Matter of Lauer v New York State Dept. of Motor Vehicles Appeals Bd.

2013 NY Slip Op 30958(U)

April 4, 2013

Supreme Court, New York County

Docket Number: 402203/12

Judge: Peter H. Moulton

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SCANNED ON 5/3/2013
[* 1]

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

PRESENT: Hon. Peter H. Moulton, *Justice* PART 40 B

Nicholas Lauer

For a Judgement under Article 78

v.

NYS Department of Motor Vehicles Appeals Board

INDEX NO. 402203/12

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	Papers Numbered
Notice of Motion/Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
MAY 03 2013
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

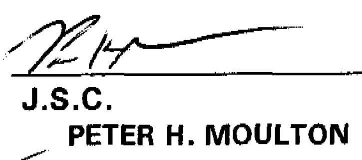
Upon the foregoing papers, it is ordered and adjudged that

Pursuant to this court's decision and order dated April 4, 2013, and the hearing held on today's date, the court finds that respondent did not provide proper notice to petitioner of the hearing held on October 29, 2010. Accordingly, it is ordered and adjudged that the matter is remanded to respondent agency for a hearing, held upon proper notice to the petitioner (petitioner gave his correct current address to respondent's counsel in open court on today's date), concerning the revocation of his driver's license.

This constitutes the decision and judgment of the court.

Dated: May 1, 2013

New York, New York



J.S.C.
PETER H. MOULTON

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

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Supreme Court: New York County
Part 40B

---------------------------------------X

In the Matter of the Application of

Nicklaus Lauer,

Petitioner,

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

-against-

Index No. 402203/12

The New York State Department of Motor Vehicles Appeals Board,

Respondent.

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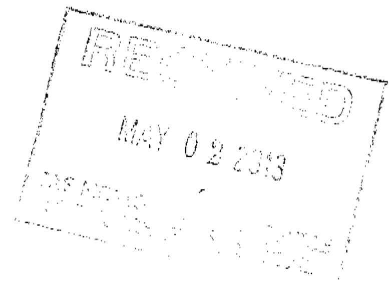
Peter H. Moulton, Justice

In this Article 78 proceeding petitioner pro se seeks to reverse a determination of the New York State Department of Motor Vehicles ("DMV"). In that determination, DMV denied petitioner's application to reopen a determination, rendered on default, that petitioner refused to submit to a chemical test after being arrested for driving while impaired, and related charges.

Background

On or about July 29, 2010, petitioner was arrested and arraigned on charges of driving while impaired. The arresting officer alleged that petitioner had refused to submit to a chemical test pursuant to VTL § 1194-2. At his arraignment petitioner was



given a temporary suspension notice which, inter alia, directed him to appear for a hearing on the issue of his alleged chemical test refusal on August 9, 2010.

Petitioner appeared for the refusal hearing on August 9, 2010, but the arresting officer did not appear. The temporary suspension of petitioner's driver's license was lifted. In what respondent calls the "unofficial transcript" of the August 9th hearing, the hearing officer states "[t]his hearing will be rescheduled to another date." Petitioner was told by the hearing officer that he would be notified of the adjourned date for the refusal hearing.

Respondent generated a notice dated September 13, 2010 ("September 13th notice"), informing petitioner that the refusal hearing had been adjourned to October 29, 2010. Petitioner contends he never received the September 13th notice. As proof that he was not given proper notice, he points to a copy of an envelope that is the last page of the record provided by respondent with its motion papers. The return address on the envelope is respondent's. The address portion of the envelope is blank. There is a "Return to Sender" stamp, with a date of September 25, 2010, on the envelope. Petitioner asks the court to draw the reasonable inference that this envelope contained the September 13th notice. Because the envelope contains no address, petitioner contends, it shows that he never received notice of the October 29 adjourned date of the refusal hearing. It is remarkable that respondent's

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papers are silent on this issue. Indeed, respondent does not mention the envelope.

It is undisputed that petitioner did not appear for the October 29th hearing. The arresting officer did appear. The hearing officer found that the evidence established that petitioner had refused the chemical test. The hearing officer revoked petitioner's license. On or about November 4, 2010, respondent mailed petitioner an Order of Suspension informing him of this revocation. The Order also provided that petitioner had to pay a $500 civil penalty before his license would be reinstated.

By letter received by respondent on December 20, 2010, petitioner requested the reopening of his case, based on his assertion that he had not received notice of the hearing. By letter dated January 28, 2011, the DMV Safety Bureau notified petitioner that a senior Administrative Law Judge had reviewed the hearing officer's determination and found that the case should not be reopened. While it is unclear from the parties' papers, petitioner apparently attempted a second time, in late April 2012, to reopen his case. A second letter from respondent to petitioner, dated April 27, 2012, reiterates the agencies' prior denial of this request.

Petitioner administratively appealed this determination using an Appeal Form dated May 5, 2012. In the form, petitioner made the following claims:

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1) that he had not been told at the August 9, 2010 hearing that he would have to appear on an adjourned date. This claim is contradicted by the unofficial transcript of the August 9th hearing, which contains a colloquy in which the hearing officer unequivocally tells petitioner that he would have to appear again for hearing, and that he would be informed of the date.

2) Petitioner contended that he was incarcerated from December 10, 2010 to October 18, 2011 in New Jersey, and that he was paroled to an inpatient facility from October 198, 2011 to March 7, 2012.

3) that "enclosed stamped documentation" demonstrated that a chemical test was never requested by the arresting officer.

Respondent's Appeals Board denied the appeal in a decision dated June 26, 2012. The decision states in relevant part:

> A review of the case file indicates that appellant was issued a notice at the arraignment, notifying him of the date, time and place of the hearing. The document further indicates that appellant's failure to appear at the hearing would constitute a waiver and result in the immediate revocation fo driver's license privileges. However, notwithstanding the foregoing notice, appellant failed to appear as required and has not provided a reasonable excuse for default. Accordingly, the determination should be affirmed.

Petitioner thereupon brought this Article 78 proceeding.

DISCUSSION

Courts may reverse agency action only when the agency's action are without sound basis in reason. The court may not substitute its judgment for the agency's, so long as the agency's decision was

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rational. (Matter of County of Monroe v. Kaladjian, 83 N.Y.2d 185, 189, (1994), citing Matter of Pell v. Bd. Of Educ., 34 N.Y.2d 222, 231, (1974)). The agency's determination need only be supported by a rational basis. (Matter of Jennings v. Comm., N.Y.S. Dept. of Social Svcs., 71 A.D.3d 98, 109, (2d Dept.2010)). Unless the agency's determination was arbitrary and capricious, it must be sustained (See Matter of Jennings v. Comm. N.Y.S. Dept. of Social Svcs., supra; Matter of Cortlandt Nursing Care Center v. Whalen, 46 N.Y.2d 979, 980.)

The copy of the un-addressed envelope that is contained the administrative record is some evidence that respondent did not act rationally in denying petitioner's appeal. The stated reason for the denial, quoted above, was that petitioner was given notice of the adjourned date of the refusal hearing yet he failed to appear on that date. If the un-addressed envelope contained the notice, which appears to be a reasonable inference, then the agency had within its own files irrefutable evidence that petitioner had not been given notice of the adjourned date of the refusal hearing. It would be irrational for the agency to ignore such evidence. Moreover, there is no indication that petitioner had knowledge of this evidence. It is likely that the envelope, upon its return to the agency, was simply placed in the agency's file on this matter.

A failure to notify petitioner would provide a reasonable excuse for his default. As for a meritorious claim, petitioner has

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provided sworn statements, and has consistently maintained in correspondence, that he was not asked to take a chemical test at the time of his arrest. In petitioner's absence on October 29, 2010, the agency had only the arresting officer's testimony on this point.

However, the copy of the unaddressed envelope is not conclusive proof that the agency acted arbitrarily. There may be other explanations for the un-addressed envelope. Unfortunately, respondent does not grapple with the significance of the envelope in its papers; it ignores it entirely. Accordingly, pursuant to CPLR 7804(h) the court will give the parties the opportunity to provide evidence at a hearing at 111 Centre Street, Room 623, on May 1 at 2:15, concerning whether petitioner was properly notified of the October 29th adjourned date of the refusal hearing. If this date is not possible for either side, the parties shall confer and present the court with alternate dates and times.

Respondent is directed to bring the original of the copy of the unaddressed envelope, and the envelope's contents, if any, to the hearing.

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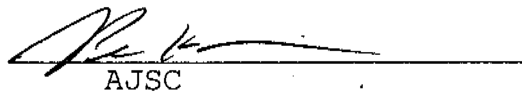
CONCLUSION

For the reasons stated, decision and judgment on the petition will abide the hearing to be held on May 1, 2013. This constitutes the decision and order of the court.

Date: April 4, 2013



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