

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

Matter of the Application of DANIEL HASPBERRY et al.,

INDEX NO. 405070/06

Petitioners,

For a Judgment Pursuant to CPLR Article 78,

- v -

THE NEW YORK CITY DEPARTMENT OF EDUCATION et al.,

Respondents.

RECEIVED
NOV 21 2007
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MOTION DATE

MOTION SEQ. NO. 001

FILED
NOV 23 2007
NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: In this article 78 proceeding, the petitioners challenge determinations by the respondent New York City Department of Education ("DOE" or "City") which denied their separate applications for certification as a New York City school bus driver or school bus escort based on their respective felony convictions. The petitioners allege that the City, in denying their applications, violated section 752 of the Correction Law, under which an application for a license or employment may not be denied by reason of the applicant's having been previously convicted of a crime unless the criminal offense and the specific license or employment sought or the issuance of the license or the granting of the employment would involve an unreasonable risk to the safety or welfare of specific individuals or the general public. They also allege, *inter alia*, that the City's procedures for denying their applications violated their due process rights by failing to provide them with adequate notice of the reasons for the denial or with a meaningful opportunity to respond to the allegations which form the basis of the denial.

The City has cross-moved to dismiss the claims of two of the petitioners as barred by the applicable four-month statute of limitations. It also seeks an order dismissing the entire petition for failure to state a cause of action.

As to the statute of limitations, the court agrees that the claims of petitioners Linda Branch and Marco Viola are time-barred. By letters dated June 19, 2006, the City advised the company which employed both of these petitioners, respondent Thomas Buses, Inc., that their respective applications to be certified by DOE as a school bus driver had been denied because their criminal convictions rendered them "unsuitable to perform duties associated with the transportation of school age children." A copy of these letters was also sent to both Ms. Branch and Mr. Viola.

Although the letters were not addressed to either of the petitioners, service on them of a copy effectively constituted notice of the challenged determinations. To conclude otherwise, at least in the context of this proceeding, would exalt form over substance. Indeed, the petitioners have not cited any case or regulation which requires that notice of an administrative determination be addressed in the body of the letter itself to the affected party. Since this proceeding was not commenced until November 27, 2006, more than five months after notice was sent to Ms. Branch and Mr. Viola, the claims are untimely under CPLR 217(1) and must therefore be dismissed.

MVAJ

As to failure to state a cause of action, the City argues that the petitioners' due process claims are without merit because they do not have a constitutionally protected property interest in obtaining DOE certification. The City's argument on this issue consists of single paragraph in which it simply contends that whereas a current recipient of benefits has a protected property interest which cannot be taken away without due process of the law, an applicant for these benefits, such as the petitioners, does not have a protected property issue. This argument is facile and inaccurate. The Supreme Court has repeatedly reserved decision on the issue of whether applicants for benefits possess a protected property interest. See, e.g., *Lyng v. Payne*, 476 US 926, 942 (1986); *Walters v. National Ass'n of Radiation Survivors*, 473 US 305, 320 n. 8 (1985). See also *Kapps v. Wing*, 404 F3d 105, 115 (2nd Cir 2005); *Mallette v. Arlington County Employees' Supplemental Retirement System II*, 91 F3d 630, 637-638 (4th Cir 1996). Indeed, in *Mallette*, the Fourth Circuit observed that every lower federal court which has considered the issue has rejected the "application/revocation" distinction. *Id.* at 638. Moreover, as the petitioners have pointed out, applications to obtain a driver's license or a license to practice law, which involve a right to earn a living and engage in one's chosen occupation, are subject to due process protection. See *Chware v. Board of Bar Examiners*, 353 US 232 (1957); *Raper v. Lucey*, 488 F2d 748 (1st Cir 1973). But see *Medina v. Rudman*, 545 F2d 244 (1st Cir 1976); *Welch v. Paicos*, 66 F Supp2d 138 (D. Mass 1999). In *Matter of Brown v. Murphy*, 34 Misc2d 151 (Sup Ct NY Co 1962), the court found that a tow truck driver is entitled to procedural due process with respect to his application for a license to perform his trade.

Thus, on its cross-motion, the City has failed to provide the court with a basis for dismissing the petitioners' due process claims. In the absence of a comprehensive discussion by the City on this issue and on the issue of whether, if petitioners have a protected property or liberty interest, their due process rights have been violated, the court declines to reach the merits of the petitioners' due process claims on the cross-motion to dismiss. Under the circumstances, the court is also persuaded that the merits of the petitioners' Correction Law claims should be resolved in the same decision in which the merits of their due process claims are addressed. The City's cross-motion to dismiss is therefore denied with respect to both the petitioners' due process claims and Correction Law claims.

Accordingly, the respondents' cross-motion to dismiss is granted with respect to the claims asserted by petitioners Linda Branch and Marco Viola and the claims of these two petitioners are hereby dismissed. The motion is otherwise denied.

The respondents shall serve the petitioners with their answer within ten days of service upon them of a copy of this order with notice of entry. The case shall be re-noticed for submission to the court pursuant to the time limits set forth under CPLR 7804(f).

ENTER ORDER

Dated: 11/9/07

Check one: FINAL DISPOSITION



MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION

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NOV 23 2007

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