

<b>Matter of Northeast Advanced Life Support, LLC v Daines</b>
2010 NY Slip Op 32352(U)
August 30, 2010
Sup Ct, Albany County
Docket Number: 2306-10
Judge: George B. Ceresia
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In The Matter of the Application of  
NORTHEAST ADVANCED LIFE SUPPORT, LLC,  
Petitioner,  
For A Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

-against-

RICHARD F. DAINES, M.D., Commissioner of  
Health of the State of New York; and  
NEW YORK STATE DEPARTMENT OF HEALTH.

Respondents.

Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJ# 01-09-ST1330 Index No. 2306-10

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**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The above-captioned CPLR Article 78 proceeding was commenced to review a

determination dated March 19, 2010 in which the respondent denied petitioner's application to renew a certificate which authorized petitioner to operate an advanced life support first response service<sup>1</sup> in portions of Rensselaer County, New York. The respondent, in its determination found that the certificate renewal application was untimely, was incomplete and/or contained incorrect information, and that the petitioner had not obtained prior approval from an entity known as the Hudson Mohawk Regional Emergency Medical Advisory Committee ("HMREMAC").

The determination dated March 19, 2010 recited as follows:

"The Department has reviewed the biennial renewal application for certification of Northeast Advanced Life Support, LLC. (NEALS), received on December 1, 2009, after NEALS' previously issued Advanced Life Support First Response Certificate (serial #91142) expired on November 30, 2009. After review, the Department has determined the application to be deficient for the following reasons:

- [1]<sup>2</sup> Untimely
- [2] The call volume reported on the DOH-206 form item 21 is more than 400% greater than substantiated by recent PCR copies submitted to the Department for inspection for 2008
- [3] Contact information for the service medical director on the DOH-206 form item 22 is incomplete

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<sup>1</sup>Advanced Life Support is "definitive acute medical care" administered by qualified technicians on-site or en route to, from or between general hospitals and/or health care facilities (see Public Health Law "PHL" § 3001 [11], [12]). An advanced life support first response service is "an organization which provides advanced life support care, but does not transport patients" (see PHL § 3001 [17]).

<sup>2</sup>The Court has numbered the designated reasons for denial of the renewal application for purposes of discussion.

- [4] The response area served by NEALS [Northeast Advanced Life Support] exclusively authorizes 911 responses via dispatch by the Rensselaer County Bureau of Public Safety (RCBPS). In item 28 of the DOH-206 form the dispatch agency is reported as “Self”, yet section 10 of the form reports dispatch through local 911 system. RCBPS confirms ceasing dispatch of NEALS effective May 7, 2009 at 0600 hrs and that no ALS First Response is “self dispatched” in Rensselaer County.
- [5] The 2<sup>nd</sup> response vehicle, PSU-2, later identified as having a separate garaging location per email received from NEALS dated February 4, 2010, is incompletely documented on the DOH-1881 form page 2.
- [6] The Level of Care is incorrectly identified as AEMT-P when ALS authority has not yet been reinstated by Hudson Mohawk Regional Emergency Medical Advisory Committee (REMAC). Minutes of the HMREMAC as well as correspondence from Michael W. Dailey, MD dated October 9, 2007, granting “paramedic level advanced life support (ALS) first response in the REMO region” specifically place contingencies on NEALS ALS authority regarding “equipment and medical requirements”. Such requirements have not been maintained since NEALS’ May 2009 resignation of ALS. To date ALS authority has not been reinstated.

“For the above reasons, the Department will not renew NEALS’ ALSFR Certificate. Please be advised that NEALS is currently not authorized to operate due to its prior Operating Certificate having expired on November 30, 2009 and its renewal application for certification being both untimely and insufficient. If you would like to resume operations, you may submit to the Hudson Mohawk Regional EMS Council a new application for an operating certificate.”

#### Mandamus To Compel

The petitioner initially argues that the issuance of a biennial renewal certificate is a ministerial act involving the exercise of no discretion, and that it therefore is entitled to relief

in the nature of mandamus to compel. Mandamus is an extraordinary remedy, available, as against an administrative officer, only to compel the performance of a duty enjoined by law (see, Klostermann v Cuomo, 61 NY2d 525, 539, 540). It is only appropriate where the right to relief is "clear" and the duty sought to be enjoined is performance of an act commanded to be performed by law, purely ministerial and involving no exercise of discretion (Mtr Hamptons Hosp v. Moore, 52 NY2d 88, 96 [1981]; Matter of Legal Aid Socy. Of Sullivan County v Scheinman, 53 NY2d 12, 16; Matter of Maron v Silver, 58 AD3d 102, 124-125 [3<sup>rd</sup> Dept., 2008], lv to app denied 12 NY3d 909). “The general principle [is] that mandamus will lie against an administrative officer only to compel him [or her] to perform a legal duty, and not to direct how he [or she] shall perform that duty” (Klostermann v Cuomo, supra, p. 540, quoting People ex rel. Schau v McWilliams, 185 NY 92, 100).

The only statutory reference to biennial review of the operating certificate is set forth in PHL § 3005 (4), which recites as follows:

“4. A certificate issued to an ambulance service or advanced life support first response service shall be valid for two years. The initial certification fee shall be one hundred dollars. Thereafter the biennial fee shall be in accordance with the schedule of fees established by the commissioner pursuant to this article. [ ] ”

PHL § 3005 (3) recites that an initial operating certificate shall be issued where the respondent finds that the advanced life support first response service is staffed and equipped in accordance with applicable rules and regulations. PHL § 3005 (7) indicates that an application for a certificate shall be on forms provided for by the department, and recites that “[t]he application shall state the name and address of the owner and such other information as the department may require pursuant to rules and regulations.” The requirements for an

advanced life support system are set forth in § 800.5 of the Rules of the Department of Health (see 10 NYCRR 800.5).<sup>3</sup>

“It is well settled that when an agency acts within its area of expertise in interpreting statutes it is responsible for administering, its construction of those statutes is to be upheld if its decision is not irrational or unreasonable” (In the Matter of Transitional Services of New York for Long Island, Inc. v NYS Office of Mental Health, 13 NY3d 801, 802 [2009], citing Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v Department of Env'tl. Protection of City of N.Y., 11 NY3d 327, 334 [2008]). In this instance, while it is quite clear that the legislature intended that operating certificates issued pursuant to PHL §

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<sup>3</sup> § 800.5 entitled “Requirements for an advanced life support system” recites as follows:

“(a) An advanced life support system must meet the following requirements:

- (1) designation of a qualified physician to provide medical supervision and direction.
- (2) integration with a hospital emergency service, or intensive care, coronary care, or other appropriate hospital unit.\* \* \*

“(c) An advanced life support system providing pre-hospital intermediate care must include the following:

- (1) voice communications to receive medical direction;
- (2) equipment and supplies to provide pre-hospital intermediate care;
- (3) staffing by a certified emergency medical technician-intermediate, emergency medical technician-critical care, or emergency medical technician-paramedic, as appropriate.

“(d) An advanced life support system providing pre-hospital critical care and/or EMT-Paramedic services must include the following:

- (1) voice communications to receive medical direction;
- (2) biomedical telemetry;
- (3) equipment and supplies to provide pre-hospital critical care and/or EMT-paramedic services; and
- (4) ~~staffing by a certified emergency medical technician-critical care~~ or emergency medical technician-paramedic, as appropriate”

3005 be issued on a biennial basis, the legislature provided no guidance with respect to the depth or breadth of the review process. Under such circumstances, the Court is of the view that the determination of the respondent, the agency charged with its enforcement, with regard to the extent of its review, is entitled to judicial deference unless such interpretation is irrational, unreasonable or inconsistent with the governing statute (see In the Matter of Transitional Services of New York for Long Island, Inc. v NYS Office of Mental Health, supra; Matter of Posada v New York State Department of Health, 75 AD3d 880 [3d Dept., 2010]). The Court finds that respondent's interpretation of PHL § 3005 (4), that review of biennial operating certificate applications must be carried out in a relatively comprehensive fashion, is not irrational, unreasonable or inconsistent with PHL Article 30 (Matter of Transitional Services of New York for Long Island, Inc. v NYS Office of Mental Health, supra; Matter of Posada v New York State Department of Health, supra). Nor has the petitioner satisfied its burden of demonstrating that the respondent, in the past, in carrying out its responsibilities under PHL § 3005, has reviewed biennial certificate renewal applications of other emergency medical service agencies in a manner different than that conducted here.

In summary the Court finds that the review of a biennial certificate renewal application under PHL § 3005 (4) requires the exercise of discretion with regard to whether the petitioner has satisfied the requirements of PHL § 3005. For this reason, the Court finds that the petitioner is not entitled to relief in the nature of mandamus to compel.



## De Facto Revocation of The Petitioner's Certificate

The petitioner argues that the respondent engaged in actions which effectively resulted in the de facto revocation of its operating certificate without the benefit of a hearing, as required under PHL § 3012 (3).<sup>4</sup> This issue has its genesis in petitioner's action, in May 2009, of removing itself from 911 dispatch service in Rensselaer County. After learning of this, the respondent, by letter dated July 7, 2009, sent the petitioner the following letter:

"The Department of Health, Bureau of Emergency Medical Services has been made aware that Northeast Advanced Life Support is no longer providing advanced life support first response (ALS-FR) service and has not been operational for greater than 30 days.

"If it is your intention to permanently stop providing ALS-FR, please surrender the Operating Certificate no later than close of business August 3, 2009. If we do not receive the operating certificate, the Department will seek enforcement action in accordance with Article 30, 3012 of the Public Health Law. As of the date indicated, the Department will no longer recognize Northeast Advanced Life Support as a certified EMS agency. Additionally, the agency code number previously issued to your agency will no longer be active and may not be used to identify your agency on Patient Care Reports (PCR) or to obtain reimbursement for EMS certification training.

"The Northeast Advanced Life Support will be responsible for insuring that the Patient Care Reports (PCR) are retained in a secure and confidential fashion. The PCRs must be made available to patients if requested in accordance with New York State Public Health Law, DOY policy statements and written

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<sup>4</sup>"No certificate shall be revoked, suspended, limited or annulled without a hearing. However, a certificate may be temporarily suspended without a hearing and without the approval of the appropriate regional council or state council for a period not in excess of thirty days upon notice to the certificate holder following a finding by the department that the public health, safety or welfare is in imminent danger." (PHL § 3012 [3]).



service policies. For your information, the applicable EMS Policy statement is enclosed.

“Please remit the Northeast Advanced Life Support’s original EMS agency Operating Certificate to my attention at the Bureau of EMS Central Office. If you have any questions, please do not hesitate to contact this office [].

Notably, there is no evidence in the record that the respondent followed up on its July 7, 2009 letter by revoking, suspending or annulling petitioner’s operating certificate. While the July 7, 2009 letter mentions that as of August 3, 2009 the respondent would not recognize the petitioner as a certified EMS agency, and that petitioner’s code number would no longer be active, petitioner has not demonstrated that respondent took any specific action in furtherance of its letter; and does not indicate how or in what specific manner such action restricted, impaired and/or limited its ability to operate as an advanced life support first responder. As petitioner concedes, the respondent never commenced a formal proceeding under PHL § 3012 (3) to revoke or suspend its operating certificate. Moreover, and apart from the foregoing, the petition does not request any relief with respect to its initial operating certificate (which relief, in any event would be moot, by reason of the certificate’s expiration on November 30, 2009). Under all of the circumstances, the Court finds no evidence to support petitioner’s contention that there was a de facto revocation of its operating certificate. Rather, petitioner’s certificate renewal application was reviewed, considered and denied pursuant to the provisions of PHL § 3005 (4).

Mandamus To Review

The Court is mindful that it’s role in reviewing an administrative determination is not

to substitute its judgment for that of the agency, but simply to ensure that the agency determination has a rationale basis and is not arbitrary and capricious (see Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009]; Matter of Warder v Board of Regents, 53 NY2d 186, 194; Matter of Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363; Akpan v Koch, 75 NY2d 561, 570; Matter of Prestige Towing & Recovery, Inc. v State of New York, 74 AD3d 1606 [3<sup>rd</sup> Dept., 2010]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (Matter of Peckham v Calogero, *supra*), citing Matter of Pell v Board of Educ., 34 NY2d 222, 231 [1974]; Matter of Prestige Towing & Recovery, Inc. v State of New York, *supra*).

There is, in the Court’s view, a rational basis for the respondent to review the biennial certificate renewal application under PHL § 3005 (3), which is applicable to an initial operating certificate (to be specific, the requirement that the advanced life support first response service be properly staffed and equipped). In this respect and as pointed out by the respondent, the adequacy of staffing and equipment, as a practical matter, would be governed by the level of care which the emergency medical service intended to provide. Paragraph 6 of the March 19, 2010 determination indicated that the level of care was not correctly identified. On the renewal application form, in the box requesting the highest level of care currently authorized by REMAC, the petitioner checked the box for EMT-paramedic. The respondent, in disapproving the application, noted that Hudson Mohawk REMAC had not authorized the petitioner for this level of service. The requirement for REMAC approval is set forth in a Policy Statement adopted by the respondent in 1995, well before approval of

petitioner's initial operating certificate.<sup>5</sup> The Policy Statement recites, in part, as follows:

“Definitions: [] 8. ‘EMS system’ means one or more EMS services organized to provide emergency medical service in an area served by one or more Regional EMS Councils. *An EMS system must have a system medical director and have been approved by each REMAC as having met the medical standards of the REMAC in each Region within which the system will provide care.*

“Medical Control: [] Regional Emergency Medical Advisory Committee (REMAC) (b) Each Regional Emergency Medical Advisory Committee, within the standards and guidelines established by SEMAC [the State Emergency Medical Advisory Committee]: [] (3) may develop policies and procedures to optimize medical control of all pre-hospital patient care services for all EMS services providing care within its region. Such policies and procedures shall include, but are not limited to, [] (ii) minimum staffing, equipment and documentation requirements for medical control locations, [] (iv) approval of EMS services, indicating they have met the requirements of the REMAC to provide a level of service, upon initial application and any subsequent changes in the level of service offered [].” (emphasis supplied)

The Court is of the view that the respondent had a rational basis to construe PHL § 3005, and respondent's 1995 Policy Statement, in such a manner as to conclude that REMAC authorization was required before petitioner's renewal application could be approved. Consistent with and supportive of the foregoing is the fact that REMAC approval had been secured by the petitioner in connection with its initial operating certificate. As respondent points out, it appears from the minutes of REMAC's May 6, 2009 meeting that REMAC deemed petitioner's advanced life support service to be suspended as of May 7, 2009 (the effective date of discontinuance of 911 service). In a letter dated March 3, 2010, Michael

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<sup>5</sup>Specifically, Policy Statement No. 95-1, dated May 30, 1995.

W. Dailey, M.D. the Chair of the Hudson Mohawk REMAC confirmed that REMAC had not reinstated petitioner's Advanced Life Support level of care. This carries with it the inference that in REMAC's view, reinstatement by REMAC was required. In view of all of the foregoing, the Court finds that there were rational grounds for the respondent to conclude that the absence of REMAC authorization with respect to the level of care to be provided by the petitioner served as grounds to deny the certificate renewal application.

Turning to paragraph 4 of the March 19, 2010 determination (supra), in Box 10 of petitioner's application it is indicated that the petitioner would be dispatched by 911, even though petitioner had removed itself from the 911 system in May 2009. The same application indicated in Box 28 that it was "self" dispatched. Inasmuch as the petitioner had recently removed itself from the 911 system, petitioner's response in Box 10 of the application appears on its face to be incorrect. In addition, respondent had a legitimate concern with regard to how petitioner would be able to operate without participating in the Rensselaer County 911 dispatch system. This, in the Court's view provided a rational ground for denial of the renewal application.

It also appears that a portion of petitioner's responses on the application were incomplete and/or incorrect (see paragraph 2<sup>6</sup>, 3 and 5 of the March 7, 2009 determination, supra)<sup>7</sup>.

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<sup>6</sup>The respondent now concedes that call responses were not exaggerated by 400%. It still maintains, however, that they were overestimated. It now takes the position that the petitioner responded to 33% fewer calls than claimed in the application.

<sup>7</sup>Regarding paragraph 2 of the March 19, 2010 determination, petitioner appears to have exaggerated its call volume, but not to the extent initially claimed by respondent. Although petitioner reported call volume of 500 calls in year 2008, patient care records documented

The Court finds that the determination under review to deny petitioner's renewal application, other than with respect to timeliness of the application, was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion.<sup>8</sup>

Turning to petitioner's due process arguments, it has been held that a protectable property interest does not arise where the benefit is wholly discretionary (see Matter of Daxor Corporation v State of New York Department of Health, 90 NY2d 89, at 98-99 [1997]; Huntington Yacht Club v Incorporated Village of Huntington Bay, 1 AD3d 480, at 481 [2d Dept., 2003]; Matter of New York Dirt Contracting Corp. v The City of New York, 2010 NY Slip Op 3101U [Sup. Ct., NY County, 2010]). As the Court has found here (supra), the grant of a biennial operating certificate is within the respondent's discretion. The Court therefore finds that there has been no due process violation.

The Court concludes that the petition must be dismissed.

Accordingly, it is

**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original

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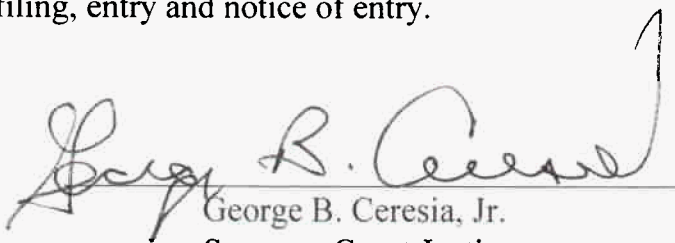
approximately 333 such calls. Item 3 involved incomplete contact information of petitioner's medical director (apparently his telephone number).

<sup>8</sup>With regard to paragraph 1 of the March 19, 2010 determination, there does not appear to be a statutory or regulatory deadline with respect to submission of the renewal application. Although it was arguably submitted one day late (having been received by respondent the day after expiration of petitioner's initial operating certificate), the delay was, in the Court's view, *de minimis*. Moreover, upon receipt of the renewal application, the respondent proceeded to review it, and thereafter requested additional documentation. The review process extended over a period of three and one half months. Were it necessary to reach the issue, the Court would find that respondent's determination, that the renewal application was untimely, was irrational, arbitrary and capricious. Significantly however, this alone does not serve as grounds to overturn the determination under review.

decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

**ENTER**

Dated: August **30**, 2010  
Troy, New York



George B. Ceresia, Jr.  
Supreme Court Justice

**Papers Considered:**

1. Notice of Petition dated April 6, 2010, Petition, Supporting Papers and Exhibits
2. Verified Answer dated May 17, 2010
3. Affidavit of Lisa S. Burns, sworn to May 14, 2010, Supporting Papers and Exhibits
4. Affidavit of Dana L. Jonas, sworn to May 13, 2010
5. Affidavit of Gary L. Tuthill, sworn to May 13, 2010
6. Reply Affirmation of Peter A. Lynch, Esq., dated May 27, 2010