

<b>Jack Jaffa and Assoc. v City of New York</b>
2019 NY Slip Op 30750(U)
March 21, 2019
Supreme Court, New York County
Docket Number: 158061/2018
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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Jack Jaffa and Associates,

Plaintiffs- Petitioners,

Index No.  
158061/2018

For a Judgment under and pursuant to CPLR Article 78,  
CPLR Article 30, and 40 USC §1983,

- against -

**DECISION and  
ORDER**

The City of New York and The New York City  
Office of Administrative Trials and Hearings,

Mot. Seq. 1

Defendants-Respondents.  
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Petitioner, Jack Jaffa and Associates (“Petitioner”) represents citizens and businesses in hearing at Respondent The New York City Office of Administrative Trials and Hearings (“OATH”) for summonses issued by The City of New York (“City”) agencies. Petitioner brings this action as a “hybrid plenary action and special proceeding” to challenge certain administrative procedures of OATH as *ultra vires*, recover damages and injunctive relief against OATH pursuant to Section 1983 of the United States Civil Rights Act (“Section 1983”); and to enjoin OATH from engaging in certain practices pursuant to Article 78 of the CPLR.

Respondents cross move for an Order dismissing the Declaratory Judgment and Section 1983 claims pursuant to CPLR § 3211(a)(2), (3), and (7).

Parties

Pursuant to Chapter 45-a of the New York City Charter (“Charter”), OATH is responsible for conducting adjudicatory hearings for agencies of the City. See Charter § 1048(1). The Charter authorizes OATH to promulgate rules for the conduct of hearings. See Charter §§ 1048(1); 1049(3). From July 1, 2017 to June 30, 2018, OATH held approximately 330,110 hearings. The average number of hearings per day (excluding holidays and weekends) was 1,326. (Affirmation of Maria

Marchiano, Deputy Commissioner/Chief Clerk of OATH, paragraph 4). OATH adjudicates a high volume of matters, including summonses issued by the Buildings, Fire, Parks, Police and Sanitation Departments, the Departments of Environmental Protection and Transportation, the Landmarks Preservation, Taxi & Limousine, and Business Integrity Commissions, as well as the Departments of Health and Mental Hygiene and Consumer Affairs.

Section 1049 of the Charter authorizes the Chief Administrative Law Judge of OATH to “direct the office...with respect to its management and structure” and to “establish rules for the conduct of hearings in accordance with the requirements of chapter forty-five of the charter.” Section 1049(1)(a); Section 1049(2)(a).

48 RCNY §6-02(b) gives the OATH Hearings Division the authority “[t]o maintain order in the functioning of the Tribunal, including the conduct of hearings,” “[t]o take all necessary action to avoid delay in the disposition of proceedings,” and “[t]o maintain order in the functioning of the Tribunal, including the conduct of hearings.”

48 RCNY §6-11(a) states that “a hearing will be presided over by a Hearing Officer, proceed with reasonable expedition and order and, to the extent practicable, not be postponed or adjourned.” A party may reschedule the initial hearing without having to show good cause pursuant to 48 RCNY §6-05, and additional adjournments are prescribed by 48 RCNY §6-14 which requires “a showing of good cause.” Pursuant to 48 RCNY §6-16, “each party has a right to be represented by an attorney or another authorized representative” subject to the requirements of Sections 6-23 and 6-25 of Title 48 of the RCNY.

#### Article 78 Proceeding

Under Article 78 of the CPLR, a party may challenge the determination of administrative agencies where “a determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” CPLR § 7803(3). An administrative regulation will be upheld “if it has a rational basis, and is not unreasonable, arbitrary or capricious.” *New York State Ass'n of Ctys. v. Axelrod*, 78 N.Y.2d 158, 166 (1991). “Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context.” *Id.* “The challenger must establish that a regulation is so lacking in reason for its promulgation that it is essentially arbitrary.” *Id.* The “Court’s role in reviewing an agency action is not to

determine if the agency action was correct or to substitute its judgment for that of the agency, but rather to determine if the action taken by the agency was reasonable.” *Chem. Specialties Mfrs. Ass’n v. Jorling*, 85 N.Y.2d 382, 396 (1995). This standard of review also applies to a court’s review of a challenge to an agency rule. *Id.*

Here, Petitioner challenges OATH’s case management procedures related to scheduling and a requirement for representatives to appear for hearings.

Specifically, Petitioner challenges OATH’s alleged practices of limiting the summonses that Petitioner’s representatives can appear to fifty per hearing date and not allowing more than one of Petitioner’s representatives to appear before a hearing officer at a time. (Petition, 42-45). OATH has demonstrated that contrary to Petitioner’s allegations, “OATH imposes no arbitrary limit on either the number for cases or the number or cases or the number of representatives who appear before Hearing Officers,” and “[t]he Jaffa firm and other HVRs regularly appear by two, three, or four representatives on 80 cases or more per day.” (Marchiano Aff., 20). Additionally, OATH demonstrates that the procedures that it applies in scheduling matters which includes requiring representatives to notify OATH two days in advance if they plan to appear on 15 or more cases in a given day serves “to balance the daily demand on its resources,” and “seeks to avoid any perception that one kind of matter or one kind of respondent is favored over the others.” It “allows the Tribunal staff to prepare the case files in advance so that they can be expeditiously assigned to Hearing Officers for adjudication and minimize respondent wait time,” “create[s] balance and to fairly allocate resources between the variety of respondents appearing on the day,” and “assists the Tribunal [in] determin[ing] which ... firm in fact represents a particular respondent.” (Marchiano Aff., 18).

Petitioner further challenges OATH’s “requirement that Jaffa’s non-attorney representatives prove that they are authorized to represent a respondent by providing the hard-copy original of an authorization form.” (Petition, 52). OATH demonstrates that it “requires original signatures on its authorization forms to maintain the integrity of its processes and ensure that all respondents have actually hired the representative who appears on their behalf.” (Marchiano Aff., 22). Marchiano states:

“Over the years, OATH has received numerous complaints from respondents who complain that someone whom they do not know appeared for a hearing on their behalf without their authorization. In such cases, the Tribunal must vacate the determination and reschedule the hearing so the respondent can appear at their hearing, thus

duplicating efforts at a cost to City administrative resources. Such occurrences can often confuse unrepresented individuals about how City adjudications are conducted.” (Marchiano Aff., 22)

Marchiano further states:

“There are at least seven instances where a member of Petitioner's firm appeared at an OATH hearing and the respondent later contacted OATH, pursuant to our rules, to request a new hearing based on the lack of authorization. In each of these instances (summons nos. 012038772R, 012020287H, 012022161C, 012024778K, 035144958Z, 035124082P, and 011610873Y), it was determined that Jaffa's representative was not authorized, and the prior Hearing Officer decision had to be vacated and remanded, causing delay and waste of resources.” (Marchiano Aff., 23).

Marciano further states that the requirement of “[t]he policy of requiring original signatures for live hearings but not for remote hearings is based on the Tribunal’s experience that fraud is most frequently perpetrated against unrepresented respondents in the context of live hearings” and “the exception to the original signature requirement allowed in remote hearings preserves the convenience of remote hearings for those New Yorkers who for a variety of reasons, including medical conditions, cannot or will not appear in person at Tribunal.” (Marchiano Aff., 24 and 25).

Based on the record before the Court, Petitioner has failed to show that OATH’s scheduling and authorization requirement for in person hearings are unlawful exercises of OATH’s authority or arbitrary or capricious. Rather, OATH’s procedures have a rational basis in promoting efficiency, balancing resources, and are designed to benefit the public. Additionally, Petitioner has failed to show that OATH has abused its discretion or acted unlawfully in enforcing these practices.

#### Petitioner’s First Amendment Claim

Petitioner also challenges OATH’s rules that allow the parties to reschedule the initial hearing date contained in the summonses one time before the hearing and

then appear on the scheduled hearing date to seek a further adjournment. (48 RCNY 6-05; 48 RCNY 6-14[e]).

Petitioner alleges that “OATH’s conduct, in forbidding Jaffa to reschedule hearings on Jewish and Muslim holidays, deprives Jaffa, its employees, and derivatively its clients, of their rights to free expression of religious practice unfettered by hostile government action, in violation of the Establishment Clause of the First Amendment of the United States Constitution, applicable to OATH under the Fourteenth Amendment and Equal Protection Clause of the Fourteenth Amendment.”

The United States Supreme Court has held “that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 521 (2006) (citing *Employment Div. Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878). The Court held “that where a prohibition on the exercise of religion ‘is not the object ... but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” *Catholic Charities*, 7 N.Y. 3d at 522 (citing *Employment Div.*, 494 U.S. at 878). A “neutral law of general applicability” is a law that that does not “target religious beliefs as such” or have as its “object ... to infringe upon or restrict practices because of their religious motivation.” *Catholic Charities*, 7 N.Y. at 522 (citing *Church of Lukumi Babalu Aye v City of Hialeah*, 508 US 520, 533 [1993]).

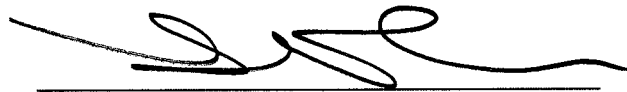
Petitioner has failed to state a claim for violation of its First Amendment right of free exercise of its religion. OATH’s rules concerning the rescheduling and adjournment of hearings are neutral in both object and application and therefore “the First Amendment has not been offended.” *Catholic Charities*, 7 N.Y. 3d at 522 (citing *Employment Div.*, 494 U.S. at 878).

Wherefore, it is hereby

ORDER that the Petition is denied, the Respondents’ cross motion to dismiss is granted and this special proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: March 21, 2019



EILEEN A. RAKOWER