

CHAIRPERSON'S FINAL DETERMINATION AND ORDER

In the Matter of
New York City Taxi & Limousine Commission
Petitioner
against
Mbaye Faye
Respondent

DETERMINATION

The decision of the Office of Administrative Trials and Hearings (“OATH”) Taxi and Limousine Appeals Unit (“Appeals Unit”) regarding summons 1389881A is **reversed**. The imposed penalty of a \$350.00 fine and a three point demerit to Respondent’s TLC license shall be vacated.

FINDINGS OF FACT

Respondent was cited for violating TLC Rule 55-14(g)(1) (use of an electronic device while operating a for-hire vehicle (“FHV”))¹, as alleged in summons #1389881A.

On October 20, 2011, a hearing was held on the violation cited in summons #1389881A. The TLC Inspector testified that he observed Respondent with two wired headphones in his ear, but that he did not see if the headphones were connected to any device and he did not see Respondent talking on the phone. The ALJ found that the Inspector’s testimony was sufficient evidence for the case to proceed. Respondent denied the allegation; the ALJ’s decision states: “Respondent testified: he did not have the headphones in his ears. He has a Bluetooth.”² The ALJ found Respondent’s testimony credible that he did not have the cited white headphones in his ears at the time and place of occurrence, and dismissed the summons on that ground.

The TLC appealed the ALJ’s decision and argued that Respondent admitted that he had an electronic device in his ears, which is a violation because an electronic device does not have to be activated in order to sustain a violation of the cited rule. Respondent’s attorney argued that Respondent did not admit that he had an electronic device in his ears, and that the ALJ’s findings on this point are clear. Counsel argued that the ALJ made no finding that Respondent had an electronic device in his ear, and points to the language in the decision which states: “Respondent testified: he did not have the headphones in his ears. He has a Bluetooth.”

The Appeals Unit reversed the ALJ’s decision and held that the ALJ erred as a matter of law. The Appeals Unit’s decision states: “Respondent testified that he did not have headphones in his ear, he had a Bluetooth,” and “There is no requirement that a driver be talking on the phone for

¹ 35 RCNY §55-14(e)(1)

² *Taxi & Limousine Commission v Mbaye Faye*, Lic. No. 882260 (October 20, 2011)

the driver to be found in violation of Rule 54-14G(1).”³ The Appeals Unit imposed a penalty of \$150 and two demerit points to Respondent’s TLC license.⁴

ANALYSIS

The Appeals Unit’s determination to reverse the ALJ’s dismissal of the summons was incorrect. The Appeals Unit misinterpreted the issue on appeal because it did not defer to the ALJ’s findings of fact.

TLC Rule 55-14(g)(1) states:

A driver must not Use an Electronic Communication Device while operating a Vehicle. A Driver can Use an Electronic Communication Device only while the Vehicle is lawfully standing or parked.

Violation of Rule 55-14(g)(1) carries a mandatory penalty of \$350 and a three-point demerit on the driver’s TLC license.

“Use” for purposes of the rule is defined to include “hav[ing] a device permitting hands-free operation of an Electronic Communication Device in or near the ear.”⁵ Furthermore, it is settled case law that “use” of an electronic device is established if a driver has an earpiece in his ear, even if the earpiece is not in use with the cell phone.⁶ Thus, the Appeals Unit is correct in its assertion that “There is no requirement that a driver be talking on the phone for the driver to be found in violation of Rule 5[5]-14[(g)(1)].”⁷ However, the aforementioned conclusion is irrelevant to the issue on appeal and is an erroneous basis on which to overturn the ALJ’s decision.

It is well established that an ALJ’s findings will not be disturbed on appeal if those findings are based on “substantial evidence.”⁸ Substantial evidence is the standard for review of administrative decisions and requires such relevant proof that a reasonable mind may accept as adequate to support a conclusion.⁹ In determining whether a decision is based on substantial evidence, the reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the decision.

In this case, the evidence considered by the ALJ was the competing testimony of Respondent and the TLC Inspector. The ALJ’s decision gives a summary of each party’s testimony and states the ALJ’s finding that Respondent’s testimony was credible. Where evidence conflicts and there is

³ *Taxi & Limousine Commission v Mbaye Faye*, Lic. No. 882260 (December 22, 2011). The Appeals Unit incorrectly cites TLC Rule 54-14(g)(1), which applies to medallion taxicab drivers. Respondent is licensed by the TLC as a for-hire vehicle driver. The ALJ’s decision and summons 1389881A correctly cited TLC Rule 55-14(g)(1), which prohibits for-hire vehicle drivers from using an electronic device while operating a for-hire vehicle.

⁴ The penalty imposed by the Appeals Unit is incorrect, as TLC Rule 55-14(g)(1) dictates a mandatory penalty of a \$350 fine and three demerit points.

⁵ Title 35 RCNY §55-03(u)(2)

⁶ *Taxi and Limousine Commission v Md M. Uddin*, Lic. No. 5287609 (November 4, 2011)

⁷ *Taxi & Limousine Commission v Mbaye Faye*, Lic. No. 882260 (December 22, 2011)

⁸ See *Taxi & Limousine Commission v Exec U Car Limo Inc.*, Lic. No. 5179939 (Sept. 27, 2007) citing 300 *Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 NY2d 176 (July 13, 1978)

⁹ *Id.*

room for choice, the ALJ's decision will be upheld since the ALJ observed the demeanor of the witnesses and weighed the evidence presented.¹⁰ The ALJ observed and considered the testimony of each party and concluded that Respondent's testimony was true. Accordingly, the Appeals Unit had no basis for disturbing the ALJ's finding that Respondent did not have headphones in his ear, because that finding was based on substantial evidence. The Appeals Unit erred as a matter of law by failing to defer to the ALJ's findings.

The TLC's argument that Respondent admitted to having an electronic device in his ear appears to be based on the language in the ALJ's decision which states: "Respondent testified: he did not have the headphones in his ears. He has a Bluetooth." Respondent's attorney argued that the language does not refer to any admission by Respondent, but rather it presents the finding that Respondent did not have headphones in his ear, because he has a Bluetooth and does not own any such headphones. Review of the audio recording of the hearing demonstrates that TLC's argument is unsupported: Respondent testified multiple times throughout the hearing that he was not using his cell phone at the time of the violation. Respondent testified that he does not own white headphones and that when he uses his cell phone to make a phone call, he uses a Bluetooth. Respondent maintained throughout his testimony that he did not have any electronic device in his ear nor was he using any electronic device at the time of the citation. This testimony clarifies the language in the ALJ's decision and supports the ALJ's conclusion that Respondent did not violate the rule.

For the reasons stated *supra*, the Appeals Unit should have deferred to the ALJ's findings. The Appeals Unit's decision states no reason for substituting its assumption that Respondent had an electronic device in his ear in place of the ALJ's conclusion to the contrary. In fact, the Appeals Unit's decision is devoid of any acknowledgment of Respondent's testimony or the ALJ's finding that Respondent did not have the electronic device in his ear at the time of the citation. Rather, the entirety of the Appeals Unit's decision addresses the meaning of "use" as it relates to TLC Rule 55-14(g)(1). However, the ALJ's decision does not address whether or not Respondent was using his phone, because the decision rests on the conclusion that Respondent did not have the electronic device in his ears. Accordingly, it was doubly inappropriate for the Appeals Unit to disturb the ALJ's findings of fact and additionally to reverse the decision based on an argument and issue that was not relevant to the ALJ's decision and on which the ALJ made no findings of fact.

DIRECTIVE

In the matter of New York City Taxi & Limousine Commission against Mbaye Faye (TLC Lic. No. 5069638), the decision of the OATH Taxi and Limousine Appeals Unit regarding summons 1389881A is reversed. The imposed penalty of a \$350.00 fine and a three point demerit to Respondent's TLC license are hereby vacated. Respondent will be refunded any monies paid.

¹⁰ See *Berenhaus v Ward*, 70 NY2d 436 (1987); *Matter of Ifrah v Utschig*, 98 NY2d 304 (2002).

This constitutes the final determination of the TLC in this matter.

So Ordered: March 14, 2012

A handwritten signature in black ink, appearing to read 'Meera Joshi', is written over a horizontal line.

Meera Joshi, General Counsel/ Deputy Commissioner of Legal Affairs