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

PRESENT: Hon. DIANE A. LEBEDEFF PART 8
Justice

SLOAN,

- v -

NYC Taxi & Limo Comm.

INDEX NO. 123003/01
MOTION DATE 12/20/01
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Art. 78

PAPERS NUMBERED

~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits ... 1

Answering Affidavits — Exhibits

Replying Affidavits

SCANNED
MAR 05 2002

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: FEB 27 2002

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8

----------X

SAMUEL H. SLOAN,

Petitioner,

For a Judgment Pursuant to CPLR Article 78,

-against-

Index No. 123003/01
Mot. Seq. No. 001

NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Respondent.

----------X

DIANE A. LEBEDEFF, J.:

In this Article 78 proceeding, petitioner Samuel H. Sloan, *pro se*, seeks various types of relief against respondent New York City Taxi and Limousine Commission (the "TLC" or the "Commission"). Leaving aside minor branches of the petition which are addressed at the close of this decision, petitioner's allegations raise an inquiry regarding a TLC summons adjudication and then two primary issues as to whether the TLC acted arbitrarily, capriciously or unlawfully in summarily suspending petitioner's for-hire license without providing a prompt hearing; and when denying petitioner's application for a new license.

For several years, petitioner was a TLC licensed hack driver. He drove a cab without incident: he was not involved in any accident, no customer filed a complaint against him, and he had no points on his license. In December, 1999, petitioner applied for a renewal of his license but his application was rejected as untimely by reason of a change in

TLC policy, which "new" policy was ultimately found fatally flawed (*Matter of Singh v. Taxi and Limousine Commission of the City of New York*, 282 A.D.2d 368 [1st Dept.], lv den 96 N.Y.2d 720 [2001]).

The record does not reveal whether the TLC took any steps to notify or accommodate drivers, like petitioner, who had been affected by the illegally-imposed rule change. However, as surely as the night follows the day, petitioner's attempts to resume his career as a taxi driver met with difficulty after difficulty.

Appeal of TLC Summons Adjudication

One such difficulty concerns a TLC judgment on a TLC summons which was adjudicated against him on default on December 11, 2000. The procedural posture of this portion of the petition's request for relief as to this summons is such that it cannot be determined if court action is timely.

Petitioner filed a motion to vacate this summons determination when he learned of it in June, 2001, and the motion was denied by a TLC administrative law judge on June 5, 2001. Petitioner then attempted to file a "petition for rehearing" with the ALJ. While he alleges that he filed an appeal in June, 2001 (Petition, para. 34 and Exhibit G), he has not yet received a decision. The copy of the appeal annexed to the petition is undated and does not indicate where it was sent. Respondent denies that an appeal was filed (Answer, para. 25).

TLC rules require that an appeal of an ALJ's decision "must be addressed to the Deputy Commissioner for Legal Affairs/General Counsel and received within thirty (30) days of the decision to be appealed" (35 RCNY § 8-13 [a][i]). If the appeal was properly

filed, then this branch of the within Article 78 proceeding is timely. However, if the appeal was not properly filed, then this Article 78 proceeding is untimely, having been brought more than 120 days following the ALJ's decision

The essence of petitioner's challenge is that TLC did not gain personal jurisdiction because the summons was not properly served. He urges no TLC jurisdiction could be acquired over him by mailing the summons to him at the address on his expired TLC license, given that he was not then a licensee of the TLC (*Watergate II Apts v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 [1978]; see *Humming Bird Car Service, Inc. v. New York City Taxi and Limousine Comm'n*, 184 Misc.2d 146, 149 [Sup. Ct., N.Y. Co. 2000], concerning the propriety of service by mail). Given the merit of petitioner's position, it is necessary to ascertain whether the court may proceed to consideration of this challenge

Under these circumstances, this branch of this petition will be referred to a referee to determine the propriety and status of petitioner's administrative appeal.

TLC's Denial of Petitioner's Application for a Hack License

Coincidentally, just three days after the First Department's decision in *Matter of Singh v. Taxi and Limousine Commission*, petitioner filed an application for a new license, which was assigned Application/License No. 5081212 (Petition, para. 25; Answer, para. 44). On this new application, he paid the $500 fee, took the required 80-hour course, passed the physical examination, and scored 92 out of 100 on the written examination.

The TLC, however, informed petitioner on June 1, 2001, that a new license could not be issued because there was an "old summons" outstanding (Petition, para. 25), which is the summons addressed above. The TLC summons in question had been adjudicated

against petitioner on default (35 NYCRR § 8-12[a]), on December 11, 2000, and the ALJ had assessed a fine of $280 and four points to petitioner's license, as a penalty.

On June 4, 2001, petitioner moved to vacate the default TLC adjudication of this summons. As reasonable excuse for his default, he alleged that he had not received notice of the hearing because the notice had been mailed to his old address. As his defense to the charges, petitioner averred that he was not a taxi driver on the date the summons was issued, that he had never had a taxi license number 5061483, and that on the date the summons was issued he was actually driving to Parris Island, South Carolina, to attend his daughter's graduation from the United States Marine Corps boot camp. The motion was denied by decision dated June 5, 2001, on the ground that petitioner had failed to show excusable neglect (Petitioner's Exh. C). The conclusion was based on the patently incorrect factual finding that petitioner held a TLC license on the date the summons was issued, and had therefore consented to service by mail at the old address listed on the summons.[1]

Petitioner attempted to file a "Petition to Rehear Motion to Vacate," dated June 8, 2001, at the TLC office at JFK Airport, but claims that the TLC employee there refused to accept it and pushed it back to him through the window (Petitioner's Exhibit I). Petitioner learned that the name of the ALJ who had denied the motion to vacate was Michelle Manzione, and he mailed his petition for rehearing to ALJ Manzione at the address

---

[1] The summons was filled in with Mr. Sloan's Department of Motor Vehicles ("DMV") driver's license number 799315111, and also indicated the taxi license number as 5061483 (see, Petitioner's Exh. L). It is undisputed that petitioner never held a taxi license with that number, and that he did not hold a TLC license on the date the summons was issued. A notice of a hearing to be held on December 11, 2000, was mailed to Samuel H. Sloan, at 24 6th Avenue, in Brooklyn. Mr. Sloan alleges that was his former address, and that he had notified TLC of his change of address.

provided to him by the Office of Court Administration. Because the ALJ had provided no independent office address, the address he received turned out be the ALJ's home address. Petitioner also mailed a copy to the Port Authority, because he was unsure whether ALJ Manzione worked for the TLC or for the Port Authority (see, Transcript of Hearing No. 5093363 ["Transcript"] at 19-20).

Petitioner determined that he had no choice but to pay the $280 fine in order to have his license issued, but that the ruling had to be "entered" first if he wanted to appeal it. He paid the fine at the TLC office at JFK Airport, and received a "clearance certificate" which evidenced that he met the requirements for issuance of a new license. He then went to the TLC's office in Long Island City to get his license. However, when he arrived he was told by the Supervisor of Licensing that such Supervisor "had received a phone call" from a TLC employee at JFK Airport, and that he could not issue the license until a hearing could be had on this matter (Petition, para. 33).

TLC then sent petitioner a notice, dated June 13, 2001, directing him to appear on June 26, 2001, for a hearing before the Licensing Standards Committee, in regard to "disorderly conduct at JFK Airport" (Respondent's Exh. J). The form notice indicates that the fitness hearing is ordinarily invoked for issues involving the applicant's past criminal record, past/current medical record or past driving record. Respondent was not told the date or dates of any incident at issue nor the identity of any complainant.[2] The TLC rules

---

[2] Respondent has annexed to its Answer a June 12, 2001, letter written by an unidentified TLC inspector stating that that petitioner had been "Very Verbally Abusive" to a TLC employee at JFK, that he had "got a hold of the home address of ALJ Manzione which is confidential to the public," and that he had "verbally threatened" ALJ Manzione in

(Respondent's Exhibit E), provide that the TLC "may direct" that an applicant for a license appear for a "fitness hearing" if "it believes that [the applicant] does not meet ... the qualifications for licensure" (35 NYCRR § 8-15[a]).[3] In such cases, the TLC "shall prepare a notice of hearing" which must set forth the basis for the "charge that the respondent fails to meet the minimum requirements for licensure" (35 NYCRR § 8-15[b]). The hearing is to be conducted before an ALJ "who shall review the documentary evidence and testimony submitted by the Commission *and afford the respondent an opportunity to respond under oath* and to proffer evidence on his behalf" (35 NYCRR § 8-15[c]), and the hearing must be recorded. The ALJ then must issue a recommended decision and, if the applicant has previously been a licensee, the recommendation is to be issued to the Chairperson (as opposed to the Deputy Commissioner for Licensing or his designee) (35 NYCRR § 8-15[d]; See 35 NYCRR § 8-02(d)(i), providing that an ALJ's decision concerning fitness will be a recommended decision, not a final decision.).

Petitioner, who was represented by counsel at the hearing, alleges that there "was no

---

his June 8, 2001 petition (see, Respondent's Exh. I, at 1). The inspector stated: "I feel that this person who is trying to become a TLC Licensee for the Commission should be Denied, Because I feel our passengers of N.Y.C. will not be safe" (*id.*).

3

35 NYCRR § 2-02(a) sets forth ten requirements that an applicant for a taxi driver's license must meet. Seven of these ten, the first five, and the ninth and tenth (respectively, age requirement; residency requirement; holding of valid chauffeur's license; being of sound health, as certified by a licensed physician; absence of drug or alcohol addiction; and holding certificates pertaining to required hours of instruction in taxi-related subjects, and in defensive driving) leave little, if any scope for discretion on the part of the TLC. The remaining three requirements leave varying degrees of discretion to the TLC. The applicant is also required to have the ability to speak, read, and write English, and to be familiar with the geography, streets and traffic regulations of the City. The seventh requirement, being of good moral character, allows substantial discretion.

prosecutor, no statement of charges, no evidence and no witnesses except for myself and my girlfriend" (petition, para. 36). The transcript of the hearing, produced after the within petition was submitted, shows that petitioner was questioned almost exclusively about why he had mailed his June 8, 2001, petition to ALJ Manzione's home address, and about what he had meant by writing that he would not forget her name, and that he intended to see her in jail. Petitioner explained that he had gotten ALJ Manzione's address from "the Bar Association," and that he had not known whether it was her home or business address (see, Transcript at 19). He also explained that what he meant is that he would undertake political action against the TLC, and that he intended to file a grievance against ALJ Manzione (see, Transcript at 22, 24-25).

On the date of the hearing, June 26, 2001, ALJ Greaves issued a decision recommending that petitioner's application be denied. That recommended decision was submitted to Assistant Commissioner Daphne Blackwood (not the Chairperson designated by the Mayor, TLC Rule 8-01[d]) on July 11, 2001, and she adopted the recommended decision. It is undisputed that petitioner was never provided with a copy of the hearing/determination of ALJ Greaves, adopted by the Assistant Commissioner (Petition, para. 37; Answer, para. 28).

By letter dated July 19, 2001, the Supervisor of Licensing, Roger Morgan, informed petitioner that his application had been denied because it had been determined that issuance of a license to him "would create an unreasonable risk to the public" (Petition, Exhibit F). Although petitioner had filed a change of address form with the TLC on June 26, 2001 (Petition, Ex. E), that letter was sent to petitioner's old address; it was not until August 15,

2001, that a second letter, signed by a representative of the Licensing Standards department, was sent to petitioner at his new address informing him that his license application had been denied (petition, Exhibit A; see, verified answer, at 14).

Petitioner then met with Assistant Commissioner Blackwood, who told him that the decision had been based on letters submitted by ALJ Manzione and letters of complaint, which were confidential (petition, para. 37). The Assistant Commissioner also told him that the decision and the transcript of the hearing were confidential (*id.*). She advised him that he could file a FOIL request for items from his licensing file (answer, para. 28), which he did on November 5, 2001 (petitioner's Exhibit R). In November, 2001, petitioner met with the Deputy Commissioner of the TLC, who informed petitioner that no administrative appeal lies from a determination to disapprove an application for a new operator's license.

This court is the proper venue for determination of questions of error of law affecting the administrative proceedings (CPLR 7803[3]).[4] As the history set forth above

---

[4] Preliminarily, the court must determine whether the applicable standard of review is whether the "determination was supported by substantial evidence" (CPLR 7803 [4]) or whether the "arbitrary and capricious" standard governs (CPLR 7803 [3]). If the former standard applies, the proceeding is in the nature of *certiorari*, and the matter should be transferred to the appellate division, unless determination of other issues will "terminate the proceeding" (CPLR 7804 [g]; see, *Matter of Margolin v.* Newman, 130 A.D.2d 312, 314-15 [3rd Dept. 1987]; *Matter of Hudson Riv. Fisherman's Assn. v. Williams*, 139 A.D.2d 234 [1988]). Where a hearing is "discretionary or informational in nature," the proceeding is in the nature of mandamus, and the arbitrary and capricious standard governs (*Margolin v. Newman, supra*).

Here, the TLC is not required to have any hearing in connection with a license application but, once it exercises its discretion to hold a fitness hearing, a comprehensive scheme is set forth in the TLC Rules, providing for a formal administrative hearing (35 NYCRR § 8-15 [a]). In similar circumstances, such hearings have been categorized as clearly "adjudicatory or quasi-judicial" in nature (*Margolin v. Newman, supra*, 130 A.D.2d at 315, holding that although Civil Service Law did not explicitly provide for mandatory hearings,

makes clear, respondent failed to follow its own rules for a fitness hearing and, instead, provided a hearing based entirely on secret evidence and undisclosed complainants. Thus, the procedure followed by the TLC in connection with petitioner's application conformed with neither its own rules, as set forth above, nor with the basic requirements of due process.

It is axiomatic that due process precludes an administrative deprivation of rights on the ground of misconduct that has not been charged (*Matter of Dhabuwala v. State Bd. for Professional Med. Conduct*, 225 A.D.2d 209 [3d Dept. 1996]; *Matter of Sulzer v. Environmental Control Bd.*, 165 A.D.2d 270 [1st Dept. 1991]). A "party is entitled in an administrative proceeding to be advised of the identity of the witnesses appearing against him" (*Studefin v. Taxi & Limousine Commission*, 135 Misc.2d 923, 927 [Sup. Ct., N.Y. Co. 1987], citing *Greene v. McElroy*, 360 U.S. 474, 496-97 [1959]), "unless some overriding interest of public policy articulated in the record reasonably indicates otherwise" (*Studefin v. Taxi & Limousine Commission, supra*, 135 Misc.2d at 927). "It is

---

where rules provided for formal adjudicatory hearing on charges against public employee, action was clearly adjudicatory).

Thus, to the extent the petition challenges respondent's decision as lacking an evidentiary basis, the matter should be determined by the Appellate Division. Even in cases where there is no evidence, transfer to the Appellate Division for a review of the "substantial evidence" issue is required (see *705 Ninth Ave. Restaurant Corp. v. State Liquor Authority*, 187 AD2d 349, 350 [1st Dept. 1992], holding, in case involving denial of application for license to serve beer, that appellate division provides initial review "whenever a hearing has been held" even absent a transcript and where "no other files, reports or documents were either marked as exhibits or introduced into evidence at the hearing, and no testimony by any witness on behalf of respondent was taken"). In this case, respondent has included several documents that were not before the ALJ at the fitness hearing and these items are stricken from the record. The only evidence before the ALJ, and which petitioner was given an opportunity to respond to, is the notice of hearing and the testimony recorded in the transcript (*Fanelli v. NCCAB*, 90 A.D.2d 756, 757 [1st Dept. 1982]; *Margolin v. Newman, supra*).

fundamental to procedural due process that a licensee be given notice of adverse action by the licensing authority, ... an opportunity to be heard [and] .... reasons for an adverse decision" (*Ricketts v. City of New York*, 181 Misc.2d 838, 845 [Sup. Ct., N.Y. Co. 1999], citing *In re Claim of Kokoni*, 110 A.D.2d 1023 [3rd Dept.1985]; *Wnek Vending & Amusements Co. v. City of Buffalo*, 107 Misc.2d 353 [Sup.Ct., Cty. of Erie 1990]).

The June 13, 2001, notice specified only "disorderly conduct at JFK Airport" as the subject of the hearing (see, Respondent's Exh. J). The notice to petitioner did not advise him that he was being charged in connection with the mailing of the rehearing petition to ALJ Manzione, and he was never given any opportunity to confront witnesses or even know the evidence against him concerning the "disorderly conduct" that was charged at JFK. However, ALJ Greaves questioned petitioner (the only witness who testified at the hearing, other than his girlfriend) almost exclusively about the mailing of the rehearing petition, and her recommended decision refers only to that petition as a basis for denial of license.

Further, respondent concededly relied on "confidential" information concerning the charge of "disorderly conduct at JFK," deriving from one or more written complaints that were never disclosed to the petitioner, who therefore had no opportunity to respond to the evidence against him.[5] It is also undisputed that ALJ Greaves' recommended decision was

---

5

It is noted that on this proceeding respondent has submitted materials that were not before the TLC in connection with the denial of the motion to vacate the summons, the denial of his application for the new license, or the summary suspension of the for-hire license. These materials, including writings posted on the internet by the petitioner, which appear to be literary rather than literal in nature, are not properly before the court, and have not been considered.

not reviewed by the Chairperson, as required by TLC's own rules when the applicant has previously been a licensee. Finally, there is no dispute that petitioner was never provided with a copy of ALJ Greaves' recommended decision, stating the reasons underlying the determination that petitioner "would create an unreasonable risk to the public," until respondent answered the instant Article 78 petition.

In sum, the hearing held in connection with petitioner's application for the Second License failed to accord with the minimal standards of a fair hearing: petitioner was not given fair notice of the charges against him, an opportunity to respond to the evidence against him, a statement of facts and conclusions of law underlying the determination, or the review provided for by the TLC Rules.

It bears repeating that petitioner had previously driven a taxi cab for two years while holding his original license and that, during those two years he was never involved in any accident, had no customer complaints filed against him, and had no points on his license. His application for renewal of that License was denied pursuant to a policy change which was subsequently found to have been illegally implemented. In short, it appears that if petitioner had simply paid the $280 fine due on the Summons, he would have been issued a new license.

Accordingly, the petition is granted to the extent it seeks to annul the determination of the respondent denying the application for TLC License number 5081212 and the matter remanded to the agency for further administrative action on such application.

Summary Suspension of For-Hire License

Petitioner applied for the for-hire vehicle driver's license, which does not allow the driver to pick up fares on the street, after receiving the August 15, 2001, letter denying his application for a new license. That application was approved, and the TLC issued a for-hire license to petitioner on September 19, 2001.

By letter dated October 19, 2001, TLC investigator Jeanmarie Ariola notified petitioner that the for-hire license was suspended, effective immediately, pursuant to TLC Rule 8-16(a) "based upon a finding by the Commission that emergency action is required to ensure public health, safety and welfare pending a final disposition of the charges" (Petitioner's Exhibit N; Respondent's Exh. P). The basis for the finding was the allegation that petitioner had "committed, and/or attempted to commit, fraud against the TLC by failing to truthfully answer question #18 on [his] licensing application" (*id.*). The letter also notified petitioner that he was entitled, within ten calendar days of the date thereof, to request a hearing "to have this emergency action" reviewed.

Petitioner wrote back to Ms. Ariola within ten days, protesting the charge that he had responded untruthfully to Question No. 18, since he had answered that question truthfully. Question no. 18 on petitioner's application asks "has any license issued to you been suspended or revoked?" (Respondent's Exh. O, at 2). Petitioner truthfully placed a mark next to the word "no." This answer was unobjectionable.

There is some inference in the papers that the TLC might have been attempting to indicate the answer to question no. 17 was the erroneous answer. This possibility fares no better for respondent. Question no. 17 asks whether the applicant "ever applied for, or is

now the holder of, a license granted by" the TLC. The form allows for a "yes" or "no" response and, if "yes," there are spaces for information about any past or current license. It only asks about licenses "granted," not about denials. Petitioner provided all the information requested with regard to his original license, and was not called upon by the form to submit the information which TLC could have asked for, but did not seek to elicit in any unambiguous manner.

Petitioner challenged the summary suspension of his license as an unconstitutional deprivation "of a valuable property right, without notice and an opportunity for a hearing and without being informed of the nature and the cause of the accusation against me" (Petitioner's Exhibit O). Petitioner subsequently received another letter, dated November 23, 2001, from Marc T. Hardekopf, assistant general counsel of the TLC, which informed petitioner that the TLC would seek "the discretionary revocation" of the for-hire license, pursuant to 35 NYCRR § 8-14, and that a hearing would be held three weeks later, on December 13, 2001, on three charges: (i) that petitioner had harassed ALJ Manzione by mailing a petition containing threatening language to her home address; (ii) that petitioner had threatened ALJ Manzione by mailing the petition to her home; and (iii) that petitioner had falsely stated, on question no. 18, that no license held by him had ever been suspended or revoked (Petitioners' Exhibit S). The letter further advised that his TLC license "is suspended pending the outcome of the hearing" (*id.*). This hearing has been stayed pending resolution of this proceeding. In the meantime, petitioner's for-hire license remains suspended.

"It has long been established that a taxi driver's license is a valuable property interest

that is afforded constitutional protection" (*Pierre-Lys v. New York City Taxi and Limousine Commission*, [Civil Ct., N.Y. Co., N.Y.L.J. 21, col. 4, 1/31/2002], citing *Hecht v. Monaghan*, 307 N.Y. 461 (1954); *Studefin v. NYCTLC, supra*). Since a taxicab driver's license "is nothing short of his livelihood," "summary suspension works a deep invasion of his property, for it prevents him from earning a living" (*Padberg v. McGrath-McKechnie*, 108 F.Supp. 2d 177, 187 [E.D.N.Y. 2000]).

Subject to some exceptions, constitutional due process requires that an individual be given notice and an opportunity to be heard before being deprived of a license, which is a property interest (*Studefin v. NYCTLC, supra*; *Salahuddin v. Coughlin*, 781 F.2d 24, 27 n.4 [2nd Cir. 1986], "[T]he infliction of punishment when not authorized by state law is a classic instance of denial of liberty without due process of law."). In determining the nature and extent of that right, courts balance (1) the nature of the claimant's property interest affected, (2) the risk of erroneous deprivation given the procedure followed, and (3) the burden on governmental interests that would be imposed were procedural safeguards provided (*Mathews v. Eldridge*, 424 U.S. 319, 335 [1976]). The summary suspension of a TLC license is required to be supported by a showing of "exigent circumstances" since it results in depriving the driver of his livelihood (*Pierre-Lys v. New York City Taxi and Limousine Commission, supra*, holding that "the possibility that a cab driver might commit a service refusal does not present a threat of harm to the public that raises issues of immediate public safety"; see also *Padberg v. McGrath-McKechnie, supra*, 108 F. Supp. 2d at 189-90, same, finding likelihood of success on § 1983 claim for deprivation of property). Exigent circumstances exist when the seizure is carried out by a government official

pursuant to a narrowly-drawn statute; it is necessary to "secure an important public or governmental interest" and there is a need for "prompt action," such as seizure of highly mobile property or to "protect the public health," for instance from drunk drivers (*Padberg v. McGrath- McKechnie, supra*).

The November 23, 2001, notice, advising petitioner that the TLC would seek the discretionary revocation of his Third License, specified the following three charges: (1) violating Taxicab Drivers Rule 2-60(a) by harassing ALJ Manzione by sending the June 8, 2001, petition to her home address; (2) violation of the same rule by threatening ALJ Manzione in that petition; and (3) violating Taxicab Driver's Rule 2-61(a) by falsely stating on question 18 of his application for the Third License that he had never had a license suspended or revoked. The notice stated that a hearing would be held three weeks later, on December 13, 2001, and did not inform petitioner of any right to an earlier hearing on the summary suspension (although respondent has taken the position that one was available).

As set forth above, petitioner drove a cab in New York City for two years without incident or complaint from the public. The charges cited in the November 23, 2001, notice may or may not justify revocation of petitioner's Third License, but respondent has not shown that they present such an immediate threat to the public safety that summary suspension, and the consequent hardship to petitioner and his family was warranted. Accordingly, TLC's summary suspension of the Third License is violative of due process and is vacated forthwith.

Additional Relief Sought

Additionally, petitioner seeks money damages, if available in an Article 78 proceeding. In an Article 78 proceeding, the judgment issued by Supreme Court may grant restitution or damages so long as they are "incidental to the primary relief sought by petitioner" (CPLR 7806; *See Gross v. Perales*, 72 N.Y.2d 231 [1988], money damages are incidental when "the same facts which justify equitable relief justify money damages"). Respondent argues that it is absolutely immune from liability for damages because the matter involves official action involving the exercise of discretion (*Tango v. Tulevech*, 61 N.Y.2d 34, 40 [1983]). Petitioner's claim for refund of the $280 fine paid on the summons would flow from grant of the discretionary relief requested in this proceeding; any claim resulting from an unconstitutional deprivation of a property interest could be brought in an action pursuant to 42 USC § 1983.

Finally, petitioner seeks an order requiring respondent to produce its files pertaining to his original license, the application for a new license, and the for-hire license, which he previously requested pursuant to FOIL on November 5, 2001 (Petitioner's Exhibit R). The record contains no response to that FOIL request; accordingly, this branch of this Article 78 proceeding is premature with respect to that request, and moot to the extent that respondent has now provided respondent with a copy of the transcript of the hearing held in connection with his license application, and the recommended decision rendered by the TLC ALJ following that hearing.

Based on the foregoing, it is hereby

ORDERED that the issue of the status of the appeal from the TLC summons adjudication is referred to a Special Referee to hear and report and the parties are directed to serve a copy of this decision upon IAS Legal Support and complete any necessary forms in order to obtain a calendar date, and the branch of the petition relating to such claim is held in abeyance; and it is further

ORDERED and ADJUDGED that the petition is granted to the extent that the determination by the respondent New York City Taxi and Limousine Commission denying petitioner's application for issuance of taxicab driver's license no. 5081212 to petitioner is annulled, and the matter remanded for further proceedings not inconsistent with this decision, and it is further

ORDERED and ADJUDGED that respondent is directed to reinstate petitioner's for-hire license TLC License number 5093363, pending a hearing on the charges in the November 23, 2001, notice of a hearing on revocation of the license; and it is further

ORDERED and ADJUDGED that the balance of the relief requested is denied.

This decision constitutes the order of the court.

Dated: February 27, 2002

J.S.C.