

**Matter of Mr Moe Gourmet Deli Corp. v Department  
of Consumer Affairs**

2021 NY Slip Op 30602(U)

February 11, 2021

Supreme Court, New York County

Docket Number: 100369/2020

Judge: Erika M. Edwards

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

In the Matter of the Application of

Index No.: 100369/2020

MR MOE GOURMET DELI CORP.,

DECISION and ORDER

Petitioner,

Motion Seq. No.: 001

For a Judgment Pursuant to N.Y.  
C.P.L.R. Article 78

-against-

DEPARTMENT OF CONSUMER AFFAIRS and  
LORELEI SALAS as COMMISSIONER OF CITY  
OF NEW YORK, DEPARTMENT OF CONSUMER  
AFFAIRS and CITY OF NEW YORK,

Respondents.

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

Papers	Numbered
Petition and Affidavits/Affirmations/ Memos of Law annexed	1
Answer/Opposition Affidavits/Affirmations and Memo of Law annexed	4-14
Reply Memo	15-17

*ERIKA M. EDWARDS, J.S.C.:*

Petitioner Mr Moe Gourmet Deli Corp. (“Petitioner”) brought this Article 78 proceeding against Respondents Department of Consumer Affairs (“DCA”) and Lorelei Salas as Commissioner of City of New York, Department of Consumer Affairs and City of New York (collectively referred to as “Respondents”) challenging the denial of Petitioner’s Tobacco Retail Dealer (“TRD”) license application for the premises located at 1924 2<sup>nd</sup> Avenue, New York, New York. For the reasons set forth herein, the court denies Petitioner’s petition in its entirety with prejudice and without costs and dismisses this proceeding.

Petitioner seeks an order reversing DCA’s denial of its cigarette license application, a declaration that the denial was arbitrary and capricious and an abuse of discretion in violation of DCA’s procedures and Petitioner’s due process of law under the United States Constitution and New York State Constitution; directing DCA to reverse the Decision and grant Petitioner’s cigarette license application; permanently enjoining DCA and the Office of Administrative Trials

and Hearings (“OATH”) from enforcing the penalty on Petitioner and placing a restriction on the tobacco license for the subject premises; and awarding costs and disbursements of this proceeding.

Petitioner purchased the subject premises on August 19, 2019, from Metropolitan Gourmet Deli Corp. (“seller”) and applied for a TRD license on August 29, 2019, under License Application Number 10354-2019-ATRD. DCA issued Petitioner a Notice of Intent to Deny TRD License Application on October 11, 2019. On October 25, 2019, Petitioner responded via email to DCA asking DCA to reconsider its determination to deny Petitioner’s application.

In a decision dated November 8, 2019, DCA denied Petitioner’s TRD License Application and determined that the seller was not “in good standing at the time of the sale” as required within the meaning of Administrative Code of the City of New York §§ 20-202(e)(4)(B) and 20-201 since it was found to have violated pertinent provisions of the Administrative Code on two separate dates within the three consecutive years prior to the date of the sale. Therefore, DCA found that Petitioner did not fall within the exception to the statutory cap on licenses. DCA indicated that its decision was a final determination and if Petitioner wished to seek review of the determination, it had to initiate an Article 78 proceeding within four months of the date of the letter.

Petitioner argued in substance that DCA’s denial of its TRD license was arbitrary and capricious, an abuse of discretion, unfair, and in violation of DCA’s procedures and Petitioner’s due process rights because Petitioner purchased the business for \$25,000 in good faith after verifying that the seller had a valid, active license to sell cigarettes at the time of the sale and Petitioner had no way of knowing that the seller had two violations within the past three years. Additionally, Petitioner argued that the effective date of Administrative Code §§20-202(e)(4)(B) and 20-201 was February 24, 2018, but it was applied retroactively to affect the valid transfer of stores with cigarette licenses. Since the statute altered the seller store’s value and its cigarette license eligibility at the time of the sale, it altered the property rights of both parties and unfairly penalized Petitioner and other purchasers who were not at fault by prohibiting them from obtaining a new cigarette license for no justifiable reason or public purpose.

In its Answer and Opposition to Petitioner’s petition, Respondents argued in substance that Petitioner’s petition should be denied because DCA’s decision to deny Petitioner’s TRD license was reasonable, rational, and made in accordance with the applicable rules and regulations. Petitioner has no standing to challenge the retroactivity of the effected property rights of TRD licensees who wish to sell their businesses within three years of receiving two or more Administrative Code violations. DCA also alleges that Petitioner could have accessed the seller’s violation history through a search of NYC Open Data or through a Freedom of Information Law (“FOIL”) request. Finally, DCA argues that Petitioner cannot receive costs and disbursements in an Article 78 proceeding.

DCA further argues that it properly denied Petitioner’s TRD application because the seller was not in good standing on the date of the sale as it had two violations of pertinent statutory provisions within the previous three years. The seller was found to have violated Administrative Code § 17-706(a) for selling a tobacco product to a minor who was under the age of 21 on July 7, 2017 and it was fined \$1,000 after a hearing. Additionally, the seller was found to have violated Administrative Code § 2-202(a)(1) for selling a tobacco product without a license on March 1, 2018 and it was fined \$500 after pleading guilty. As such, DCA determined

that the exception to the statutory cap did not apply and Petitioner was not eligible to receive a new license.

A determination subject to review under Article 78 exists when, first, the agency “reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party” (*Walton v. New York State Dept. of Correctional Servs.*, 8 N.Y.3d 186, 194 [2007]).

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency’s determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; and *Scherbyn v BOCES*, 77 N.Y.2d 753, 757-758 [1991]). In reviewing an administrative agency’s determination, courts must ascertain whether there is a rational basis for the agency’s action or whether it is arbitrary and capricious in that it was without sound basis in reason or regard to the facts (*Matter of Stahl York Ave. Co., LLC v City of New York*, 162 AD3d 103, 109 [1<sup>st</sup> Dept 2018]; *Matter of Pell*, 34 NY2d at 231). Where the agency’s determination involves factual evaluation within an area of the agency’s expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1<sup>st</sup> Dept 2010]). When a court reviews an agency’s determination it may not substitute its judgment for that of the agency and the court must confine itself to deciding whether the agency’s determination was rationally based (*Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.*, 72 NY2d 753, 763 [1<sup>st</sup> Dept 1988]).

Here, based upon the applicable statutory provisions and law, this court finds that Petitioner failed to demonstrate that DCA’s decision to deny Petitioner’s TRD license was arbitrary and capricious, an abuse of discretion, or lacking a rational basis. Additionally, the court finds that Petitioner’s arguments that DCA’s decision was a violation of its rules or procedures, or a violation of Petitioner’s due process rights are without merit and Petitioner does not have standing to support its retroactivity argument.

As Respondents correctly noted, effective February 24, 2018, Administrative Code § 20-202(e)(1) was amended to restrict the availability of new TRD licenses by capping the number of licenses at 50% of the total number of TRD licenses issued to retail dealers in the community district (Administrative Code § 20-202[e][1]). However, Administrative Code § 20-202(e)(4)(B) provides for an exception to the cap on new licenses and permits that when “a business whose owner has been issued a retail dealer license is sold, the succeeding owner may apply for a license for use at the same location, provided that the retail dealer selling such business was in good standing at the time of such sale . . .” (Administrative Code § 20-202[e][4][B]). Good standing means that the business must not have been found to have violated certain provisions of the Administrative Code more than one day during the past three consecutive years (Administrative Code § 20-201).

It is undisputed that the seller of the business, Metropolitan Deli Corp., was not “in good standing” within the meaning of the Administrative Code at the time of the sale of the business because of its two prior violations within the past three years. It is of no moment that the seller’s


TRD license was valid and active at the time of the sale or that Petitioner was unaware of the seller's previous violations. The statute is clear. If the seller was found to have committed two or more violations of pertinent provisions within the three years prior to the sale of the business, then the seller was not in good standing under the law and Petitioner was not entitled to a TRD license based upon this exception. Therefore, DCA's decision to deny Petitioner's license application was not arbitrary and capricious, an abuse of discretion, a violation of its rules or procedures, or a violation of Petitioner's due process rights. Furthermore, the court finds Petitioner's other arguments to be without merit.

Therefore, the court denies Petitioner's petition in its entirety with prejudice and without costs and dismisses this proceeding.

As such, it is hereby

**ORDERED** that Petitioner's CPLR Article 78 Petition is denied with prejudice, without costs or disbursements, and the clerk is directed to enter judgment in favor of Respondents against Petitioner.

Date: February 11, 2021

  
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 HON. ERIKA M. EDWARDS  
**HON. ERIKA M. EDWARDS**  
**J.S.C.**