

**Matter of Uddin v New York City Taxi & Limousine
Comm.("TLC")**

2012 NY Slip Op 32246(U)

August 29, 2012

Supreme Court, New York County

Docket Number: 102739/12

Judge: Joan B. Lobis

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: LOBIS
Justice

PART 6

MUSBA UDDIN
- v -
NYC TAXI COMMISSION
Commissioner

INDEX NO. 102739/12
MOTION DATE 6/12/12
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 18 were read on this motion (to) for annual agency determination.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1-3</u>
<u>4-14</u>
<u>15-18</u>

Cross-Motion: Yes No

UNFILED JUDGMENT

Upon the foregoing papers, it is ordered that this motion ~~and~~ notice of entry cannot be served by the County Clerk obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).
This judgment has not been entered by the County Clerk

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION and Order. Judgment to enter accordingly.

Dated: 8/29/12

JOAN B. LOBIS
J.S.C.

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
NEW YORK COUNTY: IAS PART 6**

-----X

In the Matter of the Application of

MISBA UDDIN,

Petitioner,

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

Index No. 102739/12

Decision, Order, and Judgment

- against -

THE NEW YORK CITY TAXI & LIMOUSINE
COMMISSION ("TLC"); DAVID YASSKY,
Commissioner, Chair, and Chief Executive
Officer of the TLC; THE OFFICE OF ADMINISTRATIVE
TRIALS AND HEARINGS ("OATH"); and
SUZANNE A. BEDDOE,
Chief Administrative Law Judge and
Chief Executive Officer of OATH.

Respondents.

-----X

JOAN B. LOBIS, J.S.C.:

Petitioner Misba Uddin brings this proceeding, by order to show cause, under C.P.L.R. § 7803(3), seeking an order annulling, vacating, and setting aside the revocation of his license to drive a New York City medallion taxicab ("Hack License"), and declaring that any witnesses complaining about petitioner must be produced in person and be subject to petitioner's cross examination. Respondents New York City Taxi and Limousine Commission ("TLC"), David Yassky, Commissioner and Chair of the TLC, the Office of Administrative Trials and Hearings ("OATH"), and Suzanne Beddoe, Chief Administrative Law Judge of OATH answer and assert various affirmative defenses.

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 141B).

Petitioner has held his Hack License since 2005. On six (6) occasions between August 2011 and February 2012, while driving his taxi, petitioner was involved in conflicts with passengers or, in one instance, a dispatcher, that resulted in consumer complaints. As a result of the complaints, administrative hearings were held before OATH administrative law judges (“ALJs”). In all of the hearings, the complaining witnesses appeared telephonically and, in all but one hearing, the witnesses identified themselves by first and last name (the sixth witness only identified herself by first name). Petitioner waived representation by counsel at all six hearings, and objected to the complaining witnesses appearing by telephone in only three of the hearings. Petitioner had a full opportunity to question the witnesses during their telephonic appearances. After each hearing, the respective ALJs issued determinations finding that petitioner had violated one or more rules and issued him fines and/or points on his license accordingly; as a result of the last two hearings on April 18, 2012, petitioner’s Hack License was revoked because he was found guilty of his third violation within a thirty-six (36) month period. 35 R.C.N.Y. § 54-02(e). Petitioner appealed the ALJs’ decisions to OATH’s Appeals Unit (“Appeals Unit”). In none of his appeals did he object to the complaining witnesses having appeared by telephone. With one exception, the ALJs’ determinations were fully affirmed by the Appeals Unit; in one case (in which the complainant did not reveal her last name), the decision was reversed in part and affirmed in part.

Petitioner sets forth that for four of six of the Appeals Unit’s determinations, he petitioned TLC Chair David Yassky to reject those determination. He states that his petitions for rejection were denied on May 2, 2012.¹

¹ Apparently, petitioner’s petitions to the TLC Chair were deemed denied as of May 2, 2012, because the TLC Chair failed to take action on the petitions within thirty (30) days of their delivery to him, the deadline being May 2, 2012.

TLC is the administrative agency charged with overseeing taxi and limousine service in New York City (N.Y.C. Charter § 2300), and it is authorized to promulgate rules and regulations to exercise its authority (N.Y.C. Admin. Code § 19-503). Pursuant to the City Charter, TLC shall create an administrative tribunal to adjudicate charges of violation of the administrative code, but by Executive Order Number 148,² Mayor Michael R. Bloomberg transferred all TLC tribunals to OATH. The rules that govern the adjudication of TLC matters (35 R.C.N.Y. § 68-01, et seq.) still govern the adjudication of these matters before OATH.

As to the issue of witnesses appearing at hearings, pursuant to Section 19-506.1(a) of the Administrative Code:

If [TLC] is unable to produce a complaining witness in person, where such witness' credibility is relevant to the charges made in the notice of violation, [TLC] shall make reasonable efforts to make such witness available during the hearing by videoconferencing or teleconferencing. If the complaining witness is not available during a hearing, [TLC] shall produce a statement outlining its efforts to produce such witness. An administrative law judge shall examine such statement and if he or she decides the commission's efforts to produce the complaining witness were inadequate, the administrative law judge shall dismiss the notice of violation.

The hearing procedures regarding the right to confront witnesses, which apply to TLC hearings conducted by OATH, contain language similar to Admin. Code § 19-506.1(a):

- (1) [TLC] will produce a complaining witness, if there is one, to testify in person where the witness's credibility is relevant. The Respondent will have the opportunity to confront a complaining witness, if the witness is produced.
- (2) If the witness does not personally appear, [TLC] will make reasonable efforts to have the witness available by videoconferencing or teleconferencing at the Hearing.

² Available at http://www.nyc.gov/html/ajc/downloads/pdf/eo_148.pdf.

(3) If [TLC] is unable to produce the witness in person or by video or teleconference, it will provide the ALJ with a statement outlining its efforts to produce the witness.

(4) If the ALJ determines that [TLC's] efforts were not adequate, the ALJ shall dismiss the notice of violation.

35 R.C.N.Y. § 68-11(e).

Mayoral Executive Order 148 adopted the Report and Recommendations of the Mayor's Committee on Consolidation of Administrative Tribunals and its appendix.³ The appendix sets forth a number of modification of TLC rules that apply to and govern the adjudication and disposition of TLC matters until adoption of new rules by OATH or TLC. One of the rule modifications in the appendix provides that 35 R.C.N.Y. § 68-16 is superseded and replaced with the rule that within thirty (30) days of the issuance of a decision by the Appeals Unit, either party may petition the TLC Chair to reject the determination (35 R.C.N.Y. § 68-16[a][1]); if the TLC Chair fails to take action on the petition within thirty (30) days of its delivery, the Appeals Unit's determination becomes TLC's final determination (35 R.C.N.Y. § 68-16[a][2] & [3]).

Petitioner argues that he has been denied due process and the ability to confront the complaining witnesses because the witnesses appeared telephonically at the hearings. He maintains that his identity was at issue at each of the hearings, and that he was not allowed to adequately confront his accuser face-to-face. He argues that it is TLC's policy to make no effort to produce witnesses in-person and to actually discourage complaining witnesses from appearing at hearings in-person or from revealing their identity. Petitioner cites to In re McBarnette v. Sobol, 83 N.Y.2d

³ Available at http://www.nyc.gov/html/ajc/downloads/pdf/consolidation_report_final_lh.pdf.

333 (1994), and its progeny, for the principle that parties whose rights are being determined in an administrative hearing must be given the opportunity to cross-examine witnesses. Petitioner acknowledges that he has yet to appeal two of the Appeals Unit's determinations to the TLC Chair, but argues that he need not exhaust his administrative remedies because TLC's and OATH's actions were unconstitutional and because resorting to the full administrative remedies would be futile.

In answering, respondents assert that the petition should be denied because petitioner failed to exhaust his administrative remedies; telephonic testimony is lawful, proper, and not constitutionally defective; and petitioner waived the argument that the witnesses should have appeared in person by failing to raise this objection in the underlying hearings or in his appeals to the Appeals Unit. Respondents also assert that the determinations are based on substantial evidence and that the matter should be transferred to the Appellate Division.

In reply, petitioner argues that even though he did not complete the appeals process for the two determinations that actually resulted in the revocation of his Hack License, the TLC appeals process violates his right to due process because 35 R.C.N.Y. § 68-16, as relied upon by respondents, is an unpublished rule that only the City has access to. In response to respondents' assertion that telephonic appearance by witnesses is lawful, petitioner asserts that TLC's position that telephonic appearance is equal in preference to in-person appearance is a misinterpretation of Admin. Code § 19-506.1; he cites a 2008 report of the City Council's Committee on Transportation, which discusses the proposed addition of section 19-506.1 to the Administrative Code, for the proposition that TLC should make a complaining witness available by telephone only where the TLC

demonstrates that it is unable to produce such witness in person. Petitioner argues that the ALJ should determine whether a witness may appear by telephone only after TLC demonstrates the necessity of a telephonic appearance. In reply to respondents' assertion that petitioner waived the argument that the witnesses should have appeared in person by failing to raise this objection in the underlying hearings or in his appeals to the Appeals Unit, petitioner argues that this defense must fail for the same reason that petitioner need not have exhausted his administrative remedies. Finally, petitioner argues that his petition does not raise issues of substantial evidence and is brought solely under C.P.L.R. § 7803(3).

The court will first address the threshold issue of whether petitioner failed to exhaust his administrative remedies. Although petitioner complains that respondents are relying on an unpublished rule, he availed himself of the administrative process, by filing a petition to the TLC Chair, for four of the six decisions issued. Petitioner concedes that he filed this petition before the TLC Chair had determined his petitions to reject the determinations to revoke his Hack License. Thus, while it is troublesome that the "rule" upon which respondents rely, in arguing that petitioner failed to exhaust his administrative remedies, was not subject to the rulemaking process (i.e., was not subject to public hearing nor publication in the New York City Record), it cannot be said that petitioner was ignorant of the appeals process adopted by OATH and TLC since jurisdiction over TLC tribunals was transferred to OATH by Mayoral Executive Order 148. The fact remains that petitioner did not exhaust the administrative remedies available, of which he had full awareness, with respect to the two determinations to revoke his Hack License, and the petition must be denied on this basis.

Regardless, even on the merits, petitioner could not prevail. In a petition under C.P.L.R. § 7803(3), the only questions that the court may determine are whether the underlying “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.” TLC’s presentation of telephonic witnesses during petitioner’s hearings did not violate petitioner’s rights. The right of confrontation applies only to criminal proceedings (N.Y. Const., Art. I, § 6; U.S. Const. 6th Amend.); however, there is “a limited right to cross-examine adverse witnesses in administrative proceedings.” In re Gordon v. Brown, 84 N.Y.2d 574, 578 (1994) (citations omitted). Petitioner was given the opportunity to cross-examine the complaining witnesses. Telephonic appearances neither violate the Administrative Code nor the Rules of the City of New York. A plain reading of 35 R.C.N.Y. § 68-11(a) and Admin. Code § 19-506.1(a) does not indicate any preference for in-person appearances over telephonic appearances and does not place the burden on TLC to explain why witnesses are appearing telephonically instead of in-person (TLC must make a statement explaining the unavailability of a witness only if the witness does not appear at all, not if the witness appears telephonically). The report of the City Council’s Committee on Transportation, which discusses the proposed addition of Section 19-506.1 to the Administrative Code (annexed to petitioner’s reply papers), simply sets forth: “section 19-506.1 would require TLC to make reasonable efforts to make available a complaining witness by videoconferencing or teleconferencing where such witness’ credibility is relevant to the charges made in the notice of violation and the TLC is unable to produce such witness in person.” There is no discussion in the Transportation Committee’s report about what efforts TLC is required to undertake to achieve an in-person appearance or whether an in-person appearance is

preferred over a telephonic appearance. Thus, with respect to allowing TLC to present complaining witnesses telephonically, the ALJs who conducted petitioner's hearings followed the law, the Administrative Code, and the Rules of the City of New York.

The petition does not raise any issues with respect to substantial evidence, thus transfer to the Appellate Division is unwarranted. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: *Aug. 29*, 2012

ENTER:

JB

JOAN B. LOBIS, J.S.C.

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 141B).