Matter of Mehta v New York City Taxi & Limousine Commn.
2006 NY Slip Op 30817(U)
June 27, 2006
Supreme Court, New York County
Docket Number: 117000/2005
Judge: Paul G. Feinman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
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In the Matter of the Application of
PERVAIZ MEHTA,
Petitioner,

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

- against -

NEW YORK CITY TAXI AND LIMOUSINE COMMISSION; MATTHEW W. DAUS, Commissioner, and THE CITY OF NEW YORK,
Respondents.
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Index Number	117000/2005
Mot. Submit Date	May 3, 2006
Mot. Seq. No.	001
Mot. Cal. No.	10

DECISION, ORDER AND JUDGMENT

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Papers considered in review of this petition to annul and remand:

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	1
Verified Answer, Memo of Law.....	2, 3
Petitioner's Reply Memo.....	4
Respondents Aff. in Further Support.....	5
Letters of April 10, 2006 and May 3, 2006.....	6, 7

PAUL GEORGE FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks an order annulling the summary temporary suspension and subsequent revocation of his taxi driver's license. Alternatively he seesk to have the matter remanded for a new license revocation hearing pursuant to CPLR 7803(3). For the reasons which follow, the petition is denied.

Factual Allegations and Procedural History

001

Petitioner was a New York City taxi driver for approximately nine years, licensed by the New York City Taxi and Limousine Commission ("TLC") (Ver. Pet. ¶ 3). At the time he last sought to renew his license, he submitted a urine sample for testing as required under the rules of the Taxi & Limousine Commission (35 RCNY § 2-19[b]). He was notified on December 10, 2004 that his sample had tested positive for the presence of codeine and morphine (Ver. Pet. ¶ 4). He received a "notice of fitness hearing" dated December 14, 2004 which informed him that his license had been suspended as an "emergency" measure pursuant to 35 RCNY § 8-16(a), and that a Licensing Standards Fitness Hearing was scheduled for Thursday, December 23, 2004 at the TLC office, the purpose of which was "to determine your fitness to maintain a TLC license in light of the positive drug test result." (Ver. Pet. Ex. A). It stated that based on the outcome of the hearing, it might be recommended that his license be revoked. The notice advised him that he could have legal representation at the hearing and could present evidence and witnesses. He was also instructed what to do if he believed his positive test result was due to medication.

Due to rescheduling at the request of petitioner, the hearing did not take place until May 19, 2005.[1] The administrative law judge (ALJ) was given a memorandum prepared by the Assistant General Counsel of the TLC which set forth the TLC allegations that the results of the drug test showed that petitioner tested positive for the presence of codeine at 25, 312 nanugrams per milliliter, when the federal government's drug test guidelines set the cutoff level at 2,000 nanugrams per milliliter, and the presence of morphine at 2,729 nanugrams per milliliter when the federal government sets the cutoff level at 2,000 nanugrams per milliliter (Ver. Ans. Ex. C).

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[1]A copy of the transcript is attached to the Verified Answer as Exhibit L.

After hearing testimony and then adjourning the matter in order for petitioner to submit his medications to the Doctor's Review Service for its review, the ALJ issued a written recommendation on June 9, 2005 (Ver. Pet. Ex. B). The recommendation stated that although petitioner claimed his positive result may have been caused by a medication he received in Pakistan for migraine headaches and that he did not otherwise use these medications, and his attorney presented arguments challenging the sufficiency of the drug testing facility's documentation and the chain of custody, the conclusion by the Doctor's Review Service was that the medication had not influenced the test results.[2] Although the ALJ recommended that petitioner's license be revoked, by letter dated June 9, 2005 he offered petitioner an opportunity to submit a written response to his recommendation on or before June 19, 2005, prior to the Chairperson issuing a final decision (Ver. Pet. Ex. B). On June 13, 2005, petitioner's then attorney wrote to the TLC Commissioner, raising issues as to the fairness of the hearing, including the purported lack of authentication of the documents showing the report of a positive test, and lack of testimony by an expert toxicology witness and testimony concerning the chain of custody of the sample (Ver. Ans. Ex. O).

On August 12, 2005, the TLC Commissioner issued his findings in the form of a letter (Ver. Ans. Ex. P). The letter stated that the Commissioner did not find the arguments by petitioner's attorney to be persuasive, accepted the positive drug test findings of the testing service, and rejected petitioner's defense that his result was due to a prescription medication. Thus, petitioner's license was revoked. Thereafter, on August 17, 2005, petitioner addressed a

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[2]See Verified Answer Ex. M.

letter to the TLC Commissioner stating that urine sample sent to a second lab did not find traces of any drugs, and that he believes his sample was inadvertently typed as someone else's or was mixed, as he has "never used any illegal substance in my life." (Ver. Ans. Ex. Q).

Contentions

Petitioner seeks to have the revocation of his taxi driver's license annulled and his TLC license restored, and also to be awarded his lost earnings from the date of his suspension until the time of his reinstatement. In the alternative, he asks for a new revocation hearing before OATH. He brings this proceeding pursuant to CPLR 7803(3), arguing that the decision to revoke his license was arbitrary and capricious, in particular that his due process rights provided for in the TLC regulations were violated. He contends first that based on the regulations, his proceeding should have been conducted by an ALJ at the Office of Trials and Hearings (OATH) rather than an ALJ at the TLC. He further argues that he was unlawfully suspended prior to his fitness hearing as he was not found to be driving while impaired, was not afforded a timely commencement of the revocation proceeding, and was not informed of his right to have a hearing concerning the suspension which is set forth in the regulations. He argues that where an agency acts in contravention of its own rules and procedures, its action may be annulled as being arbitrary and capricious.

Respondents' verified answer contains five affirmative defenses. The first is that the matter should be transferred to the Appellate Division as there is a question of substantial evidence (Ver. Ans. pp. 15-16). The second is that the decision by the TLC was not arbitrary and capricious as it was based on the testimony and evidence which showed an illegal presence of morphine and codeine in petitioner's system, the latter in an amount of more than 12 times the

legal limit (Ver. Ans. pp. 16-20). They take issue with petitioner's argument that revocation of a license should not be based on the presence of an excessive amount of a controlled substance without establishing that the individual is abusing the substance or is impaired by the substance. The third affirmative defense contends that the TLC regulations provide "extensive due process protection" and that petitioner received adequate notice and a right to be heard (Ver. Ans. pp. 2-23, esp. ¶ 77). The fourth affirmative defense disputes the claim by petitioner that his hearing should have been conducted before OATH. The fifth affirmative defense is that petitioner is mistaken as to the law concerning summary suspensions of licenses (Ver. Ans. pp. 25-26).

Legal Analysis

It is a well-settled rule that judicial review of an administrative determination brought pursuant to Article 78 of the CPLR is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is "'determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). Furthermore, an arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232). The court is to dispose of an Article 78 proceeding in the same manner as it would a motion for summary judgment (CPLR 409[b]).

Reviewing courts are "not empowered to substitute their own judgment or discretion for

that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). The scope of review does not include "any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" and that "the sanction must be upheld unless it shocks the judicial conscience" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell*, 34 NY2d at 232-234).

Once the court has found a rational basis exists for the determination, its review is ended (*Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]). Put another way, the courts may not interfere unless there is no rational basis for the exercise of discretion or the action complained of is found to be "arbitrary and capricious." (*Matter of Pell*, 34 NY2d at 231[citations omitted]).

1. Substantial Evidence Review

Contrary to respondents' characterization of it, the petition does not seek to have the court conduct a substantial evidence review of the entire record. Thus, CPLR 7803(4) and 7804(g) are not implied. The claim here is not that there was not a sufficient quantum of evidence before the ALJ to revoke petitioner's taxi license, but rather that the proceedings were legally flawed due to alleged procedural failures by the TLC to apprise petitioner of his right to a summary hearing and to have his hearing conducted by an ALJ who is under the aegis of OATH rather than ALJ in the employ of the TLC. These procedural defects, petitioner contends, rendered the proceedings arbitrary and capricious as a matter of law. As the sufficiency of the evidence is not at issue, the matter can be fully determined in this court and need not be transferred pursuant to CPLR 7804(g).

2. Proper Venue for the Hearing

Pursuant to section 19-506(1) of the New York City Administrative Code, the TLC has the power to "impose reasonable fines, suspend or revoke any driver's license or vehicle license where the holder has failed to comply with or has willingly or knowingly violated any of the provisions of this chapter or a rule or regulation of the commission." The regulations promulgated by the TLC as concerns taxicab drivers are contained in Title 35 of the Rules of the City of New York. The regulations provide that, as in the facts before the court, where the TLC finds pursuant to 35 RCNY § 8-16(a) that "emergency action is required to insure public health, safety or welfare," the commissioner "may order the summary suspension of a license or licensee, pending revocation hearings." The TLC is to notify the licensee of the summary suspension within five days of the suspension (35 RCNY § 8-16[c]). "If the licensee wishes to receive a hearing concerning the suspension, he or she may request a hearing within ten (10) calendar days of receipt of the notice of suspension." (35 RCNY § 8-16[c]). The summary suspension hearing is conducted pursuant to chapter 8, "Adjudications" of the TLC rules (35 RCNY §§ 8.01-8.16). It is held before one of the TLC's administrative law judges who considers relevant evidence and testimony under oath and issues a written recommendation to the Chairperson, and the Chairperson's acceptance, rejection, or modification of the recommendation is the final determination with respect to the summary suspension (35 RCNY § 8-16[d-e]).

Petitioner contends that he was suspended due to his failure to pass the annual drug test. The regulation in force at the time that petitioner's license was suspended stated in pertinent part:

> [E]ach licensee . . . shall be tested, at the licensee's expense, for drugs or controlled substances, as set forth in § 3306 of the Public Health Law annually, within thirty (30) days of the anniversary of the issuance of either a new or renewal license. Such testing

> shall be performed by an individual (entity designated by the Commission . . . . The licensee shall be afforded the opportunity of a hearing as to the licensee's fitness where a positive test result has been reported to the Commission.[3]

(35 RCNY 2-19[b][1]). Petitioner argues that because Section 2-19 of Title 35 of the RCNY is silent as to the penalty for a positive test, the TLC should have followed Section 8-14 which provides that where the Commission seeks the penalty of license revocation for violation of a regulation that does not contain discretionary or mandatory revocation as a penalty, the proceeding must be commenced before OATH.

Petitioner's argument is unpersuasive. The notice to petitioner states that his license was suspended pending a revocation hearing, as an emergency action to protect the public pursuant to 35 RCNY § 8-16(a), and that the purpose of the hearing was to determine his fitness to maintain a license. Pursuant to 35 RCNY § 8-02(a), the TLC's adjudications tribunal has original jurisdiction over reviews of the fitness of licensees regarding licensing determinations (35 RCNY §8-02[a][iii]). Thus, a hearing before an ALJ employed by OATH would be improper according to the rules of the TLC.

3. Emergency Suspension of License and Due Process

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[3] The regulation was revised in November 2005 and now reads in pertinent part:

> E]ach licensee . . . shall be tested annually, at the licensee's expense, for drugs or controlled substances, as set forth in § 3306 of the Public Health Law. Such testing must occur no sooner than thirty (30) days prior to, and in any event no later than, the anniversary of the date of issuance of the current driver's license. Such testing shall be performed by an individual or entity designated by the Commission and possessing a requisite permit issued by the New York State Department of Health. If the results of said test are positive, the driver's license may be revoked after a hearing in accordance with § 8-15 of this Title.

35 RCNY 2-19(b).

a. Commencement of the Proceeding

Section 8-16 of Title 35 of the RCNY requires that where the emergency action of suspending a license is taken so as to protect the public safety, revocation proceedings shall commence within five calendar days of the suspension. Respondents' records show that the proceeding was timely commenced, as the positive test results were received on December 13, 2004 and the letter notifying petitioner of his license suspension and hearing was dated and mailed December 14, 2004 (Ver. Ans. Ex. A, Telephone Memoranda/Correspondence Notes; Ex. D, Notice of Fitness Letter).

b. Notice of Suspension Hearing

As noted above, section 8-16 states that the licensee may request a hearing concerning the suspension within ten calendar days of receipt of the notice of suspension, and that the hearing must normally occur within 10 days of the request (35 RCNY § 8-16[c]). Petitioner argues that although the December 14, 2004 notice informed him of his license suspension and the date of the fitness hearing on December 23, 2004, it nowhere stated that he had the right to request a hearing concerning the suspension itself. This failure to notify him explicitly of his right to request a hearing concerning the suspension, petitioner argues, is a violation of his due process rights.

Where an agency may exercise a statutory power in a manner that adversely affects property rights, such as the right of a taxi driver to be licensed so as to earn a living, the courts have found there to be a requirement of notice and hearing even where a statute is silent (*Matter of Hecht v Monaghan*, 307 NY 461, 467, 468 [1954]). Any hearing regarding the revocation or suspension of a taxi driver's license must meet minimal constitutional requirements (*Hecht v*

Monaghan, 307 NY at 470). "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" (*In re Gault*, 387 U.S. 1, 33 [1967] [citations omitted]).

Here, petitioner argues that he was never given notice of his right to request a hearing on his suspension. Respondents contend that the revocation hearing implicitly considered both the suspension and revocation issues and that therefore there was no violation of petitioner's due process rights (Hoggan Aff. in Furth. Supp. ¶ 12). Respondents rely on *Matter of New York Apple Tours, Inc. v Hoffman*, 278 AD2d 70, 72 [1st Dept. 2000], *lv denied* 96 NY2d 729 [2001]), which addressed a somewhat analogous situation. In *New York Apple Tours*, the Department of Consumer Affairs had commenced a proceeding concerning the fitness of a tour bus company to continue as a licensed operator, and during the course of the hearing, the agency commenced a second hearing for an emergency suspension of the company's license. After three days of testimony concerning the suspension, the administrative law judge granted the motion to temporarily suspend the company's license pending completion of the fitness hearing.[4] The tour bus company then commenced a proceeding to enjoin the suspension based in part on the alleged lack of notice concerning the suspension hearing. Its petition was ultimately denied, as the court

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[4]The suspension hearing consisted of testimony and evidence concerning the company's numerous violations of the Vehicle and Traffic Law, the existence of many incomplete files concerning the company's drivers, and its many serious failures to comply with rules of the Department of Motor Vehicles for bus drivers (278 AD2d at 71). The administrative law judge suspended the company's license based on the company's history of sloppy record keeping which showed it was not to be trusted to hire drivers were e properly licensed to operate tour buses, as well as the fact that the company admitted guilt to Federal charges of illegally importing buses (278 AD2d at 71).

found that the company was provided with n[illegible].e of the application for emergency relief "in the context of a license revocation hearing that was already in process." (278 AD2d at 72). The court stated that the expansion of the hearing's scope to include both the company's fitness to operate and the application to suspend its license still concerned matters which with the company was familiar, and implicitly found no prejudice to the company.

Here, the transcript of the revocation hearing reveals that petitioner's attorney addressed her arguments to the sufficiency and adequacy of the test results, as well as to petitioner's claims that he never used codeine or morphine but did have a medication prescribed by a doctor in Pakistan which might contain those drugs and which should be tested. Such testimony and evidence were pertinent to both the issues of whether his license was properly suspended on an emergency basis, as well as to his fitness to maintain a license. The ALJ then relied on the totality of the evidence to formulate a recommendation, which was then affirmed by the TLC commissioner, that there were grounds to revoke petitioner's then-suspended license. Given that the petitioner had notice and could have challenged at the same hearing both the suspension and the revocation, there was no due process violation.

Here, it should be emphasized that it is not for this court to substitute what it might have done were it the trier of fact in the first instance. And nothing expressed in the preceding paragraph constitutes an evaluation of whether the TLC's actions were supported by substantial evidence, a role reserved to the Appellate Division. Rather, this court's role is limited to determining whether the TLC's actions were taken in an arbitrary or capricious manner, or differently stated, whether there is any reasonable basis to support the TLC's determination and action. That its determination may have harsh and, in the eyes of some, unfair consequences is

not the standard of review. The record does support a determination that the suspension followed by the revocation of petitioner's license by TLC was either arbitrary or capricious. Accordingly, the petition must be denied. It is therefore,

ADJUDGED and ORDERED that the petition is denied and the proceeding is dismissed.

The foregoing shall constitute the decision, order and judgment of this court.

ENTER:

Dated: June 27, 2006
New York, New York

J.S.C.

Norman Goodman
Clerk