

**Matter of Falco v New York City Dept. of  
Health & Mental Hygiene**

2008 NY Slip Op 32985(U)

October 30, 2008

Supreme Court, New York county

Docket Number: 107846/08

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

Index Number : 107846/2008

FALCO, MICHAEL J.

VS.

N.Y.C. DEPT. HEALTH & MENTAL HYGIENE

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO.

107846-08

MOTION DATE

MOTION SEQ. NO.

#001

MOTION CAL. NO.

\_\_\_\_\_ 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

*petition is denied*

*per attached*

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

**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 1415).

Dated:

10/30/08

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: I.A.S. PART 17

-----X  
In the Matter of the Application of  
MICHAEL FALCO,

Petitioner,

Index No. 107846/08

For a judgment pursuant to Article 78 of the CPLR

-against-

NEW YORK CITY DEPARTMENT OF HEALTH  
AND MENTAL HYGIENE,

Respondent.

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1415)

-----X  
EMILY JANE GOODMAN, J.S.C.:

Petitioner Michael Falco is an honorably discharged military veteran who served in Vietnam during the infamous Tet offensive. He was permanently disabled as a result of his service to this country. In recent years, Falco has earned his living with a food vending vehicle. This Article 78 proceeding flows from Respondent's determination not to renew Falco's mobile food unit license due to a confusing regulation and a confusing series of events. Respondent's position is that Falco was denied a renewal license-- despite the fact that he timely filed his renewal application--because he was approximately one week late in requesting that Respondent's Food Protection office inspect his vehicle. In other words, even though the agency could have notified Falco of a date that it planned to inspect his vehicle, Falco was denied a license because he did not initiate the request within a specified time frame, and because the agency did not inspect the vehicle during that period.

On or about April 30, 2007, prior to the expiration of his license on August 31, 2007, Falco received a renewal application. His quite reasonable understanding was that he was required to file the renewal application by August 31, 2007 (which he did) and to have his vehicle inspected within six months after the expiration of his current license. However, Respondent maintains that Petitioner's vehicle had to have been inspected within six months of "the date an application is submitted" and maintains that this time frame is mandated by New York City Administrative Code § 17-307. Respondent also argues that the license renewal package sent to Petitioner clearly informed him of this requirement. However, the package is in fact confusing, even to the Court, and contains numerous referenced deadlines on various pages, in varying fonts, with the provision at issue buried on the last page, in smaller, partially underlined/bold font.

New York City Administrative Code § 17-307 (b) (2) (d) (i), as well as New York City Administrative Code § 17-307 (b) (3) (a), share common language which provides:

The issuance or renewal of a full-term permit ...shall be subject to the permittee within three months after the certification of a complete application therefor presenting a pushcart or vehicle for inspection by the department and within six months after such certification, passing such inspection (emphasis added).

Respondent apparently equates the language "certification of a complete application" with "submission of an application." Where the question is one of pure statutory construction, judicial review is less restricted and there is little basis to rely upon any special competence or expertise of the administrative agency (see Matter of KSLM-

Columbus Apts. Inc. v New York State Div. Of Hous. & Community Renewal, 5 N.Y.3d 303, 312 [2005]). The provision is not a model of clarity, and the Court has found no cases interpreting this aspect of the regulation and none were cited in its defense. The provision does not state whether the “certification” is made by the applicant or the agency. However, New York City Administrative Code § 17-307 (b) (2) (d) (ii) provides that “[n]otwithstanding the provisions of subparagraph (d) (i) of this paragraph, where a permittee with a certification of a complete application for the renewal...”. This provision does not refer to a permittee who has certified a complete application for renewal, but rather refers to a permittee with such a certification. Accordingly, giving the words their natural meaning, the Court concludes that the certification is made by the agency which would be in the best position to know whether an application is complete. None of the documents submitted in Exhibit D to Respondent’s Verified Answer include a certification by the agency, or can even be deemed one. Accordingly, the agency erred in determining that the requisite period to request an inspection expired prior to Falco’s request for the inspection.

Moreover, even if Falco failed to timely request that Respondent inspect his vehicle, Respondent’s determination that Petitioner, a disabled veteran, must lose his livelihood over the passage of a few days, is arbitrary and capricious (see DiStefano v Kelly, 47 AD3d 928 [2d Dept 2008] [denial of a handgun license for failure to timely renew the license was arbitrary and capricious]; Balaskas v Hamburg, 198 AD2d 82 [1st

Dept 1993] [denial of a renewal license to food vendor under New York City Administrative Code § 17-310 (a) for failure to timely renew the license was “hard to justify” and an abuse of discretion, where the applicant depended on the license for his livelihood and missed the deadline as a result of extended hospitalization]; Porzungolo v New York State Liquor Authority, 35 AD2d 573 [2d Dept 1970] [denial of license to sell liquor because of an inadvertent failure to timely renew the license was an abuse of discretion]). Respondent’s unstated position, that it does not have the discretion to inspect the vehicle after the six month period, is not rational. For example, had Falco timely requested that his vehicle be inspected, but the agency failed to conduct such inspection, it would be absurd for the agency to determine that because of its own lapse, it could not inspect the vehicle outside of the six month period because the regulation states that the renewal permit is “subject” to a vehicle passing inspection within that period. Here, the decision not to renew Petitioner’s license, for such a minor mistake (assuming there was one) is especially arbitrary in light of State law evidencing a preference for disabled military veterans. Both parties note that under GBL §35-a veterans are allowed to vend in areas restricted to other general vendors. Even New York City Administrative Code § 17-307 evidences this preference, as disabled veterans are given the highest priority on waiting lists for obtaining licenses.

Accordingly, it is hereby

ADJUDGED that the Petition is granted and Respondent's determination to deny Petitioner a renewal license is vacated as made in error of law and as arbitrary and capricious; and is it further

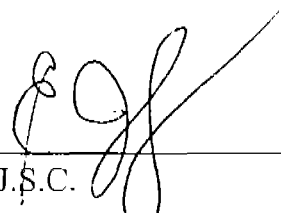
ORDERED that within 20 days of receipt of a copy of this Decision and Order, Respondent shall arrange for, and complete, the inspection of Petitioner's vehicle and shall provide Petitioner with advance written notice of the inspection date; and it is further

ORDERED that Respondent continue to process Petitioner's application expeditiously.

**This constitutes the Decision, Order and Judgment of the Court.**

Dated: October 30, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**UNFILED JUDGMENT**

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