circuit Judges.

CRAIG ROTH,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
COUNTY OF NASSAU,	)
	)
Defendant-Appellee.	)
	)

FOR PLAINTIFF-APPELLANT:

MICHAEL CONFUSIONE, Hegge & Confusione, LLC, Mullica Hill, NJ.

FOR DEFENDANT-APPELLEE:

KATHARINE SMITH SANTOS (Joseph Covello, *on the brief*), Lynn, Gartner, Dunne & Covello, LLP, Mineola, NY.

Appeal from a March 27, 2018 judgment of the United States District Court for the Eastern District of New York (Leonard D. Wexler, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court be and hereby is **AFFIRMED**.

Plaintiff Craig Roth ("Roth") appeals from the District Court's grant of summary judgment on the ground that Roth was collaterally estopped from asserting discrimination claims under the Americans

with Disabilities Act ("ADA") and the New York State Human Rights Law ("NYSHRL"). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"We review a district court's grant of summary judgment *de novo*." *Utica Mut. Ins. Co. v. Clearwater Ins. Co.*, 906 F.3d 12, 17 (2d Cir. 2018). "The district court's judgment may be affirmed on any ground fairly supported by the record." *Trikona Advisers Ltd. v. Chugh*, 846 F.3d 22, 29 (2d Cir. 2017) (internal quotation marks omitted). We also review a district court's application of the doctrine of collateral estoppel *de novo*, accepting all factual findings of the district court unless clearly erroneous. *Id.* Under New York law, collateral estoppel "may be invoked to preclude a party from raising an issue (1) identical to an issue already decided (2) in a previous proceeding in which that party had a full and fair opportunity to litigate." *Farrell v. Burke*, 449 F.3d 470, 482 (2d Cir. 2006) (internal quotation marks omitted). In addition, "the issue that was raised previously must be decisive of the present action." *Id.* at 482-83.

Roth challenges the District Court's conclusion that he was collaterally estopped from asserting discrimination claims that he raised in an Article 78 proceeding before the New York Supreme Court. Roth concedes that he is collaterally estopped from arguing that he could perform the "essential functions" of a police officer's job. He nevertheless contends that he is not collaterally estopped from arguing that he could perform the essential functions of the job "with or

without reasonable accommodation." Roth claims that the state court's Article 78 order did not adequately address the issue of accommodation, and that he is not barred from demonstrating that he was able to perform the essential duties of the police officer job with or without such accommodation. *See Makinen v. City of New York*, 857 F.3d 491, 495 n.3 (2d Cir. 2017) ("[B]oth the NYSHRL and the ADA require a plaintiff to demonstrate as an element of [his] claim that [he] was able to perform the essential duties of [his] job with or without a reasonable accommodation.").

The District Court correctly concluded that Roth's ADA and NYSHRL claims are precluded under the doctrine of collateral estoppel. Roth's complaint in the instant action seeks to relitigate issues that were fully and fairly decided during his Article 78 proceeding in New York Supreme Court. Roth's Verified Petition before the New York Supreme Court specifically asserted that his disqualification violated Section 296(1)(a) of the NYSHRL and "may be actionable pursuant to the American's [*sic*] with Disabilities Act as that Act protects individuals from employment discrimination based upon an actual or perceived disability." App. 831 ¶¶ 50-52. Moreover, in both his memorandum and reply memorandum in support of the Verified Petition, Roth claimed to have "established a *prima facie* case of discrimination in that [the County] medically disqualified [him] due to his diabetes disability." *Id.* at 852, 887. Finally, the parties' briefs before the New York Supreme Court made clear that to demonstrate "disability" within the meaning of the NYSHRL, a plaintiff must show that he was able to perform the essential functions of the job with or

without a reasonable accommodation. *See id.* at 852 (Roth quoting the NYSHRL definition of "disability" as being "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." (emphasis added) (quoting N.Y. EXEC. LAW § 292(21)); *see also id.* at 872 (County agreeing that "[u]nder the [NYS]HRL, an applicant must be able to perform the essential functions of the job *with or without a reasonable accommodation*." (emphasis added)).

The New York Supreme Court explicitly acknowledged Roth's discrimination argument, *id.* at 810, but nevertheless denied the Verified Petition "in its entirety," *id.* at 816. The gravamen of the County medical experts' medical conclusions was that there was a significant risk that Roth could become mentally or physically incapacitated during bursts of severe exertion, including in pursuing suspects, using force, and rescuing individuals. Given the particular nature of those functions, and Roth's conceded failure to request accommodations (or to suggest any in his briefing to the New York Supreme Court), we think that—absent a clear indication to the contrary—the New York Supreme Court reasonably concluded that there was "substantial evidence" to support a determination that it would have been impossible to provide any reasonable accommodation for those particular essential functions, *see, e.g.*, *McMillan v. City of New York*, 711 F.3d 120, 125 (2d Cir. 2013) ("[A] reasonable accommodation can never involve the elimination of an essential [job] function." (internal

quotation marks omitted)), and so it conclusively decided that element of Roth's discrimination claims.[1] *Cf. Vargas v. City of New York*, 377 F.3d 200, 205, 207-08 (2d Cir. 2004) (holding that the *Rooker-Feldman* doctrine—and by extension, issue preclusion—prevents re-litigation of an equal protection claim that a plaintiff previously raised in an Article 78 proceeding); *DiLauria v. Town of Harrison*, 64 F. App'x 267, 269-70 (2d Cir. 2003) (summary order) (granting summary judgment on plaintiff's ADA claims under the doctrine of collateral estoppel even where plaintiff "raised no specific claims for relief under the ADA" in his Article 78 petition, but "presented to the state court a description of the discriminatory actions that he believed played a role"). In sum, Roth's discrimination claims fail because he is precluded under the doctrine of collateral estoppel from arguing that he was able to perform the essential functions of a police officer with or without a reasonable accommodation.

CONCLUSION

We have reviewed all of the arguments raised by Roth on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the March 27, 2018 judgment of the District Court.

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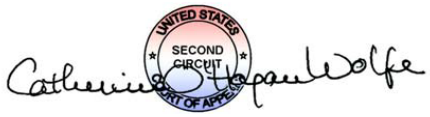
[1] Notably, Roth's counsel conceded at oral argument that he did not seek to challenge that any of the County's purported essential functions were indeed essential. Thus, although what functions are "essential" under the ADA is normally an issue of fact, *see Stone v. City of Mount Vernon*, 118 F.3d 92, 96-100 (2d Cir. 1997)—and reasonable accommodations can only be determined based on what functions are essential, *see Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991)—we deem that argument waived.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

15-CV-6358

(Wexler, J.)

[Filed March 27, 2018]

CRAIG ROTH,

Plaintiff,

-against-

COUNTY OF NASSAU,

Defendant.

APPEARANCES:

PHILLIPS & ASSOCIATES, PLLC.
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MEMORANDUM AND ORDER

WEXLER, District Judge:

Plaintiff Craig Roth ("Roth" or "Plaintiff") commenced this action against defendant County of Nassau (the "County" or "Defendant") alleging that he was discriminated against in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. and New York State Human Rights Law ("NYSHRL"), N.Y. Exec. L. § 290 *et seq*. Currently before the Court is the County's motion for summary judgment. *See* Motion, Docket Entry ("DE") [41]. Plaintiff opposes the motion. For the reasons set forth herein, the motion is granted.

I. BACKGROUND

A. Factual History

The facts are undisputed unless otherwise indicated. *See* Defendant's Rule 56.1 Statement ("Def's R.56.1 Stmt"), DE [41-2]; Plaintiff's Response & Counterstatement ("Pl's R.56.1 Stmt"), DE [44-1]; Defendant's Response, DE [45-1]. Plaintiff was diagnosed with juvenile Type I diabetes when he was seven years old. Type I diabetes cannot be treated with oral medication, but rather is treated by administering insulin via injection or insulin pump. In or around 2001, he began using an insulin pump to regulate the level of insulin.[1]

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[1] An insulin pump is a mechanical, battery-powered, computer-controlled pump about the size of an electronic beeper that is attached to a reservoir of insulin and provides infusions on a 24-hour basis. It is attached to the body through a subcutaneous port,

Plaintiff sought a position with the Nassau County Police Department ("NCPD"). Hiring for the NCPD is done pursuant to New York Civil Service Law and open competitive examinations. The Nassau County Civil Service Commission (the "Commission") oversees the process for candidates on the list of potential hires. Plaintiff scored high enough on the exam to be asked to interview. In late 2014 and early 2015, Plaintiff underwent various psychological and physical assessments. During the medical examination, Roth disclosed that he had Type I diabetes. Plaintiff was psychologically approved, but was placed on a medical hold on January 21, 2015 and was asked to submit additional materials from his private endocrinologist.

Defendant claims that upon receipt and review of these materials, Dr. Marlaine Tapply, Medical Director of the Civil Service Commission, recommended that Plaintiff be disqualified from the position of police officer. The parties dispute the basis for Dr. Tapply's recommendation. Defendant claims that it was "based on the fact that the plaintiff's condition was brittle, that his blood sugars were widely fluctuating, that plaintiff had pump problems, and that plaintiff had experienced numerous hypoglycemic episdoes." Def's R.56.1 Stmt, ¶110. Plaintiff claims that Dr. Tapply had no evidence to suggest that he was not qualified and

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and a catheter tube connects the insulin pump to the port. Patients commonly carry the insulin pumps in their pockets and run the tube to the port. The amount of insulin released by the pump can be adjusted. The patient must monitor glucose levels periodically by using a glucometer, a separate instrument, to check his blood sugar level, and then adjusts the delivery of insulin from the pump as necessary.

relied on documents without any medical input. Pl's R.56.1 Stmt, ¶110.

On or about April 1, 2015, the Commission disqualified Roth due to "endocrine condition (insulin-dependent diabetes) which precludes ability to fulfill the physical requirements of a Police Officer." Affidavit of Karl Kampe ("Kampe Aff."), Ex. QQ. Roth appealed this decision to the Commission. In response, the Commission on July 8, 2015 referred him to the Chief of Endocrinology at the Nassau University Medical Center for "final determination." *Id.*, Ex. UU.

Dr. David S. Rosenthal interviewed and examined Roth as requested by the Commission. In addition to his examination and taking an oral history from Roth, Dr. Rosenthal reviewed the specifications for Nassau County police officers,[2] and letters from Roth's treating endocrinologist and a second doctor. No medical records were provided or reviewed. Dr. Rosenthal's medical

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[2] The County has established class specifications for police officer positions to determine whether a candidate can perform the duties of the position. The classification lists thirteen typical duties, twelve of which are designated as essential functions. Defendant points to two such essential functions that it claimed Plaintiff would be unable to perform:

> 4. Locates, pursues if necessary, and arrests persons wanted on warrants or court orders, or as a result of observation, or crime in progress, using forceful arrest methods and/or deadly physical force, as required.
> * * *
> 10. Rescues individuals at accidents, emergencies, and disasters, which may involve climbing and/or jumping up, down, or over obstacles, entering confined areas, and balancing on narrow surfaces, as required.

opinion was that "the potential for glycemic instability which may occur during the performance of the duties of a Nassau County police officer is troubling and significant." Rosenthal letter of 8/19/15, Kampe Aff. Ex. WW. In reference to Roth's prior employment as a safety officer at Nassau Community College and as a seasonal police officer with the Long Beach Police Department, and his active patrol duties for the proceeding two months with the New York City Police Department,[3] Dr. Rosenthal noted that "[t]he lack of such an event during his prior work experience is reassuring but does not preclude future problems should he become a member of the Nassau County Police Department." *Id.* On September 2, 2015, the Commission ruled that Plaintiff remained disqualified and subsequently informed him that his appeal was complete.

B. Procedural History

1. State Court Article 78 Proceeding

On or about May 3, 2015, Plaintiff commenced an Article 78 proceeding in New York Supreme Court, Nassau County, seeking to set aside the Commission's decision. Verified Petition ("the Petition"), Def's Ex. BBB. The Petition asserted that his disqualification violated NYSHRL and may be actionable under the ADA:

> 50. Respondents engaged in sheer and unsupported speculation about Petitioner's

[3] On or about January 7, 2015, Roth was hired by the New York City Police Department.

> physical capabilities and a decision based upon nothing but speculation about his physical capabilities is arbitrary and capricious and may be actionable pursuant to the American[s] with Disabilities Act as that Act protects individuals from employment discrimination based upon an actual or perceived disability.
>
> 51. The disqualification determination and the affirmation of the disqualification determination is in violation of New York Executive Law § 296(1)(a).
>
> 52 Petitioner's diabetes condition as alleged by Respondents is a disability" under New York Executive Law § 296(1)(a) and 292(21).
>
> 53. There is absolutely nothing in the record to indicate that Petitioner's diabetes impairs or would impair his physical functioning in any way.

Verified Petition ("Petition"), Kampe Aff., Ex. BBB. The issue of whether the Commission's decisions constituted disability discrimination under the NYSHRL was briefed by both parties.

By Order dated May 3, 2016, the state court denied Roth's petition in its entirety. Short Form Order ("Article 78 Order"), Defendant's Ex. ZZ. Noting that an Article 78 proceeding is "limited to an inquiry into whether the agency acted arbitrarily and/or capriciously," the judge determined that the decision was rational and noted that the County relied upon expert recommendations from Drs. Tappley and Rosenthal. Article 78 Order at 10-11. She found that

the determination "was not irrational, but rather supported by substantial evidence," denied the petition in its entirety, and dismissed it. Plaintiff did not appeal the Article 78 Order.

2. Federal Action

After filing the Article 78 Petition, Plaintiff filed a discrimination charge with the Equal Employment Opportunities Commission ("EEOC"). The EEOC dismissed the charge and issued a Notice of Right to Sue on October 15, 2015. This case was commenced on November 5, 2015. After Defendant filed its answer, the state court issued its decision in the Article 78 proceeding.

Plaintiff states two discrimination claims, one under the ADA and the other under the NYSHRL. He seeks an award of compensatory damages, lost wages, punitive damages, and attorneys' fees.

II. LEGAL STANDARDS

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In determining a motion for summary judgment, the court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 122 (2d Cir.

2004). After the moving party has met its burden, the opposing party "'must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.'" *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

The ADA makes it unlawful for employers to discriminate on account of a disability, stating in relevant part that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Claims of disability discrimination under the ADA and the NYSHRL are governed by the same legal standards. *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 184 n.3 (2d Cir. 2006).

Disability discrimination claims under the ADA are subject to the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 96 (2d Cir. 2009). To establish a prima facie discrimination claim under the ADA, a plaintiff must show: (1) the employer is subject to the ADA; (2) plaintiff is disabled within the meaning of the ADA; (3) plaintiff was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; (4) plaintiff suffered an adverse employment action; and (5) the adverse action

occurred under circumstances giving rise to an inference of discriminatory intent. *See Davis v. New York City Dep't of Ed.*, 804 F.3d 231, 235 (2d Cir. 2015). Once a prima facie case is established, "the burden of production shifts to the employer to articulate a non-discriminatory reason for the adverse employment action," and if the employer carries that burden, "the plaintiff must then produce evidence capable of carrying the burden of persuasion that the employer's action was at least in part motivated by discrimination." *Id*.

III. DISCUSSION

A. Waiver of Affirmative Defenses

Defendants argue on this motion, *inter alia,* that Plaintiff's claims are precluded by the doctrines of res judicata or collateral estoppel. Plaintiff submits that the County has waived these affirmative defenses by failing to raise either in its answer. *See* FED. R. CIV. P. 8(c). Defendant's answer filed on January 11, 2016 did not include either defense as the Article 78 decision forming the basis for these defenses was not issued until May 3, 2016.

When a defendant raises an affirmative defense in a motion for summary judgment, the court has "the discretion to entertain the defense . . . by construing the motion as one to amend the defendant's answer." *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 283 (2d Cir. 2000); *see also S&L Vitamins, Inc. v. Australian Gold, Inc.*, 521 F. Supp. 2d 188, 213 (E.D.N.Y. 2007) ("Courts also consider factors underlying a leave to amend under Rule 15 of the Federal Rules of

Civil Procedure in permitting an affirmative defense when such defense was first raised on summary judgment."). Leave to amend "should not be denied unless there is evidence of undue delay, bad faith, undue prejudice to the non-movant, or futility." *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001)(quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962)). Delay in asserting an affirmative defense is not a basis for denying amendment "absent a showing of bad faith or undue prejudice." *State Teachers Ret. Bd v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981); *see also Cowan v. Ernest Codelia, P.C.*, No. 98 CIV. 5548, 2001 WL 856606, at *5 (S.D.N.Y. July 30, 2001) (noting that courts "have been especially flexible where the defense of res judicata was not available at the pleading stage because the other action had not yet been concluded").

There is no prejudice to Plaintiff in allowing assertion of the res judicata and collateral estoppel defenses at this juncture. The primary purpose of the pleading requirement is to provide notice to the plaintiff. *See, e.g.*, *Blonder-Tongue Labs. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971) (noting that the purpose of requiring collateral estoppel to be pled as an affirmative defense "is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate."). As Defendant raised its defenses in its memorandum in support of this motion and Plaintiff responded to those arguments in his opposition, he has been afforded sufficient notice and opportunity to respond to those defenses. *See Curry v. City of Syracuse*, 316 F.3d 324, 331 (2d Cir. 2003) (noting

adequate notice and opportunity to respond where issue was first raised in reply on motion for summary judgment and plaintiff was permitted to submit a sur-reply); *Gelfman Int'l Enters. v. Miami Sun Int'l Corp.*, No. 05-CV-3826, 2009 WL 2242331, at *4 (E.D.N.Y. July 27, 2009) ("A district court may consider the merits of an affirmative defense raised for the first time at the summary judgment stage, so long as the plaintiff has had an opportunity to respond"). In addition, Plaintiff cannot claim surprise as he was clearly aware of the state court's decision. *See, e.g.*, *Sullivan v. Am. Airlines, Inc.*, 613 F. Supp. 226, 230 (S.D.N.Y. 1985) (allowing plaintiff to amend to add collateral estoppel defense at summary judgment where arbitration award was issued after answer was filed and plaintiff "was certainly aware of the imminence of an arbitrators award, cannot assert he was unduly surprised by the proposed amendment").

Plaintiff here has had notice and an opportunity to be heard on the affirmative defenses. In the absence of a showing of unfair prejudice to Plaintiff, and in light of the fact that the state court decision was not issued until after Defendant's answer was filed, the Court finds that Defendant's failure to assert claim preclusion and res judicata in its answer does not constitute a waiver of those defenses. Accordingly, Defendant's affirmative defenses of res judicata and collateral estoppel will be considered by the Court.

B. Claim Preclusion or Res Judicata

Under the doctrine of res judicata or claim preclusion, "[a] final judgment on the merits of an action precludes the parties or their privies from

relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). To apply, New York law requires establishment of four elements: "(1) there must be a final judgment; (2) the judgment must have been on the merits; (3) the parties in the second action must be the same as those in the first; and (4) the claims must be the same in the first and second actions." *Sedacca v. Mangano*, No. 12-cv-1921, 2014 WL 1392224, at *3 (E.D.N.Y. Apr. 9, 2014) (internal quotation and citation omitted).

Claims will not be barred by res judicata "where the initial forum was not empowered to grant the full measure of relief available in the subsequent lawsuit. *Overview Books, LLC v. United States*, 755 F. Supp. 2d 409, 415 (E.D.N.Y. 2010) (citing *Burka v. New York City Transit Auth.*, 32 F.3d 654, 657 (2d Cir. 1994)), *aff'd*, 438 F. App'x 31 (2d Cir. 2011). A state court reviewing an administrative determination in an Article 78 proceeding may award only damages "incidental to the primary relief sought" and may not award compensatory damages. *See Goonewardena v. New York State Workers' Comp. Bd.*, 2016 WL 7439414, at *9 (S.D.N.Y. Feb. 9, 2016) (citing N.Y. CPLR §7806), *adopted by* 2016 WL 7441695 (S.D.N.Y. Dec. 22, 2016). As such, claims for such monetary damages in federal cases are not precluded by res judicata. *See, e.g.*, *Nash v. Bd. of Ed.*, 99 Civ. 9611, 2016 WL 5867449, at *5 (S.D.N.Y. Sept. 22, 2016) (plaintiff's claim damages in civil rights action not barred by res judicata); *Beharry v. M.T.A. New York City Transit Auth.*, No. 96-CV-1203, 1999 WL 151671, at *5 (E.D.N.Y. Mar. 17, 1999) (finding that res judicata did not bar ADA claims

because plaintiff "could not have obtained in his Article 78 proceeding the monetary relief he seeks in this federal action"), *aff'd,* 242 F.3d 364 (2d Cir. 2000). Since Roth could not have received compensatory damages for violations of his rights in the Article 78 proceeding, res judicata does not apply to Plaintiff's claims.

C. Issue Preclusion or Collateral Estoppel

Defendant also argues that Plaintiff's claims are barred by issue preclusion or collateral estoppel. "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). The conclusion that res judicata is inapplicable is not determinative of whether the Plaintiff is collaterally estopped from raising particular issues before this Court. *See generally Burgos v. Hopkins*, 14 F.3d 787, 792 (2d Cir. 1994) (applying collateral estoppel and noting that while unavailability of money damages may save plaintiff from res judicata determination, "it does not necessarily change the fact that a court has already decided the issues he now raises").

The doctrine of collateral estoppel provides that an issue may not be relitigated "when (1) the identical issue necessarily was decided in the prior action and is decisive of the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to litigate the issue in the prior action." *In re Hyman*, 502 F.3d 61, 65 (2d Cir. 2007). "A judgment

pursuant to Article 78 precludes relitigation of the issues already decided in that earlier judgment." *McBride v. Bratton*, 122 F.3d 1056 (2d Cir. 1997); *see also Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349-50, 690 N.Y.S.2d 478, 712 N.E.2d 647 (1999) (plaintiff collaterally estopped from relitigating issues decided against him in Article 78 proceeding). Plaintiff does not dispute that he raised disability discrimination in his submissions to the state court, nor does he suggest that he did not have a full and fair opportunity to litigate the issue in that court. Instead, he argues that there was no decision rendered by the state court regarding his discrimination claim because the Article 78 Order did not expressly reference or discuss that claim.

Plaintiff clearly raised the issue of disability discrimination in the state court action. His Petition asserted that the Commission's decision violated the NYSHRL and may be actionable under the ADA. In addition, his legal memorandum in support of the Petition further addressed his contention that he had been discriminated against. He devoted several pages in both his memorandum and reply memorandum to the argument that his diabetes is a disability under the NYSHRL, and that he had "established a *prima facie* case of discrimination in that [the County] medically disqualified [Roth] due to his diabetes disability." Memorandum of Law in Support of Article 78 Petition, Kampe Aff., Ex. CCC. Contrary to Plaintiff's argument, the state court acknowledged Plaintiff's argument that there was discrimination, *see* Art. 78 Order at 6, and ultimately the Petition was "**DENIED in its entirety**." *Id.* at 12 (emphasis in original). It thus

appears that the state court considered and rejected Plaintiff's arguments. *See Parker,* 93 N.Y.2d at 350 (finding that claim was precluded where court in prior proceeding "primarily addressed" the existence of substantial evidence, but also held that "remaining contentions were without merit"). Roth did not appeal this decision.

Even crediting Plaintiff's argument that the Article 78 Order did not expressly address his discrimination arguments, the lack of explicit language making a finding on Plaintiff's discrimination claim does not lead to the conclusion that there can be no collateral estoppel. "The prior decision of the issue need not have been explicit, however, '[i]f by necessary implication it is contained in that which has been explicitly decided.'" *Postlewaite v. McGraw-Hill, Inc.*, 333 F.3d 42, 48 (2d Cir. 2003) (quoting *Norris v. Grosvenor Mktg. Ltd.*, 803 F.2d 1281, 1285 (2d Cir. 1986)). "Where a plaintiff has raised arguments concerning defendants' purportedly . . . discriminatory behavior in an Article 78 proceeding, and that court finds that defendants had a rational basis for their actions, a later claim that defendants' behavior was . . . discriminatory will be precluded." *McGuinn v. Smith*, 11-CV 4761, 2012 WL 12887595, at *7 (S.D.N.Y. Sept. 7, 2012). At the very least, rejection of Plaintiff's disability discrimination argument is implicit in the state court's finding that the Commission's decision was supported by substantial evidence. *See, e.g.*, *Latino Officers Ass'n v. City of New York*, 253 F. Supp. 2d 771, 787 (S.D.N.Y. 2003) (finding that where Article 78 petition raised discrimination and retaliation claims, the "state court's determination that . . . decision to terminate him was

supported by substantial evidence . . . necessarily implied rejection of [petitioner's] claim that termination was discriminatory and retaliatory").

Plaintiff is attempting to relitigate issues necessarily decided in the Article 78 proceeding. The facts underlying both this action and the Petition are identical. In both cases, Plaintiff argues that the County's disqualification was based on determinations made after review of medical records, the same records forming the basis of Plaintiff's argument here. He raises no new facts that were not before the state court. Moreover, he raised the same legal arguments in both courts—that the County's conduct was discriminatory under both the ADA and the NYSHRL. A plaintiff is barred from relitigating issues where the state court has "held against appellant on factual issues that are central to the constitutional claims he now asserts in federal court." *Genova v. Town of Southampton*, 776 F.2d 1560, 1561 (2d Cir. 1985); *see also Leo v. New York City Dep't of Ed.*, 2014 WL 6460704, at *5 (E.D.N.Y. Nov. 17, 2014) (federal action precluded by collateral estoppel where "[a]ll of the facts alleged in [plaintiff's] complaint suggesting bad faith conduct, retaliation, or discrimination were also offered at the Article 78 proceeding."). Here, the Commission disqualified Roth because it found that he was not able to perform the duties of the position, and the Article 78 judge found that this decision was supported by substantial evidence. As such, the factual issue of whether Plaintiff was qualified to perform the essential functions of his job, an essential element of a claim under the ADA and the NYSHRL, has been decided, and he is precluded

from relitigating that issue here. Accordingly, Defendant's motion for summary judgment is granted.[4]

IV. CONCLUSION

Defendant's motion for summary judgment is granted. The Clerk of the Court is directed to close the case.

SO ORDERED.

s/_____
LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Central Islip, New York
March 27, 2018

[4] In light of this ruling, the Court declines to address Defendant's alternative arguments in support of its motion for summary judgment.

APPENDIX C

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

[Filed May 3, 2016]

In the Matter of the Application of CRAIG ROTH,	)
Petitioner,	)
For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules,	)
- against -	)
THE NASSAU COUNTY CIVIL SERVICE COMMISSION, KARL KAMPE, EXECUTIVE DIRECTOR, JOHN J. SENKO JR., COMMISSIONER, ALAN M. PARENTE, COMMISSIONER, and GARY L. ACKERMAN, COMMISSIONER,	)
Respondents.	)

TRIAL/IAS PART 37
NASSAU COUNTY

Index No.: 9631/15
Motion Seq. No.: 01
Motion Date: 12/11/15
XXX

The following papers have been read on this application:

	Papers Numbered
Notice of Petition, Verified Petition, Memorandum of Law, Affidavit and Exhibits	1
Verified Answer to Verified Petition, Affidavit in Opposition and Exhibits and	
Memorandum of Law in Opposition	2
Reply Memorandum of Law	3
Sur-Reply Memorandum of Law	4

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioner moves, pursuant to CPLR Article 78, for a judgment annulling, reversing and setting aside respondents July 8, 2015 determination or, in the alternative, the September 9, 2015 determination which affirmed the decision to disqualify petitioner

from consideration for the position of police officer with the Nassau County Police Department and reinstating petitioner to the eligible list as an eligible candidate for Police Officer Examination No. 2000, established by respondent Nassau County Civil Service Commission ("Commission") for the position of Nassau County Police Officer, or, in the alternative, for an order directing respondents to conduct a hearing whereat petitioner has the opportunity to present evidence in support of his appeal or, in the alternative, and in lieu of affirming respondents' determination, for an order scheduling a trial pursuant to CPLR § 7804(h). Respondents oppose the application.

Counsel for petitioner contends that the determination made by respondents concerning petitioner's disqualification from further consideration for the position of Nassau County Police Officer "is not warranted by the facts, is in violation of the Petitioner's due process rights, is in violation of lawful procedure, is otherwise affected by error of law, is made in bad faith, is arbitrary and capricious, is not based upon substantial evidence, is irrational and is in abuse of any discretion properly vested in [respondents].

Petitioner participated in Police Officer Examination No. 2000 for the position of Nassau County Police Officer with the Nassau County Police Department. The examination was administered by respondent Commission. By letter dated January 28, 2015, respondent Commission informed petitioner that it reviewed his medical records and placed him on "medical hold to complete endocrine and cardiac evaluations." By an additional letter dated January 28,

2015, respondent Commission requested that petitioner have his endocrinologist and cardiologist review medical documentation and to submit their own medical documentation to respondent Commission. *See* Petitioner's Verified Petition Exhibits A and B.

Counsel for petitioner submits that "[b]y letter dated March 2, 2015, Petitioner's cardiologist, Daniel M. Appelbaum, M.C., FACC notified the Commission that he evaluated Petitioner. Dr. Appelbaum further stated, 'Mr. Roth is very healthy and has no exercise restrictions, which would include running a mile and a half.' In addition to his letter, Dr. Appelbaum provided the Commission with an Exercise Stress Test Report, which report indicated no cardiac problems. . . . Dr. Appelbaum's letter fully addressed the Respondents' concern regarding Petitioner's cardiac health, reporting to the Commission that there were no cardiac concerns. By letter dated May 27, 2015, Petitioner's endocrinologist, Perry B. Herson, M.D., F.A.C.E., notified the Commission that Petitioner's 'glycemic control is excellent and he has had no episodes of hypoglycemia'. Dr. Herson further stated, 'I believe [Mr. Roth] would be fully able to perform his duties as a Nassau County Police Officer.' In addition, Dr. Herson provided the Commission with medical documentation supporting his medical opinion. . . . Dr. Herson's letter fully addressed the Respondents' concern regarding Petitioner's diabetes, reporting to the Commission that Petitioner would be 'fully able to perform his duties as a Nassau County Police Officer.' By letter dated April 8, 2015 contained within an envelope postmarked April 10, 2015, the Commission informed Petitioner that his candidacy for the position

of Nassau County Police Officer had been disqualified upon the following grounds: 'endocrine condition (insulin-dependent diabetes) which precludes ability to fulfill the physical requirements of a police officer'. In this letter nor at any other time, did Respondents state exactly how Petitioner would not be able to fulfill the physical requirements of a police officer. . . . By letter dated April 20, 2015, the undersigned notified the Commission that Petitioner was appealing the medical disqualification. In this letter, the undersigned requested that the Commission forward to the undersigned's attention, all documentation in the possession of the Commission and the NCPD that were used to form the basis of the disqualification determination. In addition, it was requested that the Commission grant a thirty (30) day extension of time within which to submit documentation in support of Petitioner's appeal, which extension *(sici)* to begin from the date the undersigned received the requested information. This letter also informed the Commission that Petitioner passed the NCPD's physical fitness screening test and that he was appointed as a New York City Police Officer and that he was currently training in the New York City Police Academy. . . . By letter dated May 6, 2015, contained within an envelope postmarked May 9, 2015, and received by the undersigned on or about May 12, 2015, the undersigned was informed that the Commission granted a twenty (20) day extension of time from the date of the postmark on the envelope to submit facts in opposition to the disqualification. . . . The envelope from the Commission postmarked May 9, 2015 did not contain any medical documentation from the NCPD or the Commission. Rather, the letter stated, 'Craig Roth's

disqualification was based upon documents he provided to the Civil Service Commission. Please ask your client to provide you with those documents'. Notably, the medical documents provided to the Commission by Petitioner clearly indicated he was unequivocally medically qualified for the position of police officer. By letter dated May 22, 2015, the undersigned respectfully requested that the Commission grant an additional extension of time within which to submit documentation in support of Petitioner's appeal. . . . By letter dated June 10, 2015, contained within an envelope postmarked June 12, 2015, the undersigned was informed that the Commission granted a final twenty (20) day extension of time from the date of the postmark on the envelope to submit facts in opposition to the disqualification. . . . On June 25, 2015, Petitioner submitted a legal brief and other documentation to the Commission in opposition to the Commission's disqualification determination. . . . By letter dated July 8, 2015, the Commission notified Petitioner of its final disqualification determination. This letter failed to provide any explanation as to the specific reasons for the disqualification. . . . By letter dated July 29, 2015, the Commission informed the undersigned that it decided to refer Petitioner to Nassau University Hospital for an endocrinology evaluation. This letter was dated exactly three (3) weeks after the date on the Respondents' final disqualification letter. . . . By letter *(sic)* September 9, 2015, contained within an envelope postmarked September 11, 2015, the Commission stated in relevant part that it had reviewed 'all relevant materials regarding [Petitioner's] disqualification'. The Commission further stated it 'has determined that the appeal process for [Petitioner] has

been completed'. . . . By email communication dated September 16, 2015, the undersigned inquired of the Commission whether its letter dated September 9, 2015 meant that the Commission was standing by its July 8, 2015 disqualification determination. The Commission did not respond to this email inquiry. . . . The Commission's letter dated July 8, 2013 notified the Petitioner of the Commission's final disqualification determination. However, the Commission's letter dated September 9, 2015 could potentially supersede the July 8, 2015 letter as the actual notice of the Commission's final disqualification determination, making the date of the Commission's final disqualification determination, September 9, 2015 rather than July 8, 2015. Significantly, Respondents failed to indicate specifically how Petitioner's 'endocrine condition (insulin-dependent diabetes)' would preclude his ability to fulfill the physical requirements of police officer. The Commission provided this reason for disqualification in the absence of any explanation or evidence whatsoever to support its validity. Further, and most notably, Petitioner's condition has not preclude, prevented or in any way impaired his ability to pass the NCPD physical fitness screening test. According to the Commission's website, the Nassau County Police Officer Physical Fitness Screening Test requires candidates to perform push-ups, sit-ups and a mile and one-half run, within a specified period of time. Petitioner's successful completion of this examination provided unequivocal evidence that Petitioner can indeed fulfill the physical requirements of police officer as the physical fitness test is designed to evaluate whether a candidate can fulfill the physical requirements of police officer. . . . Respondents'

assertion that Petitioner cannot fulfill the physical fitness requirements of police officer wholly discredits and invalidates the NCPD's own physical fitness screening test." *See* Petitioner's Verified Petition Exhibits C-P.

Counsel for petitioner argues, "[r]espondents failed to conduct an individualized test of Petitioner to determine whether Petitioner's diabetes condition currently prevents the Petitioner from performing in a reasonable manner the particular activities involved in the functions of a police officer. Respondents did not conduct an individualized investigation into Petitioner's capabilities to perform the functions of a police officer and relied solely on the fact that he has diabetes in making its disqualification determination. Respondents' failure to conduct an individualized examination of the Petitioner's ability to perform the duties of a police officer precluded the Respondents from being able to render a rational determination, rendering its final decision irrational and arbitrary and capricious. Respondents failed to indicate specifically how Petitioner's diabetes condition would prohibit him from performing the functions of a police officer. The simple fact that Petitioner has diabetes does not in any way indicate or even remotely suggest that he would be unable to perform the physical functions of a police officer. Respondents engaged in sheer and unsupported speculation about Petitioner's physical capabilities and a decision based upon nothing but speculation about his physical capabilities is arbitrary and capricious and may be actionable pursuant to the American's with Disabilities Act as that Act protects individuals from

employment discrimination based upon an actual or perceived disability."

In opposition to the Verified Petitioner, counsel for respondents asserts, "[p]etitioner took the civil service exam for police officers. He took and passed the written portion of the exam. In 2014, petitioner was reachable off the civil service list and was given a conditional offer of employment. As part of the conditional offer of employment, petitioner was required to undergo a physical medical examination. The purpose of the examination was to determine whether the petitioner was able to perform the essential functions of the police officer position with or without an accommodation. The medical assessment was performed by Dr. Tapply, the Medical Director for the Civil Service Commission. Dr. Tapply is familiar with the job duties and functions of the police officer position. Dr. Tapply is also familiar with the Municipal Police Training Council ('MPTC'), the physical standards used to determine if a candidate meets the physical qualifications of the police officer position. Dr. Tapply oversees all medical examinations of the police officer candidates. During the course of the medical assessment, the petitioner disclosed that he had diabetes. As a result, petitioner was placed on a medical hold and was asked to submit his blood glucose logs for the prior two years. On January 28, 2015, petitioner was instructed to have his private endocrinologist provide a report of his condition. . . . Upon receipt of the reports, Dr. Tapply reviewed petitioner's medical records and learned that petitioner had multiple ambulance calls involving low blood sugar, confusion, and passing out. Additionally, on at least four occasions, petitioner was treated for episodes

involving seizures. For these reasons, Dr. Tapply recommended that petitioner be disqualified from the position of police officer. . . . On April 1, 2015, the Commission reviewed the medical notes and disqualified petitioner from the position of police officer . . . . On April 29, 2015, petitioner was granted a twenty day extension of time to appeal the Commission's determination. On June 3, 2015, petitioner was granted a final twenty day extension of time to appeal. On July 1, 2015, the Commission reviewed the petitioner's appeal. As part of his appeal, the petitioner submitted his original blood glucose logs. The appeal did not provide any additional information except a note dated 05/27/2015 from the petitioner's private endocrinologist stating the petitioner would be able to perform the duties of a police officer. . . . The Commission denied the petitioner's appeal. . . . Although the Commission denied his appeal, it agreed to send the petitioner for a further evaluation to an endocrinologist. Petitioner was then examined by David Rosenthal, M.D., who also reviewed the job specifications for a police officer in connection with his evaluation. In addition, upon information and belief, petitioner provided Dr. Rosenthal with letters from Dr. Perry Herson, his treating endocrinologist, and Dr. Lorber. After a full and complete examination, Dr. Rosenthal found that the job requirements of a police officer inevitably raise concerns regarding the stability of glycemic control, especially the potential for significant hypoglycemia under conditions of episodic 'bursts' of severe physical exertion. The type of physical activity also raises concern regarding pump damage, malfunction and dislodgment of the subcutaneous insulin delivery needle. Should excessive glucose

excursions occur, and especially significant hypoglycemia, this might impair cognitive and physical danger to Mr. Roth as well as possibly others in the vicinity. Dr. Rosenthal concluded his report by stating [i]n my medical opinion, the potential for glycemic instability which may occur during the performance of the duties of a Nassau County police office (*sic*) is troubling and significant. The lack of such an event during his prior work experience is reassuring but does not preclude future problems should he become a member of the Nassau County Police Department. . . . Based on Dr. Rosenthal's report, Dr. Tapply recommended that petitioner remain disqualified for the position of police officer. The Commission reviewed Dr. Tapply's recommendation and Dr. Rosenthal's report (including the letters from Dr. Herson and Dr. Lorber). On September 2, 2015, the Commission ruled that Mr. Roth remained disqualified, and declared his appeal process completed." *See* Respondents' Affirmation in Opposition Exhibits B-H.

Counsel for respondents argues, "[t]he Commission's decision to disqualify Petitioner was rational and must be affirmed. Petitioner was examined by Dr. Tapply, a qualified medical professional, who reviewed petitioner's medical history and determined that his uncontrolled endocrine condition precludes his ability to perform the essential functions of a police officer. In particular, if hired as a police officer, petitioner would be required to, among other things, locate, pursue, and arrest suspected criminals and rescue individuals at accidents, emergencies, and disasters. Petitioner's medical history raises highly plausible concerns that he might

experience another bout of confusion, passing out, or seizure without prior notice, which would preclude his ability to perform these functions. Accordingly, the Commission's decision to disqualify Petitioner was based in reason and evidence and was neither arbitrary or capricious. Moreover, petitioner was given the opportunity to submit evidence in opposition to his disqualification on appeal. Nevertheless, the only new information that petitioner submitted was a handwritten note by petitioner's endocrinologist opining that petitioner would be able to perform the duties of a police officer. After considering the new evidence, the Commission decided to affirm his disqualification. Under these circumstances, the Commission's decision to disqualify the petitioner was entirely rational. [citations omitted]. Finally, the fact that the Commission reached a different conclusion from petitioner's personal endocrinologist is irrelevant."

Counsel for respondents further asserts the fact "[t]hat the Respondents failed to attach documents addressing the considerations used in disqualifying Petitioner and only provided letters informing plaintiff of his disqualification and right to appeal are equally unpersuasive. Section 50 of the N. Y. Civil Service Law permits municipal commissions to refuse to certify a candidate for a number of reasons, including if a candidate is 'found to have a disability which renders him or her under (*sic*) to perform in a reasonable manner the duties in which he or she seeks employment.' [citation omitted]. Section 50 further provides that '[n]o person shall be disqualified pursuant to this subdivision unless he has been given

a written statement of the reasons therefore and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.' [citation omitted]. Petitioner's own documentary evidence, a copy of the April 8, 2015 letter from the Commission, confirms that the Respondents did comply with the mandates of Civil Service Law § 50(4). It is unrefuted that Petitioner received written notification stating the reason for his disqualification and the letter plainly gave the petitioner the opportunity to make an explanation and to submit facts in opposition to disqualification. Clearly, Petitioner understood this because he did submit information in opposition to his disqualification and has been represented by counsel since the beginning of the appeal process. In any event, Civil Service Law § 50(4) does not require the Commission to have been any more specific than the statement originally provided to Petitioner, which stated that he was disqualified 'upon the following grounds: endocrine condition (insulin-dependent diabetes) which precludes ability to fulfill the physical requirements of a Police Officer.' Finally, Petitioner's claim that the Commission violated his due process rights by informing him of his disqualification without attaching the documents is simply wrong and without basis in law."

New York State Civil Service Law § 50, entitled "Examinations generally" provides, *inter alia*, as follows:

> 1. Positions subject to competitive examinations. The merit and fitness of applicants for positions which are classified in the competitive class

> shall be ascertained by such examinations as may be prescribed by the state civil service department or the municipal commission having jurisdiction. . . .
> 4. Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible
> (a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies; or
> (b) who is found to have a disability which renders him or her unfit to perform in a reasonable manner the duties of the position in which he or she seeks employment, or which may reasonably be expected to render him or her unfit to continue to perform in a reasonable manner the duties of such position; . . . .

Moreover, New York Civil Service Law § 58, entitled "Requirements for provisional or permanent appointment of certain police officers" provides for the establishment of more stringent qualifications for law enforcement applicants providing at subsection (2) as follows:

> 2. The provisions of this section shall not prevent any county, city, town, village, housing authority, transit authority or police district from setting more restrictive requirements of eligibility for its police officers, except the maximum age to be a police officer as provided

in paragraph (a) of subdivision one of this section.

It is well settled that the standard for judicial review of an administrative determination pursuant to CPLR Article 78 is limited to an inquiry into whether the agency acted arbitrarily and/or capriciously, *i.e.*, without any sound basis in reason. *See Matter of Pell v. Board of Education of Union Free School District No. 1*, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974). An appointing authority such as respondents has wide discretion in determining the fitness of candidates. This discretion is particularly broad in the hiring of persons for position in law enforcement, to whom high standards must be applied. *See Tardif v. Town of Southold*, 56 A.D.3d 755, 868 N.Y.S.2d 143 (2d Dept. 2008) *quoting Matter of Mullen v. County of Suffolk*, 43 A.D.3d 934, 841 N.Y.S.2d 648 (2d Dept. 2007); *Matter of Verme v. Suffolk County Dept of Civ. Serv.*, 5 A.D.3d 498, 773 N.Y.S.2d 106 (2d Dept. 2004); *Needleman v. County of Rockland*, 270 A.D.2d 423, 704 N.Y.S.2d 887 (2d Dept. 2000). Courts will not interfere with the discretion of the appointing authority to determine the qualifications of candidates unless the determination warrants judicial intervention on the grounds that it is irrational and arbitrary. *See Matter of Winnegar v. County of Suffolk*, 13 A.D.3d 382, 785 N.Y.S.2d 524 (2d Dept. 2004). The fact that the opinion of petitioner's privately retained expert is contrary to that of respondents' expert is not controlling. *Matter of Keryc v. Nassau County of Civil Service Comm.*, 143 A.D.2d 669, 533 N.Y.S.2d 6 (2d Dept. 1988). It is not for the courts to choose between diverse professional opinions. *See Brussel v. LoGrande*, 137 A.D.2d 686, 524 N.Y.S.2d

775 (2d Dept. 1988). Indeed, "[a]n appointing authority is entitled to rely upon the findings of its medical personnel, even if those findings are contrary to those of professionals retained by the candidate and the judicial function is exhausted once a rational basis for the conclusion is found." *Thomas v. Straub,* 29 A.D.3d 595, 818 N.Y.S.2d 90 (2d Dept. 2006) *citing Winnegar v. County of Suffolk, supra*; *Matter of Curcio v. Nassau County Civil Serv. Commn.*, 220 A.D.2d 412,631 N.Y.S.2d 881 (2d Dept. 1995). Therefore, where there is any rational basis or credible evidence in support of an agency's determination, the decision will be upheld. *See Matter of Curcio v. Nassau County Civil Service Commission, supra.*

In the instant matter, respondents have clearly presented a rational basis for their determination to disqualify petitioner – respondents relied upon expert recommendations from Dr. Tapply and Dr. Rosenthal. Moreover, respondents permitted a full appeal of the disqualification and they reviewed the submitted reports and evaluation of petitioner. The Court, having examined the proof submitted by both petitioner and respondents, finds that respondents' determination was not irrational, but rather supported by substantial evidence. There is no basis for the Court to conclude that the actions of respondents were *not* in conformance with the policy and procedures that are part of the normal course of business within respondent Nassau County Civil Service Commission (emphasis added).

Accordingly, respondents' determination is upheld.

Therefore, petitioner's application, pursuant to CPLR Article 78, for a judgment annulling, reversing and setting aside respondents July 8, 2015 determination or, in the alternative, the September 9, 2015 determination which affirmed the decision to disqualify petitioner from consideration for the position of police officer with the Nassau County Police Department and reinstating petitioner to the eligible list as an eligible candidate for Police Officer Examination No. 2000, established by respondent Nassau County Civil Service Commission for the position of Nassau County Police Officer, or, in the alternative, for an order directing respondents to conduct a hearing whereat petitioner has the opportunity to present evidence in support of his appeal or, in the alternative, and in lieu of affirming respondents' determination, for an order scheduling a trial pursuant to CPLR § 7804(h) is hereby **DENIED in its entirety** and the Verified Petition is hereby **dismissed**.

This constitutes the Decision and Order of this Court.

E N T E R :

s/_____
DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
May 3, 2016