Matter of Belkebir v New York City Dept. of Health & Mental Hygiene
2013 NY Slip Op 32365(U)
August 26, 2013
Supreme Court, New York County
Docket Number: 100564/13
Judge: Joan B. Lobis

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS PART 6
Justice

Rebah Belkebir

-v-

NYC Dep't of Health and Mental Hygiene

INDEX NO. 100564/13

MOTION DATE 8/1/13

MOTION SEQ. NO. 01

The following papers, numbered 1 to 24, were read on this motion to/for Art. 78 Petition

Notice of Motion / Order to Show Cause – Affidavits – Exhibits ____ No(s). 1-11

Answering Affidavits – Exhibits ____ No(s). X-mot: 12-16; ans. 17-24

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER + JUDGMENT

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):

Dated: 8/26/13

JOAN B. LOBIS, J.S.C.

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
NEW YORK COUNTY: IAS PART 6

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In the Matter of the Application of

REBAH BELKEBIR,

Petitioner,

Index No. 100564/13

-against-

Decision, Order and Judgment

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Respondent.

For an Order and Judgment Pursuant to Article 78 of the *Civil Practice Law and Rules*.

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JOAN B. LOBIS, J.S.C.:

Rebah Belkebir, an Army veteran with service-related disabilities, petitions under Article 78 of the New York Civil Practice Law and Rules. He seeks an order and judgment against the Respondent, the New York City Department of Health and Mental Hygiene (DOH), declaring that the DOH's recent interpretation of protective legislation for veterans, Sections 32 and 35 of the General Business Law, is affected by an error of law. The DOH notified Petitioner in April that those protections no longer apply to him in light of this Court's series of decisions, including Rossi v. New York City Department of Parks and Recreation, Index No. 103794/2012, 2013 N.Y. Misc. LEXIS 1092 (N.Y. County Sup. Ct., Mar. 20, 2013)[1] (collectively the "2013 Decision"), and, therefore, Petitioner must comply with all local laws and regulations governing food vending. In an

[1]Related proceedings appear at Belkebir v. New York City Department of Parks and Recreation, Index No. 103796/2012, 2013 N.Y. Misc. LEXIS 1097 (N.Y. County Sup. Ct., Mar. 20, 2013); Diaz v. New York City Department of Parks and Recreation, Index No. 103795/2012, 2013 N.Y. Misc. LEXIS 1098 (N.Y. County Sup. Ct., Mar. 20, 2013); and Rossi v. New York City Department of Parks and Recreation, Index No. 103792/2012, 2013 N.Y. Misc. LEXIS 1117 (N.Y. County Sup. Ct., Mar. 20, 2013).

interim decision and order dated June 27, 2013, this Court denied the DOH's cross-motion to dismiss the petition for failure to state a cause of action. Respondent now files its answer, opposing the petition. For the reasons set forth below, the petition is granted.

In the 2013 Decision, a food-vending veteran with service-related disabilities challenged notices of violation that he had received in operating a hot dog pushcart. The notices had been issued under Section 35-a of the New York General Business Law. Under Section 35-a, the New York City Department of Consumer Affairs (DCA) issues specialized vending licenses that restrict by location, size of vending area, and number of vendors per area, among others, veterans with service-related disabilities who are general vendors. This Court, construing the face of the statute, found in its 2013 Decision that Section 35-a distinguishes general vendors, who are regulated by the DCA, from certain other types of vendors, including food vendors, who are regulated by the DOH. In the 2013 Decision, this Court construed Section 35-a and held that the provision, which was enacted as a narrow exception to the veteran protections provided under New York General Business Law Sections 32 and 35, did not apply to restrict food vendors.[2]

In response to the 2013 Decision, the DOH issued a letter dated April 1, 2013, signed by its General Counsel, Thomas Merrill, addressed to "To Whom It May Concern," indicating that the DOH would construe the 2013 Decision as excluding Petitioner and those food-vending veterans similarly-situated to Petitioner from protections contained under Sections 32 and 35 of the General

[2]No motion to reargue or renew was submitted following the 2013 Decision. The Respondent in those proceedings has filed notices of appeal.

Business Law (DOH Interpretation).[3] Failure to comply with all local laws regulating food vending would subject them, notwithstanding their veteran status and service-related disabilities, to "appropriate enforcements [sic] proceedings." Mr. Belkebir now petitions, challenging the DOH Interpretation and seeking a declaration that the protections under Sections 32 and 35 of the General Business Law continue to apply to his food vending.

In challenging the DOH Interpretation, Mr. Belkebir contends that the DOH is threatening him by unilaterally rewriting New York state law in reaction to this Court's 2013 Decision. Due to his physical disabilities he can only vend several days a week. The location where he vends is lighter-volume, allowing him to comfortably work despite his physical limitations.

This Court has issued injunctive relief pending disposition of the petition. At oral argument on this petition and related petitions brought by other food-vending veterans with service-related disabilities, the DOH indicated that seventy-nine joint holders of food permits and specialized vending licenses were notified in the April 1, 2013, letter of the DOH Interpretation. Another of the petitioners, Elizabeth Rossi, testified that of those notified, approximately thirty also have mobile food vending permits, and of those thirty, only five individuals actually vend food. The DOH defends its legal construction that following this Court's 2013 Decision the veterans' protections under Sections 32 and 35 of the New York General Business Law no longer apply to food vendors. The DOH further contends that this Court's construction that those Sections still apply, as set forth in this Court's interim decision and order dated June 27, 2013, in this action which denied the

[3]The DOH was not a party to the proceedings in the 2013 Decision.

DOH's cross-motion to dismiss, "defies logic."

In an Article 78 proceeding, the judiciary reviews an administrative action to determine whether that action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). Where an issue is limited to "pure statutory interpretation," a court is not required to defer to an administrative agency but rather should consider the plain language of the statute. E.g., Dunne v. Kelly, 95 A.D.3d 563, 564 (1st Dep't 2012); see also Lynch v. City of N.Y., 965 N.Y.S.2d 441, 445 (1st Dep't 2013) (statute must be read and given effect as written by legislature). Agencies may not "create whatever rule they deem necessary" that conflicts with the statutes that they interpret. N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health and Mental Hygiene, 2013 WL 3880139 (1st Dep't July 30, 1013); see also County of Westchester v. Bd. of Trustees, 9 N.Y.3d 833, 835-36 (2007) (administrative agency's regulations must not conflict with state statute or that statute's underlying purposes); Edenwald Contracting Co. v. City of N.Y., 86 Misc.2d 711, 720 (N.Y. County Sup. Ct. 1974) (agency cannot step beyond powers conferred upon it by statute); aff'd, 47 A.D.2d 610 (1st Dep't 1975). A court may render a declaratory judgment pursuant to Section 3001 of the Civil Practice Law and Rules.

The New York State legislature has long recognized the plight of war veterans like Mr. Belkebir in creating protective legislation. More than one hundred years ago the Legislature enacted Section 32 of the General Business Law, which authorizes veterans "to hawk, peddle, vend,

and sell goods, wares or merchandise . . . ." Id.; e.g., Kaswan v. Aponte, 142 Misc.2d 298, 300 (Sup. Ct. N.Y. County 1989). Protections under Section 32 were expanded through the enactment of Section 35 of the General Business Law, which singled out veterans with service-related injuries for even greater protection, allowing them to operate pushcarts on "any street, avenue, alley, lane or park of a municipal corporation." Id.; e.g., Kaswan v. Aponte, 160 A.D.2d 324 (1st Dep't 1990). On its face, neither state statute limits protections to general vending as distinguished from food vending.

As time went by, however, the New York State legislature determined that certain restrictions on veterans' rights were needed. The Legislature enacted Section 35-a of the General Business Law, which, as this Court held in its 2013 Decision, authorizes the local licensing authority in cities having a population of at least one million to create "specialized vending licenses" for general vendors who "hawk, peddle, vend and sell goods, wares or merchandise." 2013 N.Y. Misc. LEXIS 1092, at *6 (quoting Gen. Bus. Law § 35-a(1)(a)). The Department of Consumer Affairs, which regulates general vendors, but not food vendors, is the local licensing authority authorized under New York City law to issue those licenses. Id. at *8 (citing 6 R.C.N.Y. § 2-315; N.Y.C. Admin. Code § 20-452(b)); see also Ousmane v. City of N.Y., 22 Misc.3d 1136(A), at *3 (N.Y. County Sup. Ct., Mar. 17, 2009).

This Court rejects the DOH Interpretation that this Court's 2013 Decision vitiated any protections under Sections 32 and 35 of the General Business Law for food-vending veterans with service-related disabilities. The DOH Interpretation is ultra vires, and accordingly, plainly affected by an error of law. E.g., N.Y. Statewide Coalition, 2013 WL at 3880139; see also Lynch v. City of N.Y., 965 N.Y.S.2d at 445-46; 439 East 88 Owners Corp. v. Tax Comm'n, 307 A.D.2d 203 (1st

Dep't 2003). To consider the issue this Court must recount the straw man argument upon which the Respondent bases its legal argument. The DOH's entire argument is premised on false representations of this Court's 2013 Decision and the law which it interpreted. Specifically the DOH claims that "since GBL §35-a which permits disabled veterans 'to hawk, peddle, vend and sell goods, wares or merchandise or solicit trade upon the streets and highways' in cities of more than one-million people was found to not apply to food vendors . . . .," because Section 32 contains the same phrase, "to hawk, peddle, vend . . ." the same result must apply to that Section.

There are several fallacies contained in those representations by the DOH. First, Section 35-a does not permit individuals "to hawk . . ." That permission was long ago conferred by Section 32. In Section 32, the phrase "to hawk, peddle, vend . . ." is used as a predicate: "Every honorably discharged member of the armed forces . . . shall have the right to hawk, peddle, vend and sell goods, wares or merchandise . . . ." Section 35-a, in contrast, is narrowly limited to allowing certain restrictions in larger cities on disabled veterans with service-related disabilities who are engaged in general vending. 2013 N.Y. Misc. LEXIS at 1092. Respondent completely ignores the distinct uses of the phrase "to hawk, peddle, vend" as it appears in the two statutes, Section 32 and Section 35-a. In Section 35-a, the phrase "to hawk, peddle, vend" is used adjectivally, to describe the category of vendors affected by the Legislature's enactment of limited restrictions requiring specialized vending licenses for general vendors. See Gen. Bus. § 35-a(1)(a).

Although not raised by the pro se Petitioner, this Court further notes that the DOH Interpretation is not only affected by error of law, but also, procedurally defective under the New York City Administrative Procedure Act (CAPA). See N.Y.C. Charter § 1041(5) (defining rule to

include statements of general applicability that materially affect rights or procedures); § 1043 (rules may not be adopted except according to notice and publication procedures set forth in that provision); see also, e.g., Union of City Tenants v. Koch, 177 A.D.2d 328, 330 (1st Dep't 1991)(policy statements violated CAPA); Ousmane, 22 Misc.3d(A) 1136, at *4-*6; 1700 York Assocs. v. Kaskel, 182 Misc.2d 586, 592-93 (N.Y.C. Civ. Ct., Apr. 5, 1999) (DOH interpretation unenforceable absent compliance with rulemaking procedures); Edenwald Contracting Co., 86 Misc.2d at 721 (rejecting "semantic sophistry" of agency term, "directive," to consider its "substantive effect"), aff'd, 47 A.D.2d at 610. Accordingly, it is

ADJUDGED and DECLARED that the DOH Interpretation is ultra vires, and Sections 32 and 35 of New York General Business Law continue to apply to food vending; and it is further

ADJUDGED that the petition is granted.

Dated: August 26, 2013

ENTER:

JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
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