

**Baybusky v Department of Transp.**

2012 NY Slip Op 32587(U)

October 3, 2012

Supreme Court, New York County

Docket Number: 102383/2012

Judge: Geoffrey D. Wright

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

PRESENT: JUDGE GEOFFREY D. WRIGHT  
*Justice*

PART 62

Index Number : 102383/2012  
BAYBUSKY, RICHARD  
vs.  
DEPARTMENT OF TRANSPORTATION  
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). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the hereto annexed decisions*

### 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).

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

*G*  
**GEOFFREY D. WRIGHT**  
**AJSC**  
\_\_\_\_\_, J.S.C.

Dated: 10/3/12

- 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

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

-----X  
RICHARD BAYBUSKY,

Petitioner,

Index # 102383/2012

-against-

DECISION

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

-against-

THE DEPARTMENT OF TRANSPORTATION and  
JANETTE SADIK-KHAN, as Commissioner

Respondents.

**Present:**  
Hon. Geoffrey D. Wright

-----X Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the  
review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	___ 1 ___
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	___ 2 ___
Replying Affidavits.....	___ 3 ___
Exhibits.....	_____
Other.....cross-motion.....	_____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Petitioner moves, pursuant to CPLR Article 78, to vacate the decision of the respondent Department of Transportation (DOT) and reinstate petitioner to his position as maintenance worker with back pay and benefits from December 9, 2011, on the grounds that: (1) the determination was not supported by substantial evidence; (2) the determination was arbitrary and capricious; (3) the determination violates the Omnibus Transportation Testing Act of 1991, PL 102-143 (OTTA); and (4) the determination violates petitioner's fourth amendment rights.

**BACKGROUND**

Petitioner was employed by DOT as a maintenance worker for approximately 20 years

from 1990 through December 9, 2011, and he previously worked in a similar capacity at the City University of New York (CUNY). Petition, Ex. 1. From the summer of 2009 until his termination, petitioner was assigned to the Terminal Operations Division and, while so assigned, he did not perform any work on ferry boats. Petitioner's duties included daily inspection of the terminal grounds and building, looking for broken doors, defective equipment and malfunctioning lights. In addition, petitioner moved supplies and equipment and performed general cleaning functions. Petition, Ex. 2.

Maintenance workers, such as petitioner, are subject to supervision by skilled trades persons, such as electricians and plumbers. Pursuant to his job specification, petitioner was required to make minor repairs to masonry, woodwork, flooring and walls, as well as minor repairs to building electrical, plumbing and heating systems. *Id.*

On September 13, 2010, petitioner was assigned to Terminal Operations and, on that date, was selected for a random drug test, for which he tested positive. Petitioner asserts that such random drug tests are not uniformly administered at DOT to maintenance workers assigned to DOT headquarters. As a result of this drug test, petitioner was suspended, effective September 20, 2010 without pay for 30 days. Petition, Ex. 3.

On or about October 8, 2010, DOT served petitioner with disciplinary charges. Petition, Ex. 4. On October 19, 2010 petitioner's suspension was lifted, and DOT sought petitioner's termination. The matter was referred to Administrative Law Judge (ALJ) Faye Lewis (Lewis) for adjudication at the Office of Administrative Trials and Hearings (OATH).

The hearings were held at OATH on March 9 and 14, 2011 (Petition, Ex. 1), and both petitioner and DOT submitted documentary evidence and called witnesses. DOT called eight witnesses, and petitioner called two. Lewis' recommendation went into each witness' testimony in detail and found them to be credible. At the conclusion of the hearings, the parties submitted closing briefs. Petition, Ex. 9.

On July 13, 2011, ALJ Lewis issued her report and recommendations. Petition, Ex. 10. ALJ Lewis recommended that the drug test be suppressed and that the charges against petitioner should be dropped. *Id.* ALJ Lewis found that the drug test was an impermissible search, pursuant to the Fourth Amendment and OTTA<sup>1</sup>, because petitioner was not in a safety sensitive position. According to OTTA, random drug tests may be performed on persons performing safety sensitive tasks, and Lewis determined that petitioner was not in such a position.

At the hearings before ALJ Lewis, petitioner proffered two arguments for the suppression of the drug test. Petitioner's first argument was that he did not work on the ferries or ferry

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<sup>1</sup>OTTA requires drug and alcohol testing for workers in safety sensitive positions, which are defined in the Act as maintaining a revenue service vehicle or equipment used in revenue service. 49 CFR sec. 655.4.

equipment and, hence, was not in a safety sensitive position so as to be subject to a random drug test. However, Lewis found that petitioner was “immediately available,” if called upon by his supervisors, to work on the ferry and, therefore, to that extent, would be considered to be in a safety sensitive position.

Petitioner’s second argument concerned the actual work that he could be called upon to perform on the ferry, which is basic maintenance, and, since his work is supervised, petitioner said that such tasks do not fall within OTTA’s definition of safety sensitive work. ALJ Lewis found, based on *Burka v New York City Transit Authority* (739 F Supp 814 [SD NY 1990]), that because petitioner’s work was supervised, his potential work on the ferry would not impact public safety, because a supervisor would intervene between petitioner’s work and the public. Therefore, Lewis found that petitioner’s actual work would not be deemed safety sensitive. As a consequence, ALJ Lewis determined that petitioner’s employment did not subject him to random drug testing as an employee engaged in safety sensitive work.

Petitioner also argued that, although he could be assigned to work on the ferries, if he were to be so assigned, it would be out-of-title work, which is prohibited under the Civil Service Law. *Id.* ALJ Lewis did not find that such assignment would necessarily be considered out-of-title.

In her conclusion, ALJ Lewis found that “[o]n this record [DOT] has failed to establish that [petitioner] is a safety-sensitive employee within the meaning of the federal regulations and controlling case law. Thus, while [petitioner] is subject to warrantless testing after an incident or accident or upon a finding of individualized, reasonable suspicion, he is not subject to random drug testing under the ‘special needs’ exception to warrantless testing under the Fourth Amendment.”

*Id.*

On December 2, 2011, respondent Janette Sadik-Khan (Sadik-Khan) issued a determination based on ALJ Lewis’ recommendation. Petition, Ex. 12. In her determination, Sadik-Khan said that, while she was accepting ALJ Lewis’ finding that petitioner was not in a safety-sensitive position regardless of the fact that he was not specifically assigned to work on a ferry, she rejected ALJ Lewis’ finding that petitioner was not in a safety-sensitive position because of his job specifications. *Id.*

Sadik-Kahn, in reaching her conclusion, cited to OTTA, which defines “safety sensitive function” to include, among other things, “maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service.” 49 CFR § 655.4. Sadik-Kahn said that, because petitioner would be “immediately available” to perform such functions on a ferry, he is considered to be in a safety-sensitive position and, hence, subject to

random drug and alcohol testing. Therefore, Sadik-Khan did not suppress the marijuana test and, based thereon, found that petitioner's conduct warranted the penalty of termination. *Id.*

Sadik-Khan's determination became final on December 7, 2011, at which time petitioner was informed of his right to appeal her determination either to the New York Civil Service Commission or to a court, pursuant to Article 78. Petition, Ex. 13.

Petitioner has admitted that he received DOT's Controlled Substance and Alcohol Abuse Policy, which states that the consequence of a positive drug test is termination. Petition, Ex. 6.

Petitioner argues that Sadik-Khan's decision ignored the ALJ's findings, which were based on substantial evidence and determinations regarding credibility, and, as such, should have been afforded deference by the commissioner. Petitioner asserts that Sadik-Khan ignored the ALJ's assessments regarding credibility and based her decision solely on the results of the drug test that was suppressed by ALJ Lewis.

Petitioner maintains that there was no showing of special needs that would warrant the drug test administered to him, because his job function was not safety-sensitive. Petitioner states that he was never ordered to perform any work on the ferries, maintenance or otherwise. Therefore, any determination that he was "immediately available" to perform such work is conclusory and not supported by the evidence.

Lastly, petitioner asserts that the penalty of termination, based on his work history, should be overturned because it shocks the conscience.

Respondents, while answering the petition, have provided no memorandum of law and seek to have Sadik-Khan's determination upheld or to have the matter transferred to the Appellate Division.

In his reply to respondents' answer, petitioner, inexplicably, agrees that the matter should be transferred to the Appellate Division, even though he brought the matter before this court.

## DISCUSSION

"It is well settled that a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaronack, Westchester County*, 34 NY2d 222, 232 (1974). The arbitrary or capricious test is whether the action taken is justified or without foundation in fact. *See id.* at 231. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.* at 231.

The facts of this case are not in dispute; what is argued is the applicability of the facts to the law, which is a determination to be made by this court, not the Appellate Division, pursuant

[\* 6]  
to CPLR 7804 (g).

The issue raised in this proceeding is whether petitioner's job description falls within the definition of safety sensitive maintenance work, pursuant to OTTA regulations, thereby rendering him subject to random drug testing.

The courts have determined that governmental employees who perform safety sensitive tasks are subject to random drug testing. *Burka v New York City Transit Authority*, 739 F Supp 814, *supra*. As stated above, a DOT employee who performs maintenance on a ferry is defined as being in a safety sensitive position. 49 CFR § 655.4. All of the evidence presented indicates that, whereas petitioner never has performed any maintenance work on a ferry, he was considered to be "immediately available" to be assigned to perform such work. Petitioner claims that, based on the evidence that he had never worked on a ferry and that his work is supervised, Sadik-Kahn's determination is not supported by substantial evidence.

"This Court has defined 'substantial evidence' as such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact, and 'is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt.' The standard 'demands only that a "given inference is reasonable and plausible, not necessarily the most probable"' [internal citations omitted]."

*Matter of Ridge Road Fire District v Schiano*, 16 NY3d 494, 499 (2011).

In reaching her conclusion, Sadik-Khan stated that Lewis misinterpreted *Burka*, resting her recommendation on the fact that petitioner's work is supervised and that, under *Burka*, supervision can take the employee's task out of the category of being safety sensitive because the supervisor can address any mistakes that the subject employee may make before there is any negative impact on the public. However, in reviewing the testimony at the hearings, Sadik-Khan found that there was credible evidence presented by DOT's chief operating officer that petitioner's work could involve assisting in repairs in the ferry's main engine room while it is in service carrying thousands of passengers. Petition, Ex. 1. Therefore, Sadik-Khan found that, even though petitioner would be supervised, there might not be time for the supervisor to intervene between a mistake made by petitioner and harm to passengers. Based on this testimony, Sadik-Khan found that petitioner could be immediately called upon to perform safety sensitive work and is, consequently, subject to random drug testing.

In addition, Sadik-Khan pointed out that *Burka* was decided one year prior to the passage of OTTA, and that the above-quoted provision of OTTA regulations makes no distinction between those employees who are supervised and those who are not. Sadik-Khan stated that *Burka*'s emphasis on supervision is no longer a decisive factor in the determination as to whether

work is safety sensitive since OTTA.

Once Sadik-Kahn determined that petitioner was in a safety sensitive category, the random drug test was permissible and not subject to suppression. Hence, Sadik-Khan found that petitioner was properly terminated for testing positive for marijuana while in a safety sensitive position.

Based on the foregoing, the court concludes that Sadik-Kahn's determination is supported by substantial evidence and statutory authority. Further, based on DOT's enunciated zero tolerance policy regarding drugs and alcohol, of which petitioner was aware, the court concludes that the punishment imposed is not excessive, nor does it shock the conscience.

### CONCLUSION

Accordingly, it is  
ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

  
**GEOFFREY D. WRIGHT**  
**AJSC**

Dated: October 3, 2012

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JUDGE GEOFFREY D. WRIGHT  
Acting Justice of the Supreme Court