

**Filco Carting Corp. v Environmental Control Board
of City of New York**

2007 NY Slip Op 34178(U)

December 7, 2007

Supreme Court, New York County

Docket Number: 0100817/2007

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Filco
- v -
Environment & Ctr. Bd of N.Y.C., et al

INDEX NO. 100817/07
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion
are decided per attached

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

UNFILED JUDGMENT
No judgment has yet 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 115)

Dated: 12/7/07

Check one: FINAL DISPOSITION

J.S.C.
EMILY JANE GOODMAN
 NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

-----X
FILCO CARTING CORP.,

On its Article 78 Petition to annul the
action dated December 21, 2006 taken by
the Environmental Control Board of New
York City,

Petitioner,

Index No. 100817/07

-against-

THE ENVIRONMENTAL CONTROL BOARD OF THE
CITY OF NEW YORK and THE NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

-----X

EMILY JANE GOODMAN, J.:

In this an Article 78 proceeding, petitioner Filco Carting Corp. (Filco) challenges a practice of respondent Environmental Control Board of the City of New York (ECB) governing the preparation of transcripts of administrative hearings, and seeks an order declaring that practice to be null and void, and requiring that the notices of violation (NOVs) issued against Filco by the Department of Sanitation be adjudicated by the New York City Office of Administrative Trials and Hearings (OATH), or that the NOVs be annulled. Pending the determination of the proceeding, Filco seeks a preliminary injunction, enjoining the administrative adjudications relating to the NOVs. Respondents ECB and the New York City Department of Environmental Protection cross-move to dismiss the petition.

The petition alleges that two NOVs were issued to Filco by

the New York City Department of Sanitation (DOS) which were returnable at a hearing before the ECB. The two NOVs were consolidated and a hearing was held before an Administrative Law Judge (ALJ) of the ECB on October 26, 2005, November 4, 2005 and November 16, 2005. The hearing was recorded on audio tape, as per the ECB procedures. The ALJ issued a Decision and Order, dated January 13, 2006, upholding the violations as specified in the NOVs.

Filco decided to appeal the decision and ordered a transcript of the hearing from the ECB, which was prepared by Compu-Scribe, Inc., the transcription service selected by the ECB. The petition alleges that the transcript prepared by Compu-Scribe contained more than 750 notations that the audio tape was "inaudible".

On May 8, 2006, Filco filed an appeal letter, which, in addition to challenging numerous instances of alleged bias by the ALJ, argued that because of the numerous instances where the audio tapes were inaudible, Filco was not able to establish a clear and complete record and that, therefore, the decision of the ALJ must be vacated and a new hearing directed.

On December 21, 2006, ECB Appeals Attorney, Vivienne U. Kahng, wrote to counsel for Filco, Lawrence B. Goldberg, responding to Filco's complaint concerning the inaudible portions of the transcript as follows:

After reviewing the hearing audiotapes, the Board is providing the parties in this matter with an amended, re-certified transcript as the official transcript for the purposes of appeal. The Board is also providing the parties with a transcript of the audio portion of the videotape that was entered into the record as Petitioner's Exhibit 1. The transcript of the audio portion of the videotape is deemed part of the amended, re-certified transcript of the hearing.

The Board grants you a period of 30 days from the date of this letter, plus permissible mailing time, to submit additional claims, if any, based on the amended, re-certified transcript. The Board will only review claims based upon information previously omitted in the original transcript due to problems in transcription.

Letter from Vivienne U. Kahng, dated December 21, 2006.

Filco contends that Compu-Scribe is the official transcription service for the ECB, and that the transcript prepared by Compu-Scribe constitutes the official transcript. Filco further contends that the Kahng letter, stating that the ECB had created a re-certified transcript, effectively constitutes a new administrative rule for the ECB which was promulgated without complying with the City Administrative Procedure Act (CAPA) which requires, among other things, notice and comment periods, and that the "rule" is, thus, invalid. See NY City Charter § 1043. Filco also argues that, as a result of the ECB policy as articulated by Kahng, it was prevented from raising the arguments raised in its appeal letter based upon the original transcript. The ECB contends that it is clear from the Kahng letter that Filco's original claims had been preserved and that Filco was merely being informed that any new arguments based

on the "re-certified" transcript could also now be presented.

Respondent ECB opposes Filco's motion for a preliminary injunction and moves to dismiss the petition on the ground that Filco has failed to exhaust its administrative remedies. Quoting section 1046 (c) (3) of the City Charter, Elfrida Brownstein, chief of the Appeals Unit of the ECB, asserts that administrative hearings "*shall be transcribed or recorded,*" (Brownstein affirmation, dated February 22, 2007, ¶ 8, emphasis supplied by Brownstein), and although a party to an administrative hearing may request that the recording be transcribed at its own expense, not all parties do so. It is clear that under CAPA, the administrative hearing in which Filco participated must be transcribed or recorded, and that the transcript or record must be made available to any party to the hearing that requests it. NY City Charter § 1046 (c) (3). Brownstein further asserts that when neither of the parties choose to have the audio recording transcribed, staff members of the Appeals Unit, including law students, interns, ECB staff, and per-diem ALJs create an in-house transcript. According to Brownstein, it is also standard practice of the Appeals Unit to have staff members independently review the transcripts prepared by Compu-Scribe and make corrections based on their independent review of the audio tapes. If any "material change" is made to the transcript, any party who has requested a written transcript is served with the copy of the

amended transcript and given the opportunity to submit new claims or arguments based on the amendments. *Id.*, ¶ 18. According to Brownstein, the ECB uses "a variety of informal methods to complete and/or correct the record in order to perfect the appeal," always on notice to all parties with an opportunity for the parties to be heard. "These informal methods are an effort to give the parties an opportunity to agree on the content of the hearing record prior to the Board's consideration of the appeal."

Id., ¶ 16. Finally, according to Brownstein, prior to a decision, the Board is empowered, pursuant to 15 RCNY § 31-74 (b), to remand a case for a new hearing if gaps in the record cannot be resolved.

Thus, the ECB argues that Filco was required exhaust its administrative remedies and the Article 78 proceeding must be dismissed. The ECB further contends that the Kahng letter is not a "rule," because it is not a statement of "general applicability," but rather, that it is addressed to the parties in the particular administrative proceeding. Therefore, according to the ECB, Filco's CAPA claim must be dismissed. However, according to the Brownstein affirmation, the ECB maintains a practice, which apparently is of general applicability - that is, a practice of using its own staff to amend and "re-certify" transcripts of hearings that have been transcribed by outside transcription firms. Although the ECB

contends that it gives the party that purchased the transcript an opportunity to contest the accuracy of the changes, that is far from clear from the wording of the Kahng letter. Although the Kahng letter indicated that Filco could submit "additional claims, if any, based on the amended, re-certified transcript" (Khang letter, *supra*), it did not state that Filco could dispute the accuracy of the "re-certified" transcript. *Id.*

Notably, ECB does not cite any rules or regulations of the City or the ECB state that the ECB in fact has the authority to "re-certify" the transcript in this manner. However, it is not necessary for this court to determine whether the Kahng letter, or the underlying ECB policy is a "rule" for the purposes of CAPA.

Where the transcript of an administrative hearing contains numerous omissions of words and phrases and/or sentences because they are unintelligible, a transcript may be considered not complete, and it is proper to annul the administrative determination and remand the matter for a new hearing. *Matter of Robinson v Blum*, 73 AD2d 691 (2d Dept 1979); *see also Matter of Treutlein v Jackson*, 271 AD2d 614 (2d Dept 2000) (where transcript of administrative hearing is so defective as to preclude administrative review, the proper remedy is to remand for a new hearing); *Matter of Sullivan v Buscaglia*, 75 AD2d 990 (4th Dept 1980). The proper remedy is not dismissal of the NOVs,

as Filco, alternatively, requests. See *Matter of Treutlein v Jackson*, 271 AD2d 614, *supra*. And though the ECB could, as Brownstein indicated, have remanded the matter for a new hearing, it did not do so.

Although the entire transcript has not been provided to the court, approximately 80 pages of transcript are annexed to the Verified Petition containing numerous insertions by ECB staff where Compu-Scribe found the tape inaudible, as well as other alterations in the transcript made by ECB staff. It is not clear how ECB staff could decipher portions of the tape that Compu-Scribe found inaudible. Nor is it possible, on the basis of the papers in the record, for the court to determine the significance of those insertions and alterations, but their number alone raises a significant concern about the possible effect those changes may have on the record for purposes of the administrative appeal. Furthermore, the ECB apparently considered the amendments to be "material changes" because Filco was notified that it could raise new arguments based on those changes.

Thus, for the foregoing reasons, it is hereby

ADJUDGED that the petition is granted to the extent that the matter is remitted to the Environmental Control Board for the purposes of giving the parties the opportunity to reach agreement as to the accuracy of the transcript, and if such an agreement cannot be reached, then the Environmental Control Board is

directed to conduct a new administrative hearing, and the petition is otherwise denied; and it is further

ORDERED that petitioner's motion for a preliminary injunction is denied as moot; and it is further

ORDERED that respondents' cross motion is denied.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: December 7, 2007

ENTER:



J. S. C.

EMILY JANE GOODMAN

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 a judicial representative must appear in person at the Judgment Clerk's Desk (Room 142)