

Matter of Churchill v New York State Dept. of State

2014 NY Slip Op 30091(U)

January 9, 2014

Sup Ct, New York County

Docket Number: 100207/13

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON
SUPREME COURT JUSTICE
Justice

PART 40B

Index Number : 100207/2013
CHURCHILL, SCOTT E.
vs.
NYS DIVISION OF LICENSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

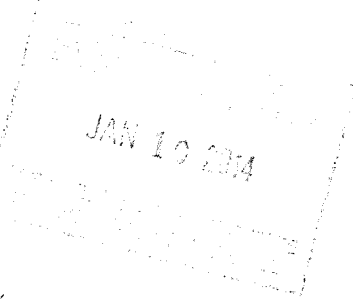
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

*decided in accordance with
the written decision & judgment of
the judge's date*

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: 1/9/14

[Signature], J.S.C.
HON. PETER H. MOULTON
SUPREME COURT JUSTICE

- 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 : STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 40-B
 ----- X
 In the Matter of SCOTT E. CHURCHILL and :
 EASTERN PRIVATE DETECTIVES, :
 :
 Petitioners, : Index No.:
 : 100207/13
 :
 -against- :
 :
 NEW YORK STATE DEPARTMENT OF STATE, :
 DIVISION OF LICENSING SERVICES, :
 :
 Respondent. :
 ----- X

Peter H. Moulton, J.S.C.

Petitioners pro se in this Article 78 proceeding challenge the decision of an Administrative Law Judge dated October 1, 2012, which revoked the private investigator's license of petitioner Scott E. Churchill.

Respondent moved to dismiss the petition on the basis of petitioners' failure to exhaust administrative remedies. Petitioners subsequently moved 1) to disqualify as "attorney of record" an attorney who worked on the case for the Department of State who is in fact not the attorney representing respondent in this Article 78 proceeding, and 2) to change venue.

For the reasons set forth below the respondent's motion is granted and the proceeding is dismissed.

BACKGROUND

Prior to the revocation of his license, Churchill had been a licensed private investigator in New York State since 2004.

Churchill is the president and qualifying officer of petitioner Eastern Private Detectives, Inc.

One of the duties of the respondent Department of State is the licensure and regulation of private investigators. In 2011 the Department of State began a investigation into allegations of professional misconduct by Churchill. The investigation resulted in the commencement of an administrative proceeding against petitioners in 2012. The Department of State charged petitioners with submitting multiple license renewal applications containing material misstatements. These misstatements concerned licensing agencies' denial of handgun permits to Churchill.

A notice of hearing was sent to Churchill by certified mail on October 11, 2011. The cover letter concerning the notice of hearing recites that it is accompanied by a booklet entitled "Guide to Statutes and Rules related to Hearings." Churchill states that neither he nor his attorney received the booklet. Churchill's statement is unsworn. The former attorney, who represented petitioners during the administrative proceeding but not herein, does not submit an affirmation concerning his alleged non-receipt of the booklet.

The hearing went forward on July 18, 2012 before Administrative Law Judge Ziedah F. Giovanni.

In the challenged decision, dated October 1, 2012, ALJ Giovanni held that the Department of State had proven several of the

charges against Churchill. The ALJ found, inter alia, that Churchill had obtained his private investigator license under false pretenses. The court found Churchill's explanation for omitting information from his renewal applications to be "unpersuasive." The ALJ revoked Churchill's private investigator license.

The October 1, 2012 decision was duly served on petitioners. They did not take an administrative appeal. Instead, they brought this Article 78 proceeding.

DISCUSSION

Petitioners offer no facts in support of their motion to disqualify David Mossberg as attorney of record. Churchill states that he has made a complaint about Mr. Mossberg before the New York City Bar Association. As noted above, Mossberg is not representing respondent in this proceeding, although he did work on the agency hearing. He has submitted affirmations to provide factual allegations concerning the Department of State's actions in revoking petitioners' license. Petitioners' motion for a change of venue is apparently based on petitioners' suspicion that other lawyers in the Secretary of States' City office will engage in "impropriety." Petitioners do not explain what potential "impropriety" they are concerned about. Both motions are specious and are denied.

Respondent's motion to dismiss for failure to exhaust administrative remedies is based on the rules and regulations

implementing the state's Administrative Procedure Act, in particular 19 NYCRR § 400.2(k). The relevant portions of § 400.2 are set forth below:

(j) After the hearing the administrative law judge shall issue a decision based on findings of fact and conclusions of law. Such decision shall be final and binding when issued unless an appeal is taken pursuant to subdivision (k) of this section.

(k) Any of the parties may appeal the decision ... to the Secretary of State within 30 calendar days of receipt. Such an appeal shall be made by filing with the Secretary of State, and serving on the other party or parties, a written memorandum stating the appellant's arguments and setting forth specifically the questions of procedure, fact, or law or policy to which exceptions are taken
....

The Secretary of State ... may, in his or her discretion, stay the effective date of the decision, and shall, based solely on the record on appeal [with the option of directing oral argument], either confirm the decision in writing, make a written, superceding decision including a statement as to why he or she has not confirmed the administrative law judge's decision, or remand the matter to the administrative judge for additional proceedings.

The use of the phrase "may appeal" arguably raises the question whether an appeal to the Secretary of State is necessary to exhaust administrative remedies. This interpretation is arguably supported by subsection (j)'s statement that the ALJ's decision is "final and binding" unless an appeal is taken.

Petitioners also point to a section in DOS's guide given to applicants for private detective licenses which states:

The action of the Department of State in granting or refusing to grant or to renew a license under this article, or in revoking or suspending ... such a license ... shall be subject to review by a proceeding instituted under Article 78 of the Civil Practice Law and Rules.

This passage does not speak to exhaustion of administrative remedies, and so does not support petitioners' argument that the court has jurisdiction over this case.

A more coherent explanation of the phrase "may appeal" in § 400.2(k), one that comports with the general policy in favor of exhaustion of administrative remedies, is that it merely acknowledges that not every license applicant will want to pursue his claim after denial by an ALJ. The word "shall" would connote a mandatory appeal by a license applicant.

CPLR 7801 provides that an Article 78 proceeding may not be brought "to challenge a determination which is not final or can be adequately reviewed by appeal ... to some other body or officer." The Court of Appeals has consistently found that if further agency appeal will prevent, ameliorate, or render the dispute moot, the administrative decision is not sufficiently final for purposes of triggering a Article 78 proceeding. (See Essex County v Zagata, 91 NY2d 447, 453-4.) Here, pursuant to § 400.2(k) the Secretary of State has plenary authority to confirm or supercede the

administrative law judge's decision, or remand the matter to the administrative law judge for additional proceedings. This sort of authority allows for an agency to craft its own interpretation of its empowering statutes in making determinations on license applications. Once an agency decision is truly final, then it is subject to judicial review. However, before a court reviews agency action, the agency should be allowed to engage in whatever iterative process it deems useful in executing the tasks set to it by the legislature.

Perhaps for these reasons, the Second Department has held that the specific section at issue herein, § 400.2(k), requires an administrative appeal to the Secretary of State before an Article 78 proceeding may be commenced. In Podolsky v Daniels the court held "[t]hat the language of 19 NYCRR 400.2(k) is couched in permissive, rather than mandatory terms, does not excuse the petitioner's failure to exhaust the administrative remedies available to them." (21 AD3d 559, 560.) Petitioners have not cited, and the court could not find, any contrary authority from the First Department. In the absence of such contrary authority, this court is bound to follow precedent from the Second Department. (See Mountain View Coach Lines, Inc. v Storms, 102 AD2d 663.)

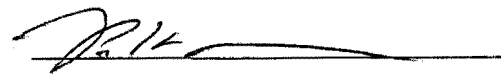
As petitioners have not exhausted their administrative remedies this proceeding is dismissed. (See Indemini v Beth Israel Med. Center, 4 NY3d 63, 66.)

CONCLUSION

For the reasons stated, the motions by petitioners to disqualify counsel and change venue are denied. The cross-motion by respondent to dismiss the petition for failure to exhaust administrative remedies is granted and it is ORDERED AND ADJUDGED that the proceeding is dismissed.

Dated: New York, NY

January 9, 2014



Hon. Peter Moulton

JSC

**HON. PETER H. MOULTON
SUPREME COURT JUSTICE**

UNFILED JUDGMENT

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