STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

JORGE J. GONZALEZ,
PETITIONER

THE DEPARTMENT OF CONSUMER AFFAIRS
OF THE CITY OF NEW YORK
RESPONDENT

A proceeding pursuant to General Business Law Section 35-a concerning a disabled veteran vendor.

DECISION OF HEARING OFFICER

Vending Matter 2010-002

Pursuant to section 35-a of the New York General Business Law, a hearing was held on February 16, 2011 to adjudicate a dispute concerning the implementation of procedures as required by General Business Law ("GBL") §35-a for reissuing the Petitioner a specialized vending license for veterans that determine the locations at which the Petitioner is eligible to vend within particular areas of midtown Manhattan. The Petitioner maintains that the New York City's method of notice for the re-issuance of the specialized vending license in 2004 failed to notify him of the procedures to timely apply for the reissuance of a specialized vending license. (See, Hearing Officer Exs. 1, 4; T. p. 35, 62) The Petitioner further maintains that the New York City Department of Consumer Affairs ("DCA") failed to properly provide the New York City Police Department and other enforcement agencies with educational material regarding the rights of authorized veteran vendors. (T.62)

The Respondent seeks dismissal of the petition for the following reasons: 1) as a current resident of Ohio, Petitioner is ineligible for a GBL §35-a vending license and, thus, does not have standing to challenge DCA's issuance of those licenses; 2) Petitioner waited over six years to challenge the 2004 re-issuance of GBL §35-a specialized vending licenses and, thus, should be barred from challenging DCA's procedure on the grounds of laches; and 3) the procedures used by DCA to re-issue specialized vending licenses in 2004 fully comported with the requirements of GBL §35-a and the Citywide Administrative Procedure Act ("CAPA"). (See, Respondent's Post-Hearing Memorandum of Law, pg. 2)

Subsequent to the hearing, the parties were given until April 15, 2011 to submit Post-Hearing Memorandum of Law. An extension of time was granted until May 9, 2011. The Respondent submitted its post-hearing brief on May 9, 2011. On May 10, 2011, the Petitioner notified the Hearing Officer and the Respondent that he rested on the record created at the hearing.

The Statutory Scheme

Title 20, Chapter 2, Subchapter 27, Section 20-453 of the New York City Administrative Code ("Administrative Code") provides that it is illegal to sell or offer to sell goods or services on the City's streets without first applying for and obtaining a general vendor's license from DCA. (Answer, Hearing Officer Ex. 5, at para. 2) The general vendor's license is valid for a period of one year and, effective September 13, 2002, general vendor's licenses expired on September 30 of each year. (See Title 6, §1-02(b) of the Rules of the City of New York ("RCNY"); Answer, Hearing Officer Ex. 5 at fn 4) Pursuant to 6 RCNY 1-09 "Any application for a license renewal that is filed sixty days or more after the expiration date of such license shall be treated as a new license application." (See, Respondent's Answer, Hearing Officer Ex. 5, at pg. 3, fn 5)

GBL §35-a provides that specialized vending licenses are issued by DCA to qualified disabled veterans in addition to the general vendor's license that is required of all individuals who want to sell goods or services on the City's streets. A qualified disabled veteran cannot obtain a specialized vending license without first providing proof that he or she has a general vendor's license. [See Answer, Hearing Officer Ex. 5 at para. 11, citing: GBL §32 and 35; *Scott v. Ratner*, 101 Misc. 2d 841 (N.Y. Sup. Ct. 1979)]

The current version of GBL §35-a was enacted on March 5, 2004. Prior to the 2004 amendments, there had been two earlier versions of § 35-a. The first version of § 35-a became effective on June 30, 1995 and sunset on March 1, 1998, and the second version became effective on November 1, 1998 and sunset on March 1, 2003. The 2004 amendments revived, revised and made permanent the provisions of GBL § 35-a that had sunset in 2003. As a result, the current version of GBL § 35-a was deemed to be effective as of February 28, 2003. (See, Answer, Hearing Officer Ex. 5, at para. 9)

As initially enacted in 1998, and as reenacted in 2004, GBL § 35-a establishes two types of specialized vending licenses: licenses to vend throughout the City, including an area known as "the midtown core," an area of the City in which all other general vendors are generally prohibited from vending ("midtown-specialized licenses), and licenses to vend throughout the City, but not in the area known as the midtown core ("city-specialized licenses"). (See, Answer, Hearing Officer Ex. 5 at para. 12) The 2004 amendments increased the authorized number of midtown-specialized licenses from sixty, as allowed in the 1998 legislation, to 105. (See, GBL § 35-a(7)(c); Answer, Hearing Officer Ex. 5, at para. 13)

GBL § 35-a authorized cities with a population of more than one million to issue specialized vending licenses to honorably discharged veterans who are physically disabled as a result of injuries sustained while in the service of the Armed Forces. Pursuant to GBL § 35-a (1) (b), the City was required to set forth by rule "procedures for issuing specialized vending licenses pursuant to this section; such rules shall establish a priority system, based upon the date of application for specialized vending licenses issued pursuant to his section; provided, however, that any disabled veteran vendor holding a specialized vending license issued in such city prior to March first, two thousand three, shall be accorded a priority based upon the date of issuance of such specialized vending license."

The City's Rule

In conformity with GBL § 35-a (1) (b), the City of New York prepared a Proposed Rule (hereinafter the "Rule") revision of 6 RCNY §2-315, which was the provision of the City's rules that enumerated the procedures for obtaining specialized vending licenses under the version of GBL § 35-a that was enacted in 1998. On June 30, 2004, DCA published in the New York City Record, a Notice of Public Hearing and Opportunity to comment on the said revisions to 6 RCNY §2-213. (See, Answer, Hearing Officer Ex. 5, paras. 15-16 and Ex. F to the said Answer.) After conducting a public hearing on July 30, 2004 and reviewing the comments on August 23, 2004, DCA published a Notice in the City Record formally adopting the amendments to 6 RCNY §2-315. (See, Answer, Hearing Officer Ex. 5, para. 18 and Ex. H to the said Answer.) The DCA sent to all specialized vending license holders, including the Petitioner, letters that included of the Notice of Hearing and Opportunity to Comment, and notification of the new procedure for applying for the reissuance of their specialized vending licenses in accordance with the new rules, together with a copy of the license application. (See, Answer, Hearing Officer Ex. 5, paras.

17, 19 and Exs. F, G, I, J; T. 119-120, 122-126, 126-128)

Pursuant to the new Rule 2-315 (b) (3) (i), vendors who had currently valid specialized vending licenses at the time GBL § 35-a sunset of March 1, 2003 were required to apply for reissuance. Provided that such vendor applied on or before 5:00 p.m. on September 22, 2004, if he or she desired a midtown specialized vending license, the vendor would receive a preference over all other specialized vending license applicants for a midtown specialized vendor's license. (See, Answer, Hearing Officer Ex. 5, para. 21) Those vendors meeting the application deadline would be given a priority ranking based on the date of issuance of the specialized vending license issued prior to March 1, 2003, with the earliest given to the highest ranking. (See, Answer, Hearing Officer Ex. 5, para. 21) The seventy-five vendors with the highest rankings who desired midtown specialized vending licenses would be issued such licenses. (See, Answer, Hearing Officer Ex. 5, para. 21)[1]

Any qualified applicants for the reissuance of midtown specialized vending licenses remaining after these licenses were issued, or any other city specialized vending licensee who filed an application and requested their name be included on the list, were included on a waiting list maintained by DCA. (See, Answer, Hearing Officer Ex. 5, para. 22)

The Petitioner's Status

There is no dispute that the Petitioner is an honorably discharged member of the armed forces of the United States who is physically disabled as a result of injuries received while in the service of the armed forces and, therefore, entitled to a specialized vending license if he complied with the rules of the City of New York and the New York State General Business Law. (Petitioners Ex. A; T. 17-18)

Petitioner first applied to DCA for a generalized vendor's license on or about October 22, 2001 and his initial general vendor's license was issued on October 31, 2001. (Answer, Hearing Officer Ex. 5, para. 4) On that same date, the Petitioner was also issued a specialized vending license with priority number 373. (Answer, Hearing Officer Ex. 5, para. 14) Thereafter, the Petitioner maintained his vendor's license through renewal applications. On several occasions the Petitioner did not timely file his renewal applications resulting in the issuance of "new"

[1] An additional thirty midtown specialized licenses were authorized to be issued in groups of ten on January 31 of 2005, 2006 and 2007. (Id.)

vendor licenses pursuant to 6 RCNY 1-09. For example, the Petitioner's general vendor's license issued in 2002 expired on January 1, 2003. Petitioner did not seek to renew this license until April 28, 2003. (See Answer, Hearing Officer Ex. Paras. 5, 6, and Ex. D) Pursuant to 6 RCNY §1-09, this application for a license renewal that was filed sixty days or more after the expiration date of such license is treated as a new license application, a fact admitted by the Petitioner at the hearing. (T. 102)

Following the enactment of the City's new Rule 2-315 (b) (3) (i), Petitioner did not submit an application for the reissuance of his specialized vending license until September 23, 2004, one day after the September 22nd deadline, and he is currently on the waiting list. (See, Answer, Hearing Officer Ex. 5, para. 22) Regardless of whether the Petitioner timely submitted his application for the reissuance of his specialized vending license, possession of a general vending license is a condition precedent to eligibility for a specialized vending license. The Petitioner admitted that his special vending license is not valid unless he possessed a valid general vendor's license. (T. 99) Since the Petitioner did not seek to renew his general vendor's license until April 28, 2003, he could not have possessed a valid specialized vending license prior to March 1, 2003 that would have granted him the priority ranking provided by Rule 2-315 (b) (3) (i) if he had timely submitted his application for reissuance of his specialized vending license.

The Parties Contentions

The Petitioner maintains that DCA's method of notice for the re-issuance of the specialized vending license in 2004 failed to notify him of the procedures to timely apply for a specialized vending license. (See, Hearing Officer Exs. 1, 4; T. p. 35, 62) He testified that he did not receive any of the DCA mailings and only received notice of the reapplication procedures by word of mouth from another vendor. (T. 109-111) As a consequence, the Petitioner testified that he applied for a license on the day after DCA's imposed deadline (See, Answer, Hearing Officer Ex. 5, para. 23 and Ex. K; T. 109). Finally, the Petitioner maintains that DCA failed to properly provide the New York City Police Department and other enforcement agencies with educational material regarding the rights of authorized veteran vendors. (T. 62)

The Respondent seeks dismissal of the petition for the following reasons: 1) as a current resident of Ohio, Petitioner is ineligible for a GBL §35-a vending license and, thus, does not have standing to challenge DCA's issuance of those licenses; 2) Petitioner waited over six years

to challenge the 2004 re-issuance of GBL §35-a specialized vending licenses and, thus, should be barred from challenging DCA's procedure on the grounds of laches; and 3) the procedures used by DCA to re-issue specialized vending licenses in 2004 fully comported with the requirements of GBL §35-a and the Citywide Administrative Procedure Act ("CAPA"). Finally, the Respondent maintains that the NYS Department of Labor ("DOL") lacks jurisdiction to adjudicate the issue of the alleged failure to properly provide the New York City Police Department and other enforcement agencies with educational material regarding the rights of authorized veteran vendors as the statute only contemplates the DOL adjudicating disputes between vendors, not between a vendor and a municipal licensing authority.

Discussion

A. Jurisdiction

GBL § 35-a (7) (d) provides that "any dispute regarding the implementation of such procedure shall be subject to a prompt hearing before an administrative law judge with the New York State Department of Labor," where "such procedure" is referring to "procedures for determining the location at which a specialized vending license holder is eligible to vend."

Respondent maintains that the DOL lacks jurisdiction over the issue of whether the DCA provided the New York City Police Department and other enforcement agencies with educational material regarding the rights of authorized veteran vendors.

The statute references the nature of the dispute over which it confers jurisdiction, namely one regarding the implementation of procedures for determining a location at which a license holder may vend. Additionally, the Rule's procedures for assigning priorities in the issuance of specialized vending licenses clearly have an effect upon the location at which a disabled veteran can vend. Accordingly, the legislature intended for the DOL to adjudicate disputes between the City and vendor, and I find the legislature conferred jurisdiction on the DOL to adjudicate disputes between the City and veterans regarding the implementation of procedures that have an effect upon the location at which they might vend. However, since the issue of whether DCA provided the New York City Police Department and other enforcement agencies with educational material regarding the rights of authorized veteran vendors does not clearly involve disputes between the City and vendors over the implementation of procedures that have the effect upon the location at which the vendors may vend, I find that DOL lacks jurisdiction to adjudicate the

issue.

B. The Statutory Proviso and Notice

The Petitioner does not contend that the Respondent violated GBL § 35-a (1) (b) when it adopted the new procedure to establish a priority system that accorded priority to disabled veterans holding specialized vending licenses issued prior to March 1, 2003. As stated previously, the Petitioner argues that DCA's method of notice for the re-issuance of the specialized vending license in 2004 failed to notify him of the procedures to timely apply for a specialized vending license to receive a high priority number. (See, Hearing Officer Exs. 1, 4; T. p. 35)

The relevant statute required the City to establish a priority system, based upon the date of application for specialized vending licenses issued; "provided, however, that any disabled veteran vendor holding a specialized vending license issued in such city prior to March 1, 2003, shall be accorded a priority based upon the date of issuance of such specialized vending license." GBL § 35-a (1) (b). The City's procedure adopted pursuant to the statute did establish a priority system that accorded priority to disabled veterans holding specialized vending licenses issued prior to March 1, 2003 and required the disabled veteran to reapply for the special vending license on or before 5:00 p.m. on September 22, 2004. In so doing, the City reasonably established a cut-off date by which applications had to be made in order for it to accord such priority. As the statute limited to 105 the specialized vending licenses to be issued in midtown Manhattan, there was a need to fix with certainty the individuals to whom the specialized vending licenses would be issued. Consequently, it was entirely reasonable and necessary to fix an application deadline. Although not an issue raised by the Petitioner, it is accepted law that the construction of a statute by an agency charged with administering it is to be accorded great weight, and should not be disturbed unless irrational or unreasonable. *Matter of Scott v Ratner*, 101 Misc. 2d 841, 843 (1979). I find the City's procedure adopted pursuant to the statute reasonably established a window within which veterans had to apply in order to obtain the priority established by the statutory proviso. (See, *Grossman v Baumgartner*, 17 NY 2d 345, 349 (1966).

The Petitioner contends that the procedure was important and the City should have provided him with adequate notice of the application deadline. (T. 20-21) The Petitioner concedes that there is no statutory support for this proposition. (T. 21, 111)

Pursuant to section 1043 (b) (1) of Chapter 45 of the Administrative Code of the City of New York (hereinafter "Code"), pertaining to rulemaking, the Agency is required to publish a proposed Rule in the City Record at least 30 days prior to the date set for public hearing.

The City maintains that in addition to publishing the required notice in the City Record, it gratuitously notified the eligible disabled veterans by separate mailings for the public hearing and adoption of the rule. (Answer, Hearing Officer Ex. 5, Exs. F, G, H, I, J) Assistant Commissioner Pico testified that she personally ensured that all eligible disabled veterans, including the Petitioner, were included in these mailings. **(**t. 119-120, 122-125, 126-128) Pursuant to Code § 1043 (e), a Rule becomes effective thirty days after its publication in the City Record, with no additional community notice required. Therefore, the record supports a finding that the City provided the Petitioner with more notice of the rule making process than is required by the Code and there is no reason to invalidate the process based upon lack of notice.

The Petitioner's argument that the City was obligated to give him notice of the application procedure because this is an important statute and he should have known of it, is not persuasive under the facts presented herein. In the first instance, the City Code governing the rule making process requires that City to publish notice in the City Register of both the public hearing for the proposed rule and the adoption of the proposed rule. In this case, the City complied with this notice requirement. (See Hearing Officer Ex. 5, Exs. F, H; T. 121). In addition to this notice, the evidence establishes that the City gave additional notice of the public hearing and the adoption of the proposed rule by mailing letters and applications for the new special vending licenses to the eligible disabled veterans, including the Petitioner. (Hearing Officer Ex 5, Exs. F,G,H,I,J; T. 119-120, 122-125, 126-128) The record indicates that the additional notices mailed to the Petitioner were sent to his last known address that was used by the Petitioner on his most recent license application, and an address the Petitioner agrees was his correct address at that time. (T. 74-77). If this address was not the best address at the time of the DCA mailings to provide the Petitioner with notice of the application deadline the record indicates it was because he had moved or he was living at his girlfriend's apartment. (T. 74-76) Therefore, the Petitioner's failure to receive notice of the City's rule making process and the deadline for the reapplication for specialized vending licenses resulted from the Petitioner's

failure to notify the DCA of a change of address as required by applicable City rules.[2] (T. 77)

I find that the procedures adopted by the City to give eligible disabled veterans, including the Petitioner, notice of the rule making process, and the additional mailings by the DCA to the eligible disabled veterans complied with the statute and was a reasonable method for the City to disseminate information about the new procedures. The notice given to the Petitioner was legally sufficient. Consequently, the Rule may not be disregarded or invalidated because the Petitioner alleges he lacked actual notice of its adoption and implementation when this lack of notice resulted from the Petitioner's failure to notify the City of his change of address as required by Rule or to otherwise review his mail that was properly addressed and sent to the Petitioner's correct address.

C. Petitioner's Residence

The Respondent requests a finding that the Petitioner lacks standing to challenge the application of GBL §35-a and the implementing Code Rule provisions since he is not a resident of the State of New York. The Respondent is correct that being a resident of the State of New York is a necessary requirement for the issuance of a specialized vending license. (See GBL §§ 32 and 35-a) It is clear from the record that the Petitioner moved to the State of Ohio in or about February 2009 and that Ohio has, thereafter, been his permanent residence. (T. 51) The issues raised in the Petition took place in 2004, before the Petitioner moved to Ohio. While the Petitioner's present residence in the State of Ohio may preclude him from being eligible to receive a specialized vending license after 2009, I find that the Petitioner's current residence does not in and of itself support a finding that he does not have standing to challenge the DCA's actions in 2004. Accordingly, I will not dismiss the Petition solely on the issue of the Petitioner's current residence in the State of Ohio.

D. Laches

The Respondent finally requests that the Petition be dismissed on the ground of laches. The equitable relief of laches is available in administrative proceedings. [See *Wesby v. State of New York Division of Housing and Community Renewal*, 20 Misc. 3d 1103A (N.Y. Sup. Ct.,

[2] Administrative Code §20-462 "whenever any information provided on the application for a license or renewal thereof has changed the licensee shall notify the commissioner within ten days of such change;" 6 RCNY §1-08 "a licensee shall notify the Department in writing of any change of address within 10 days of the change;" 6 RCNY §2-302(c) "each general vendor shall notify the Department of Consumer Affairs within ten days if his or her home address or telephone number has changed."

Kings Co., 2008)] However, I find that the Petitioner is a pro se litigant and, as such, he should be given a full and fair opportunity to litigate the issues raised in his petition. Accordingly, I decline to dismiss this proceeding on the ground of laches.

DETERMINATION

After hearing Petitioner and the Department of Consumer Affairs of the City of New York, and after review of the evidence received and the respective parties written submissions, and due deliberation having been had upon the entire record of this proceeding, for the foregoing reasons, I make the following Determinations:

DETERMINE that the Petitioner's application is denied; and

DETERMINE that the Petition is dismissed.

Dated: April 30, 2012
Albany, New York

Respectfully submitted,
Office of Administrative Adjudication