

Police Dep't v. Rodriguez-Toribio

OATH Index No. 302/10, mem. dec. (Oct. 9, 2009)

Respondent's motion to reargue denied. The appropriate avenue of review is an Article 78 proceeding.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
POLICE DEPARTMENT
Petitioner
-against-
RAFAEL RODRIGUEZ-TORIBIO
Respondent

MEMORANDUM DECISION

JULIO RODRIGUEZ, *Administrative Law Judge*

Pending before me is respondent's motion to reargue this tribunal's decision in *Police Department v. Rodriguez-Toribio*, OATH Index No. 302/10, amended mem. dec. (Aug. 7, 2009). In that case, this tribunal found that the Department satisfied its burden under *Krimstock v. Kelly*, 99 Civ. 12041 (HB), third amended order and judgment (S.D.N.Y. Sept. 27, 2007) (the "*Krimstock Order*") and was thus entitled to retain possession of respondent's vehicle, seized as the alleged instrumentality of a crime, pursuant to section 14-140 of the Administrative Code, pending the outcome of the forfeiture action.

At the hearing, respondent conceded the first two prongs under the *Krimstock Order*; that probable cause existed for the arrest pursuant to which the vehicle was seized and that it is likely that the Department will prevail in a civil action for forfeiture of the vehicle. However, respondent argued that the Department failed to establish that returning the car to him would pose a heightened risk to public safety. After reviewing the record and precedent and considering respondent's demeanor and credibility, I concluded that respondent's high blood alcohol content, the undisputed fact that a bottle containing vodka was recovered from the car when respondent was arrested, his lack of remorse, and his failure to appreciate the potential

serious consequences associated with drinking and driving was sufficient to establish that returning the car to respondent would pose a heightened risk to public safety.

Respondent seeks to reargue these findings claiming that the tribunal “misapprehended relevant facts in the record” and “overlooked virtually indistinguishable case law.” In opposing the motion, the Department asserts that the only means of review of this tribunal’s decision is by judicial review in an Article 78 proceeding. For the reasons set forth below, respondent’s motion to reargue is denied.

ANALYSIS

As a preliminary matter, this tribunal’s Rules of Practice do not expressly provide for motions to reargue. While the CPLR may provide for motions to reargue, the CPLR does not govern proceedings before this tribunal. *Police Dep’t v. Martino*, OATH Index No. 1420/07, mem. dec. at 6 (May 31, 2007); *Police Dep’t v. Edison*, OATH Index No. 1451/07, mem. dec. at 2 (Mar. 15, 2007).

This tribunal has stated that a motion to reargue, addressed to the discretion of the judge, is designed to afford a party an opportunity to establish that the judge overlooked or misapprehended relevant facts or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to the unsuccessful party to argue once again the very questions previously decided. *Dep’t of Correction v. Taylor*, OATH Index Nos. 717-18/92, 720/92, 768-73/92 (May 21, 1992); *Pro Brokerage, Inc. v. Home Insurance Co.*, 99 A.D.2d 971 (1st Dep’t 1984).

Generally, motions to reargue have been entertained when the Administrative Law Judge is preparing a report and recommendation for an agency head, as opposed to a final decision, and the report has not yet been issued. *See* 48 RCNY § 1-52 (Lexis 2008); *Dep’t of Buildings v. Goldberg*, OATH Index No. 652/03, mem dec (Jan. 24, 2003). By contrast, it appears that motions to reargue made subsequent to issuance of a decision are to be entertained in very rare circumstances. *See e.g. Classic Electric, Inc. v. Contract Dispute Resolution Bd.*, Index No 112065/04 (Sup. Ct. N.Y.Co. Mar. 28, 2005) (denial of motion to reargue overturned to allow petitioner to address a computational error).

Here, a final decision has been issued. More importantly, the *Krimstock* Order provides that “[t]he decision of the OATH judge will be subject to review in New York State Supreme Court” *Krimstock*, Order, para. 8. The *Krimstock* Order does not provide for any other

means of review. Accordingly, the appropriate avenue of review is an Article 78 proceeding. Respondent's motion to reargue is denied.

Nonetheless I considered respondent's arguments and find them to be without merit.

Respondent's first argument is that the tribunal misapprehended relevant facts in the record. Respondent focused on the tribunal's determination that returning the car to the respondent would pose a heightened risk to public safety because the respondent did not appear to "appreciate[] the potential serious consequences associated with drinking and driving. He did not display any remorse, nor did he testify that he would not repeat said conduct in the future." *Rodriguez-Toribio*, OATH 302/10 at 4-5. Respondent argued that the tribunal "overlooked critical testimony provided by the respondent in the hearing. In fact, the respondent did express remorse. The entire thrust of his testimony left no doubt that he would not repeat his mistake." Specifically, counsel cited respondent's response when asked, "what have you learned from this experience?" Respondent replied, "[a] lot, because this is my first time being arrested. Never had problems. I almost lost my job, my car, and that affects me today, the career that I want...law school...my future. . . I feel bad. So sorry about it. Never thought this would happen to me." Counsel's argument mischaracterizes the testimony and misstates the basis on which the tribunal reached its decision.

Respondent's testimony regarding what occurred on July 13, 2009, was limited to his statement that he had been celebrating a friend's birthday. Respondent then invoked his Fifth Amendment rights and declined to answer any questions regarding what the events were that led to his arrest. Respondent's testimony about having learned a lot from this experience and being sorry is generic, vague, and unpersuasive. On the record before me, I was not convinced that respondent was sorry for drinking and driving rather than being sorry that he was caught and subjected to criminal prosecution and potential forfeiture of his car.

More importantly, respondent misapprehends the basis on which the tribunal concluded that returning the car to respondent would pose a heightened risk to public safety. The determinative factors were respondent's high blood alcohol content, .176%, more than double the legal limit, just shy of the .18% minimum that would have exposed him to prosecution for Aggravated Driving While Intoxicated in violation of Vehicle & Traffic Law section 1192(2-a), and the undisputed fact that police officers recovered a bottle containing vodka from

respondent's car. Thus, even if I concluded that respondent appreciated the potential serious consequences associated with drinking and driving that alone would not have been dispositive.

Respondent's second argument is that the tribunal overlooked indistinguishable case law. Specifically, respondent cited to *Police Department. Monge*, OATH Index No. 836/08, mem. dec. (Oct. 31, 2007) and *Police Department v. House*, OATH Index No. 587/07, mem. dec. (Sept. 27, 2006). Respondent is incorrect.

To be clear, there are cases in which this tribunal has ordered cars released to respondents who had been arrested for drunk driving, as a first offense, and registered high levels of blood alcohol content. *Monge* and *House* are two such cases. However, there are also cases in which this tribunal permitted the Department to retain cars where respondents had been arrested for drunk driving, as a first offense, and registered high levels of blood alcohol content. *See Police Dep't v. Melendez*, OATH Index No. 1520/06, mem. dec. at 4 (Apr. 5, 2006) (necessity to retain vehicle established where respondent's blood alcohol level was .182%, which is "more than twice the legal limit"); *Police Dep't v. Lester*, OATH Index No. 1049/06, mem. dec. at 4 (Jan. 10, 2006) (explaining respondent's .17% "blood alcohol content was so high that it alone might have constituted an aggravating factor"); *Police Dep't v. Serrano*, OATH Index No. 499/06, mem. dec. at 5 (Sept. 22, 2005) (finding respondent's blood alcohol level of .207% and .239% on retest so high that they indicated recklessness). These cases are not irreconcilable. To the contrary, they establish that there is no bright-line rule, no set blood alcohol level or formula that would *per se* require a finding of heightened risk to public safety if the car is released to the respondent. Rather, each case must be assessed based on its individual merits.

As Judge Casey explained in *House*, "[a]n arrest for driving while intoxicated, without more, is not enough to [establish that returning the vehicle to respondent presents a heightened risk to public safety]. . . . Instead, petitioner must present additional evidence concerning the nature of the offense or the background of the offender. . . . This tribunal has held that a very high blood alcohol level might be sufficient to prove that the driver's continued use of a vehicle may present a heightened risk to public safety. . . . But that is not the sole inquiry. The evidence must be examined in its entirety." *House*, OATH 587/07 at 5 (citations omitted).

I have considered and rejected respondent's arguments on the merits. However, the basis for my denial of respondent's motion to reargue is that it is not properly before me at this juncture.

Julio Rodriguez
Administrative Law Judge

October 9, 2009

APPEARANCES:

CARRIE B. TALANSKY, ESQ.
Attorney for Petitioner

LEGAL AID SOCIETY
Attorneys for Respondent
BY: TRACEY KIM, ESQ.