

**Matter of Testwell, Inc. v New York City Dept. of
Bldgs.**

2009 NY Slip Op 30637(U)

March 12, 2009

Supreme Court, New York County

Docket Number: 101001/09

Judge: Martin Shulman

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

PRESENT: S. Shulman
Justice

PART 1

TESORAI INC

- v -

NYC DEPT BUILDINGS

INDEX NO.

101001/09

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

+ Verified Petition

Exhibits ...

Answering Affidavits, Exhibits

Answer - Exhibits

PAPERS NUMBERED

1, 2, 3

4, 5, 6, 7

Replying Affidavits

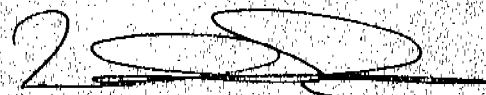
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and petition are decided in accordance with the attached decision, order and judgment.

NOTICE OF ENTRY
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:

MAR 12 2009



MARTIN SHULMAN

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
In the Matter of the Application of

Index No: 101001/09

TESTWELL, INC., f/k/a TESTWELL
LABORATORIES, INC. d/b/a TESTWELL
LABORATORIES, and VIDYASAGAR REDDY
KANCHARLA,

Decision, Order and Judgment

Petitioners,

For a judgment pursuant to Article 78 of the CPLR

-against-

THE NEW YORK CITY DEPARTMENT OF
BUILDINGS and ROBERT D. LIMANDRI,
Commissioner of the New York City Department of
Buildings,

Respondents.

-----X

Hon. Martin Shulman, J.S.C.:

On January 26, 2009, petitioners, Testwell, Inc. f/k/a Testwell Laboratories, Inc. d/b/a Testwell Laboratories ("Testwell"), and Testwell's principal, Vidyasagar Reddy Kancharla ("Kancharla") (collectively, "petitioner"), commenced this Article 78 proceeding by order to show cause ("OSC") seeking to annul as arbitrary, capricious and contrary to law a January 20, 2009 Decision and Order of Robert LiMandri, Commissioner of the New York City Department of Buildings ("DOB" or "respondent") which suspended Testwell's concrete testing laboratory license ("concrete testing license"), Kancharla's site safety manager certificate ("Safety Mgr. certificate") as well as Kancharla's professional privileges to file self-certified documents with DOB and/or obtain limited DOB supervisory review ("document filing privileges") (collectively,

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 1417).

"property rights" or "licenses and privileges") indefinitely until the resolution of pending criminal charges against petitioner ("Comm'r Decision" as Exhibit 12 to Verified Petition). Concomitant with the filing of the verified petition, the OSC sought a temporary restraining order and preliminary injunction, the former of which this court then granted reinstating the licenses and privileges pending a hearing on petitioner's request for a preliminary injunction. On February 13, 2009, this court issued a bench Decision/Order on the record granting petitioner a preliminary injunction¹ pending a determination of the Article 78 petition.²

Background

On October 29, 2008, a New York County Grand Jury voted out a 109 count indictment charging Testwell,³ Kancharla and six of Testwell's employees *inter alia* with enterprise corruption such as falsifying business records and offering false instruments for filing, all related to its testing activities. At the same time, the District Attorney also started a parallel asset forfeiture action.

¹ As dictated on the record, this court implicitly concluded that petitioner has shown a likelihood of success on the merits; that more than one hundred Testwell employees not implicated in any crime will suffer substantial and irreparable harm and not mere economic loss if the suspensions of petitioner's licenses and privileges are allowed to continue; that greater injury will be inflicted upon petitioner by the denial of this preliminary injunction staying the suspensions than will be inflicted upon DOB by the granting thereof; that petitioner has no adequate remedy at law; and that under these circumstances, the equities favor petitioner. CPLR §6301; *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990).

² Petitioner's verified petition, supporting exhibits and memoranda of law as well as Respondent's opposition affirmations, supporting exhibits and memorandum of law are part of the record this court considered in issuing the preliminary injunction. The record is enlarged to now include respondent's verified answer and a memorandum of law in opposition to the Article 78 petition.

³ Testwell, a New York corporation, "is engaged principally in the business of providing inspection, testing and quality control for the construction industry . . ." (¶ 6 to Verified Petition).

On October 30, 2008, shortly after the issuance of the indictment, DOB notified petitioner that it was suspending petitioner's licenses and privileges grounded on N.Y.C. Adm. Code (Construction Code) §§28-401.19 ("License Suspension Code Section"), and 28-211.1.2 as well as 1 RCNY §21-02, and specifically charged Testwell and Kancharla with: (1) "[t]he making of a material false or misleading statement on any form or report filed with the [DOB] . . ." (Construction Code §28-401.19[2]); (2) "[f]raudulent [d]ealings" (Construction Code §28-401.19[5]); and (3) "[n]egligence, incompetence, lack of knowledge or disregard of the [Construction Code] and related laws and rules" (Construction Code §28-401.19[6])(collectively, "Subsections [2], [5] and [6] misconduct") (Exhibits 4 and 5 to Verified Petition). Because Kancharla is a licensed professional engineer, DOB further charged Kancharla with knowingly or negligently making false or misleading statements to DOB, personally or through agents (1 RCNY §21-02[3]) and conducting testing activities which evidence petitioner's failure to comply with relevant Federal, State or City laws, rules and/or [DOB] regulations and requirements (1 RCNY §21-02[7])("RCNY Violations") (see Exhibit 5 to Verified Petition). DOB did not allege any specific facts to support any of these charges but generically referred to the indictment (see Exhibit A to Respondent's Opp. Aff. to the Preliminary Injunction). Resting on the notion that an indictment is legally sufficient to support the pre-hearing suspension of petitioner's licenses and privileges, DOB contended the sole issue for the New York City Office of Administrative Trials and Hearings ("OATH") judge to determine was whether Testwell and Kancharla, as named

respondents at the hearing, were the identical individual and entity named as defendants in the criminal prosecution.

These pre-hearing suspensions were grounded on DOB's belief that petitioner's conduct imminently jeopardized public safety. Because a pre-hearing suspension is limited to five working days, Administrative Law Judge Tynia Richards ("OATH Judge") conducted an administrative hearing on November 6, 2008. The parties stipulated to the admission of the indictment into evidence in support of DOB's charges against petitioner. Respondent presented no other testimonial or documentary evidence to corroborate a single allegation contained in the 109 count indictment. Rather, the hearing substantially consisted of colloquy and legal argument among counsel and the OATH Judge (see Hearing Transcript as Exhibit 7 to Verified Petition). Petitioner submitted a post-hearing dismissal motion and closing statement (Exhibit 8 to Verified Petition which DOB's counsel opposed (Exhibit 9 to Verified Petition). On December 2, 2008, the OATH Judge issued her Report and Recommendation to dismiss the charges ("OATH Report") (Exhibit 10 to Verified Petition).

OATH Report

The well reasoned OATH Report recounted certain undisputed information. Since the adoption of the New York City Building Code in 1968, and except for its re-numbering, the relevant Construction Code provisions therein substantively remain the same. During the ensuing forty years, DOB has never exercised its authority to suspend a defendant's license pending a resolution of a criminal action solely predicated on a criminal indictment. Stated differently, "no prior cases exist where similar suspensions [of licenses and privileges] pursuant to Construction Code §28-

401.19 were imposed solely on the fact of an indictment.” (Petitioner’s Memorandum of Law at p. 4, citing to OATH Hearing Transcript at p.10). And an indictment is not among the fourteen specified acts of misconduct listed in the License Suspension Code Section (see OATH Report at p. 2, n. 2).

Weighing in on the merits of DOB’s legal positions asserted during the hearing, the OATH Judge found them wanting. The Oath Report noted that the indictment was stipulated as “evidence” of DOB’s prima facie case to support the charges. Nonetheless, the OATH Judge found this stipulation could not transmute the indictment (a hearsay, accusatory instrument without a presumption of guilt procured under a lower evidentiary burden), without more, as competent proof of any misconduct set forth in the charges against petitioner by a preponderance of the credible evidence (OATH Report at pp. 4-5).

The OATH Report clearly deemed it appropriate for DOB to impose pre-hearing suspensions of petitioner’s licenses and privileges due to claimed exigent concerns for public safety. Yet, the OATH Judge could not fathom respondent’s refusal to proffer even a single falsified concrete test report as evidence of resultant compromise of the structural integrity of any Testwell tested building, especially if respondent’s concern was a real one (OATH Report at p. 11). Rather, the OATH Judge analyzed DOB’s legal posture as an attempt:

to insert within the existing [Construction] [C]ode an interim (or “continued”) suspension that occurs after the initial pre-hearing suspension but that delays . . . [petitioner’s] receipt of a meaningful post-deprivation hearing until after the criminal case is completed . . . without any hearing on the facts that led . . . [DOB] to a belief that the public was in such jeopardy, or any presentation of evidence on the misconduct alleged that would offer an assurance of a “meaningful” hearing . . . [i.e.,]

finality [and] . . . normal due process protections . . . [and seemingly] require . . . [OATH] to relinquish its fact finding authority to that of the grand jurors . . ." (bracketed matter added)(OATH Report at pp. 5-6).

Because the indictment is not evidence of a crime as a matter of law, the OATH Report noted that no factual conclusion could be made whether petitioner *inter alia* committed acts of Subsections (2), (5) and (6) misconduct and RCNY violations, necessary findings to enable DOB to prevail on its charges against petitioner. The OATH Judge further noted that respondent intentionally positioned petitioner without any room to "challeng[e] specific allegations, cross examin[e] witnesses, or evaluat[e] the credibility or reliability of evidence. . ." (OATH Report at p. 7). Moreover, the OATH Judge simply did not believe DOB's claim that it could not comply with petitioner's discovery demands because the former turned over all of DOB's records to the District Attorney's Office⁴, and rejected respondent's unjustified refusal to present any pre-indictment facts resulting from at least one investigation of Testwell by the New York City Department of Investigations for fear of adversely affecting the entire criminal case.

Id.

The OATH Report also found DOB's reliance on certain Federal/State case law sustaining a license suspension based on an indictment misplaced because in those cases, there was express statutory authority to suspend an indicted defendant's license

⁴ The complex 109 count indictment contained numerous allegations of Testwell falsifying concrete testing related documents and implicated about 102 building projects throughout New York City including the Freedom Tower and Yankee Stadium. Given the ongoing construction of these building projects, the OATH Judge found DOB counsel's claim "absurd" that respondent relinquished all DOB records of these building projects to the prosecutor, because if true, then DOB would presently be legally incapable of issuing permits or certificates of occupancy without the availability of these files' critical paper trails of inspector reviews and sign-offs.

relative to the offense(s) charged. However, the OATH Judge found no statutory framework for such action here. After weighing the parties' respective interests based upon the three *Mathews* factors⁵, the OATH Report concluded that DOB had no evidentiary substance to justify an indefinite suspension of petitioner's licenses and privileges "that could work a significant financial cost to . . . [Testwell and Kancharla]" (OATH Report at p. 11) and effectively deprive petitioner of property rights without due process of law.⁶ The OATH Report recommended dismissal of all of the charges.

Comm'r Decision

On December 12, 2008, the DOB Commissioner notified the parties to file written submissions to address two questions: (1) whether the indictment alone warrants DOB's suspension of petitioner's licenses and privileges; and (2) "whether, based upon reasonable cause to believe that the indictment's charges are true, Respondents' [Testwell and Kancharla] continued performance of their regulated activity imminently jeopardizes public health or safety." (Exhibit 11 to Verified Petition).

⁵ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) sets forth the three factors which address an aggrieved individual's due process concerns when adversely affected by governmental action (e.g., license suspension): (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of that interest and the value of additional procedures in avoiding error; and (3) the government's interests.

⁶ The OATH Report found additional infirmities, viz., the pre-hearing suspension of Kancharla's professional document filing privileges was unauthorized; a licensing pre-hearing suspension for a period exceeding five working days was unauthorized under the Construction Code; and upon suspension of his Safety Mgr. certificate and document filing privileges, Kancharla was impermissibly given either no notice or short notice regarding the calendaring of respective hearings on the relevant DOB charges.

On January 20, 2009, the DOB Commissioner issued the Comm'r Decision which rejected four of the Findings and Conclusions⁷ set forth in the OATH Report as well as the OATH Judge's ultimate recommendation to dismiss the DOB charges. The Comm'r Decision succinctly echoes the same factual and legal arguments (and cites to the same case law) DOB counsel presented before the OATH Judge during the administrative hearing and in post-hearing written submissions. While acknowledging the absence of an express regulatory provision authorizing a suspension based on an indictment, the DOB Commissioner appears to have seeded the License Suspension Code Section (Construction Code § 28-401.19) with an implied subsection authorizing DOB to rely solely on an indictment to justify reinstatement of the suspensions of petitioner's licenses and privileges indefinitely until the resolution of the criminal action. And the DOB Commissioner stated he exercised his implied authority to suspend petitioner's licenses and privileges after affording petitioner a full and fair opportunity to be heard and due process of law. The Comm'r Decision also factually inferred that because of the nature of the concrete testing license, Safety Mgr. certificate and document filing privileges, "a licensee's indictment for falsifying documents generated in the course of work that . . . [the licenses and privileges] authorize[] warrants suspension in the interest of public safety . . . [and] also serves the purpose of preserving public confidence in the . . . [DOB's] ability to safely and efficiently regulate

⁷ The DOB Commissioner rejected the following Findings and Conclusions: "5. An indictment is insufficient evidence of misconduct. 6. An indictment is not a valid basis for suspension under section 28-401.19.1 of the Construction Code. 7. A post-deprivation suspension hearing under the Construction Code in which an indictment is the sole evidence of misconduct deprives respondents of due process. 8. Petitioner failed to serve timely notice of the trial date on respondents." (OATH Report at p. 17; see also Exhibit 12 to Verified Petition).

construction in the City of New York . . ." (bracketed matter added)(Exhibit 12 to Petition at [p. 3]).

Article 78 Petition

In seeking judicial review of the Comm'r Decision, petitioner essentially contends: DOB exceeded its authorized powers and acted contrary to law, viz., its Commissioner lacked implicit authority to suspend petitioner's licenses and privileges based solely an indictment, especially when this ground is not one of the fourteen enumerated acts of misconduct set forth in the License Suspension Code Section DOB could otherwise rely on to suspend a license; the indictment merely contains allegations of criminal misconduct and "requires a finding only of 'reasonable cause' to believe the defendant committed the charged crime. . .," whereas the post-deprivation hearing requires the higher preponderance of the credible evidence standard of proof (see 1 RCNY §13-20⁸); since DOB relies solely on the indictment as "evidence" substantiating its charges against Testwell and Kancharla *inter alia* for Subsections (2), (5) and (6) misconduct and RCNY violations, respondent failed to meet its burden at the administrative hearing as this "evidence" can never be proof of petitioner's acts of misconduct or violations by a preponderance of the credible evidence; the legislature

⁸ 1 RCNY §13-20(a) states: "The burden of proof shall be on the party initiating the proceeding. The hearing panel shall utilize a preponderance of the evidence standard of proof with respect to any recommendation calling for the imposition of a fine, suspension or revocation of license."

has enacted other New York City regulatory provisions which expressly authorize suspension of a license solely on a criminal charge (e.g., 35 RCNY §816[c]⁹), and at DOB's behest, could easily have enacted another subsection to the License Suspension Code Section which would authorize DOB to suspend a license based on an indictment but did not do so; the exacting nature of the License Suspension Code Section regarding specifically enumerated acts of misconduct undermines DOB's claim that it has the power implicitly derived from the regulatory scheme and exercised for the first time to suspend a license based on alleged criminal charges; DOB Commissioner's due process overtures to petitioner subsequent to the post-deprivation hearing were illusory, because the OATH Report concluded that DOB's mere submission of the indictment without any other testimonial and documentary proof of misconduct effectively foreclosed petitioner from having a meaningful evidentiary hearing with a full and fair opportunity to cross-examine DOB witnesses, call its own witnesses and submit its own proof to defend against the charges, all while holding DOB to its burden of proving its charges by a preponderance of the evidence (OATH Report at p. 9); and while the Comm'r Decision advances two governmental interests to support a summary

⁹ Title 35 are Rules of the City of New York that govern the Taxi and Limousine Commission. As to adjudications affecting licensees, 35 RCNY § 8-16 [a]-[c] states, in relevant part: "Summary Suspension Pending Revocation to Protect the Public Health or Safety. (a) If the Chairperson finds that emergency action is required to insure public health or safety, he/she may order the summary suspension of a license or licensee, pending revocation proceedings. b) Such revocation proceedings shall be initiated within five (5) calendar days of the summary suspension. © Notwithstanding subdivision (b) of this section, the Chairperson may summarily suspend a license subject to the provisions of subdivisions (a) and (d) through (g) of this section based upon an arrest on criminal charges that the Chairperson determines is relevant to the licensee's qualifications for continued licensure . . .".

license suspension on an indictment without a full evidentiary hearing (i.e., public safety and unacceptable risks to a successful criminal prosecution), nonetheless, DOB submitted no evidence that the allegations of petitioner's misconduct set forth in the indictment actually jeopardized public safety or credibly demonstrated how a full evidentiary hearing would negatively affect the pending criminal action against petitioner.

Based on the foregoing, petitioner seeks an order and judgment annulling the Comm'r Decision, directing respondent to reinstate the licenses and privileges and awarding petitioner incidental relief as a result of damages which resulted from the suspension of petitioner's licenses and privileges.

Respondent's Opposition

The following points can be gleaned from respondent's memorandum of law in opposition to the Article 78 petition and in support of DOB's Verified Answer:

- ◆ The DOB Commissioner rationally based his Comm'r Decision on the indictment which constitutes substantial evidence and established that respondent's suspension of petitioner's licenses and privileges was in the public interest;
- ◆ Applying the *Mathews* balancing test, the government interest in protecting the public is paramount and supportable (*see* Arnold Opp. Aff. to OSC for a Preliminary Injunction at ¶ 22¹⁰) (allegations of false concrete testing and inspection reports submitted to DOB for construction projects

¹⁰ Notably, the affirmation of Phyllis Arnold, Esq., DOB Deputy Commissioner for Enforcement and Legal Affairs, and the affidavit of Constadino Sirakis, DOB Director of the Office of Technical Certification and Research, were submitted for the first time in opposition to petitioner's application for a preliminary injunction in this Article 78 proceeding. This court in ruling on this application noted DOB's belated, written submissions to justify the Comm'r Decision with explanations of certain facts, procedures and DOB protocols were *dehors* the record and never furnished to the OATH Judge during the post-deprivation suspension hearing.

created uncertainty as to their accuracy resulting in unknown, immeasurable and imminent design and strength flaws);

- ◆ The unavailability of grand jury evidence to DOB to support its charges against Testwell and Kancharla at the post-deprivation hearing made such due process procedures to which petitioner claims it was entitled a virtual impossibility and having a true evidentiary hearing would interfere with and compromise the criminal action;
- ◆ Petitioner has not demonstrated irreparable harm resulting from the temporary suspension of its licenses and privileges pending the resolution of the criminal action, and mere economic losses are not enough to support reinstatement of same especially when the impact on petitioner's private interests is significantly less than the risk to the public of purported compromised construction of structures with a 50 year service life;
- ◆ Petitioner's claimed entitlement to a full evidentiary hearing with the right to cross-examine witnesses is not always required to satisfy petitioner's constitutional due process concerns which were met by the scheduled post-deprivation hearing;
- ◆ Support for DOB's implied license suspension authority can be illustratively found in federal case law such as *Rutigliano Paper Stock, Inc. v. U.S. General Services Admin.*, 967 F. Supp. 757 (E.D.N.Y. 1997) ("*Rutigliano*") (contract bidding suspension grounded on an indictment upheld even where it would result in a total loss of business), and *Gilbert v. Homar*, 520 U.S. 924 [1997] ("*Gilbert*") (a governmental employment suspension without pay grounded on an indictment upheld even in the absence of express statutory authority for such suspension);
- ◆ The absence of a specific subsection listing an indictment as a ground for suspension in the License Suspension Code Section is of no moment because the indictment repeatedly charges petitioner with acts of Subsections (2), (5) and (6) misconduct, which is more than sufficient to justify the suspension of petitioner's licenses and privileges and is otherwise well-within the statutory framework of the Construction Code as a whole and DOB rules; and
- ◆ Petitioner's claimed incidental damages resulting from the suspensions are unproven and unsustainable against respondent which enjoys governmental immunity for its discretionary acts based on the DOB Commissioner's exercise of reasoned judgment, even if such acts are wrong.

Discussion

Generally, the standard of review in an article 78 proceeding is whether an administrative agency's determination was arbitrary, capricious or an abuse of discretion, was made in violation of a lawful procedure and/or was affected by an error of law (CPLR §7803[3]). See also, *New York City Health & Hospitals Corp. v McBarnette*, 84 N.Y.2d 194, 203, n. 2 (1994); and *Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 757-758 (1991). Where the "interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. . ." *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980). In this context, deference is to be accorded to an agency's interpretation of the regulations it administers and this court may not substitute its own judgment for that of the agency. *Howard v. Wyman*, 28 N.Y.2d 434 (1971).

However, this Article 78 petition brings up the issue of statutory interpretation of the License Suspension Code Section and solely involves a question of law since the developed record at the post-deprivation hearing, as respondent must concede, did not involve any evaluation of factual data or the exercise "of any special competence or expertise of . . . [this] administrative agency . . ." (bracketed matter added). *LaCroix v. Syracuse Executive Air Service, Inc.*, 8 N.Y.3d 348, 352 (2007).

Preliminarily, this court does not question DOB's laudable goals to promote public safety and confidence in DOB's City Charter mission of safety, service and integrity

particularly in construction projects (see DOB letterhead as Exhibit 12 to Verified Petition). However, respondent's license suspension authority to promote public safety must not be based on speculation, surmise or unproven allegations.

Consider, during the ensuing forty years that respondent has been charged with enforcing the Construction Code, DOB has never suspended a defendant's license pending a resolution of a criminal action solely predicated on a criminal indictment until now. Nor has DOB ever sought to have the License Suspension Code Section amended to expressly authorize a license suspension grounded on an indictment. For DOB to sustain its charges of Subsections (2), (5) and (6) misconduct as well RCNY violations against petitioner (and for that matter any of the other eleven discrete acts of misconduct under the Construction Code) and impose a license suspension requires competent proof of "facts on the ground" at a full evidentiary hearing. As the Oath Report accurately noted, an indictment, without more, will not legally cut it, because "[a]n indictment is a mere accusation and raises no presumption of guilt. It is pure hearsay, it is the conclusion or opinion of a body of men based on *ex parte* evidence. The rule applies to criminal actions as well as civil, and to all witnesses whether parties or not." *People v. Miller*, 91 N.Y.2d 372, 380 (1998) . . ." (OATH Report at p. 5). Moreover, that a Grand Jury found reasonable cause to vote out a 109 count indictment alleging criminal activity comporting with Subsections (2), (5) and (6) misconduct does not mean respondent has met its burden by only relying on the indictment as proof to establish any of these same acts of misconduct by a preponderance of the credible evidence. "[T]he preponderance of the evidence standard is more stringent than the reasonable cause standard . . ." *People v. Torres*, 5 A.D.3d 1097, 1098 (4th Dept. 2004).

It is that burden to which the OATH Judge properly held respondent in accordance with the rules of practice before that tribunal (see Footnote 8, *supra*), which was clearly not met.

DOB's claimed power to suspend grounded on an indictment is not implicit in any regulatory scheme. And without any express statutory or regulatory authority to indefinitely suspend petitioner's licenses and privileges pending the outcome of the criminal prosecution, it was arbitrary, capricious, an abuse of discretion and contrary to law for the DOB Commissioner to discount the relevant Findings and Conclusions of the OATH Report and ultimately reject the OATH Judge's recommendation to dismiss the charges against petitioner.

Upon review, the Comm'r Decision clearly lacks factual and legal support. And as to the latter, respondent has repeatedly and illustratively cited to federal case law such as *Rutigliano* and *Gilbert* as instructive guiding stars for DOB's questionable actions (notices of the charges under the License Suspension Code Section resting solely on the indictment, an opportunity for petitioner to be heard at a limited administrative hearing where the only evidence was a copy of the indictment and petitioner's indefinite licenses and privileges suspensions pending the resolution of the criminal action without the benefit of a full-blown evidentiary hearing) *viz.*, without DOB having met its mandated burden to prove a single fact of misconduct under the License Suspension Code Section which jeopardizes public health and safety.

Unfortunately, these cited cases are falling stars distinguishable on the law and on the facts. *Rutigliano, supra*, involved a federal agency, General Services Administration ("GSA"), which had express statutory authority to temporarily suspend a

plaintiff-contractor from bidding on future government contracts after being indicted in state court.¹¹ Applying the *Mathews* factors and other FAR regulations, the federal court determined that plaintiff-contractor had a significant property interest in bidding on future contracts. However, the District Court concluded that plaintiff-contractor's interests did not outweigh the GSA's interest in ensuring its contracts were responsibly completed and maintaining an express regulatory scheme which affords a government contractor notice of the suspension and an opportunity to be heard at a limited hearing specifically without GSA being burdened with a full evidentiary hearing in every suspension case.

As aptly noted in the OATH Report, the foregoing type of regulatory scheme GSA promulgated is clearly not the case here where a licensee must be afforded due process at a post-deprivation suspension hearing with the right to challenge the allegations contained in the indictment, i.e., testimonial and/or documentary evidence of Subsections (2), (5) and (6) misconduct as well as RCNY violations, the right to cross-examine DOB witnesses and the right to test the reliability of DOB evidence.

¹¹ As noted, GSA relies on the Federal Acquisition Regulations ("FAR") to promote uniform regulation and procurement of government contracts. "Agencies are to award contracts to responsible bidders only; suspension is a method to effectuate this policy. See FAR 9.402(a). Suspension of a contractor is a discretionary act that is to be 'imposed only in the public interest for the Government's protection and not for purposes of punishment.' FAR 9.402(b). A suspension may be imposed, upon adequate evidence, for a variety of causes, including the commission of a fraud or other offense that 'indicates a lack of business integrity or business honesty.' FAR 9.407-2(a)(7)." (*Rutigliano*, 967 F. Supp. at 761). FAR §9.407-2 expressly authorizes a federal agency such as GSA to suspend a contractor based on an indictment and an indictment "constitutes adequate evidence." (FAR §9.407-2 [a] and [b]; *Id.*, n. 1).

As previously noted, reliance on *Gilbert*¹² is similarly misplaced. In DOB's memorandum in support of the Comm'r Decision, respondent cites to "the threshold case of [*Gilbert*] in which the United States Supreme Court upheld a suspension based on an indictment, [which] did not involve a statute that expressly authorized such suspension. . ." (Respondent's Memorandum of Law in Opposition to the Petition at p. 12). On this point, respondent is not entirely correct. Moreover, DOB is relying on a case which involved a police officer's temporary suspension of employment without pay, but with continued benefit coverage, a governmental action adversely affecting a property interest procedurally and factually distinguishable from the indefinite suspension of petitioner's licenses and privileges and a more significant property interest.

In *Gilbert*, a Pennsylvania police officer employed by a state university was arrested and charged with a drug-related felony. The university immediately suspended him without pay. Relevant to the disputed issues here, the suspended police officer eventually sued his employer claiming due process entitled him to notice and an opportunity to be heard at a pre-suspension hearing. At the District Court level, the state university won summary judgment. Upon appeal, the Third Circuit reversed and held that due process categorically precluded the employer from suspending its employee

¹² The U.S. Supreme Court in *Gilbert* devotes a portion of its opinion discussing *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230 (1988), which respondent also relies on to explain the Court's earlier analysis of due process concerns an indicted banking employee raised after being suspended by the Federal Deposit Insurance Corporation without a pre-suspension hearing. There, too, an express statutory provision exists authorizing such governmental action (*see* 12 U.S.C.A. §1818[g][1][A]) and the Court found no constitutional infirmity with the banking employee not being entitled to a pre-suspension hearing, a concern not central to the larger due process issues being raised here.

without pay unless the latter is granted a pre-suspension hearing. The United States Supreme Court, in reversing the Third Circuit, found the absence of a pre-suspension hearing under these circumstances not to be a violation of due process.

It is critically important to note that in *Gilbert*, the police officer's suspension without pay was pursuant to the Governor's Executive Order, which expressly authorizes and mandates that a state employee be automatically suspended without pay "as soon as practicable after [being] formally charged with . . . a felony." 4 Pa. Code §7.173 (1997) . . ." 520 U.S. at 933. It is true that *Gilbert* held that the police officer was not constitutionally entitled to have a pre-suspension hearing (and similarly not fatal to the larger denial of due process issue being raised *vis-a-vis* the scope and breadth of a post-deprivation hearing). Nonetheless, Associate Justice Scalia, writing for a unanimous court, astutely noted that its purpose would have been to establish whether there are reasonable grounds to believe the truth of the charges against an employee and support the temporary suspension without pay of short duration, which were found without a pre-suspension hearing when the police officer was arrested and charged with a felony. Further, *Gilbert* makes clear that once the police officer's criminal charges were dropped shortly after his temporary suspension without pay, the police officer's right to a prompt post-deprivation hearing became paramount because "the risk of erroneous deprivation increased substantially . . ." 520 U.S. at 935.

Contrarily here, the Construction Code authorized respondent, without a pre-suspension hearing, to suspend petitioner's licenses and privileges for only five working days (Construction Code § 28-419.1), which the former did immediately after the issuance of the indictment on a belief that the licenses and privileges related activity

posed an imminent jeopardy to public safety and scheduled a post-deprivation hearing to justify a continuing suspension, if warranted. Under these circumstances and pending the criminal action, especially given DOB's stated goal to indefinitely suspend petitioner's licenses and privileges (the *sine qua non* for Testwell's very existence) which will invariably affect the lives of hundreds of petitioner's innocent employees, due process compels respondent at a full evidentiary hearing to not simply rest on an indictment as proof of alleged acts of petitioner's charged Subsection (2), (5) and (6) misconduct and base its belief on such allegations to justify the Comm'r Decision, but rather to factually demonstrate this misconduct as well as RCNY violations actually occurred and jeopardize public safety. Query: If at least one of the offenses charged in the 109 count indictment against petitioner for falsifying concrete testing results is, in fact, true, why would respondent not want to submit evidence of same, independent of the criminal action, to factually justify continued suspensions of petitioner's licenses and privileges based upon an actual threat to public health and safety?; why would respondent not want to submit at least one act of Subsections (2), (5) and (6) misconduct or one of the many alleged RCNY violations based upon its New York City Charter mandate to enforce the N.Y.C. Building Code of which the Construction Code is a part to ensure public safety?; and how could such a proffer of evidence of even one charged act of misconduct torpedo the prosecution when the indictment charges petitioner with having committed 118 discrete criminal acts?

In sum, the Comm'r Decision to indefinitely suspend petitioner's licenses and privileges based on the indictment pending a resolution of the criminal action is not only contrary to law, it also violates petitioner's due process rights to be heard at a full

evidentiary hearing. More compelling, respondent's official action, contrary to the OATH Report, to advance its unproven interests in ensuring public health and safety are far outweighed by the severity of the deprivation of petitioner's property rights, particularly when this official action failed to take into account the length and implied finality of the indefinite suspension.

Accordingly, petitioner's Article 78 petition is granted annulling and vacating the Comm'r Decision to indefinitely suspend Testwell's and Kancharla's licenses and privileges pending the completion of the criminal action.

Petitioner's remaining claim for incidental relief or monetary damages resulting from the Comm'r Decision is dismissed. Although this court concludes that DOB's action has resulted in an erroneous deprivation of petitioner's property rights, nonetheless, respondent is immunized from liability for its discretionary actions *inter alia* colorably taken under the Licensing Suspension Code Section because it involved acts of reasoned judgment, albeit made in error. *Lauer v. City of New York*, 95 N.Y.2d 95, 99 (2000).

This constitutes this court's Decision, Order and Judgment. Courtesy copies of this Decision, Order and Judgment have been mailed to counsel for the parties.

Dated: New York New York
March 12, 2009



HON. MARTIN SHULMAN, 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 41B).