Taxi & Limousine Comm'n v. Sow

OATH Index No. 467/20 (Oct. 15, 2019), *adopted*, Comm'r Dec. (Oct. 17, 2019), **appended**

Petitioner suspended respondent's TLC Driver License based on his arrest for assault in the third degree and harassment. At a summary suspension hearing, ALJ determined that petitioner failed to hold hearing within ten days of request, as required by its rules, and granted respondent's motion to dismiss. ALJ recommends that summary suspension of respondent's license be lifted.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TAXI AND LIMOUSINE COMMISSION
Petitioner
- against -
MAMADOU SOW[1]
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

Petitioner, the Taxi and Limousine Commission ("Commission"), commenced this summary suspension proceeding against respondent, Mamadou Sow, holder of a TLC driver's license, pursuant to the Commission's rules, title 35 of the Rules of the City of New York ("RCNY"), and the New York City Administrative Code. Admin. Code § 19-512.1 (Lexis 2019); 35 RCNY § 68-15(d) (Lexis 2019). The Commission suspended respondent's license on July 10, 2019, after it received notice that he had been arrested and charged with assault in the third degree and harassment in the second degree. Petitioner seeks to continue the suspension

[1] Respondent's counsel requested, in an e-mail accompanying its memorandum of law, that respondent's name be redacted from the decision. That request is denied as respondent stated no legally cognizable basis for removing his name from the decision. *See* 48 RCNY § 1-49(d) (Lexis 2019) (all decisions will be published without redaction unless the administrative law judge finds that there are legally recognized grounds to omit information from a decision); *see also Mosallem v. Berenson,* 76 A.D. 3d 345, 348 (1st Dep't 2010) ("Under New York Law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records"); *Fire Dep't v. Gala*, OATH Index No. 2772/18 at 2-4 (Apr. 16, 2019) (denying respondent's request to remove his name from decision).

during the pendency of the criminal charges on the ground that respondent poses a direct and substantial threat to the health or safety of the public (ALJ Ex. 1).

At a trial held before me on September 20, 2019, petitioner relied on documentary evidence. Respondent testified in his own behalf and presented documentary evidence. The record, which was reopened for submission of legal memoranda (ALJ Exs. 2, 3), closed on October 4, 2019. For the reasons set forth below, I find that respondent's motion to dismiss the petition should be granted because petitioner failed to timely schedule a hearing as required by its rules. Accordingly, I recommend that petitioner lift the suspension of respondent's TLC Driver License.

ANALYSIS

Section 19-512.1(a) of the New York City Administrative Code authorizes the Commission "for good cause shown relating to a direct and substantial threat to the public health or safety" to suspend a license before a hearing, and authorizes revocation or suspension after a hearing. The Commission's rules permit pre-hearing, summary suspension of a TLC Driver License "based upon an arrest or citation if the Chairperson believes that the charges, if true, would demonstrate that continued licensure would constitute a direct and substantial threat to public health or safety." 35 RCNY § 68-15(d)(1) (Lexis 2019). The rules provide for notice to the licensee within five days of the suspension. 35 RCNY § 68-15(a)(3). The rules further provide that if the Commission does not schedule a revocation hearing within 15 days from the pre-hearing suspension, licensees "can request a hearing on the Summary Suspension" by notifying petitioner "within ten calendar days from receiving the notice of suspension." *Id.* at § 68-15(b)(1). Such a hearing must be held within ten calendar days of the Commission's receipt of the request for a hearing. 35 RCNY § 68-15(b)(2).

Petitioner suspended respondent's TLC Driver License by notice dated July 10, 2019, after being notified that respondent had been arrested on July 5, 2019, for assault in the third degree (Penal Law section 120.00) and harassment in the second degree (Penal Law section 240.26) (Pet. Ex. 1). By notice dated September 4, 2019, petitioner informed respondent that pursuant to his request, a summary suspension hearing had been scheduled at this tribunal for September 20, 2019 (ALJ Ex. 1).

Motion to dismiss for failure to comply with due process

At the start of the trial, respondent moved to dismiss the petition on several grounds. First, respondent argued that the proceeding should be dismissed and respondent's license restored immediately because this tribunal's proceeding does not comport with due process requirements in light of the recent Second Circuit Court of Appeals decision in *Nnebe v. Daus*, 931 F.3d 66 (2d Cir. 2019).

According to respondent, in its recent decision in *Nnebe v. Daus*, the Second Circuit determined that the Commission's procedures in summary suspension cases do not comply with the due process requirements of the state and federal constitutions (Tr. 6). Noting that the Second Circuit directed the District Court to address proper remedies for the constitutional violations, respondent argues that this tribunal should dismiss the proceeding and immediately restore respondent's license (Tr. 6-7, 18-19). Petitioner opposed the application, contending that the *Nnebe* decision affirmed its right to summarily suspend its licensees based on their arrest, and "provided for a new standard within the [post-suspension] hearing" that affords respondents the opportunity to make arguments and present information to rebut the presumption that their continued licensure poses a threat to public health and safety because they were arrested for one of the charges enumerated in petitioner's rules (Tr. 8-9).

Respondent failed to establish that the Second Circuit's decision in *Nnebe* is a basis for dismissing the petition. The Commission's interpretation of its rules has been challenged in protracted litigation in which licensees claim the Commission's post-suspension hearings do not comply with constitutional due process requirements. *See Nnebe v. Daus,* 556 F. Supp. 2d 311 (S.D.N.Y. 2009), *aff'd in part, vacated in part and remanded*, 644 F.3d 147 (2d Cir. 2011), *on remand,* 184 F. Supp. 3d 54 (S.D.N.Y. 2016), *amended opinion,* 306 F. Supp. 3d 552 (S.D.N.Y. 2018), *aff'd in part, vacated in part and remanded,* 931 F.3d 66 (2d Cir. 2019).[2]

In *Nnebe*, the Second Circuit held that "a hearing that in effect conclusively presumes that suspension is appropriate based solely on the abstract relationship of the elements of a charged offense to safe driving provides inadequate process." *Nnebe*, 931 F.3d at 86. Relying on section 19-512.1(a) of the Administrative Code, the Court noted that to suspend a license, the Commission must show "good cause" that "relat[es] to a direct and substantial threat to the

[2] A summary of the history of the *Nnebe* litigation can be found in *Taxi & Limousine Comm'n v. Baig*, OATH Index No. 179/20 at 3-4 (Aug. 15, 2019) and *Taxi & Limousine Comm'n v. Azad*, OATH Index No. 142/20 at 3-4 (Aug. 15, 2019.)

public health or safety," posed by continued licensure of the driver. *Id.* at 82. Thus, the Second Circuit concluded, "a meaningful hearing . . . must give the driver an opportunity to show that his or her particular licensure does not cause a threat to public safety," *Id.* at 83. Relevant factors in this inquiry include the conduct underlying the arrest, the driver's overall record, and the driver's character. *Id.* at 82. By way of example, the Court noted that "in the majority of cases, the further removed the crime is from the driver's job, the less 'direct' the threat may be if [the driver] remains licensed" and that "[d]epending on the surrounding circumstances, and the driver's history, the threat may also be more or less 'substantial.'" *Id.* The Court also noted that a driver could be charged with conduct that was the sole infraction in an otherwise unblemished record or that satisfies the elements of a crime, but was "technical or mitigated," such that continued licensure does not "pose the kind of threat conjured by the general nature of the crime charged." *Id.*

Emphasizing that it was not requiring "an inquiry into factual guilt or innocence to satisfy the due process inquiry," the Court noted that "a hearing that encompasses some level of conduct-specific findings based upon the facts underlying the complaint and the driver's history and characteristics, for example, would be sufficient." *Id.* at 88. The case was remanded to the District Court to "fashion a constitutionally adequate process after hearing from the parties." *Id.*

Respondent's argument that the recent *Nnebe* decision bars this tribunal from proceeding with a summary suspension trial is premised upon a misreading of the decision. Other than a reference to the language in the opinion remanding the case for the District Court to address proper remedies for the proven constitutional violations, respondent offered no support for this contention (Tr. 18-19). Moreover, the language to which respondent's counsel directed this tribunal does not support this argument. The Second Circuit did not stay summary suspension proceedings under the Commission's rules pending direction from District Court; instead, it provided guidance as to the contours of a constitutionally adequate hearing. As Administrative Law Judge Garcia noted in a decision issued after the Second Circuit's recent *Nnebe* decision, the Court's guidance is consistent with this tribunal's "practice of allowing the parties to present all relevant evidence to make the required determination." *Azad*, OATH 142/20 at 5. *See, e.g.*, *Taxi & Limousine Comm'n v. Broiles,* OATH Index No. 849/19 (Nov. 7, 2018) (ALJ recommended lifting license suspension of licensee charged with third degree assault based on licensee's unblemished record and circumstances of his arrest); *Taxi & Limousine Comm'n v.*

Stallworth, OATH Index No. 467/18 (Sept. 26, 2017), *rejected*, Comm'r Dec. (Oct. 18, 2017) (where licensee was charged with leaving scene of an accident without reporting it, ALJ held that, based on licensee's conduct surrounding the incident, TLC did not prove continued license suspension was necessary to protect the public); *Taxi & Limousine Comm'n v. N.S.*, OATH Index No. 395/15 (Sept. 9, 2014) (ALJ held that even if charge was true, TLC did not prove that licensee who was charged with third degree assault posed a direct and substantial threat to public health or safety); *Taxi & Limousine Comm'n v. Nau*, OATH Index No. 985/14 (Nov. 22, 2013), *rejected*, Comm'r Dec. (Jan. 30, 2014) (where licensee was charged with driving while intoxicated, ALJ recommended lifting license suspension based on a psychological evaluation of licensee and other mitigating factors); *Taxi & Limousine Comm'n v. Bhatti*, OATH Index No. 2364/13 (Aug. 27, 2013), *rejected*, Comm'r Dec. (Sept. 24, 2013) (ALJ held that even if charge was true, TLC did not prove that licensee who was charged with third degree assault posed a threat to public health or safety); *Taxi & Limousine Comm'n v. Adjoor*, OATH Index No. 1044/08 (Dec. 7, 2007), *rejected*, Comm'r/Chair Dec. (Dec. 20, 2007) (ALJ held that TLC did not prove that licensee who was charged with third degree assault posed a threat to public health or safety).

Motion to dismiss for failure to timely hold hearing

Respondent's second basis for dismissal of the petition is more persuasive. Respondent argued that the petition should be dismissed because petitioner failed to schedule the hearing to be held within ten calendar days of its receipt of respondent's request for a hearing, as required by its own rules.

Section 19-512.1(a) of the Administrative Code, the statute governing summary suspension proceedings, mandates that upon notification of suspension of the license, the "licensee shall have an opportunity to request a hearing before an administrative tribunal of competent jurisdiction within ten calendar days after receipt of any such notification. Upon request such hearing shall be scheduled within ten calendar days. . . ." Admin. Code § 19-512.1(a).

The Commission's rules provide that:

> Upon receipt of a request for a hearing, the Commission must request a Summary Suspension hearing to be held within 10 calendar days of receipt of the request (if the tenth day falls on a

> Saturday, Sunday, or holiday, the hearing may be held on the next business day), unless the Chairperson determines that the hearing will impair an ongoing civil or criminal investigation.

35 RCNY § 68-15(b)(2).

By written notice dated July 10, 2019, petitioner notified respondent that his license had been suspended. That notice advised respondent:

> You have the right to request a hearing to contest this suspension. Your request for a hearing must be made no later than ten (10) days from receipt of this letter. If there is a substantial change in your case, such as a disposition, or if the charge(s) pending against you has been reduced to a less serious offense, TLC may lift the license suspension.

(Pet. Ex. 1). There is no evidence that respondent submitted a request for a summary suspension hearing within ten days of receipt of the July 10, 2019, notice of suspension. Indeed, there is no reliable evidence in the record as to the exact date respondent made his request for a summary suspension hearing.[3]

Respondent contends that petitioner failed to timely schedule a summary suspension hearing as required by its rules. Respondent argued that the undisputed evidence shows that by September 4, 2019, petitioner had been notified of respondent's request for a hearing. This is because petitioner sent a notice on that date stating that at respondent's request, a summary suspension hearing had been scheduled at this tribunal (ALJ Ex. 1). However, the scheduled date, September 20, 2019, was 16 days after the date of the notice. Therefore, respondent maintains, petitioner failed to comply with the requirements of its rules for timely hearing (Tr. 25-26).

Petitioner, on the other hand, argues that respondent failed to make a timely request for the hearing and thus waived his right to an expedited proceeding (Tr. 16-17, 22, 26-27; Pet.

[3] At the trial, respondent's counsel, Ms. Stoddard Leatherberry, made representations as to her efforts to contact petitioner to request the summary suspension hearing. Similarly, petitioner's counsel, Ms. Horn, made representations regarding her knowledge of when respondent requested the summary suspension hearing. Counsels' representations regarding when respondent requested the hearing are not evidence and were not considered in rendering this decision (Tr. 24-26). In addition, the parties' memoranda, to the extent they relied on counsels' representations regarding when respondent requested the hearing, were not considered in rendering this decision. Also not considered were respondent's affidavit, dated October 4, 2019, and an e-mail included with petitioner's memorandum, which were submitted without my request or authorization, after the trial had concluded.

Mem. at 1).[4] According to petitioner, section 68-15(b)(1) of its rules required that respondent submit his request for a hearing within ten days of receipt of the notice of suspension dated July 10, 2019. Petitioner's argument is inconsistent with the plain language of its rule.

The regulations do not require that respondent request a hearing within ten days

The starting point of statutory construction is the plain language of the statute. *See Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 507 (2010) ("the text of a provision is the clearest indicator of the enactors' intent, 'and courts should construe unambiguous language to give effect to its plain meaning'") (citation omitted); *see also Nnebe*, 931 F.3d at 81. Section 68-15(b)(1) of petitioner's rules states that a respondent "*can* request a hearing . . . by notifying the Commission within 10 calendar days from receiving the notice of suspension." (Emphasis added). This language is permissive, not mandatory. In contrast, the next subsection of the rule, section 68-15(b)(2), mandates that petitioner "must request" a hearing to be held within ten calendar days of the receipt of the request for such a hearing. This distinction is not without significance. *See People v. Schonfeld*, 74 N.Y.2d 324, 328 (1989) (Although the Legislature's use of mandatory language, such as "must," is not conclusive, "such a word of command is ordinarily construed as peremptory in the absence of circumstances suggesting a contrary legislative intent"); *GE Capital Corp. v. State Div. of Tax Appeals*, 2 N.Y.3d 249, 255 n.1 (2004) (noting that "may" is permissive, Court gave effect to the legislature's terminology, particularly since mandatory language "shall" appears in another provision about the same subject matter that was enacted at the same time). By its own rules, petitioner is required to schedule the hearing to be held within ten days of its receipt of the request. The rules, however, afford licensees the opportunity to request a hearing within ten calendar days of receiving the notice of suspension, but does not require that they do so.

This interpretation of the Commission's rule is consistent with the plain language of the Administrative Code provision that governs this proceeding, which does not require that

[4] Petitioner's counsel also suggested that to the extent there was any delay in scheduling the hearing, "the Court's calendar also hold's sway, and if there, if there were any kind of delay . . . it is entirely possible and/or probable that it was a result of court calendar requirements and not TLC inaction." (Tr. 23). Petitioner offered no evidence to support this speculation, even when afforded an opportunity to do so (Tr. 23-24). As the party who bears the burden of holding the summary suspension within ten calendar days of its receipt of a demand for such a hearing, petitioner should be prepared to offer evidence to rebut challenges to the timeliness of its hearings, such as evidence of the date it received the request and when it placed the summary suspension hearing on this tribunal's calendar.

licensees request a suspension hearing within ten calendar days of receipt of the notice. As noted by the Second Circuit in *Nnebe*, the Commission's rules "are 'to be read, if possible, in a manner consistent with, rather than in opposition to, the governing statute.'" *Nnebe*, 931 F.3d at 82 (citation omitted). Here, the Code provides that the "licensee *shall have an opportunity* to request a hearing . . . within ten calendar days after receipt" of the notice of suspension. Admin. Code § 19-512.1(a) (emphasis added). The Code does not require that licensees make such a request within ten days, only that petitioner afford them an opportunity to seek an expedited hearing. It does, however, mandate that once the licensee makes a request, "such hearing *shall be scheduled* within ten calendar days," without limitation based on the timeliness of the request for a hearing.[5] *Id*. This interpretation is consistent with what the Second Circuit described as the Administrative Code's "clear intent to leaven the Commission's eagerness to discipline drivers with greater concern for driver's rights." *Id*. at 83.

Thus, petitioner's contention that respondent was required to request a hearing within ten days of having received the notice is not supported by the plain language of the Administrative Code and the Commission's rules.

Petitioner failed to establish waiver of right to an expedited hearing

Relying on section 68-15(b)(4) of its rules, petitioner further contends that because respondent failed to request a hearing within ten calendar days of receiving the notice of suspension, he waived the opportunity to be heard on an expedited basis. Therefore, petitioner maintains, the hearing was properly scheduled in a manner consistent with OATH's rules of practice. Section 68-15(b)(4) provides:

> If a Respondent does not request a hearing on the Summary Suspension within the time specified in paragraph (1) of this subdivision, then all of the following apply:
> (A) the Respondent is deemed to have waived the opportunity to be heard on an expedited basis.
> (B) The Respondent will be scheduled for a hearing on the underlying violation in accordance with the normal procedures set forth in Chapter 1 of Title 48 of the Rules of the City of New York.

[5] Indeed, the only exception to the requirement that hearings be scheduled within ten calendar days of request is where "the Commission or successor agency or other administrative tribunal . . . determines that such hearing would be prejudicial to an ongoing criminal or civil investigation." In addition, if the tenth day falls on a Saturday, Sunday, or holiday, the hearing will be held on the next business day. *See* Admin. Code 19-512.1(a).

(C) The Summary Suspension will be continued until lifted by the OATH ALJ in the Revocation hearing.

Petitioner's reliance on this rule is unavailing for several reasons.

First, as discussed above, petitioner's contention that section 68-15(b)(1) requires that respondent must request a hearing within ten calendar days of receiving the notice is unsupported by the plain language of the provision. Nevertheless, section 68-15(b)(4) provides that failure to do so is deemed a waiver of the opportunity to have an expedited hearing. Thus, according to the rule, respondent will be scheduled for a hearing "on the underlying violation" and summary suspension of his license will continue until the revocation hearing, where this tribunal can recommend that the suspension be lifted. Yet, section 68-15(d)(2), which applies specifically to "Summary Suspension for Criminal Charges" (while section 68-15(b) is captioned "Summary Suspension or Revocation Hearing"), provides that although the Commission need not commence a revocation proceeding while criminal charges are pending, "the Respondent is entitled to request a Summary Suspension hearing." The provision makes clear that the controlling concern is the respondent's right to request a hearing to challenge the suspension of his license, a right that petitioner contends respondent waived because he failed to exercise it within ten days of receipt of the notice.

Moreover, it is difficult to reconcile section 68-15(b)(4) of the Commission's rules with section 19-512.1 of the Administrative Code, which does not bar licensees from pursuing summary suspension hearings if they fail to make the request within ten days of receipt of the notice of suspension. *See* Local Law 20 of 1999, § 1 ("it is the Council's determination that any rules of the Taxi and Limousine Commission that are inconsistent with any provision of the New York City Charter and Administrative Code of the City of New York as enacted by the City Council are superseded and thereby void and of no legal force and effect.").

Second, section 68-15(b)(4) effectuates a waiver of a licensee's opportunity to have an expedited hearing regarding the Commission's suspension of the license, which "is a prerequisite to plying [his] trade" and in which the licensee has a protected property interest. *Nnebe*, 931 F.3d at 80, 87. Section 68-15(b)(4) would appear to waive the opportunity for a due process hearing in which a licensee can challenge the summary suspension of his license. Taken at face value, section 68-15(b)(4) provides not only that the licensee waives the opportunity for an expedited hearing, but also waives the opportunity to challenge the summary suspension of the

license. Because the summary suspension "will be continued until lifted" in a revocation hearing at this tribunal, the licensee is effectively foreclosed from an opportunity to challenge the summary suspension of the license. Given the scope of this waiver provision, its application merits careful scrutiny.

To be effective, a waiver must be knowingly, intentionally, and voluntarily made. *See Brookhart v. Janis*, 384 U.S. 1, 4 (1966) ("There is a presumption against the waiver of constitutional rights . . . and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege'"); *Feinerman v. Board of Cooperative Educational Services*, 48 N.Y.2d 491, 497 (1979) ("a waiver must be found to have been knowingly and freely given, and not the product of coercive tactics"). Here, there was no knowing, intentional, and voluntary waiver.

Petitioner relied on its notice of suspension hearing to support its contention that respondent waived his right to a hearing within ten days of his request. Indeed, petitioner's counsel argued that respondent waived his right to an expedited hearing as "laid out in the rules with what's required and, and in the language of our notice of arrest suspension" (Tr. 17). However, that notice of suspension is utterly devoid of notice to respondent that failure to request a hearing within ten days will be deemed a waiver of the opportunity for an expedited hearing under the Commission's rules (Pet. Ex. 1).

The July 10, 2019, notice of suspension merely advised respondent of his right to request a hearing to challenge his suspension, states that the request "must be made no later than ten (10) days" from receipt of the letter, and provides information as to how respondent can contact a Commission representative to request a hearing (Pet. Ex. 1). The absence of notice to respondent that his failure to request the hearing within ten days of receipt of the suspension notice will be deemed a waiver of his right to a summary suspension hearing is fatal to petitioner's claim that respondent waived that right. *See Wilson v. Annucci*, 148 A.D.3d 1281, 1283 (3d Dep't 2017) (inmate has a fundamental right to be present at a disciplinary hearing and where record does not indicate steps taken to determine the legitimacy of his refusal to attend the hearing or to inform him of his right to attend the hearing and the consequences of his failure do so, court declined to find knowing, voluntary or intelligent relinquishment of his right to attend the hearing).

In sum, there is no evidence that respondent knowingly, intentionally, and voluntarily waived his right to a hearing within ten days of his request for such a hearing. Petitioner failed

to provide a timely hearing as required by its rules because although the evidence establishes that respondent's request was made on or before September 4, 2019, the hearing was not held until September 20, 2019, past the ten calendar days mandated by the Commission's rules.

Lifting of respondent's license suspension is the appropriate remedy

In determining the appropriate remedy for petitioner's failure to timely hold respondent's summary suspension hearing, this tribunal's proceedings in vehicle forfeiture cases provide guidance. *Krimstock v. Kelly,* 306 F.3d 40 (2d. Cir. 2002), involved the New York City Police Department's seizure of vehicles incident to arrests and its retention of those vehicles pending legal proceedings. Noting the central role that vehicles play to a person's livelihood and daily activities, the Second Circuit held that due process required that owners of seized vehicles be afforded prompt hearings in which they could challenge the City's continued possession of their vehicles. As the Court noted in *Nnebe*, the concerns addressed in *Krimstock v. Kelly* "apply with equal force here." *Nnebe*, 931 F.3d at 87.

Krimstock v. Kelly, U.S. Dist. 2007 LEXIS 82612 (S.D.N.Y. Sept. 27, 2007) (the "*Krimstock* Order"), mandated proceedings at this tribunal and established detailed procedures governing notice of right to the retention hearing and the hearing. Similar to the summary suspension procedures at issue here, the order includes time frames for providing notice of the right to a hearing and for holding the hearing itself. Of significance for purposes of determining the appropriate remedy here are instances where the Police Department failed to hold a timely hearing as required under the *Krimstock* Order.

This tribunal has consistently dismissed proceedings brought pursuant to the *Krimstock* Order where the City failed to comply with the Order's time frames and notice requirements. *See Police Dep't v. Ramirez*, OATH Index No. 2418/07, mem. dec. at 4 (July 16, 2007) ("due to the constitutional bases underlying the *Krimstock* Order, compliance with the time frames and notice requirements should be strictly construed against the petitioner."); *see also Police Dep't v. Brandon,* OATH Index No. 2062/19, mem. dec. at 4 (Apr. 17, 2019) (noting that this tribunal has consistently held that "the notice requirements in the *Krimstock* Order are not 'an empty formality,'" ALJ ordered Police Department to return vehicle where it failed to serve notice as required by the Order); *Police Dep't v. Peake,* OATH Index No. 1282/12, mem. dec. (Feb. 24, 2012) (ordering release of vehicle for failure to serve vehicle seizure notice at time of arrest);

Police Dep't v. Sica, OATH Index No. 1139/06, mem. dec. (Jan. 26, 2006) (noting that the *Krimstock* Order has been strictly construed against petitioner, ALJ granted motion to dismiss and ordering release of vehicle where the Police Department failed to comply with the Order's notice requirements).

In *Police Dep't v. Manning,* OATH Index No. 1162/05, mem. dec. (Jan. 25, 2005), Judge Merris granted respondent's motion to dismiss the *Krimstock* proceeding and ordered the vehicle released where the Police Department failed to timely mail notice of the hearing and failed to timely schedule the hearing within the required ten days of receipt of the initial demand for a hearing. Notably, the delay in scheduling the hearing was two days. Judge Merris found that strict adherence to the time frames set out in the order is required because individuals who have had their vehicles seized are to be afforded prompt resolution of their challenge to that seizure and "the burden is on the Department to provide a speedy hearing to respondent." *Manning*, OATH 1162/05 at 5.

The *Krimstock* Order does not include a remedy for the Department's failure to meet its time frames, but provides for release of the vehicle if this tribunal fails to issue a timely finding that the Department met its burden. *Manning,* OATH 1162/05 at 5. Judge Merris reasoned that the provision for return of the vehicle when the administrative law judge failed to issue a decision within three business days, as required by the *Krimstock* Order, implied that the same remedy is required when petitioner fails to adhere to the time frames established in the Order. Accordingly, she ordered that the vehicle be released to the claimant because the Department failed to comply with the Order's time frames for notice and a hearing. *See also Police Dep't v. Singletary*, OATH Index No. 342/06, mem. dec. (Aug. 24, 2005) (Judge Kramer granted respondent's motion to dismiss the *Krimstock* proceeding and ordered return of the vehicle where the Police Department scheduled a hearing 22 business days after receipt of respondent's initial demand for a hearing, rather than the ten days required by the Order, noting that the lack of bad faith or intentional misconduct by petitioner, or prejudice to respondent, is not controlling). In *Manning* and *Singletary*, this tribunal found that the failure to provide timely notice and hearing required immediate release of the vehicle, without regard to the underlying merits of the seizure. *See Police Dep't v. Edwards,* OATH Index No. 1575/13, mem. dec. at 3 (Mar. 19, 2013) (holding that principles of due process and application of the Order mandate dismissal of the petition and the return of respondent's car, irrespective of the underlying

merits)*; Peake*, OATH 1282/12 at 5 (same) (citing *Ezagui v. City of New York*, 726 F. Supp. 2d 275, 286-88 (S.D.N.Y. 2010) (the right to procedural due process is "absolute" in that it "does not depend upon the merits of a claimant's substantive assertions"; therefore, its denial entitles the claimant to nominal damages without proof of actual injury)).

Here, as in the *Krimstock* context, there are important due process considerations undergirding the summary suspension hearings. *See Nnebe*, 931 F.3d 66. Because a driver's TLC Driver License is often his or her means of earning a livelihood, the stakes are high when that license is suspended. *Nnebe*, 931 F.3d at 83-84 ("As we have already stated in this case, 'the private interest at stake . . . is enormous – most taxi drivers rely on the job as their primary source of income and often earn the sole income for large families in a city where the cost of living significantly exceeds the national average.'") (quoting *Nnebe v. Daus*, 644 F.3d at 159); *Spinelli v. City of New York*, 579 F.3d 160, 171 (2d Cir. 2009) ("The Supreme Court has 'repeatedly recognized the severity of depriving someone of his or her livelihood.'") (citation omitted).

The Commission's rules provide an avenue by which its licensees are to be afforded a prompt hearing on summary suspension of their licenses, and it is the Commission's burden to provide an expedited hearing. Moreover, the rules require that the suspension be lifted until a decision is rendered when the Commission's Chairperson fails to render a decision within 60 calendar days of the summary suspension hearing. 35 RCNY § 68-15(c)(5). This is analogous to the *Krimstock* Order, which requires that the vehicle be released to the claimant if this tribunal does not issue a timely decision. *Krimstock* Order, ¶ 3. The Commission's rule lifting a driver's suspension if there is no timely chairperson's decision after the summary suspension hearing is consistent with the requirement that its licensees be afforded prompt resolution of the status of their licenses.

Notice and a meaningful opportunity to be timely heard are the cornerstones of due process. *See Spinelli*, 579 F.3d at 169-170 (the touchstone of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and afforded an opportunity to be heard at a meaningful time and in a meaningful manner) (citations omitted). Here, respondent was not afforded a timely hearing as required by the Commission's rules. Under these circumstances, dismissal of the petition and lifting of the summary suspension is the appropriate remedy. To hold otherwise would render meaningless petitioner's obligation to

adhere to its own rules governing due process proceedings after summary suspension of a driver's license. The Commission is not without recourse, as it can pursue revocation of respondent's license at a hearing before this tribunal even while the criminal charges are pending. Such a proceeding would permit petitioner to establish, by a preponderance of the credible evidence, that respondent's TLC Driver License should be revoked in light of the alleged conduct that gave rise to his arrest.

In sum, respondent's motion to dismiss the petition should be granted and his TLC Driver License should be reinstated.

RECOMMENDATION

I recommend that suspension of respondent's TLC Driver License be lifted.

Astrid B. Gloade
Administrative Law Judge

October 15, 2019

SUBMITTED TO:

BILL HEINZEN
Acting Commissioner

APPEARANCES:

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October 17, 2019

Mamadou Sow
[redacted]

Re: **TLC License No. 5277240**

Dear Licensee Sow:

Pursuant to TLC Rule 68-15, a summary suspension hearing was held on September 20, 2019, as a result of your July 5, 2019 arrest for assault in the third degree and harassment in the second degree.

After hearing the evidence presented, the presiding Administrative Law Judge ("ALJ") found that your suspension should be lifted because the September 20, 2019 summary suspension hearing was not scheduled within ten calendar days of your request for same, as required by TLC Rule 68-15(b)(2).

Therefore, I accept the ALJ's recommendation and lift the suspension of your TLC Driver License.

Sincerely,

[redacted]

Christopher C. Wilson
General Counsel

cc: Wanda Rivera, *Executive Assistant, Licensing and Standards*
Astrid B. Gloade, *Administrative Law Judge*