

<b>Matter of Gouranga v New York State Dept. of Veh. Traffic Violation Bur.</b>
2009 NY Slip Op 30788(U)
April 6, 2009
Supreme Court, New York County
Docket Number: 117077/08
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Talub  
Justice

PART 15

Gouranga, Kumar

INDEX NO.

117077/08

MOTION DATE

- v -

MOTION SEQ. NO.

01

NYS Dept. M.V. Traffic Violation

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Agree

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 ACCOMPANYING MEMORANDUM DECISION

**FILED**

APR 08 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/6/09

WALTER B. TOLUB 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: IAS PART 15

-----x  
In the Matter of the Application of  
KUMAR GOURANGA

Petitioner,

Index No.117077/08  
Mtn Seq.001

For a Judgment Pursuant to CPLR Article 78

-against-

NEW YORK STATE DEPARTMENT OF VEHICLE  
TRAFFIC VIOLATION BUREAU

Respondent.

**FILED**  
APR 08 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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**WALTER B. TOLUB, J.:**

By this Article 78 proceeding, petitioner seeks an order reversing the final determinations of respondent New York State Department of Motor Vehicles Traffic Violations Bureau ("DMV") which found petitioner guilty of two traffic violations.

**Facts**

At the outset, the court notes that the petitioner's complete file has not been made available from his former counsel as of the filing date of this petition.

Petitioner Kumar Gouranga ("Mr. Gouranga") is a commercial limousine driver holding a Class 'E' license ("License") [Ver. Pet. at ¶¶3-4, Ex. E Driving Record]. In April 2007, Mr. Gouranga received two summonses for traffic violations in the DMV Administrative Adjudication District designated as "Manhattan South." The April 25, 2007 summons #AAE1240584 was for improper use of a bus lane in violation of New York City Traffic Rule

(NYCTR) 4-12m ("Bus Lane Violation"). The April 27, 2007 summons #OAC7453515 was for disobeying a traffic device in violation of Vehicle and Traffic Law ("VTL") §1110(a) ("Traffic Device Violation"). (Ver. Pet. at ¶5, Ex. E Driving Record; Ver. Ans. Ex. A and B Abstract of Driving Record, Ex. B Substitute Ticket). Although it is unclear how Mr. Gouranga was notified, he was directed to appear for administrative hearings pursuant to VTL §§225-227 and 15 NYCRR Parts 123-124. The Bus Lane Violation hearing was held on April 1, 2008; the Traffic Device Violation hearing was held on August 12, 2008. Mr. Gouranga was represented by counsel and did not appear personally during the administrative hearing process.<sup>1</sup> (Ver. Pet. at ¶¶6, 25-26; Ver. Ans. Ex. A Associated Reporters Transcript; Kumar Gouranga Affidavit ("Gouranga Aff.") at ¶¶6, 11).

On April 1, 2008 Administrative Law Judge Robert Re ("ALJ Re") convicted Mr. Gouranga of the Bus Lane Violation. ALJ Re imposed a \$150 fine and suspended Mr. Gouranga's License for 31 days. (Ver. Pet. at ¶¶7-8, Ex. A Orders of Suspension; Ver. Ans. Ex. A Case Analysis).

On August 12, 2008, an unidentified Administrative Law Judge (the "ALJ") convicted Mr. Gouranga on the Traffic Device

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<sup>1</sup>Mr. Gouranga was represented by the Law Office of Deborah Magee, Esq. ("Magee Firm"). Michael Altholz, Esq. of the Magee Firm appeared for Mr. Gouranga at the administrative hearing on April 1, 2008.

Violation. The ALJ imposed a \$150 fine and suspended Mr. Gouranga's License for 45 days. (Ver. Pet. at ¶¶7-8, Ex. A Orders of Suspension; Ver. Ans. Ex. B Case Analysis).

Mr. Gouranga maintains that he is not guilty of either violation and further asserts that any suspension of his driving privileges prevents him from pursuing his livelihood (Ver. Pet. at ¶¶3-4; Gouranga Aff. at ¶¶9, 21, 23).

Mr. Gouranga appealed both convictions pursuant to VTL Article 2-A and 15 NYCRR Part 126 (Ver. Pet. at ¶9). The License suspensions were stayed pending the outcome of the appeals (Ver. Pet. Ex E Driving Record; Ver. Ans. Ex. A and B Case Analysis, Abstract of Driving Record, Ex. A Notice of Restoration Work copy).

Mr. Gouranga claims that he saw neither the paperwork filed on his behalf nor the hearing transcripts (Gouranga Aff. at ¶11).

On November 5, 2008, the Appeals Board reviewed the transcript of the Bus Lane Violation hearing, affirmed the determination of ALJ Re, and vacated the stay of the 31-day License suspension. By letter dated November 19, 2008, the Appeals Board informed Mr. Gouranga of its decision. The letter further advised Mr. Gouranga that an appeal of its final determination could only be taken via the filing of an Article 78 Proceeding (Ver. Ans. Ex. A).

The Traffic Device Violation determination was assigned for

transcript review by the Appeals Board, but because no transcript was submitted, the appeal was conducted on a "penalty-only" basis pursuant to VTL §228[2][c].<sup>2</sup> The Appeals Board affirmed the ALJ's determination as to the penalty and vacated the stay of the 45-day License suspension. By letter dated November 21, 2008 the Appeals Board advised Mr. Gouranga that, pursuant to VTL §228[2][c], the decision of the Appeals Board was final and that there was no possibility of judicial review (Ver. Ans. Ex. B).

As both appeals were denied, the License suspensions were reinstated in November 2008. (Gouranga Aff. at ¶12; Ver. Pet. Ex. A Orders of Suspension; Ver. Ans. Ex. A Reinstatement Suspension Order Work copy, Ex. B Letter dated November 21, 2008).

#### The Instant Petition

On December 17, 2008, Mr. Gouranga retained Johnathan Cartelli, Esq. ("Mr. Cartelli") of Katz Law Offices to file the instant Article 78 Petition. On December 18, 2008 by personal visit to the Magee Firm and by demand letter marked for hand delivery and fax and accompanied by Mr. Gouranga's authorization, Mr. Cartelli requested a copy of Mr. Gouranga's entire file (the "File") from the Magee Firm, claiming that any delay would result in irreparable harm to Mr. Gouranga because of

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<sup>2</sup>The date of the appeal is not available because the file is incomplete, as noted *supra*.

the pending License suspensions (Ver. Pet. ¶¶16-23, Ex. C Demand Letter and Ex. D Affidavit of Service).<sup>3</sup> As of the filing of this petition on December 22, 2008, the Magee Firm had failed to provide the File (Ver. Pet. ¶23). Mr. Cartelli claims that a complete and detailed petition on Mr. Gouranga's behalf cannot be formulated without access to the File and reserves Mr. Gouranga's right pursuant to CPLR 7804(d) to amend the instant Petition upon receipt of the File. Mr. Gouranga claims that he cannot, without access to the File, determine what justification supported the DMV's determinations. (Ver. Pet. at ¶¶24, 49-50).

Mr. Gouranga now seeks to reverse the determinations of the administrative hearings as affirmed by the Appeals Board and to fully reinstate his driving privileges.

#### Discussion

"A determination of the appeals board in any case where a transcript of the hearing has been submitted shall be subject to review pursuant to the provisions of article seventy-eight of the civil practice law and rules." (VTL §228(9)(b), 15 NYCRR 126.5).

The standard of review under the CPLR is: "...whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an

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<sup>3</sup>The letter is addressed to Deborah Ann Magee, Esq. at 76 Washington Street, New York, NY 10006. The address of record for the Magee Firm is 70 West Street, New York, NY 10006. The affidavit executed by Madeline Schaller affirms personal service upon "Hector" at the 70 West Street address of the Magee Firm.

abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed...." (CPLR §7803(3)).

Whether a determination is arbitrary or capricious or an abuse of discretion is subject to a rational basis review (See *Pell v. Board of Ed.*, 34 N.Y.2d 222 [1974]).

When a determination is the result of a hearing held pursuant to direction by law where evidence was taken, the determination must be, on the entire record, supported by substantial evidence. (CPLR §7803(4)).

[S]ubstantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably--probatively and logically....[T]he reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the agency's decision....[Internal quotation marks and citations omitted.]

(300 Gramatan Ave. *Associates v. State Division of Human Rights*, 45 N.Y.2d 176, [1978]).

Where an issue of substantial evidence is raised, the proceeding must be transferred to the Appellate Division (CPLR §7804(g)).

Bus Lane Violation - Summons #AAE1240584

Here, an administrative hearing was held, and the Appeals Board affirmed ALJ Re's determination upon a transcript-based review. Mr. Gouranga has exhausted all administrative remedies

and is entitled to bring an Article 78 proceeding [Ver. Pet. at ¶12; Ver. Ans. Ex. A, Letters dated November 5, 2008 and November 19, 2008; CPLR §7801; see also *In re City of New York* 6 N.Y.3d 540, 814 N.Y.S.2d 592, 847 N.E.2d 1166 (2006)].

However, Mr. Gouranga has raised an issue of substantial evidence by claiming that his ability to challenge the rationality of the DMV's decision is hampered by the inaccessibility of his File. Thus, inasmuch as a substantial evidence issue has been raised, this court does not have jurisdiction to review the DMV's determination and must transfer the proceeding to the Appellate Division, First Department, pursuant to CPLR §§7803(4) and 7804(g).

Traffic Device Violation - Summons #OAC7453515

VTL §228(5) provides that a transcript of a hearing forming the basis of an appeal to the Board will only be reviewed if the appellant submits the transcript of the evidentiary hearing to the Appeals Board. If the appellant does not submit a transcript, the only issue that the Appeals Board will consider is the appropriateness of the penalty. Under these circumstances, the Appeals Board's determination is final, and no judicial review is available (VTL §228(2)(c), (5), (9); 15 NYCRR 126.3; *Brady v. Department of Motor Vehicles*, 98 N.Y.2d 625[2002]; see also *Hanchard v. Facilities Development Corp.*, 85 N.Y.2d 638 [1995]).

Here, an administrative hearing was also held. The Appeals Board affirmed the ALJ's determination pursuant to a "penalty-only" review because no hearing transcript was submitted. Mr. Gouranga has exhausted all administrative remedies but is not entitled to bring an Article 78 proceeding (Ver. Pet. at ¶12; Ver. Ans. Ex. B Letters dated November 21, 2008, October 23, 2008 and August 27, 2008; CPLR §7801; see also *In re City of New York* 6 N.Y.3d 540, 814 N.Y.S.2d 592, 847 N.E.2d 1166 (2006)).

Moreover, the unavailability of Mr. Gouranga's File is moot. The record indicates that the DMV notified both the Magee Firm and Mr. Gouranga that a hearing transcript was required in order for the Appeals Board to conduct a transcript-based review of the hearing testimony and that, absent a transcript, only the penalty would be reviewed upon appeal. Because a transcript was never submitted to the Appeals Board, DMV complied with its statutory and regulatory requirements by reviewing the traffic device determination on a "penalty-only" basis. (See Ver. Ans. ¶¶67-76 Ex. B Letters dated August 27, 2008, October 23, 2008, and November 21, 2008)). As such, pursuant to VTL §228[2][c] and 15 NYCRR 126.3, this determination of the Appeals Board on a "penalty-only" basis is not judicially reviewable. (See VTL §228[2][c]; *Brady v. Department of Motor Vehicles*, 98 N.Y.2d 625[2002]; see also *Hanchard v. Facilities Development*

Corp., 85 N.Y.2d 638 [1995]).

Accordingly, it is

ORDERED that the portion of the petition seeking review of the determination pursuant to the Traffic Device Violation is denied for lack of jurisdiction; and it is further

ORDERED that, upon the foregoing papers, the balance of the application seeking to vacate and annul the determination by respondent pursuant to the Bus Lane Violation is respectfully transferred to the Appellate Division, First Department, for disposition pursuant to CPLR §7804(g); and it is further

ORDERED that the Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

This memorandum opinion constitutes the decision and order of the Court.

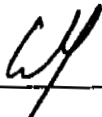
Dated:

4/6/09

**FILED**

APR 08 2009

COUNTY CLERK'S OFFICE  
NEW YORK

  
HON. WALTER B. TOLUB, J.S.C.