[* 1]

SCANNED ON 5/10/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

ABOU YAYA NDAW

INDEX NO. 402583/2011

-v-

MOTION DATE

CITY OF NEW YORK ECB

MOTION SEQ. NO. 001

The following papers, numbered 1 to 2, were read on this ~~motion~~ petition to/for vacate and reverse respondent's determination

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1

Answering Affidavits — Exhibits No(s). 2

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants the petition to the extent set forth and otherwise dismisses this proceeding, pursuant to the accompanying decision. C.P.L.R. §§ 7803(3) and (4), 7806.

FILED
MAY 10 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/6/13

Lucy Billings, J.S.C.
LUCY BILLINGS
J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ..... ~~MOTION~~ PETITION 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: PART 46

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In the Matter of the Application of
ABOU YAYA NDAW,

Petitioner

- against -

CITY OF NEW YORK ECB,

Respondent

----------x

Index No. 402583/2011

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Petitioner seeks to vacate two default orders and judgments issued January 31, 2011, by respondent New York City Environmental Control Board (ECB), imposing $2,000 in fines for two notices of violations (NOVs) issued to petitioner, N.Y.C. Charter § 1049-a(d)(1)(d), and to reverse respondent's denials July 21, 2011, of his requests to reopen the hearing on the NOVs after he defaulted in appearing. After oral argument, based on respondent's administrative record and regulations, the court grants the petition and remands the proceeding to respondent for a new hearing for the reasons explained below. C.P.L.R. § 7803(3) and (4).

I. THE UNDISPUTED ADMINISTRATIVE PROCEEDINGS

After petitioner defaulted in appearing for a hearing on the NOVs originally scheduled January 31, 2011, prompting issuance of the default orders and judgments, N.Y.C. Charter § 1049-a(d)(1)(d), petitioner submitted a request March 9, 2011, to respondent vacate the default orders and judgments and to

reschedule the hearing. Respondent granted this first request to the extent of reopening the hearing and rescheduled it for May 10, 2011, pursuant to 48 R.C.N.Y. § 3-82(b), which requires respondent to grant requests for new hearings received within 45 days after the missed hearing unless respondent finds the request in bad faith.

After petitioner defaulted in appearing at the hearing May 10, 2010, respondent again issued default orders, which it mailed to him May 16, 2011. He again submitted a request to respondent July 14, 2011, to vacate the default orders and reschedule the hearing. Although respondent received this request more than 45 days after the hearing held May 10, 2011, at which petitioner defaulted, respondent did not deny the request for that reason. Respondent based its denial on its finding that "you [petitioner] were already granted one request and did not appear for your hearing." V. Answer Ex. K. Petitioner attests that he never received notice of the hearing rescheduled for May 10, 2011, explaining his nonappearance. V. Pet. ¶ 3.

II. APPLICABLE PROCEDURAL REQUIREMENTS

A. Respondent's Regulations

In denying petitioner's request to reopen the hearing at which petitioner defaulted May 10, 2011, respondent relies on 48 R.C.N.Y. § 3-82(e), which, referring to petitioner here as "respondent" there, provides:

> No more than one request for a new hearing under this section may be granted with respect to any one notice of violation unless the notice of the new hearing date was not mailed pursuant to subdivision (d) of this section. If the

> respondent is unable to appear on the hearing date scheduled after a request for a new hearing is granted, respondent may request that the hearing be rescheduled a final time.

(emphases added) 48 R.C.N.Y. § 3-82(d), to which § 3-82(e) refers, provides:

> If a request for a new hearing is granted, the Environmental Control Board shall send a notice to the respondent at the respondent's address stated on the request for a new hearing.

(emphasis added)

Respondent's Verified Answer ¶ 21 alleges that: "On March 22, 2011, notices of the new hearing date [May 10, 2011,] were generated through AIMS [the Automated Information Management System] and mailed to petitioner at his address." Yet respondent presents no affidavit or record of any mailing to petitioner on or near that date, as respondent does for other notices to petitioner. Nor does respondent point to any evidence that petitioner actually received notice of that rescheduled hearing or any other evidence, such as conduct by him, indicating he knew about the hearing May 10, 2011.

Based on respondent's administrative record, which is consistent with petitioner's sworn statement that he never received notice of the hearing rescheduled for May 10, 2011, "notice of the new hearing date was not mailed pursuant to subdivision (d)" of 48 R.C.N.Y. § 3-82. 48 R.C.N.Y. § 3-82(e). Therefore the limitation on granting more than one request for a new hearing does not apply. Id. Moreover, since petitioner was "unable to appear on the hearing date scheduled" after his request March 9, 2011, for a new hearing was granted, 48 R.C.N.Y.

§ 3-82(e), because he never received notice or otherwise knew about the hearing May 10, 2011, subdivision (e) further permits him to "request that the hearing be rescheduled a final time," which he did July 14, 2011. Id.

B. Due Process

To apply respondent's regulations so as to deny petitioner a new hearing under these circumstances would amount to a denial of constitutional due process, as due process requires that petitioner be given notice and an opportunity to appear to defend and rebut the charges against him and to submit evidence in response. E.g., Board of Educ. of Monticello Cent. School Dist. v. Commissioner of Educ., 91 N.Y.2d 133, 139-40 (1997); Gutierrez v. Rhea, ___ A.D.3d ___, 2013 WL 1458598, at *3-4 (1st Dep't Apr. 11, 2013); Pacicca v. Allesandro, 19 A.D.3d 500, 501 (2d Dep't 2005); Strom v. Erie County Pistol Permit Dept., 6 A.D.3d 1110, 1111 (4th Dep't 2004). See Wolfe v. Kelly, 79 A.D.3d 406, 410-11 (1st Dep't 2010); Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d 470, 472-73 (1st Dep't 2009); Whitbread-Nolan, Inc. v. Shaffer, 183 A.D.2d 610, 612-13 (1st Dep't 1992); Rice v. Hilton Cent. School Dist. Bd. of Educ., 245 A.D.2d 1106 (4th Dep't 1997). Without notifying petitioner of the date to appear, respondent undeniably deprived him of an opportunity to challenge the NOVs and present evidence that he did not commit the violations charged. Gutierrez v. Rhea, ___ A.D.3d ___, 2013 WL 1458598, at *3-4; Marciano v. Goord, 38 A.D.3d 217, 218 (1st Dep't 2007). Therefore his default in appearing must be vacated.

See, e.g., Jones v. New York City Tr. Auth., 293 A.D.2d 322 (1st Dep't 2002); Levy v. New York City Hous. Auth., 287 A.D.2d 281 (1st Dep't 2001); Bonik v. Tarrabocchia, 78 A.D.3d 630, 632 (2d Dep't 2010); Pelaez v. Westchester Med. Ctr., 15 A.D.2d 375, 376 (2d Dep't 2005).

Nor may respondent now rely on its receipt of petitioner's request July 14, 2011, more than 45 days after the hearing held May 10, 2011. 48 R.C.N.Y. § 3-82(b). Even if the evidentiary record shows petitioner's noncompliance with that regulatory requirement, since respondent did not base its denial on such noncompliance, the lateness of petitioner's request may not furnish a new reason for denying petitioner a hearing. Mayo v. Personnel Review Bd. of Health & Hosps. Corp., 65 A.D.3d at 472; Pantelidis v. New York City Bd. of Stds. & Appeals, 43 A.D.3d 314, 316-17 (1st Dep't 2007); Benson v. Board of Educ. of Washingtonville Cent. School Dist., 183 A.D.2d 996, 997 (3d Dep't 1992).

Reliance now on a new justification for denying petitioner a new hearing would constitute an impermissible post hoc rationalization. New York State Ch., Inc., Associated Gen. Contrs. of Am. v. New York State Thruway Auth., 88 N.Y.2d 56, 75 (1996); L&M Bus Corp. v. New York City Dept. of Educ., 71 A.D.3d 127, 135 (1st Dep't 2009), aff'd as modified on other grounds, 17 N.Y.3d 149, 159 (2011); Missionary Sisters of Sacred Heart, Ill. v. New York State Div. of Hous. & Community Renewal, 283 A.D.2d 284, 287-88 (1st Dep't 2001); 72A Realty Assocs. v. New York City

Envtl. Control Bd., 275 A.D.2d 284, 286 (1st Dep't 2000). "It is impermissible for respondents to raise issues . . . that were not raised on the record at the time" of the administrative determination. AAA Carting and Rubbish Removal, Inc. v. Town of Southeast, 17 N.Y.3d 136, 143 n.4 (2011).

III. CONCLUSION

For the foregoing reasons, the court grants the petition to the extent of vacating the two default orders and judgments originally issued January 31, 2011, by respondent, which imposed $2,000 in fines for NOVs issued to petitioner, and vacating respondent's denials July 21, 2011, of his requests to reopen the hearing on the NOVs after he defaulted in appearing. C.P.L.R. § 7803(3) and (4). The court remands this proceeding to respondent for a new hearing on the NOVs after reasonable advance notice of the hearing date to petitioner. This decision constitutes the court's order and judgment granting the petition to the extent set forth above and otherwise dismissing this proceeding. C.P.L.R. § 7806.

DATED: April 19, 2013

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.