CHAIRPERSON'S FINAL DETERMINATION AND ORDER

In the Matter of
New York City Taxi & Limousine Commission
Petitioner
against
Allsta Inc., Lic. No. 5373783
Respondent

DETERMINATION

The decision of the Office of Administrative Trials and Hearings ("OATH") Taxi and Limousine Tribunal Appeals Unit ("Appeals Unit") regarding summons #1450785A is **reversed.**

FACTUAL BACKGROUND

On October 25, 2012, Respondent was issued summons 1450785A, which alleged a violation of New York City Administrative Code Section 19-506(b)(1):

> []any person who shall permit another to operate or who shall knowingly operate or offer to operate for hire any vehicle as a taxicab ... or for-hire vehicle in the city, without first having obtained or knowing that another has obtained a license for such vehicle pursuant to the provisions of section 19-504 of this chapter, shall be guilty of a violation ... This paragraph shall apply to the owner of such vehicle and, if different, to the operator of such vehicle.

The events leading up to the issuance of this summons took place on October 25, 2012. It is undisputed that, on that date, Mr. Soro Bourahima ("Driver") was operating a vehicle owned by Respondent, and that this vehicle was not licensed for use as a for-hire vehicle.[1]

At a hearing held on the summons on November 7, 2012, TLC's issuing inspector testified that he observed Driver pick up an undercover inspector who was hailing from the street. Driver, who is not licensed by the TLC, was summonsed for unlicensed activity.[2] Upon determining that the vehicle was not licensed by the TLC, the inspector issued a second summons to Respondent, the vehicle's owner, charging Respondent with permitting another to operate an unlicensed taxicab, in violation of Administrative Code Section 19-506(b)(1). In a

[1] From October 22, 2010, to October 22, 2012, Respondent did hold a TLC license authorizing the use of this vehicle for for-hire transportation only pursuant to dispatch from a licensed base. This license did not, however, permit the vehicle to be used for street-hail service. In any event, the license expired three days prior to the events at issue in this case. On the date of the summons, October 25, 2012, there was no valid TLC license permitting the use of this vehicle for any form of for-hire transportation.

[2] Driver was summonsed for a violation of Administrative Code Section 19-506(d) in summons EE1450784A

separate proceeding, Driver was later found guilty of violating Section 19-506(d) of the Administrative Code.

At the hearing on this summons, Respondent conceded that Driver was in fact illegally operating Respondent's vehicle as a taxicab. Nonetheless, Respondent argued that Driver acted without its permission. Respondent's attorney provided no evidence to support this claim. Rather, the attorney presented a notarized letter from Driver stating that Respondent had loaned him the vehicle for personal use and not to pick up fares, and that Respondent did not allow him to use the car for hire. Respondent's attorney closed her argument with the following summary: "it really comes down to whether Allsta knew that this guy [the driver] was doing this. ... and they specifically forbade him from doing street hails..." Based on the attorney's statement and Driver's letter, the Hearing Officer dismissed the summons on the basis that the commission "failed to establish the required evidence."

TLC appealed the Hearing Officer's decision on the grounds that the Hearing Officer failed to apply a rebuttable presumption of an owner's permission when unlicensed for-hire activity is shown. TLC cited the Chairperson's Final Determination and Order in *Taxi & Limousine Commission v Samfes Yo Corp.*, (November 30, 2012), which held that Section 19-506(b) creates the presumption that, where a driver engages in illegal for-hire activity, the owner of the vehicle is presumed to have consented to the activity. TLC further cited to Appeals Unit decisions which hold that once the presumption of permission is applied, a respondent must raise a proper defense that rises above mere denial.[3] TLC argued that under this standard Respondent did not raise a sufficient defense to rebut the presumption of permission.

On December 26, 2012, the Appeals Unit denied TLC's appeal and affirmed the Hearing Officer's decision. The Appeals Unit's decision states:

> [Section] 19-506(b)(1)'s unambiguous language sets forth owner permission as an element that the Commission must prove when charging a vehicle owner[,] and does not expressly create a presumption of owner permission. Such a presumption will not be assumed, implied, or inferred.
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> When the Administrative Code intends to create a presumption, the Administrative Code expressly states the presumption. For example, Administrative Code §10-119A makes it unlawful for anyone ... to attach handbills ... to enumerated public structures ... [The] Administrative Code ... expressly creates a rebuttable presumption that the person whose identifying information appeals on the handbill violated the section...
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> [Section] 19-506(b)(1) does not expressly state a rebuttable presumption of owner permission, and a presumption will not be created in the absence of express language creating one.

TLC now petitions the Chairperson pursuant to TLC Rule 68-16(a) to reverse the Appeals Unit's determination.

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[3] *see Taxi and Limousine Commission v Gloria S. Mable,* Lic. No. 5322510 (May 3, 2011); *see also Taxi & Limousine Commission v Queens Village Inc.,* Lic. No. B00031 (September 28, 2011), citing *Taxi & Limousine Commission v Yukanov Fuzaylov,* Lic. No. U65098 (April 29, 1994)

LEGAL ANALYSIS

I. The Rebuttable Presumption of Consent in 19-506(b)(1)

The Appeals Unit's failure to follow the interpretation of Section 19-506(b) set forth in the TLC's Final Determination and Order in *Samfes Yo Corp.* was reversible legal error. It is well-established under New York law that: "Courts 'regularly defer to the governmental agency charged with the responsibility for administration of [a] statute' in those cases where interpretation or application 'involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom,' and the agency's interpretation is not irrational or unreasonable."[4] OATH has recognized that the same principle applies to it as a tribunal when reviewing an agency's decision: "An agency's interpretation of the statutes and regulations that it administers is entitled to deference, and must be upheld if reasonable."[5] At the very least, the Appeals Unit should have recognized that *Samfes Yo Corp.*, issued less than a month before the Appeals Unit decision and concerning exactly the same issue, was relevant precedent.[6]

This general principle of deference was instantiated firmly in Mayor's Executive Order No. 148[7], which provides that Appeals Unit decisions are reviewable by the TLC. The Mayor's Committee on Consolidation of Administrative Tribunals Report and Recommendation, which was adopted by the Executive Order, explains the rationale for TLC's reviewing authority:

> The Committee recognizes that effective tribunal management includes management of the appellate function. At the same time, the Committee recognizes that consolidation of the fact-finding and other adjudicative functions of an agency tribunal with OATH is not meant to supplant the agency's authority to determine final agency action, for example with respect to the interpretation and enforcement of its rules and regulations or the final determination of penalties, unless the agency separately opts to delegate such authority.... The agency's ultimate authority should be safeguarded by allowing either party, after receiving a decision from the appeals unit, to petition the agency to modify or reject the appeals decision.[8]

Moreover, the Appeals Unit ignored not only the TLC's holding in *Samfes Yo Corp.*, but also the sound legal reasoning on which that holding was based.

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[4] *Lighthouse Pointe Property Assocs. LLC v. New York State Dep't of Environmental Conservation*, 14 N.Y.3d 161 (2010), quoting *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451 (1980).

[5] *Carreras v. Dep't of Environmental Protection*, OATH Index No. 3032/09 (July 23, 2009), at 2, citing *ATM One, LLC v. New York State Div. of Housing & Community Renewal*, 37 A.D.3d 714 (2d Dep't 2007).

[6] *Compare, e.g., Taxi & Limousine Comm'n v. Linda & M Transportation Inc.*, OATH Index No. 1527/07 (April 9, 2007) (basing penalty recommendation on "past precedent" including two prior OATH recommended decisions and their modifications on review by the Chairperson)

[7] *Transfer of Certain Tribunals & Adjudicatory Functions Consistent with Mayor's Committee Report*, N.Y.C. Exec. Or. 148 (June 8, 2011)

[8] Mayor's Committee on Consolidation of Administrative Tribunals, *Report and Recommendations* 29 (June 7, 2012)

Appeals Unit's decision was incorrect for several reasons. First, the Appeals Unit's decision contains little legal analysis – and the analysis it *does* contain is wrong. The basis for the Appeals Unit's decision appears to be that a court or agency may recognize a presumption only when it is set forth expressly in the statute. The Appeals Unit is incorrect; there is no such limitation. The Appeals Unit identified a single example to support its premise that "[w]hen the Administrative Code intends to create a presumption, the Administrative Code expressly states the presumption" – Section 10-119(b), does contain an explicit presumption that a person whose name appears on a poster or handbill affixed to a telephone pole or other similar structure permitted the poster or handbill to be placed there. From the fact that the Administrative Code in one instance sets forth an explicit presumption, the Appeals Unit reasoned that since Section 19-506(b)(1) "does not expressly state a rebuttable presumption of owner permission, ... a presumption will not be created in the absence of express language creating one."

However, courts often interpret statutes to create presumptions by implication. New York courts have long recognized that:

> Proof of consent can, however, often depend on the testimony of a hostile party – the owner. Recognizing this, we have held that "proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied." [Citation omitted.] Once the plaintiff meets its initial burden of establishing ownership,"a logical inference of lawful operation with the owner's consent may be drawn from the possession of the operator." [Citation omitted.][9]

Similarly, CPLR 2103(b)(2) on its face simply provides that legal service may be made by, and is complete upon, mailing; interpreting the statute, however, New York courts have held that a properly executed affidavit of service creates a presumption that mailing occurred.[10]

Agencies no less than courts can recognize presumptions in statutes that do not expressly contain them. For example, in *Casse v. New York State Racing & Wagering Bd.*,[11] the Court of Appeals upheld a "trainer responsibility rule," including a rebuttable presumption that a trainer of a thoroughbred race horse is responsible for the impermissible presence of a restricted substance found in that horse's system, where the authorizing statute simply authorizes the agency to adopt rules governing equine drug testing.[12] While the presumption in *Casse* was established in a rulemaking, courts have regularly upheld presumptions established by agencies in adjudications. For example, the State Commissioner of Education has interpreted Education Law § 3202(1) as creating a rebuttable presumption that the residence of a child is with his or her parents.[13]

Second, the Appeals Unit disregarded its *own* decades-long practice of recognizing a rebuttable presumption in Section 19-506(b)(1). This practice dates back at least to 1994, *see Taxi & Limousine Comm'n v. Fuzaylov*, Lic. No. U65098 (April 29, 1994), and was restated by

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[9] *Murdza v. Zimmerman*, 99 N.Y.2d 375, 380 (2003); *see also Country-Wide Ins. Co. v. Nat'l RR Passenger Corp.*, 6 N.Y.3d 172, 177 n.2 (2006) ("[t]he presumption is not contained in the statute but is part of our decisional law").

[10] *Engel v. Lichterman*, 62 N.Y.2d 943, 944 (1984).

[11] 70 N.Y.2d 589 (1987)

[12] Racing, Pari-Mutuel Wagering and Breeding Law § 902

[13] *Catlin by Catlin v. Sobol*, 77 N.Y.2d 552, 559 n.1 (1991) (collecting Commissioner of Education decisions); *Bd. of Educ., Union Free Sch. Dist. No. 6, Harrison v. Allen*, 29 A.D.2d 24, 27-28 (3d Dep't 1967) (same).

the Appeals Unit as recently as 2011, *see Taxi & Limousine Comm'n v. Mizhquiri*, Lic. No. 5383467 (August 19, 2011). There, the Appeals Unit reversed a hearing officer's dismissal of a summons for a Section 19-506(b)(1) violation; the Appeals Unit agreed with TLC "that there is a rebuttable presumption of permission given for [illegal] activity when the owner's vehicle is observed engaging in [such] activity." *Mizhquiri*, at 2. The Appeals Unit abandoned these precedents, without explanation, in *Samfes Yo Corp.*, which was promptly overturned by the TLC. Neither does the Appeals Unit decision that is the subject of the petition here does not even mention, let alone overrule or seek to distinguish, *Mizhquiri*. The Appeals Unit in this case should have followed the *Fuzaylov* and *Mizhquiri* precedents.

Third, the Appeals Unit ignored ample legislative history arguing in favor of a rebuttable presumption. Local Law 32 of 2012 recently amended Section 19-506(b)(1) in order to explicitly state that it is intended to penalize vehicle owners whose cars are used for illegal activity, and to provide harsher penalties for such violations. In addition to the plain language of the statute, the lawmakers' statements in contemplation of the amendments clearly express a desire to arm the TLC with the means to deter and punish vehicle owners whose vehicles are used illegally to transport passengers for hire.[14] The legislators increased penalties in express recognition that it is a matter of public safety to penalize vehicle owners who permit drivers that have not been through the rigorous TLC licensing process to hold themselves out to the public as such. The lawmakers noted that that unlicensed drivers and vehicles are not subject to the same stringent regulations and oversight, and as a result, passengers who are hurt in unlicensed vehicles have no recourse to insurance or the TLC.[15] As a practical matter, requiring the TLC to affirmatively demonstrate a vehicle owner's specific consent to illegal pick-ups, in the absence of a rebuttable presumption of such consent, would make it virtually impossible for the TLC to enforce Section 19-506(b)(1) against vehicle owners. Eliminating the rebuttable presumption would therefore frustrate the plain intent of the statute.

Crucially, the presumption of a vehicle owner's consent to unlicensed activity was firmly in place well before Local Law 32 was enacted. During the 18 years between the Appeals Unit's decision in *Fuzaylov* and the enactment of Local Law 32, the TLC issued thousands of summonses to vehicle owners for violation of Section 19-506. We must infer that the City Council, in amending Section 19-506(b)(1), was aware of the TLC's enforcement practice and the Appeals Unit's precedents and intended to ratify them. In holding otherwise, the Appeals Unit flew in the face of the City Council's clear intention to strengthen, and not weaken, enforcement against unlicensed taxis.

A statute may be interpreted to create a presumption even if it does not *expressly* do so. An agency may establish such an interpretation through its decisions in cases arising under the statute, as TLC has done with respect to Section 19-506(b)(1). Where an agency interprets a statute it administers to create a presumption, that interpretation should be given deference by OATH. Accordingly, this decision clarifies and reiterates the TLC's interpretation of Section 19-506(b)(1): upon the submission of evidence – in the form of a sworn summons – that a vehicle was used for illegal for-hire activity, the vehicle owner is presumed to have consented to the illegal activity.

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[14] N.Y. City Council Comm. on Transp., *Intro 735*, Reg. Sess. 3/21-22, 58/9-25, 59/2-7 (June 12-13, 2012)
[15] N.Y. City Council Comm. on Transp. Rpt., Reg. Sess. 2 (June 12, 2012)

II. Application of the Presumption to the Instant Case

As applied in this case, the elements of an offense under Section 19-506(b)(1) are that a person: (1) permitted another to operate, for-hire, (2) a vehicle in the city (3) without having obtained a license for such vehicle.

The uncontested facts of this case are that Respondent's unlicensed vehicle was used to illegally pick up a street-hail. As was established in *Samfes Yo Corp.* and reaffirmed by this Order, this evidence was sufficient to create a presumption that Respondent consented to the unlicensed activity and is culpable for the violation. The Hearing Officer erred in failing to apply this presumption.

Once the presumption of an owner's consent has been applied, the burden shifts to the Respondent to prove that the driver acted without permission. To overcome the presumption of consent in Section 19-506(b)(1), OATH Appeals Unit precedent requires a vehicle owner to present detailed evidence concerning the circumstances in which the owner granted consent for the use of his or her vehicle. In *Taxi and Limousine Commission v. Queens Village Inc.* [16], citing *Taxi and Limousine Commission v Yukanov Fuzaylov*[17], the Appeals Unit established that "[A] mere denial that the ... owner had given his consent to the vehicle's use by the driver for for-hire purposes does not rise to the level of substantial evidence sufficient to rebut the presumption." Thus, a vehicle owner's bare denial of permission for illegal use, or a statement from a driver that the owner did not sanction the driver's specific conduct, is insufficient to rebut the presumption of consent. In order for the evidence to rebut this presumption it must be probative to the extent that a vehicle owner must present documentation or testimony of such specificity as to provide the finder of fact with information regarding the circumstances under which the driver used the vehicle: the agreement, if any, between the driver and the vehicle owner; the nature of the relationship between the driver and the owner; or any documentation to support an owner's claims that a driver used the vehicle without permission. In order for the vehicle owner's evidence to be probative, it should address the frequency with which the driver uses vehicles owned by the owner; whether the owner is in the business of leasing vehicles for for-hire use, and if so the terms of such leasing arrangements; and whether the vehicle is affiliated with a for-hire vehicle base, and if so, whether the vehicle owner knows the terms of such affiliation. The TLC is entitled to challenge the credibility of the vehicle owner's evidence. The Hearing Officer then makes findings of fact based on the weight of the evidence and determinations of credibility. To accept a blanket denial of an allegation or uncorroborated or self-serving statements without further supporting evidence would abdicate the Hearing Officer's responsibilities.

In the instant case, the Hearing Officer further erred by dismissing the summons without weighing or assessing the credibility of the evidence presented. TLC established a prima facie case of a 19-506(b)(1) violation by submitting the inspector's sworn summons. In order to present a defense, Respondent was required to provide evidence that it did not know of or consent to the illegal activity. Instead, Respondent attorney offered only an unsupported statement that her client lent the driver the car for personal use and a letter from the driver, written and notarized after the summons was issued, stating that Respondent did not allow the

[16] Lic. No. B00031 [September 28, 2011]
[17] Lic. No. U65098 [April 29, 1994]

activity. Therefore, the Hearing Officer erred in failing to assess the credibility of the evidence presented or to measure the weight of the evidence against the standard articulated in the *Fuzaylov* and *Queens Village Inc.* cases.

The Appeals Unit failed to identify or correct the legal errors committed by the Hearing Officer. For the reasons stated *supra,* the Appeals Unit should have corrected the Hearing Officer's failure to apply the presumption that Respondent consented to the illegal activity and should have identified that the evidence presented was not sufficient to overcome this presumption. The Appeals Unit's dismissal of the rule interpretation set forth in *Samfes Yo Corp.* and the failure to weigh the evidence against the appropriate standard were reversible error.

It is uncontested that Respondent's vehicle was used for an illegal street hail pickup. Respondent's attorney, who is not a witness, offered only a general denial that Respondent consented to the activity. The only piece of evidence presented by Respondent's attorney was an uncorroborated letter from the driver, written after the incident occurred, stating that Respondent did not allow him to use the vehicle for-hire. Based on the record created by the Hearing Officer and reviewed by the Appeals Unit, the weight of the evidence provided by Respondent is inadequate to overcome the presumption that Respondent consented to the illegal activity in violation of Section 19-506(b)(1).[18] Accordingly, the decision of the Appeals Unit regarding summons 1450785A is reversed, and the attending mandatory penalty is hereby imposed.

DIRECTIVE

In the matter of New York City Taxi & Limousine Commission against Allsta Inc. (TLC Lic. No. 5373783), the decision of the OATH Taxi and Limousine Appeals Unit regarding summons #1450785A is reversed and a fine of $1,500 is hereby imposed.

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

So Ordered: March 4, 2013

David Yassky, *Commissioner*

[18]It is worth noting that subsequent to the issuance of the summons in this case, TLC inspectors observed and issued summonses for *the same exact vehicle* being used as an unlicensed taxi on two separate occasions. Obviously, these subsequent events were not and could not have been before the factfinder. But they illustrate the policy stakes at issue here, and underscore the folly of permitting OATH factfinders to dismiss summonses upon the type of flimsy evidence offered by Respondent here.