

**My Convenience Inc. v New York City Dept. of
Consumer Affairs**

2020 NY Slip Op 31709(U)

June 1, 2020

Supreme Court, New York County

Docket Number: 150131/2020

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

INDEX NO. 150131/2020

MY CONVENIENCE INC.

MOTION DATE 03/04/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY DEPARTMENT OF CONSUMER
AFFAIRS,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED that the branch of the petition seeking review of the OATH decision pursuant to Article 78 (Motion Seq 001) is dismissed as Petitioner failed to exhaust administrative remedies; and it is further

ORDERED that the branch of the petition seeking review of the DCA decision is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804(g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence (CPLR 7803(4)); and it is further

ORDERED that Petitioner shall serve a copy of this order with notice of entry upon respondent(s) and the Clerk of the Court within 20 days of entry; and it is further

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

FINAL DISPOSITION

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner My Convenience Inc. seeks a judgment to annul: (i) the “Decision” dated September 20, 2019 by the Office of Administrative Trials and Hearing (OATH Decision); and (ii) the “Final Decision and Order” dated December 3, 2019 by the Department of Consumer Affairs (DCA Decision), for being arbitrary and capricious, unsupported by substantial evidence and in excess of jurisdiction. For the reasons set forth below, the Court denies the petition and dismisses this proceeding.

BACKGROUND FACTS

Petitioner is a general merchandise store licensed to sell tobacco. On July 8, 2019, an undercover inspection of Petitioner’s premises located at 29 John Street, New York City was conducted by two inspectors of Respondent, accompanied by a minor who posed as a cigarette buyer. Petitioner, through a part-time employee named Mr. Abul Hasan, sold a pack of cigarette to the minor without asking for identification. Consequently, Petitioner was summoned by Respondent for violation of the New York City (NYC) Administrative Code § 17-706(a) which prohibits the sale of cigarettes to a person under twenty-one years of age, as well as for violation of the New York Public Health Law § 1399-cc (2) which prohibits the sale of cigarettes to a person under eighteen years of age. A hearing ensued before Officer David Pantaleoni on September 13, 2019. During the hearing, Petitioner did not contest that Mr. Hasan sold cigarettes to the minor without asking for identification, but Petitioner requested that suspension or revocation of its license be waived (NYSCEF doc No. 12, p. 6).

The OATH Decision

After hearing, Mr. Pantaleoni issued the OATH Decision sustaining the charge against Petitioner for a violation of NYC Administrative Code §17-706(a). Accordingly, a civil penalty of

\$2,000 was imposed on Petitioner (NYSCEF doc No. 15). Despite Mr. Pantaleoni's finding that this is Petitioner's second offense, he declined to revoke Petitioner's license. The OATH Decision informs Petitioner of its right to appeal, but no appeal was taken.

The DCA Decision

Mr. Pantaleoni also issued a recommendation for Respondent DCA to sustain the charge against Petitioner for violating, as a second occurrence, Public Health Law §1399-cc (2). Moreover, Mr. Pantaleoni recommended that a two-point violation be assigned to Petitioner's license for its failure to demonstrate that "the person who committed the violation held a certificate of completion from a state certified tobacco trainer prior to the date of sale in question" (NYSCEF doc No. 16). On December 3, 2019, Respondent DCA adopted Mr. Pantaleoni's recommendation assigning Petitioner a two-point violation (in addition to the two points already accumulated for a previous violation in 2016) and imposed a fine of \$1500 and \$50 surcharge. As Petitioner accumulated a three point-violation within a 36-month period, Respondent DCA directed the Department of Taxation and Finance to suspend Petitioner's state cigarette/tobacco products retail dealer's registration for a period of six (6) months pursuant to § 1399-ee (3)(e).

Petitioner now challenges the OATH and DCA Decisions on the grounds that they are not supported by substantial evidence or are otherwise arbitrary and capricious. Petitioner also maintains that the undercover inspection was a violation of due process.

In its Answer, Respondent argues that the portion of the Petition which seeks to annul the OATH decision should be dismissed for Petitioner's failure to exhaust administrative remedies, while the portion relating to the DCA Decision should be transferred to the Appellate Division, First Department for review of "substantial evidence".

DISCUSSION

Failure to Exhaust Administrative Remedies

It is well-settled that one who objects to the act of an administrative agency must exhaust available administrative remedies prior to litigating the matter in a court of law (*see e.g. Irizarry v New York City Police Dep't*, 260 A.D.2d 269 [1st Dept 1999]). Here, the portion of the Petition that challenges the OATH Decision must be dismissed as Petitioner failed to exhaust its administrative remedies. According to Title 48 of the Rules of the City of New York (RCNY), a party may appeal an OATH Decision in whole or in part with the Appeals Unit which can affirm, reverse, remand or modify the decision (§ 6-19[a][1] and [g][1]). It is the decision of the Appeals Unit that is considered a final determination subject to judicial review pursuant to Article 78 of the CPLR (§ 6-19 [g][2]). Since Petitioner did not appeal the OATH Decision with the Appeals Unit, Petitioner has unequivocally failed to exhaust administrative remedies. This Court therefore may not review the OATH Decision finding Petitioner in violation of the NYC Administrative Code.

"Substantial Evidence" Question

Although Article 78 proceedings are initiated in the Supreme Court, CPLR 7804 (g) provides that if the "substantial evidence" question is raised, "the court shall first dispose of such other objections as could terminate the proceeding . . . If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division . . ." "[A] 'substantial evidence' question is presented only where a quasi-judicial evidentiary hearing has been held. Substantial evidence 'is related to the charge or controversy and involves a weighing of the quality and quantity of the proof . . . More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence, or evidence beyond a reasonable doubt'" (*Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 769 (2d Dept 2005) [internal citations omitted]).

As Petitioner warrants that the DCA decision is not supported by substantial evidence, the Court finds that review of the DCA decision must be transferred to the Appellate Division, as this proceeding involves an issue as to whether the evidentiary record at hearing already held is supported by substantial evidence (CPLR 7803(4)). Therefore, while the branch of the petition that seeks review of the OATH decision is dismissed, Petitioner’s claims regarding the DCA decision are transferred to the Appellate Division, First Department.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the branch of the petition seeking review of the OATH decision pursuant to Article 78 (Motion Seq 001) is dismissed as Petitioner failed to exhaust administrative remedies; and it is further

ORDERED that the branch of the petition seeking review of the DCA decision is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804(g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence (CPLR 7803(4)); and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon respondent(s) and the Clerk of the Court within 20 days of entry; and it is further

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Carol R. Edmead
HON. CAROL R. EDM EAD, J.S.C.
J.S.C.

6/1/20
DATE

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	