

Matter of Tesker v New York City Taxi & Limousine Commn.
2013 NY Slip Op 33270(U)
December 12, 2013
Supreme Court, New York County
Docket Number: 102579/12
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of
LEONID TESKER,

Petitioner,

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

INDEX NO. 102579/12

MOTION SEQ. NO. 001

-against-

UNFILED JUDGMENT

NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, and GARY WEISS, as Deputy Commissioner of the NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, Respondents.

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 4118).

The following papers numbered 1 to 4 were read on this motion by petitioner for a judgment pursuant to Article 78.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1

2, 3

4

Cross-Motion: ☐ Yes ☒ No

Leonid Tesker (petitioner) commenced this proceeding pursuant to CPLR Article 78, seeking a judgment reversing and annulling the respondent New York City Taxi and Limousine Commission (TLC) Chairperson's determination, dated February 14, 2012 (TLC's determination), which denied petitioner's application for a for-hire vehicle driver's license, and for an order directing the TLC and respondent Gary Weiss, Deputy Commissioner for Legal Affairs/General Counsel of the TLC (Deputy Commissioner) (collectively, respondents), to grant petitioner's application. Petitioner proffers that the TLC's determination should be reversed on the grounds that, *inter alia*, the action of the Deputy Commissioner was in excess of his jurisdiction, and the action of respondents was arbitrary and capricious or an abuse of

discretion as defined in subdivisions (2) and (3) of CPLR 7803. Respondents are in opposition to petitioner's application and submit a Verified Answer with three Affirmative Defenses.

BACKGROUND

Petitioner proffers that ALJ W. Tjong (ALJ Tjong) in his decision dated January 9, 2012, issued a recommendation that petitioner was fit to be granted a TLC for-hire vehicle (FHV) operator's license. This decision was issued after a hearing was conducted wherein petitioner's testimony was taken, his record evaluated, demeanor and credibility were considered and his supporting documentation was submitted. Petitioner was convicted on September 2, 2010 of the Class A misdemeanor of criminal possession of a firearm in the 4th degree and he received a three-year sentence of probation. Petitioner was sixty-seven years old at the time of the offense. ALJ Tjong addressed petitioner's prior conviction, in his attempt to return a dangerous weapon he found in the bushes while walking his dog, and found that petitioner "expressed regret and remorse at the circumstances leading to the misunderstanding - and for his decision to follow his lawyer's advice to plea guilty to something for which he vehemently maintains his innocence" (Verified Petition, ¶ 11). ALJ Tjong in his recommendation notes that petitioner's DMV record is so unblemished despite petitioner being a taxicab driver in the 1980's, that the only issue for discussion at the fitness hearing was his prior conviction which petitioner states was the result of a serious misunderstanding and ineffective assistance of counsel. ALJ Tjong noted that petitioner did not renew his TLC medallion operator license in 1989 when it expired. Furthermore, ALJ Tjong found that petitioner's DMV record showed

absolutely safe driving habits, with no violations or infractions, especially considering how long he has driven both personally as well as professionally. I believe he can be trusted not only to be a good and safe driver, but also to be honest with the Commission and all law enforcement arms of the government, at any level and in any jurisdiction (*id.*).

Notwithstanding the above, the Deputy Commissioner rejected ALJ Tjong's

recommendation and seven letters submitted in support of his application and denied petitioner's FHV license application by letter dated February 14, 2012, on the basis that petitioner showed a lack of remorse, pointing to petitioner's "attempt to deny responsibility for [his] conviction and [his] casting blame on [petitioner's] lawyer for advising [him] to plead guilty to a crime that [petitioner] denied committing" (*id.* at ¶ 13). The Deputy Commissioner also stated that, "[i]t is difficult to find sufficient evidence of rehabilitation if there is no evidence of remorse" (*id.*). Petitioner challenges the TLC on the basis that the decision did not allege that petitioner has failed to comply with any other condition of licensure as governed by Administrative Code § 19-505(b), which sets forth the qualifications for a license issued by the TLC, other than (b)(5) which requires that the applicant be of "good moral character." In support, petitioner submits the decision of *Islam v New York City Taxi and Limousine Commission*, in Supreme Court, New York County under Index No. 111754/08 (*Islam*) rendered by Justice Goodman. Petitioner claims that the ALJ is charged with the responsibility of findings of fact and are not for review by the Deputy Commissioner, pursuant to CAPA and the TLC Rules.

Respondents submit a Verified Answer arguing, *inter alia*, that after petitioner's application was received, the fingerprint response for the petitioner showed that he had been arrested on March 19, 2010 for Criminal Possession of a Weapon in the second degree, a Class C Felony, and also showed that on September 2, 2010 petitioner pled guilty to a Criminal Possession of a Weapon in the Fourth Degree, a Class A Misdemeanor (Verified Answer ¶ 58). Further, petitioner had re-applied for a Medallion Operator License in 2003 but was denied for failure to pass the written exam. Respondents state that the petition should be denied as the decision to deny petitioner's application was rational, reasonable, and supported by the administrative record and the Deputy Commissioner was well within his discretion to deny the ALJ's recommendation. Further, respondents proffer that petitioner's argument is incorrect

insofar as the TLC is not mandated to conduct fitness hearings of applicants, and cites to 35 RCNY § 6-20.

In reply, petitioner argues that he was discharged from probation as of May 9, 2012, pursuant to an early discharge by the Court. As such, petitioner argues that the TLC decision should be rejected as it stated that petitioner had only completed one year and four months of his three-year probation term, and such is evidence that he has been rehabilitated.

STANDARD

The standard of review in this Article 78 proceeding is whether the TLC's determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; *see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of an agency within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; *see also Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

Moreover, an "[a]gency determination of a license application requires a certain amount of discretionary judgment-making which courts will not disturb absent a finding that such

judgments were arbitrary or capricious" (*Matter of Montanez v City of N.Y. Dept. Of Bldgs.*, 8 Misc3d 405, 407 [Sup Ct NY County 2005]; see *Matter of Pell*, 34 NY2d at 231).

Article 23-A encompasses sections 750–755 of the Correction Law. Section 752 prohibits the unfair discrimination against persons previously convicted of criminal offenses who are applying for a license or employment, and states the following:

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or

(2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Section 753(1) of the Correction Law sets forth factors to be considered when denying or approving a license or job application for any individual with a criminal conviction. The factors are:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure... of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license ... sought or held by the person.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Section 753(2) of the Correction Law also states the following:

In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

As set forth in Correction Law § 701, a Certificate of Relief is issued to eligible offenders so that they are not automatically barred from employment based on the conviction. Section 701(1) states the following, in pertinent part:

A certificate of relief from disabilities may be granted as provided in this article to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein.

Section 701(3) of the Correction Law explains that the Certificate of Relief does not prevent any "judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege."

DISCUSSION

Petitioner claims that the portion of the TLC Decision which states that petitioner lacked remorse regarding his prior conviction is not based on the record and ALJ Tjong's recommendation, which is similar to what troubled the Court in the *Islam* matter. Additionally, petitioner argues that 'lack of remorse' which the Deputy Commissioner cited as reasoning why he denied petitioner's application is not one of the relevant factors to be considered when deciding whether to grant or deny an application for licensure.

Respondents state that petitioner's criminal record reflects that he does not possess the required fitness necessary for a TLC license, and the denial of same was a proper exercise of TLC's discretion in licensing matters, pursuant to 35 RCNY §§ 68-20(e), and its determination should be upheld. Specifically, respondents proffer that the TLC's determination reviewed the

totality of petitioner's criminal record and the evidence he submitted in support of his good moral character as well as the eight factors pursuant to Article 23-A of the Correction Law, § 753, which an agency must take into consideration when making a determination concerning a previous conviction.

In the TLC determination, the Deputy Commissioner found that "petitioner failed to provide sufficient evidence to assure the TLC that he was sufficiently rehabilitated and would not pose a risk to the public or that he could be trusted to follow all of the TLC rules and regulations" (Verified Answer ¶ 70). Specifically, the Deputy Commissioner noted that petitioner had only completed one year and four months of his three-year probation sentence and the importance of an applicant to show his ability to independently follow rules and regulations governing our society (*id.*). The Deputy Commissioner also took issue with petitioner's attempt to deny responsibility for his conviction and casting blame on his attorney for advising him to plead guilty to a crime he denied committing, which indicates a lack of remorse.

The Court does not agree with the Deputy Commissioner's decision to deny petitioner's application and reject the ALJ's recommendation that petitioner is not rehabilitated on the basis of a 'lack of remorse' and as such will re-weigh the relevant factors of the Correction Law. Although the TLC is not mandated to conduct fitness hearings of license applicants 35 RCNY § 6-20, one was held in this instance and the ALJ is in the best position to determine petitioner's credibility. Furthermore, similar to the facts in the *Islam* matter, the petitioner's prior conviction is not related to the job and license of operating a vehicle for hire. In fact, ALJ Tjang noted that petitioner had a perfect driving record and the Deputy Commissioner's decision does not set forth how the prior conviction would interfere with petitioner's driving duties. Other than the misdemeanor conviction, petitioner had never been in any trouble. Although petitioner was still serving his three-year probation sentence during this proceeding, he has since been discharged and submits with his reply a notice of early termination of probation, effective May 9, 2012.

Although the seriousness of a misdemeanor criminal possession of a firearm conviction is not to be taken lightly, it is a misdemeanor and not a felony charge. It is important to note that this crime did not involve injury to anyone, or sustained loss to anyone at the time it occurred or in the future. Although petitioner at age 68 was sentenced to three years of probation, same was discharged early before he had even completed two years. In addition to the favorable findings of ALJ Tjong, petitioner supplied seven letters in support of his application, one from a company Prime Time Transportation, Inc. that has offered petitioner a provisional position if he is granted his license. Furthermore, as noted by ALJ Tjong, all of the letters introduced by petitioner "show that he is highly regarded by his peers, friends and family as skilled, honest, kind, hardworking, respectful, reliable, trustworthy, punctual and competent, among other superlative qualities" (Verified Petition, exhibit D at pg. 3-4). Although in the TLC's decision the Deputy Commissioner mentioned that he reviewed the letters in recommendation in support of petitioner's application, including the Certificate of Relief from Disabilities, he found that petitioner was not sufficiently rehabilitated as he had not completed his probation, as well as showing a lack of remorse. As stated above, petitioner has since been discharged early from his probation, and a lack of remorse is not one of the relevant factors to be considered by the Correction Law.

For the reasons discussed above, the Court finds that the Deputy Commissioner in the TLC's decision failed to comply with the Correction Law and abused and acted in an arbitrary and capricious manner and must revisit petitioner's application (*see Gallo v OMRDD*, 38 AD3d 984 [3d Dept 2008]; *see also Islam v New York City Taxi and Limousine Commission*, 2008 NY Slip Op 33326[U] [Sup Ct, NY County 2008]).

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED and ADJUDGED that Leonid Tesker's Article 78 petition is granted to the

extent that the decision of the Deputy Commissioner/TLC is vacated and the matter is remitted to the New York City Taxi and Limousine Commission for further proceedings consistent with this Decision, Order and Judgment; and it is further,

ORDERED that the portion of Leonid Tesker's Article 78 petition seeking an Order directing the New York City Taxi and Limousine Commission and the Deputy Commission to grant petitioner's application for a for-hire vehicle's driver's license is denied; and it is further,

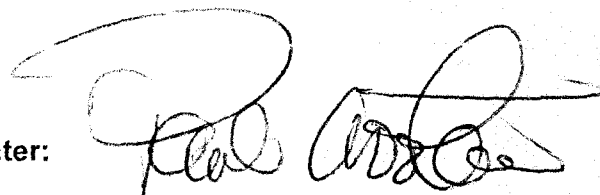
ORDERED that counsel for petitioner is directed to serve a copy of this Decision and Order, with Notice of Entry, upon the respondents and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated:

12/12/13

Enter:



PAUL WOOTEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
 Check if appropriate: : ☐ DO NOT POST ☐ REFERENCE

UNFILED JUDGMENT

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