SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____
Justice

Index Number : 403135/2011
PRINCE, ALBERT
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

is decided in accordance with the annexed decision.

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

3/1/12 PK

Dated: 2/28/12

PK, J.S.C.

1. **CHECK ONE:** ..... [X] **CASE DISPOSED** [ ] **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** [ ] **GRANTED** [ ] **DENIED** [ ] **GRANTED IN PART** [ ] **OTHER**
3. **CHECK IF APPROPRIATE:** ..... [ ] **SETTLE ORDER** [ ] **SUBMIT ORDER**
[ ] **DO NOT POST** [ ] **FIDUCIARY APPOINTMENT** [ ] **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

In the Matter of the Application of
ALBERT PRINCE,

Petitioner, Index No. 403135/11

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

-against-

THE CITY OF NEW YORK,

Respondent.

----------x

HON. CYNTHIA KERN, J.S.C.

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

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	
Exhibits.....	

Petitioner brings this petition seeking to annul the decision of the New York City Environmental Control Board ("ECB") impounding petitioner's vehicle pending payment of a $2000 fine for "removal of recyclables from residence using motor vehicles," for a judgment that the vehicle impoundment is unconstitutional, for a judgment that the penalty constitutes an excessive fine and for an order continuing the order of the ECB suspending payment of the fine pending appeal. For the reasons set forth more fully below, the petition is denied.

The relevant facts are as follows. Petitioner is an artist who uses "found objects" in his art. It is undisputed that on Wednesday, February 23, 2011, petitioner took a rooftop television

antenna made of recyclable metal, as well as metal cans, into his car in front of 1602 East 53rd Street, a one or two family house, in Brooklyn. Petitioner alleges that he took these items to use in his artwork. The sanitation officer who issued him the citation testified that petitioner claimed he redeems some of the metal at a scrap yard. In any event, it is undisputed that petitioner was in violation of NYC Administrative Code §16-118(7)(b)(1) which prohibits removing recyclable materials which have been placed outside for collection by the sanitation department and transporting them by vehicle. NYC Admin. Code §16-118(7)(f)(1)(i) imposes a $2,000 fine for the first such offense and §16-118(7)(g)(1) requires that the motor vehicle used in committing the violation be impounded.

On March 23, 2011, petitioner appeared at ECB and was granted an expedited hearing, which was held that very day, rather than the originally scheduled date of March 29, 2011. The hearing was held before Administrative Law Judge Judith E. Stein. By decision dated March 23, 2011, ALJ Stein found that petitioner was in violation of §16-118(7)(b)(1) and therefore imposed a fine of $2,000. ALJ Stein stated that she did not have the discretion to lower or waive the fine. Petitioner appealed the ECB's decision by Notice of Appeal dated March 31, 2011. Petitioner also requested a waiver of the civil penalty due to financial hardship. By letter dated May 9, 2011, ECB informed petitioner that it had granted his request for a waiver pending the appeal. By stipulation dated June 24, 2011, petitioner and the Sanitation Department agreed to cap storage fees for petitioner's vehicle at $500 and to release the vehicle before having to pay the fine. By decision dated October 27, 2011, the appeal panel affirmed ALJ Stein's decision.

Petitioner's argument that the $2,000 is an excessive fine within the meaning of the Eighth Amendment of the United States Constitution and Article 1, section 5 of the New York

State Constitution is without merit. "The question is not whether [the court] might have imposed another or different penalty, but whether the agency charged with disciplinary responsibility reasonably acted within the scope of its powers." *Pell*, 34 N.Y.2d at 238. Moreover, a fine is excessive only if the fine constitutes punishment and is grossly disproportionate to the gravity of the offense. *United States v Mackby*, 243 F.3d 1159, 1167 (9th Cir. 2001); *Street Vendor Project v City of New York*, 10 Misc.3d 978, 982-83 (Sup. Ct. N.Y. Cty 2005). One of the factors to be considered in determining whether a fine is disproportionate is whether the fine imposed is required to achieve the desired deterrence. *See Mackby*; 243 F.3d at 1167; *Street Vendor Project*, 10 Misc.3d at 982-83. During the hearings before the City Council, the Department of Sanitation testified that the prior fine of $100 was not producing the required amount of deterrence. Based on the foregoing, petitioner has failed to establish that the fine imposed was grossly disproportionate to the gravity of the offense or that the amount of the fine was not reasonably related to the permissible goal of deterrence.

Moreover, fines cannot be excessive "where the offending individual has the power to mitigate the accrual of fines or penalties." *See Street Vendor Project*, 10 Misc.3d at 982. In the instant case, petitioner could have avoided the fine by not taking the recyclables or by obtaining the owner's permission to take them.

The court also finds that the impoundment of the vehicle is not an excessive fine. In *County of Nassau v Canavan*, 1 N.Y.3d 134, 140-41 (2003), the Court of Appeals held that forfeiture of a car could be excessive under certain circumstances. However, in the instant case, the penalty was not forfeiture in which the car cannot be recovered but impoundment in which the car can be recovered.

Petitioner's argument that he was denied due process in that he did not receive a prompt decision on the need for vehicle impoundment in conformity with 48 RCNY 1-32 is meritless. Petitioner received a prompt post-seizure hearing relating to the vehicle impoundment. Petitioner could have requested an expedited hearing sooner (*see* 48 RCNY §2-51) but did not. When he did request an expedited hearing, on March 23, 2011, it was held that very day. Moreover, 48 RCNY 1-32 does not apply to proceedings before the ECB.

Petitioner's argument that he was denied due process because the relevant statute lacks a mens rea requirement is also without basis. Petitioner points to no case law requiring that mental intent be read into every statute creating civil violations. His citation to *Morisette v United States*, 342 U.S.246 (1951) is irrelevant as that case involved criminal violations. Moreover, the civil cases petitioner cites to do not stand for the proposition that all civil violations must have a mens rea requirement. *See Property Clerk v Pagano*, 170 A.D.2d 30 (1st Dept 1991); *244 East 53rd Street Rest. Inc. v New York State Liquor Authority*, 86 A.D.2d 832 (1st Dept 1982).

To the extent that petitioner argues that it was arbitrary and capricious to enforce the statutes as written because such enforcement does not reflect the underlying intent of the statutes, that argument is without merit. When a statute is unambiguous on its face, the court may not look beyond the plain language to the legislative intent. *See Encore College Bookstores, Inc. v Auxiliary Service Corp. Of the State University of New York at Farmingdale*, 87 N.Y.2d 410, 417 (1995). In the instant case, the relevant statutes are unambiguous on their face and provide that anyone who takes recyclables off the street and puts them in a motor vehicle is subject to a $2,000 fine and impoundment of that vehicle. Petitioner argues that the Department of Sanitation's statements during hearings on the relevant statute that it was aimed only at "those

[taking recyclables] for commercial purposes... and in great bulk" means that the ECB's and ALJ's enforcement of the statutes as written was arbitrary and capricious. Petitioner is incorrect. Since the statutes are unambiguous on their face, this court may not look beyond their plain language to the legislative intent. *See Encore*, 87 N.Y.2d at 417. The statute as written does not apply only to those persons taking recyclables off the street "for commercial purposes and in great bulk." Therefore, the ECB did not act arbitrarily when it enforced the statute as written and issued petitioner a notice of violation and ALJ Stein did not act arbitrarily when she imposed the mandatory fine. It is not the role of the courts to rewrite the statute to make exceptions for people taking items in small number or for artistic purposes. If the legislature so chooses, it may amend the statute or the Department of Sanitation may direct its employees not to issue notices of violation for people taking recyclables in small amounts. However, as they currently stand, the applicable statutes contain no such exceptions and the ECB and ALJ's enforcement of them as written was not arbitrary and capricious.

Accordingly, the petition is denied. This constitutes the decision, order and judgment of the court.

Dated: 3/1/12

Enter: _____
J.S.C.