

At a Special Term of the Rensselaer County
Supreme Court, held in and for the County
of Rensselaer, in the City of Troy, New
York, on the 7th day of September, 2018.

PRESENT: HON. RICHARD J. MCNALLY, JR.
JUSTICE

STATE OF NEW YORK
SUPREME COURT RENSSELAER COUNTY

In the Matter of the Application of
JAMES HUBERT,

Petitioner,

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

DECISION AND
ORDER/JUDGMENT
Index No. 258275

-against-

MICHAEL C. GREEN, AS THE EXECUTIVE
DEPUTY COMMISSIONER OF THE NYS
DIVISION OF CRIMINAL JUSTICE SERVICES,

Respondent.

APPEARANCES:

Mack & Associates, PLLC
Attorneys for Petitioner
(Lucas G. Mihuta, Esq., of Counsel)
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Albany, New York 12202

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Attorney General of the State of New York
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MCNALLY, J.

Petitioner, a registered sex offender, commenced the instant CPLR Article 78 petition challenging the period of time he must register as a sex offender. Respondent has answered the petition and opposes the relief requested.

In this case, petitioner was convicted in 1997 in the State of Florida of two counts of a Lewd and Lascivious Act in the Presence of a Child under the Age of Sixteen. Pursuant to a judgement of the Circuit Court, Pinellas County, the imposition of petitioner's sentence was withheld, petitioner was placed on community control as a youthful offender for a period of two years followed by four years of probation as a youthful offender (Verified Petition, Exhibit "Ex." B). Petitioner asserts that as part of his plea *nolo contendere* he was required to register as a sex offender in the State of Florida.

On or about September 22, 2004, petitioner moved from the State of Florida to the State of New York. In October 2004, the New York State Board of Examiners of Sex Offenders determined that petitioner would be required to register as a sex offender with New York State and sent him a New York State Sex Offender Registration packet. Petitioner filled out the required forms and returned it to the New York State Sex Offender Registry. In connection with petitioner's registration, a risk level hearing was conducted by Schenectady County, Supreme Court on March 10, 2006. The Court determined petitioner's risk level to be that of a level 2 sex offender with no designations. Petitioner sought modification of this designation pursuant to New York State Corrections Law § 168-O (2). On or about December 12, 2009, petitioner's risk level was modified and lowered to a level 1 sex offender with no designations.

Upon relocating to New York State petitioner has been compliant with annual address

verification with the exception of one instance in 2008. Petitioner has moved a total of 6 times while residing in New York State and has filled out the required change of address forms with the New York State Sex Offender Registry. Petitioner has additionally complied with the Electronic Security and Targeting of Online Predators Act of 2008, by reporting to the designated authorities all internet accounts, email addresses, and screen names he has utilized.

Under New York State Correction Law § 168-h (1), petitioner is required to register annually for a period of twenty years from his initial date of registration. At issue is the statutory meaning of “initial date of registration”. Petitioner argues he initially registered on July 24, 1997, the date of his conviction for sexual offenses he committed in the State of Florida. Respondent contends “initial date of registration” means the first time petitioner registered as a sex offender in the State of New York, which in this case was on October 4, 2004.

First, respondent argues petitioner failed to exhaust his administrative remedies and seeks dismissal of the petition on this ground. It is well settled that a determination made by an administrative agency must first be challenged through every available administrative remedy before it can be raised in a court of law (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52 [1978]). Petitioner’s challenge, however, is one of statutory interpretation which is a question of law and one of the narrow exceptions to the exhaustion requirement (*Matter of Hudson Riv. Val., LLC v Empire Zone Designation Bd.*, 115 AD3d 1035 [3d Dept 2014]). Therefore, petitioner was not required to exhaust his administrative remedies prior to filing the instant Article 78 proceeding.

Turning now to the merits of the petition, in the *People of the State of New York v Ellis* (162 AD3d 161 [3d Dept 2018]), the Third Department recently held that, “[w]hen presented

with a question of statutory interpretation, [the court's] primary consideration is to ascertain and give effect to the intention of the Legislature. When construing statutory language, [the Court] must do so in such a manner as to discern and give effect to the drafter's intention. [The Court] must first look to the language of the statute, and, where that language is unambiguous, . . . must give effect to its plain meaning. However, where the statutory language is ambiguous, [the Court] may look to the statute's legislative history to decipher its meaning." (*id.* at 163) (internal quotation marks and citations omitted).

The statute at issue, Correction Law § 168-h (1), states "[t]he duration of registration and verification for a sex offender who has not been designated a sexual predator, or a sexually violent offender, or a predicate sex offender, and who is classified as a level one risk, or who has not yet received a risk level classification, shall be annually for a period of twenty years from the *initial date of registration*" (emphasis added).

The Court has reviewed the statute and finds that "initial date of registration" is not defined (Article 6-C Sex Offender Registration Act §§ 168 - 168 w). That being said, the language at issue is unambiguous. The word "initial" is commonly understood to mean and is defined as "placed at the beginning: first" (see Merriam-Webster Online Dictionary, [<https://www.merriam-webster.com/dictionary/initial>]). Thus, "initial date of registration" must mean the first time a convicted sex offender registers as a sex offender with the required state and local authorities. The Court rejects respondent's interpretation that in this case "initial date of registration" means the first time petitioner registered as a sex offender with the required New York State authorities.

As previously stated, petitioner asserts he was required to register as a sex offender on the

date of his conviction which was July 24, 1997. As such, petitioner seeks to be credited with 7 years, 2 months, and 10 days, the time period he alleges he was registered as a sex offender in the State of Florida. However, the record reveals petitioner first registered as a sex offender on August 14, 2003 with the Jefferson County Sheriff's Department (Verified Answer, Ex. A [Sexual Offender Registration Form]). Under Florida Law it would appear that compliance with the state's registration statute applied to petitioner only after his completion of community control and probation which ended in 2003 (Fla. Stat. § 943.0435; *K.J.F. v State*, 44 So. 3d 1204 [2010 Fla. App.]) (the statute requiring juveniles to register as sexual offenders does not apply to juveniles for whom adjudication of delinquency is withheld). Accordingly, the Court finds petitioner's initial date of registration to be August 14, 2003. Petitioner shall be required to annually register as a sex offender with all required New York State and local authorities until August 14, 2023.

The Court has considered the remaining contentions of the parties not specifically addressed herein and finds them to be without merit.

It is,

ORDERED, that the Verified Petition is hereby granted in part and denied in part, in accordance with the Court's Decision and Order/Judgment.

This shall constitute the Decision and Order/Judgment of the Court. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not

relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

**ORDERED and ADJUDGED.
ENTER.**

Dated: September 7, 2017
Albany, New York



RICHARD J. MCNALLY, JR.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated December 8, 2017, Verified Petition with annexed exhibits.
2. Verified Answer dated March 9, 2018, Supporting Affidavit with annexed exhibit, Memorandum of Law.
3. Reply Affirmation dated March 26, 2018 with annexed exhibit.
4. Letter response dated June 21, 2018 with annexed exhibit.