

**Matter of Whitney Trucking Inc. v New York City
Bus. Integrity Commn.**

2005 NY Slip Op 30417(U)

April 8, 2005

Supreme Court, New York County

Docket Number: 106336/04

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 62

WHITNEY TRUCKING

INDEX NO. 106336/04

- v -
NY CITY BUSINESS INTEGRITY

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. 001

The following papers, numbered 1 to 5 were read on this motion to/for Article 78 proceeding

	PAPERS NUMBERED
Notice of ^{<u>Petition & Petition</u>} Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2, 3</u>
Answering Affidavits — Exhibits _____	<u>4, 5</u>
Replying Affidavits _____	

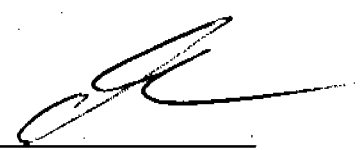
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition pursuant to CPLR § 7801 for an order annulling the decision of the NYC Business Integrity Commission is denied in accordance with the attached memorandum decision.

COPY
JUDICIAL JUDGMENT

HON. DORIS LING-COHAN

Dated: 4/8/05


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 62

-----X
In the Matter of the Application of
WHITNEY TRUCKING INC.,
Petitioner,

-against-

Index No. 106336/04

THE NEW YORK CITY BUSINESS INTEGRITY
COMMISSION,

Respondent.

-----X
DORIS LING-COHAN, J.:

Petitioner Whitney Trucking Inc. (Whitney) seeks a judgment annulling the decision of the New York City Business Integrity Commission (BIC), dated March 23, 2004, which denied Whitney's application for registration as a construction and demolition debris hauler.

BACKGROUND

Whitney is a Westchester County trucking company which is engaged in the business of removing construction and demolition (C&D) debris from construction sites. According to Whitney, it also moves some material to construction sites and hauls some contaminated materials, but does not haul garbage. Thomas Attonito and his father, Joseph Attonito, are president and vice president of Whitney.

In March 2000, Whitney filed an application with BIC seeking an exemption from the licensing requirements of Local Law 42, which regulates the private waste hauling industry in New York City. New York City Administrative Code (Administrative Code) § 16-501, *et seq.* This is the third Article 78 proceeding filed by Whitney in connection with its efforts to obtain the exemption.

The first proceeding was commenced after BIC conducted a deposition of Thomas Attonito and subsequently served Whitney with a notice of hearing, charging it with operating an unregistered trade waste removal business, in contravention of section 16-505 of the Administrative Code. In its first Article 78 petition, Whitney sought to compel BIC to issue an exemption registration, to permanently stay the administrative proceeding, or in the alternative, to stay the administrative proceeding pending completion of a criminal proceeding which was pending against Thomas and Joseph Attonito. The Supreme Court issued a temporary restraining order (TRO) staying the administrative proceeding pending hearing of their motion.

The administrative proceeding on the charges of operating an unregistered business was marked off the calendar. However, pursuant to Whitney's still pending request for an exemption from the licensing requirements, BIC's staff recommended that the exemption be denied on several grounds.

Whitney commenced a second Article 78 proceeding seeking to permanently enjoin enforcement of the recommendation, and to have BIC held in contempt for disobeying the court's prior TRO. The two Article 78 proceedings were consolidated for disposition by the Supreme Court, which held that BIC must issue an exemption from licensing requirements, that BIC did not have the authority to compel a deposition of Thomas Attonito or to serve subpoenas on third parties until after it had registered Whitney as exempt from licensing, and that BIC should be held in

contempt for circumventing the court's TRO. *Matter of Attonito v Maldonado*, Sup Ct, NY County, Tolub, J., Index Nos. 100300/03 & 104923/03, April 8, 2003, *revd* 3 AD3d 415 (1st Dept 2004), *lv denied* 2 NY3d 705 (2004), *rearg denied* 3 NY3d 702 (2004).

On appeal, the Appellate Division reversed the decision of the Supreme Court, stating:

Administrative Code § 16-509 (b) permits the BIC to "refuse to issue a license or registration to an applicant ... who has knowingly failed to provide the information and/or documentation required by the [BIC]..." (emphasis added). In sum, the BIC may "review" the application for an exemption and registration (Administrative Code § 16-505[a]), may investigate any matter within its jurisdiction (Administrative Code § 16-504 [c]), and may deny such application in those cases where the applicant fails to provide the necessary information, or knowingly provides false information (Administrative Code § 16-509 [b]).

Matter of Attonito v Maldonado, 3 AD3d at 418.

The Court also reversed the finding of contempt, holding that, in issuing the recommendation, BIC had not violated the clear mandate of the Supreme Court staying the administrative proceeding. *Id.*

On February 4, 2004, approximately two weeks after the Appellate Division's decision, BIC served Whitney with an Updated Recommendation of the Staff, denying Whitney's application for an exemption. On February 23, 2004, Whitney submitted a lengthy response and requested a hearing. The request for a hearing was effectively denied when, on March 23, 2004, BIC found that the applicant lacked good character, honesty, and integrity, and denied the application for an exemption. More specifically, BIC

listed the following bases for denying Whitney's application:

- (1) The applicant provided materially false and misleading information in its exemption application to the commission.
- (2) The applicant's president provided materially false and misleading testimony at his deposition before the commission and provided materially false and misleading information in a sworn deposition questionnaire.
- (3) The applicant's president was convicted of two felony counts, offering a false instrument for filing in the first degree and perjury in the first degree, and the applicant's vice-president is under pending criminal indictment charging him with the felony of offering a false instrument for filing in the first degree.
- (4) The applicant engaged in long-term unregistered activity and administrative charges relating to such activity are pending against the applicant.
- (5) A loaded, unregistered and illegally altered pistol was found in an office desk drawer of the applicant, pursuant to a search warrant.
- (6) The applicant's vice-president and consultant/manager both have long criminal histories, including several felony convictions for racketeering activities, such as extortion, pursuing a scheme to defraud and joining a conspiracy to commit mail fraud.
- (7) The applicant is under pending criminal misdemeanor charges for illegal dumping.
- (8) The applicant operated an illegal waste transfer station and obstructed governmental administration by failing to permit government inspectors to enter and inspect the site.

[Decision Of The Business Integrity Commission Denying The Exemption Application Of Whitney Trucking, Inc. For A Registration To Operate As A Trade Waste Business, Attached to the Petition, at 2-3].

On or about April 22, 2004, Whitney filed this proceeding

challenging BIC's decision denying it an exemption. Whitney first argues that Local Law 42 (Administrative Code §§ 16-501 et seq.) is unconstitutional as applied to applicants for exemption, and that its challenge is not barred by the doctrine of res judicata.

In substance, Whitney contends that, unlike a license to haul garbage, which is not a property right, an exemption from licensing requirements is a right, not a future interest, and, therefore, an applicant for an exemption must be given full due process protections before the exemption is denied. In making this argument, Whitney relies on language in Administrative Code § 16-505 (a) which states:

a business solely engaged in the removal of waste materials resulting from building demolition, construction, alteration or excavation *shall be exempt* from the licensing provisions of this subdivision.... Grant of such exemption *shall be made* by the commission upon its review of an exemption application, which shall be in the form and contain the information prescribed by rule of the commission and shall be accompanied by a statement by the applicant describing the nature of the applicant's business and listing all principals of such business (emphasis supplied by Whitney).

The Appellate Division, however, has already considered the impact of that language, and determined that the grant of an exemption by BIC is not mandatory upon filing of an application, and that BIC may "review" the application and conduct an investigation, and may deny the application, where the applicant fails to provide the necessary information, or knowingly provides false information. *Matter of Attonito v Maldonado*, 3 AD3d at

418. At the time that Whitney filed this proceeding, it was hoping that the Appellate Division's decision would be reversed by the Court of Appeals, but that Court has now denied review, and the decision of the Appellate Division is binding here.

In addition, this court notes that, as with a licensee, it is only after a party obtains a registration, and BIC wishes to revoke or suspend that registration, that the Administrative Code provides for notice and an opportunity to be heard. See Administrative Code § 16-513.

Whitney's arguments, that it has a property right to an exemption, and that it is entitled to full due process rights before that exemption may be denied, and that BIC did not have the legislative authority to issue its decision without a full due process hearing, therefore fail. See *Sanitation and Recycling Industry, Inc. v City of New York*, 107 F3d 985 (2d Cir 1997) (to succeed on a claim of lack of notice and opportunity to be heard, the plaintiff must establish that it was deprived of a protected property interest). This court need not once again consider Whitney's arguments concerning the structure and application of Local Law 42, except to the extent that they relate to Whitney's challenge to the individual bases for BIC's decision.

Whitney's challenge to the merits of BIC's decision denying it an exemption is not foreclosed by the Appellate Division's decision in *Attonito*. BIC's decision was not, nor was it required to be, made on the basis of a full administrative

hearing. Thus, the proper standard of review is whether BIC's decision was arbitrary and capricious; it is that standard which will be applied in considering Whitney's challenge to the eight bases for BIC's decision. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*, 34 NY2d 222, 231 (1974).

The Court of Appeals explained the "arbitrary and capricious" standard in *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1*, (*id.* at 231) as follows:

"The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified...and whether the administrative action is without foundation in fact' [1 NY Jur, Administrative Law, § 184, at 609]. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."

Thus, a court may not substitute its judgment for that of an administrative agency, if there is a rational basis for the agency's determination (*see Matter of Nehorayoff v Mills*, 95 NY2d 671, 675 [2001]). The court may not overturn the determination of an administrative agency merely because it would have reached a contrary result (*see Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 278 [1972]; *Matter of Kaplan v Bratton*, 249 AD2d 199, 201 [1st Dept 1998]). Applying this standard to the instant matter, as explained further below, the Court concludes that BIC's determination is not arbitrary and capricious.

(1) The applicant provided materially false and misleading information in its exemption application to the commission.

According to BIC, Whitney's failure to list Joseph Attonito

as a company officer constituted false and misleading information, in light of the accumulated evidence concerning his position as vice president of Whitney. Whitney contends that BIC should have directly asked Thomas Attonito, "Is your dad in the company?" Affidavit of Michele Marianna Bonsignore, ¶ 36. Since BIC's first reason for denying Whitney's request for an exemption is based on the information provided in the application for an exemption, Whitney's argument is without merit. The application for an exemption specifically directs the applicant to identify "all individuals who are or have been principals of the applicant business at any point during the past ten years." [Application for exemption, question 6]. Rather than answering the question, Whitney submitted the company's stock certificate which lists Thomas Attonito as the president and secretary of the company.

The court will not speculate as to why Whitney did not provide the information explicitly requested in the application, since it is uncontested that Joseph Attonito is the vice president of Whitney; in fact, Whitney's Article 78 petition identifies Joseph Attonito as such.

Rather than respond directly to Whitney's failure to provide accurate information regarding its officers, Whitney tries to attack the integrity of BIC by arguing that the agency was held in civil contempt by Judge Tolub in the context of the second Article 78 proceeding. That finding of contempt was, however, reversed on appeal by the Appellate Division. *Matter of Attonito v Maldonado*, 3 AD3d 415, *supra*.

(2) The applicant's president provided materially false and misleading testimony at his deposition before the commission and provided materially false and misleading information in a sworn deposition questionnaire.

BIC concluded that Thomas Attonito's deposition testimony was false and misleading when he stated that Joseph Attonito had retired from Morgan Excel, and that Joseph had assisted Whitney during the period of time that the company worked at the World Trade Center site after September 11, 2001. Whitney contends that since BIC now concedes that Thomas's testimony was "technically accurate," it was arbitrary and capricious for BIC to conclude that Thomas's testimony was materially misleading. Given Joseph's undisputed status as vice president of Whitney, and the payroll documents which indicate that Joseph worked for Whitney far more extensively than Thomas claimed in his testimony, BIC's concession regarding the technical accuracy of Thomas's statement regarding Joseph's retirement from Morgan Excel does not undermine BIC's conclusion that both Thomas's deposition testimony and the answers to BIC's questionnaire were misleading in their failure to provide accurate information concerning Joseph's involvement with Whitney - the company which was the subject of the investigation.

Whitney's argument that BIC did not ask Thomas a direct question about his father's role in the company is at least slightly more relevant with regard to Thomas's deposition testimony, than it is regarding Whitney's responses to items in the application seeking information concerning company officers.

However, in the deposition, Thomas was, among other things, asked and answered the following:

Q. And it appears that there is a blank next to vice president and a blank next to treasurer on the bylaws, is that because there is no vice president and treasurer?

A. Yeah, I guess. I guess that I'm everything. I guess there is none.

Q. If there was a vice president or treasurer, it wouldn't be anybody but you?

A. Correct.

[Exh. D, Verified Answer, Deposition of Thomas Attonito, dated January 18, 2002, at 93]. These questions were quite direct, as were Thomas's answers. Again, the court will not speculate on Thomas's reason for withholding information concerning his father's status as an officer. BIC was certainly not required to formulate its questions in the manner suggested by Whitney, and it was not arbitrary and capricious for BIC to consider Thomas's testimony to be both materially false and misleading.

The court need not reach whether BIC should have considered Thomas' failure to identify Salvatore Ardivino as the prior secretary of Whitney.

(3) The applicant's president was convicted of two felony counts, offering a false instrument for filing in the first degree and perjury in the first degree, and the applicant's vice-president is under pending criminal indictment charging him with the felony of offering a false instrument for filing in the first degree.

The charges against Whitney's president referred to in point 3 above are based on the same statements in the application for an exemption, the deposition testimony, and the deposition questionnaire discussed in points 1 and 2 above, and merely serve

to confirm BIC's conclusion that Whitney's submissions were materially false and misleading. This court was not provided information concerning the status of the charge of offering a false information for filing, against Joseph Attonito, in connection with the New York City Vendor Information System Business Entity Questionnaire (VENDEX) that he signed, and therefore, that charge is not being considered here.

The Appellate Division has held that BIC may deny an application for exemption where the applicant fails to provide the necessary information, or knowingly provides false information. *Matter of Attonito v Maldonado*, 3 AD3d at 418. The Appellate Division also held that BIC had the authority to conduct an investigation of the application. This court concludes that it was not arbitrary and capricious for BIC to deny Whitney's application based on its conclusion, after investigation, that Whitney and its president gave materially false and misleading information to BIC. Therefore, although the court may have some reservations about certain of the remaining reasons enumerated by BIC for denying the application, it need not reach those matters.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied, and the proceeding is dismissed; it is further

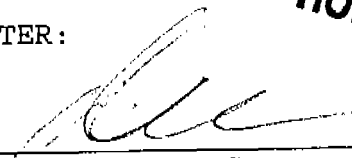
ORDERED that within 30 days of entry of this decision/order, respondents shall serve a copy upon petitioner with notice of entry.

This constitutes the decision and judgment of the Court.

Dated:

4/8/05

ENTER:



J.S.C.

HON. DORIS LING-COHAN

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