10-4411-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

SAUL ROTHENBERG, EBRAHIM ABOOD, TOBBY KOMBO, KONSTANTINOS KATSIGIANNIS, BOUBACAR DOUMBIA, ROBERT DYCE AND MOUSTACH ALI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

MATTHEW DAUS, DIANE MCGRATH-MCKECHNIE, JOSEPH ECKSTEIN, ELIZABETH BONINA, THOMAS COYNE, THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION AND THE CITY OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PLAINTIFFS-APPELLANTS

Katherine A. Rocco
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Brian J. Kreiswirth
Chair, Committee on Civil Rights,
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, NY 10036
(212) 382-6600

Attorneys for Amicus Curiae The Association of the Bar of the City of New York

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

CONSENT OF THE PARTIES

All parties have consented to the filing of this amicus curiae brief by the Association of the Bar of the City of New York.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York[1] (the "Association") was founded in 1870 and has been dedicated ever since to maintaining the highest ethical standards of the profession, promoting reform of the law and providing service to the profession and the public. With its over 23,000 members, the Association is among the nation's oldest and largest bar associations.

The Association has long been committed to protecting, preserving and promoting civil liberties, civil rights and the democratic process. Through its standing committees, the Association is interested in maintaining the balance between protecting due process and the legitimate interests of local government in expedient and effective control over administrative agencies.

PRELIMINARY STATEMENT

Appellants are former taxi drivers whose licenses were revoked by the Taxi and Limousine Commission ("TLC") after hearings before administrative law judges ("ALJs"). Appellants brought this suit pursuant to

[1] No counsel for any party helped author the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the amicus curiae, its members or its counsel, contributed money that was intended to fund preparing or submitting the brief.

42 U.S.C. § 1983 claiming, *inter alia*, that the ALJs who presided over their revocation hearings were paid and supervised by the TLC in a manner that created an impermissible risk of systemic judicial bias, thereby violating due process. The question addressed here is whether the availability of an Article 78 proceeding to review such revocation hearings cures the alleged systemic bias of the administrative tribunal. The district court found that it did; after examining the case law, we conclude that it does not.

FACTUAL ALLEGATIONS AND DECISION BELOW

Appellants allege that the TLC's administrative tribunal is wracked with systemic bias that infected their individual license revocation hearings. For example, Appellants point out ALJs who presided over their revocation hearings were at-will employees of the TLC with no security of tenure. (Appellants' Br., 13-14). These ALJs were allegedly paid on a case-by-case basis and had to apply each month to receive case assignments, which were doled out at the discretion of the TLC. (Appellants' Br., 14-16). Appellants allege that the ALJs understood that if they ruled against the TLC, they would not be assigned cases in the future. Those who most frequently ruled in the TLC's favor would allegedly receive more cases and possibly promoted to salaried status. (Appellants' Br., 16-17). ALJs who have ruled against the TLC in other contexts have allegedly been reprimanded and even

fired, and apparently no ALJ has ever ruled against the TLC in a fitness hearing involving a criminal conviction or drug test. (See Appellants' Br., 13-16, n.6). The system of bias that Appellants allegedly faced is no longer in effect; license revocation hearings are now conducted by independent ALJs employed by the Office of Administrative Trials and Hearings ("OATH"). *See* NYC Code § 19-506.1.

While the Association takes no position on the ultimate veracity of Appellants' claims, if accepted as true they might reasonably be viewed as evidence of systemic bias in the adjudication of TLC fitness hearings prior to the recent transfer of responsibilities to OATH.

Notwithstanding these allegations, the District Court, relying on *Locurto v. Safir*, 264 F.3d 154 (2d Cir. 2001), held that the availability of "an Article 78 proceeding [] is sufficient [process] for claims that the agency adjudicator was biased and prejudged the outcome or that ex parte communications with other officials may have infected the adjudicator's ruling." Mag. J. R & R. at 23. The Association believes this to be a misunderstanding both of the holding of *Locurto* and of the varied nature of the proceedings that may be brought pursuant to Article 78 of the New York Civil Practice Law and Rules. While the availability of an Article 78 remedy may, under certain circumstances, afford all the process that is due,

this is not the case where, as here, there are triable issues of fact related to allegations of systemic bias at a quasi-judicial administrative tribunal, but the available Article 78 proceeding would not permit a full adversarial hearing on those issues.

ARGUMENT

I. DUE PROCESS REQUIRES AN UNBIASED DECISION-MAKER

The Due Process Clause of the Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The protections of the Due Process Clause attach to licenses essential to the pursuit of an occupation, including the taxi licenses at issue in this case. *See Bell v. Burson*, 402 U.S. 535, 539 (1971).

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Accordingly, "under the Due Process Clause no judge can be a judge in his own case or be permitted to try cases where he has an interest in the outcome." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *In re Murchison*, 349 U.S. at 136) (internal quotations and alterations omitted).

A hearing before a tribunal with a financial stake in the proceeding's outcome does not comport with the requirements of due process. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Ward v. Vil. of Monroeville*, 409 U.S. 57, 59 (1972); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). In *Tumey v. Ohio,* the Supreme Court held that a judge would be deemed impermissibly biased where he maintained a "direct, personal, substantial pecuniary interest" in the case before him. *Tumey*, 273 U.S. at 523. In *Tumey*, the mayor of the town, sitting as a judge, received a portion of the fines that he assessed. *Id.* at 520. The Court found that even if the mayor's decision-making was unaffected by this conflict of interest, it was the mere possibility of temptation that violated due process. *Id.* at 535; *see also Caperton v. A.T. Massey Coal Co.,* 129 S. Ct. 2252, 2260 (2009) (discussing *Tumey*).

There is no requirement that a judge's pecuniary interest be "as direct or positive as it appeared in *Tumey*," to violate due process. *Gibson*, 411 U.S. at 579; *see also Caperton*, 129 S. Ct. at 2265. For example, in *Gibson v. Berryhill*, the Court found that due process was violated where a license revocation proceeding was presided over by the Alabama State Optometry Board, whose members stood to gain financially by limiting the number of practicing optometrists in the state. 411 U.S. at 578.

It is clear that this due process analysis "applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). When it comes to evaluating whether the financial interest of a tribunal in the outcome of a case violates due process, a court need not determine whether the tribunal was in fact biased; rather, the proper constitutional inquiry is whether, under the circumstances, the decision-maker's financial interest "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Caperton*, 129 S. Ct. at 2264 (quoting *Tumey*, 273 U.S. at 532). A judge's interest in a case will disqualify him from sitting in judgment when "under a realistic appraisal of psychological tendencies and human weakness, the [judge's] interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 129 S. Ct. at 2264 (quotations omitted).

If Appellants' allegations are true, then there was systemic bias built into the challenged TLC hearing procedures, thus raising serious due process concerns. Because the alleged "pay-to-play" system would have affected every ALJ employed by the TLC, it follows that there exists a triable issue

of fact as to whether the ALJs presiding over the Appellants' hearings had a constitutionally impermissible interest in the outcome of their cases.[2]

II. WHETHER THE AVAILABILITY OF AN ARTICLE 78 PROCEEDING SATISFIES DUE PROCESS DEPENDS ON THE NATURE OF THAT PROCEEDING, AND THE PROCEEDING AVAILABLE TO APPELLANTS WAS INSUFFICIENT TO CHALLENGE THE ALLEGED SYSTEMIC BIAS IN THEIR ADMINISTRATIVE HEARINGS

In the decision below, the court relied on *Locurto v. Safir*, 264 F.3d 154 (2d Cir. 2001) to hold, for due process purposes, that "an Article 78 proceeding . . . is sufficient for claims that the agency adjudicator was biased and prejudged the outcome or that ex parte communications with other officials may have infected the adjudicator's ruling." Mag. J. R. & R. at 23 (also citing *Nuebe v. Daus*, 665 F. Supp.2d 311 (S.D.N.Y 2009)). The Association respectfully submits that this conclusion was based on a misreading of *Locurto* and a failure to distinguish among the various forms of Article 78 proceedings, with the result that serious due process claims—based on allegations of systemic judicial bias—could go unheard by a neutral tribunal.

[2] Appellants' allegations of systemic bias—including direct financial incentives and a 100% success rate for the TLC—plainly distinguish this case from the ordinary administrative proceeding, where ALJs are merely employed by the agency whose actions are being challenged.

A. *LOCURTO* REQUIRES A FULL ADVERSARIAL HEARING IN ORDER TO SATISFY DUE PROCESS

In *Locurto v. Safir*, this Court held that the presence of a biased decision-maker at a pre-termination administrative hearing was not a violation of due process so long as "the state affords [the petitioner], subsequent to his termination, a full adversarial hearing before a neutral adjudicator." 264 F.3d at 174. This Court went on to explain that such a hearing must afford the petitioner the opportunity to submit new evidence and "have a trial of . . . disputed issues, including constitutional claims." *Id.* The plaintiffs in *Locurto* did not dispute the court's finding that an Article 78 proceeding would satisfy these requirements. *Id.*

B. WHETHER AN ARTICLE 78 PROCEEDING SATISFIES DUE PROCESS DEPENDS CRITICALLY ON THE TYPE OF PROCEEDING AVAILABLE UNDER THE CIRCUMSTANCES

Article 78 of the New York Civil Practice Law and Rules ("CPLR") permits a special proceeding to challenge agency action. *See Campo v. New York City Emp. Ret. Sys.*, 843 F.2d 96, 101 (2d Cir. 1988). An Article 78 proceeding may provide relief previously available through the common law writs of (1) certiorari, (2) mandamus to review, (3) mandamus to compel, and (4) prohibition. *See* CPLR 7801. Although these common law writs have now been consolidated into a single type of proceeding, the scope of

review of the agency action challenged in an Article 78 proceeding varies significantly depending upon which type of relief is sought. Importantly, not all types of proceeding afford the "full adversarial hearing"—with an opportunity to submit new evidence and "have a trial of . . . disputed issues"—critical to the holding in *Locurto*, 264 F.3d at 174. As such, a due process claim like the Appellants' cannot be dismissed simply on the ground that an Article 78 proceeding was available to them; the *nature* of the available proceeding should be a critical component of the determination.

An Article 78 proceeding challenging a denial or termination of a license will necessarily fall within the relief previously sought by the writs of certiorari or mandamus to review.[3] If the challenge is made after a quasi-judicial evidentiary hearing, then it is in the character of certiorari review; if the challenged agency action did not involve a hearing at the agency level, then the Article 78 proceeding is in the form of mandamus to review. *See* David D. Siegel, NEW YORK PRACTICE § 561 at 927 (3d ed. 1999). This distinction is critical, as the scope of the Article 78 court's review differs significantly between the two types of proceeding, and only a proceeding in

[3] We do not, therefore, address the other types of Article 78 proceeding, mandamus to compel and prohibition.

the form of mandamus to review could satisfy the requirements set forth in *Locurto*.

The inquiry under certiorari review is whether the agency decision is supported by substantial evidence in the record below. *See* CPLR 7803; *Yarbough v. Franco*, 95 N.Y.2d 342, 347 (2000); *see also Pell*, 34 N.Y.2d at 230. Certiorari entails a limited review of the ALJ's findings, and does not permit introduction of new evidence on appeal. See CPLR 7803(4). Certiorari is "confined to the facts and record adduced before the agenc[y]." *Yarbough v. Franco*, 95 N.Y.2d 342, 347 (2000); *see also Pell v. Board of Educ.,* 34 N.Y.2d 222, 230 (1974). This means that an Article 78 court on certiorari has no power to make new factual findings, *see Kelly v. Safir*, 96 N.Y.2d 32, 38 (2001), to disturb the credibility determinations of the hearing officer, *see Berenhaus v. Ward*, 70 N.Y.2d 436, 443-44 (1987); *Rodriguez-Rivera v. Kelly*, 2 N.Y.3d 776, 777 (2004), or "to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence." *Pell*, 34 N.Y.2d at 230. This is true even where petitioner has alleged judicial bias at the agency hearing itself. *See Hughes v. Suffolk County Dep't of Civil Serv.*, 74 N.Y.2d 833, 834, *amended*, 74 N.Y.2d 942 (1989).

A proceeding in the character of mandamus to review, on the other hand, provides a plenary review of whether the agency action was contrary to law or arbitrary and capricious. *See* CPLR 7803. Where issues of fact are raised by the parties' affidavits, a trial may be held to determine whether an agency's decision was arbitrary and capricious. *See* CPLR 7804(h); *In re Pasta Chef, Inc. v. State Liquor Auth.*, 389 N.Y.2d 72, 74-75 (App. Div. 4th Dept. 1976) (holding that trial court's evidentiary hearing of Article 78 seeking mandamus to review was not in error). In such a trial, the Article 78 court could develop a record and make its own factual findings. *See, e.g.*, *Lakeshore Nursing Home v. Axelrod*, 586 N.Y.S.2d 433, 438 (App. Div. 3d Dept. 1992).

The above descriptions make clear that, as between certiorari and mandamus to review, only the latter type of proceeding could meet *Locurto*'s requirement of "a full adversarial hearing before a neutral adjudicator." 264 F.3d at 174. In a certiorari review, the Article 78 court may not hold a new trial, but instead is limited to a review of the record developed at the hearing. It may not make new factual findings, substitute its judgment for the agency's, or overturn credibility determinations. While the court might identify blatant individualized bias appearing on the record

below, it is difficult to see how such a proceeding could address claims that more insidious or systemic bias infects the whole administrative process.

The need for access to a mandamus-to-review-type Article 78 proceeding in order to comport with *Locurto*'s requirements is consistent with a line of cases in which this Court found that the availability of an Article 78 proceeding was sufficient to provide due process where no evidentiary hearing was held at the agency level, given that Article 78 afforded plaintiffs subsequent access to such a hearing on their claims. *See Interboro Inst., Inc., v. Foley*, 985 F.2d 90, 93-94 (2d Cir. 1993); *see also, e.g.*, *Campo*, 843 F.2d at 102-03; *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877, 881 (2d Cir. 1996); *Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 156-7 (2d Cir. 2006). It would be inappropriate to extend *Locurto* to conclude that a certiorari-type Article 78 proceeding—with no evidentiary hearing and no new fact-finding—is sufficient to address allegations of systemic violations of due process at quasi-judicial hearings.[4]

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[4] There is a separate line of Second Circuit cases finding that the availability of a certiorari-type Article 78 proceeding can suffice to prevent a due process violation, but these cases involve challenges to random or unauthorized conduct rather than deprivations resulting from established state policies or procedures. *See Vargas v. City of New York* , 377 F.3d 200

C. APPELLANTS DID NOT HAVE ACCESS TO AN ARTICLE 78 PROCEEDING THAT MET THE REQUIREMENTS OF *LOCURTO*

The Appellants in this case did not have access to a proceeding that satisfied the requirements in *Locurto*. *See* 264 F.3d at 174. Since they all received quasi-judicial evidentiary hearings in front of the TLC, any Article 78 proceeding that they could have brought would have been in the character of a certiorari review, and the record reviewed by the Article 78 court would have been limited to the record adduced in front of the TLC in each individual driver's case.

The Appellants' due process claims rest on their contention that their termination hearings were tainted by systemic bias. The bias they allege is insidious in nature, reflected in the per diem compensation rate for ALJ termination decisions, the hidden pressures on the ALJs to rule in favor of the TLC, and aggregate numbers indicating a 100% ALJ decision rate in

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(2d Cir. 2004); *Munafo v. Metropolitan Transp. Auth.*, 285 F.3d 201, 214 (2d Cir. 2002). In due process challenges to random or unauthorized conduct, the only issue to be decided is whether the state has provided an adequate post-deprivation remedy. *See Gudema v. Nassau County*, 163 F.3d 717, 724-25 (2d Cir. 1998). Such an inquiry has no place where, as here, the authorized procedures are themselves the subject of the challenge and the issue is whether the plaintiffs have received due process in the first instance. *See Zinermon v. Burch*, 494 U.S. 113, 136 (1990).

favor of the TLC. If Appellants were unable, in the context of their individual administrative proceedings before the TLC, to depose their ALJs or obtain the agency documents and email messages produced during discovery in their federal court action, they would not even have been able to properly allege the bias claim in an Article 78 proceeding. The Article 78 court would have been powerless to supplement the record, or overturn the credibility and factual determinations made by allegedly biased ALJs. Nor could the Article 78 court have addressed the weight of the evidence or overturned the discretionary determinations made by allegedly biased ALJs.

Locurto should not be extended to a case like this one, where only certiorari review was available.[5] Had Appellants availed themselves of Article 78, they would not have been able to enter new evidence, develop a record or have a trial to determine whether bias so infected their revocation hearings as to violate due process. Such a proceeding would not have

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[5] It is possible that the *Locurto* plaintiffs erred in conceding that Article 78 afforded them access to a "full adversarial proceeding." *See Locurto,* 264 F.3d at 174. Like the Appellants here, the plaintiffs in *Locurto* had pre-termination hearings, *Locurto,* 264 F.3d at 160, and as such would likely have been permitted only a certiorari-type Article 78 review, which does not provide for new evidence or a trial of disputed constitutional issues. *See* CPLR 7803(4). In any event, Appellants have made no similar concession here, and we are unaware of any basis upon which they could bring an Article 78 proceeding in the nature of mandamus to review.

provided the "full adversarial hearing" required by *Locurto*; rather such an Article 78 proceeding would be more in the character of an appeal, and insufficient as a constitutional matter to provide due process. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972).[6] We respectfully submit that this was not the intended result of *Locurto*, and urge the Court to permit Appellants' Section 1983 claims to proceed so as to provide an adequate forum to hear their allegations of systemic judicial bias.

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[6] In *Ward v. Village of Monroeville*, the Supreme Court invalidated traffic violation convictions obtained where the mayor of Monroeville sat as the trier of fact. *See* 409 U.S. at 57-58. The court found that the mayor, as chief executive of the municipality that stood to benefit financially from the convictions, was not an impartial decision-maker and, therefore, the convictions violated due process. *Id.* at 60. The village argued that "any unfairness at the trial level [could] be corrected on appeal and trial de novo in the County Court of Common Pleas." *Id.* at 61. The Court rejected this reasoning, holding that "Petitioner is entitled to a neutral and detached judge in the first instance." *Id.* at 62. This requirement was reaffirmed and extended to the administrative context by a unanimous court in *Gibson v. Berryhill*. 411 U.S. at 579. In *Gibson*, the availability of de novo review under state law did not alter the fact that the Board proceedings themselves violated due process. *Id.* That the plaintiff optometrists could have sought de novo review in state court did not mitigate the fact that the license revocation hearings were themselves heard by a tribunal with a financial stake in the outcome. *Id.* at 578.

CONCLUSION

In light of the law discussed above, the Association respectfully asks that *Locurto* not be extended to certiorari-type Article 78 proceedings and that the decision of the District Court be reversed to permit Appellants' Section 1983 claims of alleged judicial bias to proceed.

Dated New York, New York
February 23, 2011

Respectfully Submitted,

CRAVATH, SWAINE & MOORE LLP

by

Katherine A. Rocco

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

BRIAN J. KREISWIRTH
Chair, Committee on Civil Rights
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, NY 10036
(212) 382-6600

Attorneys for Amicus Curiae The Association of the Bar of the City of New York

CERTIFICATE OF COMPLIANCE

KATHERINE A. ROCCO certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,834 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: February 23, 2011

Katherine A. Rocco