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

PRESENT: **HON. CAROL EDMEAD** PART 31

Justice

Index Number : 400502/2010

BROWN, TRACY

VS.

NYC TAXI AND LIMOUSINE COMMISSION

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 5/12/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The instant Article 78 Petition is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the petition for an order (1) declaring the determination dated October 26, 2009 (the "determination") of respondents the New York City Taxi and Limousine Commission and Matthew Daus as Commissioner of TLC which denied petitioner's For Hire Vehicle (FHV) Operator license application to be arbitrary and capricious and an abuse of discretion, and in violation of Correction Law §§ 752 and 753, Executive Law §296(15) and New York City Administrative Code §8-107(10); (2) vacating and annulling the determination, (3) entering judgment against respondents for lost wages resulting from the denial of petitioner's FHV license; or (4) in the alternative, directing a trial of any triable issues raised by the parties; and (5) awarding fees and costs including attorneys fees, is denied, and the petition is dismissed and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 5/19/10

HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

In the Matter of the Application of
TRACY BROWN,

Index No. 400502-2010

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION and MATTHEW DAUS as Commissioner of the New York City Taxi and Limousine Commission,

Respondents.

---------- X

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Tracy Brown seeks an order (1) declaring the determination dated October 26, 2009 (the "determination") of respondents the New York City Taxi and Limousine Commission ("TLC") and Matthew Daus as Commissioner of TLC (collectively, "respondents"), which denied petitioner's For Hire Vehicle (FHV) Operator license application to be arbitrary and capricious and an abuse of discretion, and in violation of Correction Law §§ 752 and 753, Executive Law §296(15) and New York City Administrative Code §8-107(10); (2) vacating and annulling the determination, (3) entering judgment against respondents for lost wages resulting from the denial of petitioner's FHV license; or (4) in the alternative, directing a trial of any triable issues raised by the parties; and (5) awarding fees and costs including attorneys fees.

Factual Background

On or about June 26, 2009, petitioner applied for an FHV driver license ("FHV license"), disclosing that he had been convicted of a crime. A criminal background check indicated that petitioner had been convicted for three different crimes: in November 1992, for criminal possession of a loaded firearm in the third degree, a Class D felony; in January 2002, for petit larceny, a Class A misdemeanor; and in June 2005, for possession (while on probation for his second offense) of a forged instrument in the third degree, a Class A misdemeanor (sentenced to three years probation). Petitioner's probation ended on June 16, 2008, a year before he applied for the subject FHV license. Because the background check did not include out-of-state offenses, at TLC's request, petitioner submitted an affidavit, stating he did not have any out-of-state open charges or arrests.

Due to petitioner's multiple offenses, a fitness hearing was conducted on September 24, 2009. At the hearing, petitioner submitted testimony and numerous exhibits, including, but not limited to, a certificate of completion of USA/New York Point and Insurance Reduction Program, Real Estate Brokers' License, State of New York Certificate of Relief from Disabilities dated November 28, 2008, and letters from a church official and a "sponsor" of petitioner.

Petitioner testified before ALJ Jodi Zagoory (the "ALJ") that as to the 1992 gun possession conviction, petitioner explained that he had acquired a gun after having been "victim of a carjacking." Petitioner explained that, he "was in a bad place mentally. . . was distraught and . . .very fearful that it would happen again, because I did get that car back and . . . was driving that car, feeling very uneasy, . . . feeling like a target. But that's no excuse it was wrong for me to have the firearm. . . ."

As to his second conviction, petitioner explained that he was in a store with a friend and that he was arrested because his friend used a stolen credit card. When the ALJ asked, "[s]o are you saying you were in the wrong place at the wrong time?" petitioner responded, "Uh, that's essentially with the wrong person."

As to petitioner's recent conviction regarding possession of a forged instrument, petitioner explained that he was arrested for using a stolen credit card at a BMW dealership. When the ALJ Zagoory asked, "[s]o you had a stolen card, a stolen credit card that you intended to use?" petitioner responded, "[y]es."

The ALJ recommended that TLC grant his application:

> Since the most recent conviction for attempted use of a stolen credit card, approximately 5 years have passed during which applicant had time for reflection through counseling and spiritual guidance and to make changes to his life. It has been 17 years since applicant's conviction of possession of a loaded firearm. The circumstances involving the commission of that crime were explained by applicant. Applicant did not attempt to justify the crime but rather admitted that it was wrong and a mistake. Applicant currently works in the real estate field which requires contact with the public and to be exposed to credit card and other personal, sensitive, private and privileged information, all of which has been without any evidence of any incident. Applicant has taken responsibility for his criminal convictions and has showed credibly that he has reformed. Based on these reasons, I find that applicant will be able to be trusted to be honest with the TLC and the general public, that he will follow the TLC rules and other applicable laws, that he will be a safe driver and that he now is of good moral character. Accordingly, I find that applicant has shown that he is qualified and fit to possess an FHV license.

Subsequently, the Deputy Commissioner "disagreed" with the ALJ and denied the license. After restating petitioner's convictions, and stating the public policy of Correction Law Article 23-A, the Deputy Commissioner stated:

> You were an adult, 36 and 38 years of age, when you committed the two most crimes [sic]. These offenses bear directly on our ability to honestly carry out the duties of a TLC license and be responsible for the safety and welfare of the riding public. You accepted responsibility for your earlier weapon possession Felony, albeit with an explanation that

> your poor decision in that matter as based on your concern for your safety. You denied any culpability for the second conviction involving use of a stolen credit card, for which you pled guilty. . . .Your insistence that you did not commit a crime to which you pled guilty is inconsistent with acceptance of responsibility and rehabilitation. More importantly, you admitted that while serving your 3 year probationary sentence for the credit card crime you claim you did not commit, you used a stolen credit card at a BMW car dealership. This chronology of events reflects poorly on the credibility of your alleged rehabilitation and state of remorse. The letters of reference, as well as the Certificate of Relief were reviewed and considered in reflecting on your fitness to hold a TLC license. Your persistent involvement in unacceptable actions demonstrate an inability to comply with the law. A candidate for licensure, whose record includes persistent recent involvement with criminal actions designed to illegally obtain money or merchandise, must be able to demonstrate that he/she is not at risk for future misconduct and that he/she can be trusted to follow all of the TLC and DMV rules and regulations and deal honestly with the public. I do not believe that sufficient evidence has been presented to assure this agency that you can be relied upon to deal honestly with the public and ensure their safe transportation.
> (October 26, 2009 Determination).

Petitioner's subsequent request for reconsideration was denied, on the ground that there was insufficient evidence to that petitioner was "sufficiently rehabilitated."

In support of his petition, petitioner argues that Correction Law Article 23-A requires that respondents' decision be based on the requisite factors set forth therein, that is, whether petitioner's convictions have a "direct relationship" to the TLC license he seeks or whether granting such license "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." The TLC's determination failed to consider the requisite factors and relied on factors outside the scope of Correction Law Article 23-A (first cause of action). By violating Correction Law Article 23-A, respondents committed an unlawful employment practice under Executive Law §296(15) (second cause of action) and New York City Administrative Code §8-107(10)(a) (third cause of action). Further, by denying petitioner's application based on his criminal record, respondents acted arbitrarily and capriciously and their

actions constituted an abuse of discretion, in violation of CPLR §7803(3) (fourth cause of action).

In its Answer and opposition, respondents contends that in determining whether an applicant for licensure possesses the requisite "good moral character" (Adm. Code § 19-505(b)), the TLC may conduct a fitness hearing, and after such a hearing and a comprehensive review of petitioner's application, the Deputy Commissioner found that the ALJ failed to consider four important facts: petitioner's age at the time of the his two most recent offenses; failure to take responsibility for all of his convictions and lack of credibility due to his own conviction of using a stolen credit card; petitioner's commission of a third offense while on probation, two years before his application; and concern for the public's welfare. Respondents contend that criminal possession of a firearm in the third degree is a violent felony (Penal Law § 7002) and as to the petit larceny offense, class A, Class A is the most severe misdemeanors (Penal Law § 55.05).

Respondents argue that based on these facts, and their direct relationship to the duties and responsibilities of for-hire vehicle drivers, the Deputy Commissioner determined petitioner could not yet be trusted with the public's welfare. As such, the denial was supported by the record and was rational.

Furthermore, the Deputy Commissioner complied with the requirements to consider (1) the eight factors and (2) the certificate of relief, both pursuant to Correction Law § 753. Unlike the ALJ, the Deputy Commissioner considered the eighth factor, *i.e.*, the public's safety and welfare, and the Deputy Commissioner's concern is supported by the ALJ's findings regarding the third and sixth factors (*i.e.*, the bearing the criminal offenses will have on petitioner's duties, and seriousness of the offenses). The Deputy Commissioner considered all of remaining factors

as required.

Since respondents did not violate Correction Law Article 23, respondents did not violate Executive Law §296(15) (second cause of action) and New York City Administrative Code §8-107(10)(a) (third cause of action), which are predicated on a violation of Correction Law Article 23-A. However, in the event the Court finds that respondents violated Correction Law Article 23-A, the Court should remand the case to the TLC so that the agency can reassess petitioner's application.

Further, petitioners' claim for lost wages and attorneys fees lacks merit, since such damages are not incidental to the primary relief sought and cannot be sought in a separate action. Such damages are not incidental because consequential damages arising from the denial of a license is precisely the type of damages that the State sought to exclude when it enacted Section 7806. In additional, TLC is immune from damages resulting from discretionary determinations. Attorneys fees here cannot be recovered because it is the state's public policy not to award such fees since there is no applicable statutory provision or contractual provision warranting such fees.

In reply, petitioners argue that first, respondents did not properly consider the fourth factor under Correction Law § 753, which is the time elapsed since the occurrence of the criminal offense. It had been five years since the occurrence of petitioner's most recent crime at the time of petitioner's application. However, respondents misstate the law stating that the ALJ did not properly evaluate "the time elapsed since petitioner's most recent probationary term ended." The time elapsed from the end of petitioner's most recent probationary term is not one of the eight factors and falls outside the scope of the applicable statute. Therefore, it is arbitrary and capricious for TLC to consider it in making its determination. Second, respondents erroneously

justify the Deputy Commissioner' rejection of the ALJ's recommendation to approve petitioner's license stating that the ALJ had not properly weighed the eighth factor and did not properly evaluate petitioner's age and the information that petitioner submitted in support of his application. The ALJ considered the eighth factor (*i.e.*, the legitimate interest of the public agency in protecting property, and the safety and welfare of individuals or the general public) in page 3 of her recommendation and included it in her analysis of section (f). The ALJ considered whether the "general public will be safe with applicant car" [sic] and considered petitioner's correct age in her recommendation and analysis. While the ALJ considered information that petitioner submitted in support of his application, the Deputy Commissioner simply lists the documents and does not discuss what weight, if any, these documents were given. No consideration was given to the fact that petitioner obtained his broker's license and handled numerous real estate transactions involving large sums of money without incident for the last four years. The Deputy Commissioner ignored not only petitioner's proof of rehabilitation for the past four to five years but also his clean driving record.

Petitioner also argues that damages and attorneys fees are available remedies within the discretion of the court for unlawful discriminatory practice in violation of Correction Law Article 23-A. Executive Law § 297(7) permits plaintiff, who is claims that respondents committed an unlawful discriminatory practice, to seek "damages, ... and such other remedies as may be appropriate" and New York City Adm. Code § 8-502(a), permits plaintiff to seek "damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate." In addition, New York City Adm. Code § 8-502(f) states that "the court, in its discretion, may award the prevailing party costs and reasonable attorney's fees."

Discussion

Petitioner proceeds pursuant to CPLR § 7803(3) which provides that the only questions which may be raised are "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." As relevant herein, an action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts" (*Matter of Pell v Board of Education*, 34 NY2d 222, 231 [1974]). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*Id.* at 231). The court's function is completed on finding that a rational basis supports the agency's determination (*see Howard v Wyman*, 28 NY2d 434 [1971]).

Matter of Pell v Board of Education (34 NY2d 222), is instructive on the basic standard of Article 78 review:

> In article 78 proceedings 'the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; 'the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence. '" . . . . 'The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious. . . ."
> *Pell* at 231 (Internal citations omitted)

Moreover, where, as here, 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 (*see Flacke v Onondaga Landfill Sys., Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 [1987]). Courts are required to "resolve [any] reasonable

doubts in favor of the administrative findings and decisions" of the responsible agency (*Town of Henrietta v Department of Envtl. Conservation,* 76 AD2d 215, 224, 430 NYS2d 440, 448 [4th Dept 1980]; *see also City of Rome v Department of Health Dept.,* 65 AD2d 220, 225, 441 NYS2d 61, 64 [4th Dept 1978], *lv. to app. denied,* 46 NY2d 713, 416 NYS2d 1027 [1979]).

And the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists (*Berenhaus,* 70 NY2d at 444, 522 NYS2d 478; *Matter of Stork Rest. v Boland,* 282 NY 256, 267 [1940]; *Matter of Acosta v Wollett,* 55 NY2d 761, 447 NYS2d 241 [1981]; *Matter of Verdell v Lincoln Amsterdam House, Inc.,* 27 AD3d 388, 390, 813 NYS2d 68 [2006]).

The Legislature enacted Correction Law Article 23-A (§§ 750 -755), "Licensure and Employment of Persons Previously Convicted of One of More Criminal Offenses," in 1976, to remove barriers to the employment of persons with criminal convictions by prohibiting unfair prejudice against them in employment and licensure (*Bonacorsa v Van Lindt*, 71 NY2d 605, 611 [1988]; *C. Schmidt & Sons, Inc. v New York State Liquor Auth.*, 52 NY2d 751[1980]). Pursuant to Correction Law §752, a license cannot be denied based on an applicant's criminal history unless one or both of the following exceptions is found to apply:

> (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or
> (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Section §753(1) of New York's Corrections Law provides that in making a determination pursuant to Section 752, which the TLC clearly made in this matter, the public agency "shall consider the following factors": (a) the public policy of this state to encourage the licensure and

employment of persons previously convicted of one or more criminal offenses; (b) the specific duties and responsibilities necessarily related to the license or employment sought or held by the person; (c) the bearing, if any, the criminal offense will have on his fitness or ability to perform one or more such duties or responsibilities; (d) the time which has elapsed since the occurrence of the criminal offense or offenses; (e) the age of the person at the time of occurrence of the criminal offense; (f) the seriousness of the offense; (g) any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and (h) the legitimate interest of the public agency in protecting property, and the safety and welfare of specific individuals or the general public." In making a determination, the agency "shall also give consideration to a certificate of relief from disabilities," which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein (Section 753(2); *see El v New York City Dept. of Educ.*, 23 Misc 3d 1121, 886 NYS2d 70 [Supreme Court New York County 2009]).

The record establishes that the Deputy Commissioner considered the factors outlined above.

As to subsection (a) (the public policy of this state to encourage the licensure and employment of persons previously convicted of one or more criminal offenses), the Deputy Commissioner expressly acknowledged that petitioner's "application and all supporting papers were carefully reviewed *in accordance with Article 23-A of the New York State Correction Law, including the public policy of New York State to encourage the licensure of persons previously convicted of criminal offenses*." (Emphasis added). Despite the ALJ's opinion, the Deputy Commissioner did not agree that petitioner was sufficiently rehabilitated due to, *inter alia*,

petitioner's "persistent involvement in unacceptable actions" which demonstrated his "inability to comply with the law." Petitioner, a "candidate for licensure," was unable to demonstrate that he was not at "risk for future misconduct." Notably, the Deputy Commissioner noted, in his letter denying reconsideration, that petitioner can apply at a later date. This conclusion was further based on the "chronology of events," which were undisputed. Therefore, it cannot be said that the Deputy Commissioner did not consider this factor.

As to subsection (b) (the specific duties and responsibilities necessarily related to the license or employment sought or held by the person), the Deputy Commissioner noted that petitioner would be required to comply with "all of the TLC and DMV rules and regulations" and "be responsible for the safety and welfare of the riding public." Although each and every rule of the TLC and DMV were not identified, reference to the obligation to follow such rules, including the duty to provide "safe transportation" to the "riding public" was noted.

As to subsection (c) (the bearing, if any, the criminal offense will have on his fitness or ability to perform one or more such duties or responsibilities), the Deputy Commissioner noted that petitioner's offenses "bear directly on [his] ability to honestly carry out the duties of a TLC licensee and be responsible for the safety and welfare of the riding public." Thus, it cannot be said that this factor was not considered.

As to subsection (d) (the time which has elapsed since the occurrence of the criminal offense or offenses), the Commissioner noted that the three convictions occurred "over the past 17 years" with the "more recent convictions in 2002 and 2005." Therefore, it cannot be said that the Commissioner did not consider the lapse in time from the most recent offense committed by petitioner.

As to subsection (e) (the age of the person at the time of occurrence of the criminal offense), the Commissioner expressly remarked that petitioner was an adult, 36 and 38 years of age, at the time the most recent crimes were committed.

As to subsection (g) (any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct), the Commissioner expressly stated that he considered "all supporting papers" including the letters of reference and the Certificate of Relief.

Finally, the Deputy Commissioner clearly considered subsection (h) (the legitimate interest of the public agency in protecting property, and the safety and welfare of specific individuals or the general public), by stating as such, and noting that petitioner failed to demonstrate his ability to deal honestly with the public.

While the Deputy Commissioner stated that he "reviewed" the "Certificate of Relief," the Court notes that the determination is silent as to whether the presumption of rehabilitation afforded by the Certificate of Relief was rebutted, especially in light of the fact that petitioner was granted real estate brokers license, and worked in such a field involving significant monetary transactions with the public without incident (*Peluso v Smith*, 142 Misc 2d 642, 540 NYS2d 631 [Supreme Court New York County 1989] ("the issuance of a Certificate of Relief from Disabilities created a presumption of rehabilitation which the respondents must rebut.")). Likewise, as to subsection (f) (the seriousness of the offense), the Deputy Commissioner's determination is silent as to how serious he considered the three offenses committed by petitioner. Yet, the Deputy Commissioner did note that he reviewed the Certificate of Relief, and that the record includes "persistent recent involvement" with criminal actions designed to illegally obtain money or merchandise. Nonetheless, it has been stated that even though an

agency does not state in its written determination that it considered and evaluated each of the enumerated factors, it must be presumed, absent evidence to the contrary, that it considered the factors enumerated in Correction Law § 753 (*Reyes v New York City Dept. Of Consumer Affairs,* 8 Misc 3d 1009, 801 NYS2d 781 (Supreme Court New York County 2005)). There is no evidence that the Deputy Commissioner did not consider the seriousness of the offenses or the presumption of rehabilitation created by the Certificate of Relief. Further, if the agency considers all eight (8) factors listed in Correction Law Section 753[1], it need not in every case produce independent evidence to rebut the presumption of rehabilitation before denying a license (*Peluso*, 142 Misc 2d at 648).

Although the petitioner presented persuasive arguments in support of his license application, the Court's role is limited to assessing whether the determination was rational, and not arbitrary or capricious as defined by caselaw. Here, the Deputy Commissioner considered all of the requisite factors and the uncontested facts in the record support the conclusion reached by the Deputy Commissioner; as such, a rational basis exists in the record to support the determination, and no issue of fact is raised to warrant a further hearing on the issues presented. It also bears repeating that the Deputy Commissioner expressly stated that petitioner was not precluded from applying for an FHV driver license at a late date. However, where such a rational basis exists, an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions are entitled to great deference (*Arif v New York City Taxi and Limousine Com'n*, 3 AD3d 345, 770 NYS2d 344 [1st Dept 2004]). And, where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion *(see Mid-State Management Corp. v New York*

City Conciliation and Appeals Board, 112 AD2d 72 [1st Dept], aff'd 66 NY2d 1032 [1985]).

In light of the above, petitioner's request for fees and costs including attorneys fees are denied as unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the petition for an order (1) declaring the determination dated October 26, 2009 (the "determination") of respondents the New York City Taxi and Limousine Commission and Matthew Daus as Commissioner of TLC which denied petitioner's For Hire Vehicle (FHV) Operator license application to be arbitrary and capricious and an abuse of discretion, and in violation of Correction Law §§ 752 and 753, Executive Law §296(15) and New York City Administrative Code §8-107(10); (2) vacating and annulling the determination, (3) entering judgment against respondents for lost wages resulting from the denial of petitioner's FHV license; or (4) in the alternative, directing a trial of any triable issues raised by the parties; and (5) awarding fees and costs including attorneys fees, is denied, and the petition is dismissed; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 19, 2010

Hon. Carol Robinson Edmead, J.S.C.