

Matter of City Servs., Inc. v Neiman

2010 NY Slip Op 30529(U)

March 10, 2010

Supreme Court, New York County

Docket Number: 117090/09

Judge: Carol R. Edmead

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

PRESENT: Edmead
Justice

PART 35

City Services

INDEX NO. 117090/09

MOTION DATE _____

Neiman

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 _____

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 1438), No

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that the Petition seeking an order (1) annulling and reversing the decision of the New York State Banking Department which denied City Services's application for a permanent check cashing license and terminated City Services's Cashier of Checks Temporary License CCC 4860; (2) declaring and adjudging that City Services is a *de facto* and *de jure* licensed cashier of checks and that the Department's actions were arbitrary, capricious and without rational basis; (3) directing the Department to conduct an evidentiary hearing prior to terminating City Services's business; (4) issuing a *writ of mandamus* compelling the Department to issue City Services a permanent check cashing license; and (5) awarding costs and attorneys' fees, is denied and the Petition is hereby dismissed; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 3/10/10

[Signature]
J.S.C.

HON. CAROL EDMEAD

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 35

-----X
In the Matter of
CITY SERVICES, INC., ARNOLD LASKER and
BARRY ALPER,

Index No.: 117090/09

Petitioners,

For a Judgment/Order Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

RICHARD H. NEIMAN, SUPERINTENDENT OF
BANKS OF THE NEW YORK STATE
BANKING DEPARTMENT,

Respondents.

-----X
HON. CAROL R. EDMOND, J.S.C.

MEMORANDUM DECISION

In this Article 78 proceeding, City Services, Inc. ("City Services") and its principals Arnold Lasker ("Lasker") and Barry Alper ("Alper") (collectively, "petitioners") seek an order (1) annulling and reversing the decision of the New York State Banking Department (the "Department") which denied City Services's application for a permanent check cashing license and terminated City Services's Cashier of Checks Temporary License CCC 4860; (2) declaring and adjudging that City Services is a *de facto* and *de jure* licensed cashier of checks and that the Department's actions were arbitrary, capricious and without rational basis; (3) directing the Department to conduct an evidentiary hearing prior to terminating City Services's business; (4) issuing a *writ of mandamus* compelling the Department to issue City Services a permanent check cashing license; and (5) awarding costs and attorneys' fees.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To appear in person at the Judgment Clerk's Desk (Room 1475).

Factual Background

The Department has regulated “personal” check cashers, *to wit*: checks cashers that cash checks made out to natural persons, pursuant to Article 9-A of the Banking Law, since 1944. Until 2004, the Department did not regulate “commercial” check cashers, *to wit*: checks payable to businesses. During this unregulated period, Lasker and Alper, as principals of City Services, operated City Services as a commercial check cashing business.

Over time, the Department implemented licensing and examination programs, which required applicants for licenses for “Money Service Businesses” (“MSBs”), of which check cashers are one type, to comply with, *inter alia*, the Bank Secrecy Act and Anti-Money Laundering requirements. The Department developed a protocol for examining and rating all MSBs in a structure called “FILMS” (“F” for financial condition; “I” for internal controls and auditing; “L” for legal and regulatory compliance; “M” for the management component or the licensee’s ability to identify and measure risks; and “S” for systems and technology for money transmitters). The “S” standard is not examined for check cashers.

In September 2004, legislation was passed, effective September 14, 2004, declaring that commercial check cashers were to be licensed under the same laws governing personal check cashers.¹ The Superintendent of Banks (“Superintendent”) was permitted to issue temporary

¹ In July 2004, the New York State Attorney General issued a formal opinion, concluding that the “licensing and regulatory requirements of Article 9-A apply to all businesses (not otherwise exempt) that cash checks for consideration, including those that cash checks only for corporations and other non-natural persons.” In that same month, the Manhattan District Attorney Robert M. Morgenthau made public a Grand Jury Report calling for increased supervision of commercial check cashers due to widespread and long-term tax evasion, money laundering, usury and other crimes. The Grand Jury Report noted that since 1970, the Bank Secrecy Act required all financial institutions, including retail check cashers and commercial check cashers, to prepare and file a Currency Transaction Report (“CTR”) on any transaction that generates a net distribution of over \$10,000 in cash by or on behalf of the

licenses, valid for 90 days, pending final approval or disapproval of a permanent license, and could extend the temporary licenses for additional 30-day periods.

In reviewing licensing applications, the Department conducts a “quantitative” review of the information to determine whether the amount of information required to be received has been submitted. Upon receipt of all quantitative information, the Department conducts a “qualitative” review of the application, which, *inter alia*, includes checking for the internal consistency of the information provided and an external verification of the information. Then, a determination is made as to whether the application meets statutory and regulatory requirements. The Deputy Superintendent of the Licensed Financial Services Division then makes a recommendation to the Superintendent, who makes a final determination to grant or deny the license application.

On November 12, 2004, Alper and Lasker submitted an application for a license, along with supporting documentation, and disclosed that in 1995, they each pleaded guilty for failing to file a CTR (a felony).

Upon receipt of the application, the Department issued City Services a 90-day temporary license (followed by a consecutive series of 30-day temporary licenses). According to the Department, its examiners visited all commercial check cashers to become familiar with their operations, and to answer any questions about the laws and regulations. On May 23, 2005, an examiner visited City Services, and found that Alper and Lasker did not know much about the Department’s rules and regulations and explained to them the important rules and regulations pertaining to their business.

In the summer of 2006, the Manhattan District Attorney’s Office advised that although

same person on the same business day.

City Services was not the target of any criminal investigation, it had executed a search warrant on City Services's office for a criminal investigation into its customers. (Stone Affidavit, ¶77)² City Services did not inform the Department that the records of City Services were taken.

On January 8, 2007, the Department denied City Services's application on the basis that it had "not satisfied the statutory provision under Section 369.1 of the Banking Law"; namely, Alper and Lasker had prior felony convictions. It was noted that Section 369(6) of the Banking Law permits the Superintendent to refuse to issue a license to any person who is, *inter alia*, an officer or employee of the applicant who has been convicted of a felony. According to the Department, Alper and Lasker, at check cashing companies called "ABG, Inc." and "Payroll Services Consultants, Inc.," failed to file a CTR and were convicted in December 1995 and sentenced to probation with a \$250,000 fine.

In response, Lasker and Alper's counsel advised that City Services was not in existence in 1986 when the actions underlying the felony were undertaken and submitted a Certificate of Relief from Civil Disabilities for Lasker. Counsel explained that Alper, a Connecticut resident, was ineligible for such a Certificate and that Connecticut did not have a similar procedure.³ In light of the Certificate of Relief and the satisfactions of judgments of Lasker and Alper, the Department kept the temporary license in effect until January 21, 2007, in order to reassess the application.

According to the Department, there was a change in administration in the Department in

² Forty boxes of records, including bank records, CTRs, copies of cancelled checks and customer account files were seized. The DA's office kept these files until summer 2008 (Id. ¶¶78, 79).

³ Petitioners assert that recently Connecticut passed a law that provides for a "provisional pardon," for which Alper is in the process of filing an application.

January 2007, and it was decided that in light of the additional material, the decision on the City Services's application should be held in abeyance until a more thorough review could be conducted. On January 19th, the Department informed Alper and Lasker that the Department's denial was being held in abeyance while a complete review of their application was conducted in view of the additional information. Their temporary license was extended to February 20, 2007.⁴

Between September 2008 and December 2008, the Department determined to refresh the files of all commercial check cashing entities, and sent examiners to review the "I" (internal controls and audit) and "L" (legal compliance) categories. The Department determined that City Services should receive a full FILM examination in order to assess Alper and Lasker's alleged rehabilitation since their convictions.

After the FILM examination was completed, the Department sent City Services a report (the "FILM report") on April 1, 2009. The FILM report explained that based on petitioners' withholding of required information, *i.e.*, its customer list and customer files, and findings made at the examination, City Services would receive an overall composite score of 4, which, to the Department exhibits unsafe and unsound practices or conditions. The Department found violations of Section 372-a of the Banking Law (failing to provide access to books and records), Title 31 of the Code of Federal Regulations (filling out CTRs incorrectly), and several sections of Part 400 of the Superintendent's Regulation (failing to maintain a daily record of checks cashed, failing to indicate a fee was collected or that none were collected, and failure to maintain a

⁴ From February 16, 2007 through September 3, 2009, the Department issued monthly transmittal letters renewing City Services's temporary license, advising that the Dept was "still in the process of completing its due diligence" and that "the denial decision . . . will continue to be held in abeyance while a complete and accurate review continues."

“returned item record”), as well as deficiencies in the Internal Controls and Auditing, Legal and Regulatory Compliance, and Management categories. The Department requested that City Services rectify the deficiencies and provide proof of same within 30 days.

In response, City Services stated that (1) it did not intentionally withhold a customer list, but only sought to protect its proprietary information; (2) a customer list was never maintained and thus, would have to be created, and that the on-site examiner had access to all records, except for “a single customer file”; (3) the CTR findings were erroneous; (4) the Department’s memorandum previously distributed to all check cashers did not mention a customer list; and (5) the regulation requiring a notation on each check of the fee charged did not apply to the cashing of checks for payees other than natural persons. City Services also indicated steps it was taking toward regulatory compliance, and expressed that it wished to cooperate with the Department and had “engaged SHC Consulting, Inc. . . . for the purpose of providing on-going technical services to ensure continued compliance.”

The Department determined that City Services’s response was inadequate, and rejected the notion that no customer list existed, given that, (1) when the on-site examiner requested the list, petitioners refused to provide it, contending that they did not trust the Department to keep it confidential and that such request should be made in writing; they never claimed that the list did not exist; (2) in response to the Department’s written request, petitioners sought legal advice as to whether they should provide the list; (3) counsel for petitioners opined that the list need not be produced since it was confidential and proprietary; (4) City Services’s Deposit Ticket Lists indicated customer’s names with numbers next to the names, revealing that numbers were substituted for names, and indicating that a customer list was used to reconcile the numbers with

the names; and (5) City Services's consulting firm wrote a letter on April 24, 2009, noting that petitioners provided the consulting firm with a "list of new customers."

Thus, on September 22, 2009, the Department notified City Services that its temporary license would not be renewed, and that City Services could not engage in any check cashing after October 7, 2009. This denial was based on (1) the "most recent examination" where City Services failed to submit "critical information requested" and (2) the principals' felony convictions and City Service's failure to meet requirements of Section 369(1). The denial was then stayed by this Court pending a "final" determination by the Department of the application.⁵

City Services then advised that the "computer system upgrades now permit" City Services to produce the customer list, and supplied a customer list; City Services also provided a "Check Report" and "Transaction Report," which included the fees charged for each check. It also advised that the new computer system identifies checks which require the filing of a CTR.

On November 9, 2009, the Department denied City Services's application for a permanent license, on the ground that (1) Alper and Lasker were convicted for a felony directly related to the license sought; (2) City Services received a "4" on the Film examination, indicating that the business was being operated in an unsafe or unsound condition; (3) City Services was uncooperative in (a) refusing to provide customer lists and (b) failing to provide access to customer files; (4) City Services failed to maintain books and records, *i.e.*, a daily record of checks cashed pursuant to Part 400.2(a)(1)-(7), and failed to write the amount of the fee collected

⁵ City Services then sought a meeting with the Department to explain the steps it had taken to remedy the issues raised in the FILM report, to which the Department did not respond. After this proceeding was commenced, and this Court issued a temporary injunction staying the Department's denial, petitioners requested another meeting. On October 14th, the Department wrote petitioners, advising that it would review any further submissions they wished to provide by October 23, 2009. Again, petitioners' counsel insisted on having a meeting instead. A meeting was held on October 23rd.

for each cashed check on the face of the check, or "n/a" or "0" if no fee is charged; (5) City Services failed to notify the Department when its business files were seized; and (6) the September 29, October 15 and 22 submissions, and meeting on October 23 failed to convince the Department that City Services has the requisite character and fitness to receive a permanent license.⁶

Petition

City Services contends that the Department's denial of its application was arbitrary and capricious. Between November 2004 and January 2007, City Services received no indication that its application was deficient in any way. Nor did the Department indicate that the temporary licenses were issued to enable City Services to demonstrate the ability to conduct the business honestly, fairly and efficiently under Section 369(1). Section 369(1) requires a finding by the Superintendent that license applicants' "financial responsibility, experience, character, and general fitness" are such as "to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently." The Department never applied this standard, but instead focused on the convictions from conduct in 1986.

The statutory authority cited by the Department provides for mandatory denial of a license to those who have been convicted of a felony in another jurisdiction when the conduct constitutes a felony in New York. Because the criminal conduct underlying the Federal offense had no New York State counterpart, neither Lasker nor Alper are subject to the mandatory

⁶ According to the Department, City Services acknowledged that it used a system to identify Asian clients with difficult or similar sounding business names and/or surnames, whereby each of those customers was identified by a number" and if the examiner asked, the "loose leaf volume containing the backup documentation cross-referenced to each numbered customer" could have been provided.

licensing exclusion. Further, the Department failed to properly consider, or explain how it considered, each of the eight factors listed in Section 753(1) of New York's Corrections Law in reviewing the license application. With regard to the felony convictions, the Department failed to consider the statements from religious leaders, friends, attorneys, accountants and bankers indicating that Alper and Lasker have reputations as honest, respected and trusted men, who command the confidence of the community. Thus, their prior felony convictions should not bar licensure.

The Department also arbitrarily and capriciously considered the findings of the FILM Examination, a process intended for evaluating licensees, not for reviewing applications, to support the conclusion that City Services was operating unsafely and unsoundly. The FILM examination was not contemplated by Section 369 as a requirement for "grandfathered" commercial check cashing businesses. Section 369 provides limited parameters of an application review, to be completed during short periods of 30-day extensions, and does not direct the Department to conduct a full scale operational audit. The Legislature recognized that since a grandfathered unlicensed applicant would not have adhered to the regulatory and bookkeeping requirements, it would be unreasonable to mandate such an operational review as a condition precedent to licensure. If, after the enactment in 2004, the Department believed that grandfathered entities should be operationally qualified prior to permanent licensure, it should have enacted a regulatory framework to deal with this new category of applicants. Any commercial check casher would be cited for noncompliance because it did not have to comply with the Department's regulations.

As to the customer list, the list of required records detailed in section 400.1 does not

mandate a customer list. And, while Section 372-a mandates that a licensee provide access to books and files "used therein," until the modernization of its computer system after the examination, City Services did not maintain a customer list. Additionally, providing FRC an "ad hoc" list of new customers is not the same as possessing, on a routine basis, a list of customers. Further, petitioners never conceded that another list existed, but referred to a loose-leaf volume containing documents for numbers which appeared on deposit tickets, to which the examiner had access. An upgraded computer system allowed petitioners to ultimately provide a customer list.

As to the customer file, the field examiner requested the "Skillman" file, which was one of the files taken by the District Attorney. Since the District Attorney had not maintained the files in an orderly manner, petitioners were forced to temporarily store them in the basement, and the examiner was told that the basement was in an unsafe condition. Petitioners told the examiner that they would access the file, which they did. And, the field examination did not identify this alleged failure as a violation, or provide documentation on this issue.

Further, the FILM report demonstrates that City Services maintained exemplary CTR documentation, and the two CTR issues raised therein are merely technical, not substantive issues, and were explained. Further, several audits done by Financial Regulatory Consulting, Inc., ("FRC") an independent consulting firm, described the soundness of the City Services Bank Secrecy Act program. The Department also ignored City Services's challenges to the factual assertions supporting the "4" rating in the FILM report, and the ratings were arbitrary.

As to placing the fees on the checks, City Services initially believed that the purpose of the regulation was to demonstrate compliance with the fee limitations imposed by 400.11; however, upon being advised differently, City Services stated that it would begin complying.

The Department also deviated from its own common practice and procedure by failing to permit City Services to correct its alleged violations in what is intended to be a remedial process. Accordingly, the FILM examination should not be a basis for the denial.

The Department's contention that City Services was uncooperative during the FILM Examination, and did not supply critical records or safe access to customer files is erroneous; City Services was cooperative and has taken further action to ensure compliance with all laws.

As to the failure to notify the Department of the District Attorney's seizure of records in 2006, the Department did nothing to address its "significant concerns"; the Department did not take any action or inquire of petitioners for clarification or information. Further, while City Services has a duty to notify the Department of any arrest or indictment of petitioners, there is no requirement that it notify the Department of any seizure of its records.

The record is devoid of any evidence that explains the Department's delay in taking action with respect to City Services' application. Petitioners have made significant investments into the business over its 17 years of operation and particularly over the past five years, including hiring employees, entering into successive long-term leases for the business premises, and updating their computer systems to improve record keeping capabilities.

Finally, petitioners are entitled to a hearing pursuant to Section 373 of the Banking Law before the Department revokes or suspends its license. The temporary licenses were issued to petitioners and Section 373 makes no distinction between temporary licenses or permanent licenses.

Because petitioners have a property interest in their business and check cashing license, the Department's termination of City Services's temporary license, without a hearing, violated

City Services's due process rights under the 14th Amendment of the U.S. Constitution, right to hearing under Section 373 of the Banking Law, and equal protection rights under the New York State and 14th Amendment of the U.S. Constitution. The Department recognized City Services as a *de facto* and/or *de jure* licensee; beginning in November 2004 and at all times thereafter, the Department treated City Services as a licensee, issuing it more than 50 successive licenses. And City Services acted as a licensee: City Services filed annual audited reports pursuant to Article IX-A and the Superintendent's Regulations, paid annual assessments (since 2004) imposed by the Department under Article II § 17(2) of the Banking Law (which imposes assessments only on licensees regulated by the Department), and made available its books, accounts, and records for review by the Department, including the FILM examination, a process required only of check cashing licensees. Therefore, City Services argues, it is entitled to hearing prior to any denial of a permanent license.

In response, the Department seeks dismissal of the petition, arguing that its November 9, 2009 determination was based on several grounds and was neither arbitrary and capricious nor in any way improper, and was rationally based. The record demonstrates that the Department possessed ample reason to determine that petitioners did not exhibit the character and general fitness such as to command the confidence of the community and to warrant belief that the business would be operated honestly, fairly and efficiently within the purposes of the Banking Law.

The Department contends that it weighed the relationship of the license sought against the nature of the crime that Lasker and Alper had committed, and found a direct relationship between the criminal failure to file CTRs and the business of commercial check cashing, which critically

requires the same regulatory compliance. Article 23-A of the Correction Law recognizes that where there is a direct relationship between the criminal offense and the specific license, the agency has discretion to deny the license. The Department further considered the serious nature of the crime committed, and its bearing on the duties and responsibilities of these principals (who were neither young, nor new to the check cashing business) in running the same business in a lawful and professional manner. The Department's initial decision to deny City Services application was grounded in a legitimate interest on the part of the Department to protect the welfare of the general public, not to mention the integrity of the check cashing industry. Also, the Department noted, no explanation or information was supplied in mitigation of the principals' earlier criminal conduct, although a Certificate of Relief from Disabilities was produced for Lasker after the initial determination in January 2007. Further, no certificate was produced for Alper. And, while Lasker's Certificate bears a rebuttable "presumption of rehabilitation," petitioners rebutted that presumption.

As articulated in its November determination, the principals failed to advise that the District Attorney's Office had removed City Services's files pursuant to a search warrant to launch a criminal investigation of its clients. They next refused to supply the Department with access to City Services's customer list, and could not provide safe access for its employees or examiners to certain client files, both in violation the Banking Law §372-a. City Services gave every reason to find that it was not being, and would not be, operated honestly, fairly and efficiently, in compliance with the law.

Upon the Department's denial of a permanent license on September 22, 2009, petitioners finally conceded that at least one list existed; but, with that concession came the claim that the

Department had never requested it. Petitioners' counsel wrote that because of difficulty with similar sounding business names, it created a system whereby each of those customers was identified by a number. In addition, petitioners' counsel suggested that upon request City Services would have provided the examiner with a loose leaf volume containing the backup documentation cross-referenced to each numbered customer. This conflicting information alone evidenced that a customer list existed and that City Services used misleading tactics to keep it from the Department.

Furthermore, notwithstanding that petitioners' felony convictions involved an aspect of money laundering and bore a direct relationship to the license they sought, those convictions were not the sole basis for the Department's final determination to deny City Services a permanent license. The Department also considered petitioners' failure to maintain and provide safe access to critical records as required by Banking Law §372-a. Without question, with the passage of Correction Law, Article 23-A in 1976, this section of the Banking Law must be applied in conjunction with the balancing test of Correction Law §§ 752 and 753[1][2]. This balancing test was conducted by the Department in its initial determination in January 2007.

The final determination was not grounded solely on the principals' criminal convictions. The Department extended City Services' 30-day temporary license many times so that the Department could, as requested by petitioners' counsel, find evidence of the principals' rehabilitation. Petitioners' acknowledge that the Department, in staying the denial of City Services' application, acted in a manner that was "consistent with New York's public policy to encourage licensure and employment of persons previously convicted of criminal offenses." The Department attempted to find if there was any support for petitioners' claim that they were

reformed and worthy of a permanent license. However, between 2007 and 2009, petitioners demonstrated an unwillingness to cooperate with the Department. In that time the Department learned, *inter alia*, that petitioners had willfully refused to provide documents, such as the client list that was requested, and in so doing, alternately claimed that they did not trust the Department to keep the information from the hands of City Services' competitors; that they had no legal obligation to provide the list, and that the list did not even exist. The Department learned that Lasker, when told by the examiner that he was to write the amount of the fee for checks cashed on each individual check, responded that he would not do so. The Department learned that certain files were kept in a basement that, according to petitioners, was not safe to access, and therefore could not be reviewed. Thus, the claim that petitioners had been rehabilitated since their 1995 felony conviction for criminal violations committed while operating in this very industry was baseless.

The Department also argues that petitioners have neither a protected property right, nor a right to an evidentiary hearing. The fact that the Legislature required in 2004 that all pre-existing commercial check cashers apply for licensure by the Department, demonstrates the Legislature's intent to have such businesses apply and be vetted by the Department, and undermines petitioners' claim that they earned a property right of licensure merely by their long-standing existence. The 2004 legislation refers to a pre-existing commercial check cashing entity as "an applicant" and are neither referred to, nor treated as, "licensees." The Department was given discretion in the awarding of licenses, and accordingly, there is no entitlement to a license so as to give rise to a property interest. Therefore, as petitioners had no property interest in their temporary license, they were not denied due process of law by the denial of their permanent

license application.

In reply, petitioners argue that in its first January 8, 2007 denial, which does not mention the Correction Law's standards, the Department relied solely on the petitioners' convictions, and such reliance was improper because the Department did not consider the factors set forth in the Corrections Law. The burden the Department placed on petitioners to demonstrate rehabilitation was in direct contravention of the express language in Correction Law §753[2]. The Department's claim that there is no support for the rehabilitation ignores the Certificate, which is proof of rehabilitation. But for Alper's Connecticut residence, there is no reason to believe that he would not have received the Certificate.

City Services's application languished for two years before the 2007 denial, another 30 months before the 2009 denial, and an additional six months before the instant, restated denial, contrary to the intent of the Legislature's instructions to process license applications within 90 days. The Department's internal quantitative and qualitative reviews broke down and it never developed a legitimate process to evaluate commercial check casher applications. Neither the Banking Law nor existing regulations mandate that an applicant be subjected to a field examination, or a FILM examination, and the FILM examination has no discernable, measurable standards that are disclosed to the applicants. Even if the power of the Department could be construed as authorizing a field examination, the power to impose such a requirement during the licensing process must emanate from the Superintendent. Further, the Department subjected City Services to a full examination under FILM, instead of the abbreviated examinations imposed on other temporarily licensed entities. The Department provided other commercial check casher applicants an opportunity to provide additional information, a right denied City Services.

Citing to a Memorandum to the Governor regarding the legislation, petitioners add that the Department failed to implement a process of review consistent with Legislature's intent to ensure an applicant due process of law. The Legislature intended that applications be processed with as little disruption to existing commercial check cashers as possible. And, the Department failed to explain any steps it had taken from February 2007 to September 2008 to complete its "review."

Further, Lasker's suggestion that the examiner should not bother to go into a basement to review records is not a denial of access to records, and City Services never had any obligation to maintain any customer list. And, the Department admits that although it requests customer lists "at all examinations," and that there are cases where an entity does not maintain customer lists; thus, it is disingenuous for the Department to fault petitioners' failure to provide the customer list as violation of the Banking Law. Since the Department did nothing in response to petitioners' counsel's letter that a customer list was unnecessary, it was reasonable for petitioners to conclude that their position was correct. Further, the Department's claim that the customer list is important for the examiner to review is inconsistent with its April 1, 2009 FILM report demanding that City Services supply the customer list after the examination.

As to the CTRs, City Services files almost 200 CTRs each month, and only four CTRs were found to have errors. City Services filed amended CTRs to correct the deficiencies, and there is no claim that City Services failed to file a CTR.

Nor does the FILM report suggest that management deficiencies should be the basis for a denial. Instead, the FILM report requests a copy of the revised policies be sent to the Department for review.

Respondents also contend that the Department failed to address petitioners' claims that the Department violated their equal protection rights under the Fourteenth Amendment by its differential application of the FILM examination, and failed to provide all relevant information that would permit petitioners to know its obligations, in violation of petitioners' due process rights under the Fourteenth Amendment.

Finally, having been in business since 1992, City Services has a fundamental right as a legal, preexisting business. City Services is entitled to a hearing prior to license termination pursuant to Banking Law §373. The fact that the Legislature set temporary licenses for thirty days demonstrates that the Department was expected to make a prompt decision. Pre-statutory commercial check cashers were not meant to be denied their statutory rights to a hearing because the Department could not manage or chose not to fulfill its duty. Further, the Department treated City Services as a permanent licensee. The Department subjected City Services to a FILM review, which is otherwise imposed upon permanent commercial check cashing licenses.

Thus, the Court should direct the Department to issue a check cashing license to City Services.

Discussion

CPLR 7803 states that the court review of a determination of an agency consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed (CPLR 7803(3); see *Windsor Place Corp. v New York State DHCR*, 161 AD2d 279 [1st Dept 1990]; *Mazel v DHCR*, 138 AD2d 600 [1st Dept 1988]; *Bambeck v DHCR*, 129 AD2d 51 [1st Dept 1987], *lv denied* 70 NY2d 615 [1988]). On judicial

review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious" (*Matter of Pell v Board of Education*, 34 NY2d 222, 230-31, 356 NYS2d 833, 839 [1974]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and is generally taken without regard to the facts" (*Pell v Board of Ed. Union Free School District*, 34 NY2d 222, 231, 356 NYS2d 833, 839 [1974]; see also *Jackson v New York State Urban Dev Corp.*, 67 NY2d 400, 417, 503 NYS2d 298, 305 [1986] (on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence")). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*id.*). The court's function is completed on finding that a rational basis supports the agency's determination (see *Howard v Wyman*, 28 NY2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (see *Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72 [1st Dept], *aff'd* 66 NY 2d 1032 [1985]).

Moreover, where, as here, the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (see *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 [1987]). Courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency (*Town of Henrietta v Department of Env'tl. Conservation*, 76 AD2d 215, 224, 430 NYS2d 440, 448 [4th Dept 1980]; see also *Jackson*, 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v Department*

of *Health Dept.*, 65 AD2d 220, 225, 441 NYS2d 61, 64 [4th Dept 1978], *lv denied* 46 NY2d 713, 416 NYS2d 1027 [1979]).

Likewise, the “construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld” (*In re Barie v Lavine*, 40 NY2d 565, 568, 388 NYS2d 878 [1976]). “Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight” (*Kurcsics v Merchants Mutual Ins. Co.*, 49 NY2d 451, 459, 426 NYS2d 454 [1980]; *see Tze Chun Liao v New York State Banking Dept.*, 74 NY2d 505 [1989]). If the agency's implementation of its powers violates the clear enablement of the statute, the Court need accord it no weight; the Court's exclusive judicial reviewing duty in such instances requires it to act autonomously (*Tze Chun Liao v New York State Banking Dept.*, 74 NY2d 505 [1989] citing *Kurcsics*, at 459).

Turning to the Department's determination on November 2009, the licensing scheme of Article IX-A of the Banking Law applies to all persons and entities that engage in the business of cashing checks, regardless of whether the checks are payable to natural persons or commercial entities (McKinney's Banking Law §367 citing Op. Atty. Gen. 2004-F5).

It is undisputed that Banking Law §369(1) sets forth the requirements of licensure in pertinent part:

If the superintendent shall find that the financial responsibility, experience, character, and

general fitness of the applicant . . . are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently . . . he shall thereupon execute a license . . . to permit the cashing of checks, drafts and money orders in accordance with the provisions of this article.

The Department's November 9, 2009 denial of City Services's application for a permanent license, was based on six grounds, which are addressed in turn.

As to the first ground, that Lasker and Alper were convicted of a felony, Banking Law § 369(6) expressly provides that

The superintendent may refuse to issue a license pursuant to this article if he shall find that the applicant, or any person who is a director, officer, partner, agent, employee or substantial stockholder of the applicant, (a) has been convicted of a crime in any jurisdiction or (b) is associating or consorting with any person who has, or persons who have, been convicted of a crime or crimes in any jurisdiction or jurisdictions; . . .
(Emphasis added).

Clearly, the Department had discretion to deny the application based on the fact that Alper and Lasker were convicted of the crime of failing to file a CTR. Although Section 369(6) of Article 9A prohibits the superintendent from issuing a license if the applicant "has been convicted of a felony in any jurisdiction or of a crime, which, if committed within this state, would constitute a felony under the laws thereof" and there is no New York State counterpart for the failure to file a CTR, as petitioners point out, based on the plain language of Banking Law §369(6), the Department's ability to approve or deny a license where an applicant has been convicted of a crime is discretionary.

In this regard, Correction Law §752 bars discrimination against persons previously convicted of criminal offenses (*El v New York City Dept. of Educ.*, 23 Misc 3d 1121, 886 NYS2d 70 [Supreme Court New York County 2009]). Pursuant to Correction Law §752, employment cannot be denied based on an applicant's criminal history unless one or both of the following

exceptions is found to apply:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or
- (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Section §753(1) of New York's Corrections Law provides that in making a determination pursuant to Section 752, which the Department clearly made in this matter, the public agency "shall consider the following factors": (a) the public policy of this state to encourage the licensure and employment of persons previously convicted of one or more criminal offenses; (b) the specific duties and responsibilities necessarily related to the license or employment sought or held by the person; (c) the bearing, if any, the criminal offense will have on his fitness or ability to perform one or more such duties or responsibilities; (d) the time which has elapsed since the occurrence of the criminal offense or offenses; (e) the age of the person at the time of occurrence of the criminal offense; (f) the seriousness of the offense; (g) any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and (h) the legitimate interest of the public agency in protecting property, and the safety and welfare of specific individuals or the general public." In making a determination, the agency "shall also give consideration to a certificate of relief from disabilities," which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein (Section 753(2); see *El v New York City Dept. of Educ.*, 23 Misc 3d 1121, 886 NYS2d 70 [Supreme Court New York County 2009]).

The record establishes that the Department considered the factors outlined above.

According to the affidavit of Regina Stone of the Department ("Stone"), the Department's

initial denial on January 8, 2007, was guided by Section 369(1) and Section 369(6) of the Banking Law.

Stone states that petitioners were given an opportunity to demonstrate their rehabilitation, thereby complying with the “public policy of this state to encourage the licensure . . . of persons previously convicted” of a crime. She agreed to “keep the temporary license in effect” to “reassess City Services’ application . . . in light of [Lasker’s] Certificate of Relief” and to ascertain whether petitioners were in fact rehabilitated by running their business in a lawful, professional and safe and sound manner. Thus, Stone measured petitioners’ fitness against the factors, “Internal Controls & Audit” and “Legal Compliance.” Stone’s decision in this regard cannot be said to be arbitrary or capricious, nor irrational, or in violation of equal protection of the law provided under the New York Constitution, given that commercial check cashing entities “that had, by this time, been granted permanent licenses were examined for all FILM components” and although not permanently licensed, City Services was in fact operating as a commercial check license entity. Therefore, Stone applied the same standard applicable to entities in the same operation as City Services.

Next, “the specific duties and responsibilities necessarily related to the license or employment sought or held by the person” was expressly considered. Stone certainly considered the duties to maintain appropriate and accessible records, CTRs, daily records, and fee information, pursuant to the Banking Law, as well as petitioner’s ability to satisfy these duties. Further, although City Services was not a permanent licensee, contrary to respondents’ contention, this factor, which calls for the Department to consider the duty and responsibility of a licensee, supported the Department’s decision to conduct the FILM examination of the City

Services.

Stone also considered the time which had elapsed since Lasker and Alper's criminal offense. Stone indicates that Lasker and Alper's counsel informed her that although the convictions were entered in 1995, the criminal actions took place in 1986. Thereafter, at the request of said counsel, and in light of Lasker's Certificate of Relief, Stone agreed to extend the temporary license and continue its assessment. Stone acknowledged her awareness that the crime took place in 1986 and held the initial denial decision in abeyance.

Additionally, though not expressly stated in the final determination or Stone's affidavit, Lasker and Alper's age was provided to the Department in their application materials in more than one form, as well as date of their criminal offense. The record also includes several instances in which Stone mentions the year of the offense, and how long petitioners have been in the check cashing business.

Stone also considered the seriousness of the offense. Stone avers that the criminal failure to file a CTR is a "serious" transgression in the MSB industry, and explains the purpose of a CTR and its impact on the Department's ability to properly supervise check cashing entities when CTR compliance is not satisfied. That both Alper and Lasker committed the crime together while operating an MSB, and that they were seeking a license together caused Stone "great concern."

Further, Stone considered "the bearing, if any, the criminal offense will have on his fitness or ability to perform one or more such duties or responsibilities." Stone found that there was a direct relationship between the license being sought and the felonies committed, in that the filing of CTRs is, according to the Department, crucial to its ability to supervise the entity, and to

the entity's ability to operate in a safe, sound and legal manner. According to Stone, both Lasker and Alper committed the failure to file a CTR, and the CTR is crucial in a FILM examination.

Moreover, the Department clearly considered the presumption created by Lasker's Certificate of Relief, as expressed in the papers and the final determination.

Therefore, the record establishes that the Department reviewed the factors outlined in the Correction Law in reaching its final determination.

The factors in addition to Lasker and Alper's criminal conviction, upon which the final determination was based, were also supported by the record.

City Services received a "4" on the FILM examination, indicating that the business was being operated in an unsafe or unsound condition. As stated above, the Department's application of the FILM review upon City Services, an applicant, was not arbitrary or capricious under the circumstances.

The record also supports the Department's conclusion that City Services was uncooperative in (a) refusing to provide customer lists and (b) failing to provide access to customer files. As to the customer list, Section 372-a of the Banking Law empowers the Superintendent to examine documents as follows:

1. For the purpose of discovering violations of this article or securing information lawfully required in this section, the superintendent may at any time, and as often as may be determined, either personally or by a person duly designated by the superintendent, investigate the cashing of checks by licensees and examine the books, accounts, records, and files used therein of every licensee.

As to access to the customer files, Section 372-a of the Banking Law also provides that:

2. For the purpose established in subdivision one of this section, the superintendent and his or her duly designated representatives shall have free access to the offices and places of business, books, accounts, papers, records, files, safes and vaults of all such licensees.

The superintendent shall have authority to require the attendance of and to examine under oath all persons whose testimony may be required relative to such cashing of checks or such business.

Pursuant to Banking Law § 371, the Superintendent is "authorized and empowered to make such rules and regulations, and such specific rulings, demands, and findings as he may deem necessary for the proper conduct of the business authorized and licensed under and for the enforcement of this article, in addition hereto and not inconsistent herewith" (*see Tze Chun Liao v New York State Banking Dept.*, 74 NY2d 505 [1989] citing 3 NYCRR 400 *et seq.* ("Duly promulgated regulations also purport to implement the legislative standards"))).

NYCRR § 400 requires applicants to submit various types of information and documents, and also provides in subsection (10), that the Superintendent "may request such additional information from an applicant deemed necessary to determine whether the applicant satisfies the standard set forth in section 369 of the Banking Law." Therefore, contrary to petitioners' contention, the Department's request for customer lists and access to the files was proper, and respondents' responses to the Department's request for these records were insufficient. According to Stone, when the list(s) was first requested by the examiner on-site, he was informed by Lasker that the City Services' client list would not be provided because he believed the examiner, or someone else at the Department, would sell the list(s) to petitioners' competitors. When the Department wrote to request "a listing of customers" and assured petitioners that Banking Law Section 36.10 requires the Department to keep such materials confidential, petitioners faxed a copy of a letter from their attorney, Robert Miller, that opined, without legal basis, that compliance with the Department's request to produce petitioners' "most valuable asset" and "lifeblood of its business" was not mandatory. Several months later, after the Department

issued its Report of Examination, citing, among other issues, petitioners' repeated refusal to provide City Services' customer, list(s) upon request, petitioners contended for the first time that no such list existed. The Department's opinion of petitioners' lack of candor in this area is supported by the record.

Furthermore, the record supports the Department's finding that City Services failed to maintain books and records, *i.e.*, a daily record of checks cashed pursuant to Part 400.2(a)(1)-(7), and failed to write the amount of the fee collected for each cashed check on the face of the check, or "n/a" or "0" if no fee is charged.

Section 400.2, entitled "Books, records and microfilm," provides that

Every licensee shall maintain the following records and information. All entries therein shall be made in ink, be typed or be available through computer printouts.

(a) A "daily record of checks cashed", in which shall be recorded all cash transactions occurring each day. . . . This record shall include the following information with respect to each check, draft or money order cashed in the face amount of \$100 or more

* * *

(8) The fee collected for cashing each such check, draft, or money order.

That City Services failed to notify the Department when its business files were seized is uncontested. However, there is no requirement that applicants notify the Department of same. Notwithstanding the fact that there is no basis to employ this factor against petitioners, the Department's final determination was not based on this factor alone. And, the consideration of this factor, though improper, does not invalidate the final determination, which was based on other amply supported grounds (*see Mintz v Bell*, 77 NYS2d 610 [Sup Ct New York County 1947] [Where Superintendent of Banks denies application for renewal licenses to engage in business as a licensed cashier of checks upon each of certain specified grounds, one of which was good, there is no necessity of considering the other grounds in proceeding by applicant to compel

the issuance of renewal licenses, citing Banking Law §369)).

Finally, the Department's conclusion that the September 29, October 15 and 22 submissions, and meeting on October 23 was insufficient to demonstrate that City Services has the requisite character and fitness to receive a permanent license is not arbitrary or irrational.

As to whether petitioners' are entitled to a hearing prior to the denial of the their application, it bears repeating that the 2004 legislation required that all commercial check cashers operate under a license, by filing "*an application...[and] otherwise satisfy[ing] the criteria in subdivision 1 of section 369 of the banking law.*" (§6) (emphasis added). Where "the applicant *does not meet the standards necessary to be licensed* pursuant to article 9-A of the banking law," the Department must "send a written denial to the applicant." (Emphasis added). Licensure is neither automatic nor guaranteed, and there is no requirement that a hearing be held prior to any denial. Notably, once the Department denies an application, the applicant must "immediately cease all activity licensable under such article at each location for which such license is sought and immediately surrender such temporary license." There is no mention of a hearing prior to the applicant's surrender of the temporary licenses. The legislation contemplates the issuance of temporary licenses, and renewals of temporary licenses for 30-day periods until the approval or denial of the application, and no hearing is required under this process.

Further, it is uncontested that Section 373(2) of the Banking Law provides that the Superintendent may suspend or revoke a license issued pursuant to Article IX-A if "after notice and a hearing," he shall find that certain specified acts (e.g., fraud, violations of law, false statements in an application, incompetency, etc.) have occurred. This statute permits a hearing prior to the suspension or revocation of a license, not a denial of a license application, and here

petitioners were never issued any license. The fact that the legislation requires an application that meets certain statutory guidelines, and permits the denial of application that do not meet such guidelines, demonstrates that the 90-day license and 30-day extensions contemplated by the 2004 legislation were "temporary" and not "permanent." The Department's delay in adjudicating petitioners' license application does not transform petitioners' status as an applicant to a licensee with a fundamental right to a hearing.

Conclusion

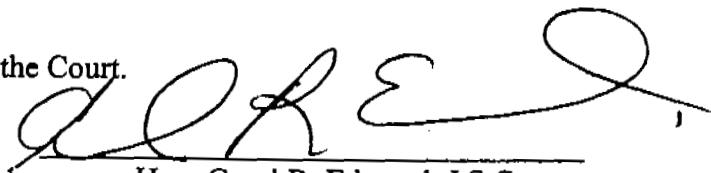
Therefore, based on the foregoing, it is hereby

ORDERED and ADJUDGED that the Petition seeking an order (1) annulling and reversing the decision of the New York State Banking Department which denied City Services's application for a permanent check cashing license and terminated City Services's Cashier of Checks Temporary License CCC 4860; (2) declaring and adjudging that City Services is a *de facto* and *de jure* licensed cashier of checks and that the Department's actions were arbitrary, capricious and without rational basis; (3) directing the Department to conduct an evidentiary hearing prior to terminating City Services's business; (4) issuing a *writ of mandamus* compelling the Department to issue City Services a permanent check cashing license; and (5) awarding costs and attorneys' fees, is denied and the Petition is hereby dismissed; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 10, 2010



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

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 1418).