NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

In the Matter of the Application of MOHSEN ABDELAZIZ, Petitioner,	Index No. 18795/12
	Motion Date November 28, 2012
For a Judgment under Article 78 of the Civil Practice Law and Rules vacating and setting aside the decision of the Respondent that suspended the rights of the Petitioner from operating his vehicle under his two-way-radio agreement with the Respondent,	Motion Cal. No. 1
	Motion Seq. No. 2

- against-

MINUTEMEN, INC., Respondent.

The following papers numbered 1 to 21 read on this Article 78 petition for a judgment vacating the determination of respondent dated August 10, 2012, which upheld an April 30, 2012 determination to suspend petitioner's right to receive radio dispatch request calls for 120 days, with an option to buy back the suspension for $4,800.00, and imposed a fine of $1,000.00. Respondent cross-moves for an order dismissing the petition on the ground that it fails to state a cause of action, pursuant to CPLR 7804 (f) and 3211 (a) (7).

	Papers Numbered
Order to Show Cause - Petition - Affidavit - Affirmation - Exhibits	1-5
Emergency Affirmation	6
Affidavit of Service	7
Notice of Cross Motion - Affirmation - Exhibits	8-11
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Upon the foregoing papers, the petition and cross motion are determined as follows:

Respondent, Fleet Radio Dispatch Corp., doing business as Minutemen Inc. (Respondent), is a wholly-owned subsidiary of Owners Transport Communication, Inc. (OTC). Respondent is a cooperative black car transportation corporation which provides its shareholders with dispatching services through two-way radio transmissions to drivers. Respondent's clients maintain regular accounts with the corporation, utilizing a voucher system for payment. Petitioner, Mohsen Abdelaziz (Petitioner), is a shareholder and driver for respondent, and is permitted to drive an approved sedan and an approved sports utility vehicle (SUV).

Pursuant to the license agreement between the parties, petitioner agreed to abide by the rules and regulations of respondent. The operational rules are the same for all drivers whether they operate a sedan or SUV. It is undisputed that respondent's shareholders/licensees and drivers are regulated by an internal disciplinary program. A security committee, consisting of three members serve as judges on a rotating basis, conduct hearings and decide the penalties to impose upon a finding that a rule or regulation has been violated.

The admissible evidence reveals, that on January 12, 2012, petitioner accepted two dispatch jobs to transport clients of respondent. The first job required petitioner to take a client to Newark Airport, and the second job required that he pick up a client, in an SUV, in Manhattan at 7:16 p.m. After taking the first client to Newark Airport, petitioner accepted a second dispatch call to pick up a client in Morris Plains, New Jersey, and drive that client to Brooklyn, New York. Petitioner claims he did not have enough time to complete the Morris Plains job and pick up the client in Manhattan; he called the dispatch office, approximately two hours before the Manhattan job was due to start, to inform the office of this conflict. The dispatcher was able to find another SUV driver to perform the Manhattan job.

Petitioner alleges that on January 17, 2012, he received a telephone call from Papken Bayizian, Chairman of Communications, who advised petitioner that he was "off the SUV" list. He further avers that on January 24, 2012, he received a telephone call from Akm Azad, Vice President of Security, informing him that he must attend the Board of Directors' (the Board) meeting the next day, January 25, 2012, at 1:00 p.m. Petitioner claims the notice was improper, and he did not attend the meeting. He alleges that from January 25, 2012 through February 27, 2012, he was "taken off the air" without notice, and was not permitted to work, due to his failure to attend the January 25, 2012 meeting.

On April 24, 2012, petitioner received a written notice, dated April 23, 2012, charging him with a violation of "Rule #1-Jeopardizing Minutemen Business" based upon his conduct on January 12, 2012, and requiring him to attend a meeting before a judicial panel on April 30, 2012. He appeared before the panel on April 30, 2012 and offered an explanation for his conduct on January 12, 2012. He claimed that SUV drivers are allowed to "bail out" two hours before a job begins. All three members of the judicial panel found him guilty of the charge, and

imposed a penalty of four months "off the air" and a fine of $1,000.00, with the option of buying back the air time for $4,800.00.

Petitioner appealed the decision of April 30, 2012, and appeared before members of the Board on August 8, 2012. He testified and asserted that he was allowed to "bail out" of the job two hours prior to its commencement, admitted to working for a competitor in January and February 2012, when he was "off the air," and responded to questions posed by members of the Board. In a letter dated August 10, 2012, the Board informed petitioner that it had upheld the judicial panel's determination of April 30, 2012.

Petitioner commenced this Article 78 proceeding on September 11, 2012, and alleged that at the April 30, 2012 hearing the charges were read and a vote was taken without a hearing; no evidence was presented against him; and no one testified on behalf of respondent. Petitioner avers that in addition to the penalty and fine imposed, the Board imposed an additional penalty, as he was informed that in order to receive his radio rights back, he had to purchase a new SUV. He contends that the additional penalty of purchasing a new vehicle is not authorized by respondent's bylaws or rules.

Petitioner alleges that respondent's actions violated its rules and regulations, bylaws, and constituted a breach of contract. He was improperly charged with a Rule #1 violation, and should have only been charged with a Rule #20 bailout violation; he was denied his rights by not having proper charges brought against him, no evidence was presented against him, and he was not permitted to participate in a full and complete hearing on the merits when he was taken "off the air" from January 25, 2012 through February 27, 2012; he was never served with charges and specifications of the alleged violations of respondent's rules and regulations at any time prior to April 23, 2012; he was not permitted to contest any charges nor given time to prepare for the hearing scheduled for January 25, 2012, and that the phone call he received on January 17, 2012, was inadequate to permit him to prepare for a hearing, inform him of the charge and to participate in said hearing. Petitioner alleges that respondent's actions were in violation of its own procedures, in violation of lawful procedures, effected by errors of law, arbitrary and capricious, and an abuse of discretion. Moreover, respondent's determination is not supported by substantial evidence.

Respondent served an answer, interposing four affirmative defenses and cross-moved to dismiss the complaint on the grounds that the petition fails to state a cause of action. In its cross motion, respondent challenges petitioner's claim that he was out of work during the pendency of the disciplinary proceedings; asserts that petitioner was afforded a hearing before the security committee on April 30, 2012, and an appeal before the Board on August 7, 2012; petitioner failed to establish any defects in the administrative process; failed to demonstrate that respondents acted in an arbitrary and capricious manner; and failed to demonstrate that respondent exceeded or abused its discretion by imposing the penalty and fine.

It is well-settled that "[I]n considering a motion to dismiss for failure to state a cause of

action (CPLR 3211 [a] [7]), the pleading must be liberally construed (CPLR 3026). The sole criterion is whether [from the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Leon v Martinez*, 84 NY2d 83 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Rochdale Vil., Inc. v Zimmerman*, 2 AD3d 827 [2nd Dept 2003]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept1985], *affirmed* 66 NY2d 946 [1985]). 'When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v Ginzburg*, *supra* at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*Guggenheimer v Ginzburg*, *supra* at 275; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)." (*Gershon v Goldberg*, 30 AD3d 372 [2nd Dept 2006].)

Judicial review of the actions of respondent is limited to whether the Board's determination on August 10, 2012, which upheld the April 30, 2012 determination, is arbitrary and capricious, as the hearings were not held pursuant to direction by law (CPLR 7803). The scope of judicial review is limited and the court will not substitute its judgment for a decision of a governing body where proper procedures have been followed (*Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo School of Dental Medicine*, 295 AD2d 944 [4th Dept 2002]; *Matter of Shepotkon v Kordonsky*, 14 Misc3d 1216[A], 2007 NY Slip Op 50045 [U] [Sup Ct, Kings County 2007]).

Petitioner was charged with putting a pre-assigned SUV job at risk on January 12, 2012, in violation of "Rule #1: Jeopardizing Minutemen Business/Bailout," which provides as follows:

> A) Any Shareholder/Driver who commits an act which tends to put in jeopardy the charter of the corporation, the FCC radio license, TLC base license or one of our accounts, or engages in any act or omission which is detrimental to the good name and reputation of Minutemen and or the interest of the Shareholders shall be temporarily suspended by a Board of Director, and will be brought before a judicial panel; Penalty;[sic] four months off air (120 days), in addition to a monetary penalty of one thousand ($1,000.00) dollars. The Shareholder/Driver may buy back the time penalty <u>only</u> for one lump sum payment of four thousand eight hundred ($4,800.00) dollars. In addition to monetary penalties, the Shareholder/Driver can be expelled as a driver from our company.
>
> B) Any Shareholder/Driver who commits an act or deed or omits an act or deed and such act or deed omission is not covered in the following rules/penalty structure, and such act or omission of same is any way is harmful or detrimental to Minuteman and its Shareholders/Drivers or employees and said act or omission

> might impair the working aims and goals of Minutemen; Penalty; [sic] four months off air (120 days), in addition to a monetary penalty of one thousand ($1,000.00) dollars. The Shareholder/Driver may buy back the time penalty *only* for one lump sum payment of four thousand eight hundred ($4,800.00) dollars. In addition to monetary penalties, the Shareholder/Driver can be expelled as a driver from our company.

To the extent that petitioner asserts that he was improperly charged with a Rule #1 violation, and should have been charged with a Rule #20 violation pertaining to "bailouts," this claim is not subject to judicial review, as it is not the function of this court to determine the propriety of a charge brought against petitioner.

Petitioner has failed to establish that the notice given on January 24, 2012, requiring him to appear before respondent on January 25, 2012, via a telephone call was improper. Petitioner has submitted a copy of respondent's rules, revised on March 26, 2012, and a copy of the prior rules, dated 2010, which were in effect in January 2012. Rule # 37 (later renumbered Rule # 41) entitled "Board Invitation-Failure to Appear" provides as follows: There are various occasions when a Shareholder/Driver is requested to appear in front of the Board. These reasons may be, but are not limited to the following; [sic] to be appointed to a committee, to give information about accounts, to answer a penalty, to give witness, or appeal a penalty. If a shareholder fails to appear, he/she or any vehicles or radios they are leasing will be placed off the air until they appear. If a Driver fails to appear, he/she will be placed off the air."

Rule #37 is silent as to the issue of notice. As petitioner has not submitted a copy of respondent's bylaws, he has failed to establish that he was given improper or insufficient notice of the meeting, in violation of the bylaws. Thus, this court finds that petitioner's suspension from January 25, 2012 through February 27, 2012, comports with the provisions of Rule #1 and Rule #37, and was neither arbitrary nor capricious.

Petitioner was given written notice of the April 30, 2012 hearing date and the charge against him, and he actively participated at that hearing. The Judicial Panel found him guilty of jeopardizing respondent's business, and imposed the penalty of a suspension for 120 days and a fine of $1,000.00. Petitioner was given the option of buying back the 120-day suspension by paying a lump sum of $4,800.00, in addition to the $1,000.00 fine. Thus, the penalty imposed comports with the prescribed penalty for a Rule #1 offense, as listed in respondent's written rules.

Petitioner actively participated in the appeal before the Board on August 7, 2012. There is no evidence that the Board, in upholding the penalty imposed by the judicial panel, imposed any additional penalty. Although some discussion was had at the August 7, 2012 hearing as to whether petitioner had committed an additional violation by driving for a competitor, and the possible imposition of a penalty which would require the purchase of another SUV, petitioner was not charged with any violations and no additional penalty was imposed by either the

judicial panel or the Board. Petitioner's claim with respect to an additional penalty, therefore, has no basis in the record.

Petitioner failed to establish that the hearings conducted by respondent on April 30, 2012 and August 7, 2012, did not comport with respondent's rules or bylaws. Petitioner has presented no evidence with respect to the procedural rules and standards of evidence governing such hearings and appeals. The court, therefore, finds that petitioner has not established that the subject hearing and appeal violated any of respondent's rules or bylaws.

At the appeal hearing, petitioner stated that he was unable to perform each of the jobs he had been assigned; he telephoned the dispatch office two hours before the pick up time; and respondent located another SUV driver for the Manhattan client. Petitioner stated that SUV drivers are allowed to "bail out" of jobs if they give notice two hours in advance, and also claimed that he had forgotten about the Manhattan job when he accepted the Morris Plains job, and only remembered it when his phone alarm went off.

Petitioner acknowledges that the same rules apply to sedan and SUV drivers. Respondent's rules do not contain any provision which simply allow a sedan or SUV driver to "bail out" of a job two hours in advance of the start time. The court has reviewed the transcript of the hearings and finds that petitioner's own testimony supports the Board's determination to uphold the judicial panel's decision and penalty. This court, therefore, finds that the Board's determination is neither arbitrary nor capricious.

It is noted that although petitioner, in his affidavit, asserts claims for damages, no such claim is alleged in the petition.

Accordingly, petitioner has failed to establish that the determination of respondent dated August 10, 2012, is arbitrary and capricious; the cross motion by respondent to dismiss the petition is granted.

Dated: April 19, 2013

DARRELL L. GAVRIN, J.S.C.