SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- x

SANFORD F. YOUNG

Petitioner,

-against- Index No. 11675/06

CITY OF NEW YORK DEPARTMENT OF FINANCE
PARKING VIOLATIONS ADJUDICATIONS

Respondents.

For a Judgment Under Article 78 of The Civil Practice Law and Rules to Vacate the Final Adjudication and Administrative Appeal against Petitioner.

---------- x

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
100 Church Street Room 5-154
New York, New York 10007
(212) 788-0461

November 1, 2006

GABRIEL TAUSSIG
MARK W. MUSCHEINHEIM
CHRISTINA L. HOGGAN
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- x

SANFORD F. YOUNG

Petitioner,

-against-

CITY OF NEW YORK DEPARTMENT OF FINANCE
PARKING VIOLATIONS ADJUDICATIONS

Index No. 11675/06

Respondents.

For a Judgment Under Article 78 of The Civil Practice Law and Rules to Vacate the Final Adjudication and Administrative Appeal against Petitioner.

---------- x

RESPONDENT'S MEMORANDUM OF LAW

Respondent, the City of New York Department of Finance ("DOF") Parking Violations Bureau ("PVB"), submits this memorandum of law in opposition to petitioner's application for a judgment pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") 1) annulling the PVB Appeals Board's determination upholding the ALJ's determination that petitioner's vehicle was parked in violation of Section 4-08(d) of Title 34 of the Rules of the City of New York ("RCNY") and 2) granting petitioner discovery.

PRELIMINARY STATEMENT

Despite petitioner's contentions to the contrary, the PVB Appeals Board's determination to uphold the ALJ's determination was rational and reasonable, and fully supported by the administrative record. Pursuant to New York State Vehicle Traffic Law ("VTL") § 238(1) and 19 RCNY § 39-08(f)(4) a summons acts as prima facie evidence of the facts contained therein. Here, the summons set forth that on Tuesday, November 29, 2005 at 6:59 pm, petitioner's vehicle was parked in an area which provided that vehicles were not

permitted to be parked there from Monday to Friday between 4 and 7 p.m. As such, petitioner was required to come forward with credible evidence that he was not parked in violation of the law. The ALJ found that petitioner's general allegation that he was parked after 7 p.m. was not credible evidence which created an issue of fact. Consequently, based on the prima facie evidence set forth in the summons, the ALJ found petitioner's vehicle was parked in violation of 31 RCNY § 4-08(d). The PVB Appeals Board rationally upheld the ALJ's determination as it found the Decision and Order did not contain an error of fact or law.

Moreover, to the extent petitioner seeks discovery, his request should be denied. In order to obtain discovery, petitioner must establish a need for the discovery and that the discovery is necessary to resolve a relevant factual issue. Petitioner has not done so and indeed has not even set forth what discovery he seeks.

Accordingly, the petition should be denied and this proceeding should consequently be dismissed.

RELEVANT STATUTORY PROVISIONS

Title 2, Article 2-B, Section 236 of the VTL, Section 1504(4) of the New York City Charter, and Title 19, Section 201 of the Administrative Code of the City of New York ("Administrative Code") provide for the creation of a PVB within the Department of Finance to adjudicate parking infractions in New York City. Section 19-203 of the Administrative Code sets forth the powers of PVB and provides, in part,

> The parking violations bureau shall have the following functions, powers and duties:
>
> (a) To accept pleas to, and to hear and determine, charges of parking violations;
>
> (b) To provide for penalties other than imprisonment for parking violations in accordance with a schedule of monetary fines and penalties...;

Pursuant to VTL §236, a "parking violation" is defined as the violation of any law, rule or regulation providing for or regulating the parking, stopping or standing of a vehicle. VTL §237 authorizes the PVB to accept pleas and hear and determine charges of parking violations and to provide for penalties for parking violations.

Title 34 RCNY § 4-08 governs unlawful parking, stopping and standing. Title 34 RCNY § 4-08(d) provides:

> **§ 4-08 Parking, Stopping, Standing.**
>
> Violation of posted no parking rules prohibited. When official signs, markings or traffic control devices have been posted prohibiting, restricting or limiting the parking of vehicles, no person shall park any vehicle in violation of the restrictions posted on such signs, markings or traffic control devices....

Pursuant to VTL § 241 and Administrative Code § 19-207, the hearing officer is empowered to make a determination of the charges set forth in the parking summonses, either sustaining or dismissing them.

The rules regarding the conduct of hearings at the Parking Violations Bureau are set forth generally at VTL 240, Admin. Code §19-206, and, in greater detail, at chapter 39 of title 19 of the RCNY. VTL § 240, sets forth, in relevant part,

> **§ 240. Hearings, notice and conduct**
>
> ....
>
> 2. Conduct of hearings.
>
> b. No charge may be established except upon proof by substantial evidence.
>
> ....
>
> d. The hearing examiner shall at the request of the person charged on a showing of good cause and

need therefor, or in his own discretion, issue a subpoena to compel the appearance at a hearing of the officer who served the notice of violation or of other persons to give testimony, and may issue a subpoena duces tecum to compel the production for examination or introduction into evidence, of any book, paper or other thing relevant to the charges....

Administrative Code § 19-206 states, in relevant part, as follows:

§19-206 Hearings.

a. Notice of hearing. Whenever a person charged with a parking violation enters a plea of not guilty, the bureau shall advise such person . . . of the date on which he or she must appear to answer the charge at a hearing. The form and content of such notice of hearing shall be prescribed by the director, and shall contain a warning to advise the person so pleading that failure to appear on the date designated, or on any subsequent adjourned date, shall be deemed, for all purposes, an admission of liability, and that a default judgment may be rendered.

b. Conduct of Hearings. 1. Every hearing . . . shall be held before a senior hearing examiner or a hearing examiner in accordance with rules and regulations promulgated by the bureau.

2. No charge may be established except upon proof by a preponderance of the evidence.

....

4. The hearing officer may, in his or her discretion, or at the request of the person charged, issue a subpoena to compel the appearance at a hearing of the officer who served the notice of violation or of other subpoena duces tecum to compel the production for examination or introduction into evidence, of any book, paper or other thing relevant to the charges.

Title 19 RCNY §39-08 states, in relevant parts:

> **§39-08 Hearings.**
>
> ....
>
> (e) *Substantial evidence required.* No charge may be established except upon proof by substantial credible evidence.
>
> (f) *Rules of evidence.* (1) The hearing examiner shall not be bound by the rules of evidence in the conduct of the hearing, except rules relating to privileged communications.
>
> (2) Evidence may be presented in any form. . . .
>
> (3) The respondent shall have the right to present witnesses, to conduct examination and to introduce documentary evidence.
>
> **(4) The summons shall constitute prima facie evidence of the statements contained therein.**
>
> (h) *Subpoenas.* The hearing examiner may, in his or her discretion, or at the request of the Respondent on a showing of good cause and need therefor, issue a subpoena to compel the appearance at a hearing of the officer who served the notice of violation or of other persons to give testimony, and may issue a subpoena duces tecum to compel the production for examination or introduction into evidence of any book, paper or other thing relevant to the charges alleged. (Emphasis added.)

In addition, section 238(1) of the VTL sets forth the standard for examining notices of violations. VTL section 238(1) provides in relevant part:

> **§ 238 Notice of violation**
>
> (1) The notice of violation shall contain information advising the person charged of the manner and time in which he may plead either guilty or not guilty to the violation alleged in the notice...A duplicate of each notice of violation shall be served on the person charged in the manner hereinafter provided. **The original or a facsimile**

> **thereof shall be filed and retained by the bureau and shall be deemed a record kept in the ordinary course of business, and shall be prima facie evidence of the facts contained therein.** (Emphasis added.)

Pursuant to VTL § 242 and Administrative Code § 19-208, the determination of a hearing examiner may be reviewed by PVB's appeals board. Section 19-208 provides, in pertinent part, as follows:

> **§ 19-208 Appeals within the bureau.**
>
> a. There shall be an appeals board within the bureau which shall consist of three or more senior hearing examiners, as the director shall determine.
>
> b. An appeal from a judgment of any hearing officer shall be submitted to the appeals board, which shall have the power to review the facts and the law, but shall not consider any evidence which was not presented to the hearing officer and shall have power to reverse or modify any judgment appealed from for error of fact or law.

Pursuant to Administrative Code § 19-209, the order of the appeals board is the final determination of PVB, and judicial review may be sought pursuant to Article 78 of the Civil Practice Law and Rules. Section 19-209 provides, in pertinent part, as follows:

> **§ 19-209 Judicial Review.**
>
> The order of the appeals board shall be the final determination of the bureau. Judicial review may be sought pursuant to article seventy-eight of the civil practice law and rules.

CPLR § 7803 sets forth the types of questions that may be raised in an Article 78 proceeding. It provides, in relevant part:

> **§ 7803. Questions Raised.**
>
> The only questions that may be raised in a proceeding under this article are:
>
> ....
>
> (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . .

CPLR §7806, sets forth the relief that may be granted in an Article 78 proceeding. It provides in relevant part:

> **§ 7806. Judgment**
>
> The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. **Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.** (Emphasis added.)

RELEVANT FACTS

On or about November 29, 2005, Notice of Parking Violation number 7332058390 ("summons") was issued to a Grey four-door BMW sedan with New Jersey License Plate number SAY26J. The summons was for violating Section 4-08(d) of the New York City Traffic Rules. More specifically, the NYPD traffic agent issuing the summons "affirm[ed] under

penalty of perjury Penal Law 210.45 that [he] personally observed" the BMW on Tuesday, November 29, 2005 at 6:59 pm, parked in an area which provided that vehicles were not permitted to be parked there from Monday to Friday between 4 and 7 p.m. A copy of the summons is annexed to the Accompanying Verified Answer as Exhibit "A."

PVB provides various means for challenging summonses. A summons may be challenged in an administrative hearing in person, by mail, or online.

On or about December 9, 2005, petitioner entered a plea of not guilty and requested an online hearing in order to challenge the summons. As a defense to the summons, Petitioner alleged that

> [t]he ticket which says I was parked at 6:59 in a "No Parking... 4P-7P" area is absurd and wrong! Knowing full well—as a life long New Yorker and lawyer – that it is not legal to park on the Avenues until 7:00 PM, and that some officers write tickets in the last few, I did not park my car until a couple of mins past 7:00. I am certain it was past 7:00 because I was watching my car clock – which is in the instrument panel. I also know that the clock is accurate because I synchronize it with my cell phone which time is set by Verizon and my watch. Therefore, I respectfully ask that the summons be dismissed.

A copy of petitioner's December 9, 2005 on-line hearing request is annexed to the Accompanying Verified Answer as Exhibit "B."

By letter dated December 21, 2005, DOF acknowledged receipt of petitioner's appeal and offered him an opportunity to pay a reduced fine amount of $43.00. A copy of the December 21, 2005 letter is annexed to the Accompanying Verified Answer as Exhibit "C."

By Decision and Order dated March 10, 2006, ALJ John F. MacKay found petitioner guilty of violating NYC Traffic Rule 4-08(d). To that end, ALJ MacKay found that petitioner "has been charged with violating Traffic Rule 4-08(d) which prohibits parking a

vehicle in violation of the restricted posted on signs, markings or traffic control devices. [petitioner] is not persuasive that he did not park until after the restriction ended." A copy of the Decision and Order is annexed to the Accompanying Verified Answer as Exhibit "D."

By letter dated March 28, 2006, petitioner appealed the hearing Decision and Order to the Appeals Board. Petitioner asserted various arguments including 1) that the City did not met its burden in proving that he was illegally parked, 2) that "the charge was not 'established... by substantial credible evidence' Chapter 39 of the N.Y.C. Compilation of Rules § 39-08(e)," and 3) that the City had the burden of proving he had parked in violation of NYC Traffic Rule 4-08(d) as he had refuted the summons as he alleged he "did not park [his] car until a couple of mins past 7:00." A copy of petitioner's administrative appeal is annexed to the Accompanying Verified Answer as Exhibit "E."

By Decision dated May 22, 2006, the Appeals Board upheld the ALJ's Decision and Order since, based upon a review of the entire record before it, it did not find any error of fact or law. A copy of the final agency determination is annexed to the Accompanying Verified Answer as Exhibit "F."

Now, by Notice of Petition and Verified Petition dated August 21, 2006, petitioner, on his own behalf, commenced the instant Article 78 proceeding requesting an Order: "(1) vacating and setting aside the aforesaid decisions and orders, and vacating the guilty determination and dismissing the summons" and (2) granting petitioner discovery.

ARGUMENT

POINT I

THE PVB APPEALS BOARD'S DETERMINATION TO UPHOLD THE ALJ'S DETERMINATION FINDING PETITIONER GUILTY OF A PARKING VIOLATION WAS RATIONAL AND REASONABLE

The Appeals Board's determination to uphold ALJ MacKay's determination denying petitioner's appeal was rational and reasonable, and was not arbitrary and capricious or an abuse of discretion.

A. Applicable Standard of Review

Administrative agencies enjoy broad discretionary power when rendering determinations on matters they are empowered to decide. Judicial review of an agency's exercise of discretion is limited in scope. Section 7803 of the C.P.L.R. provides in pertinent part:

> The only questions that may be raised in a proceeding under this article are:
>
> ...
>
> whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed .
>
> . . .

The Court of Appeals stated in Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974):

> The arbitrary or capricious test chiefly "relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact." (1 N.Y. Jur., Administrative Law, § 184, p. 609). Arbitrary

> action is without sound basis in reason and is generally taken without regard to the facts.

It is well established that what is reviewed under the arbitrary and capricious standard is the rationality or the reasonableness of the agency's determination. A court may overturn an administrative action only if the record reveals no rational or reasonable basis for it. The reviewing court does not examine the facts de novo to reach an independent determination. Marsh v. Hanley, 50 A.D.2d 687 (3d Dep't 1975). Further, the reviewing court "may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated." Purdy v. Kreisberg, 47 N.Y.2d 354, 358 (1979).

A rational or reasonable basis for an administrative agency determination exists if there is evidence in the record to support its conclusion. Sewell v. City of New York, 182 A.D.2d 469 (1st Dep't), appeal denied, 80 N.Y.2d 756 (1992). Unless the reviewing court finds that the agency acted in excess of its jurisdiction, in violation of a lawful procedure, arbitrarily, or in abuse of its discretion, the court has no alternative but to confirm the agency's decision. See Pell, 34 N.Y.2d at 231.

B. Respondent's Determination Satisfies the Standard of Review

Pursuant to VTL § 240(b) and 19 RCNY § 39-08(e) "[n]o charge may be established except upon proof by substantial evidence." Substantial evidence is something more than a "bare surmise, conjecture, speculation or rumour" but "less than a preponderance of the evidence." 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176, 181 (1978). In accordance with both VTL § 238(1) and 19 RCNY § 39-08(f)(4) the summons acts as prima facie evidence of the facts contained therein. When a prima facie case

has been established, if the respondent goes forward with evidence to refute the prima facie case, including his or her own sworn testimony, then the summons alone cannot meet PVB's burden of proving its case and additional PVB must submit additional evidence. Gruen v. Parking Violations Bureau 58 A.D.2d 48 (1st Dept. 1977) and Heisler v. Atlas, 69 Misc. 2d 911 (Sup. Ct. N.Y. Co. 1972).

Here, the summons established a prima facie case that petitioner's vehicle was parked in violation of 34 RCNY § 4-08(d). More specifically, the summons, which the issuing agent "affirm[ed] under penalty of perjury Penal Law 210.45" acted as prima facie evidence that on Tuesday, November 29, 2005, at 6:59, petitioner's BMW was found parked in violation of a restricted parking sign which provided that vehicles were not permitted to be parked on the street from Monday to Friday between 4 and 7 p.m. See Exhibit "A." In opposition to the summons, petitioner alleged, during his on-line administrative hearing[1] that

> [t]he ticket which says I was parked at 6:59 in a "No Parking... 4P-7P" area is absurd and wrong! Knowing full well—as a life long New Yorker and lawyer – that it is not legal to park on the Avenues until 7:00 PM, and that some officers write tickets in the last few, I did not park my car until a couple of mins past 7:00. I am certain it was past 7:00 because I was watching my car clock – which is in the instrument panel. I also know that the clock is accurate because I synchronize it with my cell phone which time is set by Verizon and my watch.

See Exhibit "B." Having reviewed the evidence before him, the ALJ found that " [petitioner] is not persuasive that he did not park until after the restriction ended." Thus, as the ALJ found that petitioner failed to come forward with credible evidence that he was not parked in violation of 34

[1] Notably, petitioner was also given the option of having an in-person hearing. During this hearing, petitioner could have called witnesses and requested subpoenas so as to examine or introduce into evidence any item relevant to the charges. See VTL § 240, Administrative Code § 19-206 and 19 RCNY §39-08. Petitioner opted to have an on-line hearing instead of and in-person hearing.

RCNY § 4-08(d), the ALJ, based on the prima facie evidence in the summons found the petitioner guilty.

The Appeals Board rationally upheld this determination as it found that the Decision and Order did not contain an error of fact or law. Petitioner alleged in his appeal that the ALJ erred in finding him guilty as his statements set forth in his on-line administrative hearing acted as evidence which rebutted the prima facie case established by law thereby requiring the City to submit additional evidence in support of the summons. The Appeals Board rationally rejected petitioner's argument. Contrary to petitioner's argument, it was not an error of law for the ALJ to find that petitioner's un-sworn generalized statement that he was certain he did not park his car "until a couple of mins past 7:00" was not credible evidence. Indeed, petitioner did not set forth during his on-line hearing what time it was when he parked his vehicle or that the clock in his car, which allegedly indicated that it was after 7 p.m. was accurate.[2] Petitioner also did not question the accuracy of the device used to determine the time set forth in the summons. Thus, as petitioner did not submit any credible evidence that contrary to the summons, which was "affirm[ed] under penalty of perjury Penal Law 210.45" that his vehicle was not parked on Tuesday, November 29, 2005, at 6:59 in violation of a restricted parking sign which provided that vehicles were not permitted to be parked on the street from Monday to Friday between 4 and 7 p.m., it was rational and reasonable for the Appeals Board to uphold the ALJ's determination.

To the extent petitioner, relying on Gruen v. Parking Violations Bureau of the City of New York and Heisler v. Atlas, alleges that his statements submitted during his on-line appeal constituted credible evidence that raised an issue of fact, petitioner's reliance is

[2] While petitioner alleged he set his car clock off of his Verizon cell phone and watch, there was no allegation that those devices were accurate or that once set the car clock kept accurate time.

misplaced. Indeed, unlike the case at hand, in Gruen and Heisler the petitioners each submitted sworn detailed testimony. Notably, in Heisler the petitioner testified under oath during his administrative hearing that although the summons indicated that he was parked at 10:00 a.m. in a school area where parking was prohibited from 7 a.m. to 4 p.m., that the only sign posted on the side of the street he was parked on was a no parking sign which prohibited parking on Tuesday and Friday from 11 a.m. to 2 p.m.

Moreover, to the extent petitioner attempts to challenge the accuracy of the device used to issue the summons, petitioner's argument should not be considered as he failed to exhaust his administrative remedies regarding such. Indeed, petitioner failed to address his argument before the ALJ who was the finder of fact. Rather, petitioner first addressed his argument before the Appeals Board who had no power to consider his argument and thus could not reach a determination on it. Indeed, pursuant to Administrative Code § 19-208(b), the Appeals Board's powers of review are limited to determining whether an ALJ's Decision and Order was affected by an error of fact or law. The Appeals Board may not consider new evidence or arguments. Consequently, as petitioner failed to administratively challenge the accuracy of the device used to issue the summons before the ALJ, he failed to exhaust his administrative remedies as to such and may not now raise this argument before the Court.

POINT II

PETITIONER IS NOT ENTITLED TO DISCOVERY

Petitioner is not entitled to discovery. Discovery in a special proceeding is not permitted without leave of Court. CPLR §408. Furthermore, discovery in an Article 78 proceeding is only allowed upon a showing of ample need. Shore v. Parklane Hosiery Co., 109 A.D.2d 842 (2d Dept. 1985). In Shore, the court affirmed a decision denying discovery in a

special proceeding because such need was not proven. Id. at 844. The discovery sought was not necessary to the resolution of the relevant factual issue. Id. at 844.

Here, while petitioner requests that he be granted the opportunity to seek discovery, he does not set forth what discovery he seeks or why such is relevant. Accordingly, petitioner's request should be denied as he has failed to demonstrate or even assert an ample need for the discovery or that it is necessary to resolve a relevant factual issue.

However, to the extent, the Court entertains petitioner's application it should still be denied. It is well-established that "[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency." Featherstone v. Franco, 95 NY2d 550, 554 (2000) (citing Yarbough v. Franco, 95 NY2d 342, 347 (2000), which in turn cites Fanelli v. NYC Conciliation & Appeals Bd., 90 AD2d 756, 757 (1st Dep't 1982), aff'd on other grounds, 58 NY2d 952 (1983)). The court may only consider those arguments or evidence contained in the administrative record. Consideration of the reviewing court of evidence submitted after the agency determination "would violate...[the] fundamental tenet of an Article 78 review." Featherstone, 95 NY2d at 554. As such, to the extent petitioner seeks discovery to obtain evidence not contained within the administrative record such should be denied as it is irrelevant as to whether the PVB's determination was rational and reasonable based upon the administrative record.

Notably, petitioner had the opportunity to obtain evidence and question witnesses at the administrative level, but failed to fully avail himself of this opportunity. Indeed, pursuant to VTL § 240, petitioner could have requested that the hearing officer "issue a subpoena to compel the appearance at a hearing of the officer who served the notice of violation or of other persons to give testimony, [or for] a subpoena duces tecum to compel the production for examination or introduction into evidence, of any book, paper or other thing relevant to the

charges." See also Administrative Code § 19-206 and 19 RCNY §39-08. As petitioner failed to avail himself of this opportunity, he should not now, after an administrative hearing and appeal be allowed to obtain and introduce new evidence which could have been sought at the administrative level.

WHEREFORE, respondents respectfully request that the petition be denied in its entirety.

Dated: New York, New York
November 1, 2006

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street, Room 5-161
New York, New York 10007
(212) 788-0461

By: _____
Christina L. Hoggan
Assistant Corporation Counsel