Matter of Grand Concourse/Davidson Assoc., L.P. v New York City Water Bd.

2023 NY Slip Op 31161(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 158057/2022

Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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In the Matter of

GRAND CONCOURSE/DAVIDSON ASSOCIATES, L.P.

Petitioner,

- v -

NEW YORK CITY WATER BOARD,

Respondent.

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INDEX NO. 158057/2022

MOTION DATE 01/20/2023

MOTION SEQ. NO. 001

DECISION, ORDER, and JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

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

In this proceeding pursuant to CPLR article 78, the petitioner landowner seeks judicial review of a June 6, 2022 New York City Water Board (Water Board) determination. In that determination, the Water Board denied the petitioner's administrative appeal of a January 25, 2022 New York Department of Environmental Protection (DEP) determination that the DEP properly imposed a $650 fee upon the petitioner for theft of services and properly invoiced it in the sum of $162,680.62 in Attributed Consumption Charges (ACCs) for water and sewer services retroactive to February 15, 2017, and continuing until March 13, 2020. The Water Board answers the petition, denying all substantive allegations, and submits the administrative record. The petition is denied, and the proceeding is dismissed, as the determination was not irrational and not arbitrary and capricious, and the penalty imposed did not constitute an abuse of the Water Board's discretion.

As of 2017, the petitioner owned a building located at 107 East 2nd Street, New York, New York 10009, designated as Block 429, Lot 16, on the tax maps of the Borough of Manhattan (hereinafter the premises). A 20-unit apartment building is located on the premises, with each unit measuring approximately 300 square feet and generally occupied by a single individual. Although the petitioner sold the premises in April 2021, it remained contractually liable for the water and sewer charges that previously had been imposed by the Water Board, and the petitioner has the authorization of the current owner to contest any such charges.

In a field activity report dated December 20, 2019, a DEP inspector concluded that the petitioner was engaging in theft of services of water and wastewater services, in that he

> "[f]ound New 2" copper service with existing meter # 9080 set on new service above, no permit on file, meter not registering, suspected theft of service, meter supplies EP domestic to 5 sty residential bldg, 20 units, bldg fully occupied."

On or about January 9, 2020, the DEP significantly increased the petitioner's charges for water and sewer services, which had been billed at approximately $250 bimonthly for several year prior thereto, by adding a one-time charge of approximately $135,000 in ACCs for allegedly unlawful use of water and wastewater services between February 15, 2017 and January 9, 2020. On January 21, 2020, the DEP issued the petitioner a cease and desist notice pursuant to Water Board Regulation Number 4, which prohibits actions that interfere with the accurate measure of water and wastewater services or impair the accurate billing of property. In that notice, the DEP imposed a theft of service (TOS) fee of $650, and informed the petitioner that its water and sewer account would be surcharged with ACCs, that is, that the petitioner would be invoiced, not only for actual usage, but for charges reasonably attributable to the use of water and sewer services that were allegedly obtained in a wrongful manner. The notice directed the petitioner to correct the unlawful plumbing condition by January 31, 2020.

The DEP thereafter billed the petitioner between approximately $2,000 to $4,100 per month from February 2020 to August 2021. In a follow-up field activity report dated March 9, 2020, a DEP inspector, who was dispatched to replace the water meter at the premises,

reported that he could not gain access to the building when the customer did not show up at the inspection appointment, and that he was unable to contact the owner or managing agent at the telephone numbers that they had provided. He thus was unable to replace the meter. Additional field activity reports over the course of 2020 indicated that, although the DEP ultimately installed a new meter at the premises in July 2020, the water being supplied to the premises was also diverted to an adjoining tax lot, in violation of the Water Board's regulations.

On February 17, 2021, the petitioner submitted a customer dispute form to the DEP, along with affidavits from its general partner and the managing agency of the premises, alleging that that AACs imposed by the DEP were calculated at a rate presumptively imposed only on "high-water use buildings," that its building was not a high-water use building, and that, contrary to Regulation Number 4, the attributed charges were six times the actual metered use at the premises. The petitioner asserted that, inasmuch as the premises comprised 20 small residential unit occupies by single individuals, the building generated "very low water usage." In its initial response to the dispute form, dated March 11, 2021, the DEP explained that

> "[i]n 2016, a DEP permit was obtained to replace the water service line. In December 2019, DEP confirmed that meter B35799080 was not registering water usage for the premises properly, and observed the updated water service line and the meter (the meter was set on a new service line without a valid DEP permit). As a result, a Theft of Service Administrative fee of $650.00 was imposed to the account. In addition, Attributed Consumption Charges were placed on the account as of February 15, 2017. Subsequently in 2020, a DEP permit was obtained to replace the meter. On July 30, 2020, DEP confirmed that the new meter V83052336 was installed properly and the Attributed Consumption Charges were discontinued."

The DEP nonetheless concluded that the ACCs and the TOS fee that had been imposed were "correct and in accordance to the New York City Water Board regulations governing Theft of Services, and require no adjustment." The DEP's response notified the petitioner of its right to pursue an administrative appeal. The petitioner filed its initial appeal on May 20, 2021. Inasmuch as the petitioner had sold the premises on April 26, 2021, the DEP directed the petitioner to obtain a letter of authorization from the new owner so that it would be permitted to

pursue the appeal in accordance with DEP regulations. On September 13, 2021, the petitioner resubmitted its appeal, this time submitting a notarized authorization from the new owner permitting it to prosecute the administrative appeal on the owner's behalf.

In a statement dated January 25, 2022, Jeff Lynch, the DEP's Deputy Commissioner for Customer Services, ruled on the initial administrative appeal, and explained that

> "Pursuant to the New York City Water Board rules and regulations, any actions that interfere with the accurate measurement of water and sewer services, and/or impair the accurate billing of a property in any way, are considered Theft of Services and subject the account to the imposition of Attributed Consumption Charges (ACC). In 2017, a new water tap connection & a domestic service line were installed and made active, via a DEP permit. *On December 20, 2019, a DEP inspector visited the premises and found meter B35799080 had been removed and reinstalled onto a new service line without a valid permit, which is a violation of NYC law.* A Determination of Theft of Services Cease and Desist Notice dated January 20, 2020 was sent stating the condition found at the property and informing you that a Theft of Service Account Administration fee of $650.00 was imposed to the account, and that Attributed Consumption Charges (ACC), which were added to the account as of that tap installation date February 15, 2017, would continue to bill monthly until DEP confirmed the violation was corrected."

(emphasis added). The Deputy Commissioner further noted that

> "[o]n March 11, 2020, DEP revisited the property and found new meter V83052336 installed, and an Inspector Warning Notice (IWN) was issued for improper setting of the meter. DEP records show that the superintendent of the property contacted DEP on March 13, 2020, stating that the IWN was corrected, and an inspection was scheduled for March 17, 2020. However, due to Covid-19 restrictions, the appointment was cancelled by DEP. On July 30, 2020 DEP gained access, confirmed the violation was corrected, and the ACC were prorated as of that date."

He additionally explained that, as a result of the pandemic halting the DEP's inspection schedule, ACCs were revised and prorated as of March 13, 2020, which was the date that the petitioner contacted DEP to schedule the inspection. Furthermore, he asserted that revised charges were also issued to meter V83052336 for the service period from March 13, 2020 to July 30, 2020, based on the minimum rate for water and sewer service, and that late payment charges totaling $1,255.03 were reversed. The Deputy Commissioner concluded that "[n]o further adjustments are warranted."

On March 23, 2022, the petitioner appealed the Deputy Commissioner's determination to the Water Board, again contending that the ACCs were not calculated on a proper basis, but were inflated, and that the ACCs imposed in connection with the period between February 15, 2017 and March 13, 2020 were arbitrary and capricious and not in accordance with the Water Board's Regulation Number 4. In a final determination dated June 6, 2022, the Executive Director of the Water Board concluded that there was no basis for removal of either the TOS fee or ACCs, "as they were properly assessed pursuant to the Water Board Rate Schedule and the Water Board TOS Regulation."

In his decision, the Executive Director explained that

> "[p]ursuant to Section 3.1(f) of the TOS Regulation, moving a meter without permission constitutes a TOS condition when such action is reasonably associated with the taking of services and the impairment of billing for such services. In this instance, former meter B35799080 had shown a static reading since January 3, 2018, so this property's actual usage was not being billed. On December 20, 2019, a DEP inspection found that this meter had been removed without a permit and reinstalled on a new service line, and the meter was not registering. Therefore, DEP reasonably determined that a TOS condition existed and billing was impaired, as the removal and reinstallation of the meter resulted in unregistered water consumption.

After describing the DEP's issuance of the cease and desist letter, its imposition of ACCs retroactive to February 15, 2017, and its inspection history, and the concomitant partial revision of the petitioner's invoice, the Executive Director asserted that the DEP based its TOS determination on, among other things, the physical state of the meter as observed by a DEP inspection, and "not the intent of a customer or the actual amount of services taken." As he further explained it,

> "[t]he ACC are not based on actual usage but are based on a representative usage of properties of similar type and size. As per the Water Board Rate Schedule in Part V, Section 3.C.1., ACC for a fully or predominately residential service is based on an annual consumption rate of 200,000 gallons per year for the first residential unit and 170,000 gallons per year per unit for each additional unit after the first unit. In this case, DEP correctly billed ACC for a total of 20 residential units."

The Executive Director advised the petitioner that property owners are responsible for ensuring that all water service to their properties is properly metered pursuant to the Rules of the City of New York, Title 15, Chapter 20, and ultimately are responsible for any metering violations. He concluded that the TOS condition that the DEP observed during the December 20, 2019 inspection mandated the ACC billing, and that there was no basis for any further adjustment to the petitioner's water and sewer bill. The Executive Director thus denied the administrative appeal. This proceeding ensued.

In its petition, the petitioner asserted that, inasmuch as it promptly installed a new water meter in March 2020, immediately after the date that it claimed it learned that the previous meter was malfunctioning, it was arbitrary and capricious and an abuse of discretion for the Water Board to affirm the imposition of the TOS fee. In effect, the petitioner asserted that it did not know until then that any meter attached to the premises had not been functioning for more than two years, or that someone had removed the old meter and installed a new one sometime prior to December 2019. It further asserted that it did not have the intention to steal services or refuse to pay for water and sewer services and that, in the absence of any such intention, it could not be held liable for a TOS fee or ACCs. The petitioner also contended that the Water Board's rate schedule, as applied to it, was arbitrary and capricious, because it required both the DEP and the Water Board to compute ACCs for residential buildings at an annual rate of 200,000 gallons for the first unit and 170,000 gallons for each additional unit, "regardless of the actual sizes of the units in question or their actual estimated water usage" It claims that the calculation was irrational because it concededly attributed usage to all residential buildings as "equivalent generally to usage by high consumers," despite that the fact that its building was not a high-volume consumer. The petitioner further averred that, after its meter malfunctioned and was replaced without a permit and without notifying the DEP, its historical usage was far below that attributed to it by the DEP and the Water Board.

In its answer, the Water Board denied all substantive allegations that its determination was arbitrary and capricious or constituted an abuse of discretion. It further laid out the statutory and regulatory requirements under which it operates. It asserted that the petitioner's activities clearly constituted a theft of services within the meaning of Regulation Number 4 regardless of intent, and that the Public Authorities Law authorized it to assess ACCs upon those who committed a theft of services.

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283, 283 [1st Dept 2008]; *Matter of Rumors Disco v New York State Liquor Auth.*, 232 AD2d 421, 421 [2d Dept 1996]). Inasmuch as the petitioner made no allegations that the Water Board's determination was made in violation of lawful procedure, the Water Board's determination to deny the petitioner's administrative appeal must be confirmed unless it was arbitrary and capricious or affected by an error of law.

A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (*see Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624, 624 [1st Dept 2015]), or where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh (*see Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 608 [2d Dept 2008]). Stated another way, a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Consequently, an

agency determination is arbitrary and capricious where the agency provides only a "perfunctory recitation" of relevant statutory factors or other required considerations as a basis for its conclusions (*Matter of BarFreeBedford v New York State Liq. Auth.,* 130 AD3d 71, 78 [1st Dept 2015]; *see Matter of Wallman v Travis*, 18 AD3d 304, 308 [1st Dept 2005] ["perfunctory discussion"]), provides no reason whatsoever for its determination (*see Matter of Rhino Assets, LLC v New York City Dept. for the Aging, SCRIE Programs*, 31 AD3d 292, 294 [1st Dept 2006]; *Matter of Jones v New York State Dept. of Corrections & Community Supervision*, 2016 NY Misc LEXIS 15778, *1-2 [Sup Ct, Erie County, Jul. 28, 2016]), or provides only a post hoc rationalization therefor (*see Matter of New York State Chapter, Inc., Associated Gen. Contrrs. of Am. v New York State Thruway Auth*., 88 NY2d 56, 756 [1996]; *Matter of L&M Bus Corp. v New York City Dept. of Educ*., 71 AD3d 127, 135 [1st Dept 2009]).

> "Notably, a fundamental principle of administrative law long accepted limits judicial review of an administrative determination solely to the grounds invoked by the respondent, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis. Consequently, neither Supreme Court nor this Court may search the record for a rational basis to support respondent's determination, or substitute its judgment for that of respondent"

(*Matter of Figel v Dwyer*, 75 AD3d 802, 804-805 [3d Dept 2010] [internal quotation marks and citations omitted]).

"While agency interpretations of their own regulations are generally afforded considerable deference, courts must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case" (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 654-655 [2013] [citations and internal quotation marks omitted]; *see Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999]; *Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359 [1999]; *Matter of Gaines v New York State Div. of Hous. & Community Renewal,* 90 NY2d 545, 548-549 [1997]). "While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific

application of a broad statutory term" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [citations and internal quotation marks omitted]; *see Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005]; *Matter of American Tel. & Tel. Co. v State Tax Comm.*, 61 NY2d 393, 400 [1984]).

"Courts have rarely singled out error of law by name . . . as a question for consideration in an Article 78 proceeding" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7803:1). "The question of whether an administrative agency's determination is affected by an error of law is often implicit in the nature of the grievance, and will often turn on the underlying substantive law applicable to the determination" (*Matter of Held v State of New York Workers' Compensation Bd.,* 2008 NY Slip Op 52741[U], *7, 2008 NY Misc LEXIS 10881, *20-21 [Sup Ct, Albany County, Jul. 7, 2008]; *see also* 14-7803 Weinstein-Korn-Miller, NY Civ Prac P 7803.01[3]). Hence, an administrative determination is affected by an error of law where the agency incorrectly interprets or improperly applies a statute, regulation, or rule (*see Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo,* 39 NY2d 86, 92 [1976]; *see generally Matter of CVS Discount Liquor v New York State Liq. Auth.*, 207 AD2d 891, 892 [2d Dept 1994]), or where its determination violates some other statutory or constitutional provision (*see Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo,* 39 NY2d at 93 [Fuchsberg, J., concurring] ["an order which is specifically and expressly forbidden by . . . statute is an error of law"]).

The standard for reviewing an administrative penalty is whether the punishment was so disproportionate to the offenses as to be shocking to the court's sense of fairness (*see Matter of Lackow v Department of Educ. of City of N.Y.*, 51 AD3d 563, 569 [1st Dept 2008]; *see also Matter of Mapp v Burnham*, 8 NY3d 999, 1000 [2007]; *Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Harris v Mechanicville Cent. School Dist.*, 45 NY2d 279, 285 [1978]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]), thus "constituting an abuse of

discretion as a matter of law" (*Matter of Perez v Rhea*, 20 NY3d 399, 402 [2013]; *Matter of Kreisler v New York City Tr. Auth*., 2 NY3d 775, 776 [2004]; *Matter of Featherstone v Franco*, 95 NY2d at 554). This standard of review is a "rigorous" one, and it is well settled that the "court lacks any discretionary authority or interest of justice jurisdiction in reviewing the penalty" (*Matter of Featherstone v Franco*, 95 NY2d at 554; *see Matter of Ellis v Mahon*, 11 NY3d 754, 755 [2008]; *Matter of Torrance v Stout*, 9 NY3d 1022, 1023 [2008]; *Matter of Rutkunas v Stout*, 8 NY3d 897, 899 [2008]). Thus, in reviewing a penalty, a court generally may not engage in a "balancing test" that weighs the "facts and their implications against" the petitioner's behavior (*Matter of Kelly v Safir*, 96 NY2d 32, 39 [2001]).

NYC Water Board Regulation Number 4, § 3.1, D(a), (f), and (i) respectively define theft of services as, among other things, "[u]nauthorized bypass of the meter," "[m]oving the meter without permission," and "[u]nauthorized connections to water lines . . . or other appurtenances not owned by the Customer." NYC Water Board Regulation Number 4, § 1(3) authorizes the DEP to assess retroactive ACCs, upon a determination that a customer engaged in theft of services, as defined in the regulation. Given these definitions, there can be no "intent" requirement that may impliedly be read into these regulations. Moreover, 15 RCNY 20-05(b)(1) provides, in relevant part, that "[n]o person shall set, reset, repair or disconnect a water meter used for Department billing purposes without having obtained a meter permit, except for sets, resets, repairs or disconnects done by the Department, its authorized agents or contractors. 15 RCNY 20-05(i) prohibits a customer, with exceptions not applicable here, from installing a fitting capable of a branch connection upstream of the meter.

The court concludes that the Water Board appropriately interpreted and applied its own regulations, including Regulation Number 4, in determining that the petitioner engaged in theft of services. It properly interpreted both that regulation and the water rate schedule in imposing a $650 TOS fee, and calculating ACCs retroactive to February 15, 2017 in accordance with the residential apartment building provisions of the rate schedule. Hence, the Water Board's

interpretation of applicable regulations and the rate schedule was neither arbitrary and capricious nor an error of law.

The court further concludes that the Water Board's determination to apply the rate schedule, as currently drafted, was rational, has support in the record, and was not arbitrary and capricious. In addition, the penalty imposed, consisting of the $650 TOS fee and ACCs retroactive to February 15, 2017 in the sum of $162,680.62, was not so disproportionate to the petitioner's multiple regulatory violations as to shock the conscience and, thus, did not constitute an abuse of the Water Board's discretion. In this regard, the petitioner's water and sewer usage remained unmetered for more than two years, it removed and replaced the meter without a permit and without notifying the DEP, and it did connect the new meter to the DEP's infrastructure, causing it to be significantly under-billed during that time period. The petitioner also unlawfully permitted the incoming water supplied by the DEP to be diverted to another tax lot, thus creating a justification for the DEP's strict application of the rate schedule, and its concomitant determination to assess ACCs based on six to eight times the volume of water usage that otherwise might be anticipated by a 20-unit residential building containing only studio apartments. The court thus concludes that the rate schedule, as applied to the petitioner, was not inherently arbitrary and capricious.

The decision in *Matter of Wenat Realty Assocs., L.P. v New York City Water Bd*. (2022 NY Slip Op 31921[U], 2022 NY Misc LEXIS 3797 [Sup Ct, N.Y. County, Jun. 16, 2022]) does not warrant a contrary conclusion. The court there concluded that it was arbitrary and capricious for the Water Board to impose a TOS fee and ACCs retroactive to the petitioner's installation of a new meter, where the ACCs were based on water usage that came to more than 25 times the petitioner's actual usage. Moreover, in that case, the petitioner's new meter, unlike the petitioner's new meter here, actually was connected to the Water Board's infrastructure from the time of its installation, so that the DEP could accurately bill that petitioner in a timely fashion. Furthermore, in that case, unlike the instant one, the petitioner's only

violation was its failure timely to secure a permit to install the new meter, and there was no proof that the meter was servicing two separate tax lots.

Accordingly, it is

ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

4/12/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**