

<b>Levine v N.Y.C. Taxi</b>
2014 NY Slip Op 33089(U)
June 18, 2014
Supreme Court, Queens County
Docket Number: 74/2014
Judge: David Elliot
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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IAS Part 14

JOSEPH C. LEVINE,  
Petitioner,

Index  
No. 74 2014

- against -

Motion  
Date May 12, 2014

N.Y.C. TAXI AND LIMOUSINE COMMISSION,  
Respondent.

Motion  
Cal. No. 67

Motion  
Seq. No. 1

Conference  
Date June 18, 2014

Papers  
Numbered

Notice of Petition - Petition - Exhibits.....	1-3
Answer - Exhibits.....	4-7
Stipulation.....	9

Petitioner commenced this proceeding pursuant to CPLR Article 78 for a judgment compelling respondent to issue him a license to operate a for-hire vehicle (“FHV license”). Petitioner also appears to seek review of respondent’s determination, dated November 27, 2013, which denied his application. Petitioner asserts that respondent’s actions were irrational and arbitrary and capricious. Respondent has answered the petition and asserted two affirmative defenses, to wit: (1) petitioner is not entitled to an order of mandamus, as he does not have an absolute right to be issued an FHV license; and (2) respondent’s determination in denying petitioner an FHV license was rational, reasonable, and in full accordance with the law.

On or about July 10, 2013, petitioner applied for an FHV license. Under Section 6, Question 2 of the application, petitioner indicated that he had been convicted of a crime. Notably, he answered “no” to the question as to whether he had been convicted of “driving while ability impaired by alcohol or drugs, driving while intoxicated, or driving while under the influence of alcohol or drugs.” Thereafter, respondent requested documentation concerning the crimes committed. Same revealed that, on August 19, 1999, in federal district court, petitioner pleaded guilty to the crime of conspiracy to commit mail fraud. As a result, petitioner was sentenced to three years probation with a special condition that he serve six months under home detention. Petitioner was also issued a \$ 10,000.00 fine and a special assessment of \$ 50.00. Furthermore, on July 14, 2008, petitioner pleaded guilty to the crime of grand larceny in the second degree. On October 30, 2008, he was sentenced to three to nine years of imprisonment, a \$ 1,000.00 fine, and ordered to pay \$ 432,500.00 in restitution.

Based upon his application, petitioner was scheduled for an interview with respondent’s Fitness Review Unit on November 13, 2013. On that date, Investigator Santiago Cornejo conducted his interview, at which testimony was taken, petitioner’s record was explored and explained, supporting documentation was submitted, and petitioner’s credibility was assessed. Thereafter, Investigator Cornejo issued his determination, dated November 27, 2013, denying petitioner’s application for an FHV license.

As to petitioner’s application seeking to compel respondent to issue him an FHV license, same is denied, inasmuch as petitioner has not demonstrated that respondent failed to do an act that it is specifically mandated to do (CPLR 7803 [1]; *see New York Civ. Liberties Union v State of New York*, 4 NY3d 175 [2005]; *Alltow, Inc. v Village of Wappingers Falls*, 94 AD3d 879 [2012]).

To the extent petitioner seeks review of respondent’s determination under CPLR 7803 (3), it is well settled that judicial review of an administrative determination is limited to a review of the record before the agency and whether the agency’s determination was arbitrary or capricious, was an abuse of discretion, or lacks a rational basis in the law or the record (*see* CPLR 7803 [3]; *Gilman v N.Y. State Div. of Hous. & Community Renewal*, 99 NY2d 144 [2002]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]; *Matter of Colton*, 21 NY2d 322 [1967]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken “without sound basis in reason and without regard to the facts” (*Matter of Pell*, 34 NY2d at 231).

The New York City Administrative Code § 19-505 (b) (5) requires that each applicant for a taxi license be of “good moral character.” Correction Law § 752, entitled “Unfair

discrimination against persons previously convicted of one or more criminal offenses prohibited,” states the following:

“No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual’s having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of “good moral character” when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

“(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or

“(2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”

Moreover, in making a determination under that section, respondent must consider the following factors:

“(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.”

Investigator Cornejo determined both that there was a direct relationship between petitioner's previous criminal offenses and the employment sought and that the issuance of the FHV license would create an unreasonable risk to the public. Though Investigator Cornejo analyzed the factors set forth in Correction Law § 753, the court finds that he acted arbitrarily and capriciously in his denial.

Notably, while considering the specific duties and responsibilities of a taxi driver, Investigator Cornejo appears to have glossed over the primary responsibility of being a licensee, to wit: being able to safely operate a vehicle. He appears to have ignored the fact that petitioner "successfully completed a taxi drivers' class[,] . . . passed the TLC taxi driver test, and also passed a drug test performed on behalf of the TLC." Rather, Investigator Cornejo found that "[y]our convictions are directly related to your ability to transport all members of the public safely." He goes on to state that petitioner's convictions (which involved "stealing money while working as an attorney") create a concern that petitioner cannot be trusted to engage in unsupervised financial transactions with the public. Investigator Cornejo simply alludes to the "transportation" of passengers but steers away from same to focus exclusively on the financial aspect of the job in an attempt to make a connection between same and petitioner's prior convictions, a connection this court finds to be too attenuated to have any rational basis (*see e.g. Ghulam v New York City Taxi and Limousine Commn.*, 2011 NY Slip Op 31188[U][Sup Ct New York County 2011][“ Finally, petitioner's misdeeds would obviously be relevant to the job license if his single conviction was closely related to the performance of driving a motor vehicle or his fitness to perform that task, such as a conviction for driving while intoxicated. In this case, however, the misdemeanor of Tampering with Public Records in the 2<sup>n</sup> Degree bears no relationship to whether petitioner can safely operate a motor vehicle”]; *see also Marra v City of White Plains*, 96 AD2d 17 [1983] [a “direct relationship” for purposes of Correction Law § 752 can be found where the applicant's prior conviction was for an offense related to the industry or occupation at issue]; *cf. Bonaventure v Perales*, 106 AD3d 665 [2013][larceny conviction directly related to employment as a security guard since the latter primarily involves protection of property]).

Nor does not appear from the record that petitioner poses an unreasonable risk to the public by virtue of his convictions. Petitioner, who struggled with a gambling addiction, had access to large sums of money by virtue of his prior employment as an attorney. That risk would not be posed here as a taxi driver, especially taking into considering the rehabilitative factors, noted *infra*.

Furthermore, when making the determination that petitioner was not sufficiently rehabilitated, Investigator Cornejo found that petitioner exhibited a lack of remorse. However, considering same was an abuse of discretion inasmuch as lack of remorse is not

one of the relevant factors to be considered by the Correction Law (*see In re Tesker v New York City Taxi and Limousine Commn.*, 2013 NY Slip Op 33270[U][Sup Ct New York County 2013]).

Finally, Investigator Cornejo appears not to give any meaningful consideration to those documents produced by petitioner, with respect to his rehabilitation and good conduct. For example, he seemingly ignored the fact that petitioner, inter alia: (1) successfully completed a nine-hour program with the New York Council on Problem Gambling, Inc., petitioner having been issued a certificate on September 18, 2013, to that effect; (2) has attended and continues to attend treatment for his gambling addiction; (3) is in compliance with all conditions of his release, per his parol officer's letter dated November 12, 2013; (4) is an honorably discharged Viet Nam veteran; (5) he had been practicing as a successful attorney since 1977; and (6) self-reported his actions which led to his larceny conviction in 2008.

Accordingly, for the reasons stated above it is hereby

ORDERED and ADJUDGED that the petition is granted to the extent that the decision of Investigator Santiago Cornejo is vacated that the matter is remitted to respondent for further proceedings consistent with this order and judgment, and it is further

ORDERED that the branch of the petition seeking an order directing respondent to issue him a FHV license is denied.

Dated: June 18, 2014

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J.S.C.