

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOHN PADBERG, CLIFFORD PAOLILLO, and
RASHID AHMED, individually and on behalf of
all others similarly situated,

Plaintiffs,

-Against-

00 Civ. 3355 (RJD)

DIANE MCGRATH-MCKECHNIE, RUDOLPH W.
GIULIANI, JOSEPH MCKAY, MATTHEW DAUS,
HARRY RUBINSTEIN, ELLIOT SANDER,
HARVEY GIANNOULIS, MARVIN GREENBERG,
RAMONA WHALEY, AND THE NEW YORK CITY
TAXI AND LIMOUSINE COMMISSION,

Defendants.

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**REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS MOTION TO AMEND THE COMPLAINT**

Plaintiffs submit this reply memorandum in support of their motion to amend their complaint.

Preliminary Statement

In their opposition brief, defendants acknowledge, as they must, that the standard for motions to amend under Fed. R. Civ. P. 15(a) was established by *Foman v. Davis*, 371 U.S. 178 (1962). But they fail to heed its mandate, arguing that plaintiffs' motion was untimely, despite the fact that it was made as soon as plaintiffs were permitted discovery. Whatever "delays" occurred were caused by motion practice, legitimate appeals, defendants' own opposition to discovery and settlement discussions. Defendants can claim no prejudice.

Defendants' conclusory arguments that none of the amended claims are legally sufficient simply ignore the plain legal principles on which those claims are based. Thus plaintiffs should be permitted to "test [their] claims on the merits." *Foman*, 371 U.S. at 182.

A. Plaintiffs' Motion to Amend Was Not Delayed;
Even If There Was Delay, There Was No Prejudice

In our initial motion papers, we set forth the chronology of this action, a chronology defendants do not mention and do not dispute. Following this Court's April 2002 ruling on summary judgment, the Court authorized an immediate appeal of its ruling as to the revocation policy. That appeal was ultimately denied in October 2003. Immediately after, on October 30, 2003, plaintiffs wrote to the Court asking for a pre-motion conference so we could move to certify the class and to amend the complaint. Those motions were held in abeyance as the parties pursued mediation and settlement. There was simply no delay.

In letters to the settlement mediators, plaintiffs stated clearly and again that they would seek to amend. All settlement discussions proceeded with that fact in mind. No additional discovery is needed or requested. Defendants knew well that, absent a final settlement, plaintiffs would amend. Thus, there was certainly no prejudice.

B. Plaintiffs' Proposed New Claims Are Legally Sound

Defendants' remaining objections to the motion to amend is an extended, yet conclusory argument that none of the seven new claims could survive a motion to dismiss. To the contrary, all are solidly based on the law and the record developed during the course of discovery.

1. The TLC's First Strike Revocation Policy Violates the NYC Administrative Code:

Defendants, of course, continue to insist that the first strike revocation policy was legal. No court, however, has agreed and many have disagreed.¹ Plaintiffs stand by the conclusions of the OATH judges. As these well-reasoned decisions are discussed in our summary judgment brief (pp. 21-22), and have been discussed previously, we will not repeat our arguments here.

As is explained more fully in our moving brief, newly discovered facts add further support the claim that the TLC policy was arbitrary as well. While the TLC has struggled to portray Operation Refusal as a battle against racism, their actions, admitted during depositions, and evident from the Operation Refusal decisions themselves, reveal a different story. Defendants do not deny that the Operation Refusal decisions indicate that the vast majority (more than 85%) had *no racial element*. Moreover, TLC officials, including Chairman Daus, have now admitted that *they always knew* that most refusals were based on destination, and not race.²

¹ Defendants mistakenly purport to rely on *Arif v. The New York City Taxi and Limousine Commission*, 3 A.D. 2d 345 (2d Dep't 2004), *leave to appeal granted*, 2004 N.Y. LEXIS 988 (Ct. App. May 6, 2004). The *Arif* Court held that its Article 78 jurisdiction was "limited to a determination of whether the administrative action was arbitrary and capricious or lacks a rational basis." Like this Court, it simply did not decide the legality of the penalty, which has been applied over 100 times. Perhaps suspecting the decision would be reversed, the TLC responded by settling with the plaintiff, paying him \$7,500 and allowing him to receive a new license. *See* exhibit 23 to the Declaration of Daniel L. Ackman, sworn to Dec. 13, 2004.

² See Memorandum of Law In Support of Plaintiffs' Motion to Amend the Complaint, pp. 7-10. Following the submission of that brief, Daus testified again (at 418), offering further admissions:

Q. Did you communicate that trend to Diane McGrath-McKechnie that more than half of service refusals were destination based?

A. I don't remember.

Q. Did she communicate that to you?

A. I believe it was generally known and understood at the time that we were looking at the operation.

Q. It was generally known and understood within the TLC that more than half of service refusals were destination based?

In addition, discovery has revealed a clear admission by former Chairwoman McGrath-McKechnie that the Administrative Code governed service refusals and that that law mandated the maximum penalty was a fine. She and the ex-Mayor both admitted in public statements that if they wanted to impose harsher penalties they would need action by the City Council.³ For years, defendants failed to produce the records of these statements—the videotape of a press conference announcing Operation Refusal. (For a more detailed discussion of these facts, *see* Plaintiff’s Summary Judgment Brief , pp. 19-20),

Having perpetuated what is (at best) a myth that formed the foundation of their entire program, defendants now concede (or at least don’t deny) the actual facts.⁴ They now defend them with the argument that all refusals are bad and one is as bad as the next. But as the revocations were all technically based on a claim that they were acts “against the best interests of the public,” the newly discovered facts change the entire tenor of the case. Of course, plaintiffs still maintain that the maximum lawful penalty for a first service refusal of any kind is a fine.

**2. Failure to Call a Vote of the Full TLC Board of Commissioners
in Enacting Operation Refusal Violated the City Charter:**

Even if the policy was legal (that is, consistent with the Administrative Code), it would be void as it was never properly enacted. Defendants assert that Chairwoman McGrath-McKechnie was exercising her authority to “superintend” when she changed the

A. That was my understanding.

³ At the press conference, McGrath-McKechnie stated: “The summonses right now are for a dollar figure. And these by the way, I believe are in almost every cab in New York or at least they should be. And it’s \$250—\$200 to \$350 on the first offense, and the second offense is \$350 to fine with possible suspension, and then a mandatory—revocation, if you commit the offense again.” PX 21, p.8.

⁴ Defendants’ Brief p. 8.

law in a way that led to the suspension of more than 500 hack licenses. The text of City Charter brooks no such subterfuge. The chairwoman may not act alone.

The Charter declares, “The commission shall have power to act by a majority of its members.” (§ 2301(e)) It goes on to define the commission’s jurisdiction, powers, and duties to “include the regulation and supervision of the business and industry of transportation of persons by licensed vehicles.” (§ 2303) “Such regulation and supervision shall extend to” fares, standards and conditions of service, and “*the revocation and suspension of licenses for vehicles,*” and “*the issuance, revocation, suspension of licenses for drivers, chauffeurs, owners or operators of vehicles...*” as well as other matters not at issue here.

There are no cases directly on point, but the language of the charter is plain: *the Commission* acts as a group; *the Commission* defines standards for “the issuance, revocation, suspension of licenses.”⁵ Diane McGrath-McKechnie’s assertion to the contrary is a power grab, a tyrannical act. It cannot be defended by a wave of the wand and an invocation of “discretion.”

3. The Operation Refusal Policies Are Void as the TLC Failed to Comply with the City Administrative Procedure Act Notice and Comment Requirements:

The City Administrative Procedure Act (CAPA, §§ 1041-1047 of the City Charter) requires that in order to enact a new rule, a City agency must first permit the public an opportunity for notice and comment. (CAPA § 1043) Defendants claim that CAPA does not

⁵ To claim Commissioner Alberto Torres argued otherwise is a canard bordering on slander. Mr. Torres emphatically argued that the OATH judge rulings and their view of the law should be respected. He testified that neither he nor his colleagues was consulted on Operation Refusal before the fact; nor were they consulted on the necessity of vote. They were never allowed to vote to countermand the policy. As to why no vote was taken, he said it was McGrath-McKechnie’s “practice,” not that it was lawful. Torres 11-12; 51; 58-59. In any event, even if he did testify that TLC was not require to vote, that would be his view and certainly could not be held against the plaintiffs.

apply to them because Operation Refusal was not a new rule, but an old rule, albeit with a new meaning (or “interpretation”). Factually, this claim is flat wrong. Indeed, Mr. Daus, Ms. McGrath-McKechnie and others all testified that Operation Refusal was a "new" policy.⁶

Legally, CAPA, by its terms, applies not just to rules designated as such. The term “rule” is defined to include (1) “any statement or communication of general applicability that ... implements or applies law or policy;” (2) “standards which if violated may result in a sanction or penalty;” and (3) “standards for the issuance, suspension or revocation of a license or permit.” § 1041(5) Operation Refusal clearly falls within its reach.

Several state courts have held already that the TLC violated CAPA in parallel (albeit less egregious) circumstances. For example, in *Matter of Singh v Taxi and Limousine Comm. of the City of New York*, 282 A.D. 2d 368, 723 N.Y.S.2d 476 (1st Dep’t 2001), *leave to appeal denied*, 96 N.Y. 2d 720 (2001), the Appellate Division held that the TLC’s unannounced change in method for calculating the “grace period” pertaining to license renewals violated the statute. That the TLC had not admitted to passing a new rule was precisely the problem. The policy change, which materially affected the rights of all such licensees equally and without exception, effectively amounted to the adoption of a new “rule.” Absent notice and comment, the purported policy was void.

In *Matter of Miah v Taxi and Limousine Comm. of the City of New York*, 306 A.D. 2d 203 (1st Dept 2003), the TLC purported to change the policy for computing the way “points” would be charged against cabbies pursuant to its persistent violator program. The Appellate Division again held that this “amounted to a rule change requiring compliance by

⁶ Daus 25; McGrath-McKechnie 27; Rana 105.

respondent with the public hearing procedures set forth in the New York City Administrative Procedure Act.... Inasmuch as it is plain that respondent's new rule was not duly adopted in accordance with the procedures set forth in the New York City Administrative Procedure Act, the revocation of petitioner's taxi driver's license pursuant to that rule was arbitrary and capricious." *See also Udodenko v. City of New York*, New York Law Journal July 8, 2004 (N.Y. County 2004) (change in policy pertaining to timing of drug tests; resulting suspension and fine voided). In so ruling, the Appellate Division was simply applying a well-settled principle of New York law. *See Matter of Cordero v. Corbisiero*, 80 N.Y.2d 771, 587 N.Y.S.2d 266 (1992) (voiding pursuant to the state APA a racing board policy that determined that jockeys suspended at the Saratoga track must serve their suspension at the same track). The TLC's efforts to distinguish these cases are futile.

CAPA further provides: "No *ex parte* communications relating to other than ministerial matters regarding a proceeding shall be received by a hearing officer, *including internal agency directives not published as rules.*" § 1046(c) Even if the Rana Memo did not establish new policy, it was certainly an internal agency directive. Thus plaintiffs proposed 7th Claim for Relief is well-pleaded.

4. The Former Mayor Acted in Violation of the City Charter by Ordering Operation Refusal:

Defendants do not deny that the mayor has no authority under the City Charter to order the TLC, a non-mayoral agency to do anything at all. City Charter §§ 2300-2303. Against all evidence, defendants continue to insist, however, that Mr. Giuliani did not order Operation Refusal. In order to do so, they must ignore the evidence, especially the videotape that they failed to produce. On his own radio show, the former mayor said: "I

have directed the New York City Police Department and the Taxi and Limousine Commission to intensify their existing enforcement.” At the press conference where he announced Operation Refusal, he said: “[T]he thing I like doing best is changing the things about the city that were wrong that people thought nobody could do anything about. It gives me a great deal of satisfaction. . . .” Defendants must ignore that the mayor dominated the press conference, introducing the chairwoman only to make incidental points. To be sure, the chairwoman denied that she was following orders. (“A simple matter of semantics,” is how she put it.) This denial, as self-serving as it is, given the mayor’s emphatic statements and coming after years of evasions, does not even create a jury issue. Certainly, it does not permit a motion to dismiss.⁷

CONCLUSION

Defendants insinuate that this Court “previously rejected” the claim that the mayor and the chairwoman violated the Charter. The Court, of course, did nothing of the sort, ruling only that the enactment of Operation Refusal was not egregious or outrageous. That ruling was issued prior to discovery. It was issued prior to plaintiffs learning of the admissions at the press conference. It was made before discovery revealed that Ms. McGrath-McKechnie admitted she knew the penalty for service refusals was stated in the Administrative Code—but that she chose to ignore it. It was uttered before the plaintiffs learned that the TLC was applying Operation Refusal mostly to destination refusals— all while telling this Court it was fighting “racism.” In short, it was made based on a series of

⁷ Plaintiffs’ excessive fines cause of action was well pleaded for reasons stated in our moving brief at p.6 and n. 3. Our Local Law 20 claim—that the TLC regularly allowed suspensions to last more than 60 days—is based on the plain language of the statute and factual assertions which have been admitted.

fictions. Now that discovery has revealed the truth, Rule 15's liberal standard demands that this Court permit the Plaintiffs to amend the complaint and test their claims on the merits.

Dated: New York, New York
December 14, 2004

Daniel L. Ackman (DA-0103)
1 Liberty Plaza, 23rd Floor
New York, N.Y. 10006
Tel: (917) 282-8178

Attorney for Plaintiffs

TO:
Dana Biberman, Esq.
NYC Corp. Counsel
100 Church Street
New York, NY 10007

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December __, 2004, I caused the foregoing to be served as indicated on the parties listed below.

Daniel L. Ackman

BY HAND TO:

Dana Biberman, Esq.
NYC Corp. Counsel
100 Church Street
New York, NY 10007
Counsel for Defendants