Matter of Acevedo v New York State Dept. of Motor Vehs.
2014 NY Slip Op 30422(U)
February 21, 2014
Supreme Court, Albany County
Docket Number: 2393-13
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
KEVIN B. ACEVEDO,

Petitioner,

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

-against-

NEW YORK STATE DEPARTMENT OF MOTOR
VEHICLES and BARBARA J. FIALA, as New York
State Commissioner of Motor Vehicles,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-13-ST4611 Index No. 2393-13

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AMENDED[1]
DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

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[1]The original decision/order/judgment has been amended to correct minor typographical errors.

The petitioner has been convicted three times for alcohol related driving offenses: the first on April 21, 2003where he was convicted of driving while his ability was impaired, in which he refused to submit to a chemical blood test; the second on May 8, 2006 in which he was convicted of driving with a blood alcohol level of .08%; the third on February 13, 2008, where he was convicted of driving while intoxicated. In April 2008 his license was revoked by the New York State Department of Motor Vehicles ("DMV") for a minimum period of one year. In October 2011, the petitioner submitted an application for approval to obtain a new driver license. In a determination dated February 14, 2012 the application was approved. However very shortly thereafter, in a determination dated February 17, 2012, the approval was "withdrawn" and the petitioner was advised that it would be subject to additional review. Thereafter, on November 8, 2012, DMV advised the petitioner that his application was denied on grounds that he was a persistently dangerous driver. The petitioner appealed the determination, which was denied by DMV's Administrative Appeals Board on February 26, 2013. Both determinations rely heavily upon new regulations promulgated by DMV with regard to relicensing of individuals who have multiple alcohol or drug related driving convictions. Effective September 25, 2012 the respondent revised portions of Part 136 of its regulations (see 15 NYCRR Part 136, hereinafter referred to as "Part 136"). The revisions impose significantly greater restrictions on the ability of persons convicted of multiple alcohol or drug related driving offenses to regain their operator's license after it has been revoked.

The petitioner has commenced the above-captioned combined action/proceeding to annul the determination denying his application, and for a judgment declaring that Part 136

is unconstitutional. Among the many arguments advanced by the petitioner, he maintains that the regulations conflict with the provisions of VTL §§ 510, 1193, and 1198 (among others). He asserts that they violate the Separation of Powers doctrine; and that the underlying enabling legislation is unconstitutional, as an overly broad delegation of legislative authority. In the alternative, he contends that the Commissioner exceeded her authority as delegated by the legislature. The petitioner also alleges that the new regulations violate his right to due process; that they constitute an illegal Ex Post Facto law; that they are arbitrary and capricious; and that respondent's delay in processing petitioner's application was illegal and improper. The respondents maintain that Part 136 does not conflict with the provisions of the Vehicle and Traffic Law; that Part 136 was adopted pursuant to, and wholly within the respondents' delegated authority, and within the respondents' broad discretion. The respondents contend that their actions did not violate petitioner's constitutional rights; and that the withdrawal of respondent's initial approval of petitioner's application, and subsequent delay in processing the application until November 8, 2012 were within respondents' discretion.

The determination dated November 8, 2012 of the Driver Improvement Examiner, which denied petitioner's application for a new operator's license, recites as follows:

> "On February 17, 2012, you were advised that the previously-granted approval to apply for a new license was withdrawn, and that your application would be subject to additional review. After review of your full driving record, pursuant to the authority contained in Sections 136.5 (a) (3) and 136.5 (b) (3) (i) of the Regulations of the Commissioner of Motor Vehicles, your application for a New York State driver license/privilege is hereby Denied because you are deemed a persistently dangerous driver.

"Section 136.5 (a) (3) provides as follows:

> Special rules for applicants with multiple alcohol-or drug-related convictions or incidents.
>
> For the purposes of this section 'revocable offense' means the violation, incident or accident that results in the revocation of the person's drivers license and which is the basis of the application for relicensing. Upon reviewing an application for relicensing, the Commissioner shall review the applicant's entire driving record and evaluate any offense committed between the date of the revocable offense and the date of application as if it had been committed immediately prior to the date of the revocable offense. For purposes of this section, 'date of the revocable offense' means the date of the earliest revocable offense that resulted in a license revocation for which the revocation has not been terminated by the Commissioner's subsequent approval of an application for relicensing.

"Section 136.5 (b) (3) (i) provides as follows:

> Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that:
>
> the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 years preceding the date of the revocable offense but no serious driving offenses within the 25 years preceding the date of the revocable offense and

(ii) the person is currently revoked for an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least five years, after which time the person may submit an application for relicensing. After such waiting period, the Commissioner may in his or her discretion approve such application, provided that upon such approval, the Commissioner shall impose the A2 restriction on such person's license for a period of five years and shall require the installation of an ignition interlock device in any motor vehicle owned or operated by such person for such five year period. If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

"The following constitute grounds for such denial:

Violation Date	Incidents/Convictions/Accidents	Order Number Reinstated
09/30/2007	Driving while intoxicated*	D0804160000
03/26/2006	Driving with .08% alcohol in blood*	D0605170000
12/28/2002	Driving while ability impaired - chemical test refusal	
12/28/2002	Property Damage Accident	

*Revocation orders associated with these

> violations will be reinstated effective November 26, 2012
>
> "Your driving history suggests that your failure to observe the rules and regulations governing the operation of a motor vehicle constitutes a serious lack of regard on your part for the safety and welfare of other users of the highway, and forms the basis of our decision to deny your application for a driver license.
>
> "Although you may submit an application for a new driver license on or after five years from 04/10/2009, please be aware that a review of any subsequent application will be of the entire driving history at that time. Each application is subject to the statutory $100 fee.
>
> "If you feel your case involves unusual, extenuating or compelling circumstances, you may send the information to the Driver Improvement Bureau at the above address. Any such information must be sent within 30 days of the date of this letter. The information concerning your circumstances will be reviewed and you will be advised of the result. Otherwise, this denial is considered final.
>
> "If you do not have any unusual, extenuating or compelling circumstances but wish to appeal this decision, you may file an appeal with the Appeals Board []."

Respondent's Decision of Appeal dated February 26, 2013 recites, in part, as follows:

> "Appellant's argument that Section 136.5 of the Commissioner's Regulation is inapplicable to appellant is without merit. To conclude that the conviction or incident that formed the basis for appellant's revocation is not to be considered in reviewing appellant's driving record is contrary to fundamental rules of construction and

to the statutory intent and purpose of the regulation.

"Under the Governor's direction, the Commissioner's Regulations were reassessed to address the inherent danger of relicensing drivers convicted of multiple alcohol and drug-related offenses. The Regulations were developed in an effort to address the problems caused by drivers with a history of alcohol and/or drug related offenses in order to protect all those who share the public highways of this State. The Regulations were implemented as soon as they were enacted on September 25, 2012.

"Reg. Section 136.5 (b) (3) provides that upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. The Commissioner shall deny the application for at least five years if the review shows that (i) the person has three or four alcohol-or drug-related driving convictions or incidents in any combination within the 25 years preceding the date of the revocable offense but no serious driving offenses within the 25 years preceding the date of the revocable offense, and (ii) the person is currently revoked for an alcohol- or drug-related driving conviction or incident.

"A 'revocable offense' is defined by Reg. Section 136.5 (a) (3) as: a violation, incident or accident that results in the revocation of a person's driver's license and which is the basis of the application for relicensing. Upon reviewing an application for

> relicensing, the Commissioner shall review the applicant's entire driving record and evaluate any offense committed between the date of the revocable offense and the date of the application as if it had been committed immediately prior to the date of the revocable offense.
>
> "A 'serious driving offense' is defined by Reg. section 136.5 (a) (2) as: (i) a fatal accident; (ii) a driving-related Penal Law conviction; (iii) conviction of two or more violations for which five or more points are assessed on a violator's driving record pursuant to Reg. Section 131.3; or (iv) 20 or more points from any violations.
>
> "Department records indicate that appellant's driving record includes three alcohol or drug-related incidents or convictions. Moreover, appellant's license is currently revoked for an alcohol or drug-related driving incident or conviction.
>
> "Given appellant's driving record, there was no abuse of discretion in this case. The Regulations are consistent with the Commissioner's statutory responsibilities and were properly and fairly applied. The denial of appellant's application for a driver's license had a rational basis and shall not be disturbed."
>
> "Decision By The Board: Affirm the denial."

To briefly summarize, Part 136 establishes the review criteria which the Commissioner must consider in determining whether the license of someone having multiple

alcohol and drug related convictions will be restored after revocation. As revised in September 2012, Part 136 provides that upon receipt of an application for relicensing, the Commissioner must undertake a lifetime review of the person's driving history, focusing primarily on a twenty-five year look back period. In two circumstances, it provides for what is essentially a life time denial of a new license: (1) where the applicant has five or more alcohol or drug related convictions or incidents in his or her lifetime[2]; and (2) where the applicant has three or four such convictions or incidents within a twenty five year period, and a serious driving offense[3] (see 15 NYCRR § 136.5 [b] [1], [2]). As particularly relevant here, it further provides that if a person has three or four alcohol or drug related driving convictions or incidents within 25 years, "then the Commissioner shall deny the application for at least five years" (15 NYCRR § [b] [3]). After this five year waiting period has expired, and if the Commissioner approves the relicensing application, the applicant will not receive a full license. Rather, the applicant will be issued a license with an "A2 restriction"[4] for a

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[2]Rule 136.5 (a) recites: "(a) For the purposes of this section: (1) 'Alcohol- or drug-related driving conviction or incident' means any of the following, not arising out of the same incident: (i) a conviction of a violation of section 1192 of the Vehicle and Traffic Law or an out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs; (ii) a finding of a violation of section 1192-a of the Vehicle and Traffic Law; provided, however, that no such finding shall be considered after the expiration of the retention period contained in paragraph (k) of subdivision 1 of section 201 of the Vehicle and Traffic Law; (iii) a conviction of an offense under the Penal Law for which a violation of section 1192 of the Vehicle and Traffic Law is an essential element; or (iv) a finding of refusal to submit to a chemical test under section 1194 of the Vehicle and Traffic Law." (15 NYCRR 136.5 [a]).

[3]A serious driving offense is defined as " (i) a fatal accident; (ii) a driving-related Penal Law conviction; (iii) conviction of two or more Violations for which five or more points are assessed on a violator's driving record pursuant to Section 131.3 of this subchapter; or (iv) 20 or more points from any violations." (see 15 NYCRR § 136.5, [a] [2]).

[4]See 15 NYCRR § 3.2 (c) (4), which recites: " A2-Problem driver restriction. The operation of a motor vehicle shall be subject to the driving restrictions set forth in section

period of five years, and will be required to install an ignition interlock device ("IID") on any motor vehicle he/she owns or operates (see 15 NYCRR 136.5 [b] [3] [i]).

Conflicts With The Vehicle and Traffic Law and Other Laws

The Court will review the major arguments advanced by the petitioner with regard to alleged conflicts between the Vehicle and Traffic Law and Part 136.

Five Year Waiting Period.

As relevant here, albeit in simplified terms, VTL § 1193 (2) (b) (12) (a) provides that a driver's license must be permanently revoked where the driver incurs three alcohol and/or drug related offenses (including chemical test refusals) within a four year period; or four alcohol and/or drug related offenses (including chemical test refusals) within an eight year period (see VTL § 1193 [2] [b] [12] [a]). Although the revocation is denominated as "permanent", it contains a further provision which recites that "the permanent driver's license revocation required by clause (a) of this subparagraph *shall be waived* by the commissioner after a period of five years has expired []" (VTL § 1193 [2] [b] [12] [b], emphasis supplied). The foregoing, however, is qualified by the following language: "[p]rovided, however, that the commissioner may, on a case by case basis, refuse to restore

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135.9(b) and the conditions set forth in section 136.4(b) of this Title. As part of this restriction, the commissioner may require a person assigned the problem driver restriction to install an ignition interlock device in any motor vehicle that may be operated with a Class D license or permit and that is owned or operated by such person. The ignition interlock requirement will be noted on an attachment to the driver's license or permit held by such person. Such attachment must be carried at all times with the driver license or permit."

a license which otherwise would be restored pursuant to this item, in the interest of the public safety and welfare" (id.). In a similar fashion, VTL § 1193 (2) (b) (12) (d), again in simplified terms, imposes a permanent license revocation in connection with a fourth conviction for an alcohol or drug related offense (including test refusal), after having received three such convictions within a four year period; or where the individual has received five such convictions within an eight year period. Subparagraph (e) thereof recites that the permanent revocation *may* be waived by the commissioner after the expiration of eight years.

The petitioner maintains that by virtue of the language employed in VTL § 1193 (2) (b) (12) (b) and (e), the Legislature has established a strong policy favoring unconditional restoration of a driver license after the passage of either the five year or eight year period, and that Part 136 controverts that legislative policy. In other words, the petitioner argues that where a person's license is permanently revoked, and where that individual may apply for a new license after five years (under VTL § 1193 [2] [b] [12] [a] and [b]) or eight years (under VTL § 1193 [2] [b] [12] [d] and [e]) the Commissioner may not lawfully impose a greater license revocation period. The petitioner argues, inter alia, that Part 136 renders the provisions of VTL § 1193 (2) (b) (12) (b) and (e) superfluous by reason that it: requires the Commissioner to undertake a lifetime review of a person's driving record; implements (in most cases) a twenty five year look back period; in some instances imposes a life time prohibition against restoration of a driver license; and imposes an additional five year waiting period, followed by a five year period with a restricted license, coupled with a requirement for installation of an IID.

§ 136.5 of respondent's regulations recites, in part, as follows:

> "(b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that:
>
> (1) the person has five or more alcohol- or drug-related driving convictions or incidents in any combination within his or her lifetime, then the Commissioner shall deny the application.
>
> (2) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period and, in addition, has one or more serious driving offenses within the 25 year look back period, then the Commissioner shall deny the application.
>
> (3)
>
> (i) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period and (ii) the person is currently revoked for an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least five years after which time the person may submit an application for relicensing. Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law. After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose the A2 restriction on such person's license for a period of five years

and shall require the installation of an ignition interlock device in any motor vehicle owned or operated by such person for such five-year period. If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

(4)

(i) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period and (ii) the person is not currently revoked as the result of an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least two years, after which time the person may submit an application for relicensing. Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law. After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose an A2 restriction, with no ignition interlock requirement, for a period of two years. If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident, such person shall thereafter be ineligible for any kind of license to operate a motor

vehicle.

(5) the person has two alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period, then the Commissioner may in his or her discretion approve the application after the minimum statutory revocation period is served.

(6) the person has been twice convicted of a violation of subdivision three, four or four-a of section 1192 of the Vehicle and Traffic Law or of driving while intoxicated or of driving while ability is impaired by the use of a drug or of driving while ability is impaired by the combined influence of drugs or of alcohol and any drug or drugs where physical injury, as defined in section 10.00 of the Penal Law, has resulted from such offense in each instance, then the Commissioner shall deny the application.

(c) The grounds for any denial shall be set forth in writing and a copy shall be made available to the person making the application for relicensing.

(d) While it is the Commissioner's general policy to act on applications in accordance with this section, the Commissioner shall not be foreclosed from consideration of unusual, extenuating and compelling circumstances that may be presented for review and which may form a valid basis to deviate from the general policy, as set forth above, in the exercise of discretionary authority granted under sections 510 and 1193 of the Vehicle and Traffic Law. If an application is approved based upon the exercise of such discretionary authority, the reasons for approval shall be set forth in writing and recorded."(15 NYCRR § 136.5)

The Court observes that the respondent has interposed an objection in point of law alleging that the petition fails to state a cause of action. The respondent further points out that the petitioner's license was not permanently revoked under VTL § 1193 (2) (b) (12). In fact, it appears that petitioner's license was revoked for a period of one year on April 9,

2008.[5] Under this circumstance, the reissuance of petitioner's license would be governed by VTL § 1193 (2) (c), which recites:

> "(c) Reissuance of licenses; restrictions.
>
> (1) Except as otherwise provided in this paragraph, where a license is revoked pursuant to paragraph (b) of this subdivision, no new license shall be issued after the expiration of the minimum period specified in such paragraph, except in the discretion of the commissioner." (VTL § 1193 [2] [c] [1]).

Thus, on the facts before the Court, VTL § 1193 (2) (b) (12) has not been shown to have any application to this petitioner, and any direct challenge to Part 136 on this basis presents, at most, a theoretical or hypothetical controversy, which is not justiciable, and which fails to state a cause of action (see CPLR 3001; Ovitz v Bloomberg L.P., 18 NY3d 753, 760 [2012]; Matter of Schulz v New York State Legislature, 230 AD2d 578, 582 [3d Dept., 1997]).

The Court nonetheless recognizes, that the petitioner has advanced a diffuse argument that the penalties, conditions and restrictions imposed under the recently revised Part 136 are more onerous than those imposed by the Legislature under VTL § 1193 (2) (b) (12), applicable to offenders having driving records more serious than the petitioner. It is argued that by reason of the foregoing, Part 136 conflicts with the overall legislative policy.

Looking first at respondent's statutory authority to adopt and revise Part 136, VTL § 215 (a) recites:

> "Subject to and in conformity with the provisions of the vehicle and traffic law and the constitution and laws of the state, the commissioner may enact, amend and repeal rules and regulations which shall regulate and control the exercise of the powers of the department and the performance of the duties of

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[5]Which likely was pursuant to VTL § 1193 (2) (b) (3).

officers, agents and other employees thereof."

In addition, the Legislature has conferred broad powers upon the Commissioner with regard to licencing and revocation, including license restoration (see VTL § 510). The petitioner points out that the provisions of VTL § 510, are not applicable to alcohol and drug related license revocations (see VTL § 510, [3] [a] and [6] [h])[6]. While this is true, the Legislature expressly conferred equivalently broad discretionary power over the reissuance of licenses which have been revoked by reason of alcohol or drug related revocations (or test refusals) (see VTL § 1193 [2] [b] [12] [b] and [e]; VTL §1193 [2][c], supra).

The Court discerns no conflict between VTL § 1193 (2) (b) (12) (b) and Part 136 for three reasons. First, while VTL § 1193 (2) (b) (12) (b) recites that the Commissioner "shall" waive a permanent license revocation after five years, such waiver is subject to a case by case review in the interest of public safety and welfare (see VTL § 1193 [2] [b] [12] [b]). VTL § 1193 (2) (b) (12) (b) does not preclude an additional non-permanent time of revocation, nor does it preclude consideration of additional risk factors by the Commissioner resulting in a lifetime revocation. Thus, the grant of the waiver is not mandated, so long as the Commissioner exercises her discretion.

Secondly, the issuance of a determination that the license application is denied for five years (after which time the applicant may reapply), while clearly postponing immediate consideration of the application, serves as formal recognition on the part of the

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[6]VTL § 510 (3) (a) authorizes the Commissioner to revoke or suspend a driver's license for any violation "of the provisions of this chapter, except section eleven hundred ninety-two". VTL § 510 (6) (h) recites: "The provisions of this subdivision shall not apply to revocations issued pursuant to sections eleven hundred ninety-three and eleven hundred ninety-four of this chapter."

Commissioner that the revocation is no longer permanent.

Third, the adoption of Part 136 should be viewed within the context of the broad delegation of authority given to the Commissioner. Overarching all of the foregoing is the fact that the Commissioner, and only the Commissioner, has been entrusted with the responsibility to grant or withhold the issuance of a driver license in her sound discretion. The fact that the Commissioner has adopted regulations, pursuant to her statutory authority (see VTL § 215 [a], supra), which afford greater protection to public safety and welfare than that set forth in VTL § 1193 (2) (b) (12) (b), does not establish the existence of a conflict. Moreover, as pointed out by the respondents, the revocation periods set forth in VTL § 1193 (2) (b) are expressly described as "minimum periods" (see VTL § 1193 [2] [b]). This carries with it the implication that revocation periods greater than the minimum may properly be imposed.

With regard to the eight year "permanent" revocation period under VTL § 1193 (2) (b) (12) (d), as stated in subdivision (e):

> "[n]otwithstanding the provisions of this clause, nothing contained in this clause shall be deemed to require the commissioner to restore a license to an applicant who otherwise has complied with the requirements of this item, in the interest of public safety and welfare."

Thus, on its face, there does not appear to be any stated preference favoring issuance of a new license in connection with license revocations under VTL § 1193 (2) (b) (12) (d).

Moreover, and apart from the foregoing, VTL § 1193 (2) (b) (12) (c) recites as follows:

> "For revocations imposed pursuant to clause [a] of this

> subparagraph, the commissioner may adopt rules to permit conditional or restricted operation of a motor vehicle by any such person after a mandatory revocation period of not less than three years *subject to such criteria, terms and conditions as established by the commissioner*." (emphasis supplied)

This, in the Court's view, is precisely what the Commissioner did through the revisions to Part 136, which delay issuance of a conditional or restricted license. The five year waiting period under Rule 136.5 (b) (3) has not been shown to conflict with the provisions of VTL § 1193 (2) (b) (12) (b) or (e), or other provisions of the Vehicle and Traffic Law.

Five Year Ignition Interlock

The petitioner maintains that the requirement for installation of an IID, in connection with issuance of an A2 restricted license under Rule 136.5 (b) (3) (i) violates several statutory provisions. Because, however, the petitioner was not issued an A2 restricted license, for the same reasons mentioned in the Court's discussion of VTL § 1193 (2) (b) (12) the Court is of the view that this claim fails to state a cause of action, as there is no justiciable controversy.

Even if, however, the Court were to determine that the matter was justiciable, the Court would find that the argument has no merit. 15 NYCRR §§ 3.2 (c) (4), 136.4 (b) (2) and 136.5 (b) (3) authorize the Commissioner to impose an A2 "Problem Driver Restriction" on certain licenses for a period of five years. The restriction may include a requirement that the driver install an IID on all vehicles owned or operated by the driver. The petitioner contends that the IID requirement conflicts with Penal Law § 65.10 (2) (k-1) and VTL § 1198. These sections either authorize a Court (Penal Law § 65.10 [2] [k-1]) or direct a Court (VTL §

1198 [2]), when imposing a sentence of probation or conditional discharge in connection with an alcohol related offense, to require installation of an IID on any vehicle owned or operated by the defendant (see Penal Law § 65.10; VTL § 1198). In People v Levy (91 AD2d 793 [2d Dept., 2012]), cited by the petitioner, the Court held that although Penal Law § 65.10 (2) (k-1) authorizes, as a condition of sentencing, installation of an IID in connection with violations of alcohol-related offenses (VTL § 1192 [2], [2-a] and [3]), it did not expressly authorize such a condition for a violation of VTL § 1192 (4) (driving while ability impaired by drugs). People v Letterlough (86 NY2d 259 [1995]) involved a sentence imposed for the crime of driving while intoxicated, which included as a condition of probation, that the defendant affix to his license plate a fluorescent sign stating "Convicted DWI". The Court found that such a sentence was not expressly authorized by the legislature, drawing an analogy to Penal Law § 65.10, which had recently been amended to include the imposition of IID as a condition of a sentence including probation or conditional discharge (id., at 268-269).

The respondents point out that VTL § 501 (2) (c) recites as follows:

> "(c) Restrictions. Notwithstanding the foregoing provisions of this subdivision, the operation of vehicles may be limited by a restriction or restrictions placed on a license. The following restrictions may be issued by the commissioner based upon the representative vehicle in which the road test was taken, or if the license is issued based on driving experience, the vehicle in which the experience was gained. *In addition, the commissioner may by regulation provide for additional restrictions based upon other types of vehicles or other factors deemed appropriate by the commissioner.*" (VTL 501 [2] [c], emphasis supplied)

As noted above, where a license is revoked pursuant to the provisions of VTL § 1193 (2) (b),

"[] no new license shall be issued after the expiration of the minimum period specified in such paragraph, except in the discretion of the commissioner" (VTL § 1193 [2] [c] [1]).

The Appellate Division recently observed:

> "[W]hen a person is convicted of driving while intoxicated under Vehicle and Traffic Law § 1192 (2), 'the court may sentence such person to a period of imprisonment . . . and shall sentence such person to a period of probation or conditional discharge in accordance with [Vehicle and Traffic Law § 65] *and shall order the installation and maintenance of a functioning ignition interlock device*' (Penal Law § 60.21])." (People v Barley, ___ AD3d ___, [3d Dept., January 30, 2014], emphasis supplied)

If anything, the "legislative policy" may be viewed to uniformly require installation of an IID after conviction of most alcohol related offenses (see Penal Law § 60.21). The administrative imposition of an IID requirement in connection with issuance of a conditional or restrictive license is merely a rational extension of the foregoing policy. Under such circumstances, the Court finds that the Legislature conferred sufficient authority upon the respondent, in her discretion, to adopt the IID provisions set forth in Part 136. They do not conflict with the provisions of Penal Law § 65.10, VTL § 1193 or VTL § 1198.

One further point should be made. The petitioner advances the argument that the IID requirement is improper and illegal by reason that the cost of the IID is deemed a fine under VTL § 1198. The petitioner, citing Matter of Redfield v Melton (57 AD2d 491 [3d Dept., 1977]) maintains that the respondent has no authority to impose or collect an illegal fine. Two points need to be made. First, Part 136 does not, in any respect, mention the cost of an IID and does not attempt to impose or collect a fine, fee, cost or assessment. Secondly, while the petitioner is correct, in that VTL § 1198 recites that the cost of installation and

maintaining an IID "shall be considered a fine for purposes of subdivision five of section 420.10 of the criminal procedure law" (see VTL § 1198 [5]), said section also recites that it is only applicable to a person "required or otherwise ordered *by a court*" to install an IID (id., at paragraph [1], emphasis supplied). Thus, VTL § 1198 has no application to IIDs mandated under Part 136.5 (b) (3).

Twenty-Five Year Look-Back Period and Life-Time Review of Driving Record

§ 136.5 of the Rules of the Department of Motor Vehicles provides that where a person submits an application for relicensing, the Commissioner will conduct a lifetime review of the person's driving record (see 15 NYCRR 136.5 [b]). As noted, Part 136 provides for what is essentially a life time denial of a new license: (1) where the applicant has five or more alcohol or drug related convictions or incidents in his or her lifetime; or (2) where the applicant has three or four such convictions or incidents within a twenty five year period, and in addition has a serious driving offense (see 15 NYCRR § 136.5 [b] [1], [2]). If the person has three or four such convictions or incidents within a twenty-five year period, but no serious driver offenses, then the Commissioner must deny the application for at least five years, after which the person may submit another application for relicensing (see id.). After the initial five year waiting period expires, the Commissioner may approve a relicensing application, but must impose an A2 "problem driver" restriction for a period of five years and require installation of an IID on vehicles owned or operated by the licensee (see id.).

The petitioner maintains that the lifetime review, and twenty-five year look-back

period conflict with numerous provisions of the Vehicle and Traffic Law, which only impose a ten year look-back period (or less). Among them are the following: VTL §§ 1193 (1) (a), 1193 (1) (c) (I) and (ii), 1193 (1) (d) (2), 1193 (1) (d) (4) (I) and (ii), 1193 (2) (b) (12) (a) and (d), 1194 (2) (d) (1), 1198 (3) (a); Penal Law §§ 120.04 (3), 120.04-a (3), 125.13 (3), and 125.14 (3).

The mere fact that the legislature, in limited circumstances and unrelated contexts, has imposed its own look-back period does not prohibit the respondent from administratively imposing a different one for other purposes. In order to determine if there is a conflict, the individual statutes must be examined. In this instance, the petitioner has not demonstrated the existence of a conflict. For example several of the provisions cited by the petitioner increase the level of a criminal charge or the level of criminal punishment, based upon predicate convictions for such offenses within a five or ten year period (see VTL §§ 1193 [1] [a], 1193 [1] [c] [I] and [ii], 1193 [1] [d] [2], 1193 [1] [d] [4] [I] and [ii]). Several others relate to provisions of the Penal Law, which again, involve criminal charges. Part 136 does not have any application to criminal charges or punishment. VTL § 1194 (2) (d) (as does VTL § 1193 [2] [b]) establishes a minimum period of revocation, not a maximum. VTL § 1198 (3) (a) applies to individuals who are either sentenced to probation or are conditionally discharged. In this instance, petitioner's motor vehicle record reveals that with respect to his most recent conviction (dated February 13, 2008) his sentence included a term of 1,825 days imprisonment and a $1,000.00 fine, but did not include probation or a conditional discharge. For this reason, VTL § 1198 (3) (a) has not been shown to have any application. Lastly, petitioner's arguments concerning an alleged conflict with VTL § 1193 (2) (b) (12) (b) and

(e) are not justiciable in that, as noted above, the petitioner has not shown that his license was permanently revoked.

Lifetime License Denial

Because there is no evidence that a lifetime license denial has been imposed upon the petitioner (see 15 NYCRR § 136.5 [b] [1], [2]), for the same reasons mentioned in the Court's discussion of the five year waiting period, the Court is of the view that this claim fails to state a cause of action, by reason that there is no justiciable controversy.

The petitioner points out that § 136.5 of the Rules directs that if a person has five or more alcohol or drug related driving convictions or incidents in his or her lifetime (or three or four such convictions or incidents, and one or more serious driving offenses within a twenty five year period), then the relicensing application must be denied (see 15 NYCRR § 136.5 [b] [1]). The petitioner indicates that the Vehicle and Traffic Law contains only one provision which imposes a lifetime prohibition with respect to issuance of a new license. This is VTL § 1193 (2) (c) (3), where the licensee has been twice convicted of a violation of VTL § 1192 (3), (4) and (4-a), or convicted of driving while intoxicated or ability impaired by drugs or a combination of drugs and alcohol, and where physical injury resulted from each underlying incident. The petitioner argues that § 136.5 (b) (1) greatly expands the circumstances under which a lifetime revocation may be imposed, and that it impermissibly conflicts with VTL § 1193 (2) (c) (3). The foregoing statutory language, which prohibits the grant of a license in limited factual circumstances, does not, in the Court's view, evince a legislative intent to curtail the Commissioner, in her discretion, from imposing other lifetime

license restrictions pursuant to VTL § 215. Thus, even if the Court were to find that the issue concerning a lifetime license denial was justiciable, the Court would find that there is no conflict.

15 NYCRR § 136.10.

Rule 136.10 (b) recites as follows:

> "(a) Application by the holder of a post-revocation conditional license. Upon the termination of the period of probation set by the court, the holder of a post-revocation conditional license may apply to the Commissioner for restoration of a license or privilege to operate a motor vehicle. An application for licensure may be approved if the applicant demonstrates that he or she:
>
> (1) has a valid post-revocation conditional license; and.
>
> (2) has demonstrated evidence of rehabilitation as required by this Part.
>
> (b) Application after permanent revocation. The Commissioner may waive the permanent revocation of a driver's license, pursuant to Vehicle and Traffic Law section 1193(2)(b)(12)(b) and (e), only if the statutorily required waiting period of either five or eight years has expired since the imposition of the permanent revocation and, during such period, the applicant has not been found to have refused to submit to a chemical test pursuant to Vehicle and Traffic Law section 1194 and has not been convicted of any violation of section 1192 or section 511 of such law or a violation of the Penal Law for which a violation of any subdivision of such section 1192 is an essential element. In addition, the waiver shall be granted only if:
>
> (1) The applicant presents proof of successful completion of a rehabilitation program approved by the Commissioner within one year prior to the date of the application for the waiver; provided, however, if the applicant completed such program before such time, the applicant must present proof of completion of an alcohol and drug dependency assessment within one year of the date of

application for the waiver; and.

(2) The applicant submits to the Commissioner a certificate of relief from civil disabilities or a certificate of good conduct pursuant to Article 23 of the Correction Law; and.

(3) The application is not denied pursuant to section 136.4 or section 136.5 of this Part; and.

(4) There are no incidents of driving during the period prior to the application for the waiver, as indicated by accidents, convictions or pending tickets. The consideration of an application for a waiver when the applicant has a pending ticket shall be held in abeyance until such ticket is disposed of by the court or tribunal" (15 NYCRR 136.10)

The petitioner maintains that paragraph (b) of Rule 136.10 conflicts with the provisions of VTL § 1193 (2) (b) (12) (b) and (e) by including subdivisions (1) through (4) as additional requirements to relicensing, requirements not mentioned in VTL § 1193 (2) (b) (12) (b) or (e).

In the Court's view, nothing within the Vehicle and Traffic Law prohibits the Commissioner from imposing additional requirements upon an applicant seeking to regain his or her license after multiple alcohol or drug related convictions, provided they have a rational basis. Because the Legislature has been very specific in directing that reissuance of a driver license remains within the Commissioner's discretion, so long as the criteria have are reasonably related to public safety and welfare, they may properly be applied. The Court discerns no conflict between Rule 136.10 and VTL § 1193 (2) (b) (12) (b) and (e).

Accumulation of Points.

The petitioner objects to the provisions of Rule 136.5 (a) (2) and Rule 132.1 (d), which define a serious driving offense to include a conviction of two or more violations for which five or more points are assessed, or where a driver has twenty or more points from any violations (see 15 NYCRR 136.5 [a] [2]; 15 NYCRR 132.1 [d])[7]. The petitioner proffers several hypothetical examples with regard to how use of the point system, particularly over the twenty-five year look back period is unfair; and leaves other drivers, having far worse driving records, on the highways. In the Court's view, consideration of accumulated points against an applicant's driver license is not unreasonable when determining whether to restore the applicant's license.

Constitutional Issues, Generally

Before addressing the various constitutional issues raised by the petitioner the Court must first observe that challenges to the constitutionality of a statute or regulation fall within two categories: a facial challenge to the statute or regulation, or a more limited as-applied challenge. With regard to a facial challenge, as stated in Moran Towing Corp. v Urbach (99 NY2d 443 [2003]):

> "In order to prevail [a party] must surmount the presumption of constitutionality accorded to legislative enactments by proof beyond a reasonable doubt. A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment. In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid" (id., at 448, quotations and citations omitted; see also

[7]Point values are assessed under 15 NYCRR 131.3.

Hunter v Warren County Board of Supervisors, 21 AD3d 622, 624 [3d Dept., 2005]).

On the other hand,"[] an as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the defendant under the facts of the case" (People v Stuart, 100 NY2d 412 [2003], at 421).

Improper Delegation of Authority, Separation of Powers, and Preemption

The petitioner argues that Part 136 is the product of an unconstitutionally broad delegation of legislative authority to the respondent; or, in the alternative, that the respondent, in adopting Part 136, exceeded its legislative authority, and in so doing invaded an area preempted by the legislature. The Court has structured its discussion in the same manner adopted by the Court of Appeals in Boreali v Axelrod (71 NY2d 1 [1987]).

Delegation/Separation of Powers Issue

"[T]he constitutional principle of separation of powers, implied by the separate grants of power to each of the coordinate branches of government, requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (Bourquin v Cuomo, 85 NY2d 781, 784 [1995] [internal quotation marks and citations omitted]; see Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 821 [2003]; Ellicott Group, LLC v State of N.Y. Exec. Dept. Off. of Gen. Servs., 85 AD3d 48, 54 [2011]). "While the separation of powers doctrine gives the Legislature considerable leeway in delegating its regulatory powers, enactments conferring authority on administrative agencies in broad or general terms must be interpreted in light of the

limitations that the Constitution imposes" (Boreali v Axelrod, 71 NY2d 1, supra, at 9,citing NY Const. art III, § 1). "However facially broad, a legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits" (id., citation omitted). Notably, it has also been said: "some overlap between the three separate branches does not violate the constitutional principle of separation of powers (Clark v Cuomo, 66 NY2d 185 [1985], at 189). "It is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation is violated." (id.).

Both parties have advanced arguments that the Boreali case (supra) supports their respective position. Boreali dealt with certain provisions of the Public Health Law[8] which restricted smoking in certain designated areas, namely, libraries, museums, theaters and public transportation facilities. The Public Health Council in Boreali (supra) had adopted regulations which expanded the smoking prohibition to a wide variety of indoor areas open to the public, areas not enumerated in the Public Health Law. In dual holdings, the Court of Appeals determined (1) that the regulations violated the doctrine of Separation of Powers (and for this reason were found to be invalid); but (2) that they did not violate principles of preemption.

In addressing the issue of whether the Commissioner of Health had exceeded his legislatively delegated authority, the Court of Appeals relied upon Public Health Law § 225 (5), which the Court summarized as authorizing the Commissioner "'to deal with any matters affecting * * *public health'" (Boreali v Axelrod, 71 NY2d 1, at 9, quoting Public Health

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[8]Public Health Law, art 13-E, §§ 1399-o – 1399-q.

Law § 225 [5]). The Court of Appeals commented "[h]ere, we cannot say that the broad enabling statute in issue is itself an unconstitutional delegation of legislative authority" (id.). This finding, in the Court's view, has application here, in that the respondent has been granted exclusive administrative authority over the revocation and issuance of driver licenses (see generally VTL §§ 501 [1]; 510 [6] [a]; see specifically VTL §§1193 [2] [b] [12] [b], [3] and 1193 [2] [c] [1]), and authority to adopt rules and regulations to carry out its responsibilities (see VTL § 215 [a][9]; VTL § 1193 [2] [b] [12] [c]). Inasmuch as the delegation of authority here is at least as explicit, if not more so, than that in Boreali, the Court finds that there was a proper delegation to the respondent.

The Court of Appeals in Boreali identified four criteria to define the line between administrative rule-making and legislative policy-making: (1) whether the agency acted within its legislatively delegated policy goals; (2) whether the agency was merely filling in the details of broad legislation describing the overall policies to be implemented, as opposed to "[writing] on a clean slate" without the benefit of legislative guidance; (3) whether the legislature had repeatedly tried but failed to adopt legislation in this area; and (4) whether the agency has special expertise in the area (see Boreali v Axelrod, supra, 11-14). Although, as noted, the Court of Appeals in Boreali found that there was a proper delegation of authority, it found that the Commissioner exceeded such authority when, in developing non-smoking regulations, it considered social and economic policy issues, rather than confining

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[9]VTL § 215 recites: "(a) General. Subject to and in conformity with the provisions of the vehicle and traffic law and the constitution and laws of the state, the commissioner may enact, amend and repeal rules and regulations which shall regulate and control the exercise of the powers of the department and the performance of the duties of officers, agents and other employees thereof. []"

himself strictly to public health issues. The Court of Appeals found that at that point the Commissioner had intruded into "a uniquely legislative function" (id., at 12).

Here, Part 136 falls squarely within the policy and purpose of the provisions of the VTL to protect public safety and welfare. It has not been shown that Part 136 was adopted pursuant to extraneous social or economic policy issues. As noted above, there are multiple Legislative authorizations with regard to the Commissioner's power to regulate the issuance of driver licences. The respondent did not "write on a clean slate" by creating "its own comprehensive set of rules without legislative guidance" (id., at 13). Rather, Part 136 carries out the Commissioner's legislatively delegated authority. With regard to the legislature's past efforts to adopt legislation in this area the petitioner, in reply papers, has submitted evidence of a single prior instance in which the Legislature attempted but failed to impose a twenty five year look-back period for certain driving offenses[10]. In this respect, the petitioner has not demonstrated that, prior to the revision of Part 136, the Legislature had "repeatedly" failed to legislate in this area. Lastly, the Court is of the view that public safety and welfare with regard to the operation of motor vehicles upon state roadways is a matter within the technical competence of the Commissioner.

Under all of the circumstances, the Court finds that the adoption of Part 136 did not overstep the line between administrative rule-making and legislative policy making.

Preemption and the Legislature's Intentions

As relevant here, where there is a perceived conflict between two co-equal branches

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[10]See 2011 Senate Bill 6479.

of government, the inquiry "includes an examination of both the scope of the statute authorizing the regulatory activity and the degree to which the administrative rules are either consistent or 'out of harmony' with the policies expressed in the statute" (Boreali v Axelrod, supra, at 15). Because the Legislature had given the agency a "wide field for exercise of its regulatory authority", and because the regulations were consistent with the legislative policy, the Court of Appeals, despite finding that the regulations violated the Separation of Powers doctrine, declined to find that the regulations violated the principle of legislative preemption. Notably there, the Court found that there was nothing in the enabling legislation to suggest a legislative intention "to narrow the legislative mandate or exclude the area of smoking restrictions" (id.). Thus, even though the regulations expanded the number and variety of non-smoking locations this fact, of itself, did not establish that the Public Health Council had violated the principal of legislative preemption. The Court is of the view that this is essentially what has occurred here. The petitioner points to no provision of the Vehicle and Traffic Law which expressly precludes or limits the promulgation of rules with regard to the reissuance of driver licenses. As noted, the Vehicle and Traffic Law does not prohibit adoption of rules governing lifetime review of an applicant's driving history. Nor, in the Court's view, does it prohibit the twenty-five year look-back period, the five year waiting period, the A2 restricted license, the IID, or the lifetime denial of a license. For this reason, and mindful that the Legislature has granted the Commissioner broad powers with regard to rule making and discretionary review, the Court finds that the petitioner has not demonstrated that Part 136 is inconsistent or out of harmony with the Vehicle and Traffic Law. Under all of the circumstances, the Court finds, as the Court of Appeals did in Boreali,

that the petitioner's arguments concerning legislative preemption have no merit.

The Court finds that the petitioner has failed to demonstrate the merit of his claim with respect to a violation of the Separation of Powers Doctrine, either as a facial challenge or as-applied to him personally.

Ex Post Facto Clause and Retroactivity

"[T]he Ex Post Facto Clause prohibits legislation that makes criminal an act not criminal when committed or increases punishment for previously committed offenses" (Hunter v Warren County Board of Supervisors, 21 AD3d 622, 624-625 [3rd Dept., 2005]). Phrased differently, the Ex Post Facto clause "applies only to penal statutes (Cerro v Town of Kingsbury, 250 AD2d 978, [3d Dept., 1998], citing Kansas v Hendricks, 521 US 346, 370-371, 117 S Ct 2072, 2086). The foregoing principle was applied to provisions of the New York Sex Offender Registration Act ("SORA"), where the Court found that certain provisions of SORA were not punitive, and therefore did not violate the Ex Post Facto Clause (see People v Parilla, 109 AD3d 20 [1st Dept., 2013], 23-30). From a review of the affidavit of Ida L. Traschen, First Assistant Counsel of DMV, it appears that the purpose of Part 136 is to protect the public safety and welfare, not to impose punitive sanctions. In addition, it has been held that the Ex Post Facto Doctrine does not apply to administrative regulations (see Robinson v Bennett, 300 AD2d 715, 716 [3d Dept., 2002]; Matter of Suce v Taylor, 37 AD3d 886, 887 [3rd Dept., 2007]). Apart from the foregoing, it well established that laws or regulations are not retroactive where they apply to future transactions merely because that will require consideration of antecedent events (see Miller v DeBuono, 90

NY2d 783 [1977]; Forti v NYS Ethics Comm., 75 NY2d 597 [1990]; Matter of Talisman Energy USA, Inc. v New York State Dept. of Envtl. Conservation, ___ AD3d ___, 2014 NY Slip Op 150 [3d Dept., January 9, 2014]).

Ms. Traschen avers in her affidavit that in November of 2012 officials at DMV became aware of cases where individuals with multiple alcohol related offenses were re-licensed after a minimum revocation period; and that repeat offenders were responsible for a dis-proportionate amount of alcohol-related injuries statewide. For this reason, DMV determined, in February 2012, that it was necessary to develop more rigorous criteria for re-licensing. Incident to the foregoing, it was decided that all pending license applications should be temporarily held, so that they could be reviewed in a uniform fashion under the new regulations. Thereafter, on September 25, 2012, DMV filed a Notice of Emergency and Proposed Rulemaking in relation to 15 NYCRR Parts 3, 134 and 136. Because no license had yet been issued to the petitioner, and petitioner's application had not been finally determined, the Court is of the view that the respondent could properly utilize revised Part 136 in its review. The Court finds that the petitioner has failed to demonstrate the merit of his claim with respect to a violation of the Ex Post Facto Clause, either as a facial challenge or as-applied to him personally. Incidental to the foregoing, the Court finds that the petitioner is not entitled to a review of his license application under former Part 136.

Due Process

"It is well established that a driver's license is a substantial property interest that may not be deprived without due process of law" (Pringle v Wolfe, 88 NY2d 426, 431 [1996],

citing Bell v Burson, 402 US 535, 539, 29 L Ed 2d 90, 91 S Ct 1586). Although the constitution recognizes a right to travel within the United States, referred to as the "right to free movement" (see Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 99 [2d Cir. N.Y. 2009]), it does not recognize a fundamental "right to drive" (see Miller v Reed, 176 F.3d 1202, 1205-1206 [9th Cir. Cal. 1999]). As stated in Bell v Burson (supra):

> "*Once licenses are issued*, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." (Bell v Burson, supra, at 539, citing Sniadach v Family Finance Corp., 395 U.S. 337 [1969], and Goldberg v. Kelly, 397 U.S. 254 [1970], emphasis supplied; see also Scott v Williams, 924 F.2d 56, 58 [4th Cir. Va. 1991])

That being said, it has been held that a due process right arises only where the applicant has a "legitimate claim of entitlement" to the license, not a merely a "unilateral expectation" (see Baer v White, 2009 U.S. Dist. Lexis 46412, 2009 WL 1543864 [U.S. Dist. Ct., Northern Dist. of Illinois, Eastern Div., 2009]; see generally Board of Regents v Roth, 408 U.S. 564, 577 [1972]). In this instance, the petitioner no longer has a license. Under VTL § 1193 (2) (c) (1) reissuance of a license is in the discretion of the Commissioner. The petitioner, at best, may be viewed as possessing a unilateral expectation that he would receive a license, not a bona fide right to same. Under such circumstances, Due Process was not implicated. In addition, with regard to review of his license application under Part 136, it is well settled that there is no Due Process right in a particular state-created review procedure (see Meyers v City of New York, 208 AD2d 258, 263 [2d Dept., 1995]). Apart from the foregoing, if it

were necessary to reach the issue, the Court would find that there is sufficient protection available to the petitioner to fulfill the requirements of procedural due process, by way of an administrative appeal, followed (if necessary) by review of an adverse agency determination pursuant to CPLR Article 78. The Court finds that the petitioner has failed to demonstrate the merit of his claim with respect to a violation of the Due Process Clause, either as a facial challenge or as applied to him personally.

Administrative Delay

As noted, the petitioner indicates that in a determination dated February 14, 2012 he was advised that he had been approved to apply for a driver's license. However, in a subsequent determination dated February 17, 2012 he was advised that the previously-granted approval had been "withdrawn", and that it was subject to additional review. Nothing further occurred until November 8, 2012, when DMV advised the petitioner that his application for permission to apply for a new license was denied. Revised Part 136 took effect on September 25, 2012. The petitioner argues that the delay in processing his application between mid-February 2012 and November 8, 2012 "violated due process, violated notions of fundamental fairness, violated respondent's duty to follow the law in effect at the time of petitioner's application, violated respondents' duty to process petitioner's application in a timely manner, was arbitrary and capricious, and/or constituted an abuse of discretion."

Respondent's temporary suspension of the review of new license applications was within her inherent discretionary authority, consistent with her statutory duty to oversee

issuance of licenses (see Sheffield Towers Rehabilitation & Health Care Ctr. V Novello, 293 AD2d 182, 186 [2d Dept., 2002]; Matter of Schubert v New York State Department of Motor Vehicles, Sup. Ct., Albany Co., October 1, 2012, unpublished, Index No. 3442-12]). Moreover, there does not appear to be a specific deadline within the Vehicle and Traffic Law for the respondent to process or complete its consideration of an application for a driver license (see Wolf v Novello, 297 AD2d 746, 747 [2d Dept., 2002]).

The Court discerns nothing improper in holding petitioner's application open for period of time until it finalized revisions to Part 136, after which it resumed its review.

CPLR Article 78 Relief

The Court observes that the Court's role in reviewing an administrative determination is not to substitute its judgment for that of the agency, but simply to ensure that it is not made in violation of lawful procedure or affected by an error of law, and was not arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009]; In the Matter of Terrace Court, LLC v. New York State Division of Housing and Community Renewal, 18 NY3d 446, 454 [2012]; Matter of Warder v Board of Regents, 53 NY2d 186, 194; Matter of Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363; Akpan v Koch, 75 NY2d 561, 570; Matter of Prestige Towing & Recovery, Inc. v State of New York, 74 AD3d 1606 [3rd Dept., 2010]). "'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts'" (In the Matter of Murphy v New York State Division of Housing and Community Renewal, 21 NY3d 649, [2013], quoting Peckham v Calogero, 12 NY3d 424 [2009] at 431, which cited Matter of Pell v

Board of Educ., 34 NY2d 222, 231 [1974]).

As discussed above, the Court finds that Part 136 does not violate the cited provisions of the New York or Federal Constitution, or conflict with the Vehicle and Traffic Law (or other cited laws). The Court finds that Part 136 is compatible and in keeping with the Legislature's delegation of authority as set forth in the Vehicle and Traffic Law, and was adopted in the interest of public safety and welfare. The Court finds that it has a rationale basis, was not arbitrary or capricious or and abuse of discretion, and is not affected by an error of law.

With regard to the November 8, 2012 determination (supra), the Court observes that the respondent reviewed the petitioner's individual driving record and found that it "constituted a serious lack of regard on your part for the safety and welfare of other users of the highway". The determination was made within the Commissioner's discretion, under the statutory authority set forth in VTL § 1193 (2) (c) (1). The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion.

To the extent that the petitioner seeks an order pursuant to CPLR 7803 (1) to compel the respondent to issue him a driver's license, relief in the nature of mandamus is only appropriate where the right to relief is "clear" and the duty sought to be enjoined is performance of an act commanded to be performed by law, purely ministerial and involving no exercise of discretion (Mtr Hamptons Hosp v Moore, 52 NY2d 88, 96 [1981]; Matter of Legal Aid Socy. Of Sullivan County v Scheinman, 53 NY2d 12, 16; Matter of Maron v Silver, 58 AD3d 102, 124-125 [3rd Dept., 2008], lv to app denied 12 NY3d 909). "`The

general principle [is] that mandamus will lie against an administrative officer only to compel him [or her] to perform a legal duty, and not to direct how he [or she] shall perform that duty'" (Klostermann v Cuomo, supra, p. 540, quoting People ex rel. Schau v McWilliams, 185 NY 92, 100). In this instance, the issuance of a driver's license is within the discretion of the Commissioner. For this reason, the remedy of mandamus to compel will not lie.

The petitioner has pointed out many other instances of alleged conflicts and inconsistencies between Part 136 and provisions of existing law which have not been specifically delineated herein. Several of petitioner's arguments (some of which have been noted) rely upon hypothetical circumstances not shown to directly pertain to the petitioner. The Court has reviewed and considered all of the petitioner's remaining arguments and contentions with regard to Part 136, and finds them to be without merit. The Court is particularly cognizant of the argument advanced by the petitioner, with respect to Rule 136.5 (d), that while the Commissioner may deviate from the requirements of paragraph (b) by reason of "unusual, extenuating and compelling circumstances", that in practice this is never done. Here, there is no showing that the petitioner availed himself of the provisions of Rule 136.5 (d) by presenting an argument that there were unusual, extenuating and compelling circumstances applicable to him. Beyond that, the petitioner has presented no evidence to support his broad claim that the respondent never deviates from Rule 136.5 (b), even where unusual, extenuating and compelling circumstances are present. Nor, for that matter, would such evidence necessarily be relevant with respect to how this particular license application was determined, assuming that the petitioner had properly raised an argument under Rule

136.5 (d).

The Court is mindful that the petitioner has requested that the Court issue a number of declarations with respect to his request for judgment pursuant to CPLR 3001. Because it only appears that Rule 136.5 (a) and (b) (3) directly apply to the petitioner, the Court will limit its declaration to these provisions.

Accordingly, it is

ORDERED, ADJUDGED and DECLARED, that 15 NYCRR Part 136 does not constitute a facial violation of the Separation of Powers Doctrine, the Ex Post Facto Clause, or the Due Process Clause; and it is further

ORDERED, ADJUDGED and DECLARED, that 15 NYCRR Part 136, as applied to the petitioner and to the extent discussed herein, does not conflict with the provisions of the Vehicle and Traffic Law or Penal Law; and it is further

ORDERED, ADJUDGED and DECLARED, that 15 NYCRR Part 136, as applied to the petitioner, does not violate the Separation of Powers Doctrine, the Ex Post Facto Clause, or the Due Process Clause; and it is further

ORDERED, ADJUDGED and DECLARED, that the provisions of the Vehicle and Traffic Law, as applied to the petitioner, do not constitute an unconstitutional delegation of legislative authority to the respondent with regard to issuance of driver licenses; and it is

ORDERED, ADJUDGED and DECLARED, that 15 NYCRR Part 136, as applied to the petitioner, does not constitute an act in excess of respondent's legislatively delegated authority; and it is

ORDERED and ADJUDGED, with respect to that portion of the petition which

seeks relief pursuant to CPLR Article 78, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondent. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: February 21, 2014
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated April 26, 2013, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated June 11, 2013 and Exhibit
3. Affirmation of Ida L. Traschen, Esq. filed June 17, 2013
2. Reply of Eric H. Sills, sworn to September 30, 2013 and Exhibits