

Matter of Herrera v Mintz
2011 NY Slip Op 30297(U)
February 3, 2011
Sup Ct, NY County
Docket Number: 402296/2010
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ANIL C. SINGH
Justice

PART 14

Index Number : 402296/2010

HERRERA, VICTOR M.

vs.

MINTZ, JONATHAN

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2

3

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

The petition is decided in accordance with the annexed decision and order.

FILED

FEB 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Feb. 3, 2011


HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 14

-----X
In the Matter of the Application of
VICTOR M. HERRERA,

Petitioner,

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

-against-

JONATHAN MINTZ, COMMISSIONER,
NEW YORK CITY DEPARTMENT OF
CONSUMER AFFAIRS,

Respondent.
-----X

DECISION AND
ORDER

Index No.
402296/2010

FILED

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NEW YORK
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HON. ANIL C. SINGH, J.:

In this Article 78 proceeding, petitioner Victor M. Herrera challenges respondent Department of Consumer Affairs ("DCA") denial of his application to renew his license as a tow truck operator. Respondent has interposed an answer asserting that the denial was rational and supported by the administrative record.

On January 21, 2009, petitioner filed an application for a tow truck operator's license. Herrera indicated in the application that he had been convicted of a crime. He was granted a temporary license pending receipt of information relating to the disposition of the criminal matters. Herrera apparently did not

provide the requested information, and his application was denied on September 22, 2009.

Thereafter, on May 12, 2010, Herrera submitted a new application. He disclosed two criminal convictions in 2009. On April 8, 2009, petitioner pled guilty to criminal possession of a controlled substance, cocaine, a Class A misdemeanor. On July 29, 2009, Herrera again pled guilty to the same offense for the possession of cocaine.

In a letter to DCA dated June 2, 2010, Herrera explained that on March 31, 2009, he was in his car in a remote area with his brother when he was approached by a police officer in an unmarked vehicle. A search of the vehicle resulted in the recovery of cocaine.

On July 9, 2009, Herrera states that he was pulled over “without sufficient cause” and a search of the vehicle resulted in the recovery of cocaine. Petitioner states that he decided not to challenge the legality of the stop and search. He accepted a sentence of twelve months of incarceration. He served eight months and received a conditional release for good behavior.

On June 28, 2010, DCA denied Herrera’s application for a license on the basis of the two convictions. DCA made this decision based on Correction Law Section 753, which required respondent to consider a number of factors in

determining whether or not to issue a license based on a previous criminal conviction. Respondent concluded as follows:

There is a direct relationship between your criminal history and fitness to perform as a tow truck driver. Tow truck drivers are expected to make sound judgments regarding traffic safety. You committed the crimes at 43, an age of maturity and expected discretion. Your convictions for controlled substance are recent and you committed the crimes within a few months of each other. The Department is not assured that you will not operate a tow truck under the influence of drugs.

In reaching this conclusion, DCA considered a letter of reference received on behalf of petitioner from Burnell V. Brown. Mr. Brown wrote that Mr. Herrera “is highly responsible and focused, and has the respective attitude to advance in his endeavors, notwithstanding his prior encounters with the law.” Respondent found that the State’s policy to encourage licensure of individuals convicted of criminal offenses was outweighed by DCA’s “interest in the safety and welfare of the public.”

Petitioner maintains that this determination was arbitrary and capricious. The denial is not based upon rationally related factors to the issuance of a tow truck operator’s license. The decision is based on a generalized conclusion that Herrera poses a risk to the public by operating a tow truck under the influence of drugs. It is irrational to deny his tow truck license on this basis when he possesses

a valid driver's license to operate a motor vehicle. Petitioner maintains that the denial was based on the fact that he has previous convictions and that evidence concerning his rehabilitation was not considered.

Section 752 of the Correction Law states that a person may not be denied a license because of a prior criminal conviction unless there is a "direct relationship between one or more of the previous offenses and the specific license" In making the determination, this respondent is required to consider eight factors set out in Section 753(1). They are:

- (a) The public policy of this state, as expressed in this act, 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 or offenses for which the person was previously convicted 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 or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals

or the general public.

Here, in denying the license DCA considered the factors set forth in Correction Law Section 753.

Mr. Brown's letter suggests that petitioner is now a responsible individual and is genuine in his efforts to move forward as a productive adult. However, this positive factor must be balanced against other factors that do not weigh in petitioner's favor.

Herrera seeks to be licensed as a tow truck driver, which requires him to make decisions regarding traffic safety while operating a large commercial vehicle. His arrest and subsequent convictions for possession of cocaine in both instances involved automobiles. The offenses have a direct bearing on petitioner's qualifications as a tow truck driver.

Little time had elapsed since the occurrence of the criminal offenses and the application for the license. The convictions were in 2009, and Herrera reapplied for the license in 2010. The convictions were not a product of youthful indiscretion. Mr. Herrera was an adult of 43 years of age at the time of the offenses (see Acosta v. New York City Department of Education, 62 AD 3d 455 [1st Dept. 2009]).

Respondent's determination has a rational basis. On these facts, in order to

* 7]

reverse the license denial, this court would have to re-weigh the factors in petitioner's favor. The court lacks such authority (see Arrocha v. Board of Education of the City of New York, 93 NY2d 361 [1999]).

Finally, petitioner's claim that respondent violated the New York State Human Rights Law and the New York City Human Rights law is without merit. A challenge to a public agency's violation of Article 23-A of the Correction Law is raised by an Article 78 proceeding (see Section 755(1) of the Correction Law).

For the above reasons, the petition is dismissed with prejudice.

The foregoing constitutes the decision, order and judgment of the court.

Date: February 3, 2011
New York, New York


Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**

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