Matter of Islam v Taxi & Limousine Commn. of the City of New York
2005 NY Slip Op 30578(U)
March 10, 2005
Supreme Court, New York County
Docket Number: 100265/2004
Judge: Paul G. Feinman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 52

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In the Matter of the Application of MOHAMMAD ISLAM,

Pursuant to Article 78 of the CPLR,
Petitioner,

against

TAXI AND LIMOUSINE COMMISSION OF THE CITY OF NEW YORK,
Respondent.

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Index Number	100265/2004
Motion Date	Feb. 2, 2005
Motion Seq. No.	001
Motion Cal. No.	3

DECISION AND ORDER

For the Petitioner:
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Papers considered in review of this petition for Article 78 mandamus relief and cross motion to dismiss:

Papers	Numbered
Order to Show Cause, Petition and Affidavits Annexed	1
Answering Affidavits	2
Opposition to Cross Motion	3
Verified Answer & Memorandum of Law	4, 4a

PAUL G. FEINMAN, J.:

By interim decision and order dated October 26, 2004, this court denied a cross motion to dismiss the petition and granted petitioner's request to deem timely the late service of the instant order to show cause and petition. The court held final determination of the petition in abeyance pending receipt of respondent's answer. Respondent has subsequently served and filed its verified answer. After oral argument and upon consideration of the above-referenced papers, the petition is dismissed in part and otherwise respectfully transferred to the Appellate Division, First Department, for final disposition, pursuant to CPLR 7804(g) to the extent the petition raises

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substantial evidence questions.

Petitioner seeks to annul the determination by the New York City Taxi and Limousine Commission (TLC) to revoke his operator license based on his failure to pass the annual scheduled mandatory urine test for drugs. Petitioner argues that the administrative law judge failed to perform a duty enjoined upon him by law to evaluate all the evidence before making his recommendation (CPLR 7803[1]), that the decision was arbitrary, capricious, and an abuse of discretion (CPLR 7803[3]), and that the evidence was insufficient to support a recommendation to revoke his license (CPLR 7803[4]). He also seeks compensatory damages and damages for pain and suffering. CPLR 7804[g] provides that when an Article 78 proceeding raises various issues, only one of which is substantial evidence, the court in which the proceeding is commenced shall first dispose of objections which could terminate the proceeding prior to transferring the matter to the Appellate Division for substantial evidence review.

Factual and Procedural Background

Petitioner was a yellow cab driver licensed by the New York City Taxi and Limousine Commission. On May 20, 2003, petitioner was suspended following an annually scheduled mandatory drug test in which he tested positive for marijuana (Ver. Pet. ¶¶ 7, 10). Pursuant to TLC rules, a Fitness Hearing was held on August 5, 2003 before ALJ Thomas P. Coyne.[1] According to the transcript, at the hearing the ALJ read into the record a memo from the TLC

[1]Petitioner failed to appear for the original hearing held on July 22, 2003, at which the TLC presented a copy of the test results, an outline of the protocol used by the Doctors Review Service, and a chain of custody form showing that petitioner had tested positive for marijuana, after which the ALJ concluded that petitioner was not fit to maintain a TLC license and that it should be revoked (Ver. Pet. Ex. H).

which included the chain of custody form and the protocol used by the Doctors Review Service, all of which showed that petitioner tested positive for the presence of marijuana at 118 nanugrams per milliliter[2] (Ver. Pet. Ex. B, Tr. of Hearing, Aug. 5, 2003 at 4; Ex. A, Chain of Custody Form). In addition, petitioner appeared with counsel and offered testimony which included the admission that he had used marijuana at a party three days before the test was to be administered, and an unclear explanation for why he chose to use marijuana at the party (Ver. Ans. Ex. B, Tr. of hearing, Aug. 5, 2003 at 5).[3] His counsel attempted to show through petitioner's testimony that petitioner did not normally smoke marijuana, that he had not attempted to drive after smoking marijuana on that occasion, that he has never had a drug problem or been involved in criminal proceedings involving drug use, and that he did not understand the ramifications of testing positive for drug use (Ver. Ans. Ex. B, Tr. of hearing, Aug. 5, 2003 at 5-7).

On August 13, 2003, the ALJ issued his recommendation that petitioner's license be revoked. The ALJ noted the positive test result but explicitly based his recommendation on petitioner's admission of marijuana use (Ord. to Show Cause Ver. Pet. Ex. 2). Following the hearing, petitioner was notified by letter dated August 13, 2003 that he could submit a response to the TLC "limited solely to any exceptions or objections you have to the conclusions contained

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[2]The federal government guidelines have established a cutoff level for marijuana at 15 nanugrams per milliliter (Ver. Ans. ¶ 86, n. 2).

[3]Petitioner was asked, "Was there any other time [that he smoked in addition to the party]?" he answered "No, one time." (Ver. Pet. Ex. B, Tr. of hearing Aug. 5, 2003 at 5:19-22). When asked why he chose to smoke marijuana when he knew the mandatory drug test was three days away, petitioner stated, "Because I am not, too early, but this time my one friend, he [unintelligible] he smoke, that's all. So then I do and I see my friend in the bed, for hours then they were alone [unintelligible]" (Ver. Pet. Ex. B, Tr. of hearing Aug. 5, 2003 at 7:5-10).

in the Report and Recommendation," and noting that "[n]o evidence outside of the hearing record can be considered." (Ver. Ans. Ex. L). Petitioner submitted a Response dated August 28, 2003. The response contains arguments similar to those at issue in the instant motion, namely that the ALJ's recommendation was based on an unwritten policy requiring license revocation for a positive drug test, that there was no TLC witness with first-hand knowledge concerning the testing procedure, and that there was no evidence concerning the accuracy of the testing procedures (Ver. Pet. Ex. M). The Commissioner of the TLC reviewed petitioner's Response but on September 9, 2003, revoked petitioner's license, accepting the ALJ's finding that petitioner no longer met the fitness requirement to maintain a TLC license (Ver. Ans. Ex. N).

The Petition

The petition alleges seven causes of action related to the revocation of his TLC license. The first cause of action seeks mandamus compelling reinstatement of petitioner's TLC license on the ground that the revocation resulted from an "invalidly applied 'zero tolerance policy'." The second cause of action seeks mandamus compelling reinstatement of petitioner's TLC license on the ground that the revocation resulted from "an invalidly adopted 'zero tolerance policy,' without undertaking CAPA procedures." The third cause of action seeks mandamus compelling reinstatement on the ground that the revocation "was pursuant to TLC rules that violated 'due proces.'" The fourth cause of action seeks mandamus compelling reinstatement on the ground that petitioner "was not afforded procedural due process rights" at the fitness hearing. The fifth cause of action seeks mandamus to review based on the insufficiency of the evidence at the hearing. The sixth cause of action seeks compensatory damages and the seventh cause of action seeks "pain and suffering." The court shall consider the various claims *in seriatim.*

1. First, Second, Third and Fourth Causes of Action

Petitioner contends that in all instances where a licensed TLC driver fails a drug test, it is the unwritten TLC policy to revoke his or her TLC operator's license, and that this policy differs from that promulgated in the TLC Rules. The rules for the taxicab drivers are codified in Chapter 2 of Title 35 of the Rules of the City of New York (RCNY). Petitioner was tested for drugs pursuant the TLC requirement that licensees are to be tested for drugs within 30 days of their anniversaries of obtaining their licenses and, where the test is positive, the "licensee shall be afforded the opportunity of a hearing as to the licensee's fitness." (35 RCNY §2-29[b]). Petitioner contrasts the open-endedness of this provision with two other provisions of the TLC Rules which specifically provide for revocation of the license. The first concerns applicants for a taxicab driver's license who must be tested for drugs and if the test is positive, it "shall result in the denial of a new application," which is a "final agency decision" (35 RCNY § 6-15[a][3]). The second concerns drivers whom the TLC believes to have a drug impairment who are to be tested for such impairment, and where the results of the test are positive, the operator's license "may be revoked after a hearing." (35 RCNY § 6-16[s]).

Petitioner argues that because there is no mention in 35 RCNY § 2-29(b) of license revocation, the uniform recommendations by administrative law judges made after conducting hearings to revoke licenses are "simply defer[ring] to informal [TLC] policy," rather than independently reached decisions based on all the evidence (Ord. to Show Cause Ver. Pet. ¶ 13). He thus argues that ALJ Coyne's recommendation that his TLC license be revoked was not based on the totality of the evidence which would have included his driver's record and the facts that there was no testimony that he drove under the influence or drugs or created any danger to the

riding public, but rather entirely on the unwritten TLC rule (Ord. to Show Cause Ver. Pet. ¶ 15).

As an initial matter, although petitioner's argument is based in large part on the unfairness of the "unwritten policy" to revoke operators' licenses after testing positive for drug use, he does not establish beyond his mere statement that there is such an unwritten policy being uniformly applied. Thus, his argument that the TLC should have conducted public hearings pursuant to Chapter 45 of the City Administrative Procedure Act (N.Y. City Charter, § 1043) before it adopted the new policy, has little persuasive value. It simply cannot be determined from the record before the court that the TLC has such an unwritten policy to which it always adheres. Merely alleging something does not make it so.

It is a well-settled rule that judicial review of administrative determination is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is "'determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974], quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). Furthermore, an arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232). The court is to dispose of an Article 78 proceeding in the same manner as it would a motion for summary judgment (CPLR 409[b]).

Pursuant to 35 RCNY § 8-14, the TLC "may institute proceedings to seek the revocation

of any license. . . whether or not the penalty of revocation is provided therein" (35 RCNY § 8-14[a]). Such instances include instances where it is determined that "emergency action is required to insure public health, safety or welfare" (35 RCNY § 8-16[a]). The TLC considers that testing positive for marijuana use "poses a threat to the public safety, health and welfare" (Ver. Pet. Ex. F, TLC Memo of July 3, 2003 to Presiding ALJ). In such emergency situations, the TLC requires a summary suspension hearing before an ALJ who will consider "all relevant evidence and testimony under oath, according to the hearing procedures set forth in this Chapter" (35 RCNY § 8-16[d]). At the conclusion of the hearing, the ALJ issues a written recommended decision to the Chairperson of the TLC, "who may accept, reject or modify the recommendation." (35 RCNY § 8-16[e]). The Chairperson's decision "shall be the final determination of the Commission." (*Id.*).

Petitioner argues that the rule providing for a fitness hearing does not set forth any standard to guide the ALJ in making a determination concerning the consequences of failing the drug test. He argues that the rule is vague and lacks a sufficient standard to provide due process. However, the TLC rules are clear that a taxicab driver must be "of sound physical condition," "not addicted to the use of drugs," and "of good moral character" and that the TLC may deny issuance or renewal of an operator's license if he or she fails to meet these or other requirements (35 RCNY § 2-02[a], [f], [h]). Thus, at the hearing these underlying principles guide the ALJ who is to "consider all relevant testimony and review documentary evidence submitted at the hearing," including "affidavits or affirmations submitted under penalties of perjury," "the records of the Commission maintained in the regular course of business," and the testimony of witnesses under oath (35 RCNY § 8-11, "Hearing Procedure," sub. [b]). It cannot be said that

the TLC standards are vague or otherwise infirm.

In reviewing the record upon which the TLC based its decision to revoke petitioner's license, the court must defer to the ALJ's assessment of the evidence and the credibility of the witnesses (*see, Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained" (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984], *lv denied* 62 NY2d 603 [1984]). The scope of review does not include "any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" and "the sanction must be upheld unless it shocks the judicial conscience" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell v Board of Educ.*, 34 NY2d at 232-234]). While it may be that other solutions could be found for a one time use of marijuana short of the harsh remedy of license revocation, it is not for the court to merely substitute its own judgment as to the penalty for that of the TLC because it believes it has a better or more effective approach to curbing drug use.

The TLC rule which states that testing positive for drug use is a danger to public health, safety or welfare, and requires suspension and possible revocation of the operator's license, is not inherently unreasonable, nor an error of law or abuse of discretion. The respondent is entitled to judgment in its favor dismissing the first four causes of action.

2. Fifth Cause of Action

Questions brought pursuant to CPLR 7803(4) concerning the sufficiency of the evidence presented at a hearing cannot be resolved by this court. This branch of the petition must be

respectfully transferred to the Appellate Division for determination.[4]

3. Sixth and Seventh Causes of Action

As concerns petitioner's sixth and seventh causes of action for compensatory damages and pain and suffering, respectively, CPLR 7806 allows damages "incidental" to the primary relief and "must be such as he might otherwise recover on the same set of facts in a separate cause of action or proceeding suable in the supreme court against the same body." Petitioner claims that a lack of due process and sufficient evidence presented at the hearing, has damaged his ability to earn a living and he has suffered pain and suffering and continues to be damaged until he can return to work (Ver. Pet. ¶¶ 61-62, 65-66). Although restoration of lost salary is incidental relief which may be awarded in an Article 78 petition (*see, Parker v Blauvelt Vol. Fire Co., Inc.*, 93 NY2d 343, 348 [1999]), petitioner's claim for compensatory damages and for pain and suffering are not properly brought in an Article 78 proceeding (*Vega v State Univ. of New York Bd. of Trustees*, 67 F. Supp. 2d 324, 333 [SDNY 1999]; *dismissed in part*, 2000 U.S. Dist. Lexis 4749 [SDNY 2000]; *app. remanded sub nom. Vega v Miller*, 273 F.3d 460 [2d. Cir. (NY) 2001]; *cert. denied sub nom. Vega v Miller,* 535 U.S. 1097 [2002]). Moreover, as petitioner's license suspension and revocation were discretionary acts carried out by the TLC, the agency is immune from common-law liability (*Tango v Tulevich*, 61 NY2d 34, 40-41 [1983]). Accordingly, the respondent is also entitled to judgment in its favor dismissing the sixth and seventh causes of action. Accordingly, it is

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[4]Although respondent addresses the issues raised by petitioner (see, Resp. Memo of Law at 15-18), this court may not address such arguments are they are properly raised before the Appellate Division (CPLR 7803[4]).

ORDERED and ADJUDGED that the petition is denied to the extent that the first, second, third, fourth, sixth and seventh causes of action are dismissed for the reasons stated in the court's decision; and it is further

ORDERED that the fifth cause of action by petitioner seeking to vacate and annul the determination by respondent as unsupported by sufficient evidence is respectfully transferred to the Appellate Division, First Department for disposition pursuant to CPLR 7804(g). It is further

ORDERED that the Clerk of the Court is directed to transfer the entire file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry.

This constitutes the decision, judgment and order of this court. Courtesy copies shall be mailed to counsel.

ENTER

Dated: March 10, 2005
New York, New York

J.S.C.