

**Matter of Huwel v Martens**

2014 NY Slip Op 32954(U)

November 14, 2014

Supreme Court, Suffolk County

Docket Number: 06212/2014

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

Supreme Court - State of New York  
IAS PART 6 - SUFFOLK COUNTY

Mot. Seq.: 001 MG

Hon. RALPH T. GAZZILLO  
A.J.S.C.

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In the Matter of	:	
George A. Huwel,	:	
	:	
Petitioner(s),	:	
	:	
- against -	:	
	:	
Joseph A. Martens, Commissioner, NYS	:	
Department of Environmental Conservation and	:	
Debra A. Barnes, NYSDEC Marine Resources	:	
Bureau,	:	
	:	
Respondent(s),	:	
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Upon the following papers numbered 1-14, read on this Notice of Petition and Petition and supporting papers numbered 1-5, Affirmation in Opposition and supporting papers numbered 6-12; Reply affirmation and supporting papers numbered 13-14; it is,

**ORDERED** that the petition is granted in its entirety and respondent is directed to issue a commercial food fish license for the year 2014 to the petitioner within five days of receipt of a copy of this Short Form Order with Notice of Entry; and it is further

**ORDERED** that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

Petitioner herein seeks an Order directing that the respondent, New York State Department of Environmental Conservation (NYSDEC) Marine Resources Bureau, issue to him a 2014 commercial food fish license pursuant to ECL §13-0328.

Petitioner is an attorney and a United States Coast Guard Captain licensed to carry passengers for hire in the State of New York. On January 1, 2014, Petitioner became eligible to

obtain a New York State commercial food fish license under the Limited Entry Regulations of New York State Environmental Conservation Law §13-0328(1)(c)(iv). His eligibility required him to establish, pursuant to that section of law, that 1) he had earnings of an average of \$15,000.00 of gross income for three (3) consecutive years from commercial fishing and/or carrying passengers for hire as a Licensed New York State Marine and Coastal District Charter Boat Licensee and 2) that his sole source of income was not from his party charter boat fishing business. Petitioner submitted the application but the NYSDEC rejected it and refused to issue the Commercial Food Fish License. As a result, petitioner commenced this proceeding<sup>1</sup>.

According to petitioner, he submitted his application for a Commercial Food Fish License for 2014 on or around October 1, 2013. Petitioner's application included copies of income tax returns for 2011, 2012 and 2013. Each tax return submitted included two "Schedule C" forms, one reflecting petitioner's income from his business as an attorney and the other reflecting petitioner's income from fishing. These returns showed that petitioner had sufficient income to be eligible for the commercial food fish license. In connection with his application, petitioner provided NYSDEC with an authorization to obtain his tax information directly from the IRS. According to the petitioner, he established that he met the prerequisites necessary to obtain this permit based upon his submissions to the respondent. When the application was received by NYSDEC petitioner was notified that there were more applicants than available licenses and that a random selection process would be held on February 4, 2014. Petitioner's application was one of those selected in that random drawing held and thus became subject to further review by NYSDEC. Debra Barnes, who serves as manager of the Marine Resources Permit Office (Biologist 3 Marine) for NYSDEC, administers the permitting process for commercial food fish licensing.

It is undisputed that petitioner was selected in the February 4, 2014 random license drawing. It also appears that the income tax returns he submitted substantiated his assertion that he met the income requirements set forth in ECL §13-0328. However, on or around February 7, 2014 petitioner received a certified letter (dated February 5, 2014) from Ms. Barnes advising him 1) that since there were only eight (8) licenses available for 2014, none would be available to fishermen whose sole source of income was from party charter board fishing and 2) although his initial submissions reflected the necessary income the Federal Income Tax Return Transcripts for 2011 and 2012 did not match those that he submitted with his application in that they did not contain the "Schedule C" showing his income from fishing. On February 5, 2014, Ms. Barnes stated that "unless you can provide income tax documentation to resolve this discrepancy and demonstrate commercial fishing income that can be verified as filed with the IRS, you do not satisfy the income criteria under State law..." Additionally, she advised that "in order to complete the review of your application to verify your income from commercial fishing or fishing, please submit copies of your Fishing Vessel Trip Reports as filed with the Department or

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<sup>1</sup> Petitioner has a companion declaratory judgment action which is related to this proceeding wherein he seeks to have certain laws and regulations relating to the "limited entry" fisheries for fluke (summer flounder) and striped bass deemed unconstitutional.

NOAA Fisheries Service for 2011 and 2012 (Marine and Coastal District party/Charter Boat Permit) and 2013 (Marine and Coastal District Party/Charter Boat Permit and Food Fish Landing License) as required pursuant to 6 NYCRR Part 40.1 ©". Petitioner was given ten (10) business days to deliver the required materials to NYSDEC or his license application would be "considered withdrawn" for that year.

Following receipt of this advice, petitioner supplemented his income documentation regarding its source and amount in an attempt to satisfy respondent's requirements. Part of petitioner's additional submissions included a copy of a check from Gosman's Fish Market to the petitioner in the amount of \$894.00 which he advised represented payment for the sale of a "Big-Eye Tuna" fish. In addition, petitioner advised NYSDEC that although the missing "Schedule C" fishing income forms had indeed been submitted to IRS, somehow they were not included in the official IRS records. However, he advised that he had discussed the matter with IRS and was told that he could simply correct the IRS records by filing amended returns that included the missing copies of the schedules. Petitioner affirms that he did resubmit the missing schedules such that the amended returns should match those submitted to NYSDEC which reflect an average income for 2011 and 2012 in excess of the \$15,000.00 as is required by the statute<sup>2</sup>.

Thereafter, on February 25, 2014, Ms. Barnes wrote to petitioner again and advised that:

"your proposed explanation as to the missing schedules is insufficient to overcome our reliance on the record keeping accuracy and completeness of this federal agency. Moreover, I note that the Schedule C for 2011 that you submitted to DEC showed a loss of \$21,632 from your charter fishing business. This loss however was not included in your 1040 form for 2011 even though it likely would have reduced your taxable income for that year. Under these facts I have determined that you are not qualified to obtain a limited entry 2014 commercial food fish license." Ms. Barnes further advised that the proof petitioner submitted to establish that party charter boat fishing was not his sole source of income that "[e]ven assuming that you had established the requisite

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<sup>2</sup>It is important to note at this juncture that, at the time the commercial food fish licenses were applied for, i.e. December 30, 2013, income tax returns for the year ending 2013 would, presumably, not have been filed by any license applicants. Therefore, it is a reasonable assumption to expect that most, if not all, of the 2013 income tax returns submitted to NYSDEC with the commercial food fish license applications could not be independently verified by IRS. In addition, as Ms. Barnes notes repeatedly throughout her correspondence with petitioner and her affirmation herein, NYSDEC had no ability to verify, through IRS records, whether any applicant's 2013 submissions were accurate. The NYSDEC does acknowledge, however, that it was eventually able to verify petitioner's 2013 contained a Schedule C for fishing income and did indeed match that which he had originally submitted with this application.

income from fishing in 2011, 2012 and 2013 .... “[w]e have not been able to corroborate that this check represents income from commercial fishing.” Ms. Barnes concludes the letter by stating “[c]onsequently, I have little choice by to find that you have not submitted the necessary information to qualify for a 2014 limited entry commercial food fish license and your application is denied.”

Apparently there were additional submissions or discussions between the parties following petitioner’s receipt of respondent’s February 25, 2014 letter. On March 24, 2014, Ms. Barnes again wrote to petitioner and advised that, based upon her further review of his submissions, he did not qualify for the commercial food fish license. Specifically, even though Ms. Barnes advised that although the amended returns showed that petitioner’s income during the relevant years qualified him for a permit, she elected to also review other documentation relating to petitioner’s fishing activities. For example, she inquired with other agencies regarding reports submitted to NOAA (National Oceanic and Atmospheric Agency) by petitioner relating to his charter boat fishing business. She also compared the income reflected in the income tax returns to vessel trip reports (VTRs) that petitioner had submitted to DEC but that were not part of the petitioner’s original application. (VTRs must be submitted to NYSDEC by charter boat license holders pursuant to 6 NYCRR §40.19(c)(3) and must detail all fishing activities and all species landed). She advised in her letter that an inspection of petitioner’s VTRs for the months of January through May of 2013 showed that petitioner had reported that he “did not fish” during those months. Ms. Barnes went even further into verifying the numbers contained on petitioner’s income tax returns and contacted NOAA and was “informed” by an unnamed “Fishery Reporting Specialist” that petitioner submitted “did not fish” reports to NOAA for his federal and state party/charter boat permits for 2013. However, it appears that Ms. Barnes did not review the NOAA documents personally, but rather she relied upon her NOAA informant. Nowhere in her letter to petitioner did Ms. Barnes acknowledge Mr. Huwel’s letter to NYSDEC dated February 7, 2014. As noted therein, he advised that his VTF did not show fishing in New York because his income was earned from fishing charters in Key West, Florida where he has a second residence and is permitted to fish, but not required to file VTF reports. Lastly, Ms. Barnes asserted that she “was not able to verify from purchase records” that Gosman’s Fish Market purchased a Big Eye Tuna fish from petitioner. These “discrepancies,” according to Ms. Barnes, once again disqualified petitioner from obtaining the license he sought.

Despite the determinations apparently made by NYSDEC in its February 25, 2014 and March 24, 2014 letter, Ms. Barnes sent another letter to Mr. Huwel on April 4, 2014 “to clarify the documents that must be provided to the Department in order to determine [his] eligibility for a 2014 commercial food fish license.” On May 23, 2014, Ms. Barnes again wrote to petitioner confirming the purpose of the April 4, 2014 letter and outlining NYSDEC’s evaluation of petitioner’s response to the March 24, 2014 NYSDEC letter. Specifically, Ms. Barnes wrote:

“ ... In response to that letter, you provided documentation from Gosman’s Fish Market showing that Gosman’s purchased a big-eye tuna from you in August 2013 which

corroborates the purpose of the check from Gosman's that you previously submitted. The only remaining issues is whether you have satisfied the requirement of ECL §0328(c)(iv) that you earned an average of at least \$15,000.00 from fishing during three consecutive years and that you have demonstrated that income in a manner acceptable to the Department. The three consecutive years you rely on are 2011, 2012, 2013. Although the 2011 and 2012 federal tax returns and schedules you provided to the Department with your commercial food fish license application on December 30, 2013, each contain a schedule C including the required income from fishing, the IRS transcripts of those returns included only a Schedule C for your attorney income, and no Schedule C for fishing income. Therefore, the documents you initially provided to the Department for 2011 and 2012 to establish the required fishing income were not corroborated by your filings with the IRS and your application for a food fish license could have been rejected on these grounds.

You now rely on amended tax returns you filed with the IRS for 2011 which purportedly include your income from fishing for those two years. You provided us with the IRS Records of Account for tax years 2011 and 2012, which the IRS generated after you filed the amended returns.

The Department reviewed the Records Account that you provided for 2011 and 2012 and they do not corroborate that you filed a Schedule C for fishing income with your amended tax returns. They each list only one Schedule C, which reports your attorney income for those years and no Schedule C for fishing income. Nor do the records of Accounts show any modification, either positive or negative, to your income from those years."

After acknowledging that the IRS transcript for petitioner's 2013 income tax return does indeed include a Schedule C reflecting petitioner's fishing income, Ms. Barnes advises that based upon the fact that the petitioner had not submitted necessary income information to qualify for a 2014 limited entry commercial food fish license, his application was denied.

Petitioner argues that Ms. Barnes is a marine biologist, and that as such, she is not qualified to make the determinations she is making. Moreover, petitioner affirms that he has corrected the IRS records and has provided proof from the IRS that same have been accepted for filing, albeit they may not yet be available as transcripts through IRS. Although there is no explanation as to why the transcripts dated April of 2014 do not show the missing Schedules, petitioner insists that IRS accepted his amended (corrected) returns and that, because he had filed them in the first instance, there would be not be a "modification, either positive or negative" to

petitioners income for the years in question as Ms. Barnes claims.

In opposition to the petition, respondent submits the affidavit of Ms. Barnes. According to her, NYSDEC manages most of the regulated marine fisheries population as limited access fisheries pursuant to ECL §13-0328 which limits the number of fishing permits and set harvest limits in order to guarantee a sustainable harvesting of public fisheries and compliance with the federal fishing programs. She further states that all commercial fishing permits expire on December 31 of each year and permits for the following year are generally issued effective January 1 of that ensuing year. In other words, all persons who were issued a commercial food fish license for one year are eligible to renew their license of the next year. However, the ECL also provides criteria for DEC to determine how many new commercial food fish licenses, if any, may be issued each year and it specifies the application process and minimum qualifications that must be met to entitle and applicant to such a license. Pursuant to ECL §13-0328(1)(c)(iv), only ten percent of the available commercial food fish licenses can granted to applicants whose sole source of income is from the party charter business. Since the NYSDEC's administratively determined that there were only eight commercial food fish licenses available, petitioner was, in addition to meeting the income requirements, also required to establish that his sole source of income was not from his party charter boat business. Ms. Barnes further states that although petitioner has established that his sole source of income is not from party charter boat fishing and that he did indeed show that he earned in excess of \$15,000.00 from fishing in 2013, that she still cannot corroborate that petitioner's income in 2011 and 2012 meets the statutory requirement and that her independent attempts to corroborate petitioner's submissions have been unsuccessful. Accordingly, she determined it necessary to deny petitioner's license application.

The parties have agreed, due to the ongoing exchanges of correspondence, information and the further supplementation of petitioners records, that the sole issue that remains unresolved in this proceeding is whether the DEC's determination that petitioner failed to prove adequate income in "a manner acceptable to the Department..." (See, ECL §13-0328(1)(c)(iv))<sup>3</sup>. Specifically, the question for this Court is whether the correction of IRS's income tax return records by the petitioner for the years 2011 and 2012 to reflect what petitioner, an attorney, affirms he filed with the IRS when he originally filed his income tax returns, precludes the petitioner from obtaining a commercial food fish license pursuant to ECL §13-0329(1)(c)(iv).

To begin with, it is worth noting that neither the means nor manner through which NYSDEC is to determine whether the proof of statutory compliance entitling an applicant to a commercial food fish license application is specified in writing anywhere. Despite the absence of such guidance, Ms. Barnes clearly went to great lengths and utilized multiple outside sources in an attempt to "corroborate" the information supplied by petitioner in connection with his application. However, nowhere in Ms. Barnes's February 5, 2014 letter (where she advised

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<sup>3</sup>NYSDEC's May 23, 2014 letter acknowledges that further review of petitioner's records corroborated the 2013 Federal income tax return and also proved that petitioner indeed sold a Big-Eye Tuna to Gosman's such that party charter fishing was not his "sole" source of income.

petitioner that his application was insufficient) did she advise petitioner why she sought the documentation she identified in her letter or that how she intended to “corroborate” his submissions to NYDEC and other municipal agencies. Neither did she specify what other information was required to satisfy her regarding petitioner’s fishing income received from outside his party charter boat business. She also never advised petitioner what additional documents would be deemed sufficient or what steps she took to “corroborate” the information submitted as to the source of petitioner’s fishing income as set forth in her letter. Lastly, she never advised what method she used to verify the income information submitted by all of the applicant’s for 2013 since few, if any, of the IRS transcripts for that year would have been available to her at the time she made determinations on those permit applications. In any event, and in spite of the confusion in the process, in her February 25, 2014 letter Ms. Barnes concludes by stating “[c]onsequently, I have little choice but to find that you have not submitted the necessary information to qualify for the 2014 limited entry food fish license and your application is denied.”

It is axiomatic that “[w]here an administrative agency makes a determination without an evidentiary hearing, the Court must examine the question of whether the agency’s determination was arbitrary and capricious.” (See CPLR § 7803(3); *Matter of Ball v. New York State Department of Environmental Conservation*, 35 AD3d 732; *Matter of Sasso v. Osgood*, 86 N.Y.2d 374.) The Court may not substitute its judgment for that of the agency responsible for making the determination; rather, the Court must determine whether or not the agency’s action lacked a sound basis in reason and was taken without regard to the facts. *Matter of Ball*, supra at 733; *Pell v. Board of Education*, 34 N.Y.2d 222, 231. Judgments of administrative agencies are generally afforded great weight and deference in factual evaluations due to their expertise within a particular field and statutory authorization to further particular policies and goals.” (*Mihale v. New York State Dept. of Environmental Conservation*, 15 Misc.3d 1138(A), Page 1). “If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency” (*Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431). The decision of an administrative agency to deny a license “cannot be disturbed unless it is arbitrary and capricious.” (*Matter of Arrocha v. Bd. of Educ.*, 93 N.Y.2d 361, 363).

In addition, case law in New York holds that policy considerations are “largely the same whether the proceeding be administrative or judicial—to provide guidance for those governed by the determination made ...; to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice ...” (*Field Delivery Service*, 66 N.Y.2d at 519, 498 N.Y.S.2d 111, 488 N.E.2d 1223 [citations omitted] ). And, while administrative agencies, like courts, are free to correct prior erroneous interpretations of law or to depart from previously stated policies, they must state their reasons for doing so (*id.*). “Absent such an explanation, failure to conform to agency precedent will ... require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made.” (*id.* at 520, 498 N.Y.S.2d 111, 488 N.E.2d 1223).

Here, there was no hearing provided to the petitioner and are no regulations promulgated



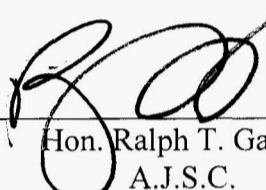
by NYSDEC to guide the manner through which the agency is to determine whether an applicant's submissions "demonstrate in a manner acceptable to the department" that the applicant met the income requirements set forth in ECL §13-0328(1)(c)(iv). In addition, the NYSDEC apparently has no written procedure through which an applicant is advised as to what documentation will be reviewed by NYSDEC to make the determination. Clearly, based upon the correspondence between the parties application review is *ad hoc* at best. In the instant case, Ms. Barnes (a marine biologist by trade), received tax returns for the years in question information from the petitioner which, although initially incomplete, were supplemented by the applicant and eventually accepted by the IRS. Despite the fact that the petitioner corrected the IRS's tax returns and the fact that applicants are apparently not required, permitted or encouraged to submit any other documentation to establish income, for unknown reasons, Ms. Barnes took it upon herself to further investigate the income documentation provided by the petitioner. Indeed, she even examined unrelated NYSDEC records and relied upon hearsay statements from another municipal entity: namely NOAA, to determine that the petitioner's VTF reports did not match up to the income tax returns he supplied. Moreover, there is no explanation as to why she rejected petitioner's assertion that he did not file VTF's in New York as he was legally fishing in Florida. Additionally, it is not clear whether any other applicant's applications were scrutinized in this manner. Since there are no rules promulgated by NYSDEC or hearings provided to applicants when licenses are denied, it is not clear what the non-accountant employees of the respondent would include as part of their review of an application. Finally, and perhaps most significantly, since it is unlikely that any of the other applicants' 2013 income tax returns were verified through comparison to IRS records, as same were presumably not available at the time the commercial food fish license applications were filed, it could be argued that petitioner was held to a different standard than all other applicants. Said another way; respondent admits that it was unable to verify 2013 income tax returns since they would not have been filed at the time the applications were made. Was it NYSDEC policy to verify only two years of income tax returns in determining eligibility for commercial food fish licenses for all other applicants when petitioner was required to establish that all three of his income tax submissions matched the records of IRS? Equally unclear is why NYSDEC asserted that petitioner's income should have been "reduced" due to the loss recorded for that year and why was petitioner's response to that assertion unacceptable to NYSDEC. Ms. Barnes qualifications for her apparently criteria-less analysis have not been demonstrated. Without a hearing or promulgated regulations to alert an applicant what exactly he or she will be expected to provide to the DEC in connection with the application, and how far NYSDEC's investigation will go and when its investigation will conclude, this type of analysis cannot be considered anything but arbitrary, capricious and unfair. It appears that the process used here was nothing short of chaotic. It also appears that an applicant is completely at the mercy of the agency in terms of understanding what is required and what documentation is "acceptable" and by what standard it will be evaluated. The fact that petitioner's application was "denied" three times and reopened at least twice illustrates this point well. The lack of "process" used and unsupported "determinations" made leaves the Court unable to properly analyze whether its decision was rational and sustainable.

Without administrative regulations through which to process and applications are managed, the operative statute; ECL §13-0238 (1)(c)(iv), requires an applicant to demonstrate

income “in a manner acceptable to the department” and gives the NYSDEC “unbounded latitude ... in their administrative actions, ... [leaving] their decisions subject to untrammelled discretion, which in turn is unreviewable.” (See, C.P.L.R. § 7803(3); *164th Bronx Parking, LLC v. City of New York*, 20 Misc.3d 796 citing *Big Apple Food Vendors’ Assn v. Street Vendor Review Panel*, 90 NY 407 at 408). Additionally, “[t]he failure of an administrative agency to furnish “an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory rights to such review” (*Neshaminy, Inc. v. Hastings*, 64 A.D.2d 830 at 831 citing *Matter of Montauk Improvement, Inc. v. Proccacino*, 41 NY2d 913).

Since it appears that the petitioner had submitted IRS documentation to substantiate that his income met the required threshold of “an average of \$15,000 of income over three consecutive years from commercial fishing or fishing ...” without making specific reviewable determinations as to why petitioner’s application was denied, its determination was arbitrary and capricious and an abuse of discretion. Accordingly, the petition is granted in its entirety as set forth herein.

Dated: 11/14/14  
Riverhead, N.Y.

  
Hon. Ralph T. Gazzillo  
A.J.S.C.

Non-Final Disposition

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