

Matter of Frank v Stevens

2007 NY Slip Op 33348(U)

October 16, 2007

Supreme Court, New York County

Docket Number: 0105245/2007

Judge: Walter Tolub

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

PRESENT: TOLUB
Justice

PART 15

RAUL FRANK

- v -

NY STATE ATHLETIC Commission

INDEX NO. 105245707

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 10/16/07

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

DEFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
In the matter of the application of RAUL
FRANK,

Petitioner,

Index No. 105245/07

For a Judgment under Article 78 of the
Civil Practice Law and Rules

-against-

RON SCOTT STEVENS, as Chairman, and
NEW YORK STATE ATHLETIC COMMISSION,

Respondents.
-----X

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

TOLUB, J.:

This article 78 proceeding arises out of a professional boxing match on January 25, 2007
between the Petitioner Raul Frank and the Respondent Terrance Cauthen.

In motion sequence 001, Raul Frank petitions the court for an order (1) annulling the
decision of Respondents Ron Scott Stevens, as Chairman, and the New York State Athletic
Commission (the Commission), which overruled the determination of the referee and changed
the result of the boxing match to "no decision;" (2) reinstating the referee's decision, made at the
time of the match, that petitioner scored a technical knockout win over Terrance Cauthen; and (3)
granting such other and further relief as this court deems appropriate.

Respondents cross-move to dismiss the verified petition, pursuant to CPLR 1001, 3211
(a) (10), and 7802 (c), on the grounds that petitioner failed to join Cauthen, a necessary party to
this proceeding. In motion sequence 002, petitioner moves to add Cauthen as a party and to
amend the caption. This motion is unopposed, and therefore, granted. The caption shall be

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amended, reflecting Cauthen as a respondent in this action. In addition, since Cauthen has answered the amended verified petition, respondents' cross motion to dismiss the verified petition on these grounds is denied as moot.

Factual Background

On January 25, 2007, petitioner, Frank, and respondent Cauthen fought at the Palace Theater, Bronx, New York. At 2:59 of the seventh round, the referee, Ricky Gonzalez, stopped the fight and declared petitioner the winner by technical knockout. This win crowned petitioner the United States Boxing Association (USBA) junior middleweight champion and advanced him to the number two position in the International Boxing Federation's (IBF) junior middleweight rankings.

On January 31, 2007, the Commission held a meeting in regard to the fight. Present at the meeting, were Chairman Stevens and members of the Commission staff, petitioner and his team, respondent Cauthen and his team, referee Ricky Gonzales, and Lindsey Tucker, a representative of the USBA and IBF sanctioning organizations. The Commission played a videotape of the fight at the meeting. In an order dated January 31, 2007, the Commission determined that referee Gonzales mistakenly ruled that the end of the fight was brought about by a legal punch and not an unintentional, but illegal, head butt. The Commission changed the official result of the fight to a "no decision." Petitioner was stripped of his win over respondent Cauthen, and the USBA title and the IBF ranking.

On February 9, 2007, petitioner requested a hearing in regard to the Commission's order. A hearing was held on February 21st before Hearing Officer Hugo Spindola, Esq. Both petitioner and respondent Cauthen were present at the hearing, each with counsel. Both parties submitted

briefs to Hearing Officer Spindola. An amicus brief was submitted by Joseph DeGuardia, Esq., on behalf of Star Boxing, the promoter of the fight. The amicus brief was in support of respondent Cauthen's position. Petitioner's counsel moved for Hearing Officer Spindola to recuse himself on the grounds that he could not be neutral, because he had been exposed to information outside of the hearing, that he had already taken a position on the issue, and had already expressed an opinion about the outcome of the hearing. Petitioner's counsel argued that Hearing Officer Spindola had written the Commission's January 31st order overturning petitioner's victory. Hearing Officer Spindola denied petitioner's request for recusal.

On March 27, 2007, Hearing Officer Spindola issued his recommendation, upholding the Commission's January 31st order. On March 29, the Commission issued a Decision and Order adopting the recommendation.

Discussion

Petitioner argues to this court that (1) the Commission has no authority, under its own rules, to change the result of the fight; (2) the Commission created a *de facto* video review rule without following the mandates of the State Administrative Procedure Act; and (3) the Commission violated the petitioner's due process rights and failed to follow proper procedure. This court disagrees.

The Commission's Authority

The powers and functions of the Commission are governed by Title 25, Chapter 1 of the New York Unconsolidated Laws. New York Unconsolidated Law § 8906 states, in relevant part, "[t]he commission shall have and hereby is vested with the sole direction, management, control and jurisdiction over all such boxing and sparring matches or exhibitions to be conducted, held

or given within the state of New York . . .” The Commission has also promulgated regulations to govern the conduct of professional boxing within New York. These regulations are found in the New York Codes, Rules and Regulations, Title 19, Chapter VII. “The rules of the commission shall be construed and enforced by the commission, in its discretion, in the best interests of boxing and wrestling in this State.” 19 NYCRR § 206.3. This rule gives the Commission very broad power and discretion.

However, petitioner argues that, in regard to inside-the-ring determinations during a fight, the referee is the one with exclusive authority, and there is no rule that empowers the Commission to overrule the referee’s decision. He relies on 19 NYCRR § 211.6, which states, in relevant part:

The referee shall *exercise immediate authority*, direction and control over contests and exhibitions to which he or she has been appointed . . . The referee shall have *exclusive authority* in the event of injury to a participant, to interrupt the progress of a round by directing the timekeeper to stop the clock and calling the ringside physician into the ring to examine and advise upon the condition of the injured participant . . . the referee *shall be authorized*, in the event of foul tactics by a participant, to take away a point or points from the score of such participant at the end of the round in which such foul tactics shall have occurred . . . the referee shall have the *exclusive authority* to stop a contest or exhibition at any stage because of a major foul being committed by either participant and to award the decision, under the circumstances, to the fouled participant; the referee shall have the *exclusive authority* to stop a contest or exhibition at any stage if he or she considers that one or both participants are failing to perform according to due standards of effort, ability or conduct, and in such event may disqualify one or both participants and if only one participant is disqualified the referee may award the contest or exhibition to the other by technical knockout; the referee shall have the *exclusive authority* to stop a contest or exhibition at any stage on the grounds that it is too one-sided. In such event, he or she may award the contest or exhibition to the superior participant as a technical knockout; the referee shall have the *exclusive authority* to decide whether or not a boxer or wrestler is knocked down during the course of a round and shall indicate such decision to the timekeeper or alternate referee whose count shall be accordingly continued or discontinued, and, if the count is to be continued, the referee shall pick it up orally and by gesture after first assuring that the opponent of the fallen participant shall

have retreated to the most distant neutral corner of the ring (emphasis added).

While the latter part of this rule gives the referee the power to exercise exclusive authority in regard to certain matters, these powers are modified by the first sentence of the rule, "the referee shall *exercise immediate authority*, direction and control over contests and exhibitions to which he or she has been appointed." 19 NYCRR § 211.6 (emphasis added). Respondents argue that while a referee has "exclusive authority" to make certain decisions, it is an immediate authority that grants to the referee of certain powers during the fight, and does not prohibit the Commission from conducting an inquiry after the fight.

A reading of Rule 211.6 makes it clear that Commission has very broad powers and is given great deference in interpreting its own rules. As previously stated, "the rules of the commission shall be construed and enforced by the commission, in its discretion, in the best interests of boxing and wrestling in this State." 19 NYCRR § 206.3. Further, 19 NYCRR § 206.5 requires that a representative of the Commission be present at boxing matches and grants this representative complete authority in general over all matters under the jurisdiction of the Commission, bestowing a very broad power on the Commission. 19 NYCRR § 206.15 allows the Commission to inquire into the affairs of licensees, and into any matter which may affect boxing or wrestling in New York in its discretion and without limitations, and licensees shall cooperate fully with inquiries by the Commission.

The very encompassing powers of the Commission are also evident in the laws that established the Commission. For example, New York Unconsolidated Law § 8906 vests the Commission with the sole direction, management, control, and jurisdiction over all such boxing and sparring matches or exhibitions to be conducted, held, or given within the State of New York.

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The Commission has construed 19 NYCRR § 211.6 as giving the referee immediate authority that does not extend beyond the fight. “In the context of an article 78 proceeding, it is established that judicial review is limited to a determination of whether the administrative decision is arbitrary and capricious, or lacks a rational basis (see *Matter of Tockwotten Assoc., LLC v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 454 [1st Dept 2004]; *Red Apple Child Dev. Ctr. v Chancellor's Bd. of Review*, 307 AD2d 815 [1st Dept 2003]), and where such rational basis exists, an administrative agency's construction and interpretation of its own regulations are entitled to great deference.” *Slesinger v Department of Hous. Preserv. & Dev. of the City of New York*, 39 AD3d 246 (1st Dept 2007). Given the broad statutory authority of the Commissioner, the court cannot characterize the Commissioner’s interpretation of its own ruling, limiting the authority of the referee’s “immediate authority,” as arbitrary, capricious or lacking a rational basis.

Petitioner’s reliance on *Tilelli v Christenberry* (1 Misc 2d 139 [Sup Ct, NY County 1953]), is misplaced. In *Tilelli*, like the present case, the petitioner brought an Article 78 proceeding to challenge the power of Commission to change the vote of one of the judges of a boxing match, whom the Commission believed was corrupt, arguing that no explicit statutory or regulatory provision authorized or prohibited such action by the Commission. The court found that the Commission was granted power by statute to take such action to cope with alleged fraud, even though the Commission rules fail to specifically state that power.¹ “This conclusion is underlined by the stark statutory specification that the rules and regulations of boxing shall be

¹ In *Tilelli*, the court granted the petition, because it found the Commission’s reason for changing the judge’s score card to be vague and meaningless, lacking a reasonable basis, because no facts were furnished to support the Commission’s conclusions.

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prescribed by the commission and by the promulgation by the commission of regulations so ample and encompassing in their generality that in appropriate circumstances they could comprehend the commission's nullification, if not reversal, of the judges' or a referee's decision." *Tilelli v Christenberry*, 1 Misc 2d at 143.

State Administrative Procedure Act

Petitioner next argues that, in reviewing the videotape of the fight and changing the result based on that review, the Commission has adopted a *de facto* rule without following the proper procedure for promulgating such a rule in violation of State Administrative Procedure Act (SAPA).

The Commission's review of the videotape and decision to reverse the referee's decision is not an unpromulgated rule in violation of SAPA. This court agrees with the Commission that the review and reversal was a reasonable interpretation of an existing promulgated rule. *See Elcor Health Servs., Inc. v Novello*, 100 NY2d 273, 279 (2003).

19 NYCRR § 206.15 allows the Commission to inquire into the affairs of licensees, and into any matter which may affect boxing or wrestling in New York in its discretion and without limitations, and licensees shall cooperate fully with inquiries by the Commission. The Commission reasonably interpreted this rule as allowing them to review evidence, such as a videotape, when making an inquiry into this matter. Further, as previously held, the Commission reasonably interpreted the Commission's rules as vesting them with the power to review a referee's decision. The Commission has not created a new rule.

Due Process

Petitioner argues that the Commission violated his due process rights by issuing the

January 31st order, taking away his victory, without the concurrence of the proper number of commissioners and without holding the required hearing.

New York Unconsolidated Law § 8901 requires the concurrence of at least two commissioners in order to render a determination by the Commission. Petitioner asserts that Commission's January 31st Order was signed by two commissioners, Chairman Stevens and Commissioner Cornstein, but Commissioner Cornstein did not review the videotape, a key piece of evidence. Petitioner argues that Commissioner Cornstein's failure to watch the videotape of the fight demonstrates that Cornstein had no meaningful participation in the determination, and the requirement that two commissioners must concur was not satisfied. However, petitioner does not offer any authority to show that Cornstein was required to watch the videotape in order to concur. Cornstein could have conferred with his colleague, and made a determination without a review of the videotape.

In *Rothkoff v Ratner* (104 Misc 2d 204 [Sup Ct, NY County 1980]), a case relied on by petitioner, petitioner Rothkoff challenged a decision rendered after a hearing, where the person drafting the decision did not review a transcript of the hearing and was not present at the hearing. The court held that, in order to have a fair hearing, the person who made the decision was required to review the evidence presented at the hearing. This is because a hearing held by an administrative body cannot dispense of the essential element of a fair trial, unless waived. The January 27th meeting with Chairman Stevens was not a hearing. In fact, petitioner refers to the gathering on that day as a meeting and he was given a hearing after he objected to the January 31st order. Thus, *Rothkoff* is not applicable.

Petitioner also believes his due process rights were violated, because the Commission

held the hearing after the Commission signed and issued its January 31st order. Petitioner argues that a hearing should have been held before any determinations were made. 19 NYCRR § 206.16 states, in relevant part, "the commission shall offer the opportunity for a hearing to an affected person before taking any final action negatively affecting such a person's individual privileges or property." This rule allows the Commission to conduct a hearing any time before taking final action. It is clear that the Commission's January 31st order was not final, because petitioner would not have been afforded a hearing after the fact. Further, the language of rule makes it clear that the Commission must offer an "affected person" a hearing. Petitioner was not "affected" until the Commission changed the fight's results to a no decision in its January 31st order.

During the hearing, petitioner's counsel moved for Hearing Officer Spindola to recuse himself on the grounds that he could not be neutral, because he drafted the January 31st order. This court does not find that Hearing Officer Spindola's denial of this request to be arbitrary and capricious. Pursuant to 19 NYCRR § 206.16, hearings can be conducted by the Commission or by Commission representatives, who submit findings and recommendations to the Commission, not binding on the Commission. Therefore, the ultimate decision after a hearing is that of the Commission, the administrative body that issued the January 31st Order. In addition, it was not improper for Spindola to deny petitioner's request where, under the Commission's rule governing hearings, there does not appear to be any prohibition against pre-exposure to the matter under consideration either by the Commission or the assigned hearing officer.

Finally, and perhaps more significantly in this court's eyes, is the fact that Hearing Officer Spindola testified to the effect that his only role, with respect to the January 31st order

was to draw up the order in accordance with the Commissioner's decision. His role was ministerial in nature and he was not part of the decision making process.

Conclusion, Order, and Judgment

Accordingly, it is

ORDERED that petitioner Raul Frank's unopposed motion to add Terrance Cauthen to the caption as a respondent is granted; Respondents Commission and Chairman Stevens' cross motion to dismiss the verified petition for failure to join Terrance Cauthen as a necessary party is denied as moot; and it is further

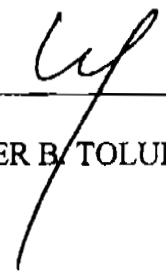
ORDERED that a copy of this order and judgment be served by petitioner's counsel on the Trial Support Office (Rm. 158) and the County Clerk (Rm. 141-B) who are directed to change their records to reflect the change in the caption; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed;

This constitutes the decision and judgment of the Court.

Dated:

ENTER:



WALTER B. TOLUB J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).