

<b>Matter of Romero v Fiala</b>
2014 NY Slip Op 33290(U)
July 16, 2014
Supreme Court, Bronx County
Docket Number: 260278/14
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX - Part 4

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In the Matter of the Application of  
**Kelvin Romero**

Index No.: 260278/14

*Petitioner,*

for a Judgment Pursuant to Article 78 of the  
Civil Practice Law and Rules

**Decision and Order**

-against-

Barbara J. Fiala, as Commissioner of the  
New York State Department of Motor Vehicles ,  
and The New York State Department of  
Motor Vehicles

*Respondents*

Howard H. Sherman  
J.S.C.

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The following papers numbered 1 to 5 read on this Article 78 proceeding submitted 05/13/14

Order to Show Cause - Affirmation in Support -Petition	1,2,3	
Verified Answer - Exhibits	4	
Reply	5	

The application by petitioner for an order pursuant to C.P.L.R. Article 78 ,  
annulling the January 28, 2014 decision of the respondent New York State  
Department of Motor Vehicles Administrative Appeal Board affirming a  
determination of the Administrative Law Judge ("ALJ") , which, after a hearing  
pursuant to Vehicle and Traffic Law 1194 ( c ), directed the revocation of petitioner's  
driver's license , is hereby transferred to the Appellate Division, First Department  
pursuant to C.P.L.R. 7804(g).

After a hearing at which petitioner and the arresting officer testified, the ALJ found that on September 9, 2012 in Suffolk County, New York, the police officer had reasonable grounds to believe that petitioner was operating a motor vehicle in violation of Vehicle and Traffic Law § 1192 in that the officer observed petitioner fail to maintain his lane of travel , and “displayed strong smell of alcoholic beverage on breath; glassy, bloodshot eyes; slurred speech ; and impaired motor coordination. “

The ALJ further found that the police officer made a lawful arrest of Kelvin Romero (“Romero”) who refused to submit to a chemical test for the purpose of determining the alcohol content of his blood . <sup>1</sup>

With respect to such “refusal” , the ALJ found that petitioner “ was given sufficient warning, in clear or unequivocal language prior to such refusal that such refusal to submit to such chemical test<sup>2</sup> or any portion thereof would result in the immediate suspension and subsequent revocation of his/her license or operating privilege , whether or not he/she was found guilty of the charge on which he/she was arrested.”

On appeal, the appeals board addressed four arguments, specifically, that the evidence failed to establish: 1) that the stop and arrest was lawful; 2) that the refusal

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<sup>1</sup> The related criminal action remains pending in Suffolk County District Court.

<sup>2</sup> The officer testified that he administered three field sobriety tests, all of which plaintiff failed, and a pre-screen breath test that resulted in a positive reading.

warnings were read to Romero in clear and unequivocal language , and 3) the alleged refusal was knowing and intelligent . Lastly, was considered the argument that Romero, whose first language is Spanish, “didn’t understand the refusal warnings.”

The board held that the officer’s testimony and that of the petitioner , together with the documentary evidence, was sufficient to support the ALJ’s findings, establishing both a reasonable basis for the stop and probable cause for the arrest based upon the officer’s observations of intoxication. It was also determined that the evidence established that petitioner was “adequately warned of the consequences of the refusal and that he refused to take the chemical test.”

To the extent that there was an issue of credibility raised by the officer’s testimony and that of petitioner , the board found no reason to disturb the ALJ’s assessment of that issue in this case. In light of the officer’s testimony that petitioner was able to understand and to respond to questions posed in English, and the report of refusal , as well as ability of petitioner to testify at the hearing without the assistance of an interpreter , it was concluded that the ALJ could infer that petitioner had sufficient understanding of English “such that the warnings given were sufficient.”

**Petition**

Petitioner brought this proceeding to review the agency determination contending that the matter should be reversed and dismissed because the evidence adduced at the statutory hearing “was not sufficient to show that [petitioner] was properly advised of the consequences of his refusal as a result of the officer’s repeated

incorrect, inconsistent and equivocal 'layman's explanations' which were confusingly inconsistent with the statutorily required written warnings."

The agency opposes the application and asserts that to the extent that the petition raises an issue of substantial evidence, it should be transferred to the Appellate Division,

First Department pursuant to CPLR § 7804(g). Alternatively, it is argued that the determination affirming the ALJ's finding that petitioner had violated Vehicle and Traffic Law § 1194 by refusing a chemical test is supported by substantial evidence, and is neither arbitrary nor capricious.

In reply, petitioner argues that although a statutorily mandated hearing was held,

the issue presented is one of legal interpretation, and as such, the matter should be heard and determined by this court.

#### Discussion and Conclusions

Upon review of the petition, and respondent's answer and the reply thereto, it is the finding of this court that the gravamen of petitioner's challenge is that the determination of the Administrative Law Judge, after a hearing, including the finding that petitioner was given sufficient warning of the consequences of refusing to submit to a chemical test, was not supported by substantial evidence, and as such, the matter should be transferred to the Appellate Division (see, Matter of Iovino v. Martinez, 39

A.D.3d 311, 835 NYS2d 36 [1<sup>st</sup> Dept. 2007]; Matter of Wagner v. Fiala, 113 A.D.3d 694, 978 NYS2d 699 [2d Dept. 2014]).


Accordingly, it is hereby

ORDERED that this proceeding be respectfully transferred for disposition pursuant to CPLR 7804(g) to the Appellate Division, First Department, and it is further

ORDERED that the Clerk of this Court is directed to transfer the file in the above-entitled proceeding to the Appellate Division, First Department, upon service of a copy of this order with notice of entry.

This constitutes the decision and order of this court.

Dated: July 16, 2014

  
Howard H. Sherman