

**Matter of Sharpe v NYC Dep't of Health & Mental  
Hygiene**

2008 NY Slip Op 32094(U)

July 15, 2008

Supreme Court, New York County

Docket Number: 0100490/2008

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madden

PART 11

Index Number : 100490/2008

SHARPE, JASON

vs

NYC DEPT. OF HEALTH & MENTAL

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this <sup>p. h. h. v.</sup> motion to/for Article 78 relief

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 is decided in accordance with the attached memorandum Decision Order + Judgment.

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

FILED

JUL 28 2008

NEW YORK CLERK'S OFFICE

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).

Dated: July 15, 2008

[Signature] J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X

In the Matter of the Application of

JASON SHARPE,

Petitioner,

-against-

Index No.  
100490/08

NYC DEP'T OF HEALTH AND MENTAL HYGIENE,  
Respondent.

-----X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner, Jason Sharpe (Sharpe), who is pro se, challenges the refusal of respondent, the New York City Department of Health and Mental Hygiene (DHMH), to accept his application for a mobile food cart permit. DHMH opposes the petition, which is denied for the reasons below.

Background

In a letter sent on or about October 30, 2007, to Steven Linden (Linden), Director of Licensing of DHMH, Sharpe requested "an application for a vending cart license (permit)," which request was previously refused on October 29, 2007, when Sharpe went in person to DHMH offices at 42 Broadway, New York, New York. The letter identifies Sharpe's rights under General Business Law (GBL) §§ 32 and 45 [sic]<sup>1</sup> as the source of his right to apply for such a permit.

By letter dated November 23, 2007, Linden refused to allow Sharpe to apply for the permit, explaining that to operate a food

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<sup>1</sup>The court presumes this is a reference to GBL § 35.

vending business in the City, an individual needs both a mobile food vending operator's license, which Sharpe already had, and a mobile food unit permit. Linden described the license as being for the person, whereas the permit was for the cart or truck.

Linden went on to explain that there were waiting lists for the permits, and that "[n]o one may apply for any of these permits unless they have been contacted from those lists, most of which were created in June 2007." Linden further informed Sharpe, who is a veteran, that there were separate waiting lists for veterans and non-veterans. Linden also suggested alternative vending possibilities, none of which were acceptable to Sharpe.

By Notice of Petition and Petitioner's Affidavit, dated January 14, 2008, petitioner commenced this Article 78 proceeding, challenging DHMH's determination denying his request to apply for a mobile food vendor permit.

#### Discussion

Under CPLR 7803 (3), the standard of review of DHMH's determination is "whether [it] was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . ." The "arbitrary and capricious" standard, defined by the Court of Appeals in Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County (34 NY2d 222 [1974]), "relates to whether a particular action should have been

[\*4]

taken or is justified ... and whether the administrative action is without foundation in fact" (id. at 231 [quotation marks and citation omitted]; see also Matter of Hughes v Doherty, 5 NY3d 100 [2005]).

"Arbitrary action is without sound basis in reason and is generally taken without regard to the facts .... '[T]he proper test is whether there is a rational basis for the administrative orders' (citation omitted)." Pell, 34 NY2d at 231. Thus, if DHMH's decision is rational, it must be upheld, even if this court might have reached a different conclusion. Matter of Verbalis v New York State Div. of Hous. & Community Renewal, 1 AD3d 101, 107 (1<sup>st</sup> Dept 2003).

In this matter, Sharpe asserts that, as a disabled veteran, under GBL §§ 32 and 35-a, he is "entitled to all licenses needed to vend in New York." However, Sharpe's argument is without merit. Indeed, neither GBL § 32 nor § 35-a appear to apply to the issuance of mobile food unit vending permits by DHMH, but rather to the issuance of licenses to operate such carts. In any event, those sections do not impair the ability of the city to control the number of carts that may operate within city limits.

General Business Law § 32, for instance, establishes the right of New York State residents who are honorably discharged members of the United States armed forces to vend and sell goods, wares or merchandise upon the streets and highways within the

[\* 5 ]  
county of his or her residence. See GBL § 32 (1). However, section 32 (8) provides that the city may "require a person holding a license issued pursuant to the provisions of this section ... to file a further application ... for the issuance of a local license and may prescribe the terms and conditions under which such local license may be issued ... ."

Thus, the city, through DHMH, may prescribe the total number of food carts allowable in the city. Indeed, the Administrative Code of the City of New York City (Administrative Code) §§ 17-307 (b) (2) (a), (b) (3) (a), and (b) (3) (b) (read in conjunction with §§ 17-315, 20-465, and 20-265.1) appear specifically designed to prescribe and limit the number of food carts allowable to 3000, plus an additional 100 reserved for veterans and disabled persons.

General Business Law § 35-a likewise provides for issuance of licenses to persons honorably discharged from the armed forces. That section goes on to state, however, that the city "shall establish a priority system, based upon the date of application for specialized vending licenses issued pursuant to this section ... [and this section] shall be subject to those restrictions on the placement of vehicles, pushcarts and stands contained in any local law, ordinance, by-law, rule or regulation." See also Administrative Code § 20-465.

Given these limitations on the number of permits allowable,

[\* 6] .

Administrative Code § 17-307 (b) (2) (e) allows for the establishment of a "separate waiting list for the issuance of full-term permits [... and that the] commissioner may by rule limit the number of places on such waiting list." Here, DHMH has done exactly that. There is nothing arbitrary or capricious about refusing further applications, even from veterans, or limiting the number of persons on the respective waiting lists. Sharpe's reliance on GBL §§ 32 and 35-a to compel acceptance of an application for a permit is amiss.

Sharpe also argues that another veteran, Mr. Mustello, in "exactly the same situation a few months earlier" successfully had a permit issued, and, as such, Sharpe is entitled to the same benefit. This argument is misplaced. In that matter (Request to Renew Permit H06-1011860), Mustello was seeking the renewal of, and not, as is the case with Sharpe, an original application for, a permit. The situations are not analogous.

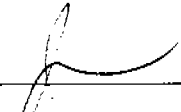
It cannot be said that the decision of DHMH to deny Sharpe's request to apply for a permit is without sound basis in reason or generally taken without regard to the facts, so as to be deemed arbitrary and capricious. See Matter of Pell, 34 NY2d at 231; see also Matter of Arrocha v Board of Educ., 93 NY2d 361, 363 [1999]). Thus, there is no basis for annulling the determination of DHMH. Matter of Nelson v Roberts, 304 AD2d 20, 23 (1<sup>st</sup> Dept 2003).

Conclusion

Accordingly,

ORDERED and ADJUDGED that the petition is denied and dismissed.

DATED: July 15 2008

  
\_\_\_\_\_  
J. B. C.

**FILED**  
JUL 15 2008  
CLERK OF COURT  
COUNTY OF LOS ANGELES

**UNFILED JUDGMENT**

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