STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

STEVEN A. MUELLER,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

Respondent.

DECISION and ORDER
INDEX NO. 1803-12
RJI NO. 01-12-106528

Supreme Court Albany County All Purpose Term, June 8, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Upon its application for and denial of a public emissions inspection license, Petitioner commenced this hybrid Article 78 proceeding / declaratory judgment action. He set forth seven "Claim[s] For Relief" without including the specific relief he sought in each, and concluded with

five substantive "wherefore" relief paragraphs.[1] Respondent answered the complaint/petition, and simultaneously moved for summary judgment of the declaratory judgment action. On this record, because Petitioner is entitled to neither Article 78 nor declaratory relief, the complaint/petition is dismissed.

In June 2010, Petitioner obtained a building permit and began constructing a pole barn. He built the new barn to expand his automobile dealership to include a New York State public emissions inspection station. Although he expended a substantial sum of money in the construction process, he had not applied for a public emissions inspection license pursuant to 15 NYCRR §79.7(b).

Petitioner waited until the end of 2011 to file his public emissions inspection license application. In the interim, on July 13, 2011, the applicable regulation was amended to cap the number of public emissions inspection licenses permitted in each County. (15 NYCRR §79.7[f]). Petitioner's application sought a license in Cayuga County, where the new regulation limited the number of licenses to 47. By letter dated January 18, 2012, Respondent informed Petitioner that there were already 77 licensed stations in Cayuga County and his application was not approved because "the maximum number of inspection stations to be licensed has been reached in Cayuga County." Petitioner's application was placed on a wait list.

Petitioner's mandamus demands for relief seek to compel Respondent to review his application, to "exercis[e] discretion on a case by case basis in reviewing applications," and to "exercis[e] discretion and consider an applicant's location in deciding upon whether to review an

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[1]As such, both the complaint/petition and the Respondent's answer/motion are being analyzed within the context of each "wherefore" demand for relief.

application. On this record, however, Petitioner failed to sufficiently demonstrate his mandamus to compel claims.[2]

"Mandamus to compel is available only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law." (Matter of Glenman Indus. & Commercial Contr. Corp. v New York State Off. of the State Comptroller, 75 AD3d 986, 989 [3d Dept 2010], quoting Matter of Schmitt v Skovira, 53 AD3d 918 [3d Dept 2008][internal quotes omitted]; Davis v NYS Dept. of Education, __AD3d__ [3d Dept. 2012]; Gasda Ltd. v Adduci, 188 AD2d 988 [3d Dept 1992]). "In other words, [t]he act to be compelled must be ministerial, non-discretionary, non-judgmental, and [must] be premised upon specific statutory authority mandating performance in a specific manner." (New York Civil Liberties Union v State of New York, 3 AD3d 811, 814 [3d Dept 2004], quoting Matter of Brown v New York State Dept. of Social Servs., 106 AD2d 740 [3d Dept 1984][internal quotes omitted]).

Here, Petitioner set forth no non-discretionary duty Respondent failed to perform. Specifically contradicting Petitioner's demand to compel Respondent to consider his application, the regulation at issue explicitly authorizes Respondent to place Petitioner's application on a wait list. 15 NYCCR §79.7(f) states: "[i]f the maximum number of public official emissions inspection stations is reached in any county, the commissioner may refuse to approve an application for an original public official emissions inspection station license... and shall place

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[2] Although not enumerated in the petition's wherefore demand for relief, the petition also seeks "in the interest of equity" this Court to compel Respondent to conduct its annual review of the maximum number of inspection facilities for Cayuga County. (15 NYCCR §79.7[f]). Petitioner, however, set forth no basis for his claimed equitable right. Nor did he demonstrate his entitlement to compel this review due to Respondent's failure to perform a non-discretionary duty. (Davis v NYS Dept. of Education, supra).

any such application on a waiting list." Nor did Petitioner set forth any proof to establish that his application is subject to an exception. (15 NYCCR §79.7[f][1-5]).

Similarly unavailing is Petitioner's demand that Respondent be compelled to perform a case by case discretionary review of each application. Such demand not only fails to set forth a non-discretionary duty but, considering the above regulatory language, seeks relief that conflicts with 15 NYCCR §79.7's process. Moreover, to the extent that Petitioner characterized Respondent's refusal to review his application on a case by case basis as an arbitrary and capricious determination, his claim is contradicted by 15 NYCCR §79.7's language and rejected.

Also contrary to Petitioner's claim, there is no basis to compel Respondent to consider each applicant's location in deciding whether to review their application. As set forth above, when a County's cap has been reached the Respondent has broad authority to place license applicants from that County on a wait list. The regulation then provides five exceptions. (15 NYCCR §79.7[f][1-5]). At issue here is the fifth exception, which states: "[n]otwithstanding the provisions of this subdivision, the commissioner shall accept an application for review if... the commissioner determines that there is a need for an inspection station in a specific geographic region within a county due to consumer factors, including but not limited to, distance and travel time between stations." (15 NYCCR §79.7[f][5]). Importantly, at no point does this exception require the commissioner to consider each application's location or perform any other non-discretionary duty. Moreover, unlike the other four exceptions, this one is not dependent upon the license applicant. Instead, Respondent is given the authority to determine consumer need for inspection stations independent of individual applications. Because this inquiry focuses solely on consumer need, Petitioner's contrary construction wholly unjustified.

Accordingly, each of Petitioner's mandamus to compel claims are dismissed.

Turning to the declaratory relief Petitioner seeks, Respondent demonstrated that Petitioner is not entitled to a declaration that he be "grandfathered in as a public emissions inspection license-holder due to [his] detrimental reliance."

Petitioner correctly notes that generally "court[s are] constrained to decide cases on the law as it exists at the time of the decision[, except when]... [a]s a result of [Respondent's] permission and approval, petitioners... change[] their position to their detriment and... expend[] a substantial sum of money." (Temkin v Karagheuzoff, 34 NY2d 324, 329 [1974]). Respondent demonstrated, however, that Petitioner does not fit within such exception.

While it is uncontested that Petitioner has expended a substantial sum of money in constructing his pole barn, this record contains no proof that he expended any funds upon Respondent's permission and approval of a license. Instead, the record shows that Petitioner did not even apply for a license until the "construction of his facility was nearing completion." To the extent that Petitioner relied upon the building permit issued by the Town of Sennett, his reliance was misplaced and does not bind Respondent. Because Petitioner did not construct his barn "in reliance on a [public emissions inspection license] legally issued" by Respondent, he has not demonstrated his entitlement to a declaration due to his detrimental reliance. (Preble Aggregate Inc. v Town of Preble, 263 AD2d 849, 851 [3d Dept 1999], quoting Matter of Ninnie v Gould, 178 AD2d 832 851 [3d Dept 1991]; see also Evans v Town of Greenfield Zoning Bd. of Appeals, 3 AD3d 705 [3d Dept 2004]; Ronsvalle v Totman, 303 AD2d 897 [3d Dept 2003]). Correspondingly, he is not entitled to an order compelling Respondent to issue a license based upon his detrimental reliance. (New York Civil Liberties Union v State of New York, supra).

Nor is Petitioner entitled to a declaration that the cap constitutes an unconstitutionally retroactive regulation. Simply put, at no point has Respondent retroactively applied 15 NYCCR §79.7(f)'s cap to Petitioner. Rather, Petitioner readily admitted that he did not even apply for a public emissions inspection license until after the regulation had been in effect for approximately six months. As such, 15 NYCCR §79.7(f) was not retroactively applied to Petitioner's application and this portion of his petition is wholly unsupported and denied.

Respondent also demonstrated its entitlement to dismissal, as a matter of law, of Petitioner's claim seeking a declaration that 15 NYCCR §79.7(f) violated his due process rights.

To establish such a claim Petitioner must establish both a "cognizable property interest and that the municipal [respondents] acted wholly without legal justification to deprive them of that property." (Kreamer v Town of Oxford, __AD3d__ [3d Dept 2012], quoting Bower Assoc. v Town of Pleasant Val., 2 NY3d 617 [2004][internal quotation marks omitted]). Here, Respondent demonstrated that it did not act wholly without legal justification in implementing 15 NYCCR §79.7(f). Respondent explained, by affidavit of its Director of Vehicle Safety and Clean Air, both its necessity to comply with the Federal Clean Air act and the reasonable fiscal basis for the regulation. Moreover, Respondent explained how it fully complied with the regulatory approval process in implementing 15 NYCCR §79.7(f). By such proof, Respondent sufficiently demonstrated that it did not act wholly without legal justification.[3]

In opposition, Petitioner set forth no proof to raise a triable issue of fact on such issue. Even accepting Petitioner's property interest claim as true, he raised no triable issue of fact

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[3] Contrary to Petitioner's claim, this proof also sufficiently establishes that the Cayuga County cap is not arbitrary and capricious.

because such proof addresses only one part of the applicable two part test. Moreover, the proof Petitioner proffered to establish that 15 NYCCR §79.7(f) is arbitrary and capricious is wholly insufficient to establish the necessary "egregious conduct that implicates federal constitutional law." (Bower Assoc. v Town of Pleasant Val., supra at 630). As such, Respondent is entitled to summary judgment dismissing this claim for relief.

Lastly, the entirely new legal theories set forth in Petitioner's Reply are not properly before this Court and are rejected. (Crawmer v Mills, 239 AD2d 844, 844-45 [3d Dept 1997]; Albany County Dept. of Social Services v Rossi, 62 AD3d 1049 [3d Dept 2009]; E.W. Tompkins Co., Inc. v State University of New York, 61 AD3d 1248 [3d Dept 2009]).

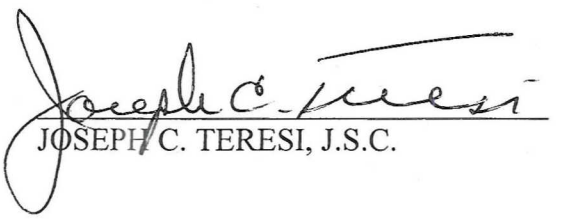
Accordingly, the Petition is dismissed and it is hereby:

ORDERED, ADJUDGED, DECLARED AND DECREED that 1) Petitioner is not entitled to be "grandfathered in as a public emissions inspection license-holder due to [his] detrimental reliance," 2) 15 NYCCR §79.7(f) has not been retroactively applied to Petitioner, and 3) 15 NYCCR §79.7(f) does not violate Petitioner's due process rights.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 27, 2012
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated March 28, 2010; Summons, dated March 23, 2012; Verified Complaint/ Petition, dated March 22, 2012, with attached Exhibits 1-5.
2. Answer, dated April 18, 2012, with attached Exhibits A-I; Notice of Motion, dated April 19, 2012; Affidavit of Steven Cooper, dated April 19, 2012; Affirmation of Adrienne Kerwin, dated April 19, 2012, with attached Exhibit A.
3. Reply of Kevin Mendillo, dated May 31, 2012.