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

PRESENT: HON. CAROL EDMEAD Justice PART 35

Schlass

- v -

David J. Swarts

INDEX NO. 109193/10

MOTION DATE 7/27/10

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	

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 Order to Show Cause by petitioner Natalie Schlass against respondents David J. Swarts as Commissioner of the New York State Department of Motor Vehicles and the Appeals Board of the Administrative Adjudication Bureau, State Department of Motor Vehicles, seeking annulling and setting aside the determination of the Commissioner and nullifying the suspension of petitioner's license, requiring respondents to re-instate petitioner's driver's license and staying the Commissioner's order suspending the license during hearing and determination of this special proceeding is denied and the proceeding is hereby dismissed; and it is further

ORDERED that petitioner Natalie Schlass shall serve a copy of this order with notice of entry upon all parties within 5 days of entry.

This constitutes the decision and order of the Court.

Dated: 8.5.10

HON. CAROL EDMEAD J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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NATALIE SCHLASS,

Petitioner,

For a Judgment pursuant to Article 78 of the CPLR

Index No. 109193/2010

-against-

DAVID J. SWARTS as Commissioner of the New York State Department of Motor Vehicles and the Appeals Board of the Administrative Adjudication Bureau, State Department of Motor Vehicles,

Respondents.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

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By this Order to Show Cause, petitioner Natalie Schlass ("petitioner") moves, pursuant to CPLR Article 78, to annul or stay the temporary suspension of her driver's license for violating §1225- c (2)(a) of the Vehicle and Traffic Law ("VTL") by driving a car while speaking on a

[1] The Court wishes to thank Irena Mykyta (Class of 2007, New York Law School), from the New York County Chambers Volunteer Attorney Program, for her assistance with this decision, and wishes to thank all of those participating in this Program.

hand-held cell phone.

Background Facts

Petitioner is a resident of New York. Respondent David J. Swarts is a Commissioner of the Department of Motor Vehicles of the State of New York (the "Commissioner"). Respondent Appeals Board of the Administrative Adjudication Bureau of the State Department of Motor Vehicles (the "Appeals Board") is authorized to hear and review determinations made pursuant to Article 2A of the VTL (collectively, "respondents").

The facts of this case are undisputed. On May 27, 2009, petitioner was using her hand-held cell phone while driving her car on Amsterdam Avenue in New York City. The New York Police Department ("NYPD") issued a citation pursuant to VTL §1225-c (2)(a), charging the petitioner with improperly operating a motor vehicle while speaking on a cell phone.

A hearing was held (the "hearing") before the Administrative Law Judge Marjorie Martin (the "ALJ"). After the hearing, the ALJ found the petitioner guilty of operation of a motor vehicle while using a hand-held mobile phone, imposed a fine of eighty-five dollars, and issued an order suspending her driver's license for 31 days.

On November 24, 2009, petitioner filed an appeal of her conviction with the Appeals Board on the ground that the suspension of her driving privileges was an abuse of discretion. Petitioner also requested and was granted a temporary stay of the suspension. On June 4, 2010, the Appeals Board affirmed the determination of the ALJ holding that "the charge was sustained by clear and convincing evidence, that the hearing was fair, and that the appeal arguments did not merit a reversal." In accordance with the Appeals Board's decision, on June 16, 2010, the Commissioner issued an Order of Suspension or Revocation (the "suspension order"), reinstating

the previously stayed suspension of petitioner's driver's license for a period of 31 days commencing July 15, 2010.

As a result of the suspension order, petitioner, by the Order to Show Cause, filed an application before this Court for a stay or to set aside the suspension. A hearing was held on July 27, 2010, during which this court heard the arguments of both sides. At the hearing and in her petition in support of the Order to Show Cause, petitioner argues that the administrative agency's determination was arbitrary and capricious. Specifically, petitioner argues that, while she committed three "cell phone violations," this is not the type of violation that warrants suspension because the law is vague in that it does not provide "a notice to a motorist of what would result in a suspension" by, for instance, ascribing points under the established "point system" (petition, ¶¶19 -21; transcript, at p. 3). And, the statute "gives too much discretion to an ALJ" (id.). Thus, argues petitioner, in the absence of aggravating circumstances (such as speeding, improperly changing lanes or an accident), the ruling of the Appeals Board was arbitrary and capricious.

Petitioner also argues that such suspension "shocks the conscience" because she is a sole caretaker of her 95-year-old father suffering from pulmonary fibrosis and requiring frequent escorts to doctor's appointments and, she is not eligible for a restricted use license[2] while suspended.

Thus, petitioner seeks an order annulling and setting aside the determination of the Commissioner and nullifying the suspension of petitioner's driver's license, requiring respondents to re-instate the license and staying the Commissioner's order suspending the license

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[2] The Order of Suspension or Revocation, dated November 5, 2009, states in the relevant part: "You are not eligible for a restricted use license/privilege because you had a restricted use license/privilege within the last three years."

during hearing and determination of this special proceeding.[3]

Respondents oppose the petition and the Order to Show Cause by arguing that the determination made by the ALJ was supported by substantial evidence and was neither arbitrary nor capricious. Further, petitioner did not testify or submit any documentary evidence at the time of the hearing before the ALJ, and the ALJ considered petitioner's prior record of vehicular offenses during the 18-month period prior to the violation in question: her conviction for an improper U-turn in July 2008; a four-point speeding ticket and violation for crossing a hazard mark in August 2008, and two recent convictions for driving while using a cell phone (August 2008 and May 2009), the latter just four days before receiving the citation at issue, and that petitioner has never taken a driver safety course.

Further, respondents argue, petitioner had not claimed that the suspension of the license would impose an undue hardship on her until she filed her appeal, when for the first time, plaintiff asserted that she was ineligible for a restricted use license and that she was the sole caretaker for her 95-year-old father. Additionally, on November 24, 2009, after submitting her appeal, petitioner for the first time submitted a letter from Dr. Brian Gelbman (the "November 24 letter") stating that petitioner's father was being treated for advanced pulmonary fibrosis and relied on petitioner to drive him to Dr. Gelbman's office. Respondents maintain that this evidence could not be considered by the Appeals Board pursuant to 15 NYCRR §126.2 (g).

Respondents further argue that the penalty imposed on petitioner pursuant to VTL §510(3) was not an abuse of discretion. The point system is not intended to narrow the broad discretion granted to the Commissioner by the VTL §510 (3) to suspend for "any violation."

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[3] The Court denied petitioner's application for an interim stay of the suspension.

Respondents point out that because petitioner committed her offense at midday on a Manhattan street, her failure to pay full attention to driving was especially dangerous.

Respondents also contend that the penalty is not excessive since petitioner's past history of driving offenses, revealing that she had two prior convictions for the same offense - use of a cell phone while driving - within 18 months of the present violation, show that petitioner was not deterred by the lesser penalties, which did not result in suspension of her driver's license. Thus, argue respondents, this court should deny the petition and uphold the determination of the Appeals Board.

Discussion

On judicial review of an agency determination 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 (*Pell v Bd. of Ed. Union Free School District,* 34 NY2d 222, 230-231[1974]). An action is arbitrary and capricious, or an abuse of discretion, when it is taken "without sound basis in reason and [. . .] without regard to the facts" (*Pell*, at 231). Further, 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 (*Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 [1987]; *Pell,* 34 NY2d at 231, 356 NYS2d at 839; *see also Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417, 503 NYS2d 298, 305 [1986]).

This court holds that the ruling by the Appeals Board affirming the ALJ's determination must be upheld.

Whether VTL §1225 -C (2) Is Vague

Petitioner's argument that the appeals decision is arbitrary and capricious because VTL §1225-c (2) is "vague" in that it fails to give notice of a suspension, is misplaced.

As a threshold matter, the court notes that the plain and clear language of VTL §1225-c (2) stating that "[n]o person shall operate a motor vehicle upon a public highway while using[4] a mobile telephone to engage in a call while such vehicle is in motion," is not vague. Indeed, it "[is] sufficiently clear to apprise a person of ordinary intelligence that the sort of conduct in which the defendant engaged comes within the statute's prohibition" (*In Re: Jonathan V.*, 55 AD3d 273, 865 NYS2d 44 [1st Dept 2008]; *citing People v Garcia*, 29 AD3d 255, 261, 812 NYS2d 66, 71 [1st Dept 2006], *lv denied*, 7 NY3d 789, 821 NYS2d 818 [2006]). Moreover, "the plain wording of the statute 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices'"(*People v Fox*, 17 Misc 3d 281, 844 NYS2d 6 [Sup Ct, Kings County 2007], *citing People v Shack*, 86 NY2d 529, 538, 634 NYS2d 660 [1995]). Indeed, the statute "provides members of the public, the police, prosecutors and juries with clear notice of the specific conduct that is prohibited" (*People v Stuart*, 100 NY2d at 420, 765 NYS2d 1[2003]).

VTL § 1225-c's prohibition clearly apprises a person of ordinary intelligence of the specific proscribed conduct - driving while using a hand-held cell phone.

Furthermore, this court finds unpersuasive petitioner's due process challenge, that VTL §1225-c (2) does not afford petitioner sufficient notice of a punishment by suspension. "In

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[4] "[U]sing" is defined in subdivision (1) of VTL §1225-c, as "holding a mobile telephone to, or in the immediate proximity of, user's ear."

construing a statute, the Court must take the entire act into consideration, and all sections of the law must be read together to determine its fair meaning" (McKinney's Statutes §97) and, it is immaterial in such construction that the statute is divided into sections, chapters or titles (McKinney's Statutes §130). Here, §1225-c and §510 (3) are in different sections of the Chapter 71 of the New York Consolidated Laws, entitled Vehicle and Traffic Law, but it is obvious from the cases involving statutory construction that they must be read together (*Cunningham v Frucher*, 110 Misc 2d 458, 442 NYS2d 693 [Sup Ct, Special Term, Albany County [1981]; McKinney's Cons Laws of NY, Book 1, Statutes §§ 97, 130).

While on its face, VTL §1225–c, entitled "Use of mobile telephones," does not speak of a punishment by suspension of a license[5], and states that it is an infraction and is punishable by a fine of not more than one hundred dollars, VTL's authority for suspension of a license appears to be found in two other sections of the statute: §510 (3)(a), which allows for discretionary, temporary suspension of a driver's license "for *any violations* of this chapter [. . .], or for *any violation* of a local ordinance or regulation prohibiting dangerous driving as shall, in the discretion of the officer acting hereunder, justify such revocation or suspension" [emphasis added]; and §510 (3)(d)[6], which grants discretion to a hearing officer to suspend or revoke a license of *habitual and persistent* violators of traffic laws. Thus, VTL §§1225-c (2), 510 (3)(a) and 510 (3)(d), read in conjunction, support a statutory basis for suspension of a license for

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[5] VTL §1225-c (4) provides that "[a] violation of subdivision two of this section shall be a traffic infraction and shall be punishable by a fine of not more than one hundred dollars."

[6] VTL 510 (3) (d) states in relevant part:
Permissive suspensions and revocations.
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(d) for *habitual* or *persistent* violation of any of the provisions of this chapter, or of any lawful ordinance, rule or regulation made by local authorities in relation to traffic.

multiple convictions under VTL §§1225-c (2).

Indeed, in cases of convictions for traffic infractions which, like the "cell phone" statute violation, set forth monetary fines and/or imprisonment, the ALJ and the reviewing courts have found authority in VTL §510 (3) to suspend one's license.

In *Martin v Adduci (*138 AD2d 599, 526 NYS2d 181[2d Dept 1988]) the court, relying on VTL §510 (3), sustained the imposition of a $100 fine *and a 60-day suspension* of a license for a speeding violation (VTL §1180(b), which does not set forth a penalty of suspension [7] (*see Halstead v Adduci*, 125 AD2d 846, 509 NYS2d 954 [3d Dept 1986] (citing VTL 510 (3) and affirming license revocation for violation of VTL §1163 ("Turning movements and required signals"), which does not set forth a penalty by suspension of a license, for improperly moving the vehicle off the straight course and striking another car parked on the side of the road]; *see also Cotugno v Commissioner of Motor Vehicles*, (304 AD2d 1030, 756 NYS2d 915 [3d Dept 2003] (petitioner's driving license was suspended for 30 days after an administrative hearing wherein he was found guilty of speeding (VTL §1180[d]), following too closely (VTL § 1129[a]), making unsafe lane changes (VTL § 1128[a]) and failing to use his turn signals during such lane changes (see VTL § 1163[d]; *see also Draper v Passidomo*, 122 AD2d 564, 505 NYS2d 21[4th Dept 1986] (a 45-day suspension was affirmed where the administrative law judge found that petitioner, by failing to drive his truck at a reduced speed at a highway construction site where traffic was restricted to one lane of travel, violated VTL §1180 (e))).

Notably, the VTL sections at issue in these cases, like the VTL section herein, were all

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[7] VTL §1180(b) provides that "[. . .] no person shall drive a vehicle at a speed in excess of fifty-five miles per hour," violation of which is punished, under VTL §1180(4), by a fine, or by imprisonment, or by both.

silent as to "suspension."

Thus, taking the entire statute into consideration, and reading all sections of the VTL together, as the court must, the court concludes that VTL §1225–c, read in conjunction with VTL §510 (3), gives petitioner sufficient notice that, her license may be suspended.

VTL § 1225-c (2) Does Not "Carry Points" Under the Point System

Furthermore, contrary to petitioner's argument that suspension cannot be imposed because the violation of VTL § 1225-c (2) does not "carry points" under the "point system," the discretionary, temporary suspension by the Commissioner or an ALJ under VTL §510 (3) does not require a series of violations to result in that action, nor is the accumulation of a specific number of points necessary either (VTL §510 (3)(a), *supra;* New York Vehicle and Traffic Law §§11:6, 12:1 [2d ed]). For instance, the Commissioner can suspend for speeding combined with an accident (*Draper v Passidomo*, 122 AD2d 564, *supra*), or, for making an improper turn in violation of VTL §1163 *(Halstead v Adduci*, 125 A.D.2d 846, *supra*).

In *Ortenberg v Commissioner of Motor Vehicles* (191 AD2d 898, 595 NYS2d 127 [3d Dept 1993]), a 45-day suspension was imposed by the Commissioner of Motor Vehicles, where the driver violated VTL §1102 by failing to comply with lawful direction of police officer directing traffic[8].

The court notes that the "point system" is a method which the Department of Motor Vehicles uses to assess a relative value to offenses, and to punish a license-holder for repetitive

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[8] VTL §1102. Obedience to police officers and flagpersons.
No person shall fail or refuse to comply with any lawful order or direction of any police officer or flagperson or other person duly empowered to regulate traffic.

behavior which in and of itself is not considered serious enough to merit a license suspension (15 NYCRR §131.1).[9] However, it is not the exclusive method which the Commissioner or agency can use under the Vehicle and Traffic Law to suspend or revoke a driver's license. In this regard, the plain language of 15 NYCRR §131.1 does not indicate that ascribing points is an exclusive way to identify such "*habitual* or *persistent* violators." Thus, the "point system" does not specifically limit the broad discretion of an ALJ under VTL § 510 (3) to suspend or revoke a license of petitioner as a *recidivist* violator.

Whether ALJ Abused Its Discretion

Likewise, petitioner's argument that, because the statute is vague, it permits an ALJ to apply and enforce the statute arbitrarily, must fail for the same reasons as discussed above. While a survey of the cases interpreting a discretionary, temporary suspension for driving violations fails to reveal the situation arising, as here, in the context of a cell phone use, as indicated above, an ALJ has broad discretion under VTL § 510 (3) to impose a temporary suspension of a driver's license for *any* violations of the VTL.

In *Draper v Passidomo* (*supra*), involving a speeding violation under VTL §1180 (e), the court implicitly relied on the broad discretion granted to an ALJ by VTL §510 [3] to suspend a license, stating that "the Respondent possessed authority to suspend petitioner's license and this was an appropriate penalty under the circumstance."

Moreover, where, as here, a driver has repeated offenses, "it [is] entirely appropriate that a

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[9] The point system was designed to "identify driv[ers] which shall be presumptively deemed to constitute *habitual* or *persistent* violat[ors] of traffic laws" (15 NYCRR §131.1) As a general rule, accumulation of 11 or more points for violations committed within an 18-month period results in *automatic* suspension or revocation of a driver license.

temporary suspension be grounded upon evidence that a driver's *continued* operation of a motor vehicle represents a danger to the public" (*People v Forgette*, 141 Misc 2d 1009, 1012 [emphasis in the original]).

In addition, the court finds further support to the determination of the punishment by ALJ and Appeals Board, in the legislative intent behind these statutes. VTL § 1225-c is intended to protect citizens from the numerous motor vehicle accidents and serious physical injuries that result from the use of hand-held cell phones (New York Bill Jacket, 2001 SB 5400, Ch 69; *see also People v Neville*, 190 Misc 2d 432, 737 NYS2d 251 [Justice Court, the Village of Valley Stream, Nassau County, NY 2002]). And, the purpose of VTL §510 is "to promote traffic safety by prohibiting *recidivist* traffic offenders from traveling the [public roads]" which is a "compelling public interest" (*People v Forgette*, 141 Misc 2d 1009, 535 NYS2d 924 [City Crim Ct, New York County 1988], citing *Bell v Burson*, 402 US 535, 92 SCt 1586 [1971] [emphasis in the original]).

In this case, petitioner cannot reasonably dispute that operating a motor vehicle while speaking on a hand-held cell phone is not "dangerous driving." And, the evidence of petitioner's two previous cell phone convictions within 18 months of the violation at issue supports the decision premised upon a finding that petitioner is a *habitual and persistent* violator and that her *continued* operation of a motor vehicle while speaking on a cell phone represents a danger to the public which warrants suspension under VTL § 510 (3). Thus, VTL §1225-c (2), prohibiting this kind of dangerous driving, is precisely the "law or regulation," multiple violations of which warrant a suspension under the broad discretion of VTL § 510 (3).

Here, the determination by the ALJ was made upon the factual findings based on the

evidence of the arresting officer and upon consideration of petitioner's prior driving record, which revealed, aside from several other violations (improper U-turn, a four-point speeding and crossing a hazard mark), two prior recent convictions for driving while using a cell phone (see Transcript of November 4, 2009 hearing).

Thus, since the ALJ's determination was grounded upon the evidence that petitioner's *continued* operation of a motor vehicle represented a danger to the public, it cannot be said that the ALJ abused its discretion in imposing the suspension.

Whether the Penalty Shocks the Conscience

As to the penalty imposed by an administrative agency under CPLR 7803 (3), the Court of Appeals has instructed that it "must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law" (*Featherstone v Franco*, 95 NY2d 550, 554, 720 NYS2d 93, 96 [2000], *citing Pell v Board of Educ.*, 34 NY2d 222, 232). "The test is whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness. [. . .] A result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct [. . .] of the individual, or to the harm or risk of harm [. . .] to the public generally [. . .] threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual" (*Pell*, at 233-235 [internal citations omitted]).

In light of the above discussed principles, the court does not conclude that the suspension of petitioner's license shocks the conscience or was an abuse of discretion as a matter of law.

In *Martin v Adduci* (*supra*), the court held that the $100 fine and a 60-day license suspension was not an excessive penalty; "[i]n light of all the circumstances, the punishment handed down is not 'so disproportionate to the offense as to be shocking to one's sense of fairness,' because the ALJ set the penalty after reviewing the petitioner's driving record, which contained *numerous other moving violations*, and after considering the great speed at which the petitioner was driving prior to being stopped by police." In *Ortenberg v Commissioner of Motor Vehicles* (*supra*), the 45-day suspension for failing to comply with lawful direction of police officer directing traffic was found not to be so disproportionate to the offense as to be shocking to one's sense of fairness where the vehicle almost struck a child crossing the street.

At first blush, the punishment imposed on petitioner might seem excessive or unduly harsh, given her personal obligations of tending for her ailing father. However, as indicated by the legislative intent of VTL § 1225-c(2)(a) (*supra*), the use of a hand-held cell phone while driving can pose a serious threat of possible harm to other drivers, pedestrians and potentially, to the passengers, like her sick father whom she chauffeurs. Here, the determination of the suspension was supported by evidence that petitioner committed the offense at midday on a busy Manhattan street and intersection, making her driving without paying full attention to the road, in disregard of the law, even more dangerous to the public.

Furthermore, since petitioner's two previous convictions for the same actions, resulting in monetary fines, did not serve as a deterrent from driving and chattering on her cell phone, there is "a reasonable prospect," absent suspension, of the recurrence of this violation by petitioner (*Pell, supra*). Thus, the court concludes that, in light of all the circumstances, the punishment was not "so disproportionate to the offense, as to be shocking to one's sense of fairness" (*id.*)

Judicial Review Limited to Evidence Which Was Before the Administrative Agency

Finally, even though mitigating factors may be considered when imposing a penalty (*Pell, supra*), 15 NYCRR §126.2 (g)[10] expressly bars the Appeals Board from considering evidence not submitted at the hearing (*see also Kelly v Safir*, 96 NY2d 32, 724 NYS2d 680 [2001] (in reviewing a penalty, the court may not properly consider facts outside the administrative record); *Featherstone v Franco, supra*).

Here, petitioner did not testify or submit any documentary evidence at the time of the hearing and had not claimed that the suspension of the license will impose undue hardship on her until the time she filed the appeal on November 24, 2009. Thus, the Appeals Board properly did not consider such evidence in its review of the determination by the ALJ.

Based on the foregoing, the court concludes that the determination by the Appeals Board imposing the suspension of petitioner's license for three violations was neither arbitrary nor capricious and must be upheld. Therefore, the petition is denied and dismissed in its entirety.

Conclusion

Accordingly, it is hereby

ORDERED and ADJUDGED that the Order to Show Cause by petitioner Natalie Schlass against respondents David J. Swarts as Commissioner of the New York State Department of Motor Vehicles and the Appeals Board of the Administrative Adjudication Bureau, State Department of Motor Vehicles, seeking annulling and setting aside the determination of the Commissioner and nullifying the suspension of petitioner's license, requiring respondents to re-

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[10] 15 NYCRR 126.2 (g) states in the relevant part: "Evidence, exhibits or documents not submitted to and considered by the hearing officer may not be filed with the appeal and will not be reviewed by the Appeals Board."

instate petitioner's driver's license and staying the Commissioner's order suspending the license during hearing and determination of this special proceeding is denied and the proceeding is hereby dismissed; and it is further

ORDERED that petitioner Natalie Schlass shall serve a copy of this order with notice of entry upon all parties within 5 days of entry.

This constitutes the decision and order of the Court.

Dated: August 5, 2010

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

HON. CAROL EDMEAD