Matter of Fadhil v New York City Off. of Admin. Trials & Hearings
2020 NY Slip Op 33898(U)
November 16, 2020
Supreme Court, Kings County
Docket Number: 507556/2020
Judge: Pamela L. Fisher

At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 16th day of November 2020.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

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IN THE MATTER OF THE APPLICATION OF
FADHIL, HALEEM M.

Petitioner,

DECISION/ORDER

- against -

Index No: 507556/2020

MS # 1

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS and FIDEL DEL VALLE as COMMISSIONER and CHIEF JUDGE of CITY OF NEW YORK OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS and DEPARTMENT OF CONSUMER AFFAIRS and LORELEI SALAS as COMMISIONER OF CITY OF NEW YORK, DEPARTMENT OF CONSUMER AFFAIRS and CITY OF NEW YORK

Respondents.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Petition/Cross Motion/Order to Show Cause and Petition/Affidavits (Affirmations) Annexed	1, 2
Answer/Memo of Law in Opposition)	3, 4
Reply Affidavits (Affirmations)	5

Petitioner's motion, pursuant to Article 78 of the Civil Practice Law and Rules, for an order reversing the determination made by respondent, New York City Office of Administrative Trials and Hearings' Appeals Unit (hereinafter "OATH"), on the grounds that this decision was arbitrary and capricious, an abuse of discretion, in violation of OATH procedures, and due process of law under the United States Constitution and New York State Constitution is granted to the extent that the court finds that OATH abused its discretion by holding the petitioner in violation of NYC Administrative Code Section 20-202(a)(1) for the period from May 22, 2018 through January 21, 2019. OATH abused its

discretion by disregarding its prior decision, dated May 17, 2019, that declined to hold petitioner in violation of NYC Administrative Code Section 20-202(a)(1) for the period from May 22, 2018 through November 30, 2018, and held petitioner in violation of the statute for one day, December 1, 2018. Petitioner's motion to reinstate the Hearing Officer's decision dated August 2, 2019 is denied. This court concurs with OATH's determination that petitioner continuously violated the statute from January 22, 2019 through June 8, 2019, the day before the inspection. This action is remanded to OATH and DCA for the calculation and enforcement of an appropriate penalty. The court declines to grant any further relief.

Petitioner, the owner of Bashir Deli, located at 480 Sutter Avenue, Brooklyn, NY 11207, was issued a summons (No. 70051495) on June 9, 2019 by the New York City Department of Consumer Affairs (Summons #70051495, annexed as Exhibit A to petition). The summons alleged a violation of NYC Administrative Code Section 20-202(a)(1) for "unlicensed tobacco retail dealer activity" (*Id.*). The summons states that the inspector observed a minor purchase a cigar, then the inspector purchased two loose cigarettes, and the computer system revealed that the entity did not have a license to sell tobacco (*Id.*). The summons indicated that petitioner was being charged as a "recidivist" or "repeat violator," listed 5/22/2018 as the start date of unlicensed activity, based on a prior decision, and listed three prior violations, including Notice of Violation #5426906, issued on April 6, 2018, Notice of Violation #5203361, issued on December 13, 2016, and Notice of Violation #70050158, issued on December 1, 2018 (*Id.*). A hearing was conducted on July 26, 2019, and Hearing Officer David Pantaleoni issued a decision on August 2, 2019, finding petitioner in violation of NYC Administrative Code Section 20-202(a)(1) for one day of unlicensed tobacco retail activity with a $2,100.00 penalty (Exhibit B to petition). In his decision, Hearing Office Pantaleoni concluded that the unlicensed activity started on 6/9/2019, the date of the inspection, even though the summons listed 5/22/18 as the start date, since "no decision with that date was submitted into evidence and [he] decline[d] to simply

pick a date from one of the submitted decisions" (*Id.* at 2). He further indicated that his finding that the owner only violated the code for one day was "based upon [petitioner's] persuasive testimony and photographs that no tobacco was being offered for sale," and "not[ed] that the summons [did] not state that the tobacco sold was on display nor do any of [respondent's] photos show tobacco being displayed on the premises"(*Id.*) DCA appealed, and OATH affirmed the Hearing Officer's determination that a violation of NYC Administrative Code Section 20-202(a)(1) occurred, but increased the penalty to $40,300.00, finding that the violation was continuous from 5/22/18, the date listed on the summons as the start date for the unlicensed activity (*DCA v. Haleem M. Fadhil*, Appeal No. 70051495 (November 29, 2019), annexed as Exhibit E to petition).

In support of his motion, petitioner alleges that OATH erred in finding that he did not rebut the presumption of continuous unlicensed activity (Petition ¶ 22). Petitioner also argues that OATH disregarded the fact that the Hearing Officer's finding was based on the petitioner's manager's testimony and photographs, as well as DCA's failure to submit the 5/22/18 decision into evidence (*Id.* at ¶¶ 22-24). Petitioner maintains that OATH abused its discretion and violated its due process rights by calculating a penalty based on the start date listed on the summons, even though DCA submitted no corroborating evidence to support that a violation was occurring on 5/22/18 (*Id.* at ¶¶ 28-31). In support of his motion, petitioner has submitted the summons, the hearing officer's decision, the brief by the Department of Consumer Affairs in support of their appeal, petitioner's reply brief, and OATH's appeal decision. In opposition, DCA contends that OATH's appeal decision was not arbitrary or capricious, indicating that the modified penalty is appropriate since the "summons is sufficient prima facie evidence of the facts stated therein," and "6 RCNY § 1-19(a) raises a rebuttable presumption that the unlicensed activity continued every day without interruption" (Respondent's Answer ¶ 105; 48 RCNY § 6-12). DCA maintains that OATH's finding of continuous unlicensed activity since 5/22/18 was correct, since the summons listed 5/22/18 as the start date for the unlicensed

activity, and petitioner's testimony and photographs failed to rebut the presumption (Respondent's Answer ¶ 106). In opposition to petitioner's Article 78 motion, respondent has submitted the summons, the transcript of the hearing before Hearing Officer Pantaleoni, the evidence that both petitioner and respondent submitted at the hearing, Hearing Officer Pantaleoni's decision, their appeal, and OATH's appeal decision. In reply, petitioner reiterates that OATH misinterpreted the Hearing Officer's decision by ignoring his finding that petitioner had rebutted the presumption of continuous unlicensed activity (Petitioner's Reply ¶ 9-10).

New York City Administrative Code Section 20-202(a)(1) provides that "it shall be unlawful for any person to engage in business as a retail dealer without first having obtained a license as hereinafter prescribed for each place of business wherein such person sells cigarettes or tobacco products in the city" (NYC Admin Code § 20-202(a)(1)). The penalty for a violation of NYC Administrative Code Section 20-202(a)(1) is $2,000, plus $100 per day (6 RCNY § 6-12). Pursuant to 6 RCNY Section 1-19(a), when a person is charged with a violation of NYC Administrative Code Section 20-202(a)(1), there is a rebuttable presumption that "the unlicensed activity continued every day, without interruption, from the date specified by the Department in the notice as the first date of unlicensed activity through the hearing date" (6 RCNY § 1-19(a)). 6 RCNY Section 1-19(e) indicates that the presumption of continued unlicensed activity may be rebutted if the respondent "present[s] credible evidence at the hearing," "such as written proof that the party obtained a license; receipts or other documentation indicating that merchandise was returned to distributors; written termination of leases or agreements; or photographs demonstrating the discontinuance of the unlicensed activity" (6 RCNY Section 1-19(e)).

Pursuant to 48 RCNY Section 6-12(a), at a hearing before OATH, the "[p]etitioner has the burden of proving the factual allegations contained in the summons by a preponderance of the evidence," and the "[r]espondent has the burden of proving any affirmative defense, *if any, by a*

preponderance of the evidence" (48 RCNY § 6-12(a)). 48 RCNY Section 6-12(b) indicates that the summons, if "sworn to under oath or affirmed under penalty of perjury" constitutes "prima facie evidence of the facts stated therein" (48 RCNY Section 6-12(b)). At a hearing before OATH, "[e]ach party has the right to present evidence, to examine and cross-examine witnesses, to make factual or legal arguments and to have other rights essential for due process and a fair and impartial hearing" (48 RCNY § 6-11(d)). When a party appeals the determination of a Hearing Officer, the Appeals Unit must evaluate "whether the facts contained in the findings of the Hearing Officer are supported by a preponderance of the evidence in the record, and whether the determinations of the Hearing Officer, as well as the penalties imposed, are supported by law" (48 RCNY § 6-19(g)(1)). The written decision of the Appeals Unit "is the final determination of the Tribunal, and judicial review of such decision may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules" (48 RCNY § 6-19(g)(2)).

In determining whether to reverse a decision of an administrative agency under Article 78 of the CPLR, a court must "ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious" (*McCollum v. City of New York*, 184 AD3d 838, 839 [2d. Dept. 2020]). A decision is arbitrary and capricious when it is "without sound basis in reason or regard to the facts" (*Id.*). If the "determination is supported by a rational basis, [the court] must sustain the determination even if [it] concludes that it would have reached a different result than the one reached by the agency" (*Id.* at 840). Article 78 of the CPLR also allows a court to determine whether the administrative agency abused its discretion "as to the measure or mode of penalty or discipline imposed" (CPLR 7803(3)). The penalty imposed by the administrative agency must be upheld "unless it shocks the judicial conscience" (*Featherstone v. Franco*, 95 NY2d 550, 554-55 [2000] (upholding penalty on the grounds that the "sanction was [not] so disproportionate to the offense as to be shocking to one's sense of fairness")).

The issue is whether OATH acted arbitrarily and capriciously, and/or abused its discretion by overruling the Hearing Officer's determination finding petitioner in violation of NYC Administrative Code Section 20-202(a)(1) solely for the date of inspection, and holding that petitioner continuously sold tobacco without a license since 5/22/18, for a total of 383 days, increasing the penalty to $40,300.00. The court will not address petitioner's contention that OATH violated the New York State and Federal Constitutions, since petitioner cites no caselaw or provision of either constitution in support of his claim. Petitioner merely argues that OATH violated his due process rights by finding him in violation from May 22, 2018, even though the May 22, 2018 decision was not submitted into evidence. Petitioner also fails to allege whether OATH violated his procedural or substantive due process rights. Since this court is not holding petitioner in violation from the 5/22/18 start date stated on the summons, the court declines to make any ruling as to the constitutionality of OATH's decision.

OATH did not act arbitrarily and capriciously and/or abuse its discretion by finding that petitioner sold tobacco without a license prior to the date of inspection on June 9, 2019. Although petitioner contends that OATH abused its discretion by overturning the hearing officer's determination that petitioner only violated the statute for one day, OATH has a duty to evaluate whether the hearing officer's findings are "supported by a preponderance of the evidence," and whether his determinations, including the "penalties imposed are supported by law" (48 RCNY § 6-19(g)(1)). The hearing officer's decision not to hold petitioner in violation for more than one day appears to be based on two factors: DCA's failure to submit the May 22, 2018 decision into evidence, and petitioner's photographs and persuasive testimony. At the hearing, petitioner's manager testified that he never purchased tobacco products for the store, there were no tobacco products in the display case on the date of inspection, the tobacco products sold on the date of inspection belonged to the employee, and he sold them on his own initiative (Hearing tr. 30, lines 19-23; at 31, lines 2-12, annexed as Exhibit E to respondent's opposition papers). He also testified that he closely monitored his employees, and when

he was not in the store, he monitored his employees using surveillance cameras (*Id.* at 31, lines 16-25; at 32, lines 3-25). Petitioner's manager submitted photographs of the display case at the store on the day of the inspection, June 9, 2019, documenting that there were no tobacco products in the store on that day (Respondent's Exhibit D). The transcript of the hearing indicates that DCA submitted summons #70050158, issued on December 1, 2018 into evidence, along with the hearing officer's decision dated January 22, 2019, and OATH's decision affirming the hearing officer's determination dated May 17, 2019 (Hearing tr. 7, lines 20-25; at 8, lines 10-25; at 9, lines 1-5). OATH's appeal decision indicates that they reviewed the hearing officer's decision, agreed with his finding that there was a violation, but disagreed with his decision to impose a penalty only for one day, the date of the inspection. OATH found that the hearing officer erred by disregarding the May 22, 2018 start date on the summons, since 6 RCNY Section 1-19(a) "raises a presumption that unlicensed activity continued from the date specified by Petitioner in the summons until the hearing date" (*DCA v. Haleem M. Fadhil*, Appeal No. 70051495 (November 29, 2019), at 2-3). OATH further maintained that "[a]n affirmed summons is prima facie evidence of the facts stated therein," pursuant to 48 RCNY Section 6-12(b), and therefore, DCA did not need to provide corroborating evidence for this start date at the hearing (*Id.* at 3). In its decision, OATH held that the hearing officer "made no findings as to whether [petitioner's] evidence rebutted the presumption," but indicates that the evidence submitted by petitioner at the hearing was not enough to rebut the presumption, since "[petitioner's] manager acknowledged that he was unaware an employee was selling tobacco products," and "therefore, [he] could not have credibly demonstrated how he knew tobacco products were not being sold as far back as May 22, 2018" (*Id.*) OATH's determination is based on the law and the evidence in the record, and therefore, its decision holding that petitioner should be penalized for unlicensed activity occurring prior to June 9, 2019 was not arbitrary and capricious. OATH also did not abuse it discretion by

increasing the penalty, since the hearing officer misapplied the law by completely disregarding the May 22, 2018 start date in the summons, and the prior decisions submitted into evidence.

OATH abused its discretion by holding that the petitioner continued to engage in unlicensed activity from May 22, 2018 through January 21, 2019, as they disregarded their prior decision, dated May 17, 2019, affirming the hearing officer's decision holding petitioner in violation of NYC Administrative Code Section 20-202(a)(1) for one day, December 1, 2018, the date of inspection. The summons issued December 1, 2018, states that the start date of unlicensed activity was May 22, 2018, but the hearing officer and OATH declined to impose a penalty for the period from May 22, 2018 to November 30, 2018, since DCA did not provide a copy of the decision at the hearing (Summons No. 70050158; *DCA v. Haleem M. Fadhil dba Bashir Deli*, Appeal No. 70050158 (May 17, 2019); annexed as Exhibit C to respondent's opposition papers). OATH supported this conclusion by referring to 6 RCNY Section 1-19(c), which provides that "if [DCA] presents at the hearing a copy of a decision or order from a prior proceeding finding that the business or individual engaged in the same unlicensed activity," there is a "rebuttable presumption that the unlicensed activity continued every day, without interruption, from the date of the decision, order or settlement through the date of the hearing" (*Id.* at 3; 6 RCNY § 1-19(c)). Although OATH acknowledges in the current decision under appeal, that the May 17, 2019 decision is "no longer controlling," since "it relied upon precedent that applied to a different penalty provision," OATH cannot hold petitioner in violation for unlicensed activity occurring during a period of time, for which OATH declined to penalize petitioner in a prior decision (*DCA v. Haleem M. Fadhil*, Appeal No. 70051495 (November 29, 2019) at 3n.1; 48 RCNY § 6-19(g)(2) (stating that the written decision of the Appeals Unit "is the final determination of the Tribunal"); *see also DCA v. Fulton Gourmet and Coffee Shop Corp.*, Appeal No. 70051342 (December 9, 2019) (refusing to impose penalties against respondent coffee shop for violation of NYC Administrative Code Section 20-202(a)(1) for a period of time alleged in a prior notice of violation,

because the hearing officer who "adjudicated" the prior summons declined to hold respondent in violation for that period)). Therefore, OATH should have only imposed penalties for violating NYC Administrative Code Section 20-202(a)(1) from January 22, 2019, the date of the hearing officer's prior decision on the December 1, 2018 summons, pursuant to 6 RCNY Section 1-19(c), through June 9, 2019, since neither party appealed the hearing officer's determination that the unlicensed activity ceased after the date of inspection.

Petitioner's motion, pursuant to Article 78 to reverse OATH's decision is granted. Petitioner's motion to reinstate the hearing officer's decision is denied. This proceeding is remanded to OATH and DCA for calculation and enforcement of an appropriate penalty.

This constitutes the decision and order of the Court.

ENTER:

Hon. Pamela L. Fisher
J.S.C.
HON. PAMELA L. FISHER