CHAIRPERSON'S FINAL DETERMINATION AND ORDER

In the Matter of
New York City Taxi & Limousine Commission
Petitioner
against
Issa Moustafa
Respondent

DETERMINATION

The decision of the Office of Administrative Trials and Hearings ("OATH") Taxi and Limousine Appeals Unit ("Appeals Unit") regarding summons 1403061A is **reversed.** The imposed penalty of a $100.00 fine is vacated.

FINDINGS OF FACT

Respondent was cited for violation of TLC Rule 59A-25(a)(1) (Title 35 RCNY §59A-25(a)(1)), which prohibits FHV owners from allowing their FHV to transport passengers for hire that are not prearranged. Respondent is both the owner and driver of an FHV, and he was separately cited in his capacity as each for two violations arising from the allegations put forth in the summons.

On April 29, 2011, a hearing was held on the aforementioned violation cited in summons 1403061A. Respondent testified at the hearing that at 1:10 AM on October 15, 2011, he was driving his FHV and saw "a little old lady who was 80 years old or so" holding a pizza. Respondent stated that he could tell the woman was freezing so he offered her a ride, free of charge, and the woman got into his FHV. Respondent testified that he makes $2,500 per week and thus has no need to solicit street-hails. Conversely, the TLC inspector who cited Respondent submitted an affirmation that he saw a woman hailing Respondent's car and that Respondent picked up the woman in response to the hail. The ALJ found Respondent's testimony to be more credible and dismissed the summons on the grounds that TLC failed to show by a preponderance of the evidence that a violation occurred because the Commission did not prove that the passenger was charged a fare.

The TLC appealed the ALJ's decision on the grounds that "an agreed fare is not an element of the violation." On February 17, 2012, the Appeals Unit granted the appeal on the grounds that the prior decision was incorrect and reversed the ALJ's decision. The Appeals Unit held that, because Respondent is the owner of his FHV and was the driver at the time of citation, he necessarily allowed his vehicle to be used in the violation.[1] The Appeals Unit's decision further states: "[]irrelevant is the respondent owner's testimony that he did not charge the passenger,

[1] *Taxi & Limousine Commission v Anees Khan,* Lic. No. 5193239 (Sept. 9, 2011)

since fare is not an element of the violation." The ALJ imposed a $100 fine, which is the mandatory penalty for a first-time violation of Rule 59A-25(a).[2]

Respondent now petitions the Chairperson to reject the Appeals Unit's decision on the grounds that he did not charge the passenger a fare and instead offered her a ride out of altruism.

ANALYSIS

TLC Rule 59A-25(a) states in its entirety: "No For-Hire Vehicle Owner will allow Owner's Vehicle(s) to transport Passengers *for hire* other than through pre-arrangement with a Base licensed by the [TLC]."[3] A "Passenger" is defined in TLC's Rules as: "a person riding in a [TLC-licensed] Vehicle, other than the Driver."[4] When read in tandem, the plain language of the two rules expressly prohibits an FHV Owner from allowing a person other than the driver to ride in the vehicle for hire other than by prearrangement.

Rule 59A-25(a) is separate and distinct from Rule 55-19(a), which governs the actions of FHV drivers as opposed to owners, and prohibits an FHV driver from "[] pick[ing] up Passengers other than by prearrangement..." The important difference between Rule 55-19(a) and 59A-25(a) is the inclusion of the "for hire" element in the violation. While Rule 55-19(a) prohibits a driver from allowing any passenger to ride in the vehicle other than by prearrangement, Rule 59A-25(a) restricts an FHV owner from transporting non-prearranged passengers for hire in the vehicle. This is a logical distinction, because an FHV owner retains the right to use his vehicle for personal use when it is not being operated for-hire, and such personal use may reasonably include transporting others. The sole factor that would distinguish an FHV owner's use of his vehicle to transport a passenger for-hire from transporting passengers for personal use is the exchange of a fare. The Appeals Unit found Respondent's testimony that he did not charge or accept a fare for transporting the woman was irrelevant. This finding was incorrect, as the determination of whether or not Respondent violated Rule 59A-25(a) rests on this issue.

It is well established that an ALJ's findings will not be disturbed on appeal if those findings are based on "substantial evidence."[5] 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.[6] In determining whether a decision is based on substantial evidence, the reviewing court must review the record to determine if there is a rational basis 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 room for choice, the ALJ's decision will be upheld since the ALJ observed the demeanor of the

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[2] Rule 59A-25(a) has scaled penalties, which provides a fine of $100 for the first violation, with the penalty increasing by $100 for each subsequent violation up to a maximum of $10,000.
[3] §35 RCNY 59A-25(a) (emphasis added)
[4] *See* §35 RCNY 51-03
[5] 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)
[6] *Id.*

witnesses and weighed the evidence presented.[7] 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 charge or collect a fare from the passenger, 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 ALJ found that Respondent did not collect a fare from the passenger, and therefore the FHV was not being used to transport the passenger for hire. The TLC did not prove all of the elements of a violation of Rule 59A-25(a), because transportation for-hire is a necessary element, and therefore the ALJ's decision to dismiss the summons was correct. Accordingly, the Appeals Unit's determination to reverse the ALJ's dismissal of the summons was incorrect and based on legal error.

DIRECTIVE

In the matter of New York City Taxi & Limousine Commission against Moustafa Issa (TLC Lic. No. C15617), the decision of the OATH Taxi and Limousine Appeals Unit regarding summons 1403061A is reversed. The imposed penalty of a $100.00 fine is hereby vacated.

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

So Ordered: April 20, 2012

Meera Joshi, *General Counsel/ Deputy Commissioner of Legal Affairs*

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