

**Matter of Nicholson v Appeals Bd. of Admin.  
Adjudication Bur.**

2014 NY Slip Op 31537(U)

May 23, 2014

Supreme Court, Albany County

Docket Number: 6583-13

Judge: Jr., George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In The Matter of the Application of  
WALTER NICHOLSON,

Petitioner,

For A Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

-against-

THE APPEALS BOARD OF ADMINISTRATIVE  
ADJUDICATION BUREAU, STATE DEPARTMENT  
OF MOTOR VEHICLES and THE COMMISSIONER  
OF MOTOR VEHICLES,

Respondents.

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Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-13-ST5248 Index No. 6583-13

Appearances: Kevin P. Sheerin, Esq.  
Attorney For Petitioner  
323 Willis Avenue, Suite 1  
Mineola, New York 11501

Eric T. Schneiderman  
Attorney General  
State of New York  
Attorney For Respondent  
The Capitol  
Albany, New York 12224  
(Adrienne J. Kerwin,  
Assistant Attorney General  
of Counsel)

**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The petitioner has been convicted of the following alcohol-related driving offenses:  
three convictions for driving while his ability was impaired, dated April 2, 1987, September

29, 1993, and January 11, 2007; and two convictions for driving with an blood alcohol content of .10%, dated May 8, 1990 and December 11, 1997. His driver license was revoked for one year by order issued on March 21, 2008.<sup>1</sup>

On March 1, 2013 the petitioner submitted an application for re-issuance of his driver license. In a determination dated April 10, 2013, the New York State Department of Motor Vehicles (“DMV”) advised the petitioner that the application was denied on grounds that he was deemed a persistently dangerous driver. The petitioner appealed the determination, which was denied by DMV’s Administrative Appeals Board on July 30, 2013. Both determinations relied heavily upon regulations promulgated by DMV in 2012 with regard to relicensing of individuals who have a driving history which includes multiple alcohol or drug related driving convictions. Effective September 25, 2012 the respondent revised portions of Part 136 of its regulations (see 15 NYCRR Part 136, hereinafter referred to as “Part 136”) to impose significantly greater limitations on the ability of persons convicted of multiple alcohol or drug related driving offenses to regain an operator’s license after the license had been revoked.

The petitioner commenced the above-captioned CPLR Article 78 proceeding to annul the determination to deny his application for a license. The petitioner maintains that the determination was arbitrary, capricious, irrational, issued in bad faith, and not supported by substantial evidence. He asserts that there is no reasonable basis for imposition of a lifetime license revocation, and that such penalty is grossly disproportionate to petitioner’s alleged

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<sup>1</sup>It would appear that petitioner’s license was revoked pursuant to the provisions of Vehicle and Traffic Law (“VTL”) § 1193 (2) (b) (3).

offense. He maintains that the penalty is so severe as to shock one's sense of fairness. The respondents contend that their actions were not arbitrary and capricious, and were within respondents' discretion.

The determination of the Driver Improvement Examiner, dated April 10, 2013, which denied petitioner's application for re-issuance of his driver license, recites as follows:

"Pursuant to the authority in Sections 136.5 (a) (3) and 136.5 (b) (1) of the regulations of the Commissioner of Motor Vehicles, your application for a New York State driver license/privilege is hereby **DENIED** because you are deemed a persistently dangerous driver.

"Section 136.5 (a) (3) provides as follows:

Special rules for applicants with multiple alcohol-or drug-related convictions or incidents.

For the purposes of this section 'revocable offense' means the violation, incident or accident that results in the revocation of the person's drivers license and which is the basis of the application for relicensing. Upon reviewing an application for relicensing, the Commissioner shall review the applicant's entire driving record and evaluate any offense committed between the date of the revocable offense and the date of application as if it had been committed immediately prior to the date of the revocable offense. For purposes of this section, 'date of the revocable offense' means the date of the earliest revocable offense that resulted in a license revocation for which the revocation has not been terminated by the Commissioner's

subsequent approval of an application for relicensing.

“Section 136.5 (b) (1) provides as follows:

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:

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.

“The following constitute the grounds for such denial:

Violation

Date	Incidents/Convictions/Accidents
05/18/2006	Driving While Ability Impaired, Drugs and Alcohol
11/06/2005	Disobeyed Traffic Device
03/24/2005	Speed in Zone 68/50
07/06/2003	Aggravated Unlicensed Operation - 3 <sup>rd</sup> Degree Misdemeanor
08/21/2001	Passed Red Light
08/21/2001	Speed in Zone 49/40
10/11/1997	Driving With .10% or More Alcohol in Blood
09/12/1997	No Inspection - Over 60 Days
05/23/1996	No Seat Belt
10/16/1994	Operating Without a license
10/16/1994	No Seat Belt Adult
03/18/1993	Driving While Ability Impaired by Alcohol
11/07/1992	Disobeyed Traffic Device
01/19/1992	Followed Too Closely
11/20/1991	Speeding 74/55
03/01/1990	Driving With .10% or More Alcohol in Blood
10/17/1987	Unregistered Motor Vehicle - Infraction

03/10/1987 Driving While Ability Impaired by Alcohol

07/28/1989 Property Damage Accident

“Your driving history suggests that your failure to observe the rules and regulations governing the operation of a motor vehicle constitutes a serious lack of regard on your part for the safety and welfare of other users of the highway, and forms the basis of our decision to deny your application for a driver license.

“Although you may submit an application for a new driver license at any time, please be aware that a review of any subsequent application will be of the entire driving history at that time and will be based upon the same standards that resulted in the denial of this application. Each application is subject to the statutory \$50 fee.

“If you feel your case involves unusual, extenuating or compelling circumstances, you may send the information to the Driver Improvement Bureau at the above address. Any such information must be sent within 30 days of the date of this letter. The information concerning your circumstances will be reviewed and you will be advised of the result. Otherwise, this denial is considered final.

“If you do not have any unusual, extenuating or compelling circumstances but wish to appeal this decision, you may file an appeal with the Appeals Board [].”

The petitioner subsequently filed an administrative appeal of the foregoing determination.

The appeals decision, dated July 30, 2013, recites in part as follows:

“Vehicle and Traffic Law §510(5) and (6) provide that once revoked, a driver’s license may be restored only by direction of the Commissioner of Motor Vehicles and that where revocation is mandatory, no new license shall be issued except in the discretion of the Commissioner. Also, Vehicle and Traffic Law §§1193(2)(c)(1) and 1194(2)(d)(1) provide that where a license is revoked as the

result of a mandatory revocation arising out of an alcohol or drug-related offense or a chemical test refusal, no new license shall be issued except in the discretion of the Commissioner. Part 136 of the Commissioner's Regulations was promulgated to assist in exercising the discretion afforded to the Commissioner by law and to help fulfill the responsibility of promoting highway safety by identifying problem drivers.

"Section 136.1 of the Commissioner's Regulations provides that in exercising the discretion authorized by law and in keeping with the responsibility to provide meaningful safeguards for the general public who are users of the highways, it is the purpose of the Commissioner to rehabilitate problem drivers through the use of education and to take action where review of the applicant's total record indicates that such action is necessary for the protection of the applicant and the public alike.

"Section 136.5 of the Commissioner's Regulations consists of general guidelines for relicensing after revocation that identify persistently dangerous drivers with multiple alcohol or drug-related driving convictions or incidents in an objective manner and provides for evaluation of the individual record. When certain factors are present, a presumption is raised that relicensing should be postponed to avoid potential danger to all users of the highways (Regs. §§136.1, 136.5; see Matter of Guido v Melton, 107 Misc2d 660, Sup. Ct., Albany Co.).

"Section 136.5(b)(1) of the Commissioner's Regulations provides that upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. The Commissioner shall deny the application if the review shows that the person has five or more alcohol or drug-related driving convictions or incidents in any combination with his or her lifetime.

"'Alcohol-or drug-related driving conviction or incident' means any of the following, not arising out of the same incident: (i) a conviction of a violation of VTL § 1192 or an out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs; (ii) a finding of a violation of VTL § 1192-a; provided however, that no such finding shall be considered after the expiration of the retention period contained in VTL §201(1)(k); (iii) a conviction of an offense under the Penal Law for which a violation of VTL § 2291 is an essential element; or (iv) a finding of refusal to submit to a chemical test under VTL § 1194. (Regs. § 136.5 [a][1]).

"Department records indicate that appellant's driving record includes five alcohol or drug-related driving convictions or

incidents.

“Given appellant’s driving record, there was no abuse of discretion in this case. The denial was mandated by the Commissioner’s Regulations. The Regulations are consistent with the Commissioner’s statutory responsibilities and were fairly applied. The denial had a rational basis and shall not be disturbed.

“Decision By The Board: The determination is affirmed. The original decision remains.”

In a supporting affidavit, the petitioner indicates that between 1987 and 2006 alcoholism caused his “irresponsible and thoughtless behavior”. He indicates that he completed a rehabilitation treatment program in May 2007, participated in outpatient treatment thereafter, and that he attends Alcoholics Anonymous every day. In addition, he participates as a sponsor in AA. He resides in Bethpage, New York with his mother ( age 79 and in poor health), together with his twelve year old daughter. He has three grown children, and became a grandfather in June 2013. He acknowledges that he has hurt his family greatly, but indicates that since May 18, 2006 he is a changed man.

As noted, in 2012 the respondent Commissioner revised Part 136 of rules and regulations of the Department of Motor Vehicles (see 15 NYCRR Part 136), imposing additional limitations on applications for relicensing in a situation where the applicant’s license had been revoked for an alcohol or drug-related offense. Although in the past the respondent had generally applied a ten year look-back period in reviewing an applicant’s driving record, the Commissioner must now undertake a lifetime review (see 15 NYCRR § 136.5 [b]). In certain instances the regulations require that the Commissioner consider the

license applicant's convictions or "incidents"<sup>2</sup> within a twenty-five year look-back period (see 15 NYCRR § 136.5 [a] [3], [b] [2], [3]). Where the Commissioner finds that the applicant has five or more alcohol or drug-related convictions or incidents during his or her lifetime, or where the applicant has three or four such convictions or incidents within the 25 year look-back period and also a serious driving offense<sup>3</sup>, then the application must be denied (see 15 NYCRR § 136.5 [b] [1],[2]). Where the applicant has three or four convictions or incidents within the 25 year look back period, but no serious driving offense, the Commissioner must delay issuance of a driver license for a five year period, after which time the Commissioner may issue a restricted license, effective for an additional five year period, coupled with a requirement for installation of an ignition interlock device ("IID") (see 15 NYCRR § 136.5 [b] [3]).

§ 136.5 of respondent's regulations recites, in part, as follows:

"(b) 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

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<sup>2</sup>Defined as: "(i) a conviction of a violation of section 1192 of the Vehicle and Traffic Law or an out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs; (ii) a finding of a violation of section 1192-a of the Vehicle and Traffic Law; provided, however, that no such finding shall be considered after the expiration of the retention period contained in paragraph (k) of subdivision 1 of section 201 of the Vehicle and Traffic Law; (iii) a conviction of an offense under the Penal Law for which a violation of section 1192 of the Vehicle and Traffic Law is an essential element; or (iv) a finding of refusal to submit to a chemical test under section 1194 of the Vehicle and Traffic Law." (15 NYCRR § 136.5 [a] [1]).

<sup>3</sup>Defined as "(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." (15 NYCRR § 136.5 [a] [2])

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 year look back period and, in addition, has one or more serious driving offenses within the 25 year look back period, then the Commissioner shall deny the application.

(3)

(i) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period and (ii) the person is currently revoked for an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least five years after which time the person may submit an application for relicensing. Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law. After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose the A2 restriction on such person's license for a period of five years and shall require the installation of an ignition interlock device in any motor vehicle owned or operated by such person for such five-year period. If such license with an A2 restriction is later revoked for a

subsequent alcohol- or drug-related driving conviction or incident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

(4)

(i) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period and (ii) the person is not currently revoked as the result of an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least two years, after which time the person may submit an application for relicensing. Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law. After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose an A2 restriction, with no ignition interlock requirement, for a period of two years. If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

(5) the person has two alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period, then the Commissioner may in his or her

discretion approve the application after the minimum statutory revocation period is served.

(6) the person has been twice convicted of a violation of subdivision three, four or four-a of section 1192 of the Vehicle and Traffic Law or of driving while intoxicated or of driving while ability is impaired by the use of a drug or of driving while ability is impaired by the combined influence of drugs or of alcohol and any drug or drugs where physical injury, as defined in section 10.00 of the Penal Law, has resulted from such offense in each instance, then the Commissioner shall deny the application.

(c) The grounds for any denial shall be set forth in writing and a copy shall be made available to the person making the application for relicensing.

(d) While it is the Commissioner's general policy to act on applications in accordance with this section, the Commissioner shall not be foreclosed from consideration of unusual, extenuating and compelling circumstances that may be presented for review and which may form a valid basis to deviate from the general policy, as set forth above, in the exercise of discretionary authority granted under sections 510 and 1193 of the Vehicle and Traffic Law. If an application is approved based upon the exercise of such discretionary authority, the reasons for approval shall be set forth in writing and recorded.”(15 NYCRR § 136.5)

The Court’s role in reviewing an administrative determination is not to substitute its judgment for that of the agency, but simply to ensure that it is not made in violation of lawful procedure or affected by an error of law, and was not arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009]; In the Matter of Terrace Court, LLC v. New York State Division of Housing and Community Renewal, 18 NY3d 446, 454 [2012]; Matter of Warder v Board of Regents, 53 NY2d 186,

194; Matter of Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363; Akpan v Koch, 75 NY2d 561, 570; Matter of Prestige Towing & Recovery, Inc. v State of New York, 74 AD3d 1606 [3<sup>rd</sup> Dept., 2010]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (In the Matter of Murphy v New York State Division of Housing and Community Renewal, 21 NY3d 649, [2013], quoting Peckham v Calogero, 12 NY3d 424 [2009] at 431, which cited Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

The issue of whether a determination is supported by substantial evidence arises in situations where "a determination is made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law" (see CPLR 7803 [4]). This is not that kind of situation, as there was no hearing (and none was required). The Court accordingly finds that the petition does not properly raise an issue of substantial evidence, even though paragraph 14 contains that allegation. For this reason, the Court has retained the matter for disposition, rather than transfer it to the Appellate Division pursuant to CPLR 7804 (g). The Court will review the petition under the standards set forth in the preceding paragraph.

"Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law" (Matter of Kelly v Safir, 96 NY2d 32, 38 [2001], mot for reargument denied 96 NY2d 854, citing Matter of Featherstone v Franco, 95 NY2d 550, 554, and CPLR 7803 [3]). The penalty imposed by an administrative agency must be upheld unless it is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of

fairness” (Matter of Pell v Board of Educ., 34 NY2d 222, 233 [1974], citations omitted; Matter of Featherstone v Franco, *supra*; Matter of Torrance v Stout, 9 NY3d 1022, 1023 [2008]; Matter of Weeks v State Education Department, 113 AD3d 944 [3d Dept., 2014]; Matter of Bottari v Saratoga Springs City School District, 3 AD3d 832, 833 [3d Dept., 2004]; Matter of Martindale v Novello, 13 AD3d 761, 763-764 [3d Dept., 2004]; Matter of Waldren v Town of Islip, 6 NY3d 735, 736-737 [2005]; Matter of JMH, Inc. v New York State Liquor Authority, 61 AD3d 1260, 1262-1263 [3<sup>rd</sup> Dept., 2009]; Matter of Liguori v Beloten, 76 AD3d 1156 [3<sup>rd</sup> Dept., 2010], at 158, *lv denied* 16 NY3d 702 [2011]; Matter of Eisenberg v Daines, 99 AD3d 1117, 1120 [3d Dept., 2012]). “It is not the role of the Court to “second-guess the administrative agency [] or substitute its own judgment for the action taken” (Matter of Castle v Maine-Endwell Central School District, 111 AD3d 1221, [3d Dept., 2013], quoting Liguori v Beloten, 76 AD3d 1156, 1158 [2010], *lv denied* 16 NY3d 702 [2011]).

The respondent Commissioner has been granted broad discretion with respect to the relicensing of individuals in general (*see* VTL 510 [5]), and with respect to those persons whose licenses have been revoked due to alcohol or drug related convictions, in particular (*see* VTL § 1193 [2] [c] [1] and VTL § 1193 [2] [b] [12] [b] [ii], [e] [iii]). In this instance, petitioner’s driving record includes eighteen violations of the Vehicle and Traffic Law, some fairly serious, of which five are alcohol and/or drug-related. § 136.5 (b) (1) of the Rules of the Department of Motor Vehicles requires that the application be denied (*see* 15 NYCRR § 136.5 [b] [1], *supra*). Mindful of petitioner’s driving record, and further mindful of the Commissioner’s obligation to protect the safety and welfare of the petitioner and the

traveling public, the Court finds that the Commissioner's determination is not irrational, arbitrary or capricious or a violation of law. In addition, to the extent that the petitioner argues that the determination constitutes imposition of an improper penalty, the Court is unable to conclude that the determination is so disproportionate to petitioner's past offenses as to shock one's sense of fairness.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion.

The Court concludes that the petition must be dismissed.<sup>4</sup>

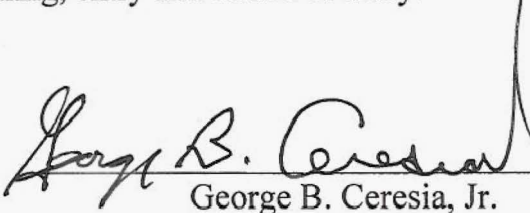
Accordingly, it is

**ORDERED and ADJUDGED**, that the petition is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

**ENTER**

Dated: May 23, 2014  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

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<sup>4</sup>Notably, the Court is of the view that the record here would support the Commissioner's discretionary determination even if Rule 136.5 (b) (1) were not in effect.

Papers Considered:

1. Notice of Petition dated December 2, 2013, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated January 3, 2014 and Exhibits
3. Affirmation of Everett A. Mayhew, Jr., Assistant Counsel with New York State Department of Motor Vehicles dated January 3, 2014