Matter of Hiraldo v New York City Dept. of Finance
2013 NY Slip Op 32064(U)
September 4, 2013
Supreme Court, New York County
Docket Number: 400978/13
Judge: Joan B. Lobis

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOBIS

Index Number : 400978/2013
HIRALDO, JENNIFER
vs
NYC DEPARTMENT OF FINANCE
Sequence Number : 001
ARTICLE 78

PART 6

INDEX NO. _____
MOTION DATE 8/27/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to 34, were read on this motion to/for Art. 78 Petition

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition | No(s). 1-24
Answering Affidavits — Exhibits | No(s). 25-34
Replying Affidavits | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER and Judgment

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/4/13

JOAN B. LOBIS, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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In the Matter of the Application of
JENNIFER HIRALDO,

Petitioner,

Index No. 400978/13

-against-

Decision, Order and Judgment

NEW YORK CITY DEPARTMENT OF FINANCE,

Respondent.

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JOAN B. LOBIS, J.S.C.:

Pro se Petitioner, Jennifer Hiraldo, who is proceeding in forma pauperis, brings this petition under Article 78 of the Civil Practice Law and Rules. She challenges a determination of the Respondent, New York City Department of Finance (DOF), which affirmed the decision of its administrative law judge, finding the Petitioner, "GUILTY [sic]" of double-parking and fining her $115.00. Respondent answers the petition. For the following reasons, the petition is granted.

Earlier this year, on January 3, a traffic enforcement agent identified as "T. Ray," issued a notice of violation to Ms. Hiraldo's vehicle, which bears the license plate DH619S. The agent represented that at 11:13 a.m. on that day Petitioner's vehicle was double-parked in "Front Of 349 Cabrini Blvd." The summons included a fine of $115.00.

Petitioner fought the ticket by appearing at the DOF's Parking Violations Bureau (PVB) the next day. An administrative law judge (ALJ) conducted an evidentiary hearing at which Ms. Hiraldo testified and presented written documentation in support of her challenge, including photographic evidence. She contended that in light of street cleaning restrictions, she double-parked

her vehicle in front of 360 Cabrini Boulevard, and not in front of the cited address, which is a school. Notwithstanding the ALJ upheld the ticket, adjudicating Ms. Hiraldo "GUILTY [sic],"[1] and fining her $115.00. The ALJ indicated that he was not persuaded that her vehicle was "not double parked at the violation location indicated on the summons." Having lost her challenge, Ms. Hiraldo appealed the hearing decision, claiming, in pertinent part, that she was "not parked in front of 349 Cabrini Blvd." In its answer, the DOF represents that no recording of the evidentiary hearing was made, due to "an audio recording defect."

Responding to her notice of appeal, the DOF scheduled oral argument for January 28, 2013. At that argument, which transcript has been included in the record, Ms. Hiraldo reiterated her position and testified that she is unemployed and cannot afford the $115.00 fine. If she had stayed on that side of the road, she pointed out, she would have only gotten a $45.00 fine for failing to move the vehicle during street cleaning. The panel acknowledged that if Hiraldo were not at the address cited on the summons that argument would be a valid defense. She testified again that she was "in front of" 360 Cabrini Boulevard.

The three-member panel nevertheless denied the appeal. Indicating that the determination was based "[u]pon review of the entire record before us," and notwithstanding Respondent's admission that the evidentiary hearing was not recorded "and so none was reviewed by the Appeals Board," the panel upheld the ticket.

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[1]Proceedings by the PVB are civil in nature. Gruen v. Parking Violations Bureau, 58 A.D.2d 48, 49 (1st Dep't 1977); see also N.Y.C. Admin. Code § 19-206(b)(2) ("[n]o charge may be established except upon proof by a preponderance of the evidence.")

Petitioner now brings this petition, pro se and as a poor person, challenging the DOF's determination. She swears that while the final determination was postmarked February 5, 2013, she did not receive the mailing until sometime in March. She continues to reiterate her position that she was "in front of 360 Cabrini Boulevard" at the time the violation was issued.

The DOF has answered, opposing the petition. It claims, in pertinent part, that the petition is time-barred. Even if it were not time-barred, the determination would not be arbitrary and capricious.[2]

In an Article 78 proceeding, a court reviews an administrative action to determine whether an agency's decision violates lawful procedure, is arbitrary or capricious, or is affected by an error of law. C.P.L.R. § 7803(3); see also Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). "An adverse agency determination must be reversed when the relevant agency does not comply with either a mandatory provision, or one that was 'intended to be strictly enforced.'" Blaize v. Klein, 68 A.D.3d 759, 761 (2d Dep't 2009) (quoting Syquia v. Bd. of Educ., 80 N.Y.2d 531, 536 (1992)).

As an initial matter, this Court notes that the DOF's answer has not been properly verified. See C.P.L.R. § 7804(d) ("there shall be a verified answer, which must state pertinent and

[2]The DOF also claims that there was evidentiary support to uphold its determination. Article 78 makes plain, however, that the issue of substantial evidence would not be proper for this Court to consider, and this Court routinely transfers those matters to the appellate division. C.P.L.R. § 7804(g); e.g., O'Dette v. N.Y. State Unified Ct. Sys., 107 A.D.3d 564 (1st Dep't 2013).

material facts showing the grounds of the respondent's action complained of.") Respondent's answer is verified by an assistant corporation counsel, who verifies that the source of her information and belief "is obtained from the records and proceedings of DEP." The DEP is not the relevant agency sued in this action, the Department of Finance is, and accordingly, this Court finds that the verification lacks foundation. Moreover, Respondent has failed to timely cure that defect. Cf. Mulholland v. Bd. of Educ., 70 Misc.2d 852, 853 (N.Y. Sup. Ct. 1972) (respondent cured defective answer by submitting proper verification prior to any disposition), aff'd, 41 A.D.2d 704 (2d Dep't 1973).

Even were the DOF's answer to have been properly verified, Petitioner's application would still prevail. This Court considers Respondent's first affirmative defense that the petition is time-barred. Respondent devotes at most two paragraphs to the substance of that defense. The Court is not persuaded. Petitions must be brought "within four months after the determination to be reviewed becomes final and binding." C.P.L.R. § 217(1). Respondent contends that the statute of limitations begins to run on the date that the notice "is mailed" to a petitioner. In this case, however, while Ms. Hiraldo notes that the envelope containing the determination was postmarked February 5, 2013, Respondent has failed to offer any proof, such as by affidavit of employee regarding mailing procedures, to establish when that postmarked envelope was actually mailed. Respondent's omission is particularly notable given the events in this case transpired only earlier this year. Petitioner's claim that the mailing was received in March, accordingly, is unrebutted, and the affirmative defense fails for lack of prima facie evidence of mailing. Cf. Finkelman v. Transp. Admin., 69 A.D.2d 806, (2d Dep't 1979) (remanding to administrative appeal board to determine whether ALJ improperly took

notice of PVB's mailing practices and dispensed with need for independent proof of mailing of impending default judgment notices, thereby improperly shifting the burden of proof to the motorist on that issue).

Next this Court considers the DOF's argument on the merits of the petition that its determination was not arbitrary or capricious. As an initial matter, this Court notes that Respondent mischaracterizes the determination before this Court. The Appeals Board did not "uphold ALJ Ballerini's determination that Petitioner violated 34 RCNY § 4-08(e)(12) . . . ." That provision, relating to obstructing traffic at an intersection, was not charged in this case. Rather, Petitioner was found to have violated the regulation relating to double-parking. See 34 R.C.N.Y. § 4-08(f)(1). The DOF also further misrepresents the facts alleged. Petitioner was not cited for double parking "opposite 349 Cabrini Boulevard." The citation lists "Front Of" that address.

That said, Respondent admits that it failed to record the evidentiary hearing. New York Vehicle and Traffic Law Section 238 sets forth the required elements of notices of violations. Notices must include among others the "time and particular place of occurrence of the charged violation." Id. § 238(2). If that information is "misdescribed, . . . the violation shall be dismissed upon application of the person charged with the violation." Id. § 238(2-a)(b). The state legislature authorized the adoption and promulgation of rules and regulations that are "not inconsistent with any applicable provision of law . . . ." Id. § 241-a(5). New York City, in turn, requires that the PVB "compile and maintain complete and accurate records relating to all charges and dispositions." N.Y.C. Admin. Code § 19-203(f); see also 19 R.C.N.Y. § 39-08(g) (a "record shall be made of every

hearing . . . ."). Charges may only be established "upon proof by a preponderance of the evidence." N.Y.C. Admin. Code § 19-206(b)(2). The DOF's admitted failure to record Ms. Hiraldo's evidentiary hearing precludes this Court from reviewing the administrative record to determine on the merits whether the agency's final determination rendered through the Appeals Board was rational. Under these circumstances this Court finds that the determination is arbitrary and capricious for violation of lawful procedures. E.g., Pell, 34 N.Y.2d at 231. Accordingly it is

ORDERED and ADJUDGED that the petition is granted; the DOF's determination is vacated, and the matter shall be remanded for further proceedings consistent with this decision, order and judgment.

Dated: September 4, 2013

ENTER:

JOAN B. LOBIS, J.S.C.