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| <b>Dempsey v New York City Dept. of Educ.</b>                                                                                                                                                                                    |
| 2012 NY Slip Op 30552(U)                                                                                                                                                                                                         |
| February 24, 2012                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                   |
| Docket Number: 401935/2011                                                                                                                                                                                                       |
| Judge: Robert E. Torres                                                                                                                                                                                                          |
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| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

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

PRESENT: ROBERT E. TORRES  
JUDGE \_\_\_\_\_  
Justice

PART 29

Index Number : 401935/2011  
DEMPSEY, LUTHER  
VS.  
NYC DEPARTMENT OF EDUCATION  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). 1, 3  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). 2, 4  
Replying Affidavits \_\_\_\_\_ No(s). 5, 6, 7

Upon the foregoing papers, it is ordered that this motion is

is

granted in accordance with the attached  
decision.

This Constitutes the Decision and  
Order of the Court.

**FILED**

MAR 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/24/2012

ROBERT E. TORRES J.S.C.  
JUDGE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

**FILED**

MAR 07 2012

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK, PART 29  
 PRESENT: HONORABLE ROBERT E. TORRES, J.S.C.

NEW YORK  
 COUNTY CLERK'S OFFICE

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LUTHER DEMPSEY,

Petitioner,

INDEX NUMBER: 401935/2011

-against-

Present:

HON. ROBERT E. TORRES

THE NEW YORK CITY DEPARTMENT OF  
 EDUCATION, and DENNIS WALCOTT,  
 as Chancellor of the New York City Department  
 of Education,

Respondents.

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Petitioner bring the instant petition for an Order reversing respondent New York City Department of Education (hereinafter "DOE")'s determination denying petitioner's application for certification as a school bus driver as arbitrary, capricious, and on abuse of discretion or, in the alternative, as unsupported by substantial evidence; declaring that Respondents violated Correction Law § 752 and § 753, Executive Law § 296(15) and New York City Administrative Code § 8-107(10) by unfairly discriminating against Petitioner because of his prior criminal offenses; issuing an Order directing respondent to approve petitioner's application to be certified a DOE school bus driver; awarding back pay and other damages incident to the primary relief sought in this petition; and awarding attorney fees and costs. The Respondent NYCHA answers the Notice of Petition and requests that the petition be dismissed in its entirety.

The relevant record herein reveals that petitioner, an experienced school bus driver licensed by the New York State Department of Motor vehicles to drive school buses, applied for certification to drive a bus from DOE. Petitioner submitted said application on request of his employer, Thomas Buses Inc.. DOE denied the petitioner's application based on his past criminal convictions. Notably, petitioner's most recent conviction was in 1993. As a result of DOE's denial, petitioner's employment was terminated.

In November, 2006, petitioner and three other school bus drivers and one school bus escort, who were also employed by Thomas Buses Inc., brought an Article 78 proceeding against the DOE and

Thomas Bus Inc. challenging the denials of their application. All denials were due to past criminal convictions.

After lengthy litigation, the appellate division, first department issued a decision reversing the lower court; remanding the matter to DOE; and directing that petitioners be given an opportunity to review the information upon which DOE's determinations were based and to submit statements and documents pursuant to Chancellor's regulation C-105.<sup>1</sup>

Subsequently, petitioner was interviewed by DOE on February 24, 2011. By letter dated March 17, 2011, the DOE denied petitioner certification once again. Petitioner's attorney sent DOE a letter, dated March 29, 2011, requesting a written statement pursuant to section 754 of the Correction Law, setting forth the reasons the DOE denied petitioner permission to transport its students. By letter dated May 4, 2011, DOE detailing the reasons for said denial.

Petitioner now brings the instant petition.

Article 78 of the C.P.L.R. provides for limited judicial review of administrative actions. Administrative agencies enjoy broad discretionary power when making determinations on matters they are empowered to decide. Section 7803 of the C.P.L.R. provides in relevant part that "[t]he only questions that may be raised in a proceeding under this article are... 3. whether a 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 or discipline imposed; or 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

In deciding whether an agency's determination was supported by substantial evidence or was arbitrary, capricious or an abuse of discretion, the reviewing court is limited to assessing whether the agency had a rational basis for its determination and may overturn the agency's decision only if the record reveals that the agency acted without having a rational basis for its decision. See, Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992) citing Pell v. Board of Education, 34 N.Y.2d 222, 230-31 (1974); Sullivan County Harness Racing Association v. Glasser, 30 N.Y.2d 269, 277 (1972). Substantial evidence is more than "bare surmise, conjecture, speculation or rumor" and "less than a preponderance of the evidence." 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176,

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<sup>1</sup> Petition submits said decision, In Re Hasberry, et al. v. NYC DOE, et al, Index Number 405070/2006 as Exhibit T of the petition.

180 (1978). Substantial evidence consists of “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” *Id.* See, also Consolidated Edison v. New York State DHR, 77 N.Y.2d 411, 417 (1991). Where the Court finds the agency’s determination is “supported by facts or reasonable inference that can be drawn from the record and has a rational basis in the law, it must be confirmed.” American Telephone and Telegraph Co. v. State Tax Commissioner, 61 N.Y.2d 393, 400 (1984). The arbitrary and capricious test “chiefly ‘related to whether a particular action should have been taken or is justified... and whether the administrative action is without foundation in fact.’” Pell, *supra*, quoting 1 N.Y. Jur., Administrative Law, §184, p. 609. The reviewing Court does not examine the facts *de novo* to reach an independent determination. Marsh v. Hanley, 50 A.D.2d 687. Furthermore, a Court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary, unreasonable and an abuse of discretion. Pell, *supra*.

Upon a review of the forgoing papers, the Court finds that petitioner’s Article 78 petition must be granted as the respondent DOE’s determination denying petitioner’s application for certification as a school bus driver was arbitrary and capricious. On Article 78 review, this Court is limited to assessing whether the agency had a rational basis for its determination. The Court finds that DOE failed to consider all eight factors as set forth in section 753 of the Correction Law. A review of the papers, demonstrates that Respondent only considered petitioner’s criminal history when reviewing his application and failed to consider his extensive evidence of rehabilitation. Petitioner’s last conviction was eighteen years ago and he obtained a certificate of relief from disabilities. DOE, in part, relied, on an arrest in 1971 and 1974. However, it should be noted that those matters were dismissed.<sup>2</sup> Moreover, respondent states that petitioner was denied in part because he did not provide any community recommendations yet he was never asked to submit said documents. Respondent also alleges that petitioner was less than truthful in his application, however, fails to support said claim by identifying the alleged untruthfulness. Finally, although respondent failed to identify the alleged gap in petitioner’s employment history, respondent argues that said gap is one of the factors considered in making its determination. These records are more than sufficient to make a showing of “substantial evidence” and for a finding that the respondent DOE’s determination was without foundation in fact. Pell, *supra*,

Accordingly, it is

ORDERED that the instant petition is granted to the extent that respondent DOE’s determination

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<sup>2</sup> See, Criminal History Report, submitted as Exhibit C of DOE’s opposition hereto.

is hereby annulled as arbitrary and capricious, and it is further

ORDERED that respondent DOE approve petitioners' application for to be a certified DOE school bus driver, it is further

ORDERED that remaining issues are hereby remanded back to DOE.

This constitutes the decision and order of this Court.

Dated: February 24, 2012



Hon. Robert E. Torres

**ROBERT E. TORRES**  
JUDGE

**FILED**

MAR 07 2012

NEW YORK  
COUNTY CLERK'S OFFICE