

**Matter of Funes v New York State Dept. of Motor
Veh.**

2013 NY Slip Op 31082(U)

May 15, 2013

Sup Ct, New York County

Docket Number: 100476/2013

Judge: Eileen A. Rakower

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

PRESENT: RAKOWEN
Justice

PART 15

HUGO FONES

- v -

NY STATE DEPT MOTION
NOTICES

INDEX NO. 100476113

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3

4, 5

Cross-Motion: Yes No

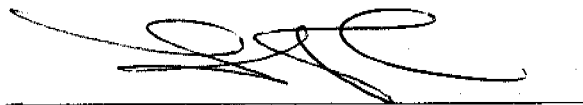
Upon the foregoing papers, it is ordered that this motion

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 IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 5/15/13



HON. EILEEN A. RAKOWER ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

In the Matter of the Application of
HUGO FUNES,

Petitioner,

INDEX NO. 100476/2013

MOTION DATE _____

- v -

MOTION SEQ. NO. 1

NEW YORK STATE DEPARTMENT OF MOTOR
VEHICLES,

MOTION CAL. NO. _____

Respondent.

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

Notice of Motion/ Order to Show Cause

Answer — Affidavits — Exhibits

Replying Affidavits

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and affidavits, Exhibits, etc. cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).
PAPERS NUMBERED 1, 2, 3, 4, 5

Cross-Motion: Yes X No

Petitioner Hugo Funes ("Petitioner") brings this Order to Show Cause pursuant to CPLR Article 78 to compel Respondent New York State Department of Motor Vehicles ("DMV" or "Respondent") to change Petitioner's license reapplication status to "APPROVED". The issues presented are whether the DMV's decision to deny petitioner's license violated his due process rights and was arbitrary and capricious. This court denied Petitioner's request for a temporary restraining order after oral argument on March 22, 2013. The court requested that the parties provide the minutes of that argument, but none have been submitted to the court.

Petitioner works in sales for Marjam Supply Company, a construction supplies company located in Brooklyn, New York, and lives in Staten Island. His complaint alleges that his "inability to drive to work at least quadruples [his] commute", and his "inability to drive to job sites and meet with existing and

prospective customers seriously hinders [his] ability to work and could jeopardize [his] employment status at any time.”

Petitioner was charged with two alcohol-related driving offenses in New York, in 2000 and 2010, and one alcohol-related driving offense in New Jersey in 2010. Petitioner pled guilty on December 6, 2001 and September 15, 2011 in connection with the 2000 and 2010 New York incidents, respectively. Petitioner pled guilty on August 17, 2010 in connection with the 2010 New Jersey incident.

Petitioner has been convicted of fifteen separate moving violations that carry points against a driver’s license within New York State in the last twenty five years.

Petitioner’s license was revoked on September 15, 2011. On January 22, 2012, Petitioner submitted an application for relicensing to the DMV. The DMV processed payment for the application on March 13, 2012.

Prior to the adoption of the September 25, 2012 regulations of the commissioner, when a person applied for relicensing after revocation, the review of the applicant’s driving record encompassed only the 10 years preceding the date of application. If the applicant had three or more alcohol-related incidents on the record, the Driver’s Improvement Unit (“DIU”) would impose an “extended waiting period” of six months for each incident.

Pursuant to the September 25, 2012 revision of the regulations of the commissioner, Section 136.5, provides:

Upon receipt of a person’s application for relicensing, the Commissioner shall conduct a lifetime review of such person’s driving record. If the record review shows that:

- (1) the person has five or more alcohol- or drug-related driving convictions or incidents in any combination within his or her lifetime, then the Commissioner shall deny the application.
- (2) the person has **three or four alcohol- or drug-related driving convictions or incidents** in any combination within

the 25 years preceding the date of the revocable offense and, in addition, has **one or more serious driving offenses within the 25 years preceding the date of the revocable offense**, then the Commissioner shall deny the application. [emphasis added].

A "serious driving offense" is defined as a:

(I) a fatal accident; (ii) a driving-related Penal Law conviction; (iii) conviction of two or more violations for which five or more points are assessed on a violator's driving record pursuant to Section 131.3 of this subchapter; or (iv) **20 or more points from any violations**. [emphasis added].

On November 1, 2012, Petitioner received a denial of his relicensing application from the DMV. The letter stated that his drivers license/privilege was denied because he is "deemed a persistently dangerous driver." The letter quotes Commissioners' Regulation 136.5(a)(3) and 136.5(b)(2). The letter lists 32 "incidents/convictions/accidents" which "constitute grounds for such denial".

On November 18, 2012, Petitioner appealed the denial. On December 24, 2012, the appeal was denied pursuant to Vehicle and Traffic Law Section 510(5) and (6) and Commissioner's Regulation 136. The decision states:

Department records indicate that appellant's driving record includes three alcohol/drug-related incidents or convictions. In addition, 38 points have been assessed to appellant's driving record within the 25 years preceding the date of revocable offense, which constitute a serious driving offense.

The DMV indicates that at time of Petitioner's application, all applications with three or more alcohol or drug related offenses on their record were held by the DMV for decision until promulgation of the September 25, 2012 Notice of Emergency Adoption. Upon the promulgation of the September 25, 2012 Notice of Emergency Adoption, Petitioner's application for relicensing was evaluated under the standards set forth in the amended Commissioner's Regulation section 136.5.

Petitioner argues that the DMV's decision to "hold back" the determination of his relicensing application, so that it could intentionally subject petitioner to planned but unwritten regulations, violates due process. However, petitioner's due process claim is now moot. The proper remedy for a claim based on delay in the making of an administrative determination is a proceeding in the nature of mandamus to compel, seeking an order requiring the agency to render a decision. (*Gianelli v. NYS Div. Of Housing & Community Renewal*, 142 Misc.2d 285 [Sup Ct 1985]). As Petitioner did not seek to compel Respondent to render a decision on his application before November 1, 2012, when his application was decided, such claim is now moot.

Additionally, Petitioner asserts that he had only two alcohol- or drug-related driving convictions preceding the date of his last revocable offense in September 2011, and therefore, his application for relicensing should not have been denied pursuant to Commissioner's Regulation 136 as revised on September 25, 2012.

It is well settled that possession of a license is a privilege, not a right, which is subject to reasonable regulation. (*See, Papaioannou v. Kelly*, 14 AD3d 459, 788 NYS2d 378 [1st Dept 2005]); *Montanez v. City of NY Dept of Buildings*, 8 Misc 3d 405, 797 NYS2d 863 [Sup Ct NY County 2005]). Judicial review of a discretionary administrative action, such as the issuance of a license, is limited to finding whether there was a rational basis for the administrative action. (*Sullivan County Harness Racing Assn. v. Glasser*, 30 NY2d 269, 283 NE2d 603, 332 NYS2d 622 [1972]). Thus, the only issue for consideration by the court is whether the administrative determination— in this case whether petitioner qualifies for the license in question— was arbitrary and capricious, or an abuse of discretion (*Arrocha v. Board of Educ. Of City of NY*, 93 NY2d 361, 712 NE2d 669, 690 NYS2d 503 [1999]). An action is arbitrary if it "is without sound basis in reason and is generally taken without regard to the facts." (*Pell v. Bd. of Educ.*, 34 NY2d 222, 313 NE2d 321, 356 NYS2d 833 [1974]). Once a rational basis for the administrative determination is shown, the function of judicial review has ended, and the agency's determination must be upheld, even where the court might have reached a contrary result. (*Sullivan County Harness Racing Assn v. Glasser*, 30 NY2d 269, 283 NE2d 603, 332 NYS2d 622 [1972]).

The DMV's interpretation of its own regulation must be deferred to by the court where it is not manifestly irrational or unreasonable. As the DMV's

interpretation of Section 136.5 is read to include the last offense which led to the revocation of Petitioner's license (the revocable offense), it is therefore triggered where a driver has three convictions for alcohol-related offenses including the revocable offense. A review of Petitioner's lifetime driving record indicates that he has three alcohol-related driving offenses within 25 years, including the revocable offense, and that he accumulated 38 points for various offenses within 25 years, well over the 20 point threshold needed to establish a Serious Driving Offense. Accordingly, the DMV's determination was not arbitrary and capricious.

Wherefore, it is hereby,

ORDERED AND ADJUDGED that this Petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 15, 2013



J.S.C.
HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

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