D&B Auto Repair v State of New York Dept. of Motor Veh.
2013 NY Slip Op 33814(U)
January 4, 2013
Supreme Court, Bronx County
Docket Number: 260678/12
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

D&B AUTO REPAIR and DAMIEN TORIBIO,

DECISION/ORDER

Petitioners.

-against-

Index No.: 260678/12

STATE OF NEW YORK DEPARTMENT OF MOTOR VEHICLES, BARBARA J. FIALA, AS COMMISSIONER OF THE STATE OF THE NEW YORK DEPARTMENT and DEBORAH DUGAN, CHAIRPERSON OF THE APPEALS BOARD OF THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

Respondents.

X

The following papers numbered 1 to 7 read on the below motions noticed on **August 29, 2012** and duly submitted on the Part IA15 Motion calendar of **October 10, 2012**:

Papers Submitted	Numbered
Pet..'s Affirmation in support, memo of law, exhibits	1,2,3
Pet.'s Motion for Stay, Aff.	4,5
Resp. Answer, exhibits	6,7

Upon the foregoing papers, petitioners D&B Auto Repair and Damien Toribio (hereinafter "Petitioners") move this Court for an order pursuant to CPLR Article 78 (1) staying of the "double-fine penalty" imposed upon Petitioners pursuant to CPLR 7805, pending determination of this proceeding, and (2) vacating and/or modifying the "double fine" determination imposed upon Petitioners by respondents New York State Department of Motor Vehicles ("DMV"), Barbara J. Fiala, as Commissioner of the DMV ("Commissioner"), and Deborah Dugan, Chairperson of the Appeals Board of the DMV ("Chairperson") by their attorney, Eric T. Schneiderman, Attorney General of the State of New York (collectively "Respondents"), and (3) returning the matter back to Respondents for the imposition of a finding

consistent with the determination of this Court. Petitioners also have filed a separate motion for a "stay" of the imposition of civil monetary fines in this matter. Respondents have answered the Petition. Both applications are consolidated and disposed of in the following Decision and Order.

I. Background

Petitioners are licensed by the DMV to perform repairs and inspections of motor vehicles, and to issue inspection stickers in accordance with the DMV's rules and regulations. Petitioner Toribio is the owner of petitioner D&B Auto Repair. Mr. Toribio is an inspector who is certified to perform the inspections and issue inspection stickers. The Petition asserts that Respondent DMV is a governmental subdivision of the State that is responsible for, among other things, regulating the automotive inspection program, and the issuance and regulation of inspection licenses to facilities and inspectors.

Here, the Petition alleges that the individual inspector (Toribio) and the repair shop (D&B) were both charged with conducting one hundred and six (106) motor vehicle inspections that were allegedly not performed in accordance with DMV regulations. Specifically, the violations charged Petitioners with the use of a substitute vehicle or an electronic device during emissions testing done during the inspection process on one hundred and six (106) separate occasions. The use of such a substitute vehicle or device constituted a violation of Vehicle and Traffic Law and DMV Regulations. After the hearing, the ALJ found, as follows:

(1) *As to D&B Auto Repair*

Charge 1-106: V and T Law §303(e)(3): Committing fraud, deceit or misrepresentation in securing the license or a certificate to inspect vehicles or in the conduct of licensed or certified activity. The penalty imposed was a fine of $37,100 ($350 per violation. 106 violations in total), and the inspection license of D&B Auto Repair was suspended for 90 days.

(2) *As to Toribio, individually*

Charge 1-106: V and T Law §303(e)(3): Committing fraud, deceit or misrepresentation in

securing the license or a certificate to inspect vehicles or in the conduct of licensed or certified activity. The penalty imposed was a fine of $37,100 ($350 per violation, 106 violations in total), and the inspection license of Mr. Toribio was suspended for 90 days.

Petitioners timely appealed the ALJ ruling to the DMV Appeals Board. On August 9th, 2012, the appeal was denied.

The Petition asserts that the only witness to testify on behalf of the DMV at the hearing was Automotive Facilities Inspector ("AFI") Vito Vitouli. The AFI testified that this was the first time that the shop had any violation, and that subsequent inspections revealed no violations. The Petition notes that Mr. Vitouli testified that its not the DMV's position to "beat up the little guy" and upon recent examination, the shop had "changed his alleged ways." Petitioners state that they have already voluntarily served their suspension time and are only challenging the monetary penalties.

Petitioners now argue that the penalty imposed is "of such a nature to be catastrophic to this small business." The penalty imposed upon both D&B Auto Repair ($37,100) and Toribio ($37,100, for a total of $74,200), was unreasonable under the circumstances of this case. They argue, *inter alia*, that the record does not support the penalty imposed, and it was disproportionate to the alleged violations. Further, the penalties were excessive in light of the fact that they were, in essence, "double" identical fines against both the shop itself and its owner. The Petition asserts that the Appeals Board merely "rubber stamped" the "double fine" penalty imposed by the ALJ after the hearing. Petitioners argue that "the fine itself is arbitrary and capricious when one considers that the licenses involved were suspended."

In their Answer, Respondents argue initially that this matter must be transferred in its entirety to the Appellate Division, First Department, pursuant to CPLR 7804(g), since Petitioners raise the question of whether the administrative determination was supported by substantial evidence. Substantively, they argue that the Respondents' determination was supported by substantial evidence, not arbitrary and capricious, and was rendered in accordance with applicable laws.

II. Applicable Law and Analysis

As a preliminary matter, the Court must determine whether there is a "substantial evidence" question here that requires transfer to the Appellate Division pursuant to CPLR 7803(4) and 7804(g). Under 7803(4), an Article 78 Special Proceeding may be based on "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence." When a substantial evidence question is raised under this section, CPLR 7804(g) requires the court to transfer the case to the Appellate Division "for disposition." This provision prohibits the Supreme Court from reaching the issue of whether an agency determination is supported by substantial evidence where the determination was "made as the result of a hearing required by law." (*Verdell v. Lincoln Amsterdam House, Inc.*, 27 A.D.3d 388, 391 [1st Dept. 2006]). Whether a petition raises a substantial evidence question, however, is a determination properly decided by the court and not by how the parties characterize the issues. (*Robinson v. Finkel*, 194 Misc.2d 55, 63 [Sup. Ct., N.Y. Cty., 2002]). The court will look to whether the Article 78 petition challenges "the respondent's application of a rule to undisputed facts." (*Id.*) Where there are no issues of fact, no substantial evidence question arises. (*Sunrise Manor Center for Nursing and Rehab. v. Novello*, 19 A.D.3d 426 [2nd Dept. 2005]).

Here, the Petition alleges that the imposed monetary penalty was not warranted because there was no evidence of a continuing pattern of violations or recidivism, and there was no evidence that a safety issue was presented. Petitioners are not challenging the violations themselves, and they do not appear to dispute the facts of this case or the ALJ's findings of numerous VTL §303(e)(3) violations. Petitioners essentially admit the violations and note that they have served the imposed suspension. Rather, Petitioners challenge the monetary penalties imposed in light of the fact and circumstances surrounding this matter. The Petition, therefore, is actually based on whether the penalty or discipline imposed by Respondents was arbitrary and capricious, or an abuse of discretion. (CPLR 7803[3]). The criterion for determining whether the punishment is to be disturbed is whether the punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (*Pauling v. Smith*, 46 A.D.2d 759, 760 [1st Dept. 1974], *citing Matter of Pell v. Board of*

Education, 34 N.Y.2d 222 [1974]). This determination is made as a matter of law, upon the basis of "arbitrariness" rather than "substantial evidence." (*Id.*) This matter, therefore, need not be transferred to the Appellate Division, but will be decided under this standard. (*Id. See also Sunrise Manor Ctr., supra.*, 19 A.D.3d at 427).

An administrative determination by an agency is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v. Board of Education, supra*, at 231). The court must give "great weight and judicial deference" to the expertise of the administrative agency's determinations, and may not substitute its judgment for that of the administrative body. (*Id.* [citations omitted]). Penalties imposed by government agencies will be modified only if the penalty is "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." (*See Matter of Empire Auto Care, Inc. v. New York State Dept. Of Motor Vehicles*, 55 A.D.3d 730, 731 [2nd Dept. 2008], citing *Matter of Pell, supra.*).

In this matter, the ALJ determined, and the Petitioners do not dispute, that the inspection facility (D&B Auto Repair) and its certified inspector (Toribio) had committed one hundred and six (106) violations of VTL §303(e)(3). The inspector and facility were fined $350 for each violation, and each entity's license was suspended for ninety (90) days.

VTL §303(h) permits the commissioner, "in addition to *or* in lieu of" suspending or revoking a license, to order "the licensee or certified inspector" to pay a monetary penalty. (Emphasis suppled). Subsection (h) authorizes imposition of a penalty of "no less than three-hundred fifty dollars and no more than one thousand dollars" upon "each and any" violation of §303(e). Notwithstanding the fact that the conceded violations were not "safety related," the ALJ found that Petitioners engaged in fraudulent activity to circumvent State emissions testing requirements. Petitioners used a substitute vehicle or an electronic device for exhaust emissions, in violation of VTL 303(e)(3), on one hundred and six (106) separate occasions. Still, the ALJ only imposed the minimum penalty amount per violation ($350), as required by law. Petitioners do not dispute that they committed one hundred and six (106) violations of the VTL. The monetary penalty imposed, therefore, was not arbitrary or disproportionate in light of the 106 separate offenses conceded by Petitioners.

Petitioners argue that the fine is unreasonable or the product of a computing error, since it was assessed against both the individual inspector (Toribio) and the inspection facility (D&B Auto Repair), totaling $74,200 in penalties. Turning again to the statute, VTL §303(h) authorizes the commissioner to order "the licensee *or* certified inspector" to pay a monetary penalty. Under New York DMV Regulations, 15 NYCRR 79.14(b), in addition to or in lieu of suspension or revocation of an official inspection station license, "the commissioner may require *an official inspection station* to pay a civil penalty in accordance with subdivision (h) of section 303 of the Vehicle and Traffic Law." (Emphasis supplied). There appears to be no statutory or regulatory authority to uphold Respondents' imposition of a duplicate monetary fine on both the official inspection station as well as an inspector himself for each violation of VTL §303(e). There is limited case law on point. It is true that in *Tyler v. New York State Dept. of Motor Vehicles* 284 A.D.2d 645 (3rd Dept. 2001), cited by Respondents, the court upheld the DMV's revocation of both the inspection station license and the inspector's certified inspector card upon finding that the inspector violated VTL 303(e)(3). Regarding the monetary fine, however, the ALJ only imposed an "aggregate" civil penalty of $1,700 for the alleged violations, which was also upheld by the Appellate Division. The court did not itemize these penalties in its decision. In *Somma v. Jackson*, likewise, the petitioner's inspection station license as well as her certified inspector card were revoked upon a finding that her facility violated "three counts each" of VTL §303(e)(1) and four (4) distinct DMV regulations. As a result of the violations, and in addition to the license revocation, the petitioner was fined an "aggregate" sum of $4,200. (268 A.D.2d 763 [3rd Dept. 2000]). The Appellate Division upheld the ALJ's penalties as reasonable under the circumstances. Again, however, there is no discussion into the particulars of the aggregate penalty. In *Empire Auto Care, Inc., supra.*, 55 A.D.3d 730, also cited by Respondents, there is no discussion of the imposition of monetary penalties.

Upon review of the applicable statute, regulations, and case law, there appears to be no support for the imposition of a duplicate civil monetary penalty on *both* a certified inspection facility as well as the individual certified inspector for each established violation. In this matter, it is undisputed that Petitioners violated 106 counts each of VTL §303(e)(3), and the ALJ assesed a fine of $350 per violation. The proper aggregate monetary penalty, therefore is $37,100,

assessed against the official inspection station. (15 NYCRR 79.14[b]).

III. Conclusion

Accordingly, it is hereby

ORDERED, that the Petition is granted solely to the extent that the imposition of the civil penalty of $37,100 as against petitioner Damien Toribio, individually, is vacated, and it is further,

ORDERED, that the imposition of the civil penalty of $37,100 as against petitioner D&B Auto Repair is affirmed, and it is further,

ORDERED, that Petitioners' motion to stay the above monetary penalties is denied as moot.

This constitutes the Decision and Order of this Court.

Dated: 1/4/13

Hon. Mary Ann Brigantti-Hughes, J.S.C.